Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA081802014

THE IMMIGRATION ACTS

Heard in Birmingham	**Determination Promulgated**
On Thursday 3 August 2017	**On 21st August 2017**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR SYED QAISER ABBAS
(NO ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, ISLAMABAD

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Although anonymity was granted in my earlier decision, the appeals of the minor Appellants have been allowed and only the Second Appellant's appeal remains. He is not a minor child and there is no reason therefore to continue the anonymity order.

DECISION AND DIRECTIONS

Procedural Background

1. This is the third time that this appeal comes before me. By a decision promulgated on 17 March 2017, I allowed the appeals of this Appellant's mother and siblings against the Respondent's decision dated 16 December 2014 refusing them entry clearance to join their husband/father, Mr Shah, who is a British citizen. That decision is annexed to this decision for ease of reference. The Appellant's mother and siblings have since entered the UK.

2. By that decision, I directed that the appeal should remain in this Tribunal for re-making. However, I was unable to proceed directly with the re-making of the decision because a dispute arose as to the relevant date for my consideration of Article 8 ECHR ("Article 8"). Ms Rahman for the Appellant submitted that it was as at the date of the hearing before me. Mr Mills for the Respondent submitted that I could only consider circumstances as they existed at the date of the Respondent's decision under appeal. I therefore directed that written submissions be made on that issue which I would determine in writing.

3. By her written submissions, Ms Rahman conceded that I should deal with Article 8 as if the matter were before me at the date of the decision of the Respondent rather than as at the date of hearing. I emphasise that this is an appeal which proceeds under the regime prior to the amendments made by the Immigration Act 2014 and therefore, as I determined on 8 June 2017, sections 85 and 85A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") operate to prevent me dealing with circumstances which arise after the Respondent's decision. I will say a little more about that when I turn to consider the legal background below. My decision on this issue dated 8 June 2017 is also annexed to this decision.

The Evidence

4. In reaching my decision I have had regard to a volume of documentary evidence before me consisting of the following:-

    - A bundle of documents submitted by the Appellants to the First-tier Tribunal (pages 1-342 – referred to as "AB/" below)
    - A supplementary bundle of documents submitted by the Appellants to the First-tier Tribunal (pages 1-49)
    - A supplementary bundle of documents submitted to this Tribunal including witness statements of the Appellant, his father, mother and the elder of his two sisters

5. In addition to the usual Home Office bundle, I received some additional documents from the Home Office consisting of the CID records relating to the

Appellant's father's entry into the UK and documents relating to an earlier appeal in relation to the Appellant and his sisters in 2011.

6. I also heard oral evidence from the Appellant's father, his mother and the elder of his two sisters.

7. I confirm that I have read and taken account of all the evidence, both documentary and oral. However, I refer below only to that evidence which is pertinent to the issues which I have to determine.

The Factual Background

8. The underlying facts in this case as they emerge from the evidence are as follows. The Appellant and his family are all nationals of Pakistan. In addition to his two sisters who, as I have noted, are now in the UK, he has an elder brother, Musarat, who continues to live in Pakistan with his own family, albeit in a different area. The Appellant's uncles also live in the same area as Musarat. I was told that this was an area about one hundred miles from the Appellant's family home which is in Rawalpindi.

9. The date of the Respondent's initial decisions in this case was 22 May 2014 but there was, at the time, a right of administrative review which the Appellant and his family exercised and the decision was upheld on 16 December 2014. Both parties accept that this is the relevant date for the purposes of my consideration of the relevant circumstances. The Appellant was born on 13 June 1992. Therefore, at the date of the decision, he was aged twenty-two years. His two sisters, who I refer to as TZ and AB were born on 4 September 1997 and 3 December 2002. They were accordingly, at the date of decision, aged seventeen and twelve years respectively.

10. It is necessary to go back to the very beginning to understand the immigration history of this family. The father of the family and the sponsor in this case ("the Sponsor"), came to the UK in October 2003. I heard oral evidence from the Sponsor about this. He came as the spouse of his second wife who I understand was British and who he married in Pakistan in 2002. At the time that he came, his first wife, the Appellant's mother, was pregnant with AB. It is of course permissible in Pakistani culture for a man to have more than one wife and I simply note this as part of the factual background.

11. The Sponsor told me that in 2006/2007, his second wife left him. By that time, he had indefinite leave to remain. He has two children from that marriage but he does not know the whereabouts of those children or his second wife. He has no contact with them.

12. The Sponsor decided not to return to Pakistan at that time or to try to bring his first family here to join him. His reasons were not entirely clear. He suggested

that he did not need them because he had his other family but when pressed about this, since the question related to the period after that marriage breakdown, he said simply that he was trying to settle his life in this country. He obtained British citizenship in 2009.

13. In 2010, an earlier application for entry clearance for his family was refused. Mr Mills produced the documents relating to that refusal and appeal in evidence and the Sponsor was asked questions about them. I deal with his evidence in this regard when reaching my decision below. I here record what the documents show was the evidence at that time.

14. The application was made for the Appellant and his two sisters. The application did not include their mother. They applied to come to the UK as dependent relatives. It was said that their mother was physically unable to look after them and that their father was the only relative capable of providing for their care. The relevant decision of the Respondent at that time was dated 7 December 2010 and the appeal was determined on 5 September 2011 (wrongly dated as 5 August 2011) following a hearing on 22 August 2011. It is not entirely clear whether the Judge hearing that appeal was determining the issue as at December 2010 or August 2011 but since that is only a matter of months, little turns on it.

15. The evidence at that time was that the Appellant was aged eighteen or over (he would have been eighteen or nineteen at the relevant dates). It was said that Musarat, then aged over twenty-one, was living independently but was making "all the decisions now and the Sponsor phones him every day to give advice." It was there noted that Musarat had been caring for the Appellant and his siblings for some months and had "assumed responsibility for their welfare" but had relocated for work (although that was somewhat contradicted by evidence that Musarat was in full-time education). It was also said that Musarat was living with the Sponsor's brother "some 3-4 miles away from the Appellant's" and that the Sponsor's brother was now working in Dubai.

16. The Judge did not accept that the Appellant's mother was so ill that she could not care for the children. The Sponsor was found therefore not to have sole responsibility on the basis that "the Sponsor shares responsibility for his children with his wife, eldest son and his uncle". By "eldest son", it is clear that the Judge is referring to Musarat. It was also found that "the Appellants live together with their mother and in close contact with their elder brother and uncle".

17. Turning then to the family's living conditions in Pakistan, the family, prior to the Appellant's mother and sisters relocating to the UK, lived in a house owned by the Appellant's father although, it appears, transferred into the name of the Appellant's mother. The Sponsor gave evidence that he continues to own this house and that, whilst he would sell it if the Appellant were permitted to come to the UK, he would not sell it if and so long as it were needed by the Appellant.

18. The Sponsor has also transferred to the Appellant a parcel of land. There was a good deal of confusion in oral evidence about the land transfers. The property which the Sponsor has transferred to the Appellant is a plot of land and not a house. The document in that regard appears at [AB/302]. Although the sale deed refers to that as "rural", the Sponsor told me in oral evidence that the land is in a city and that it is sufficient for the building of a house. The property comprised in the sale deed at [AB/312] is the house in which the Appellant currently lives which, as appears from the deed, was transferred to the Appellant's mother. Again, though, the Sponsor confirmed, in relation to the plot of land that whilst, if the Appellant is permitted to come to the UK, they would sell that plot of land, the plot of land remains in the ownership of the Appellant and would not be sold if he was unable to come here.

19. The Appellant is well-educated. Although not dealt with in the witness statements, I was told in oral evidence (and as is confirmed by the evidence in the First-tier Tribunal decision which I set aside), the Appellant has a Master of Business Administration degree. I am told that he also has a Bachelors degree. The Sponsor also confirmed that, since the date of the Respondent's decision, the Appellant had managed to secure one job, as I understood it, in the IT industry but gave it up because it meant living apart from his family. For the sake of completeness on this issue, I note that I was provided with evidence that, at the time of the appeal before the First-tier Tribunal, the Appellant had the offer of a part-time job dealing with administration and accounting for a company in Birmingham for a salary of £12,500.

20. Finally, I deal with one additional factual aspect which has some bearing on the Appellant's situation, namely the position in relation to Musarat who, as I have noted, continues to live in Pakistan. There is no mention of him in any of the witness statements prepared for this hearing and a marked reluctance, particularly on the part of the Appellant's mother, to discuss him. However, from a piecing together of the evidence which I did receive and the benefit of Mr Mills' submissions which admittedly contained a number of assumptions but which were not rebutted by Ms Rahman, the position appears to be as follows.

21. Musarat was born in 1989. According to the Appellant's mother, the family moved to Rawalpindi about twenty to twenty-four years ago. The Appellant's sisters were born there. However, she said that Musarat did not like Rawalpindi and so returned to his home area. As I have noted, there was a marked reluctance to put a date on when that occurred. However, following protracted cross-examination, she settled on an answer that he had moved after he left college. That coupled with her assertion that Musarat was not educated led Mr Mills to suggest that Musarat left Rawalpindi when he was aged about eighteen ie in about 2007. That appeared to be confirmed by the evidence of ZT. The Appellant's mother did however admit the Musarat continued to visit them thereafter about once or twice per month. The Sponsor said that the Appellant

and Musarat do not have a close relationship although little detail was provided about that.

Relevant legal provisions

22. The only issue before me is whether the Respondent's decision breaches Article 8. In my decision promulgated on 17 March 2017, I preserved the findings in [19] of the First-tier Tribunal decision which was not challenged by the Appellant. For the sake of completeness, I set out that paragraph and adopt the findings there made:

> "[19] Turning to the application made by the second appellant. His application for entry clearance as a child was refused because he was 21 at the time the application was made and 22 when it was finally decided thereby failing to meet the requirement that he was aged under 18 at the time. His application was then considered as an adult dependent relative since it was accepted that he was dependent upon the sponsor. But that part of the immigration rules only permits entry clearance under that category for those who need help with long term personal care of the basis of age, illness or disability. The sponsor has confirmed that the second appellant is in good health, having just finished his Masters in Business Administration and waiting to come to the UK with his mother and siblings where he has a job waiting for him. He clearly then falls out-with the dependent relative rule and his application, I find was correctly refused."

The legal position is therefore that the Appellant does not meet the Immigration Rules ("the Rules") for entry as the child of the Sponsor. He is not under eighteen years and his circumstances are not such that he can qualify as a dependent relative.

23. As I note at [3] above, it is now accepted by both parties that the relevant date for assessment whether there is a breach of Article 8 is based on circumstances as at the date of the Respondent's decision in December 2014. I raised an issue in my decision dated 8 June 2017 whether that excluded consideration of the separation of the Appellant from the rest of his family. As I noted at [11] and [12] of that decision, that is a slightly more nuanced question. At the date of the Respondent's decision, the circumstances were that none of the family would be permitted to enter. I have since found that the decision was not in accordance with the law as regards the Appellant's mother and sisters. I envisaged therefore that the Respondent's position might have been, as it is in some entry clearance cases where circumstances have moved on, that the Appellant would need to make another application for entry clearance based on the changed circumstances. As it was, Mr Mills did not submit that this was the position. He agreed with Ms Rahman that I must consider Article 8 on the hypothetical assumption that, when the Respondent refused the Appellant's application, the rest of the family's applications were granted and therefore that the family would be separated.

24. This issue is touched upon in PT (Sri Lanka) v Entry Clearance Officer, Chennai [2016] EWCA Civ 612 – "PT (Sri Lanka)") at [37] as follows:-

> "[37] I return to the question of the date as at which the proportionality of the refusal of entry clearance had to be assessed. Mr Waheed did not in fact seek permission to amend his grounds of appeal to rely on the error by the FTT in assessing proportionality as at the date of his decision rather than the ECO's, though he did in the course of his reply make some reference to it. I should be reluctant to allow the Appellant to rely on a point taken for the first time in reply in this Court. But I do not in fact believe that it has been established that the error was material on this aspect of the case. If the Judge had focused on the evidence relating to the position as at the date of the ECO's decision he would have had to consider the impact of the Appellant of having to live on his own on a prospective basis rather than on the basis of how things had turned out; but the difference between the two dates was only some nine months, and there is no reason to suppose that his assessment would in fact have been different."

25. PT (Sri Lanka) concerns a factually similar situation; that was a case in which the Respondent had granted entry clearance to the remainder of the family. Although the point was not the subject of full argument in that case, it is implicit in what is there said that the Court of Appeal considered it may well be legally correct to make the assumption that the other applications would succeed (as in fact they did in that case) when dealing with the refusal of one of the family's applications. Both parties in this case are agreed that I must consider Article 8 on the basis of the family separation on the hypothesis of this being the position at the date of the Respondent's decision and I have therefore heard no contrary argument about this. I therefore proceed on the basis that this is correct. My own view, in any event, is that it probably is legally correct because I found that the Respondent's decisions in relation to the rest of the family were not in accordance with the law. That was the position at the date of those decisions, albeit shown only by evidence which was not before the Respondent (but relating to circumstances which did exist at that time). It follows that, as a matter of law, the Respondent should have decided the applications of the rest of the family differently and should have granted those applications. If that had been the position at the time, it follows that the Respondent would be obliged to consider Article 8 as at that date on the factual basis that the Appellant would be separated from the rest of his family.

26. I turn to one final issue on this aspect, namely whether I can take into account developments relating to the Appellant's situation since the date of the Respondent's decision. To an extent, I am bound to do so since the rest of his family came to the UK only in May 2017. Ms Rahman objected however to Mr Mills' submission relating to, for example, the fact that the Appellant has been able to find work in Pakistan albeit a job which he then gave up. In my view, I can take such evidence into account. Indeed, the Appellant has included in his evidence a job offer made to him for work in the UK which post-dates the Respondent's decision.

27. There is bound to be a degree of speculation involved in any Article 8 assessment about what the future might bring. In this case, that is accentuated by having to look backwards to the hypothetical position in December 2014. That means that I must assume, for example, that both the Appellant's sisters remain children even though one is now aged over eighteen. It does not mean, however, that I need exclude from consideration what the position might have been, looking to the future, if, in December 2014, the Appellant's family were in the UK and he was not. At that date, as Mr Mills pointed out, the Appellant was on the verge of completing his MBA and it might therefore reasonably be assumed that he would then be looking for work. All that the evidence since shows is speculation that he would be likely to find work, whether in Pakistan or the UK, is not unfounded.

28. With that somewhat lengthy preamble, I turn then to the legal issue which it is for me to determine. I start by noting that the Respondent accepts that there is family life between the Appellant and his family in the UK. In entry clearance cases, as relevant case law shows, that is not always the position where an appellant is a adult. As Mr Mills pointed out, however, the Appellant had not at the relevant date formed an independent family life. The evidence is that he lived with his family, even when studying at university, and had not formed his own family.

29. I do not therefore need to deal in detail with Ms Rahman's submissions on the case-law so far as those focussed on this aspect. Although she sought to persuade me that the factual position in at least one of those cases (Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320) was so similar to this case that I needed to have regard to it, I do not accept that submission. It is rarely the position that the facts of one case can simply be transposed to another as consideration of that case makes clear (it involved the additional facet of the historical background and subsequent policy treatment of Gurkhas).

30. Nor does the Respondent dispute that there is a sufficiently serious interference with family life brought about by the separation. Both the first and second "Razgar" questions are therefore decided in the Appellant's favour. Although I understood one of Ms Rahman's submissions to be that the only consideration thereafter is whether the decision is in accordance with the law because there is no public interest in play, she confirmed that this was not her intention. There is no suggestion that the decision is not in accordance with the law and therefore the case turns on a proportionality assessment. The public interest in this case is the maintenance of immigration control. It is accepted by the Appellant that he does not meet the Rules to enter as his father's dependent relative (or in any other category). The issue is therefore whether the interference with his family life (and that of his family) is outweighed by that public interest.

31. The Respondent concedes as she must that the case does not just turn on the Appellant's family life but also that of his other family members. Based on the relevant date of December 2014, two of those family members – the Appellants' sisters – were children. Section 55 is therefore of relevance. Ms Rahman referred

me to what is said at [39(iv)] of Secretary of State for the Home Department v SS (Congo) and others [2015] EWCA Civ 387 ("the fact that the interests of a child are in issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the state authorities would otherwise enjoy..").

32. In terms of the public interest, as the Supreme Court succinctly put the issue at [68] of MM (Lebanon) and others v Secretary of State for the Home Department [2017] UKSC 10 ("MM (Lebanon)"), "a decision in accordance with the rules will not involve a breach of article 8 save in "exceptional circumstances"; which expression is equated with circumstances where a refusal would lead to "unjustifiably harsh" consequences for the individual or their family". As that judgment also makes clear, significant weight is to be accorded to the best interests of any children involved and, as is now trite law, those best interests are a primary consideration although not necessarily paramount or decisive.

33. One factor on which the parties were disagreed is the effect of the element of choice by the family. This too is considered by the Court of Appeal in PT (Sri Lanka) at [36] as follows:-

> "[36] Ms McGahey relied also on the point made by the UT that the immediate reason why the family life in Sri Lanka broke up was that the Appellant's mother and sisters chose to go to the UK to join the father; or, to look at it another way, because the father did not choose to come back to live with them all in Sri Lanka – it must be recalled that he was not a refugee and so did not face persecution if he returned. She did not suggest that that meant that the difference in the decisions taken in the Appellant's case and those of his mother and sisters did not constitute an interference with family life. But she said that it was relevant to the assessment of proportionality. Although this was not a point on which the FTT relied I agree that it is a material consideration. The Respondent's decision gave the family a hard choice; but it was nevertheless a genuine choice."

Mr Mills, unsurprisingly, relied on this passage.

34. In response, Ms Rahman referred me to what is said about the importance of British citizenship in MM (Lebanon) at [104]:-

> "[104]. Taking the factors listed in Jeunesse: family life would effectively be seriously ruptured, because they could spend only short periods of time together; while both spouses originated from the DRC, the sponsor has been here for many years and was naturalised as a citizen here as long ago as 2006; he also has two children who are both British citizens, so his ties to this country are extensive; the First-tier Tribunal has found what are insurmountable obstacles in the way of their living in DRC; there are no factors of immigration control or public order weighing in favour of exclusion. The only factor pointing the other way is the fact that this is a "post-flight" relationship, formed when there was no guarantee that the applicant would be admitted, although it began in 2010 before the Rules were changed, and the sponsor would easily have met the old "adequate maintenance" test."

35. It is to be noted, however, that the case there under consideration involved not simply a British sponsor but also two British children. As the Court in ZH (Tanzania) made clear, the British citizenship of a child is a particularly important factor because, of course, the child has no independent say in the exercise of that citizenship; that is influenced by the decisions made by the child's parents. Conversely, the Supreme Court in Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11, expressly accepted that, even in the case of a relationship involving a British citizen spouse, the Respondent is not obliged to permit the non-British national partner to remain (and by extension to enter) if the couple cannot meet the Immigration Rules.

36. Bringing together the above principles, the legal position is that, where the Rules are not met by the relationship under consideration, a refusal of leave to enter or remain is only disproportionate where there are compelling circumstances such that the effect on an appellant or others affected by the decision would be unduly harsh.

Decision and reasons

37. I start with the best interests of the two children involved in this case. Before I turn to the evidence I have received about them, however, it is necessary for me to deal with the position of this family in Pakistan before the Appellant's mother and sisters came here.

38. Although, as I have noted, there was a marked reluctance to mention in evidence Musarat, the Appellant's elder brother, the evidence as a whole shows that he was living with the family for at least some of the time since the Sponsor came to the UK. I cannot ignore the evidence given in the 2011 appeal that he was the one then caring for the family, albeit not living with them at that time. The Sponsor said that Musarat had lived separately from the family since 2009/2010 which is slightly later than was suggested by his wife (insofar as she was willing to answer the question at all). However, it is clear from the documents in the earlier appeal that Musarat was involved with care of the family at least until the date of that earlier appeal and possibly later. That is probably unsurprising given that the Appellant was at that time still a child himself (he turned eighteen in June 2010).

39. In his answers under cross-examination, the Sponsor sought to downplay the role which Musarat played by stating that it was not really Musarat who was looking after the family in 2010/11 but his brother who thereafter left for Dubai. That is however contradicted by the evidence which he gave in 2011 that it was Musarat with his (the Sponsor's) daily input who was looking after the family because his brother had by then left for Dubai.

40. The impression which the Sponsor and his wife were keen to give in evidence however was that it was the Appellant who paid all the bills, looked after his mother and sisters and made the decisions. That may have been the case between

2010 and 2014 but I do not accept that it was the case before 2010. The Sponsor left Pakistan in 2003. Musarat was then aged about fourteen. The Appellant's mother said that the family moved to Rawalpindi and that Musarat moved with them albeit reluctantly. It appears from what was said in 2011 that the Sponsor's brother then lived in Rawalpindi, a few miles from the family house. The evidence is that this brother was looking after the family until he left for Dubai. Thereafter, it appears, Musarat took up the reins until at least 2010.

41. This is relevant to my assessment in this case because Ms Rahman's closing submission is that the younger sisters had formed an emotional dependency on the Appellant because they grew up with no father present. The suggestion is that the Appellant became a father figure for the two younger girls. It will be observed from the factual background above that ZT was aged about six years when her father left and AB was not even born. The Appellant was himself aged only eleven years. I cannot for that reason accept what is said in ZT's evidence that the Appellant has "always looked after us". He may well have done so for several years (and of course ZT will be looking at the period up to when they left Pakistan and not on the basis of some hypothetical prior date). However, it is stretching the evidence too far to suggest that the Appellant effectively became the "man of the house" in 2003 and became a sort of father figure to the two girls from that date.

42. I do accept ZT's evidence that she and AB had a closer relationship with the Appellant than they did with Musarat. Musarat is quite a lot older than them both and it is to be expected therefore that their relationship would be closer to the sibling who was closer in age to them. The Appellant is, as she explained, not just her brother but her friend. They went everywhere together. Further, Musarat, at least at some point before 2010, appears to have taken over caring for the family and had therefore taken over from his father. One might therefore expect that they might not view him in the same way as a sibling.

43. ZT is clearly very distressed about separation from her brother. She told me that she could not imagine living without him. That position would be worse for her sister, AB, who grew up without a father in her daily life and treated the Appellant like a father as well as a brother. ZT's evidence was heartfelt and her emotions were (as Mr Mills described them) "raw". That is to be expected since, at the date of the hearing before me, the family had only been separated for a couple of months.

44. ZT was asked about her relationship with Musarat. She said that she lived with him until he was about eighteen (i.e. at least four years after her father left). She admitted that she missed him when he left home and that she had got used to it. She emphasised however that her relationship with Musarat was not as close and was of an entirely different nature to that with the Appellant. She also noted that because she was young (on her evidence about ten years) when he left, she had

not felt it as much but she now understood and felt very bad for her brother (the Appellant) left behind on his own in Pakistan.

45. Some of ZT's concerns though appeared to be focussed more on her and her sister's situation than on that of the Appellant. She was asked by Ms Rahman to tell me how she felt about the Respondent's position that, as the Appellant is (or was at the relevant time) aged twenty-two, he could look after himself. She replied:-

> "If he would have gone way then what would have happened to us and our mother? Mum is ill. He was the responsible one. If he wasn't there how would we survive?"

It might be suggested that this shows a higher than normal dependency of the sisters on their brother than would be usual. However, that takes no account of the fact that the two girls are now in the UK with their father who might be expected to resume the role of carer for the two girls.

46. Similarly, when asked about what difference it made to their daily lives that the Appellant is not here, ZT said "He used to do everything for us. We don't know how to move around in society. We have not been into practical life at all. It is very difficult". Again, that might suggest a stronger than usual family life based on the family dynamics at play here. However, the Appellant would be in no better position than his sisters to integrate into UK society. He has never lived here. It is their father who has lived and settled in the UK. It is to him that the Appellant's sisters will need to turn in order to find their way here.

47. I accept that both ZT and AB (from whom I did not hear due to her age) would very much prefer the Appellant to be in the UK with them. However, the question whether it is in their best interests is a slightly different one. Section 55 requires me to give consideration to the promotion and safeguarding of their welfare. True it is that their emotional welfare, certainly at the current time, would be better served by having their brother in the UK with them because they are upset by the separation. However, I find that this is only marginally so and whilst they suffer the evident sense of loss which is to be expected from such a recent family separation.

48. In the longer term, these are two teenage girls who have been brought to a strange country when they have been used only to the culture of Pakistan. They will inevitably need support to integrate here and that is the more important point for their emotional welfare. That can only be provided by their father who is the only person with sufficient experience of the culture. They have not had that father in their life for many years (at least not on a regular basis) and it is to be expected that a period will be required for them to adjust to having both parents in their lives. Ultimately, though, they are now living with both parents which is generally in the best interests of a child of their age. ZT is of course now no longer under eighteen and therefore not strictly a child. However, I have to

proceed on the basis that she is and in any event, it is clear that she has not formed any independent life of her own to date.

49. I start my assessment of Article 8 therefore on the basis that the best interests of the Appellant's two sisters marginally favour a result in the Appellant's favour.

50. I turn then to consider the situation of the Appellant's mother and father. I can deal with their position shortly. His father was willing to leave his family in Pakistan in 2003 to come to the UK. He has visited the family once or twice per year since. That was a matter of choice for him. I do not criticise his choices but the family life which he has formed with his son is inevitably deserving of less weight than would be the case if he had lived with him as he was growing up. Similarly, although the Appellant's mother obviously misses the Appellant, her evidence was largely directed at his relationship with his sisters rather than with her. She talked of them crying as they left their brother at the airport. Although she said that she was ill and could not look after the children properly, I have received no medical evidence as to her conditions or why she could not look after them, particularly since they are now of an age where they may be expected to form their own lives and look after themselves (save for AB). It was her and the Sponsor's choice for the family to relocate to the UK, even after they were aware that their departure would inevitably lead to separation from the Appellant, even if she hoped that might be temporary.

51. I turn then to consider the position of the person who is at the heart of this appeal – the Appellant. He was aged twenty-two years at the relevant date. He is now twenty-five. Unfortunately, the drafter of the statements prepared for this appeal has drafted them in a largely common format which does not convey the emotional impact on the Appellant of separation from his family. I did not hear from the Appellant in the same way as I did from his family members; I was not asked to.

52. I did however, receive oral evidence from his mother and ZT which I take into account. I accept therefore that he is very upset by the separation. I accept that he has always lived with his family (apart, it seems, from a short period when he moved away for work but quickly gave that up because he did not wish to live on his own). I accept that he misses them very much. I also accept though Mr Mills' submission that the separation is very recent and that is therefore to be expected. Although ZT said that she (and by implication the Appellant) would never get over being apart, I do not accept that evidence any more than I accept her evidence that she cannot live without him. Those are the understandably emotionally charged statements of a young teenager faced with a separation which she did not want and which she did not choose.

53. Turning then to the position in which the Appellant is living in Pakistan, the circumstances cannot be described as particularly compelling. He has a roof over his head. The Sponsor has confirmed that he will not sell the house for as long as

the Appellant wishes to live there. The Sponsor has supported the family financially in the past and there is evidence that he will continue to do so. He has transferred a plot of land to the Appellant which he says is sufficient for the building of a house if the Appellant wishes to do that. The Sponsor said that he transferred the land to his son as an investment for his future and therefore the Appellant could no doubt use that if he needed to. Further, the Appellant is well-educated and has already had one job offer. Given his qualifications, it may reasonably be expected that he could obtain another.

54. I accept the evidence that I heard that the Appellant is not particularly close to Musarat who also lives at some distance from the Appellant. Musarat is about four years older than the Appellant and left home aged eighteen and has formed his own independent life. However, the fact remains that the Appellant does have family in Pakistan in the form of his elder brother and two uncles who live in the same area as Musarat.

55. There is also nothing to prevent the Appellant's family returning to Pakistan to visit him. Indeed, as I note at [59] below, the family could, if they chose to do so, return to Pakistan to live. There are no very significant problems standing in their way. It is a matter of their choice. Although Mr Mills accepted that there might be some obstacles in the way of the Appellant visiting his family in the UK (given the failed applications for settlement which might cause an entry clearance officer to question the motives behind the visit), the Appellant's Article 8 rights would need to be considered in any such decision and it may well be therefore that he would be permitted to visit. Further, as I noted in the course of the hearing, his educational achievements may be such that he could either come to the UK to study or work in his own right. I do not speculate but there clearly are provisions in the Rules which might be open to the Appellant. The evidence before me is also that the family are maintaining almost daily contact by "Skype" and the like. I completely accept that such contact at distance is not the same as daily contact in person. It does however mean that there is no "rupture" of family ties as is suggested in MM (Lebanon) might exist in some cases (see [34] above).

56. Of course, ideally, the Appellant would like to come to the UK. The fact remains though that he does not meet the Immigration Rules as a relative of the Sponsor. I am mandated by Section 117B of the 2002 Act to have regard to the fact that the maintenance of immigration control is in the public interest. That means that if an applicant cannot meet the Rules, the public interest in general will outweigh that person's Article 8 rights because it is the Rules which set out the Respondent's view of where the boundaries of migration control should lie. Although it might appear to the Appellants that there is no reason of wider public interest why they should be denied having a member of their family join them here, if all families who migrated to the UK were permitted to bring any family member they chose to bring, there would undoubtedly be an impact on migration. The Rules are intended to control migration such that, whilst a partner

or minor children can be expected to be allowed to enter to join a father settled in this country (if they can meet the other requirements of the Rules), the same is not true of a child who has become an adult or other adult family members. The question whether the Rules are met is therefore a very important consideration. As the Supreme Court succinctly put it in MM (Lebanon) if a person does not meet the Rules it is only in compelling circumstances that the public interest will be outweighed by a person's Article 8 rights and that will be only where the result will be unduly harsh for the applicant or those affected by the decision.

57. In relation to the other provisions in Section 117B, Mr Mills confirmed that none are at issue. I do not have evidence whether the Appellant speaks English but ZT spoke English well and I was told that the siblings were educated in English. No issue was taken about the Sponsor's ability to provide the additional income which would be needed to support the Appellant in addition to the rest of the family. They are therefore assumed to be financially independent.

58. In this case, I have found that the Appellant's sisters' best interests are marginally favoured by the Appellant being in the UK. That is though only marginal for the reasons I have given. In particular, I do not accept that the separation of the Appellant's sisters from him is unduly harsh for them for the reasons I have given. They are understandably upset to be separated from their brother with whom they have a close relationship. They have been brought to a strange country of which they have no prior experience and have not yet had the chance to make friends. They are though living with both their parents who can no doubt be expected to care for their welfare and support them through this transition.

59. I have already dealt with the situation of the Appellant's parents. In addition, it is a relevant factor that they could choose to return to Pakistan to be with the Appellant if they wished to do so. The Sponsor said that this would be "very hard" for him because he is settled in the UK, and is working. He is also a British citizen. Those might be reasons why he does not wish to return but they are not reasons why he could not do so. He has property in Pakistan. It is not said that he could not find work there. In addition to the Appellant, he has other family members in Pakistan, namely another son and brothers.

60. I appreciate that the separation will be hardest of all for the Appellant. As ZT herself put it, "at least we are together. He is alone". However, although he is undoubtedly very emotionally attached to his mother and sisters and therefore very upset by the separation, I do not accept on the facts here that separation is unduly harsh for the reasons I have already given. He has a home in Pakistan. The Sponsor confirms that he will continue to maintain that home for as long as the Appellant needs it and continues to provide financial support to his son from the UK. There is no suggestion that this will cease. He can continue to maintain his family ties at a distance and by visits.

61. Weighing the impact of the separation of the Appellant from the rest of his family against the public interest in migration control, for those reasons, I am satisfied that the refusal of entry clearance is not a breach of Article 8 ECHR and I dismiss the appeal.

DECISION

I dismiss the appeal on human rights grounds

Signed  Dated: 14 August 2017

Upper Tribunal Judge Smith

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/08182/2014
OA/08180/2014
OA/08187/2014
OA/08183/2014

THE IMMIGRATION ACTS

Heard in Birmingham
On Monday 6 March 2017

Determination Promulgated

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Before
UPPER TRIBUNAL JUDGE SMITH

Between
MRS B F
MR S Q A
MISS S A B
MISS S T Z
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER, ISLAMABAD

Respondent

Representation:
For the Appellants: Ms K Rahman, Counsel instructed by Heritage solicitors
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Although anonymity was not granted by the First-tier Tribunal, one of the Appellants remains a minor child. It is therefore appropriate that an anonymity order be made. Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND DIRECTIONS

Background

62. The Appellants appeal against a decision of First-Tier Tribunal Judge Hawden-Beal promulgated on 6 May 2016 ("the Decision") dismissing their appeals against the Entry Clearance Officer's decisions dated 16 December 2014 refusing them entry clearance as the spouse and children of the Sponsor, Mr Shah, who is a British citizen. The First Appellant is Mr Shah's spouse. The Second, Third and Fourth Appellants are their children born on 13 June 1992, 4 September 1997 and 3 December 2002. Only two of the children are therefore still under the age of eighteen although the Third Appellant was also a minor at the date of application on 10 April 2014. That is relevant when I turn to disposal of their individual appeals.

63. The Respondent refused the applications on the basis that Mr Shah could not meet the requirements of Appendix FM-SE to the Immigration Rules ("the Rules") to show that he had the requisite income to meet the threshold requirements in the Rules. An additional point was taken in relation to the validity of the First Appellant's English language certificate. The Second Appellant who could not qualify for entry under Appendix FM as Mr Shah's child due to his age was refused because he could not meet the Rules in relation to adult dependent relatives.

64. The refusal based on the evidence of income depended in part on Mr Shah's failure to provide two payslips for part of the period during the six months prior to the application. By the date of hearing, Mr Shah had provided those payslips. The Judge accepted that the evidence showed that he could therefore meet the requirement to earn more than £24,800 which was the requisite figure for maintenance of the First, Third and Fourth Appellants. She also found that the Respondent had not proved that the First Appellant's English language certificate was valid. However, the Judge found that she was not entitled to take into account the payslips which pre-dated the application but were not provided with it. She therefore found that the First, Third and Fourth Appellants could not succeed under the Rules. The Judge also found against the Appellants in their claim that the Respondent's decisions breached Article 8 ECHR ([22] and [23] of the Decision). She found against the Second Appellant also on the basis that he could not meet the Rules in relation to adult dependent relatives ([19]).

65. The first to third of the Appellants' grounds focus on the Judge's refusal to take into account the additional payslips. The fourth ground concerns Article 8 ECHR. Permission was granted by First-tier Tribunal Judge Shimmin on both aspects of the grounds. The matter comes before me to decide whether the Decision

contains a material error of law and, if so, to re-make the Decision or remit the appeals for rehearing to the First-Tier Tribunal.

Appeals of the First, Third and Fourth Appellants

66. The main issue in relation to these Appellants is the income threshold requirement as if the Judge were wrong not to take into account the payslips, then they could succeed under the Rules (subject to the English language certificate finding not being challenged by the Respondent).

67. In her Rule 24 response, the Respondent stated as follows:-

> "[2]. The respondent does not oppose the appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing. It is quite clear the evidence would have been admissible as long as it appertained to the relevant date of application pursuant to Section 85 and S85A of the 2002 Act."

No challenge was made to the finding on the English language certificate.

68. These appeals pre-date the coming into force of the changes to appeal provisions brought about by the Immigration Act 2014. Section 85 and 85A Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") therefore read as follows (so far as relevant):-

> "Section 85
>
> …
>
> (4) On an appeal under section 82(1)…against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.
>
> (5) But subsection (4) is subject to the exceptions in section 85A"
>
> "Section 85A
>
> (1) This section sets out the exceptions mentioned in section 85(5)
>
> (2) Exception 1 is that in relation to an appeal under section 82(1) against an immigration decision of a kind specified in section 82(2)(b) or (c) the Tribunal may consider only the circumstances appertaining at the time of the decision."

69. The Respondent concedes (rightly) that this restriction relates only to the "circumstances" and not to the evidence of those circumstances. The Judge accordingly made an error in finding that she could not take into account the payslips which Mr Shah submitted showing his income in January 2014 and, most importantly, March 2014. The Appellants' ground two is therefore made out. The Appellants' ground one is also legally correct but I do not need to deal with that or ground three which relates to the Respondent's discretion to seek out documents not provided with the application.

70. Based on the Respondent's concession, Mr Mills agreed that, if the evidence contained in the March 2014 pay slip showed that Mr Shah was in receipt of more than £24,800 per annum, the appeals of the First, Third and Fourth Appellants should be allowed on the basis that the Respondent's decisions were not in

accordance with the Rules. The payslip dated March 2014 as well as Mr Shah's P60 for that year show that his income for the year was £26,070.21. The application for entry clearance was made on 10 April 2014. Accordingly, I allow the appeals of the First, Third and Fourth Appellants on that basis.

Appeal of the Second Appellant

71. The position of the Second Appellant is however different because he was not a minor child at the date of the application. Accordingly, he cannot succeed under Appendix FM in the same way. There is no challenge in the Appellants' grounds to the Judge's finding that he could not meet the Rules relating to adult dependent relatives. His challenge to the Decision is therefore confined to ground four relating to the assessment of Article 8 ECHR.

72. I pointed out to Ms Rahman at the hearing that, read strictly, her ground four ([50] of the grounds) refers only to the First Appellant. She submitted however that it should not be read in that way. The reference to the First Appellant only relates to the Judge's assessment at [22] of the Decision. She confirmed that all four appeals were argued on the basis that the Respondent's decisions were disproportionate. As such, she asked me to read that ground as relating to all four Appellants (although only now relevant to the Second Appellant because the other appeals are allowed under the Rules).

73. Mr Mills did not disagree with Ms Rahman's submission. He also conceded that the Judge's assessment of Article 8 ECHR was necessarily infected by the error made in relation to her consideration of the Rules as the Judge assumed that none of the Appellants could satisfy the Rules whereas I have found that the majority of the family can.

74. Submissions therefore proceeded on the basis that I should re-make the Decision in relation to the Second Appellant's appeal on human rights grounds. Ms Rahman submitted that, although the Second Appellant is now aged twenty-four, he has always formed part of the family unit and has not formed his own independent life. She submitted therefore that, since the other Appellants are to be permitted entry, his appeal should be allowed on human rights grounds. She directed my attention to evidence before the Judge as to the Second Appellant's position as follows:-
    - Mr Shah's statement ([AB/5-8] at [21] and [23])
    - Mr Shah's oral evidence as set out at [9] of the Decision
    - The decision of First-tier Tribunal Judge Thomas promulgated on 5 August 2011 in an earlier appeal which, whilst dismissing the appeals of the Second to Fourth Appellants in these cases, found that the family has a close relationship
    - Mr Shah's letter in support of the Appellants' applications dated 19 February 2014 ([RB/56-57])

She also made submissions as to the relevant law particularly in relation to the recent Supreme Court judgment in MM (Lebanon) and others v Secretary of State for the Home Department [2017] UKSC10 ([39] to [44] of the judgment).

75. I do not deal at this stage with the substance of those submissions because in the course of our discussions about what directions if any were required for the Appellants to adduce further evidence, a dispute arose as to the relevant date for my consideration of Article 8 – whether should be at the date of the Respondent's decision or at the date of the hearing before me.

76. Mr Mills referred me again to the terms of Section 85A of the 2002 Act and submitted that this restriction applies just as much to the consideration of human rights as to the application of the Rules. Ms Rahman indicated that she had not foreseen this dispute arising. It was not prefaced in the Rule 24 statement although, in fairness, as I have already indicated, the Appellants' fourth ground was itself shortly stated and far from clear.

77. I therefore decided that the appropriate course was to adjourn the resumed hearing with directions for written submissions on this question. Once those are received, I will then make a further decision in writing on the papers on that issue and give directions as to further evidence (if that appears necessary) before re-making the Decision in relation to the Second Appellant.

DECISION

Appeals of First, Third and Fourth Appellants

I am satisfied that the Decision contains a material error of law in relation to these Appellants. The decision of First-tier Tribunal Judge Hawden-Beal promulgated on 6 May 2016 is set aside. I substitute a decision allowing the appeals of the First, Third and Fourth Appellants on the basis that the Respondent's decisions are not in accordance with the Rules.

Appeal of Second Appellant: S Q A – OA/08180/2014

I am satisfied that the Decision contains a material error of law in relation to the Second Appellant's appeal on human rights grounds. I therefore set aside the Decision so far as concerns his appeal but I preserve the findings at paragraph [19] of the Decision which are not challenged.

The resumed hearing of his appeal to re-make the Decision is adjourned with the following directions:-

(1) The Second Appellant shall file with the Tribunal and serve upon the Respondent within fourteen days from the date when this decision is sent his submissions in relation to the point in time at which his Article 8 rights fall to be considered by this Tribunal and the legal basis on which those submissions are founded. Those submissions should also set out the Second Appellant's position as to the evidence which the Tribunal may take into account in

relation to this issue and what directions are sought in relation to the re-making of the decision in his appeal.

(2) The Respondent shall file with the Tribunal and serve upon the Second Appellant within fourteen days from the date when the Second Appellant's submissions as set out in (1) above are served, her submissions on the same issues also setting out the legal basis on which those submissions are founded and any directions sought in relation to the re-making of the decision.

(3) Thereafter, the file shall be returned to me for a decision to be made on the papers on the timing issue together with further directions as necessary for the re-making of the decision and any resumed hearing.

Signed Dated: 14 March 2017

Upper Tribunal Judge Smith

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08180/2014

THE IMMIGRATION ACTS

Decision and directions made on the papers
On Thursday 8 June 2017

Determination Promulgated

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Before
UPPER TRIBUNAL JUDGE SMITH

Between
MR SYED QAISER ABBAS
(NO ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, ISLAMABAD

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Although anonymity was granted in my earlier decision, the appeals of the minor Appellants have been allowed and only the Second Appellant's appeal remains. He is not a minor child and there is no reason therefore to continue the anonymity order.

DECISION AND DIRECTIONS

Background

78. By a decision promulgated on 17 March 2017 ("the Decision"), I allowed the appeals of this Appellant's mother and siblings against the Respondent's decision dated 16 December 2014 refusing them entry clearance to join their husband/father, Mr Shah, who is a British citizen.

79. By the Decision, I also found an error of law in the decision of First-tier Tribunal Judge Hawden-Beal promulgated on 6 May 2016 dismissing this Appellant's appeal. I directed that the appeal should remain in this Tribunal for re-making. However, I was unable to proceed directly with the re-making of the decision because, as appears from [14] and [15] of the Decision, a dispute arose as to the relevant date for my consideration of Article 8 ECHR. Ms Rahman for the Appellant appeared to submit that it was as at the date of the hearing before me. Mr Mills for the Respondent submitted that I could only consider circumstances as they existed at the date of the Respondent's decision under appeal.

80. I therefore gave directions for written submissions on this issue to be filed and served and I adjourned the appeal for re-making on the basis that I would provide a further decision on this issue following consideration on the papers and would give further directions thereafter for the re-making of the decision and any resumed hearing.

81. I have received submissions from Ms Rahman dated 27 March 2017 with relevant legal provisions and authorities. I have not received submissions from the Respondent and the deadline for filing and serving those submissions has now passed. It may be though that, in light of Ms Rahman's submissions, it was not thought by the Respondent to be necessary to make submissions since the core submission made by Mr Mills appears now to be accepted.

The Appellant's Submissions

82. The Appellant accepts that his appeal pre-dates the coming into force of the Immigration Act 2014. The appeal is therefore brought pursuant to section 82(1) Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") read with section 82(2)(b).

83. By reason of sections 85 and 85A of the 2002 Act as those provisions stood prior to amendment, "in relation to an appeal under section 82(1) against an immigration decision of a kind specified in section 82(2)(b) …the Tribunal may consider only the circumstances appertaining at the time of the decision.."

84. It is therefore accepted by the Appellant that I can consider only those circumstances which existed when the Respondent entry clearance officer made his or her decision. The Appellant refers also to the House of Lords' judgment in

AS (Somalia) (FC) and another v Secretary of State for the Home Department [2009] UKHL 32 and SA (ambit of s.85(5) of 2002 Act) Pakistan [2006] UKAIT 00018 ("SA") which are to the effect that, even in relation to human rights, the Tribunal is not required to and indeed cannot (because of section 85A of the 2002 Act) consider events which post-date the Respondent's decision. That is not contrary to the duty placed on the Tribunal by the Human Rights Act 1998 because Parliament has specifically circumscribed the limits of the Tribunal's consideration.

85. That is though not the end of the matter. The Appellant refers to the decision of this Tribunal in DR (ECO: post-decision evidence) Morocco [2005] UKIAT 00038 and submits based on the guidance in that case that the Tribunal is entitled to take into account post-decision evidence which relates to circumstances as they existed at the time of the Respondent's decision. That is confirmed by the decision in SA.

86. The submissions also refer at [18] and [19] of the submissions to the best interests of the child. This Appellant of course is not and has not been at any relevant date a child. I need not deal with those submissions at this stage in any event; whether they are relevant is a matter for me to consider when re-making the decision. Nor do I need to say anything about the lengthy list of evidence which it is said I can take into account. I will consider that evidence when coming to re-make the decision.

Conclusions

87. The Appellant now accepts that the relevant date for consideration of the Appellant's Article 8 case is the date of the Respondent's decision. He accepts that I cannot take into account events post-dating that decision. I can though take into account evidence which relates to circumstances which were in existenace at that date. I can therefore take into account the extent and nature of the Appellant's family and private life as it existed at that date.

88. There is a slightly more nuanced point about the extent to which I can take into account the separation of the Second Appellant from the rest of his family when assessing the level of interference with the Appellant's family and private life and the proportionality of the Respondent's refusal to grant him entry clearance. The circumstances at the date of the Respondent's decision were that his mother and siblings were in Pakistan and their applications also were refused. However, I have since found that the Respondent's decision in that latter regard was not in accordance with the Rules.

89. This is not a point which is addressed in the Appellant's written submissions. I have not received any submissions from the Respondent and so I do not know what stance she takes in this regard. It is though a point which I do not need to determine at this juncture as the Appellant seeks a direction that he be permitted to adduce further evidence prior to the re-making of the decision. In those circumstances, I have made that direction and I have also directed a further oral

hearing prior to the re-making of the decision. This will enable the Appellant's sponsor and father to give oral evidence if he chooses to do so and will give both parties the opportunity to make oral submissions on the issue identified at [12] above (if necessary) and on the evidence which I should take into account.

DIRECTIONS

1. **The Appellant is to file with the Tribunal and serve on the Respondent within 28 days from the date when this decision is sent any further evidence on which he relies (which evidence may relate only to circumstances as they were at the date of the Respondent's decision).**

2. **The appeal will be relisted before UTJ Smith in Birmingham on the first available date thereafter for a resumed hearing with a time estimate of three hours.**

Signed  Dated: 8 June 2017

Upper Tribunal Judge Smith