IAC-AH-SC-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/20312/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th April 2015	**On 8th July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MISS FATIMA ZULFIQAR
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Choudhury, Legal Representative
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan born on 2nd October 1997. The Appellant had applied for entry clearance as a child under Appendix FM of the Immigration Rules. Her application was refused under paragraph EC-C.1.1.(d) of Appendix FM of the Rules. In refusing the application it was noted that the Appellant's mother was divorced from her father but there was no supporting evidence that her father gave his consent for her to travel to the UK with her mother and there was also no evidence to show that the Appellant's mother had sole responsibility for her.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Grimmett sitting at Birmingham on 11th November 2014, the appeal was based both under the Immigration Rules and under Article 8 and in a decision promulgated on 1st December 2014 the Appellant's appeal was dismissed on all grounds.

3. On 15th December 2014 Grounds of Appeal were lodged to the Upper Tribunal. Those grounds were considered by Judge of the First-tier Tribunal Wellesley-Cole on 26th January 2014. Judge Wellesley-Cole noted that the grounds asserted that the judge had erred at paragraph 3 of the determination when she had concluded that the Appellant needed to show compelling reasons outside of the Rules. The grounds contended that the judge had failed to make adequate credibility findings with sustainable reasons in respect of the evidence of the Sponsor and witness which it was incumbent upon her to do and that she had misapplied the compelling circumstances test when considering Article 8 from paragraph 16 onwards of her determination. Furthermore the grounds alleged that the Appellant did not have proper regard to the best interests of the child following the authority of *T [2011] UKUT 00483 (IAC)*. Judge Wellesley-Cole had concluded that the judge may have fallen into error in not making adequate credibility findings and applying the wrong test in paragraph 3 that is compelling reasons outside the Rules along with an inadequate consideration of Article 8.

4. On 17th February 2015 the Secretary of State responded to the Grounds of Appeal submitting that the judge's approach in paragraph 3 was correct and that if the Appellant did not meet the requirements of certain Immigration Rules then compelling circumstances had to be established for the purpose of Article 8. It was submitted therein that the judge had given adequate reasons for her credibility findings and the conclusions drawn from those were open for her to make. He had fully explained the inconsistencies that led to her decision and had considered the best interests of the child at paragraph 15 of her determination.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed legal representative Mr Choudhury. Mr Choudhury is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr Jarvis.

Submissions/Discussions

6. Mr Jarvis starts off by commenting that there is nothing in this appeal whatsoever. Whilst it is acknowledged that the Sponsor may want the child to enter, and that it is incumbent in such circumstances for the judge to look at the situation, the First-tier Tribunal Judge has given reasons for any inconsistencies and therefore any perceived failings (which he disputes) on the judge's analysis and her duty to give reasons fall away. Mr Jarvis specifically takes me to paragraphs 11 to 14 of the determination

which he submits highlight the judge's concerns about the evidence that was before her.

7. He points out the Sponsor's husband gave evidence and that this is recorded at paragraph 10. He submits that any reliance made on the guidance given in *MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC)* does not assist the Appellant because the judge was considering oral evidence and that there is no real attack made on the evasive evidence provided in the appeal which goes to the heart of the question as to what the best interests of the child must be. He submits that any such submissions have to be based on reliable findings and the findings made were open to the judge and therefore the judge was entitled to conclude the Appellant had not been given reliable evidence regarding the Appellant's father. Further, as Mr Jarvis points out, it was noted by the judge that the Appellant was well cared for by her grandmother, therefore the judge had given due consideration to the best interests of the child and no error of law was shown under the Immigration Rules.

8. Addressing the issue pursuant to Article 8 the judge takes me to paragraph 16 of the decision. He submits that the grounds quite simply are wrong and refers me to the authorities of *Singh v the Secretary of State [2015] EWCA Civ 74* and *Mundeba (Section 55 of paragraph 297(i)(f)) [2013] UKUT 88 (IAC)*. He submits that reliance on the authority of *T* is not good law and that that was an exceptional circumstances case and that there is no general duty on the Secretary of State at interview. He submits that the judge has given sufficient reasons and that there is no material error of law disclosed at all pursuant to Article 8 and he asked me to dismiss the appeal.

9. Mr Choudhury relies on the Grounds of Appeal and submits that when a minor seeks to be relocated with her mother then it is incumbent upon the judge to give reasons and that this decision is empty on such observations. He acknowledges that the judge noted that the child was with a grandmother and that the grandmother was, he submits, only caring for the Appellant with the financial assistance of her mother. It is his submission that the judge failed to give adequate reasons. He acknowledges that the applicant is 18 years old this year and seeks to rely on the authorities of *T (Section 55 BCIA) [2009] – entry clearance) Jamaica [2011] UKUT 00483 (IAC)* and *TD 297(i)(e): "sole responsibility" (Yemen) [2006] UKAIT 00049*. He submits that the decision is unsustainable and he asked me to find a material error of law and to either order a rehearing or even to remit the matter back to the Entry Clearance Officer for the child to be interviewed.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational

conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Specific Legal Authorities

12. There have been several specific legal authorities referred to in this matter and it is appropriate that I give due consideration to them. The Appellant seeks to rely upon *T (Section 55 BCIA [2009] – entry clearance) Jamaica [2011] UKUT 00483 (IAC)*. That case is authority for the following propositions:

> "(i) Section 55 of the Borders, Citizenship and Immigration Act 2009 does not apply to children who are outside the United Kingdom.
>
> (ii) Where there are reasons to believe that a child's welfare may be jeopardised by exclusion from the United Kingdom, the considerations of Article 8 ECHR, the "exclusion undesirable" provisions of the Immigration Rules and the extra statutory guidance to Entry Clearance Officers to apply the spirit of the statutory guidance in certain circumstances should all be taken into account by the ECO at first instance and the judge on appeal.
>
> (iii) When the interests of the child are under consideration in an entry clearance case, it may be necessary to make investigations, and where appropriate having regard to age, the child herself may need to be interviewed.
>
> (iv) Where the appeal can be fairly determined on the merits by the judge, it is inappropriate to allow it without substantive consideration simply for a decision to be made in accordance with the law."
>
> (v) It is difficult to contemplate a scenario where a s. 55 duty is material to an immigration decision and indicates a certain outcome but Article 8 does not."

13. Thereafter the Appellant relies on *TD (Yemen)* which is authority as to the analysis of sole responsibility:

> "'Sole responsibility' is a factual matter to be decided upon all the evidence. Where one parent is not involved in the child's upbringing because he (or she) had abandoned or abdicated responsibility, the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. The test is whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life. However, where both parents are involved in a child's upbringing, it will be exceptional that one of them will have 'sole responsibility'."

In addition the grounds contend that there are inadequate reasons and the Appellant relies on *MK (duty to give reasons)[2013] UKUT 00641 (IAC)*. That case is authority for the following analyses:

> "(i) It is axiomatic that a determination discloses clearly the reasons for a tribunal's decision.
>
> (ii) If a tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons."

14. It is not necessary herein to recite the various analyses to be found in *Ganesabalan* and *MM Lebanon* other than to note a comment made by the Court of Appeal in *Singh [2015] EWCA Civ 74* that:

> "In short, neither *MM (Lebanon)* nor *Ganesabalan* undermines the point made by Sales J in para. 30 of his judgment in *Nagre*, which in my view, together with his endorsement of the approach in *Izuazu*, remains good law."

15. Further as the Secretary of State comments it is necessary to give due consideration to the position regarding serious and compelling circumstances. I am referred to the guidance of the Upper Tribunal in *Mundeba (Section 55 para 297(i)(f) [2013] UKUT 88 (IAC)* at paragraphs 34 to 36.

> "34. In our view, 'serious' means that there needs to be more than the parties simply desiring a state of affairs to obtain. 'Compelling' in the context of paragraph 297(i)(f) indicates that considerations that are persuasive and powerful. 'Serious' read with 'compelling' together indicate that the family or other considerations render the exclusion of the child from the United Kingdom undesirable. The analysis is one of degree and kind. Such an interpretation sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition that may be.
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> 35. The terms of s.55(1) and the decision of the Upper Tribunal in T (s.55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483 (IAC) [2012] Imm AR 346, made it clear that s.55 only applies to children who are in the United Kingdom. The requirement therefore in the IDIs we have

quoted above that officers must not apply actions set out in the instruction without having regard to s.55 inaccurately states the legal position, although as the Tribunal noted at [18] that the statutory guidance asks 'staff working overseas to adhere to the spirit if the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding or present welfare needs that require attention'.

36. The exercise of the duty by the Entry Clearance Officer to assess the application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require. Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is 'an action concerning children...undertaken by administrative authorities' and so by Article 3 'the best interests of the child shall be a primary consideration'. Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55."

Findings

16. It is against this background that I have to consider whether or not there has been a material error of law in the decision of the First-tier Tribunal. I start by addressing the position so far as it relates to the finding of the First-tier Tribunal under the Immigration Rules. The First-tier Tribunal Judge heard evidence from the Appellant's mother and her stepfather and noted there was also the evidence of an affidavit from the Appellant's maternal grandmother and an affidavit from a Mr Hussain the man whom it is claimed is the intermediary with the Appellant's father. The judge made findings that there were inconsistencies in the evidence provided particularly by how the Appellant obtained an affidavit from her father consenting to her leaving Pakistan with her mother and that the Appellant's mother was vague about her former husband's whereabouts. The judge made a finding of fact that the witnesses were deliberately evasive about the contact that there was with the Appellant's father and that paragraph 14 gave reasons as to why she was not satisfied that she had been told the truth about the Appellant's circumstances in Pakistan up to the time her application was made. It seems to me that the judge has given very full and careful consideration for the evidence that was before her and has within paragraph 15 of the determination set out clearly her conclusions in the reasons upon which such conclusions are based under the Immigration Rules. It cannot therefore with any reasonableness be argued that the judge has failed to give due and proper consideration to the guidance given in *MK* as to how a Tribunal should and should not set out their reasons. So far as the claim pursuant to the Immigration Rules is concerned the assertions amount to little more than disagreement with the judge's decision and I find for all the above reasons that there is no material error of law.

17. It is also appropriate to consider the position under Article 8. The judge has found that there are no compelling circumstances that warrant allowing the appeal outside the Rules and she has given detailed reasons at paragraph 16 to 19 as to why this is the case. There has been argument as to the consideration of the best interests of the child under Section 55 and of the approach generally be adopted. I am satisfied that the judge, whilst not reciting case law, has given a very full and proper consideration. The case law is an ever expanding and evolving set of authorities. There is nothing in the subsequent authorities to show that the judge's approach was erroneous. *R (on the application of Oludoyi and Others v Secretary of State for the Home Department [2014] UKUT 539 (IAC)* makes it clear that it is only necessary to look at the evidence to see if there is anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. The authorities do not qualify or fetter the assessment of Article 8 and there is no utility in imposing a further intermediary test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion based Rule. That is the approach that this First-tier Tribunal Judge has adopted. Whilst clearly cases that postdate the date of submissions cannot and would not have been referred to me there is nothing within them, in particular the decision in *SS (Congo) [2015] EWCA Civ 387* that does anything to support contentions made by the Appellant's legal representatives that there is a material error of law in the First-tier decision.

18. In all the circumstances this is a judge who has given full and proper consideration to the position firstly under the Immigration Rules and latterly Article 8 outside the Rules and her finding that the Respondent has shown that the decision is proportionate due to the inconsistencies in the evidence taking into account the public interest requirements of firm and effective immigration control is one that she was entitled to make and one that does not disclose any material error of law. In such circumstances there is no material error of law for the reasons set out above both under the Immigration Rules and pursuant to Article 8 and the Appellant's appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law and is dismissed and the decision of the First-tier Tribunal is maintained.

No anonymity order is sought and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application for a fee award.

Signed Date

Deputy Upper Tribunal Judge D N Harris