The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: OA/09208/2013**
OA/09278/2013

THE IMMIGRATION ACTS

Heard at Manchester **Decision & Reasons Promulgated**
On March 26, 2015 **On March 30, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

KS
UK
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
Appellant Dr Thorndike, Counsel, instructed by Prestige Solicitors
Respondent Mr McVeety (Home Office Presenting Officer)
Interpreter Mr Ahmed

DETERMINATION AND REASONS

1. The appellants are citizens of Pakistan. They both applied for entry clearance under paragraph 297 HC 396 as dependent children of the sponsor on December 24, 2012. The respondent eventually refused their applications under the Immigration Rules albeit the application had originally been refused under Appendix FM on March 14, 2013.

2. The appellants appealed on April 9, 2013 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

3. The matter came before Judge of the First-tier Tribunal Davies (hereinafter referred to as the "FtTJ") on June 30, 2014 and in a decision promulgated on July 7, 2014 he refused their appeals under paragraph 320(7A) HC 395 and for not meeting the requirements of paragraph 297 HC 395.

4. The appellants lodged grounds of appeal on August 5, 2014 submitting the FtTJ had erred in his approach to paragraph 320(7A) HC 395 and by failing to consider the appeal under article 8 ECHR.

5. On August 14, 2014 Designated Judge of the First-tier Tribunal McCarthy refused permission to appeal finding the FtTJ had reached findings open to him. Leave to appeal was renewed to the Upper Tribunal and on December 8, 2014 Upper Tribunal Judge Rintoul refused permission under the Immigration Rules but granted permission on article 8 grounds finding it arguable the FtTj erred in failing to give proper reasons for dismissing the appeal pursuant to article 8. Leave to appeal was limited to this issue.

6. The matter came before me on the above date and the parties were represented as set out above. The sponsor was in attendance.

ERROR OF LAW SUBMISSIONS

7. Dr Thorndike accepted the death certificate was not genuine and had a date of death that was incorrect. He submitted that the respondent accepted the father had died in March 2013 and whilst he accepted article 8 had never been raised in the application, grounds of appeal or at the hearing he submitted the FtTJ should have addressed the issue as it was "Robinson" obvious in light of the family matrix and the evidence that had been submitted.

8. Mr McVeety submitted the appellants had never raised article 8 prior to permission being sought. The original grounds of appeal did not raise article 8 and when the appeal was listed in the Tribunal and the respondent varied the grounds of refusal to include paragraph 320(7A) HC 395 the appellants did not expand their grounds of appeal. The sponsor's witness statement did not raise article 8 and their counsel, Mr Karnik, did not argue the article 8 point before the FtTJ. Whilst Dr Thorndike submitted the ground was "Robinson" obvious this was clearly not the case to two previous firms of solicitors and experienced counsel. In any event, the FtTJ found the sponsor had lied in paragraph [22] of his determination and his short statement in paragraph [24] reflected the absence of any arguments before him. This was a new issue that should be made by way of fresh application.

ERROR OF LAW ASSESSMENT

9. Dr Thorndike accepted that article 8 had not been raised prior to today but invited me to find it was a "Robinson" obvious point.

10. In R v SSHD ex parte Robinson (1998) QB 929 the Court of Appeal held that, although in seeking to appeal an immigration decision a claimant was

required to state the grounds of appeal, the appellate authorities were neither limited by the arguments actually advanced nor required to engage in a search for new grounds. However, since the appellate authorities were obliged to ensure that the claimant's removal would not breach the UK's obligations under the Refugee Convention where there was a readily discernible and obvious point in his favour, which had not been taken on his behalf, the appellate authority should nevertheless apply it. An obvious point, per Lord Woolf MR at 946 was one that has a strong prospect of success.

11. Dr Thorndike submitted that article 8 fell within what Lord Woolf MR was talking about and the FtTJ had erred by failing to deal with the article 8 claim.

12. I have considered the FtTJ's record of proceedings and it is clear the appellants' counsel did not pursue any article 8 claim on their behalf. This is consistent with what happened before the hearing.

13. The Immigration Counseling Service initially wrote to the British High Commission on December 24, 2012 indicating the appellants wished to apply under paragraph 297 HC 395. Family or private life was not raised in that letter. The sponsor's declaration dated December 9, 2012 did not mention either family or private life. When the applications were refused form IAFT1 was filed and whilst the grounds run to two pages there was no reference to human rights as a ground of appeal. By the time the case was listed for a hearing the appellants had changed representatives. There was nothing adduced that indicated article 8 would be argued. Finally, at the hearing the appellants' counsel did not argue article 8.

14. The Tribunal has considered the position where a particular claim is not pursued in the lower court and the argument is then raised in a higher court. In Sarkar v Secretary of State for the Home Department [2014] EWCA Civ 195, the Court of Appeal indicated that, although Article 8 and section 55 were mentioned in the Notice of Appeal, where no evidence had been adduced or submissions made before the First-tier Tribunal to support a claim under Article 8 of the ECHR, it could be treated as abandoned. The Court of Appeal said that even if that was wrong there was evidential basis for the First tier Tribunal to find in the appellant's favour in those circumstances. The Upper Tribunal could not be said to have erred in refusing to allow permission to appeal on that ground.

15. I am satisfied that for whatever reason decisions were taken not to argue the claim under article 8. That decision may have been the wrong decision although any judge considering such a claim would have to have regard to the adverse findings made by the FtTJ in paragraph [22] when he found the sponsor to be evasive and that she gave evidence that contradicted evidence given in her asylum claim. These factors undermined her overall credibility.

16. Case law confirms that if a party does not pursue an argument then unless it is "Robinson" obvious the upper Tribunal is not the venue to raise it for the first time. Whilst the FtTJ stated in paragraph [24] that he felt no need

to consider article 8 in light of the evidence this does not amount to an acceptance that he was obliged to consider article 8.

17. The appellants did not argue this and in the circumstances I do not find any error in law. It remains open for the appellants to renew an application for settlement bearing in mind the evidence is their father has died but the hurdles contained in paragraph 297 HC 395 would still need to be overcome if their appeals were to succeed under the Rules.

DECISION

18. There was no material error. The original decision shall stand.
19. The First-tier Tribunal made an anonymity direction pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 and I extend that order.

Signed: Dated: **March 26, 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal I I make no fee award.

Signed: Dated: **March 26, 2015**

Deputy Upper Tribunal Judge Alis