Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19215/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28th January 2022	**On 18th March 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR MOHID SHABBIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD

Respondent

Representation:
For the Appellant: Miss E Rutherford, Counsel instructed by Law & Justice Solicitors
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 31st May 2016 and is now 5 years old. He appealed (although with no litigation friend) against the Entry Clearance Officer's decision dated 14th October 2019 to refuse his application for entry clearance as the child relative of a person present and settled in the United Kingdom. It was contended that he met the requirements of paragraph 297 of the Immigration Rules and the decision to refuse him entry clearance was a breach of Article 8 of the European Convention on Human Rights. First-tier Tribunal Judge Shepherd heard his

appeal on 18th February 2021 and dismissed his appeal on 9th March 2021. The grounds of appeal against her decision were as follows:

(a) In finding that there were no serious and compelling family or other circumstances the judge had made material errors of law as follows:

(1) The judge failed to have regard to all the evidence before her and

(2) the judge had made findings that were contrary to that evidence.

(b) At [52] and [53] the judge questioned the financial situation of the parents as claimed but had before her an explanation from Mr Ijaz Ahmed Mughal (the father) in the form of an affidavit in which he explained his low income and he could not afford to care for his third child. The judge rejected this owing to a lack of specifics as to his income but she failed to have regard to the fact that he has an income monthly of RS15,000, which is approximately £70.

(c) The joint affidavit from both parents set out the arrangement and the financial situation. Contrary to the judge's finding at [54] that there was a lack of evidence from the appellant's biological mother there was in fact evidence from her. The judge ignored the evidence that was contained in the affidavit (see [52]).

(d) At [56] the judge appeared to reject the significance of the Pakistan adoption order but that was legally binding in Pakistan. No issue was taken in the refusal as to the effect of this order in Pakistan and the Entry Clearance Officer simply recognised that Pakistan is not recognised in the Adoption (Recognition of Overseas Adoptions) Order 2013 ("the Adoption Regulations"). In rejecting the significance of the order the judge failed to have regard to the Entry Clearance Officer's position as to the order and that it was accepted to be legally binding. It was relevant to the assessment of the family's circumstances.

(e) At [57] the judge had failed to give proper reasons in concluding that it was not credible that the appellant was cared for by the sponsor's sister (in Pakistan). This should be looked at against the cultural context because she would relocate within Pakistan with other family members so that she is not alone.

(f) The evidence before her was that the appellant believes the sponsors are his parents but the lack of detail about who he thought were his biological parents did not undermine this evidence which was clear, and the finding was inadequately reasoned.

(g) The judge commented that there was a lack of evidence to show the appellant's parents make decisions about their two older children but not the appellant, but it was unclear what further evidence should be provided as the sponsors communicated with the appellant's carer by telephone.

(h) The judge made reference to the sponsor's will but the findings of fact did not reflect the evidence. The terms of the will make it clear that he is considered to be the sponsor's son.

(i) At [60] the judge referred to the lack of receipts as to how the money had been spent and required evidence, but it was simply not reasonable to expect this and there was no adequate reason to reject the evidence that the money the sponsor sent was used for the benefit of the appellant.

(j) These errors were material as they affected the findings regarding the family situation.

In sum, the judge had failed to (i) consider all the relevant evidence, (ii) had taken into account irrelevant matters and (iii) failed to give adequate reasons for her key findings.

2. In her submissions Miss Rutherford emphasised the court order in Pakistan and the fact of the will made by the sister. Miss Rutherford advanced that these were key issues in considering the family circumstances. The judge had erred in approach to the evidence, particularly the parental position. What further evidence was required from the family in terms of receipts? The lack of receipts was irrelevant, and the evidence given was that and it was accepted that this money was sent to Pakistan from the sponsor to the sister. Cumulatively the judge had failed to factor in relevant considerations when assessing the family circumstances.

3. Mr McVeety submitted that the judge was clearly concerned that she was not being told the truth and that overall framed the evidence, which had to be considered as a whole.

4. The judge was being asked to consider a child who had been brought up by his brother and sister in Pakistan and about to be transported to the UK to live with an aunt he had seen sporadically during his lifetime. He was expected to leave all he knew behind to live in the United Kingdom. That would not be in the child's best interests and that was a critical factor. The judge had taken into account the relevant evidence.

Analysis

5. This appeal was considered in relation to Article 8 of the European Convention on Human Rights and the principles enunciated under **Razgar v SSHD** [2004] UKHL 27 with reference to the requirements of the Immigration Rules which set out the position of the Secretary of State. The requirement at 297(f) is that

> *'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'*

6. The first of the considerations under **Razgar** is whether family life existed, and the judge accepted that it did. That clearly demonstrates the judge took cognizance of the adoption order because, albeit the aunt was a relation, the child had met the sponsor from the UK only infrequently. Without consideration of the adoption order no finding on family life could have been made.

7. Under the proportionality exercise, when considering serious and compelling family or other considerations and whether the immigration rules were met as part of that exercise, the judge carefully went through the evidence, which she found unsatisfactory for various reasons and which I come to below. A detailed analysis and careful reading do not show that she missed, mischaracterised or failed to reflect the evidence.

8. The grounds assert further that the judge commented incorrectly, "there is nothing from the appellant's biological mother" and failed to refer to the affidavit which made clear that the couple were not able financially to support the appellant. However, the judge did at [52] set out the detail of the affidavit which described the income of the father of only RS15,000 per month (£70) and at [53] stated:

> *"There is a dearth of evidence as to how the wages earned by the appellant's father compared to his expenditure, what expenditure the appellant requires and what impact this has in real terms on the ability to care for the appellant, for example, does it mean without the sponsor's financial help he would suffer malnutrition or would have no clothes etc."*

That observation was open to the judge but clearly showed that she had taken into account the affidavit.

9. At [52] and [53] the judge did not accept that the income of the parent, even if only RS15,000 a month, was insufficient without the evidence of some form of schedule showing receipts and expenditure. The appellant was represented, and schedules are routinely produced as evidence within the Tribunal, and it was reasonable in the circumstances for the judge to expect an explanation of expenditure and it was open to the judge to consider that they could have been produced. The judge acknowledged the joint affidavit and that the father asserted that he had a low income but was entitled to find that the assertion that he could not afford to care for the child was insufficient in the absence of further evidence. First, it was open to the parents to produce more than a simple assertion in a very short affidavit as to the income, bare assertions will not suffice, and secondly, without an analysis of the expenditure, it was open to the judge to be unpersuaded that the family could not afford, having two children already, to provide for one more. The evidence was properly reflected. There was indeed a lack of specifics about the parental income and expenditure; bearing in mind the lack of income was a significant reason given for having the appellant and minor child adopted by the sponsor, the judge was obliged to consider the matter carefully. The judge was wholly

entitled to comment on the absence of the detail of the family's finances and circumstances.

10. Additionally, at [54] the judge did not say there was *no* evidence from the mother but there was a "*lack* of evidence from the appellant's biological mother and this has not been explained". That is correct. The judge had clearly taken into account the affidavit by the description of its contents at [52], and she refers to the statement of the parents, which merely repeated the affidavit information. This is a mother releasing the care of her 5 year old child to live in the United Kingdom and to expect detailed information on the parents' ability to pay for the child, which was one of the key reasons he was being sent to the UK (in addition to providing the aunt with a child), was critical; equally to expect, notwithstanding the adoption order, detailed information from a mother releasing her child to live in the UK was also relevant; the judge did not ignore the evidence in the affidavit but evidently and understandably required more.

11. There is no indication that the judge failed to have regard to the significance of the adoption order within the proportionality exercise. Despite the Entry Clearance Officer's acceptance that the adoption order was legally binding, the point being made by the judge was that the guardianship order did not confirm that the sponsor had in practical terms '*sole custody of the appellant to the exclusion of his biological parents*'. The judge was fully aware of the relationship and of the legal documentation and it was open to the judge at [56] to state that "*no evidence has been provided as to its effect within the law in Pakistan*". That statement does not undermine her overall findings within the parameters of Article 8. It was clear that the judge appreciated the adoption order was legally made in Pakistan, but it was also open to the judge to find that the adoption order was not in force in the United Kingdom because Pakistan is not on the adoption register. The evidence taken from the sponsor was that there had been no steps by the sponsor to formally adopt the child in the UK. The Adoption Regulations are specific safeguards to protect the welfare of children in the UK and that was also a relevant factor in the proportionality assessment.

12. The grounds advance that the judge had at [57] inadequately reasoned her disbelief that the appellant was cared for by the sponsor's sister and that the sister relocated to her husband's house when he was in Pakistan. In fact, at [57] the judge made a finding that it was not credible that the child appellant was cared for "solely" by the sister (rather than with the parents) and moved regularly to another house. The judge reasoned, adequately, that it would be disruptive, particularly given the evidence that the child attended school; that approach was understandable and clear, and the weight given to the evidence is a matter for the judge. As the judge added, she was not told the location of the sister's house in relation to the parents' house or whether the appellant was able to continue schooling and whether he could continue his regular activities. The judge found the evidence overall not to be credible and unpersuasive that the child would live with his parents part of the time only. Owing to

the nature and extent of the evidence, that finding was open to the judge and adequately reasoned. The judge found there was "*no evidence as to what he has been told about who his biological parents and siblings are*". The judge thus also rejected the notion of sole custody by the sister and that the child moved with the sister as and when, in part because of the dearth of evidence as to his knowledge of his relationship with his biological family. Those were adequate reasons for rejecting the sole custody by the sister to the exclusion of the parents. Significantly, at [60] the judge identified that the sister's statement did not mention that she cared for the appellant '*at all*'. Overall the judge was not ignoring cultural considerations of the sister not wishing to stay alone without her husband but focusing on the reality of the child's life.

13. The judge did consider [58] the assertion that the sponsor took all the major decisions for the appellant and noted that communication was made by telephone but was entitled to conclude on rational grounds that, bearing in mind the sister had not confirmed that she cared for the appellant in a meaningful way, it did not take the case further forward and it is difficult to see how that is not the case. It is not unclear what further evidence could be provided. Clearly, written evidence from independent sources (and there was a myriad of possibilities such as from school or doctor) in preference to telephone evidence, which was taken into account, would carry more weight and could have reasonably been produced. Mere disagreement about the weight to be accorded to the evidence, or lack of it, which is a matter for the judge should not be characterised as an error of law.

14. I am not persuaded that the omission of consideration of the will *in depth* is a material error. The judge did address at [59] the sponsor's will, which referred to the appellant as her son, but this did not change the fact that under English law he was not her son. The judge's observation in that regard was reasonable and reasoned. I am not persuaded that the further consideration of the will would add much and thus material. The fact of a will from the receiving sponsor which can easily be altered, as Mr McVeety pointed out, does not in any event add significantly to whether there are serious or compelling circumstances.

15. As the judge identified at [50], the key test under paragraph 297 of the immigration rules was whether there were "serious and compelling family circumstances making the Appellant's exclusion from the UK undesirable". She clearly found this was not made out and this was a relevant factor in her assessment.

16. When considering proportionality, as set out in **ZH (Tanzania) [2011] UKSC 4** , the primary, albeit not the paramount consideration, is the best interests of the child. That is a very significant factor. The judge gave sound reasons for considering the best interests of the child were to remain in Pakistan and indeed that was a finding which was not challenged.

17. It is important to highlight, as the judge found, that the best interests of this child appellant were to remain in Pakistan, and those findings were not challenged. The judge was fully aware that the adoption order may have taken place in Pakistan but was not effective in the UK because of procedural safeguards designed to ensure the welfare of children. It is not a sustainable assertion that the judge failed to have regard to relevant evidence in a manner which was material to the making of this decision. As the judge found, and which was not challenged, there was no reason given as to why the sponsor could not continue to fund the appellant in Pakistan if, which was not accepted on the evidence, the parents could not continue to provide for the child.

18. The judge did not accept, on the evidence, and for cogent reasons that the appellant was living in an unacceptable social and economic environment and found the appellant lived with his parents and his siblings "likely all of the time" at paragraph 69. That was not challenged in the grounds. The judge also found that the appellant was in education, and it was in his interests that he had stability and continuity. Indeed, it was the sponsor's evidence that the child was fit and well and had never been to the UK. That was not controverted. The judge did find that the appellant had met the sponsor but also found that "*no satisfactory reason has been put as to why the status quo cannot continue and why the sponsor cannot continue to support the appellant financially from the UK*". That finding was not challenged either save to assert overall that the judge had not taken into account relevant evidence or taken into account irrelevant evidence, both of which are incorrect.

19. On that basis, I find there is no error of law in the decision.

Notice of Decision

The First-tier Tribunal decision will stand and the appeal remains dismissed.

Signed Helen Rimington Date 16th February 2022

Upper Tribunal Judge Rimington