Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/02894/2013
OA/02896/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 August 2014	**On 01 September 2014**
Prepared 22 August 2014	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

HAMZA SHABBIR (FIRST APPELLANT)
FAISAL SHABBIR (SECOND APPELLANT)

Appellants

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellants: Mr H Sarwar, of Counsel instructed by Messrs Marks & Marks Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Pakistan. The first, Hamza, was born on 8 March 1996 and the second, Faisal, was born on 24 January 1995. They appeal against a decision of Judge of the First-tier Tribunal Mayall who in a determination promulgated on 10 April 2014 dismissed their appeals against decisions of the Entry Clearance Officer, Islamabad made on 12 December 2012 to refuse them entry clearance as the child of a parent

present and settled in Britain. They have the same mother, Saima but while Hamza is the son of the sponsor Faisal is not.

2. The decisions stated it was not accepted that the sponsor had sole responsibility for them and they were therefore refused under paragraph 297(i)(e) of HC 395.

3. The appellants had made previous applications which had been refused in November 2010. Their appeals had been considered by Judge of the First-tier Tribunal Lingard who in a determination promulgated on 22 August 2011 had dismissed their appeals. Judge Lingard had considered evidence from the sponsor and set out her findings and conclusions in paragraph 42 onwards of the determination. She found that the sponsor had not proved that he was settled in Britain at the date of application and moreover she questioned the nature of the relationship between the appellants and the sponsor. She stated that no satisfactory explanation had been put forward about the delay between the appellants' births and the registration of their births in August 2009 and stated that she was bound to give at least some weight to the well-documented ease with which forged or fraudulently obtained documents could be obtained within Pakistan. She noted that the sponsor had stated that he had left before the younger appellant was born in March 1996 and had not returned to Pakistan until 2006. She went on to say that there was no evidence as to the situation and circumstances of the appellant's mother who it was intended was to remain in Pakistan. She found that the sponsor's evidence had been inconsistent concerning where his wife in Pakistan had been living, noted there was no satisfactory evidence to show money had been transferred to Pakistan and concluded that there was insufficient evidence of maintenance and accommodation available. She therefore dismissed the appeals on immigration grounds and made the comment that there was no realistic prospects of the appellants succeeding in their respective appeals on the basis of Article 8 argument.

4. In his determination Judge Mayall noted that although there had been no DNA evidence before Judge Lingard at the appeal there had in fact been DNA evidence in existence as there were results dated January 2011 as well as further DNA results dated October 2011. He considered that the sponsor had been less than frank in his evidence before Judge Lingard who recorded that there was no DNA evidence before her. He noted that Judge Lingard had questioned the issue of the registration of the birth certificates.

5. In paragraph 12 he stated:-

> "Both representatives agreed that the issues for me were whether the sponsor had had sole responsibility for the children and whether, in any event, Faisal could succeed despite not being the biological son of the sponsor."

6. He then set out in very considerable detail the evidence of the sponsor before setting out his assessment of the evidence in paragraph 61 onwards. He did not find the sponsor to be credible or honest pointing to the fact that the sponsor had said that he was the biological father of both boys despite the fact that DNA evidence had already been obtained showing that that was not the case. In particular he did not believe the sponsor's statement that despite his solicitors having had the results since January 2011 he had not been aware of them until September that year. He went on to state that he placed weight on the fact that the sponsor had claimed that he had not seen the boys for ten years and had never seen the younger child before he returned to Pakistan in 2006 and said that he did not accept that the sponsor's evidence as to when his wife had remained in the family home and the boys and the grandfather who had been living there moved out nor his evidence that his wife had gone to live with her father – the sponsor's uncle – although he had earlier denied they had any uncle still alive. The judge e stated that he could not place weight on an affidavit from the children's mother nor did he accept her assertion that during the period she had been living with the sponsor's father the sponsor had taken all general decisions including decisions relating to which college the appellants would attend.

7. The sponsor had also said that his wife continued to deny that he was not the father of the appellants but that was not a matter that she had referred to in her affidavit. The sponsor had appeared to indicate that his father was dead but that was not referred to in the mother's affidavit.

8. In paragraph 69 he stated:-

> "Judge Lingard was not satisfied as to the explanation as to why the birth certificates had only been produced at such a late stage. No further evidence in that respect has been adduced."

9. Although he accepted the grandfather died he stated that was a "post-decision fact". He went on to say that he accepted that the sponsor was the biological father of Hamza and that both boys had been brought up together and that the sponsor had a relationship with both boys. He stated that he accepted that the sponsor and his current partner had visited on many occasions. However that was the only evidence which he accepted. He went on to say in paragraph 73 of the determination:-

> "I am satisfied that I have not been given an accurate picture of the circumstances in which these boys were living in Pakistan at the date of the decision. It seems to me extremely likely indeed that the responsibility for the boys' upbringing was shared between the mother, grandfather and sponsor. What I am sure of, however, is that the appellants have not satisfied me, on the balance of probabilities, that the sponsor had sole responsibility."

He therefore found that the appellants had not met the requirements of the Rules.

10. In paragraph 75 he went on to say:-

> "It was no seriously suggested that, were I to make this finding, the appeals could succeed on the basis of Article 8. Given that they are boys who have lived all of their life in Pakistan and their mother lives in Pakistan I find, like Judge Lingard before me, that there is no realistic prospect of the appellants succeeding on the basis of Article 8."

He therefore also dismissed the appeals on Article 8 grounds.

11. The grounds of appeal assert that the judge had gone behind a concession which was that the only issues in the case were sole responsibility and Article 8 and that other matters raised in the previous hearing were no longer in contention and further that the judge had erred in his consideration of the Article 8 rights of the appellants alleging that this was not a case where there was a precarious family life and that there was established jurisprudence that there might be an infringement of an individual's Article 8 rights notwithstanding that family members are present in another country. It was stated there was no proper analysis of the Article 8 rights of these appellants. Moreover it was argued that it was not reasonable to expect the sponsor to go to live with the appellants in Pakistan.

12. At the hearing before me Mr Sarwar first argued that although no concession had been recorded what Judge Mayall had written in paragraph 12 was correct and therefore the judge should not have gone on to make the comments which he made in paragraph 69 regarding the birth certificates. That he argued formed part of the assessment of the credibility of the sponsor and that was not a matter on which the judge had been entitled to rely. Mr Sarwar was unable obviously to give evidence on this point as he had been the appellants' representative before Judge Mayall but he stated that this point has been noted in the skeleton argument which he had put before me. He argued that where there has been a concession the judge should not go behind it.

13. I find that there is no merit whatsoever in that argument: the reality is that Judge Mayall in paragraph 12 correctly stated what the issues were before him. He considered the evidence and part of that evidence, although it appears not to be a factor on which he relied, related to the late production of the birth certificates. I do not consider that he went behind any concession. The issue of the birth certificates was peripheral to that of sole responsibility and the judge who properly referred to the determination of the Tribunal in **TD (Yemen) [2006] UKAIT 00049** properly applied the law to the facts and gave very clear and cogent reasons for finding that he could not find that the sponsor was credible – not least because the sponsor had not told Judge Lingard that he was already aware that there was DNA evidence which showed that Faisal was not his son.

14. Mr Sarwar went on to argue there was clear established jurisprudence that notwithstanding that the parties had not lived together there was a potential for family life which should be respected. Moreover there should have been a clear analysis of the family life which should have been approached in the appropriate structured way.

15. Again I find that there is no merit in that submission. This is a case where these appellants were born in Pakistan at a time when the first appellant was aged around 1 and his half-brother (who, of course, is not a child of the sponsor) was not yet born. The sponsor did not see them for ten years and although it was accepted that he had shared responsibility for their upbringing their whole lives have been in Pakistan and they are now adults and indeed were 16 and 17 when the applications were made. It is difficult to see how the decision interferes with their family life with the sponsor but even if that were accepted the reality is that the interference would be entirely proportionate given that the sponsor has not had sole responsibility for them and their age and the fact that they have lived all their lives in Pakistan and only met the sponsor on occasions when he has visited in Pakistan. Moreover their mother is in Pakistan. For them to come to Britain now would break their family life with the mother with whom they have lived since birth. There could be no way in which a judge could have found that the decision was a disproportionate interference with the appellant's family lives.

16. I therefore find that there is no material error of law in the determination of the Judge of the First-tier Tribunal. His decision shall therefore stand and these appeals are dismissed.

Signed Date

Upper Tribunal Judge McGeachy