UPPER TRIBUNAL

(IMMIGRATION AND ASYLUM CHAMBER) APPEAL NUMBERS: OA/10064/2015
OA/09738/2015
OA/09736/2015
OA/09739/2015

THE IMMIGRATION ACTS

Heard at: Field House
On: 29 October 2018

Decision and Reasons Promulgated
On: 16 November 2018

Before
Deputy Upper Tribunal Judge Mailer

Between
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ANONYMITY DIRECTION MADE

Appellants

and
ENTRY CLEARANCE OFFICER

Respondent

Representation
For the Appellants: Mr P Turner, counsel, instructed by Mamoon Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

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.

1. The appellants are the mother and her three children born on 7 July 1974, 23 January 1999, 7 September 2002 and 7 March 2005. They are nationals of Pakistan.

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2. They appeal with permission against the decision of First-tier Tribunal Judge Holt who, in a decision promulgated on 3 August 2018 dismissed their appeals against the decision of the respondent to refuse their applications for an entry clearance to join their sponsor in the UK. He is the first appellant's husband and the father of the other appellants. He is in the UK working. He made an application for his family who currently live in Pakistan to join him in the UK. At the date of application, the second appellant was still a child but is now an adult [2].

3. The first appellant's appeal was originally dealt with separately from the other appellants. Her appeal was dismissed by First-tier Tribunal Judge Pooler, following a hearing in Stoke on Trent on 5 April 2017. The appeals of the children appellants were dismissed by First-tier Tribunal Judge Lloyd Smith following a hearing in Manchester on 19 July 2016.

4. On 15 December 2017 the Upper Tribunal decided to remit all the cases back to the First-tier Tribunal for the appeals of all the family members to be heard together.

5. It was directed that there should be a fresh decision on all matters. On 12 July 2018 the joint appeals came before First-tier Tribunal Holt at Manchester Piccadilly.

6. She was satisfied that the sponsor and the appellants, between them, never fulfilled the Immigration Rules as the correct bank statements for the relevant period were never provided [22-23].

7. Judge Holt stated that this was not the end of the matter however: The respondent had conceded that there is family life between the appellants and their sponsor. She also accepted his evidence that he visits his family on holiday in Pakistan once a year. However, there is nothing exceptional about this arrangement which has been going on for almost ten years. The family had chosen to live a lifestyle with the sponsor in the UK whilst the rest of the family are based in Pakistan. [24]

8. She found that it is open to the appellants and sponsor to make fresh applications if they wanted to although the eldest child would no longer be eligible for consideration [24].

9. She found nothing exceptional about the case which demanded assessment outside the Rules. She nonetheless considered the case applying the Razgar "five stage test" [25].

10. She found that the proposed decision was an interference with the exercise of the appellants' right to respect for family life. Consideration of whether or not such interference was necessary in a democratic society required her to consider the issue of proportionality. She found that it was entirely proportionate to refuse a case on the basis of failure to demonstrate the requisite income [27].

11. She stated that "aligned" to the above, the fact that the eldest child – the second appellant – would now have to apply to enter the UK if he wanted to by another route 'is of scant relevance'. He is now an adult and apart from anything else '… there is no evidence whatsoever that his personal circumstances are so particular that he needs to come to the UK along with his siblings and mother to be re-united with his father for reasons, such that deprivation of this opportunity would be so fundamental as to breach his Article 8 rights outside the rules' [28].

12. On 13 September 2018, Designated First-tier Tribunal Judge Macdonald granted the appellants permission to appeal. He found that the Judge gave clear reasons why the appellants did not satisfy the terms of the Immigration Rules. However, whilst she did refer to Razgar and found that there was no breach of the family's Article 8 rights, it is arguable that by failing to consider the best interests of the children as a primary consideration the Judge erred in law.

13. Mr Turner, who did not represent the appellants before the First-tier Tribunal, noted that there were two grounds of appeal. He referred to the findings which begin at [21]. He submitted that the Judge erred in failing to consider the best interests of the children, including those overseas, which is relevant in the Article 8 assessment – R (OAO) MM (Lebanon) v SSHD [2017] UKSC 10.

14. Moreover, the appellants' eldest son was under 18 years old when the application was made. He only turned 18 after a decision on the application was made. However, the Judge erred in failing to consider Article 8 and his best interests. He had been waiting to join his sponsor father since 2015 and is now over the age of 18.

15. Mr Turner noted that the Judge stated that she did not know the date that the applications were submitted [21]. She stated that the applications were submitted some time after 5 April 2014 but before 5 April 2015. She noted that the appellant had to provide the tax return for the last full tax year prior to the application.

16. Mr Turner referred to [24] where, as already noted, the respondent conceded that there is family life between the appellants and their sponsor. She accepted that he visits his family on holiday in Pakistan once a year and there is communication between the sponsor and his family and they stay in contact electronically.

17. He submitted that the decision of the Tribunal in Mundeba (Democratic Republic of Congo) (s.55 and para 297(i)(f)) [2013] UKUT 88 was clearly a "key case." The Judge was not referred to that case. The Upper Tribunal held that:

> "The exercise of the duty by the entry clearance officer to assess an 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 interest 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."
>
> Family considerations require an evaluation of the child's welfare including emotional needs. "Other considerations" come into play where there are other aspects of a child's life that are serious and compelling, for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social backgrounds and developmental history and will involve inquiry as to whether:
>
> a. there is evidence of neglect or abuse;
>
> b. there are unmet needs that should be catered for;
>
> c. there are stable arrangements for the child's physical care;
>
> The assessment involves consideration as to whether the combination of circumstances are sufficiently serious and compelling to require admission."

18. He submitted that the eldest child's particular circumstances required a proper consideration and assessment. In addition, there had been substantial delay in this case. The applications were originally dealt with separately and then they came back together.

19. He submitted that the finding at [28], namely, the fact that the eldest child would now have to apply to enter the UK if he wanted to by another route is of scant relevance, is "a nonsense". He made his application when he was under 18. Through no fault of his own he turned 18 at the time of the decision.

20. In any event, family life does not end at the age of 18. There was simply no consideration of his interests at all.

21. In the circumstances the Judge ought to have had regard to the House of Lords decision in EB (Kosovo) v SSHD [2008] UKHL 41. Delay in the decision making process could be relevant to a claim to stay in the UK relying on Article 8. In this context, he submitted that if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes, then it may reduce the weight to be given in the assessment of proportionality to the requirements of immigration control.

22. Mr Turner stated that the Judge found that it was entirely proportionate to refuse the case on the basis of failure to demonstrate the requisite income and their right to respect for family life. She accordingly found that it would be appropriate for the eldest son to be pared off. That finding, "definitely required proper justification and reasoning based not only on his rights but also the impact of separation on the other siblings." The second appellant had still remained living as a family unit with the rest of his family in Pakistan. Nor was there any other "identifiable route".

23. There had thus been no primary consideration given to the best interests of the appellants. Although they did not meet the requirements under Appendix FM-SE, the bank statement produced showed receipts from sales in excess of £24,000 for the period 6 April 2014 until 16 February 2015.

24. On behalf of the respondent, Mr Avery submitted in his Rule 24 response that the Judge directed herself appropriately. She was right to conclude that there were no exceptional matters to be considered outside the Rules. Family life had been maintained at a distance for many years.

25. The statement of the sponsor was short and did not address the issues of the family. Nor was any additional evidence given at the hearing. Accordingly, nothing was put before the Judge. She noted that the situation had been to maintain the status quo. That was a choice that the family made to be separated. There was no evidence relating to adverse effects on any of the appellants.

26. With regard to delay, he submitted that the appellants were not in the UK. This is accordingly not a relevant factor.

27. In reply, Mr Turner repeated his submission that, having accepted that family life did exist in this case, the Judge was obliged to undertake a proper assessment of the children's best interests. Having regard to the delay in making the decision, there needed to be a proper justification relating to the continued separation of the appellants from their sponsor. There was no analysis undertaken in relation to the impact on the younger children. They were 13 and 16 at the time.

Assessment

28. I have set out the findings and reasoning of the Judge in some detail. In particular, having found that the appeal could not succeed under the Rules, she accepted that there is family life between the appellants and the sponsor. She referred to the sponsor visiting Pakistan on holiday once a year and stated that the family has chosen to live a lifestyle with the sponsor in the UK. She noted that the sponsor's wife and dependent children can choose to make a fresh application if they want to. She noted that the second appellant would no longer be eligible for consideration.

29. It was conceded that there was family life between the appellants, including him and the sponsor. That was the context in which the assessment under s.55 of the 2007 Act with regard to the best interests of the children, should have been made. There has not been a proper evaluation, particularly with regard to the younger children who were 13 and 16 years old at the relevant time.

30. The Judge stated at [28] that the fact that the second appellant would have to apply to enter the UK by another route now 'is of scant relevance'. However, she failed to take into account that at the date of application he was under 18 years old, and there had been a delay before the decision was made.

31. She compounded this error by stating that as an adult, there is no evidence whatsoever that his personal circumstances are so particular that he needs to come along with his siblings and mother to be reunited with his father for reasons, such that deprivation of this opportunity would be so fundamental as to breach his Article 8 rights outside the Rules.

32. However, she did not take into account that the appellants had lived together as a family unit in Pakistan. The fact that the appellant turned 18 after the date of decision did not militate against the need to consider the impact upon him and the others, of the potential separation from this family unit. Nor was there any evidence indicating that he was living an independent life at the relevant time.

33. I accordingly find that the decision of the First-tier Tribunal involved the making of an error on a point of law. In the circumstances, a fresh decision will have to be made. I am satisfied that the extent of judicial fact finding which is necessary in order for the decision to be re-made, is extensive. In the circumstances I find that it is just and fair to remit the case to the First-tier Tribunal for a fresh decision to be made.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside.

The appeal is remitted to the First Tier Tribunal (Manchester Piccadilly) for a fresh decision to be made by another Judge.

Anonymity direction made.

Signed Dated: 8 November 2018

Deputy Upper Tribunal Judge Mailer