



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/12775/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 18 June 2018

Decision & Reasons Promulgated  
On 29 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MISS ZAINAB KHAN  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD

Respondent

Representation:

For the Appellant: Mr M Shrimpton, Legal Representative  
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Beach dismissing her appeal against refusal by the Entry Clearance Officer to grant her entry clearance to the UK as the child of a relative who is present and settled in the UK.
2. The appellant is a citizen of Pakistan whose claimed date of birth is 10 February 1998. The respondent refused her application for leave to enter as the child of the sponsor, Miss Zahida Azam, who is present and settled in the UK. The respondent was not satisfied that there were serious and compelling reasons which made her exclusion from the UK undesirable. The respondent was also not satisfied that the appellant's

circumstances in Pakistan were as claimed by the appellant. The respondent was further not satisfied that the appellant was the age which she stated. The respondent further refused the application under Article 8. The respondent's decision is dated 18 March 2016.

3. The judge heard evidence from the sponsor, Miss Zahida Azam, her husband, Mr Muhammad Azam Khan, and the appellant's half-brother, Mr Arif Khan.
4. Mrs Azam said that she and the appellant had lived with each other from 1999 to the present. She would go to Pakistan to be with the appellant and her sons were also there with the appellant. She travels between the UK and Pakistan. She stays for six months and on one occasion she stayed in Pakistan for one-and-a-half years. Her sons were also looking after the appellant. The longest time she has spent in Pakistan was one year and nine months.
5. Mrs Azam said she first arrived in the UK in September 2006 as a spouse. At the time of the appellant's application the appellant was 17 years old. Mrs Azam said she did not need to become the appellant's guardian until 2013. Her husband is sick now and she has to look after him, so she cannot travel to Pakistan as regularly as she used to travel. She said they did not send money to the appellant because they were on benefits. Her husband's brothers sent money to the appellant. This was confirmed by Mr Arif Khan who said he had financially supported the appellant since 2012. Before this his nephew supported the appellant. The appellant is studying and he pays for her studies. He could still financially support the appellant in Pakistan.
6. Mr Khan confirmed most of what his wife said. He confirmed that his son looked after the appellant after the sponsor came to the UK in 2006.
7. The sponsor said that her daughter lives in Pakistan but has married outside the family, but she did not want the appellant to live with non-family members. The sponsor said the appellant has two half-brothers in Pakistan. The two half-brothers supported her application for guardianship of the appellant. The half-brothers had not accepted the appellant as a sister and did not keep the appellant when she was 11 months old and did not agree with the father's remarriage.
8. The collective evidence of the witnesses was that there was no-one in Pakistan to live with the appellant. She cannot live alone as a lone woman.
9. At paragraphs 35 to 40 the judge addressed the ECO's concerns. The respondent noted that on the appellant's application form she stated she had lived at her address for 21 years and one month. The judge noted that the application form confirmed that it was completed by someone else who was not the appellant or the sponsor and was consistent with the sponsor's evidence that the form was completed by someone else and that she answered the questions. The judge found that there was therefore a possibility that the sponsor mistakenly stated how long she had been living at the address rather than the appellant's length of residence.

10. The judge found that the documentary evidence before her confirmed that the date of recording of the appellant's birth was February 1998. She therefore found that the appellant had provided sufficient evidence to show that she was born on 10 February 1998 and that she was under the age of 18 at the date of her application.
11. The respondent was not also satisfied that there were serious and compelling family or other considerations which made exclusion of the child undesirable. The respondent stated that the death certificate for the appellant's mother was only issued some fourteen years after the claimed death of the mother. The respondent also stated that the appellant had not provided the death certificate for her father and that the sponsor did not become the legal guardian of the appellant until 2013 and that she had other family members who could support her in Pakistan. The respondent also noted that the appellant was studying in Pakistan and that she was living in a family property.
12. The judge considered the relevant part of paragraph 297 of the Immigration Rules by relying on the decision in **Mundeba (s. 55 and paragraph 297(i)(f)) [2013] UKUT 00088(IAC)**.
13. The judge stated that this was a human rights appeal. In assessing the appellant's human rights appeal, the judge took into account the Immigration Rules (which are a reflection of the respondent's policy), relevant case law, Section 55 of the Borders, Citizenship and Immigration Act 2009, Secretary of State 117B of the Nationality, Immigration and Asylum Act 2002 as well as the five step process set out in **Razgar**.
14. The judge made findings which are set out at paragraphs 44 to 53.
15. The judge found that there was some evidence before her to suggest that the sponsor was acting as the appellant's guardian and that the appellant's birth parents have died. The judge said the respondent was critical of this evidence and made reference to it being issued in 2013, but a close reading of the documents suggested that it was a copy from the register rather than the death was registered in 2013. The judge found that the copy of the entry confirms that the appellant's mother died on 4 January 1999 and that the death was registered on 11 January 1999. A copy of that register was then obtained in 2013. The judge said there was a further copy of the register of death for the appellant's father which recorded his date of death as 15 August 2006 and the date of the entry into the register as 22 August 2008. In the light of the evidence the judge found that it is more likely than not that the appellant's parents have died. The sponsor stated that the appellant moved to live with her after the death of her father. The judge found there was very little evidence of this before her other than the sponsor's evidence and given that the father was still alive after the mother's death, it seemed to the judge that the appellant may well have remained living with her father after her mother's death. The judge said there was evidence before her of the sponsor being made the appellant's guardian in 2013. The sponsor stated that she did not bother with the guardianship documents prior to this date because she did not need them for anything. However, it seemed strange to the judge that if the sponsor were in effect the appellant's sole guardian between 2006 and 2013 that she would not have

required some documentation to confirm this, even if only for official purposes such as school registration or medical treatment.

16. Because the documents showed that the sponsor was made the guardian of the appellant in 2013, the judge found that it was more likely than not that the sponsor was the formal guardian of the appellant.
17. The judge found that the appellant does have a family life with the sponsor and her husband and that the decision is an interference with that family life because it prevents the appellant from continuing her family life with the sponsor and the sponsor's husband in the UK.
18. The judge found that the decision is in accordance with the law to the extent that there is clearly an identifiable set of Immigration Rules which have been applied by the respondent.
19. The judge then considered whether the decision is a necessary, justified and proportionate decision. In making this assessment, she considered whether there are any serious and compelling family or other considerations which make the exclusion of the appellant from the UK undesirable as well as wider factors.
20. The judge noted that when the appellant applied for entry clearance in December 2015 she was 17 years and 9 months old. She has lived in Pakistan her whole life and has half-brothers and extended family members in Pakistan. She lives in the family home in Pakistan. The sponsor's daughter is currently living with her, according to the sponsor. The judge said there was no evidence to support the sponsor's evidence that her daughter cannot remain there because she is married and it is expected that she will live with her in-laws. There was no witness statement from the sponsor's daughter and her husband, or even evidence that she had married as stated. The judge felt that the sponsor and the husband sought to exaggerate the difficulties faced by the appellant in Pakistan.
21. The judge found that the appellant has two half-brothers in Pakistan, but again the sponsor and her husband sought to portray a situation where, although they had a good relationship with them, the half-brothers did not accept the appellant. The judge said the appellant also has two other half-brothers; the sponsor's husband and Arif Khan, both of whom live in the UK. They do not appear to have the same qualms of accepting the appellant and she found it hard to believe that of all the family the only ones who do not accept the appellant happen to be the two half-brothers in Pakistan. They were happy to provide affidavits in support of the sponsor's application to be the appellant's guardian and it was clear from the oral evidence that they visit the family when the sponsor and her husband are in Pakistan. The judge found that it is more likely that the two half-brothers in Pakistan play a part in the appellant's life and that the sponsor and her husband have sought to downplay that involvement in order to bolster the appellant's application.

22. The judge noted from the sponsor and her husband's evidence that the appellant cannot live on her own in Pakistan. The judge said it was clear that the half-brothers live in the same area as the appellant and the sponsor's daughter also remains in Pakistan. Whilst lone women can face difficulties in Pakistan there was no real evidence before her as to why this particular appellant would face difficulties. Whilst she was still under the age of 18 at the date of application, she was almost 18 when the application was made. Whilst the mere fact of turning 18 does not automatically mean that family life ceases to exist or that an appellant suddenly becomes more capable of looking after herself, the judge found that this was an appellant who has for the last eleven years lived a life where the sponsor does not spend the whole of the year with her and instead splits her time between Pakistan and the UK, spending approximately six months in each (except on one occasion when the sponsor spent one year and nine months in Pakistan). This means that the appellant spends half of her time without the sponsor and has done since the age of approximately 8. It appears that the sponsor, her husband and the appellant's half-brother in the UK all regularly visit Pakistan. They also remain in contact with the appellant by telephone and there was no suggestion that this would change. The appellant is currently studying in Pakistan and if she came to the UK this would be an interruption to those studies.
23. The judge noted that the sponsor's husband said that he had difficulties in travelling because of health problems, but he did not provide any medical evidence to suggest that he was unable to travel or that his health would impact on future travel. The sponsor's husband's evidence was that he was not particularly involved with the appellant (which seemed strange given that the sponsor stated that she has looked after the appellant since the death of the appellant's mother when the appellant was 1 year old and suggested that the relationship between the sponsor and the appellant was perhaps not as close as stated). The sponsor's husband also stated that the appellant would be able to look after him given the sponsor's age and health problems. The judge found that the evidence suggested that the sponsor's husband was really expecting a carer rather than a daughter.
24. The judge noted that the appellant is financially supported in Pakistan by Mr Arif Khan. He confirmed that he could continue to support the appellant financially. He also said that he could fund her studies in the UK, so equally he would be able to do so in Pakistan. The judge found on the evidence that the appellant will remain in a situation where she receives adequate financial support for her needs. She is housed in Pakistan and has family in Pakistan who the judge found are able to provide some emotional and practical support. While the appellant may well wish to live in the UK, there would be no real change in her family's circumstances if she did not come to the UK. Her family life has, in effect, consisted of visits by the sponsor, the sponsor's husband and her half-brother for a number of years. The evidence suggested to the judge that the appellant would not be adversely affected by remaining in Pakistan in such circumstances, although the sponsor, her husband and her half-brother would be unable to visit the appellant in the future.
25. Taking account of all the evidence, including the best interests of the appellant as a minor, the judge found that there are no serious or compelling family or other

considerations such that it is undesirable to exclude the appellant from the UK. Therefore, the respondent has shown that the decision is a necessary, justified and proportionate decision.

26. Mr Shrimpton adopted the observations made by First-tier Tribunal Judge P J M Hollingworth who granted permission in the following terms:

*“It is arguable that the Judge has fallen into error by not setting out a sufficient analysis in relation to the question of whether the Immigration Rules had been fulfilled at the date of the application. It is arguable that the Judge has set out an insufficient analysis of the significance of whether those Immigration Rules had been fulfilled at the date of the decision in carrying out the proportionality exercise. It is arguable that the Judge has conflated the application of Section 55 in carrying out the proportionality exercise in considering whether one limb of the Immigration Rules had been fulfilled. It is arguable that the Judge has fallen into error in conflating an analysis of whether there would be a breach of Article 8 outside the Rules with the fulfilment or otherwise of the Immigration Rules. At paragraph 49 of the decision the Judge has referred to feeling that the Sponsor and her husband sought to exaggerate the difficulties faced by the Appellant in Pakistan which of course was understandable. It is arguable that the Judge should have set out an analysis in greater detail of the basis for reaching this conclusion. It is arguable that in considering whether there would be a breach of Article 8 outside the Rules the Judge should have set out a greater analysis of the application of Section 117.”*

27. Mr Shrimpton argued in respect of paragraph 297(i)(f) that the judge had insufficient regard to the decision in **Mundeba**. Mr Shrimpton submitted that head note (ii) of **Mundeba** accurately summarises the decision in the grant of permission. Head note (ii) says:-

*“Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is ‘an action concerning children ... undertaken by ... administrative authorities’ and so by Article 3 ‘the best interests of the child shall be a primary consideration’.”*

28. Mr Shrimpton submitted that this extends Section 55 to EC cases which is what head note (iii) allows by stating:-

*“Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State’s IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55.”*

29. Mr Shrimpton submitted that the primary interest of the appellant became of interest and that the judge applied paragraph 297(i)(f) as if the situation was before the UK adopted the UN Convention on the rights of the child. He submitted that the judge only paid lip service to **Mundeba**. If the appellant’s welfare is of primary consideration then the appeal ought to be allowed because she has to be reunited with her legal guardian.

30. Mr Shrimpton submitted that the date of application was 3 December 2015 when the appellant was a minor. Her birth was registered only two days after her birth. The person who filled in the application form caused confusion but that confusion was resolved in the appellant's favour. Therefore, the relevant date for consideration of paragraph 297(i)(f) was 3 December 2015.
31. Mr Shrimpton submitted that primary findings of fact have been made by the judge. The sponsor is the appellant's guardian and the child was a minor at the date of application. **Mundeaba** should be applied and the appeal ought to be allowed.
32. Mr Shrimpton said that the appellant's case is stronger under the Immigration Rules. He said the proportionality test was wrong, although he accepted that the judge's decision on Article 8 was clearly not unreasonable. His primary submission was that the appellant can get home under paragraph 297(i)(f) in the light of **Mundeaba**.
33. Mr Clarke submitted that the judge's decision does not disclose material errors of law. Mr. Clarke said that the four points set out in the grant of permission bore no relation to the grounds submitted on behalf of the appellant. I find that this was because the grounds were lodged by the sponsor and the grounds challenged the ECO's decision and not the judge's decision. Mr Clarke accepted that head note (ii) of **Mundeaba** engages with Section 55 of the Borders, Citizenship and Immigration Act 2009.
34. I was not persuaded by Mr. Shrimpton's argument that the judge only paid lip service to **Mundeaba**. At paragraph 42, the judge set out all of the five headnotes in **Mundeaba**. The first headnote relates to paragraph 297(i)(f) as it holds that the exercise of the duty by the ECO to assess an application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require.
35. Head notes (iv) and (v) set out the factors that need to be looked at in conducting such an exercise.
36. Head notes (iv) and (v) state:-

*“iv) Family considerations require an evaluation of the child's welfare including emotional needs. 'Other considerations' come in to play where there are other aspects of a child's life that are serious and compelling for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social backgrounds and developmental history and will involve inquiry as to whether:-*

- a. there is evidence of neglect or abuse;*
- b. there are unmet needs that should be catered for;*
- c. there are stable arrangements for the child's physical care;*

*The assessment involves consideration as to whether the combination of circumstances are sufficiently serious and compelling to require admission.*

- v) *As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important: see also SG (child of a polygamous marriage) Nepal [2012] UKUT 265 (IAC) [2012] Imm AR 939.*

37. In **Mundeba**, the Tribunal were satisfied that the judge correctly directed himself as to the law relating to Article 8 and reached a permissible conclusion on proportionality. The Tribunal went on to find that although not referring specifically to the best interests of the child, the judge clearly had these in mind observing a reference to s.55 of the Borders, Citizenship and Immigration Act 2009. I rely on this finding by the Tribunal to find that even though the judge in this case did not refer specifically to the UN Convention on the Rights of the Child, the judge clearly had it in mind. Indeed, the judge at paragraph 43 stated that in assessing the appellant's human rights appeal she had taken into account the Immigration Rules, the relevant case law and Section 55 of the Borders, Citizenship and Immigration Act 2009.
38. It is evident from the decision that the judge considered the factors set out in **Mundeba**. The judge undertook an evaluation of the child's welfare including her emotional needs and the family's circumstances. The judge's findings from paragraphs 44 to 53 were a detailed consideration of the family's circumstances which took account of the appellant's best interests. The judge bore in mind that whilst the appellant was still under 18 at the date of the application she was almost 18 when the application was made. The judge found the appellant was cared for by her father when her mother died and then following the death of her father to the present date, she has been cared for by the sponsor and various members of the family. These findings have not been challenged.
39. I find that the judge's findings clearly showed that she had the child's best interests in mind. The judge's findings that there are no serious or compelling family or other considerations which make it undesirable to exclude the appellant from the UK was sustainable in the light of the analysis of the evidence that was before her. I find that as the appellant's appeal could not succeed under the Immigration Rules, it was most unlikely that her Article 8 claim could succeed on the findings made by the judge. Indeed, Mr Shrimpton accepted that the judge's decision under Article 8 was not unreasonable.
40. The judge rightly stated that this was a human rights appeal as the appellant's appeal was by way of s.82(1) of the Nationality, Immigration and Asylum Act 2002. This means that the judge was considering the human rights appeal at the date of the hearing, which in turn means that at the date of the hearing the appellant was 18 years old and therefore an adult. With this evidence in mind the judge found at paragraph 51 that the mere fact of turning 18 does not automatically mean that family life ceases to exist or that an appellant suddenly becomes more capable of looking after herself. The judge found that this is an appellant who has for the last eleven years lived a life where the sponsor does not spend the whole of the year with her and instead splits her time between Pakistan and the UK spending approximately six months in each.



The appellant is housed in Pakistan and there are family members in Pakistan who are able to provide her with emotional and practical support. Whilst the appellant may wish to live in the UK, there would be no real change in her family circumstances if she did not come to the UK. The judge's findings were open to her on the evidence.

41. I do not on the findings made by the judge find that she has conflated the application of Section 55 whilst carrying out the proportionality exercise. The judge made clear findings of fact and her findings clearly indicated that she had in mind Section 55 of the Borders, Citizenship and Immigration Act 2009.

**Notice of Decision**

42. I find that the judge's decision does not disclose an error of law.
43. The judge's decision dismissing the appellant's appeal shall stand.
44. No anonymity direction is made.

Signed

Date: 27 June 2018

Deputy Upper Tribunal Judge Eshun