Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/09169/2013
VA/09173/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Decision and Reasons Promulgated**
On 10th November 2014	**On 14th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

(1) MR ANEEQ AHMAD
(2) MR MOEED AHMAD

(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No attendance
For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are citizens of Pakistan who were born on the (i) 4th May 2001, and (ii) 3rd June 1994. They appeal against the decision of Judge

Robson who, in a decision promulgated on the 24th June 2014, dismissed their appeals against refusal of their applications for entry clearance as family visitors.

2. The appellants were represented by Mr Garni (solicitor) at the hearing before the First-tier Tribunal. The grounds of appeal to the Upper Tribunal were, however, settled Mr Farooq Azam (see below). Mr Farooq Azam subsequently indicated, by letter, that he was unable to attend the hearing due to work commitments and requested that it proceed in his absence. I was satisfied that the appeal could be justly decided without his presence and I therefore acceded to his request.

Background

3. The appellants had applied - along with their mother (Mrs Izmat Ijaz) and brother (Mr Roshaan Ahmad) - for entry clearance in order in order to visit their uncle (their mother's brother-in-law), Mr Farooq Azam (hereafter, "the sponsor"). The respondent initially refused all four applications; that is to say, those of the each appellant and of their mother and their brother. The decision to refuse the applications of Mrs Izmat Ijaz and Roshaan Ahmad were subsequently withdrawn, and their applications were granted. Hence, only the appeals of the present appellants fell to be determined by the First-tier Tribunal.

The decision of the First-tier Tribunal

4. Judge Robson set out his findings (conclusions) at paragraphs 42 to 46 of his determination –

> 42. I considered the Immigration Appeals (Family Visitor Regulations 2012 and the category of persons referred to therein which does not include uncles or indeed Aunts. Further since the mother has no longer proceeded with her appeal it is inevitable that she will not accompany her younger minor child and for that reason alone the appeal must fail as being noncompliant with paragraph 46A(iv)(a) [of the Immigration Rules].
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> 43. It has been put to me that the decision of the Respondent would interfere with the Appellant's right to Family Life and Private Life [under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms] it being submitted in particular that the current decision had been in fact been particularly emotionally harmful to the older child. There is no evidence of that.
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> 44. The family life such as it is of the Appellant is undoubtedly being conducted in Pakistan and there is nothing before me that suggests that that relationship can in anyway be disrupted.
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> 45. In terms of the relationship with the UK family that relationship can be continued either by UK family visits to Pakistan on the one hand or other modern means of communication such as telephone and alike or

indeed some other application which would be compliant with Immigration Rules and could be successful.

46. In relations to the Private Life of these two Appellants again given the terms of 276ADE there is nothing to suggest that those requirements will in anyway be breached by the Respondent's decision.

The grant of permission to appeal

5. Judge Gillespie granted permission to appeal to the Upper Tribunal in the following terms –

2. Grounds of appeal aver that the First-tier Tribunal Judge erred in law in that he the (sic) based his decisions upon an erroneous understanding of the factual situation. More particularly, the documented facts showed that the Appellants had originally applied for entry clearance with their mother and one other sibling, and that the Respondent, after initially refusing all applications had, after the noting of the appeals, withdrawn the refusals in respect of the mother and other siblings, conceding that they were entitled to visas. This was misunderstood by the First-tier Tribunal Judge who formed the mistaken view that the mother and other sibling had withdrawn their appeals against the refusal.

3. That the First-tier Tribunal Judge was under the mistaken impression averred is clear from the terms of the determination. In dismissing the outstanding appeals, the First-tier Tribunal Judge relying upon the supposed abandonment of the appeal by the mother, stated as a main ground of the decision that the Appellants could no longer enter as family members and with their mother but would be seeking entry clearance in order to visit a person who, would be seeking entry clearance in order to visit a person who, although a close family member of their mother, would not be their own close family member for the purpose of the purposes of the (Family Visitor) Regulations. This is arguably an error of law.

Analysis

6. Both Judge Robson and Judge Gillespie appear to have confused and conflated two discrete legal principles.

7. Firstly, the Tribunal was required to decide the appeals by reference to the circumstances <u>appertaining at the date of the immigration decision</u> [Section 85 of the Nationality, Immigration and Asylum Act 2002]. The *subsequent* decision by the respondent to withdraw the immigration decision and to grant the applications of the appellant's mother and brother was therefore <u>irrelevant</u> to the issues before the Tribunal concerning the remaining appellants. For the same reason, it would have been irrelevant to the issues before the Tribunal had the

position been (as Judge Robson erroneously believed) that Imtiaz Ijaz had abandoned her appeal. At the date of the decision, the position was simply that all four applications had been refused. It was against that factual background that the Tribunal was obliged to assess the merits of the appeals.

8. Secondly, both appellants were limited to appealing against the immigration decision on the ground that it was incompatible with their rights under the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. This is because, as Judge Robson observed, the appellants relationship with the sponsor (nephews and uncle) was not such as to attract a full right of appeal under the Immigration Appeals (Family Visitor) Regulations 2012. That position was not dependent, as Judge Gillepie supposed, upon the fact that the first appellant was a minor and would therefore be travelling with his mother, who, by contrast with her minor son, had the benefit of a full right of appeal against the immigration decision.

9. This leads me to consider the errors of law that are in fact contained within Judge Robson's determination.

10. Firstly, it is clear, from the second sentence of paragraph 42, that Judge Robson dismissed the first appellant's appeal on the basis of a post-decision event, and also because he believed that this event meant that the first appellant was unable to meet the requirements of the Immigration Rules. He was wrong on both counts. It was not open to him to take account of a post-decision event, even if his assumption as to its character had been correct. Nor was it open to him to dismiss the first appellant's appeal on the basis that the immigration decision was in accordance with immigration rules. As with the second appellant, the only issue that he was required to decide was whether the immigration decision was compatible with the appellant's right to respect for private and family life. That decision could only be made by reference to the circumstances appertaining at the date when it was made.

11. Secondly, having dismissed the appeal of the first appellant on the ground that the immigration decision was in accordance with paragraph 46A of the Immigration Rules, the judge does not appear to have considered his appeal under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. I say that he 'appears' not to have done so, because whilst the judge refers to a single appellant throughout the course of his reasoning in paragraphs 43 and 44, it is by no means clear to which appellant he is referring. This means that one cannot say, with confidence, that he has considered the individual circumstances of either appellant in deciding whether the immigration decisions were compatible with their respective rights under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

12. The above errors of law are so fundamental that I have decided that the entire determination should be set aside and the appeals remitted to the First-tier Tribunal for them to be decided afresh.

Notice of Decision

13. The appeals are allowed.

14. The decision of the First-tier Tribunal to dismiss the appeals is set aside.

15. The appeals are remitted to the First-tier Tribunal to be heard afresh (not before Judge Robson) and none of the original findings are preserved.

Anonymity not directed.

Signed Date

Deputy Judge of the Upper Tribunal **13th November 2014**