**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-005171

First-tier Tribunal No: HU/54385/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On 7 September 2023**

**Before**

**UPPER TRIBUNAL JUDGE BLUNDELL**

**Between**

**ROKSHANA JAHAN**
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**
For the Appellant: Sonia Ferguson, instructed by Kalam Solicitors
For the Respondent: Edward Terrell, Senior Presenting Officer

**Heard at Field House on 23 August 2023**

**DECISION AND REASONS**

1. This is my second decision in this appeal. By the first decision, I found that the First-tier Tribunal had erred in law. I set that decision aside and ordered that the decision on the appeal would be remade following a further hearing. The further hearing took place on 23 August 2023. For the reasons which follow, I have decided to remake the decision on the appeal by dismissing it.

## Background

2. The appellant is a Bangladeshi national. Her date of birth is given as 1 January 1992. Her daughter SA is a British citizen who was born on 9 May 2011.

3. The appellant married a man – MH – according to Islamic law, in Bangladesh, in December 2012. He is a British citizen who was born on 1 December 1967. Unbeknownst to the appellant at the time, this was a polygamous marriage and MH's relationship with his first wife and their children was subsisting. The appellant conceived her daughter with MH and gave birth to her before she discovered this. MH returned to the UK. The appellant remained in Bangladesh and raised her daughter there until 2020, when the appellant decided that SA should relocate to the United Kingdom for a better life. The appellant remains married to MH in Islamic law but their relationship is said not to subsist as a result of his deceit.

4. The appellant made two applications for visit visas in 2018, both of which were refused. On 8 March 2021, she made an application for entry clearance as SA's parent. The application was supported by various documents. For the purposes of this decision, I need only mention the following.

5. There was a covering letter from the appellant's solicitors which set out all of the relevant requirements of the Immigration Rules. It also provided a helpful summary of the case. The background to SA's birth was set out, as was the breakdown in the relationship between the appellant and her husband. SA was said to live in the Midlands with the appellant's uncle, Mr Qayoum, and to have no contact with her father. The letter stated that the appellant had parental responsibility for SA and that she continued to play an active role in the life of the child.

6. The letter stated that the appellant relied on third party support in order to meet the Financial Requirements in the Immigration Rules. Such support was to be provided by the appellant's cousin, Mr Mohammed Abul Hussain Ali, who earned a salary of more than £42,000 and had savings of more than £9000. The appellant had in any event been offered a full time job on arrival in the United Kingdom. She would live with her uncle and her child at his property in the West Midlands. It was submitted that the best interests of the appellant's daughter militated in favour of the appellant's admittance.

7. The relevant assertions in the covering letter were supported by a statement from the appellant's uncle, amongst other documents.

## The Respondent's Decision

8. The respondent refused the application on 14 June 2021. She gave the following reasons for that decision. Firstly, she was not satisfied that the appellant was the parent of a British child as claimed (paragraph E-ECPT 2.2 refers). Secondly, the respondent was not satisfied that the applicant had sole parental responsibility for her daughter, or that the appellant met the alternative relationship requirement (paragraph E-ECPT 2.3 refers). That conclusion and the third conclusion (under paragraph E-ECPT 2.4) were based on the respondent's refusal to accept that MH played an ongoing role in SA's life. Fourthly, the respondent was not satisfied that the appellant met the Financial Requirements in Appendix FM because neither reliance on third party support nor offers of prospective employment were accepted for applications under this route. The application

was accordingly refused under the Immigration Rules and the respondent considered that there were no exceptional circumstances which rendered refusal incompatible with Article 8 ECHR.

**Proceedings on Appeal**

9. The appellant appealed to the First-tier Tribunal and her appeal was dismissed by Judge Thorne on 16 July 2022. I need not set out his conclusions. It suffices to note that the decision was set aside in full, although it was agreed at the first hearing that the appellant was able to meet paragraph E-ECPT 2.3(b) of Appendix FM of the Immigration Rules and that she was unable to meet Gen 3.1 of that Appendix. Those concessions were properly made for reasons which I explained in my first decision, and they helpfully refined the scope of the resumed hearing.

10. No further documentary evidence was filed for the resumed hearing; the appellant's bundle remained as it was before the FtT. Ms Ferguson filed and served a concise skeleton argument. I heard oral evidence from the sponsor, Mr Qayoum, and the third party sponsor, Mr Ali. I do not propose to rehearse their evidence and will instead refer to it insofar as it is necessary to explain my findings of fact.

**Submissions**

11. Mr Terrell submitted that the appropriate yardstick for addressing maintenance was the income support level set out in *KA (Pakistan)* [2006] UKAIT 65; [2007] Imm AR 155. The appellant was required to show £162.58 per week, comprising Income Support for a lone parent of £84.80 and support for a dependant child of £77.78. On the facts, the appellant could not establish that sum. Mr Ali, the third party sponsor, only pledged £125 per week. He had not been challenged on that sum but there was a real question over his ability to pay that sum for the foreseeable future. There was in any event a serious shortfall and it was not clear that the offer of employment – made to the appellant in 2021 – remained open.

12. Mr Terrell submitted that there was a very real reason not to permit the consideration of third party support in cases in which only the lower threshold of adequate maintenance had to be met. Without support at that level, he submitted, the risk of ghettoization of which the Tribunal spoke in *KA (Pakistan)* was a real one. That policy should be afforded proper weight, even if it was not a matter of 'high policy' of the type considered in *MM (Lebanon) v SSHD* [2017] UKSC 10; [2017] 1 WLR 771.

13. As SA's mother, Mr Terrell accepted that it should not be particularly difficult for the appellant to show that she takes and intends to take a role in SA's upbringing. But in that respect, as in others, the evidence was lacking. There was nothing to show how she had been involved in SA's life after SA's trip to Bangladesh in October 2022. In the circumstances, the appellant failed to show that this aspect of the Rules was met. The sponsor's evidence had not been entirely straightforward, as regards the appellant's ability to speak English in particular. It was still not clear why the appellant had not applied to come to the UK at the same time as SA and this was also relevant to the role the appellant played in her daughter's life.

14. Ultimately, therefore, it was submitted for the respondent that the appellant failed to meet the Rules in two respects. Firstly, she was unable to show that she

played an active role in her daughter's upbringing and that she intended to do so in future. Secondly, she was unable to meet the Financial Requirements. There was also a lack of financial independence and a lack of proficiency in English to take into account in the balancing exercise. (When pressed, Mr Terrell withdrew the submission in reliance on English language, having noted that the appellant was accepted in the ECO's decision to meet the requirement of the Rules in this respect.) Whilst it was probably in the best interests of SA for her mother to enter the UK, those best interests were outweighed by the countervailing considerations in the case. It was proportionate to refuse entry in the circumstances.

15. For the appellant, Ms Ferguson accepted that the yardstick was to be found in *KA (Pakistan)*, although she queried whether it was appropriate to add in the sum for the maintenance of SA, given that she would continue to be maintained by Mr Qayoum.

16. Mr Ali now earned more than £50,000 per annum. His wife earned in the region of £35,000. They were clearly able to offer support to the tune of £125 per week. Mr Ferguson sought tentatively to submit that Mr Ali would be willing to offer whatever support would be necessary but she accepted, when pressed, that I could not properly make such a finding when there was no evidence in support of it. Either way, she submitted that the third party support and the offer of employment provided 'enough of a safety net' for the appellant and her daughter. Whilst the closing balances in Mr Ali's account were accepted to be quite low, he clearly had a savings account from which he could offer additional support. Mr Ali had provided a sponsorship undertaking which illustrated his intention even if it was not legally enforceable. Even if third party support could not be taken into account under the Rules, its existence was relevant to Article 8 ECHR. Even if the job offer could not be taken into account, the fact remained that the appellant was young and healthy and willing to work.

17. Ms Ferguson submitted that the appellant clearly took and intended to continue to take an active role in her daughter's upbringing. They spoke every day and SA had explained in her letter that she missed her mother. The appellant could not communicate directly with the school because she made via calls via Whatsapp so she could not call a landline but she still gave instructions about SA's life to Mr Qayoum. It was always intended to be a temporary arrangement until the appellant could secure entry clearance.

18. SA is British and her best interests were clearly to remain in the UK. (I observed without demur from Mr Terrell that it had been no part of his case that SA should leave the UK to be raised by the appellant in Bangladesh.) It was evidently upsetting for SA to remain in the UK without her mother, particularly given that she has no relationship with her father. Contact via WhatsApp and visits was no real substitute for regular physical contact with a parent. SA already felt different from her friends due to the absence of her mother. The best interests of the child clearly militated in favour of entry clearance and nothing in s117B militated sufficiently powerfully in favour of the opposite conclusion so as to justify the refusal of entry clearance.

19. Mr Terrell helpfully confirmed at the end of Ms Ferguson's submissions that paragraph 35 of the Immigration Rules had been deleted by HC 1160 in March 2023. Both advocates were content for me to consider the transitional provisions for myself. I then reserved my decision.

**Analysis**

20. The appellant's appeal is brought solely on the basis that the refusal of entry clearance is unlawful under section 6 of the Human Rights Act 1998. There is no doubt that Article 8 ECHR is engaged in its family life aspect. The appellant is accepted to be the mother of a British citizen child and it is presumed that there is a family life between a parent and a minor child unless subsequent events have broken that tie: *Berrehab v The Netherlands* (1989) 11 EHRR 322, at [21]. Mr Terrell quite rightly made no submission to that effect.

21. There is also no issue that the refusal has consequences of such gravity as to engage Article 8 ECHR. Whilst the scope of the state's positive obligations in this field has never been precisely defined, it is accepted that the refusal of entry amounts to an interference with the right of the appellant and her daughter to develop the extant family life.

22. The focus, therefore, must be on the proportionality of the respondent's decision to refuse entry. The appropriate starting point, in considering that question, is to consider the appellant's ability to meet the Immigration Rules. Where an applicant is able to meet the Immigration Rules, that is positively determinative of the appeal in their favour: *TZ (Pakistan) & Anor v SSHD* [2018] EWCA Civ 1109; [2018] Imm AR 1301. As the then Senior President of Tribunals went on to explain in his judgment in those cases, it is always necessary to reach findings about an appellant's ability or inability to meet the Immigration Rules because those findings inform the evaluation of Article 8 ECHR.

23. It is accepted that the appellant meets all but two of the requirements of the requirements for entry clearance as a parent. It is not accepted by the respondent, firstly, that the appellant is taking and that she intends to continue to take an active role in SA's upbringing: E-ECPT 2.4(b) of Appendix FM refers. Secondly, it is not accepted that the appellant is able to maintain herself and any dependants in the UK adequately, without recourse to public funds: E-ECPT 3.2 refers. As my first decision shows, the second of those issues might be thought to give rise to a greater amount of legal complexity but I shall return to that in due course.

24. I accept that the appellant plays an active role in SA's upbringing and that she intends to continue to do so. SA was born on 9 May 2011 and is therefore twelve years old at present. She and the appellant have written letters to the Tribunal explaining that they are regularly in contact and how they miss each other dearly. Ms Ferguson helpfully drew my attention to the fact that SA writes in her letter about how she feels different from other children at school because she is not taken to school by a parent. This evidence speaks to the appellant's role in her daughter's life. I also found Mr Qayoum's evidence in this respect to be truthful and compelling. He stated that the appellant and SA speak every day via WhatsApp and that he speaks to the appellant whenever a decision is to be made about SA's welfare. Unprompted, he gave the example of school trips and illness, stating that he consults the appellant whenever decisions on such matters are to be taken. Given the absence of SA's father from her life, I consider this spontaneously given evidence to be true.

25. I do not lose sight of the sensible points made by Mr Terrell in favour of the alternative conclusion. There is no reference to the appellant in the letter from SA's school and it is fair to say that there is a dearth of up-to-date evidence in every respect, not least as to contact between the appellant and SA. There is

also no satisfactory explanation of the appellant's decision to send SA to the UK on her own, rather than making an application to accompany her to the UK. Having heard from Mr Qayoum and having considered the documentary evidence to which I have already referred alongside the rather aged screenshots of video calls between the appellant and her daughter, however, I accept on the balance of probabilities that the appellant is taking and that she intends to continue to take an active role in SA's upbringing.

26. I therefore turn to the question of funding. As in the first hearing before me, there was a good deal of discussion in the submissions before me of the extent to which third party support could properly be taken into account in a case of this nature. I am particularly grateful to Mr Terrell for his research into the relevant policy and for his ably made submissions about the reason why third party support should not be taken into account in a case of this nature. Given the findings of fact which follow, however, it is not necessary for me to consider those points.

27. I begin my consideration of the financial questions in this appeal by stating that I accept the submission made jointly by Mr Terrell and Ms Ferguson that the relevant 'yardstick' by which the adequacy of maintenance is to be assessed must be that described in *KA (Pakistan)* and endorsed by the Court of Appeal in *French v ECO* [2011] EWCA Civ 35. The test is therefore whether the appellant would have available to her a level of funding which is at least equivalent to that which would be received by way of Income Support.

28. Ms Ferguson submitted that the yardstick calculation should not include a sum for the appellant's daughter but only for the appellant herself. That submission was made on the basis that Mr Qayoum currently supports SA and that he would continue to do so. I am unable to accept that submission for two reasons. The first is that it runs counter to the logical basis upon which *KA (Pakistan*) was decided. As the AIT explained at [8] of that decision, the purpose of the requirement of adequacy is to ensure that a proper standard, appropriate to a family living in a not inexpensive western society, is available to those who seek to live here. To accept that certain members of the family need not be brought into the equation because they might be supported by a third party is to risk the ghettoization which the Tribunal sought in *KA (Pakistan)* to guard against. The second difficulty with Ms Ferguson's submission is much more straightforward; it simply was not borne out by the evidence. Mr Qayoum does not say in his witness statement that he intends to continue supporting SA indefinitely, even if the appellant enters the UK, and he gave no such evidence orally. In the circumstances, I consider that the submission was both wrong in law and without evidential foundation. I therefore accept Mr Terrell's submission that the appellant must show a total of £162.58.

29. Ms Ferguson submits that the appellant is comfortably able to do so with reference to Mr Ali's support and/or her ability to work in the UK. I am unable to accept either limb of that submission.

30. As regards Mr Ali, I have no doubt that he wishes to help. Mr Terrell did not suggest to him that he was lying when he suggested in oral evidence that his salary had increased to more than £50,000 or when he suggested that his wife earns in the region of £35,000. Nor, despite the rather low closing balances in Mr Ali's bank statements, did Mr Terrell suggest to him that he was currently unable to afford the £125 per week which he suggested in his oral evidence that he

would provide to the appellant. The difficulty with that pledge is instead that it is, at best, a statement of current intention made with little regard for the future.

31. The copies of Mr Ali's bank statements which appear in the bundle date back to 2021. The closing balance of the account is quite low on a number of occasions. Mr Terrell asked the sponsor about his current outgoings, and in particular about his mortgage commitments. He said that he currently has a low rate (2.4%) and that it is due for renewal next year. He thought that it might increase by £200 or so per month. Mr Ali has a wife and a child. The cost of living has increased significantly in recent times. Notwithstanding the respectable salaries earned by him and his wife, I am not satisfied that he is in a position to state that he can support the appellant and her daughter to the tune of £500 per month or so for the foreseeable future.

32. At [19] of *Mahad & Ors v ECO* [2009] UKSC 16; [2010] 1 WLR 48, Lord Brown endorsed an observation by Collins J that it might be difficult to satisfy an ECO that 'any third party support relied upon is indeed assured.' For the reasons I have given, I am not satisfied that the promises offered by Mr Ali and the evidence before me go to establish on the civil standard that the appellant and her daughter can be continuously supported by him despite his own financial commitments.

33. Ms Ferguson nevertheless drew my attention to the offer of employment made by a Mr Hussain on 15 February 2021. He is the director of Panache Fine Dining in Sutton Coldfield and he states that a job vacancy for a Kitchen Assistant role 'will remain vacant' for the appellant. He stated that she would work for forty hours per week 'on a salary basis', although he does not specify the salary. This letter is simply too old to bear any weight. It was written as the country was emerging from the pandemic. I cannot know whether the offer stands, two and a half years later. I cannot even know whether the restaurant is still operating, or whether it requires additional staff. Given the difficulties encountered by the hospitality industry in recent times, the letter is deserving of no weight when considering the important question of whether the appellant will be able to support herself and her young daughter adequately.

34. Ms Ferguson nevertheless submitted that the appellant is fit and well and willing to work. The appellant is likely to get a job, she submitted, and that should be taken into account in considering the extent to which she might become a burden on public funds. I reject that submission, which is simply too fraught with uncertainty. I do not know the field in which the appellant would seek work or whether she has any experience in that area. I know that she speaks English to the level required by the Immigration Rules but I do not know whether she is able to converse in English to a level where she might find employment. Mr Qayoum's evidence rather suggested that she was not. Even if she has relevant experience, I do not know what opportunities there might be in the area in which she would live with Mr Qayoum. To decide this question on the basis suggested by Ms Ferguson would be to engage in impermissible speculation, and I decline to do so.

35. I therefore conclude that the appellant is not able to show that she and her daughter would be adequately supported to the level required by the authorities. I am not able to accept, in fact, that there is any reliable evidence of dependable support. Whether or not it is permissible to take account of third party support (or a job offer) in this area inside or outside the Rules, therefore, the appellant's submission fails on the facts.

36. Having made my findings about the appellant's inability to meet the Immigration Rules, I turn to consider proportionality in Article 8 ECHR terms. The first question to which I must turn is the best interests of the appellant's daughter, SA. I am grateful to both advocates for their submissions in this regard. Mr Terrell was correct, in my judgment, to accept that it was in SA's best interests for her mother to be admitted. That must be right, particularly with reference to the accepted fact that SA's father has completely avoided his responsibilities to his daughter. No doubt in recognition of what was said by Baroness Hale in *ZH (Tanzania) v SSHD* [2011] UKSC 4; [2011] 2 AC 166 about the importance of nationality in the best interests assessment, Mr Terrell did not submit that SA's best interests would be served by returning to Bangladesh to be with the appellant. This case is instead about the extent to which SA's best interests militate in favour of the appellant's admission: *EV (Philippines) v SSHD* [2014] EWCA Civ 874 refers, at [36].

37. I have already referred to the written evidence given by the appellant and SA in 2021. I have no doubt that they miss each other and that they would much prefer to be with each other. It is obviously generally the case that it is in the best interests of a child to be raised by one or both parents. There is no reason to depart from that presumption here, particularly where I was told by Mr Qayoum that he had been given permission by SA's school to take her to Bangladesh during school term time so that she could see her mother. There is obviously a loving bond between the two of them and it must be very difficult for parent and child alike to live apart.

38. There is an additional component to my assessment of SA's best interests, however, which informs the question posed by Christopher Clarke LJ at [36] of *EV (Philippines)*. It concerns the appellant's likely financial circumstances in the UK. Given that I have not accepted on the evidence before me that she will be supported reliably by Mr Ali, and given that I have rejected the suggestion that she will readily find employment, it follows that her arrival to the UK would bring about a period of financial uncertainty and precariousness which militates (to some extent) in favour of the maintenance of the status quo.

39. In sum, whilst I accept that it is in SA's best interests for the appellant to be admitted to the UK, I consider that it is not emphatically or overwhelmingly so. SA is cared for by Mr Qayoum and his family (which includes his wife and two daughters) and there is nothing to suggest that they are providing care which is inadequate in any way. Nor is there any reason to think that his care of SA will not continue whilst the appellant is not in the UK. The appellant and SA miss each other acutely but there is no evidence to show that the separation is affecting SA's health or schooling. She is able to see her mother via video call and is able to visit her in Bangladesh, as she did last year. Visits and video calls are not a substitute for physical contact and the presence of a parent in the home but they are relevant considerations to the extent to which SA's best interests militate in favour of her mother's admission. For the reasons I have given, I accept that SA's best interests militate in favour of that course but I consider that they do not exert great force on the scales of proportionality.

40. On the other side of those scales is the 'considerable weight' which I am required by *TZ (Pakistan*) to attach to the appellant's failure to meet the Immigration Rules. The importance of that consideration is underscored by s117B(1) of the Nationality, Immigration and Asylum Act 2002. The appellant can speak English to the extent required by the Immigration Rules, and that is a neutral matter in

the assessment of proportionality. The appellant's failure to establish that she would be financially independent of the state on arrival in the UK militates against her, however.

41. Drawing all of these threads together, I reach the clear conclusion that the respondent has established that her decision to refuse entry is proportionate under Article 8 ECHR. The weight which I must attach to the matters on the respondent's side is considerable. The best interests of SA and the strength of the family life between her and her mother are insufficient to outweigh those considerations.

42. As Mr Terrell very fairly observed in his closing submissions, the outcome of this appeal is merely a reflection of the evidence which is presently before the Tribunal. I have found that evidence to be deficient in several respects and there is nothing to prevent the appellant making a further application based on better and more up-to-date evidence. I record that observation for the sake of the appellant and her daughter, and not because the possibility of such an application has played any part in my consideration of proportionality in this case.

**Notice of Decision**

The decision of the First-tier Tribunal having been set aside, the Upper Tribunal remakes the decision on the appeal by dismissing it.

**M.J.Blundell**

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 August 2023