



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04769/2017
HU/04758/2017

THE IMMIGRATION ACTS

Heard at Field House
On 6th August 2018

Decision & Reasons Promulgated
On 11th September 2018

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

PZ & AZ
(ANONYMITY DIRECTIONS MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Lams of Counsel, instructed by Fisher & Myftari Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants appeal against the decision of First-tier Tribunal Judge Cary promulgated on 22 March 2018, in which their appeals against the decisions to refuse their applications for entry clearance to join their father in the United Kingdom dated 13 and 16 January 2018 were dismissed.
2. The Appellants are nationals of Afghanistan, born on 18 December 1998 and 14 March 2000 respectively. They are brothers who at the time of application were residing with

their mother and four siblings (all of whom are British Citizens) in Pakistan and who applied for entry clearance to join their father, a British Citizen, in the United Kingdom.

3. The Respondent refused the applications for essentially the same reasons, because the Appellants resided with their mother who was not being admitted on the same occasion for settlement and their father did not have sole responsibility for them. It was not accepted that there were any serious or compelling circumstances that made their exclusion from the United Kingdom undesirable. An entry clearance manager reviewed and upheld both decisions following receipt of the application for permission to appeal.
4. Judge Cary dismissed the appeals in a joint decision promulgated on 22 March 2018 on all grounds. This was on the basis that the Appellants could not meet the requirements of the Immigration Rules in paragraph 297 because their father did not have sole responsibility for them and there were no serious or compelling circumstances that made their exclusion from the United Kingdom undesirable. It was found that it was in the Appellants' best interests to remain residing with their mother, maintaining continuity of residence in Pakistan where they had been born and spent all of their lives. There was nothing to suggest the Appellants spoke English and they were in education in Pakistan. Overall, the refusal of Entry Clearance was not a disproportionate interference with their right to respect for family life under Article 8 of the European Convention on Human Rights.

The appeal

5. The Appellants appeal on four grounds. First, that the First-tier Tribunal made a mistake of fact in mistaking Jafar Khan to be a different person to Jafar Hamid when they are the same person (as confirmed by the passport numbers given in the two different affidavits, one under each name) and the discrepancy was not put to the Sponsor at the hearing. Further, the Appellants' case is that the First-tier Tribunal failed to take into account one of these affidavits and one from the Appellants' mother which stated their mother could not look after them. This is consistent with the medical evidence about the Appellants' mother and overall, the evidence supported the claim that the Appellants' father had sole responsibility for them.
6. Secondly, that the First-tier Tribunal failed to properly consider whether there were compelling considerations under paragraph 297(i)(f) of the Immigration Rules, in particular failing to consider the precarious immigration status of the Appellants in Pakistan as Afghan refugees who were under pressure to return to Afghanistan, that the Appellants' uncle was relocating his family to Afghanistan but that the Appellants' mother was not well enough to do the same.
7. Thirdly, that the First-tier Tribunal erred in its assessment of Article 8 of the European Convention on Human Rights by failing to consider that the Appellants' siblings had not relocated to the United Kingdom (as of right as British Citizens) so as not to split the family up and inconsistently finding that the mother could in principle meet the

rules for entry clearance but also finding that they were not met and that there would be a strain on the public purse.

8. Fourthly, the First-tier Tribunal erred in applying section 85(5) of the Nationality, Immigration and Asylum Act 2002 to preclude evidence post-dating the decision when that section had been amended to remove any such restriction.
9. Permission to appeal was granted by Judge O'Brien on 4 May 2018 on all grounds.
10. At the oral hearing, Mr Lams made further detailed submissions on the grounds of appeal submitted. As to the first ground of appeal, the mistake of fact, he highlighted that the affidavit in the Respondent's bundle from Mr Jafar Hamid (undated) stated his passport number to be 01157682, the same as the affidavit from Jafar Khan. This is consistent with the Appellants' father's evidence that refers only to one brother. The decision places little reliance on letters from other people about who cares for the Appellants, including a letter from the family lawyer, although it was accepted that the evidence didn't deal with the role of the Appellants' father. Although the evidence suggested that the Appellants' mother attended to some day-to-day care of the children and therefore had joint responsibility for them, that evidence could be read either way and the conclusion based on this overlooks other key documents and evidence as to her role.
11. In relation to Article 8, it was submitted that the First-tier Tribunal erred in the assessment in failing to take into account the Appellants' four British Citizen siblings, that the Appellant's mother could not seek entry clearance to the United Kingdom because she could not meet the English language requirement and that economic factors were held against the Appellants in the balancing exercise when there was evidence to show that the Appellant's father had sufficient earnings to meet the financial requirements for the whole family to come under Appendix FM and in any event there is no specific level of earnings required for an application under paragraph 297 of the Immigration Rules, only that the applicants be adequately maintained and accommodated.
12. Mr Lams accepted that there was no express challenge to the findings in paragraph 35 of the decision as to the assessment of the best interests of the children, however he submitted that such a challenge was implicit in the second ground of appeal in relation to compelling circumstances.
13. As to the fourth ground of appeal, Mr Lams submitted that the only documents not taken into account by the First-tier Tribunal due to the mistaken reliance on the section 85(5) of the Nationality, Immigration and Asylum Act 2002 were the articles about the position of Afghan refugees in Pakistan and potential removal back to Afghanistan.
14. On behalf of the Respondent, Mr Tarlow submitted that the grounds of appeal amount to disagreement with the decision rather than showing any material error of law in the First-tier Tribunal's decision. In particular, the medical evidence in relation to the Appellant's mother was unclear and there was a lack of evidence showing that she was unable to care for the Appellants. There was also evidence that she had a degree

of responsibility for the Appellants including feeding them and sending them to school and that the Appellants' father was prepared to leave Pakistan in 2015, which he would not have done if the mother was incapable. Overall, the First-tier Tribunal reached sustainable findings on there not being sole responsibility which were open to it on the evidence available.

15. In relation to whether Jafar Khan and Jafar Hamid were the same person, it was submitted that the findings and reasoning in relation to this were immaterial given the other reasons set out for finding that the Appellants' mother was capable and at least partly responsible for the children.

Findings and reasons

16. Paragraph 297 of the Immigration Rules sets out the requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, in one of a number of circumstances. So far as relevant to the present appeals, these are set out in paragraph 297(i)(e) that one parent is present and settled in the United Kingdom... and has had sole responsibility for the child's upbringing; and (i)(f) that one parent is present and settled in United Kingdom... and there are serious and compelling family considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care.
17. The First-tier Tribunal correctly set out relevant provisions and authority on these issues, in particular, TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 as to sole responsibility. The findings on this point are contained in paragraphs 29 to 32 of the decision of the First-tier Tribunal, which include detailed references to the evidence available, including the medical evidence, letters from family and friends in Pakistan and the United Kingdom as to the role of the Appellants' mother in their upbringing. It was noted in particular that the medical evidence was relatively brief and included no mention of the Appellants or their mother's ability or otherwise to care for them or manage their lives. The letters of support are considered in paragraph 30 as follows:

"I have been provided with various letters from various people in Pakistan who all assert that [the Appellants' mother] is incapable of looking after her children. I can place little reliance on those letters, particularly as they give very little detail for the reasons for the conclusions expressed in their letters. In particular I have an Affidavit from Mr Zahanat Ullah dated January 22, 2018 who claims to be the family lawyer who asserts that "for the last 10 years I certify that the wife of [the Appellants' father] is mentally depressed cannot look after herself for the children. Therefore the children are looked after by their uncle Mr Jafar Khan in Pakistan". That affidavit takes no reference to any involvement by [the Appellants' father] with the children either during the time when he was in Pakistan or elsewhere. Judging from the other evidence that has been produced the Appellant's uncle is Mr Jafar Hamid not Mr Jafar Khan. I have a statement from Mr Jafar Hamid [the Appellants' father's brother] in which he states that the children's father is "away in the United Kingdom" and that he has taken over "responsibility" for the children "due to their mother being ill". Again he makes no mention of any past or present involvement by [the Appellants' father] with the children. Indeed he goes further

and claims that he now has “responsibility” for the children. The letters from ... (January 5, 2018) and ... (January 5, 2018) also make no reference to any continuing involvement in the Appellant’s lives by [the Appellants’ father] (over that matter his brother). All they say is that the Appellant’s mother is not capable of looking after them due to “depression”.

18. The Judge then noted that the level of financial support given to the Appellants and their family in Pakistan was unclear, the only evidence from 2016 being that money was sent to the eldest Appellant on a regular basis. The conclusion as to paragraph 297(i)(e) is then set out in paragraph 32 as follows:

“During his time in Pakistan, [the Appellants’ father] was prepared to travel abroad leaving the children in the care of his wife. He was also prepared to return to the United Kingdom towards the end of 2015 leaving the children with her. If she was incapable of caring for them as claimed it is difficult to accept that the Appellant would have been prepared to return to the United Kingdom leaving them in her care although I accept he has been back to Pakistan since returning to the United Kingdom. I have no doubt that [the Appellants’ mother] as always had some measure of responsibility of the children in addition to meeting their daily needs. In her declaration she referred to cooking and preparing meals as well as preparing the children going to school. The evidence does not suggest that the Appellant’s mother does not continue to play some role in their lives and have some level of ongoing responsibility for them. The evidence does not suggest that [the Appellants’ mother] has abrogated all responsibility for the children or even that she has any significant mental health issues. I place little reliance on the medical evidence such as it is in accordance with the decision in Tanveer Ahmed. Although I was told in evidence that [the Appellants’ father] speaks to his children every day, there is no evidence to confirm that, although I accept that with modern means of communication, such evidence may not actually exist. I also note that in a statement, he claimed to telephone his brother every day to “check whether my children are okay” yet there is no mention of that by his brother in any of the documentation I have seen. In his statement, the Appellant claimed that his children “currently reside with my brother and his family in Islamabad” it is his evidence that the accommodation is shared with each family occupying separate law. When I look at all the evidence before me, I am not satisfied as at the date of decision that the Appellants met the requirements of paragraph 297(i)(e).”

19. It is clear from the detailed reasons given in paragraphs 29 to 32 of the First-tier Tribunal’s decision that the evidence before the Tribunal was both inconsistent as regards to who had responsibility for the Appellants (their father, their mother, their uncle and when looking back at the evidence myself, the Appellants’ aunt can also be added to the list of those stated to be responsible for or looking after the Appellants) and that there was a distinct lack of evidence as to both the Appellants’ mother’s capacity and the role of the Appellants’ father in their upbringing. There was no detailed medical evidence in relation to the Appellants’ mother nor any detail in the evidence more generally as to her capacity or care of the Appellants. The Appellants’ mother’s own evidence was inconsistent, her declaration referring to caring for the children (which Counsel for the Appellant accepted could be read both ways in the context of the affidavit) and also referring interchangeably to sole responsibility

having always been with the Appellant's father, being given to him or raising no objection to it being given to him together with custody in the future.

20. The mistake of fact as to whether there was a single uncle or two different ones is immaterial in light of the wealth of other detailed reasons for the conclusion reached that the Appellants' father did not have sole responsibility for the Appellants. In any event the mistake is entirely understandable given that, as it is now claimed, the same individual produced legal affidavits in two different names with no explanation or confirmation that they were the same person. It is not reasonable to criticise the First-tier Tribunal Judge for not appreciating that such documents in different names were in fact from the same person as there was no reason for the Judge to analyse the passport numbers given in the two documents.
21. Overall, the reasons given by the First-tier Tribunal for finding that the Appellant's father did not have sole responsibility for the Appellant such that they did not meet the requirements of paragraph 297(i)(e) of the Immigration Rules are entirely sustainable on the evidence before the Tribunal and the findings made were open to it on the basis of that evidence.
22. In relation to paragraph 297(i)(f) of the Immigration Rules, the First-Tribunal considered that there were no serious compelling circumstances making the Appellant's exclusion from the United Kingdom undesirable. There was no evidence that the Appellants were living in poverty or overcrowded conditions and they were still attending school. Once found that the Appellants were living with their mother who had joint responsibility for them, there was no other basis on which the First-tier Tribunal could have found that the requirements of paragraph 297(i)(f) were met. The suggestion that the Appellant's uncle's relocation to Afghanistan would mean that there was no one left to care for the Appellants carries little if any weight in light of the lawful findings as to the Appellants mother and her care of the Appellants.
23. The third ground of appeal challenges the First-tier Tribunal's assessment under Article 8 of the European Convention on Human Rights on the basis that it is said that material factors were not appropriately weighed in the balancing exercise when considering the proportionality of the refusal. I do not accept that as drafted this ground of appeal included even an implicit challenge to the findings in relation to the best interests of the Appellants as children contained in paragraph 35 of the decision. The assessment of the First-tier Tribunal was that it was in the best interests of both Appellants to remain Pakistan with their mother, based on continuing to reside with at least one of their parents, with continuity of residence, with a parent that they have lived with and spent more time with since they were born, where they are fully integrated into society and where they have undertaken all of their education, where there is extended family and in the absence of any evidence that the Appellants speak English. It was acknowledged that the Appellants' siblings currently live in Pakistan but that may change in the future if they use their British citizenship to move to the United Kingdom. Although not determinative of the assessment under Article 8, the best interests of the Appellants are a primary consideration to which significant weight is to be attached in the balancing exercise.

24. In the circumstances where it is in best interests of the Appellants to remain in Pakistan with their mother, it cannot be said that there was an error of law in the balancing exercise for the First-tier Tribunal to also rely on attaching weight to economic factors of limiting the demands on the public purse. I accept that there was sufficient evidence before the First-tier Tribunal that if entry clearance was granted to the Appellants, their father would be able to adequately maintain and accommodate them without recourse to public funds and this was not a factor to be weighed in the balance against them. However, if that was removed, the outcome that refusal of entry clearance would still not amount to disproportionate interference with the Appellants' family life would inevitably be the same. Similarly, the possible future place of residence of the Appellants' siblings, which was in any event expressly recognised and taken into account in paragraph 35, could not have affected the outcome of the balancing exercise. There is nothing in the present case to balance against the best interests of the children for the purposes of Article 8.

25. As to the final ground of appeal, the First-tier Tribunal stated as follows in paragraph 24 as the legal position of what evidence he could take into account:

*"... In order to reach a decision, I am confined to reviewing the circumstances existing at the time of the original decision to refuse in view of the requirements of section 85(5) of the 2002 Act. However, I am not confined to only considering the evidence before the Entry Clearance Officer. I am entitled to take into account all the circumstances existing at the date of the decision even if such circumstances were not drawn to the attention of the Entry Clearance Officer. I am also entitled to consider post decision evidence but only insofar as it concerns a matter arising at the date of the decision. I am not entitled to take into account evidence showing something which was likely to happen at the date of the decision had actually occurred – **DR (Morocco) 2005 UKAIT 0038**. I can therefore take into account what has happened since the decision but only in so far as it sheds light on the position and in particular the parties intentions at the date of decision."*

26. The statement set out above is a clear error of law as the version of section 85(5) of the Nationality, Immigration and Asylum Act 2002 relied upon by the First-tier Tribunal was substituted by section 15(5) of the Immigration Act 2014 which came into force on 20 October 2014. The amended provision deals with new matters raised during the course of an appeal and contains no limitation as to the evidence which can be taken into account the way described above.

27. This error is not however material in the context of this appeal given that in reality it is said that the only evidence not expressly considered for this reason were news articles about the possible forced return of Afghan refugees from Pakistan to Afghanistan which could only potentially be relevant to whether there were compelling and compassionate circumstances making the exclusion of the Appellants from the United Kingdom undesirable. However, there was a paucity of evidence before the First-tier Tribunal as to the status of the Appellants and the mother in Pakistan, limited to a brief statement that they were refugees. There was no information whatsoever as to whether they had any status at all in Pakistan, whether they were personally risk of removal to Afghanistan, nor in any event the basis upon

which they claimed to be refugees or would be at risk on return to Afghanistan. In these circumstances the suggestion of a possible removal to Afghanistan as part of a wider government plan could not have made any material difference to the assessment undertaken by the First-tier Tribunal either under the Immigration Rules or outside of them on Article 8 grounds.

28. For all of these reasons, I find no error of law in the decision of the First-tier Tribunal which is therefore confirmed.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeals is therefore confirmed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their immediate family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed



Date

7th September 2018

Upper Tribunal Judge Jackson