Upper Tribunal
Immigration and Asylum Chamber Appeal Number: OA/02962/2013

THE IMMIGRATION ACTS

Heard at: Birmingham	Decision Promulgated:
On: 4 September 2014	On: 5 September 2014

Before

Upper Tribunal Judge Pitt

Between

Entry Clearance Officer - Islamabad

Appellant

and

SSH
F S

(Anonymity Order Made)

Claimants

Representation:

For the Appellant: Mr Mills, Senior Home Office Presenting Officer
For the Claimants: Mr Chahal as McKenzie Friend

DETERMINATION AND REASONS

1. The claimants are citizens of Afghanistan and were born on 21 May 2003 and 22 September 2010 respectively.

2. For the purposes of this decision I refer to the Entry Clearance Officer as the respondent, his position before the First-tier Tribunal.

3. This is the respondent's appeal against the determination promulgated on 9 June 2014 of First-tier Tribunal Judge Flower which allowed the entry clearance appeals under Article 8 ECHR brought against the respondent's decisions of 20 December 2012 to refuse entry clearance.

4. The background to this appeal is that the two appellants are siblings. Their father was killed in Afghanistan on 20 January 2010 when their mother was pregnant with the second appellant. The family then moved to Pakistan.

5. On 28 June 2010, following family discussions, the appellants' mother married her husband's brother, the appellants' paternal uncle. He has been recognised by the Secretary of State for the Home Department as a refugee. His first wife and children were all killed in an air bombardment in Afghanistan.

6. The mother of the appellants then made an application for entry clearance for the first appellant and two other siblings from her first marriage. The application was refused but successfully appealed on 1 February 2012. Entry clearance was granted to the appellants' mother and two other siblings but not the first appellant. This was because the legal representative at that time had failed to include him in the appeal.

7. After the appellants' mother and two siblings were granted entry clearance, a further application was made for the appellants on 2 June 2012 and the refusal on 20 December 2012 has led to the appeal before me.

8. The grounds argue that as the Immigration Rules are a complete code, they must be the starting point in any Article 8 consideration. The judge is stated not to have considered the Immigration Rules and the public interest correctly. That cannot be right. Judge Flowers considered the Immigration Rules at [7], [13], [14] and [27] to [32], finding that the maintenance requirement was not met. The judge set out the correct test for the public interest at [33], referred to the Razgar [2004] UKHL 27 questions at [34], and at [35] found the respondent's decision to be in accordance with the law as the Immigration Rules were not met.

9. Further, at [37], the First-tier Tribunal judge stated in terms that he recognised the public interest in the maintenance of immigration control. He stated in terms at [37] that the failure to meet the financial requirements was a matter of significance in that context.

10. As a result, I was satisfied that in the proportionality assessment the First-tier Tribunal judge took the correct approach to the general weight to be afforded to public interest in the maintenance of effective immigration control and to the specific detriment to the public interest here, that a burden on state funds arose where the maintenance requirement had not been met. No error arises from the judge's approach to the public interest, therefore.

11. The grounds go on to maintain that a test of compelling or unduly harsh circumstances or

exceptionality applied in any Article 8 consideration but that such circumstances were not identified here. Firstly, as conceded by Mr Mills for the respondent, as the applications were made prior to 9 July 2012 that ground loses its force following the ratio of Edgehill v SSHD [2014] EWCA Civ 402. The approach to Article 8 brought about by the changes to the Immigration Rules on 9 July 2012 has no purchase where this application was made prior to that date.

12. In any event, it appeared to me that Judge Flower provided sufficient reasons in the determination and at [38] and [39] in particular for allowing the Article 8 appeal regardless of the legal matrix applied. At the date of the decision the mother and two other siblings of the appellants had been granted entry clearance. The situation of the appellants was that they were to live on their own in Pakistan, not their country of origin, cared for by neighbours. The second appellant was 2 ½ years old at that time and the first appellant under 10 years old. The very tragic family background set out above was not disputed. Judge Flower referred to it as "devastating" at [39]. Even on the post-9/7/12 legal matrix of there needing to be "exceptional", "compelling" or "unduly harsh" circumstances, it appeared to me that Judge Flower found that there were, after, as above, having taken the correct approach to the public interest and was entitled to do so.

13. Paragraph 6 of the grounds is only a disagreement with the finding of the First-tier Tribunal that the accommodation requirement of the Immigration Rules was met, a finding clearly open to the judge on the evidence, and Mr Mills sensibly took that point no further before me.

14. For all of these reasons, I did not find that the grounds of appeal had merit.

DECISION

12. The decision of the First-tier Tribunal does not contain an error on a point of law and shall stand.

Signed:  Date: 4 September 2014
Upper Tribunal Judge Pitt