Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04531/2016

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 4th March 2019	**On 5th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

ZARGARA [T]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:
For the Appellant: Mr A Pipe (Counsel)
For the Respondent: Mrs H Aboni (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Row, promulgated on 7th August 2017, following a hearing at Birmingham on 31st July 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

2. The Appellant is a citizen of Afghanistan and was born on 13th December 1998, and is a female. She applied for entry clearance to the UK as the child of a [MT], a British citizen. This application was refused by the Entry Clearance Officer on the basis that she had been separated from her family for over three years by choice and was leading an independent life. The Entry Clearance Officer's decision is dated 21st January 2016. A review conducted thereafter by the Entry Clearance Manager is dated 19th September 2016.

The Appellant's Claim

3. The Appellant's claim is that she was 17 years old at the time of the application. She was a minor. She had been living with six other siblings of hers in Afghanistan at the time. It had been decided that she would remain behind in Pakistan to live with her grandmother, whilst her mother and her remaining six siblings came to the UK in 2012, which they did after they had all been living in Pakistan together. The grandmother was also in Pakistan and that is where the Appellant also lived with her. The reason why the Appellant was left with the grandmother in Pakistan was that the grandmother was ill. The Appellant stayed to look after her. It was always anticipated that the Appellant would join the rest of the family in due course in the UK. When the grandmother then died on 5th January 2014 in Pakistan, the Appellant went to live with the sponsoring father's eldest brother and then the younger brother, and their families. These family members had all moved about eight months ago back to Afghanistan from Pakistan. They were now living in the same property in Jalalabad. The Appellant has never worked, is uneducated, and is not married.

The Judge's Decision

4. The judge began with the observation that the application fell to be determined in accordance with the requirements of paragraph 298(iii) of HC 395. It was necessary to determine whether the Appellant was, not leading an independent life, was unmarried, and had not formed an independent family unit. The judge was not satisfied that any of this was true. There was a death certificate produced, to confirm that the grandmother had died, but the judge was not persuaded that this was so, because it had been issued more than eighteen months after the alleged death (paragraph 14). The death certificate also recorded that the informant was a man called Amir Mohawaiya Abdullah, who was described as the sister of the deceased, but this could not be correct, because at the hearing the sponsoring father described Mr Abdullah as the head of the community (paragraph 15). There was also a difficulty with the Afghan birth certificate and the Afghan ID card for the Appellant. The sponsoring father had said that his daughter, the Appellant, had gone to Jalalabad to obtain this document. The document records the Appellant as being a housewife and her marital status as being married. The sponsoring father

at the hearing said that this was a mistake. The judge unsurprisingly concluded that this seemed to be odd because if it was true the document ought not to have been allowed to be issued in that form, and no effort had been made to correct it since then. Indeed, the Appellant had not been described as a dependant in her mother's application, when she and the rest of the children came to the UK in 2012. The judge concluded that the Appellant was indeed married and this is the reason why there is no evidence of financial dependency on the Sponsor either (paragraph 18). The appeal was dismissed under the Immigration Rules.

5. The judge then went on to consider the position under free-standing Article 8 jurisprudence. He began with the observation that

> "There is really nothing to consider outside of the Rules. If the Appellant was able to show that she was still a family member of the Sponsor and had not formed an independent family life she would succeed under paragraph 298. The burden of proof falls on the Appellant ..." (paragraph 20).

6. The appeal was also dismissed under Article 8.

Grounds of Application

7. The grounds of application state that there was no reference at all by the judge to the oral evidence given by the sponsoring father, whose evidence had been so roundly criticised, and found to be untenable. The grounds also state that the conclusion that Article 8 was not even engaged was arguably unsustainable.

8. On 1st March 2018, permission to appeal was granted on the basis that the judge ought to have referred to the oral evidence before it was criticised. It was also significant that the Appellant was a minor at the date of the application, a young Afghani woman with little autonomy, and in these circumstances the conclusion that separating the Appellant permanently from her parents and the rest of the siblings, did not engage Article 8, was one that was not open to the judge to make on the evidence. Family life between parents and minor children is generally regarded as automatic (see paragraph 3 of the grant of permission).

Submissions

9. At the hearing before me on 4th March 2019, Mr Pipe made the two following submissions. First, that the judge had applied the wrong Rule, namely paragraph 298(iii) in considering the appeal (see paragraph 13 and paragraph 20), but that this was not a material error, given that even if Rule 371 had been considered, as it ought to have been because this was an in-country appeal, the question still remained the same, which was whether the Appellant was living an "independent" life. In this respect, the judge had concluded that the Appellant had formed her own independent family unit, in that she had been married, and had been described as a housewife in the document that had been disclosed by the

Appellant herself. Even so, submitted Mr Pipe, given that the sponsoring father, who gave evidence in court, had strenuously denied that this was the case, his evidence needed to be recorded, before it could be rejected. There was no trace of his evidence being recorded at all. Second, there was the question of whether the appeal succeeded outside the Immigration Rules, under free-standing Article 8 ECHR jurisprudence, and here the judge had wrongly stated that, “There is really nothing to consider outside of the Rules” (paragraph 20). However, given that evidence was given before the Tribunal by the sponsoring father that the Appellant was a minor daughter, who formed a group of seven siblings of the sponsoring father, it was difficult to see how Article 8 was not even engaged, given that they had all been living together up until 2012, before the rest of the siblings came to the UK.

10. For her part, Mrs Aboni relied upon her Rule 24 response. She stated that the judge gave reasons to say why the Appellant was living an independent life now. There were documents produced and they were the Appellant’s documents. The mother and the siblings made an application to come to the UK in 2012 in which the Appellant was not even described as a dependant. The judge was entitled to come to the conclusions that he did. There was no error of law.

11. In his reply, Mr Pipe submitted that if the judge was making credibility findings, he could only do so upon the basis of assessing the oral evidence, and that in turn could only be done if he had set out the evidence in the first place. The Sponsor’s evidence had not been set out. Yet, he had doggedly maintained that the Appellant had been living with her mother in Pakistan, together with the rest of the siblings, up until 2012, when the rest of them left to come to the UK. The conclusion, “I do not find that Article 8 ECHR is engaged in respect of family or private life” (paragraph 20), could not therefore be sustained.

<u>Error of Law</u>

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. First, this is a case where there is diametrically opposed evidence before the Tribunal. The Appellant’s sponsoring father maintained that the Appellant has never worked, is uneducated, and not married, and does not live an independent life. He has given account of how and why the Appellant was left behind in Pakistan when the rest of the family came to the UK to join the sponsoring father in 2012. She had been left behind to look after her elderly grandmother, who died in 2014, whereupon the Appellant moved to go and live with her uncles and their families before relocating back to Afghanistan again, and where she is living now in Jalalabad. The documentation, however, tells a different story, in that it confirms that the Appellant is married, lives as a housewife, and is not dependent upon the sponsoring father. In these circumstances, it was incumbent upon the judge to set out the evidence of

the sponsoring father before reaching a decision on the credibility of the evidence as a whole.

13. Second, as far as Article 8 is concerned the Appellant had lived all her life with her mother and her siblings up until 2012. She was a minor. She was a minor even at the time of the application. The threshold for the engagement of Article 8 is low. This is well established. The conclusion that Article 8 was not even engaged in respect of family life is, therefore, in these circumstances, not correct. In terms of the second of the **Razgar** steps also, it is difficult to see how family life is not interfered with in the decision by the Secretary of State. Ultimately, the question that remains to be determined is that of proportionality. That question could not have been properly decided if the initial decision was that Article 8 was not even engaged.

Notice of Decision

14. The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Row, pursuant to Practice Statement 7.2(b) of the Practice Directions.

15. No anonymity direction is made.

16. This appeal is allowed.

Signed Date :3 April 2019

Deputy Upper Tribunal Judge Juss