



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

Appeal Numbers: HU/27621/2016  
HU/27689/2016

**THE IMMIGRATION ACTS**

**Heard at Manchester  
On 28 September 2018**

**Decision & Reasons Promulgated  
On 15 November 2018**

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**A H  
A Z**

**(ANONYMITY DIRECTION MADE)**

Respondents

**Representation:**

For the Appellant: Mr C Bates, Home Office Presenting Officer

For the Respondents: Mr J Nicholson, instructed by Bolton Citizens Advice Bureau

**DECISION AND REASONS**

1. The Secretary of State appeals against the decision of Judge L Mensah, promulgated on 20 November 2017, allowing appeals against decisions made on 16 November 2016 to refuse them entry clearance to the United Kingdom under the refugee family reunion provisions, in particular paragraph 352D of the Immigration Rules.
2. The respondents' mother fled Pakistan on account of domestic violence she suffered there at the hands of the respondents' father and was

recognised as a refugee as a result. That status was granted following an appeal.

3. The appellant refused the application on the basis that he was not satisfied that they met the requirements of paragraph 352D(i) or 352D(iii) noting that there was no evidence that they were related to the sponsor (their mother) as stated and no evidence to show that they do not reside with their father and other siblings in Pakistan.
4. The judge heard evidence from the respondents' mother who explained that the respondents live with her husband and, as they are boys, not as badly treated as the girls who had been forced to marry the husband's nephews; that she had limited contact with them but was able to make the application because the children spent time with her mother and cousin; and, that the father had consented to the application because she believed that it now suited him to agree to this as he wished to remarry. The judge also took note of the DNA test confirming that the respondents are the biological sons of the sponsor.
5. The judge directed herself that the fact that an appellant may or may not show they meet the requirements of the Immigration Rules at the date of application is only a factor [14] and she must take into account Section 117B of the 2002 Act in assessing the public interest. She accepted that the respondents lived with the sponsor and the father in a family unit before they came to the United Kingdom; that they were related as claimed; and that the only question remained as to whether they had formed a separate family unit with their father [15].
6. The judge directed herself in line with BM and AL (352D(iv); meaning of "family unit") Colombia [2007] UKAIT 00055 concluding that there was no doubt the children living in a home where the mother is subjected to violence and life-threatening battery are themselves being subjected to an abusive environment which is damaging to them as well as to their mother. She concluded they had not formed a separate family unit in the sense envisaged following BM and AL.
7. The judge concluded:-
  - (1) it was not for her to second guess whether the father would prevent them joining the sponsor or has given consent, the personal preferences of those being involved not being determinative [18];
  - (2) the respondents met all the requirements of the Rules at the date of decision and that, applying Section 117B, there being no need to maintain effective immigration control because the respondents met the requirements of the Rules, that the decision was proportionate, there being clear evidence of exceptional circumstances.
8. The Secretary of State sought permission to appeal on the grounds that the judge had erred in failing to have regard to all the relevant issues in assessing the children's best interests pursuant to section 55 and had failed to determine a relevant issue and had further erred in the finding without proper reasons that the respondents' father wants nothing to do

with them. Accordingly, the finding that the children had not led an independent life was infected, the finding that they had been subject to an abusive environment being widely speculative.

9. On 24 April 2018 First-tier Tribunal Judge E B Grant granted permission noting:-
  3. The refusal was on the basis the [respondents] have not shown they do not reside with their father and other siblings in Pakistan and relied on 352(i) and (iii). The judge made no determination of whether this is correct and arguably erred in law in failing to make findings on the refusal so as to carry out a proper balancing exercise under A8. There was no evidence from the appellants about their circumstances and no evidence from their father despite the fact he cooperated in the entry clearance application process by providing his DNA for the DNA tests.
  4. The judge arguably erred in law in making speculative findings about the family's circumstances of the two appellants when she allowed in the A8 appeal.
  5. Although not raised in the grounds there was fresh evidence before FTTJ Mensah not before Judge Thorne which arguably undermines the sponsor's case she fled as a victim of domestic violence. To make out her case to be a refugee before Judge Thorne has had to accept that the letter of support from her husband [S A] for her visit to the United Kingdom to visit another daughter was a forgery. The sponsor's allegedly abusive husband who allegedly did not cooperate with her visit to the United Kingdom because he allegedly he did not know about it, is very obviously cooperative and supportive because he has provided his DNA for the appellants' DNA test."
10. Although this is a human rights appeal, it arises from a consideration of the Immigration Rules, and thus whether or not the requirements of paragraph 352D of the Immigration Rules are met is an appropriate question for the judge to consider first before going on to consider article 8.
11. The appellant's grounds are not well drafted. They do not follow the proper logical basis followed by the judge in considering whether the requirements of the Immigration Rules are met, and then, considering whether the refusal of Entry Clearance is proportionate. It is therefore best to consider ground 3 - the challenge to the Immigration Rules findings first.
12. So far as is relevant, paragraph 352D of the Immigration Rules provides as follows:-
  - 352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who currently has refugee status are that the applicant:
    - (i) is the child of a parent who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
    - (ii) is under the age of 18; and
    - (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum; and

13. In ground 3, the appellant challenged the finding that the respondents had not led an independent life.
14. The judge was manifestly entitled to conclude that the requirements of paragraph 352D(i) was met by the DNA test results. That is not challenged. There is no suggestion that either child was at the relevant date under 18 nor is it suggested that they were not part of the family unit of the person granted asylum at the time that the person left the country of origin; nor is it suggested that they should be otherwise excluded. None of those findings are challenged.
15. The focus of the appeal is therefore paragraph 352D(iii) which sets out four situations in which an applicant who would otherwise qualify for entry clearance cannot succeed.
16. It is not suggested that either respondent was married or was a civil partner, but the appellant's case set out in the refusal notice does not expressly address whether it is suggested that either are leading an independent life, rather it is implied that they should not be residing with their father and other siblings which, on one reading at least, is directly contrary to the requirement that they should not be living an independent life in order to qualify. The submissions made to Judge Mensah appear to be that as they were now living with the father they had "formed an *independent* (emphasis added) family unit".
17. The facts in BM and AL were very different. There, the mother of the children had never been married to the sponsor father, had never lived with him and indeed the children had only lived with their mother and grandmother in Colombia. In any event the issue in the case was whether the children had formed part of the same family unit prior to the parent fleeing which is not in doubt here. It is of some assistance in noting that there has been a change in that the mother no longer forms part of that family unit but of more assistance in this case are the parallel decisions NM (Leading an independent life) Zimbabwe [2007] UKAIT 00051 and MI (paragraph 298(iii): "independent life") Pakistan [2007] UKAIT 00052. The headnote in the former provides:-

"Where a child (who may be over 18) is seeking limited leave to remain as the child of a parent with limited leave, in order to establish that he is not 'leading an independent life' he must not have formed through choice a separate (and therefore independent) social unit from his parents' family unit whether alone or with others. A child who, for example, chooses to live away from home may be 'leading an independent life' despite some continuing financial and/or emotional dependence upon his parents."

The use of "has formed" requires a positive act on the part of the person in question; the question is thus whether either respondent has acted to form a family unit separate from the family unit in which he lived

previously. It is evident from the decisions with respect to independent family or independent life that this is a unit separate from the parents.

18. On the basis of the evidence before her, and on a proper analysis of the relevant Immigration Rule, the judge was accordingly entitled to conclude that the respondents remained within an existing family unit, and had not formed an independent family unit. Indeed, given that it is the appellant's case that the respondents continue to live with their father, and that he supports them, it is contradictory to suggest that they have formed *independent* lives or an *independent* family unit.
19. I now turn to grounds 1 and 2. Having properly and for sustainable reasons concluded that the respondents had met the requirements of the Immigration Rules, the judge acted correctly in considering whether in those circumstances, refusal of entry clearance was proportionate. What she did not do was bear in mind that the Immigration Rules are a statement of the Secretary of State's position as to where the balance of public interest and the right to respect for private and family life lies which in turn includes an assessment of where in general the best interests of a child lie and in that way, the duty imposed by section 55 is met. How that is achieved can be seen in the provisions in paragraph 297 in relation to sole responsibility and in the reference to serious and compelling family or other considerations; and, in the need for there to be suitable arrangements for the child's care.
20. It is also of note that an article 8 was not considered by the appellant in the initial decision, nor was there a best interests assessment carried out.
21. What the appellant argues is that despite having met the requirements of the Immigration Rules as at the date of decision and now, that is insufficient; there must also be a consideration of the best interests of the children over and above that provided for in the Immigration Rules he drafted and which take the best interests into account. It is, in effect, a submission that it is not enough for the respondents to meet the requirements of the Immigration Rules, but that a grant of entry clearance must be in their best interests.
22. The "section 55 assessment" referred to in ground 1 is one carried out by the Secretary of State. Section 55 of the 2009 Act does not place obligations directly on the First-tier Tribunal. and does not apply to children who are outside the United Kingdom - see T (s.55 BCIA 2009 - entry clearance) Jamaica [2011] UKUT 00483(IAC) albeit that the best interests are to be considered particularly where there is a cause for concern.
23. Further, contrary to what is averred in the grounds at [1], the reference to best interests at [22] was not seen as an important feature. It is at best an aside, and it is manifest in the decision at [18] that the requirements of the rules being met was a much more important factor. The references to best interests arise only after the judge misdirected herself that in assessing the proportionality of the decision there had to be exceptional circumstances. That is not material as in so doing she wrongly started the

balancing exercise with the scales weighted very much in the Secretary of State's favour in terms of the public interest which is not applicable where the Immigration Rules are met.

24. As the respondents point out, the assertion made by the appellant is that rather than live with their mother in Pakistan, is in effect that it would be in the children's best interests to remain with the father who had abused their mother in the past. It was open to the judge on the evidence to conclude that the household in which they had all lived was an abusive home. That is not speculative; this experienced judge was entitled to conclude on the evidence that this would have affected the children.
25. Contrary to what is averred in the grounds, there was sufficient evidence from the sponsor on which the judge was entitled to make the impugned findings; what is averred in the grounds at [2] is speculative.
26. It is of further note that all that will occur here is a grant of entry clearance; it allows the children to travel to and reside lawfully in the United Kingdom. It does not necessarily follow that this will occur against the father's wishes if, as was found, they live with him, and he is aware of the application.
27. The judge thus misdirected herself (albeit not materially in this case) in asking herself whether there were exceptional circumstances to warrant allowing the appeal under Article 8, yet not appreciating that having met the requirements of the Immigration Rules is in itself is a weighty matter. The judge should not have gone on to consider EX1 and Appendix FM which are irrelevant. There was no need for her to then consider unjustifiably harsh consequences.
28. The only basis on which consideration of the children's best interests could have been taken into account were it not accurately reflected in the Immigration Rules would be in assessing proportionality. Again, no rationale is provided by the Secretary of State as to why this should be considered where the requirements of the Immigration Rules are met. This is not a situation where, unlike in paragraph 297 of the Immigration Rules, issues of sole responsibility lie, and while the best interests of the children are a factor to be taken into account in assessing proportionality, it is not at all clear how the Secretary of State could argue that, despite the requirements of the Immigration Rules being met, that a refusal to issue entry clearance was proportionate on account of the weight to be attached to the best interests of the children.
29. The challenges set out in the grounds at paragraphs 1 and 2 are at best a challenge to the finding that the children have not led an independent life which proceeds on an erroneous basis of what an independent life is. It is not at all speculative to consider that, given that it had been established that there was abuse towards the respondents' mother within the relationship, that they were living in an abusive household. In any event whether they were or were not living in an abusive household was not relevant to a consideration under the Rules.

30. In summary, Judge Mensah made adequate and sustainable findings that the requirements of paragraph 352D of the Immigration Rules were met. For reasons that are not at all clear she then went on to speculate about matters arising on irrelevant matters when considering whether there was a breach of Article 8. The self-direction that she needed to find exceptional circumstances is simply misplaced and wrong. The need to find justifiably harsh consequences arises only when the Rules are not met.
31. In the circumstances, there is no merit in the grounds whatsoever. They focus on matters which were not material to the finding under the Immigration Rules and insofar as they are an attack on the finding there would be a breach on Article 8 they are misplaced. They do not show any error in the findings that the requirements of the Rules were met in that they misconstrue what an independent life is and bring in extraneous issues with regard to the best interests of the children.
32. The comments of Judge Grant at paragraph [5] of the grant of permission are inappropriate and should not have been made. Further, in so doing, no regard appears to have been made to the principles set out in AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC) with particular reference to paragraph [69]. Mr Bates did not seek to rely on that ground nor, with respect, does it properly identify any error of law.
33. For these reasons I find that the decision of the First-tier Tribunal did not involve the making of an error of law capable of affecting the outcome and I uphold it.

### **SUMMARY OF CONCLUSIONS**

1. The decision of the First-tier Tribunal did not involve the making of an error of law and uphold it.
2. The respondents are reminded that any application for costs must be made pursuant to Rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 within one month of the issue of this notice.
3. I make an anonymity order in respect of the respondents.

### **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.

Signed

Date 9 November 2018



Upper Tribunal Judge Rintoul