Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14001/2012

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 10th December, 2013	**On 29th January 2014**
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Before

Upper Tribunal Judge Chalkley

Between

LIPY BEGUM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: *Mr Timson of Counsel, instructed by Maya Solicitors*
For the Respondent: *Mr Harrison, Home Office Presenting Officer*

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh, who was born on 12th April, 1994, and is now 19 years of age. On 20th March, 2012, she made application to the respondent for entry clearance for settlement under paragraph 297 of Statement of Changes in

Immigration Rules, HC 395, as amended ("the Immigration Rules"). The Entry Clearance Officer refused the appellant's application under both paragraph 297 and paragraph 320(7A), on 1st July, 2012. The appellant appealed that decision to the First-tier Tribunal Judge and her appeal was heard by First-tier Tribunal Judge De Haney on 23rd July 2013. In his determination, promulgated on 9th August, 2013, Immigration Judge De Haney allowed the appellant's appeal.

2. The respondent, dissatisfied with the decision, challenged the judge's determination and was granted permission to appeal by Designated Judge of the First-tier Tribunal J M Lewis.

3. On 3rd October, 2013, I heard submissions from the representatives and set aside Immigration Judge Delaney's determination. A copy of my reasons for that finding are set out in the appendix to this determination.

4. At the hearing before me I explained that I had no up to date bundle. The Presenting Officer told me that he had received a bundle, but only by facsimile on the morning of the hearing. Counsel gave me his bundle.

5. Counsel explained that the appellant's mother has difficulty in giving evidence. He advised me that it was accepted that the appeal could not succeed under the Immigration Rules and that reliance was placed on the appellant's Article 8 ECHR rights. He explained that it was also accepted that the appellant's Article 8 appeal could not succeed under the Immigration Rules, which were not applicable.

Oral Evidence from the Sponsor

6. I heard oral evidence from Shufia Besgum. She and the interpreter both confirmed to me that they understood each other. She confirmed her full name and address. The sponsor told me that she was feeling well enough to give evidence.

Evidence-in-Chief

7. In answer to questions put to her by Counsel, the sponsor confirmed that she recalled making a statement which had been signed on 6th December, 2013. She was shown page 10 of the statement and confirmed that her signature appeared on the bottom of it. She also confirmed that it was read to her in a language she understood and that its contents were true and accurate.

Cross-examination

8. The sponsor confirmed that the appellant, her daughter, lives with her paternal grandfather who is very elderly. The witness told me that no other family members lived with them. She told me that there were no other family members living close by. In answer to further questions put to her by the Presenting Officer, the witness confirmed that she has one sister living in Bangladesh but all her other siblings live

in the United Kingdom. The sister living in Bangladesh lives in her parents' home. She is older than the witness and lives in Polidaw which is quite far away from where the appellant lives. The witness explained that if one were to set off in the morning it could be reached by car in the evening.

9. It was pointed out to the witness by Mr Harrison that when the appellant's application was considered a verification report had been undertaken. Neighbours had told the person responsible for compiling the report that the appellant had two uncles living nearby.

10. The witness said that she had already mentioned that uncles live close by. Mr Harrison pointed out that she had not mentioned that. The witness explained that the uncles were terrorists and they abuse the appellant. Asked what she meant, she said that one of the uncles, Babul, is a terrorist. She was asked why she had not mentioned this in her statement. She said that she had mentioned it before when she came to court. She mentioned that these uncles abuse the appellant and they swear at her and they throw things at the house. They are the appellant's father's brothers. They do not live with the appellant's grandmother. The witness explained that she has no other children in Bangladesh. She then told me that she has four children living in Bangladesh and they all live with their grandmother.

11. When asked questions the witness replied on occasions that she did not know and that questions would have to be asked of her husband. When it was pointed out to her that she was present to give evidence she gave a reply. I was concerned that she was not feeling well but she insisted that she was well enough to continue. She confirmed that she understood the interpreter.

12 There was no re-examination.

Oral Evidence of Mr Afiz Ali

13. The witness and the interpreter both confirmed that they understood each other and the witness confirmed his full names and address.

Evidence in Chief

14. The witness was referred by Mr Timson to page 5 of the bundle. He recalled making a statement on 6th December, 2013 and identified his signature at the foot of page 5. He confirmed that he had told the truth in the statement and that it was read back to him in Bangladeshi. He agreed with Counsel that he had been granted residence from 4th August, 2013.

Cross-examination

15. The witness told me that he entered the United Kingdom in 2005 with a visit visa and at the end of his visit he overstayed. The first time he attempted to make his stay legal was in 2009. His wife Shufia Begum, the sponsor, came to the United Kingdom in 2009. She had a right of abode to the United Kingdom as her father was a British citizen. She persuaded the witness to regularise his stay. He agreed with Mr Harrison that between 2005, and the arrival of his wife in 2009, he did nothing to regularise his stay. He told me that in 2009 he worked in a factory. Before 2009 he did not work at all. Friends and relatives in the United Kingdom looked after him and fed him. During those four years he was not in a position to support his family in Bangladesh, but he kept in regular contact with them on the phone and by facsimile. While he lived with friends and family, they gave him pocket money which he used to contact his family. Now he has a job. When he came to the United Kingdom he had £500 which he brought with him. He currently works in a laundry and started work at his present job on 10th June, 2013.

Questions put by me in order to clarify the Witness's Evidence

16. I asked the witness several questions in order to clarify evidence he had given. He told me that between 2005 and 2009 his family in Bangladesh survived because when he left Bangladesh he left 11 lakh with a business partner. There is still 5 lakh of that money left in Bangladesh. The witness used to telephone his wife every week.

Re-examination

17. The witness explained in response to questions put by Mr Timson that he left money in Bangladesh because he had been a businessman. The money was left with a business partner and his wife and children were supported by this money. While the witness was in the United Kingdom decisions about his daughter were taken jointly by him and his wife.

Questions put by me in order to clarify the Witness's Evidence

18. The witness confirmed that he had four children living in Bangladesh and that they all lived together. The appellant is the second oldest. There was no further re-examination.

Paragraph 301 of the Immigration Rules

19. I clarified the position of paragraph 301 of the Immigration Rules with Counsel. Counsel told me that paragraph 301 was not applicable. The appellant's father's appeal was granted by a First Tier Tribunal Judge in March 2012, but he was not actually granted leave in accordance with that decision until 4th August 2013. This appellant's application was dated 1st July, 2012.

20. Mr Timson thought it was fair to warn Mr Harrison before he made his submissions, that he would be relying on the fact that there had been a lengthy delay in granting the appellant's father leave following his successful appeal in March 2012, and if leave had been granted within a reasonable time following the hearing of his appeal, then the appellant would have been eligible for admission to the United Kingdom under paragraph 301 when her application was considered on 1st July, 2012. I was grateful to Mr Timson for making this clear.

Submissions

21. Mr Harrison relied on the refusal and the Entry Clearance Officer Manager's report. In his view the sponsor and her husband had been less than candid. It has been difficult to obtain the true position with regard to the appellant's circumstances, not least to identify with whom she is actually living. It now appears, contrary to the evidence of the sponsor, that she is living with her siblings, one of whom is her eldest sister. Other relatives live locally. Money was clearly left in Bangladesh by the appellant's father when he came to the United Kingdom and overstayed in 2005. The appellant's mother has a right of abode in the United Kingdom and entered in 2009 when they chose to leave all their children in Bangladesh. They had not concerned themselves with their family life; they were content that they maintained contact with the appellant by telephone. The family lived the way they did entirely by choice, but now they want something else. Family life, as it existed, is not affected by the respondent's decision and given the false claims that had been made it is not a decision which is disproportionate.

22. Mr Timson reminded me that the appeal had been refused under paragraph 320 of the Immigration Rules and drew my attention to page 58 of the appellant's bundle which was a discharge certificate confirming that an 86 year old, Aklasun Nessa, wife of Mantaz Ali, was admitted to hospital on 20th June, 2012. I pointed out to Counsel that according to the certificate she had pain and swelling in the left mid "thigh" and that the clinical diagnosis was "fracture of the LT shaft of femur". He explained that nonetheless the appellant's grandmother was clearly in hospital at the time of the village visit and there was no evidence, therefore, of any deception. The visit had taken place on 24th June, four days before the grandmother's discharge.

23. Dealing first with the evidence of the appellant's mother, Counsel suggested that allowance must be made for the fact that she suffers from confusion. All she has ever done has been to try and support the appellant. Her husband has confirmed that he arranged for money to be available for the appellant and his wife to live on when he came to the United Kingdom. Both he and his wife had given straightforward evidence and his wife had sole responsibility.

24. Additionally, the delay on the part of the respondent in granting the appellant's father leave once his appeal had been granted means that paragraph 301 of the Immigration Rules was not considered by the Entry Clearance Officer. Discretionary

leave was not granted to the appellant's father until over a year after his appeal was allowed.

25. Mr Timson confirmed that those instructed on behalf of the appellant did not send a copy of the determination for her father to the Entry Clearance Officer, before the Entry Clearance Officer's decision was made. Mr Timson urged me to allow the appeal on human rights grounds. In doing so I must consider the family life of all family members. The appellant's siblings have all now applied to come to the United Kingdom. Mr Timson confirmed that there was no evidence before the Entry Clearance Officer which might have caused the Entry Clearance Officer to realise that the appellant's father had been successful in his appeal.

26. I reserved my decision.

Consideration of the Appeal

27. Paragraph 297 of the Immigration Rules provides as follows:

> **"Requirements for indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom**
>
> 297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:
>
> (i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
>
> (a) both parents are present and settled in the United Kingdom; or
>
> (b) both parents are being admitted on the same occasion for settlement; or
>
> (c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or
>
> (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or
>
> (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
>
> (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
>
> (ii) is under the age of 18; and
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which

the parent, parents or relative the child is seeking to join, own or occupy exclusively; and

(v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and

(vi) holds a valid United Kingdom entry clearance for entry in this capacity; and

(vii) does not fall for refusal under the general grounds for refusal."

28. Paragraph 320(7A) provides as follows

> "(7A) where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts have not been disclosed, in relation to the application *or* in order to obtain documents from the Secretary of State or a third party required in support of the application."

29. In relation to paragraph 271, the burden of proof is on the appellant. In respect of paragraph 320(7A) the burden changes; the burden is on the respondent to prove that false representations have been made or false documents or false information have been submitted (whether or not material to the application, and whether or not to the appellant's knowledge, or material factors have not been disclosed, in relation to the application or in order to obtain documents from the Secretary of State or a third party requiring support of the application).

30. Dealing first with the refusal under paragraph 320(7A), it is clear to me that the appellant's grandmother was actually in hospital in Sylhet at the time of the visit to her home. She had a fracture of her left femur, having been admitted to hospital on 20th June, 2012. The Entry Clearance Officer refused the application under paragraph 320(7A) became there was no evidence following the visit to the grandmother's house that she had broken a limb and her neighbours had no knowledge of her breaking her limb. The fact of the matter is that she had broken a limb and was in hospital at the time. **To that extent**, I find that the decision of the Entry Clearance Officer to refuse the application under paragraph 320(7A) was not in accordance with the law and the Immigration Rules and **I allow the appellant's appeal**.

31. I now turn my attention to paragraph 297 of the Rules and before doing so it is necessary to make some findings of fact.

32. I have made what I believe to be due allowance for the fact that in giving evidence to me the sponsor was anxious and found it difficult to give evidence through an interpreter, however, I did not find Shufia Begum to be credible witnesses. Having seen and heard her give evidence, I believe that she would say anything if she thought it would help the appellant's appeal, whether it was true or not.

33. In her witness statement, the witness says that all her siblings are settled in the United Kingdom. She contradicted that when giving oral evidence to me and told

me that one of her sisters is still living in Bangladesh in Polieaw. I believe that the reason she did not make reference to this sister in her statement was because she was seeking to persuade the Tribunal that all her relatives were in the United Kingdom.

34. In paragraph 7 of her statement, she refers to the appellant as being her dependant. However, according to Mr Afiz Ali, the appellant's father, when he left Bangladesh and came to the United Kingdom he left funds available with his partner for the maintenance of his wife and his children, including the appellant. He told me that there were still 5 lakhs left in Bangladesh. I believe this is another example of the appellant seeking to portray a situation which bears no relationship to the truth.

35. In paragraph 8 of her statement Shufia Begum refers to the appellant's grandmother being ill and unable to look after her children. She says that she is at least 90 years of age. In actual fact the grandmother is 86 and it is clear beyond doubt that the appellant has uncles living in the same village. According to the visit report the appellant lives in a recently built "structured" house with her sisters and brother and with her uncles living nearby. The report says that the appellant's two uncles live nearby. According to the witness, the grandmother is ill and poorly and unable to look after the appellant and her siblings, but one of the appellant's siblings is actually older than the appellant and it is clear that there are two of the appellant's father's brothers living in the same village. I believe that this was a further example of the witness's inability to give honest and credible evidence. According to paragraph 13 of the witness's statement, she has been the principal financial sponsor and the appellant is under her financial care and direct responsibility. This evidence is directly contradicted by her husband who says that not only did he leave the sum of 11 lakh with a business pattern for the maintenance of his children and his wife but there is still 5 lakhs left in Bangladesh. He also indicated that while he was in the United Kingdom decisions about his daughter had been taken jointly by him and his wife.

36. Counsel asked me to note that the witness suffered from depression. He did not draw my attention to any medical evidence, but I have noted the letter at page 21 of the appellant's bundle from her GP which suggests that she suffers from anxiety, depression and palpitations. The doctor says that she takes regular medication but gives no indication as to what this medication is. The witness appears to be receiving no treatment other than unidentified medication for her anxiety, depression and palpitations.

37. I have made what I believe to be due allowance for the fact that in giving evidence to me the sponsor was anxious and found it difficult to give evidence through an interpreter. However, even having made such allowance I find that she is not a witness of truth. I believe that she is quite willing to say anything which she believes will help her daughter gain entry to the United Kingdom. I believe that she deliberately invented a story about her brothers-in-law being terrorists and abusing the appellant and I believe that had it not been pointed out by the Home Office

Presenting Officer that the appellant has two uncles living in the same village, the sponsor would not have mentioned these relatives at all.

38. I am prepared to accept that Mr Afiz Ali is a credible witness. I believe that he was telling me the truth when he said that he had left funds with a business partner for the maintenance of his wife and his family, including the appellant, when he came to the United Kingdom in 2005 and that 5 lakhs still remained available for use by his children including the appellant. I believe that he did not at any time after he came to the United Kingdom abdicate responsibility for his daughter. He told me that he kept in regular contact with his family and that while he was in the United Kingdom decisions about his daughter were taken jointly by him and his wife. I believe that that is the truth of the matter.

39. Mr Afiz Ali made no mention at all of his brothers being terrorists or having assaulted the appellant. I do not believe that they are terrorists or that they have assaulted the appellant. I believe that if they were terrorists or if they had behaved in any way harmful to the appellant that he would have told me.

40. In considering I bear in mind that reliance was placed on paragraph 297(1)(e). I am satisfied on the evidence before me that at the date of the Entry Clearance Officer's decision the appellant's mother was present and settled in the United Kingdom. However, I am satisfied that she did not have sole responsibility for the child's upbringing; the appellant's father could not have given clearer evidence on the point. After he came to the United Kingdom all decisions concerning his daughter were taken jointly by him and his wife.

41. Neither can the appellant succeed under paragraph 297(1)(f). The appellant lives with her siblings and with her elderly grandmother. According to the visit report, the house they live in has been reenlist built. The appellant's two uncles live nearby in the same village.

42. On consideration of all the evidence placed before me, I find that as at the date of the Entry Clearance Officer's decision there were no serious and compelling family or other considerations which made the exclusion of the appellant undesirable.

43. I find that the appellant's mother, the sponsor, was, at the date of the entry clearance application, present and settled in the United Kingdom. The appellant's father was in the United Kingdom. He had overstayed his visit visa in 2005. The appellant did not meet the requirements of paragraph 297 as at the date of the Entry Clearance Officer's decision. Her immigration appeal is dismissed.

44. I turn now to the appellant's Article 8 appeal and I am most grateful to Counsel for his indication earlier in the hearing that I was not concerned with the appellant's legibility under the Rules to claim asylum, since she could not meet the requirements.

Article 8

The Law

45. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides for respect for a person's private and family life, their home and correspondence. The appellant has to show that the subject matter of the Article 8 subsists and that the decision of the respondent will interfere with it. If he does so, it is for the respondent to show that the decision is in accordance with the law, that it is one of the legitimate purposes set out in Article 8(2) in this case for the economic well-being of the country, for the prevention of disorder or crime and for the protection of the rights and freedoms of others, and that it is necessary in a democratic society, which means that it must be proportionate.

46. At paragraph 17 of Razgar v Secretary of State for the Home Department [2004] UKHL 27, Lord Bingham of Cornhill said this:

> "17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:
>
> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

47. I am satisfied that the appellant does enjoy a family life with her parents and I believe that the respondent's decision does amount to an interference with that family life, because it prevents her from enjoying it fully with her parents as she did before her parents chose to come to the United Kingdom. I find that the interference has consequences of such gravity as potentially to engage the operation of Article 8 which, as Sedley LJ reminded us in paragraph 28 of *AG (Eritrea) v Secretary of State for*

the Home Department [2007] EWCA Civ 801, does not have a particularly high threshold.

48. The interference is in accordance with the law and is necessary in a democratic society for the economic wellbeing of the country, for the prevention of disorder or crime and for the protection of the rights and freedoms of others. The question I have to consider is whether or not such interference is proportionate. I must bear in mind in considering the appellant's Article 8 appeal is the fact that it is necessary to look at the family as a whole.

49. Dealing first with the point made by Counsel concerning paragraph 301 of the Immigration Rules, I note that the appellant's father's appeal was granted by a First Tier Tribunal Judge in March 2011. The appellant's application was dated 20th March 2012. I do not know the date on which the appellant's father became aware that his appeal was successful, but I do think it significant that at no time following the promulgated of the determination in his appeal did the appellant's solicitors notify the Entry Clearance Officer that her father had been successful in his appeal and that she should now be considered under paragraph 301.

50. Instead, the application was pursued on the basis that the appellant's mother was present and settled in the United Kingdom and had had sole responsibility for the child's upbringing, or that there were serious and compelling family or other considerations which make exclusion of the appellant undesirable and suitable arrangements had been made for her care. The truth of the matter was that the appellant's mother did not have sole responsibility for the child's upbringing and there were no compelling family or other consideration which made the exclusion of the child undesirable.

51. It is surprising and of particular concern that it took the Secretary of State from March 2011 to August 2003 to implement the judge's decision to allow the appellant's fathers appeal.

52. I can quite understand why there would be some delay following the successful appeal and I do not believe that a delay of a few months would, necessarily, be unreasonable; I think it would have been unrealistic to expect the Secretary of State to have acted within three months. The fact that the appellant might have qualified under paragraph 301 of the Immigration Rules is something that I take into account, but I have to bear in mind that no one saw fit to notify the Entry Clearance Officer that the appellant's father's appeal had been allowed. The Entry Clearance Officer would not have been sent a copy of the father's determination. I bear in mind that the appellant's mother was entitled to a right of abode in the United Kingdom; her own father was a British subject. The appellant's father, however, deliberately overstayed after the end of his visit visa. He chose not to return to Bangladesh. The situation the appellant now finds herself in is one very largely of her parents' own making. She could never have succeeded in her application under paragraph 297 and did not make an application under paragraph 301. It is doubtful whether, as at

the date of the decision, the respondent could properly and reasonably have been expected to have granted the appellant's father discretionary leave following his successful appeal and when I consider all these factors in the round I have concluded that the respondent's decision is entirely proportionate.

53. The appellant's human rights appeal is dismissed.

Summary

The appellant's appeal against the decision of the Entry Clearance Officer under Paragraph 320(7A) is **allowed**.

The appellant's appeal against the decision of the Entry Clearance Officer under Paragraph 297 is **dismissed.**

The appellant's human rights appeal under Article 8 European Convention for the Protection of Human Rights and Fundamental Freedoms is **dismissed**.

Upper Tribunal Judge Chalkley

The Appendix above referred to

APPELLANT: LIPY BEGUM

RESPONDENT: Secretary of State for the Home Department

CASE NO: OA/14001/2012

DATE OF INITIAL HEARING IN UPPER TRIBUNAL: 3rd October, 2013

Representation:

For the Appellant:	*Mr J Nicholson of counsel*
For the Respondent:	*Mr McVeety, a Home Office Presenting Officer*

REASONS FOR FINDING THAT TRIBUNAL MADE AN ERROR OF LAW, SUCH THAT ITS DECISION FALLS TO BE SET ASIDE

1. In a determination promulgated following a hearing at Manchester on 23rd July, 2013 First Tier Tribunal Judge De Haney allowed the appellant's appeals under Paragraph 297 of Statement of Changes in Immigration Rules, HC 395, as amended ("the immigration rules").

2. Mr Nicholson suggested that the appellant could succeed under paragraph 297 (i) (e) and urged me to accept that at paragraph 33 the judge had found that the appellant's father had abandoned or abdicated responsibility for the appellant.

3. At paragraph 33 the judge said this:

> " In TD (paragraph 297 (i)(e); "sole responsibility") Yemen [2006] UKIAT 00049 THE Tribunal said that sole responsibility is a factual matter to be decided upon on all the evidence. They went on to state that where one parent in this case the father has abandoned or abdicated responsibility the issue may arise between the remaining parent, in this case the mother in the United Kingdom, and others who have day to day care of the child abroad."

4. That, with very great respect to Mr Nicholson, was not a finding that the appellant's father has either abandoned the appellant or abdicated his responsibility for her. I pointed out to Mr Nicholson that there were no

findings in respect of the father who, according to the evidence, was living in the United Kingdom with the mother.

5. In the circumstances, I could not understand how the appellant could bring herself within paragraph 297. He told me that the appeal should have been allowed, both under the Immigration Rules and under Article 8.

6. I set aside the determination. No findings are preserved.

Upper Tribunal Judge Chalkley 3rd October, 2013