Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/17028/2013
OA/17032/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th January 2015	**On 19th January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

ENTRY CLEARANCE OFFICER – NEW DELHI

Appellant

and

SS (1)
SS (2)
(ANONYMITY ORDER MADE)

Respondents

Representation:

For the Appellant: Mr S Kandola, Senior Home Office Presenting Officer
For the Respondents: No legal representation

DECISION AND REASONS

Anonymity

1. Pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order. Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Respondents before the

Upper Tribunal. This direction applies to all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. I make this order of my own volition because the Respondents are children.

Introduction and Background

3. The Entry Clearance Officer (ECO) appeals against the determination of Judge of the First-tier Tribunal K Henderson promulgated on 10th October 2014.

4. The Respondents before the Upper Tribunal were the Appellants before the First-tier Tribunal and I will refer to them as the Claimants.

5. The Claimants are Indian citizens and they are twins born 12th November 2012. An application for entry clearance was made on their behalf to enable them to join their mother SK (the Sponsor) who is a Tier 4 Student in the United Kingdom, and their father who is in the United Kingdom with limited leave as the Sponsor's dependant. In addition the Claimants have a sister residing in the United Kingdom who has limited leave to reside with their parents, and who was born in 2010.

6. The applications were refused on 1st August 2013 the ECO not accepting that the requirements of paragraph 319H(i), (g), (j)(1), (2) and (3) were satisfied.

7. An appeal was entered, contending that the refusal was not in accordance with the law and breached Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention). One of the reasons for refusal was that the Claimants had not been born during the Sponsor's most recent grant of entry clearance, leave to enter or leave to remain as a Tier 4 Student, nor were they born no more than three months after the expiry of that most recent grant of leave. It was pointed out that the Sponsor had applied for leave to remain as a Tier 4 Student on 3rd April 2012 which application had been refused in October 2012. It was contended that the refusal was wrong in contending that a bank statement was missing, and as a consequence it was intended to issue judicial review proceedings. Subsequently it was acknowledged that the refusal in October 2012 was wrong, and the Sponsor was granted leave to remain on 19th April 2013. By then the Claimants had been born in November 2012. It was submitted that it was an error in refusing the application which led to the Claimants not being born while the Sponsor had leave to remain as a Tier 4 Student.

8. The decision made on 1st August 2013 to refuse the Claimants' entry clearance was reviewed by an Entry Clearance Manager on 6th February 2014. The decision to refuse was maintained. The Entry Clearance Manager noted the reference in the Grounds of Appeal to Article 8 of the 1950 Convention and was satisfied that Article 8(1) was engaged, but

considered that refusal of entry clearance was proportionate and appropriate.

9. The appeals were heard together by Judge Henderson (the judge) on 29th September 2014. It was conceded on behalf of the Claimants that they could not satisfy paragraph 319H of the Immigration Rules. The judge considered it appropriate to consider Article 8 outside the Immigration Rules, having noted that there was no evidence that the welfare of the children had been taken into account when refusing them entry clearance. The judge dismissed the appeals under the Immigration Rules, but allowed them under Article 8 of the 1950 Convention.

10. The ECO applied for permission to appeal to the Upper Tribunal. The grounds may be summarised as follows;

    (1) The judge erred in considering Article 8 by giving no consideration to sections 117A-117B of the Nationality, Immigration and Asylum Act 2002. (This is erroneously referred to in paragraph 3 of the grounds as being paragraphs 117A-117B of the Immigration Act 2014.)

    (2) Reliance was placed upon Gulshan [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 (Admin), in submitting that there must be compelling or exceptional circumstances not recognised by the Immigration Rules in order for Article 8 to be considered outside the rules. The judge had failed to identify why the Claimants' circumstances amounted to compelling or exceptional circumstances. It was submitted that exceptional circumstances meant circumstances whereby refusal would lead to an unjustifiably harsh outcome.

    (3) It was contended that the judge had failed to make a proper assessment as to whether the Claimants could be adequately financially maintained without being a burden on the taxpayers.

11. Permission to appeal was granted by Judge of the First-tier Tribunal Cruthers on 24th November 2014.

12. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision must be set aside.

The Upper Tribunal Hearing

13. The Sponsor attended the hearing and explained that she had received a message from her legal representatives to state that the Claimants' barrister would not be attending. Subsequently a fax was received from the representatives confirming this. The fax stated that it was understood that the Sponsor wished to proceed without legal representation.

14. The Sponsor confirmed that she did not wish the hearing to be adjourned and that she wished to make some representations on behalf of the Claimants. I ensured that the Sponsor was provided with a copy of the grounds seeking permission to appeal, and the grant of permission. The

Sponsor was given time to consider those documents, and subsequently indicated that she was ready to proceed, and confirmed that she did not seek an adjournment.

15. I explained to the Sponsor the procedure that would be adopted at the hearing, and that the purpose of the hearing was to consider whether the First-tier Tribunal had erred in law in allowing the Claimants' appeals under Article 8 of the 1950 Convention. The Sponsor told me that she understood the nature of the proceedings, and I was satisfied that this was the case. There was no need for an interpreter, and proceedings were conducted in English.

16. I firstly heard submissions from Mr Kandola who relied upon the grounds contained in the application for permission to appeal. In relation to section 117B of the 2002 Act, Mr Kandola submitted that the immigration status of the Sponsor and her husband were precarious, in that they only had limited leave to remain in the United Kingdom.

17. Mr Kandola submitted that the Sponsor had chosen to leave the children with grandparents in India and return to the United Kingdom to study, and submitted that this was a case of individuals attempting to choose where they wish to carry on their family life. It was submitted that there was no satisfactory evidence to prove that the grandmother would be unable to care for the Claimants. I was asked to find that the parents had decided that it would be in the best interest of the Claimants to remain with their grandmother, while the parents returned to the United Kingdom.

18. Mr Kandola submitted that the determination did not reveal that a thorough assessment of the Sponsor's financial circumstances had been carried out. Mr Kandola confirmed that no strong reliance was placed upon Gulshan and Nagre.

19. I then heard from the Sponsor who explained why her initial application for leave to remain as a Tier 4 Student had been refused, and stated that it was acknowledged by the Home Office that a mistake had been made which is why the application was subsequently granted in April 2013. Both the children had been born in the United Kingdom in November 2012, and once she received her leave to remain as a Tier 4 Student, she was able to return to India to mourn the death of her father. Her husband and her three children accompanied her, and when they wished to return to the United Kingdom, the Claimants were refused entry clearance.

20. The Sponsor wished to pursue her studies in accountancy which she described as her dream career, and therefore returned to the United Kingdom, believing that the separation from the Claimants would only be for a short duration before they were granted entry clearance.

21. The Sponsor confirmed that her daughter who resides with herself and her husband in the United Kingdom misses the Claimants, as does both the Sponsor and her husband, and she believed that the judge was correct to

allow the appeal with reference to Article 8 of the 1950 Convention. The Sponsor confirmed that she did not work, but her husband was in employment and provided for the family and they had never claimed public funds, and they had submitted to the First-tier Tribunal bank statements and evidence of her husband's employment, and she believed the judge was correct to find that adequate finance for the family was available.

My Conclusions and Reasons

22. I firstly consider whether the judge erred in considering Article 8 outside the Immigration Rules. The judge referred to the relevant case law in paragraph 24 of the determination, and in paragraph 23 set out the principle in Mundeba [2013] UKUT 88 (IAC) which indicated that in an entry clearance application involving children, the best interests of the child shall be a primary consideration. The judge correctly noted that the facts in that appeal related to an entry clearance application for settlement, whereas this was not a settlement application.

23. In paragraph 28 the judge found that the welfare of the children had not been taken into account in refusing them entry clearance. There is no reference in the refusal decisions to the best interests of the children being considered, neither is there any such reference in the Entry Clearance Manager review dated 6th February 2014. The Immigration Rule considered in refusing entry clearance is paragraph 319H.

24. In my view the correct approach when deciding whether to consider Article 8 outside the Immigration Rules is set out in paragraph 135 of MM (Lebanon) [2014] EWCA Civ 985. In this decision the Court of Appeal considered and made reference to both Nagre and Gulshan and I set out below paragraph 135;

> Where the relevant group of IRs, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law.

25. In my view the judge in this appeal was entitled to conclude that paragraph 319H was not a complete code, and there had been no consideration of the best interests of the children, and therefore was required to undertake a consideration of proportionality, and consequently did not err in considering Article 8 outside the Immigration Rules.

26. I turn next to the submission that the judge erred by not considering section 117 of the 2002 Act. The judge made reference to this in paragraph 24 although there is an error in referring to Part 5A of the Immigration Act 2014 and paragraphs 117A and 117B of that Act. The correct position is that on 28th July 2014 section 19 of the Immigration Act 2014 was brought into force which amended the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A, which contains sections 117A, 117B, 117C, and 117D. The relevant section to be considered in this case is section 117B which in summary states that when proportionality is considered under Article 8, the maintenance of effective immigration controls is in the public interest, and it is in the public interest that individuals seeking to enter or remain in the United Kingdom are able to speak English, and are financially independent.

27. The judge at paragraph 30 made reference to the Sponsor speaking excellent English although that is not directly in issue, as it is the Claimants seeking entry clearance. However ability to speak English is to be considered in the light of the fact that at the date of refusal, the Claimants were only 9 months of age.

28. The judge did in fact consider the issue of financial independence in paragraphs 28 and 29. In my view it is clear from those paragraphs that evidence relating to financial issues was placed before the judge. This is confirmed by the contents of the bundle placed before the First-tier Tribunal on behalf of the Claimants, which contains pay slips of the Sponsor's husband, together with P60 tax forms, and Barclays Bank statements and HSBC statements.

29. The judge has considered the financial evidence which included not only the earnings of the Sponsor's husband, but savings held in the bank accounts, and did not err in concluding in paragraph 29 that the Claimants could be "adequately cared for in terms of their parents' finances".

30. There is reference in section 117B(5) to a precarious immigration status to which reference was made by Mr Kandola. I do not find this to be applicable in this case, as that relates to the fact that little weight should be given to a private life established by a person when the person's immigration status is precarious, but this case relies upon family life, and not private life.

31. It is therefore my conclusion that the judge did take into account section 117A of the 2002 Act which states that when considering whether an interference with a person's right to respect for private and family life is justified under Article 8(2) all the considerations listed in section 117B must be taken into account. I therefore conclude that the judge did not err on this issue.

32. The third point raised in the application for permission to appeal relates to the contention that inadequate consideration was given to financial

matters, but I have already considered this point, when considering section 117B and concluded that the judge did not err.

33. In summary, the grounds indicate a strong disagreement with the decision made by the judge, but for the reasons I have given above, do not disclose a material error of law. In my view the judge was entitled to consider Article 8 outside the Immigration Rules, and in considering Article 8, had to have regard to the best interests of the children as a primary consideration (although it is not the only consideration), and reached a decision that was open to her on the evidence, and adequate and sustainable reasons were given for that decision.

Notice of Decision

The determination of the First-tier Tribunal does not disclose a material error of law. I do not set aside the determination, which stands. The appeal of the Entry Clearance Officer is dismissed.

Anonymity

I remind the parties that an anonymity order has been made.

Signed Date 13th January 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

As the determination of the First-tier Tribunal stands, so does the decision regarding a fee award. There is no fee award.

Signed Date 13th January 2015

Deputy Upper Tribunal Judge M A Hall