Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00191/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th April 2018	**On 21st May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR MQA
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – UKVS SHEFFIELD

Respondent

Representation:
For the Appellant: Ms A Basharat, Counsel instructed by Buckingham Legal Associates
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Pakistan, born on 16th September 1997 appealed to the First-tier Tribunal against the decision of the Entry Clearance Officer (ECO) of 25th November 2015 to refuse the Appellant's application for entry clearance to join his father in the United Kingdom under paragraph 297 of the Immigration Rules. In a decision promulgated on 25th April 2017 the First-tier Tribunal Judge dismissed the Appellant's appeal under Article 8 of the ECHR. The Appellant now appeals to this Tribunal with permission granted by Upper Tribunal Judge Plimmer on 29th January 2018.

2. The background to this appeal is that the Sponsor came to the United Kingdom in 1998 and claimed asylum. He was granted indefinite leave to remain in 2011 and is a naturalised British citizen. The Appellant, his son, lived with his mother. However it is the Appellant's case that his mother is now unwell and cannot look after him because she needs care herself. The Appellant says that he lives with his grandfather who is elderly and can no longer look after him. The Sponsor claims to make the main decisions in the Appellant's life. The Sponsor says that he was working until September 2016 when he had a car accident in Pakistan. It is claimed that he is in receipt of Employment Support Allowance and housing benefit and that he expects to return to work when he feels better.

3. The ECO refused the application for entry clearance under paragraph 297 of the Immigration Rules. The ECO did not accept that the Appellant is related to the Sponsor as claimed. However on the basis of the evidence before her the First-tier Tribunal Judge did accept that the Appellant is the Sponsor's son. The ECO did not accept that the Sponsor has had sole responsibility for the Appellant's upbringing. However in considering all of the evidence of financial support, contact between the Appellant and the sponsor and decision making, the First-tier Tribunal Judge found that the Sponsor has had sole responsibility for the Appellant [19]. These findings have not been challenged.

4. The third main reason for the refusal of entry clearance is that there was not evidence that the Sponsor would be able to adequately maintain himself and the Appellant without further recourse to public funds. The ECO considered the Sponsor's income and outgoings and concluded that the net weekly income after housing costs was less than the level of income support and therefore adequate maintenance requirements for the Appellant and Sponsor had not been met. The First-tier Tribunal Judge considered this matter at paragraphs 20 to 22 of the decision. In considering the figures put forward by the Appellant and Sponsor at the date of the application the judge took into account the decision in **KA & Others (Pakistan) [2006] UKAIT 00065** where the Tribunal held that it would not be appropriate to have immigrant families existing on resources that were less than the income support level for a British family of that size. The judge considered the figures concluding that the Sponsor was earning less than the income support rates for a lone parent and child over 18, i.e. £140 per week and found on balance that the Appellant did not meet this requirement of the Rules [22]. Again this finding has not been challenged.

5. The judge went on to consider the Appellant's appeal under Article 8 outside the Rules. As the Appellant applied after 6th April 2015 and his appeal is on human rights grounds of appeal, the judge directed herself appropriately at paragraph 24 where she said that it was necessary to conduct a full proportionality exercise. The judge found that the Appellant and the Sponsor are related as father and son and at the date of the application the Appellant was a minor and that they have a genuine and subsisting relationship and family life is engaged. The judge considered evidence as regards the genuine and subsisting relationship including the fact that there is a relationship between the parties and the Sponsor makes the main decisions in the Appellant's life, that the Appellant's mother is too ill to look after him and make decisions for him, that

she needs care herself and that the Sponsor is the person with sole responsibility for the Appellant [29].

6. In considering Section 117B of the Nationality, Immigration and Asylum Act 2002 the judge noted that the evidence showed that adequate income is not available for the Appellant in the UK. In conclusion, at paragraph 31, the judge said:

> "The Sponsor is a British citizen and not required to leave the UK and I find he can visit the Appellant and continue to provide for him as he has done in the past. I find that the Appellant does not meet the requirements of the immigration rules and therefore public interest does not tip the balance in his favour. I find on balance that the refusal of entry clearance is proportionate."

7. It is contended in the grounds firstly that the financial requirements are not mandatory. Reference is made to the decision in **KA** and it is contended that in assessing adequacy the levels stipulated are, in essence, a guide to assess if there is adequate maintenance available to the Appellant.

8. The second main ground contends that in considering proportionality the First-tier Tribunal Judge did not give sufficient consideration to the positive factors in favour of the Appellant and the Sponsor. This ground is articulated in the grant of permission to appeal by Upper Tribunal Judge Plimmer who considered it arguable that the First-tier Tribunal had given inadequate reasons why the compassionate factors of the case including the Sponsor's car accident and health needs do not outweigh the public interest. She considered that the judge had given inadequate reasons for the finding at paragraph 31 that the public interest does not tip the balance in the Appellant's favour and that inadequate reasons had been given for finding that the refusal of entry clearance is proportionate given the accepted facts in the case. She also considered it arguable that given the Appellant's age and potential for employment the First-tier Tribunal failed to take into account a relevant factor when undertaking the balancing exercise.

9. At the hearing Ms Basharat expanded on the grounds and submitted that the First-tier Tribunal Judge failed to take account of the Sponsor's medical condition and failed to consider the Sponsor's ability to work. In his submissions Mr Duffy accepted that the decision was brief and appears to not do anything except consider the Rules. However, he pointed out that paragraph 297 does have a maintenance requirement and the judge had therefore an obligation to consider maintenance. He further submitted that the fact the Appellant's failure to meet the requirements of the Rules due to the maintenance requirement could not be sidestepped via an Article 8 assessment. He submitted that in her Article 8 assessment the judge had to take account of factors at the date of the hearing. Whilst he accepted that the assessment could have been more detailed he submitted that it was sufficient. In his submission as at the date of the hearing the Sponsor was in receipt of Employment Support Allowance which was only payable for himself. In his submission the Sponsor would not be able to meet the maintenance requirement whilst on this benefit alone; he could only do so if he was in receipt of disability benefits which would be paid to a higher level.

10. It appears in my view that the assessment at paragraph 31 is inadequate. The judge has failed to engage with the positive factors in the Appellant's favour appearing to consider that the failure to meet the requirements of the Rules is determinative of the proportionality assessment.

11. I have considered the evidence before the First-tier Tribunal Judge. Nothing further was submitted to me and the Sponsor did not attend the hearing. Ms Basharat submitted that the Sponsor was not in attendance because his mobility is restricted and he was unable to travel to the hearing. However there was no further evidence before me in relation to that.

12. I have considered the contents of the Appellant's bundle. I note that at the date of the hearing the Appellant was residing with his paternal grandfather who had been looking after him since 2013. He said that his mother has been unwell and because of her ill-health his father, the Sponsor, had been providing for him financially since 2013. The Appellant said in his witness statement that he would be able to work when he joined his father in the UK and would therefore not be relying on public funds. He pointed out that when the application was made his father did have more than the required minimum amount as earnings. He suggested that if the right decision had been made in the first place then he would have already joined his father in the UK. He also said that he would like to join the Sponsor in the UK so that he could support him in circumstances where his health is deteriorating after an accident.

13. In his witness statement the Sponsor said that he had been separated from his family for a number of years but his wife's health condition deteriorated and she has not been able to look after the children. He referred to his own ill-health saying that he suffers from diabetes, high blood pressure and had a facial injury. He said that his mental health is poor and he cannot manage things on his own. He said that if the Appellant were to come to the UK he would support himself through working.

14. There is a letter from the Appellant's paternal grandfather at page 39 of the Appellant's bundle. That states that the Sponsor cannot stay in Pakistan because of "medication". It states that from September 2016 the Sponsor has been unable to work and he needs someone from his family "as per doctor advised in UK". At page 46 there is a permission letter from the Appellant's mother who also refers to the Sponsor's ill-health and saying that he needed someone from his family to take care of him.

15. There is some evidence in the Appellant's bundle in relation to the Sponsor's medical condition. From page 250 onwards there is a report from South East Hertfordshire Wellbeing Team dated 1st November 2016 which talks about the Sponsor's pain in his back and face which prevents him from sleeping. It also talks about the fact that he has been suffering from dizziness. It states that he has been living in very isolating circumstances and that he has no family and that he has been struggling financially and accepts that he now needs support. He states that he wanted his son to come from Pakistan as a carer as he did not want to be a burden on the system and felt that his son could care for him and help with things that he struggles to do due to pain. Medical evidence from Pakistan on 24th September 2016 states that the Sponsor was

injured in a road accident and sustained a facial injury for which he required ten stitches and heavy bleeding and wounds on different parts of his body.

16. The evidence set out above was not considered by the judge when carrying out the proportionality assessment. The evidence raises factors which were capable of being weighed in the balance in favour of the Appellant as against the public interest in these circumstances. In my view the judge gave inadequate reasons for finding that the public interest outweighed the Appellant's circumstances without considering these matters. Therefore I find that the First-tier Tribunal Judge gave inadequate reasons for finding that the refusal of entry clearance is proportionate.

Remaking the Decision

17. The parties agreed that if I accepted that the Grounds of Appeal had been made out it would be appropriate for me to remake the decision on the basis of the evidence before me. There was no dispute in relation to the First-tier Tribunal Judge's findings that there is family life and that the decision amounts to interference with family life in this case.

18. In considering proportionality I take into account as weighing in favour of the public interest the fact that the Appellant cannot meet the maintenance requirements of the Immigration Rules. I take into account that the Sponsor is a British citizen and is not required to leave the UK. He can continue to visit the Appellant as he has done since leaving Pakistan in 1998.

19. I take into account Section 117B of the 2002 Act. I note that the Respondent had not taken issue with the Appellant's ability to speak English as noted at paragraph 30 of the First-tier Tribunal Judge's decision and this finding has not been contested. The Sponsor is currently in receipt of Employment Support Allowance and Housing Benefit and on the basis of receipt of these benefits, if he were to come to the UK and they were to continue to be in receipt of benefits they would not be financially independent.

20. In the Appellant's favour I take into account the evidence from the Appellant and the Sponsor that the Appellant intends to work when he comes to the UK. In **MM (Lebanon) [2017] UKSC 10** the Supreme Court considered potential future earnings as follows:-

> "99. Operation of the same restrictive approach outside the rules is a different matter, and in our view is much more difficult to justify under the HRA. This is not because "less intrusive" methods might be devised (as Blake J attempted to do: para 147), but because it is inconsistent with the character of evaluation which article 8 requires. As has been seen, avoiding a financial burden on the state can be relevant to the fair balance required by the article. But that judgment cannot properly be constrained by a rigid restriction in the rules. Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly. These are not matters of policy on which special weight has to be accorded to the judgment of the Secretary of State. There is nothing to prevent the tribunal, in the context of the HRA appeal, from judging

> for itself the reliability of any alternative sources of finance in the light of the evidence before it. In doing so, it will no doubt take account of such considerations as those discussed by Lord Brown and Lord Kerr in Mahad, including the difficulties of proof highlighted in the quotation from Collins J. That being the position before the tribunal, it would make little sense for decision-makers at the earlier stages to be forced to take a narrower approach which they might be unable to defend on appeal.
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> 100. As already explained, we do not see this as an issue going to the legality of the rules as such. What is necessary is that the guidance to officers should make clear that, where the circumstances give rise to a positive article 8 duty in the sense explained in Jeunesse, a broader approach may be required in drawing the "fair balance" required by the Strasbourg court. They are entitled to take account of the Secretary of State's policy objectives, but in judging whether they are met, they are not precluded from taking account of other reliable sources of earnings or finance. It is open to the Secretary of State to indicate criteria by which reliability of such sources may be judged, but not to exclude them altogether."

21. Whilst I accept that no details have been provided as to any particular job offer it is appropriate to take into account that the Appellant intends to work in the UK. This is a case of family life between a father and son who is now a young adult. I take into account that no other factors in Section 117B are relevant for the purposes of this appeal. I note that the only aspects of the Immigration Rules not met are the maintenance requirements and that the Appellant met the requirements as to relationship and sole responsibility at the time of the decision.

22. I take into account the fact that the Sponsor has been unwell and is suffering from a lack of family support and social isolation. I take into account the evidence that the Appellant will provide the Sponsor with care and support which should reduce the likelihood of him becoming a burden on the system. He will also contribute to the household income.

23. I weigh all these factors in considering proportionality. I take account of the positive factors in the Appellant's favour including the fact that the Sponsor is unwell and the Appellant will be able to provide him with care and support, he will be able to contribute to the family's finances, and that (although he is now a young adult), the Sponsor has had sole responsibility for the Appellant. In these circumstances I find that the decision to refuse entry clearance is not proportionate to the Respondent's legitimate aim in this case.

Notice of Decision

24. The decision of the First-tier Tribunal contains a material error of law and I set it aside.

25. I remake the decision by allowing the appeal under the Immigration Rules.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 16th May 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award because all of the evidence enabling me to make this decision was not provided to the ECO.

Signed Date: 16th May 2018

Deputy Upper Tribunal Judge Grimes