



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/11679/2016
HU/11689/2016
HU/11685/2016

THE IMMIGRATION ACTS

**Heard at Bradford
On 13th March 2018**

**Decision & Reasons
Promulgated
On 10th April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

**(1) MISS J M
(2) MR K M
(3) MR A A
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Ms Chaudhary, Counsel instructed by Riaz Khan and Co Solicitors

For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizen of Pakistan and appeal against the decision of Judge Caswell, promulgated on the 11th August 2017, to dismiss their appeals for entry clearance as the dependent children of parents who are

present and settled in the United Kingdom. Their dates of birth are, respectively, the 30th July 1998, the 28th June 2009, and the 5th May 2001.

2. The respondent refused the applications solely on the basis that the appellants had failed to prove that they were related as claimed to their sponsor in the United Kingdom. However, as Judge Caswell noted at paragraph 14 of her decision, the evidence available at the hearing of the appeal proved conclusively that they were in fact related as they claimed. Then, at paragraph 15, the judge made the following observation:

“However, this is a human rights appeal, and Mr Paramor has asked me to find that it should not succeed. By contrast, Mr Raza [who represented the appellants at the hearing below] submits to me that refusal of the appeal on Article 8 grounds would be wrong because the interference with family life is disproportionate.”

3. The core of the judge’s reasoning in deciding that the respondent’s decision to refuse entry clearance did not amount to an unlawful interference with family life can be found at paragraph 17 of her decision:

“Applying the test in *Razgar*, I accept that there is family life between the Appellant’s and their mother, but cannot find that it would be interfered with if the appeal were refused, because there is no adequate reason put forward why the parents could not live with their children in Pakistan. Further, family life has been continuing for some years on the basis of phone contact and visits, and arguably there would be no significant interference with family life if this were to continue – at least for the length of time it would take for a further application. There is no evidence before me to suggest that the grandmother is unable to care adequately for the children, and the eldest is of course now over 19.”

4. The judge concluded, at paragraph 18, by stating that given that the relationship of the appellants to their sponsors had now been established they would be able to succeed in a fresh application, but the present appeal could not succeed on human rights grounds. The suggestion that a fresh application would be successful was of course incorrect given that, as the judge herself had noted at the end of the previous paragraph, the first appellant had now attained the age of 19 years and was thus excluded from the provisions relating to dependent children under the Immigration Rules.
5. There was but a single error of law pleaded before me and this was that the judge had failed to view the appellants’ Article 8 rights through the lens of the Immigration Rules.
6. The extent to which fulfilment of the requirements of a particular immigration rule will carry weight in an analysis under Article 8 will obviously vary according to the individual circumstances of the case and the nature and purpose of the Rule in question. Fulfilment of the requirements for entry clearance as a family visitor, for example, is unlikely to carry significant weight under Article 8 save where there are insurmountable obstacles to a visit between two closely related family

members taking place outside the United Kingdom. The instant application, however, was made under Appendix FM of the Immigration Rules, and it is clear that this particular body of rules is intended by the Secretary of State to set out the circumstances in which it would otherwise be a breach of Article 8 (and thus unlawful under section 6 of the Human Rights Act 1998) to refuse leave to enter or remain in the United Kingdom. Thus, the introductory paragraph at GEN.1.1 makes the following statement of general principle concerning the provisions of Appendix FM:

'It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims [in Article 8(2)] and in doing so also reflects the relevant public interest considerations as set out in part 5A of the Nationality, Immigration and Asylum Act 2002.' [emphasis added]

7. Had it been necessary for the judge to look beyond the terms of Appendix FM, then it would have been impossible to fault the judge's analysis of the appellants' claim under Article 8. As it was, given that she had found that the appellants had fulfilled all the requirements of a body of rules whose express purpose is recognition of the rights of foreign nationals under Article 8, such an exercise was otiose and the judge ought simply to have allowed the appeal on the ground that the respondent's decision was unlawful under section 6 of the Human Rights Act 1998.
8. It follows from the above that the judge made an error of law in circumstances where the only decision that was reasonably open to her was to allow the appeal.

Notice of Decision

9. The appeal is allowed.
10. The decision of the First-tier Tribunal to dismiss the appeal is set aside and substituted by a decision to allow the appeal.

Judge Kelly

Date: 9th April 2018

Deputy Judge of the Upper Tribunal

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

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