Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/13828/2018
HU/13830/2018
HU/13831/2018
HU/13832/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th March 2019	**On 28th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

MRS ZARLKHTA [D] (FIRST APPELLANT)
[A D] (SECOND APPELLANT)
MISS AMINA [D] (THIRD APPELLANT)
MISS ROQIA [D] (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr Lea, Counsel
For the Respondent: Ms Cunha, Senior Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Afghanistan, currently residing in Pakistan. The first Appellant is the mother of the second, third and fourth Appellants. The second Appellant is a minor. They appeal with permission

against the decision of a First-tier Tribunal (Judge Meah) dismissing their appeals against the refusal by an Entry Clearance Officer ("ECO") to grant them entry clearance to the UK for settlement.

2. Their applications were considered under the Family Reunion provisions contained within the Rules. They sought reunification with the first Appellant's son, Mr [OD] ("the Sponsor"), who was granted full refugee status in the UK in June 2014.

3. The ECO refused the applications on several grounds:

   - He was not satisfied that the parties were related as claimed. This ground now falls away as relationships have been established but I will return to this point further in this decision
   - The applications did not meet the Immigration Rules so far as financial dependency is concerned
   - There were no exceptional/compassionate circumstances put forward such as to warrant a grant of entry clearance outside the Rules.

4. The Appellants appealed the Entry Clearance Officer's refusal under Section 6 of the Human Rights Act claiming that the decisions to refuse their applications were in breach of their Article 8 ECHR rights to family/private life.

Background

5. There is a background to these appeals which it is necessary to recite. Although the Appellants are citizens of Afghanistan, they are currently living in Pakistan having left Afghanistan in 2006, on account of the Sponsor's father having been murdered by the Taliban in a car bomb attack. Their claim is that they have no status in Pakistan. The Sponsor (and another brother who is also now in the UK) formed part of the Appellants' pre-flight family and were also part of the family unit in Pakistan.

6. When the Appellants' applications were first made, the family unit comprised not only the Appellants but included the Sponsor's wife and children. At that point all applications were refused because the Entry Clearance Officer did not accept the relationship as claimed between the Sponsor, his wife and children, and the Appellants. Once the family relationships were established, the Sponsor's wife and children were granted entry clearance under the Family Reunion provisions of the Rules. The ECO however maintained his refusal in the cases of the Sponsor's mother and his siblings because they did not come within the Immigration Rules. They exercised their right to appeal to the FtT. The FtT upheld the ECO's decision. The Appellants appealed the FtTJ's decision and thus the matter comes before me to decide if the FtTJ's decision discloses an error of law requiring it to be set aside and re-made.

Error of Law Hearing

7. Before me Mr Lea appeared for the Appellants and Ms Cunha for the Respondent. I heard submissions from both representatives.

8. Mr Lea acknowledged that the grounds seeking permission are extensive but said, in summary, that his submissions would concentrate on grounds (1) and (2) which asserted that the FtTJ had taken the wrong approach to the evidence, by going behind the concession made by the Respondent and by taking an evidential point not raised during the hearing.

9. In support of these assertions he referred to [30] and [31]. The FtTJ, following an exposition of the jurisprudence, clearly records a concession made by the Respondent that Article 8 is engaged in these appeals. The judge follows this by confirming at [33] that he accepts that there is family life between the Appellants and their Sponsor. Therefore what should have followed was a fact sensitive exercise analysing whether there was a compelling case under Article 8 outside the Rules. The judge's approach to this was incorrect.

10. The Appellants' circumstances are that they are living in Pakistan with no status there. Their dependency on the Sponsor is by force greater than that which exists in normal family circumstances. The judge focused on saying that the relationships did not meet the threshold test in **Kugathas [2003]** by looking mainly at financial dependency. He thereby failed to engage with the Appellants' case which is that in their particular circumstances "dependency" merits a wider consideration of Article 8, because family life in their situation could only be enjoyed in the UK. This error rendered the decision materially flawed. The judge had treated reliance on public funds as determinative, and failed to properly consider relevant matters such as background evidence (ground 4) and credibility of the witnesses (ground 3). Had the judge not followed the restrictive approach which he did, he would have engaged in a proper proportionality exercise which may well have resulted in a different decision.

11. The next point raised by Mr Lea specifically concerned ground (2), the "fairness" point. This arises in relation to the evidence of a letter from Mr Gul, put forward in support of the Appellants' claims. The FtTJ at [40] made a finding that this letter was a fabrication and thus discredited the Sponsor's evidence. Mr Lea pointed out that nowhere during the course of the hearing was this evidence questioned and this point put to the Sponsor. The suggestion of this evidence being a fabrication was raised only in the Respondent's closing submissions. The Sponsor was given no opportunity to respond to it despite objection being raised by the Appellants' representative. There is no evidential basis therefore to show what led the FtTJ to conclude that the letter is a fabrication. The evidence contained in the letter forms a material part of the Appellants' case and they have been denied the opportunity of a fair hearing. The decision is materially flawed and should be set aside to be re-made.

12. Ms Cunha sought to defend the decision by saying, if I understood her correctly, firstly that the concession at [31] was no more than an acknowledgement that the parties are related to the Sponsor as claimed. (The applications had been refused originally on the relationships not being accepted.) Secondly in any event the judge had made clear findings that the connection between the Sponsor and the Appellants was such that it did not go beyond the normal emotional ties envisaged in **Kugathas**.

13. At the end of submissions I announced my decision that I was satisfied that the decision of the FtT must be set aside for material error. I now give my reasons for this finding.

Consideration of Error of Law

14. I find force in Mr Lea's submissions as set out above (paras 10 and 11). The judge's findings are contradictory when [37] is looked at in the light of the finding made at [33]. I find that the judge appears to accept initially that there is family life between the Appellants and their Sponsor indicating Article 8(2) should be considered. He then goes on to adopt the restrictive approach set out in **Kugathas**. I find that this has led the judge to take the wrong approach in evaluating the evidence before him including, for example, evidence that the Sponsor had become the head of the Appellants' family unit at the time they left Afghanistan. Criticism is made of the lack of visits made by the Sponsor to the Appellants but in making that criticism it appears that material evidence has been side stepped. The family circumstances are not the norm. The Sponsor does not come from Pakistan so he has no given right to visit there. Any assessment under Article 8(2) must keep these matters in mind and in my judgment on a reading of the decision I find the judge has not properly assessed this evidence.

15. This brings me to the second ground raised by Mr Lea. It is hard to see what reasoning the judge has employed in order to reach his finding at [40] that he disbelieves the contents of the letter from Mr Gul. The letter from Mr Gul which forms an integral part of the Appellants' claims sets out that he can no longer provide support for them. Mr Lea in his submissions said that in the course of the hearing there was no cross examination of the Sponsor on this point. Ms Cunha in her submissions was unable to assist. According to Mr Lea's submissions the credibility or otherwise of Mr Gul's letter was only raised by the Respondent in closing submissions. Objection to the point was taken by the Appellants' representative stating that procedural fairness required the point to be put to the Sponsor by reopening cross examination.

16. Nowhere in the FtTJ's decision do I see that the above point noted. What the judge says is as follows;

> "I was also told that ..... Mr Gul ..... is now saying he can no longer accommodate or assist them. A letter from him to this effect was provided in the appellants 'bundle. [39]
>
> "Ms Godfrey argued that it was not credible that he would suddenly stop his support in the manner described and she asked me therefore to attach limited weight to this claim. I accept her contention on this point as I find the timing of the claim and the letter (the source of which cannot be verified) is all too convenient and I find that this has been provided to bolster the claim that the appellants are under pressure to leave Peshawar on all counts hence this created an additional feature of exceptionality in their cases, and I simply do not believe this aspect of the claim." [40]

17. Nowhere do I see it noted by the FtTJ, as it should have been, that objection was taken to this point. Nor do I see any note by the FtTJ directing that the point be put to the Sponsor thereby giving him the opportunity to answer it. I am bound to conclude therefore that the FtTJ's findings at [40] are reached improperly and constitute material error.

18. The errors set out above are sufficient therefore for me to conclude that the decision is flawed and must be set aside. I find nothing is to be preserved from the decision. It is set aside in its entirety. The appropriate course is for it to be remitted to the First-tier Tribunal for a fresh hearing to take place. It should be noted that the finding at [31] recording that "a concession" was made by the Respondent is of course also set aside. Mr Lea indicated that he was taking no point on this issue.

Notice of Decision

The decision of the First-tier Tribunal is set aside for material error. These appeals will be remitted to the First-tier Tribunal for a full rehearing. Nothing is preserved from the original decision. The hearing should take place before a Judge other than Judge Meah.

No anonymity direction is made.

Signed C E Roberts Date 22 March 2019

Deputy Upper Tribunal Judge Roberts