Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/19093/2011
OA/19094/2011
OA/19095/2011
OA/18742/2011

THE IMMIGRATION ACTS

Heard at Laganside Court Centre, Belfast	**Determination Promulgated**
On 10th January 2014	**On 6th February 2014**

Before

The Hon. Mr Justice McCloskey, President

Between

MUSTAFA YUSIF IBRAHIM AL ZEHHAWI
NOOR YOUSIF IBRAHIM AL ZEHHAWI
ZINAH YOUSIF IBRAHIM AL ZEHHAWI
And
SHUA AMEEN SHAREFFI

Appellants

and

ENTRY CLEARANCE OFFICER, AMMAN

Respondent

Representation:

For the Appellant: Mr McTaggart (of Counsel), instructed by Paul K Nolan & Co, Solicitors
For the Respondent: Mrs O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

INTRODUCTION

1. These are four conjoined appeals. The first three Appellants are siblings who, in sequence, are aged 12, 21 and 14 years respectively. The fourth named Appellant,

aged 38, is their mother. Each is of Iraqi nationality. The husband of the latter and father of the family ("*the sponsor*") resides in the United Kingdom. The first three Appellants applied for clearance to enter the United Kingdom on the basis of child settlement. The fourth Appellant similarly applied, on the basis of spousal settlement. All four applications were refused by the relevant Entry Clearance Officer (the "*ECO*"), in a series of decisions made on 26th and 30th June 2011. By its determination promulgated on 24th July 2012, the First-Tier Tribunal (the "*FtT*") dismissed the ensuing appeals. The Appellants now appeal, with permission, to this Tribunal.

THE APPEALS, FRAMEWORK

2. The refusal decisions of the ECO, duly analysed, contain the following findings and assessments:

(i) The applications contained an assertion that the sponsor is a self-employed grocery shop owner. The only supporting evidence was an accountant's letter containing a profit forecast for the year ending July 2011.

(ii) The application contained no evidence of income or profit such as company accounts, tax returns, Inland Revenue receipts or profit and loss accounts.

(iii) Based on the above, there was no evidence that the sponsor is engaged in business as claimed or is in receipt of a regular and secure income.

(iv) The claim that the sponsor has an income of £1350.00 per month was bare assertion, unsupported by the bank statements submitted, which showed a closing balance of £760.00 on 31st May 2010.

(v) The claim that the Appellants were in regular contact with their father/husband was unsupported. Similarly, there was little or no evidence of family photographs indicative of mutual support or an enduring, subsisting relationship.

(vi) The assertion that the Appellants "met" the sponsor once weekly was demonstrably false.

(vii) There was a failure to state clearly when the Appellants had last seen the sponsor.

(viii) Based on the applications presented, the five persons concerned had last lived as a family in 2001 viz 10 years previously.

3. Based on the findings and assessments rehearsed above, the ECO considered whether the applications complied with paragraph 281 of the Immigration Rules. This gave rise to the following specific conclusions:

   (a) The Appellants would not be able to adequately maintain themselves in the United Kingdom without recourse to public funds.

   (b) The sponsor would be unable to adequately maintain and accommodate the Appellants without recourse to public funds.

   (c) A subsisting relationship with the sponsor had not been demonstrated.

   This gave rise to the omnibus conclusion that the applications were non-compliant with the Rules. The ECO then considered briefly, and dismissed, the Appellants' claims under Article 8 ECHR, in the following pithy sentence:

   > "*I have considered your application under Article 8 of the Human Rights Act, however this is a qualified right, proportionate with the need to maintain an effective immigration and border control.*"

4. Dismissing the appeals, the FtT Judge noted that the sponsor had acquired the status of naturalised British citizen with effect from 11th October 2011, having entered the United Kingdom originally as a refugee. The Judge found, specifically, that the marriage is subsisting and that the five persons concerned intended to live together permanently as members of the same family. Having summarised the relevant evidence and competing arguments, the Judge made the following further specific findings:

   (i) There was no satisfactory evidence of the availability of a residential property suitable to accommodate everyone concerned.

   (ii) The "accountancy" evidence was wholly unsatisfactory, as was the related evidence given by the sponsor about business and income.

   (iii) The sponsor's claims about his business and income were significantly undermined by the evidence concerning an undischarged tax liability to HMRC and his admitted inability to settle this debt.

   (iv) While the sponsor claimed to be in a business partnership with his cousin, the HMRC evidence disclosed that he is not taxed as a partner.

The Judge expressed "*grave concerns*" about the accountancy and related evidence. He stated that he could not repose any trust therein. He made two clearly identifiable conclusions. The first was that the Appellants could not satisfy the accommodation requirements of the Immigration Rules. The second was that they had failed to satisfy the financial requirements.

5. In his consideration of the Appellants' claims under Article 8 ECHR, the Judge noted the extremely limited evidence concerning the claims that they had fled from a refugee camp in Syria and also had to leave Iraq. He accepted the sponsor's evidence that he had made fairly frequent visits to the Appellants in Iraq, noting that these had occurred without mishap. The Judge noted the absence of any evidence about adverse impact on the two younger Appellants arising out of separation from their father. He recorded that a fourth child of the marriage had been born very recently (on 7th March 2012). He accepted, by implication, that the sponsor had been providing funds to his wife and children. The Judge made the following conclusion:

> "…… *Currently the best interests of the children do not warrant admission to the United Kingdom. Their care and welfare has been provided by their mother and she continues to comply with this duty apparently without difficulty. I am not advised or presented with evidence that there* [are] *difficulties on the education, financial, welfare or general living fronts …..*
>
> *I am satisfied from the evidence ……. that there has been no breach of the Appellants' Article 8 rights as I am satisfied that the family life can reasonably be expected to be enjoyed elsewhere, as already indicated.*"

In thus concluding, the Judge did not perform the five stage exercise formulated by Lord Bingham in Razgar – v – Secretary of State for the Home Department [2004] 2 AC 368, paragraph [17].

6. The grounds of appeal contented that the Judge had erred in fact relating to the current whereabouts and plight of the Appellants. All of them, it is asserted, live in a refugee camp in Syria, having fled from Iraq. It is further complained that the Judge failed to grapple with the evidence concerning the inaccessibility of the Appellants to the sponsor in their current circumstances. The Judge was further criticised for failing to recognise that the most recently born child of the family is a British citizen who, given the Judge's endorsement of the ECO's decisions, will be unable to enjoy his citizenship. Permission to appeal was granted accordingly.

CONSIDERATION AND CONCLUSIONS

7. As the summary in paragraph 6 above indicates, there is no challenge to the Judge's conclusion that the ECO correctly dismissed all of the applications under the

Immigration Rules. Rather, the contention that the Judge erred in law is confined to his assessment of the Appellants' claims under Article 8 ECHR and his inter-related consideration of section 55 of the Borders, Citizenship and Immigration Act 2009 ("*the 2009 Act*"). I interpose the observation that any challenge to the Judge's decision that all of the applications were manifestly non-compliant with the Immigration Rules would have been doomed to fail.

8. At the hearing, the arguments of the parties' respective representatives focused on a statutory prohibition which arises in certain contexts. The appeals pursued by the Appellants against the decisions of the ECO engaged section 85(5) of the Nationality, Immigration and Asylum Act 2002 ("*the 2002 Act*"), the effect whereof was to restrict the FtT to considering "*only the circumstances appertaining at the time of the decision to refuse*". This was formulated in the argument of Mr McTaggart as the central issue in the appeal. In AS (Somalia) – v – Secretary of State for the Home Department [2009] UKHL 32, the House of Lords rejected a challenge that section 85(5) is incompatible with Article 8 ECHR. Four of the members of the Judicial Committee acknowledged the possibility that this remedy might be appropriate in a suitable individual care. Per Lord Hope, paragraph [21]:

> "… *I would not rule out the possibility of a declaration of incompatibility in an individual case if the circumstances were so clearly focused as to enable the precise nature of the incompatibility with the applicant's Article 8 right to be identified.*"

Mr McTaggart was unavoidably constrained to acknowledge that this Tribunal is not empowered to make a declaration that a provision of primary legislation is incompatible with a person's Convention right: see the definition of "*court*" in section 4 of the Human Rights Act 1998. Bowing to the inevitable, Mr McTaggart agreed with the Tribunal that this presented an insurmountable obstacle, as it precluded the FtT – and, of course, this Tribunal – from considering either the birth of the most recent child of the family or the sponsor's evidence concerning current conditions in Syria. Since the error of law on which the Appellants relied was based on the birth of the youngest child and various outworkings thereof, together with certain post-ECO decision evidence, the conclusion that the appeals cannot succeed follows inexorably.

DECISION

9. I dismiss all appeals and affirm the decision of the FtT.

Signed: Edward McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 5 February 2014