Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/09838/2017
HU/09837/2017

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre
On 14 May 2019

Decision & Reasons Promulgated
On 11 June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR S S
MR H S
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr R Parkin, Counsel, instructed by Rayan Adams Solicitors
For the Respondent: Ms Aboni, Home Office Presenting Officer

DECISION AND REASONS

The Appellants are nationals of Pakistan and are brothers born respectively on 31 August 1999 and 20 July 2002. They applied for entry clearance to join their father in the United Kingdom, where he is present and settled. That application was made on 25 May 2017. In decisions dated 11 August 2017 the applications were refused with reference to paragraph 297(i)(e), (f) and (v) of the Immigration Rules.

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The Appellants appealed against that decision and the appeals came before Judge of the First-tier Tribunal Aziz for hearing on 25 June 2018. In a Decision and Reasons promulgated on 9 July 2018, the judge dismissed the appeals, finding that the evidence given was not credible and that the requirements of the Rules were not met, nor were there any compelling or exceptional circumstances to justify allowing the appeal outside the Rules pursuant to Article 8.

Permission to appeal was sought, in time, on the basis that the judge had erred materially in law, in that the judge had of his own volition investigated the relationship between the Appellants' father and their stepmother and thus significantly departed from the grounds in respect of which the applications had been refused; secondly, that the judge failed to engage with the alternative head of claim, i.e. paragraph 297(i)(f), whether there were serious and compelling family or other considerations making exclusion of the Appellants undesirable, and the judge had entirely failed to engage with the best interests in an entry clearance application, *cf.* Mundeba (Section 55 and paragraph 297(i)(f)) [2013] UKUT 00088 (IAC), which provides as follows:

> *"(i) The exercise of the duty by the ECO 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 interests require.*
>
> *(ii) 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.*
>
> *(iii) Although the statutory duty under Section 55 of the UK Borders Act 2009 only applies to children within the UK the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under Section 55.*
>
> *(iv) Family considerations require an evaluation of the child's welfare including emotional needs. Other considerations come in to 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.*
>
> *(v) As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor. Change in the place of residence where a child has grown up for a number of years when socially aware is important: see also SG Nepal [2012] UKUT 265 (IAC)."*

It was asserted that the judge's decision lacked consideration of any of these plainly relevant factors.

Permission to appeal was granted by First-tier Tribunal Judge Keane in a decision dated 3 October 2018 in relation to the grounds of appeal, holding as follows:

> *"The grounds disclosed arguable errors of law but for which the outcome of the appeal might have been different. First, although the judge was aware of the guidance offered by the Upper Tribunal in Mundeba [2013] UKUT 00088 (IAC) nowhere in the judge's decision did the judge embark upon an appropriate assessment of the Appellants' welfare and their best interests. It was incumbent upon the judge to embark upon such an assessment and to arrive at findings of fact. The judge arguably failed to do so. Secondly, although the genuineness of the Sponsor's and Mrs Kaur's relationship had not been put in issue by the Respondent in the notices of decision the judge resolved to do so if paragraphs 27 to 31 inclusive of the judge's decision were read. If paragraph 30 in particular is read it is difficult to avoid the impression that the judge embarked upon a line of persistent questioning. In time the judge arrived at a finding that the Appellant and Mrs Kaur had fabricated an account as to the circumstances in which they met and married, 75 of the decision. The judge's conduct in introducing the issue of the Sponsor's and Mrs Kaur's relationship, in circumstances where the Respondent had not done so, arguably amounted to a procedural irregularity capable of making a material difference to the outcome and the fairness of the proceedings. The application for permission is granted."*

Hearing

At the hearing before the Upper Tribunal, Mr Parkin sought to rely on the grounds of appeal. In respect of the first ground of appeal, he referred to [27] to [31] of the decision and asserted that the judge had engaged in what was essentially a lengthy line of cross-examination as to how the parties met and how the relationship was formed. He submitted that it is clear from [30] that it

was quite apparent that this weighed heavily on his mind and this was wrong, given that no criticism of the marriage had ever been advanced by or on behalf of the Secretary of State and even if it were it was not directly relevant, given that the appeal was in respect of permission to enter the UK by the Sponsor's children. The genuineness of the marriage or otherwise did not go to the issues of sole responsibility or the circumstances in Pakistan and there was no logical basis for questioning this as it was not a spouse application nor a point taken on behalf of the Entry Clearance Officer and was essentially irrelevant.

Mr Parkin submitted that this was a significant error, given that it makes up a substantial body of the decision in terms of the judge's reasoning. He submitted that the judge was distracted by concerns about the genuineness of the marriage and that this ultimately was the reasoning behind his decision to dismiss the appeal despite the fact it was not relevant nor a factor in the refusal.

Mr Parkin submitted in respect of the second ground of appeal that it is clear from [77] that the judge simply did not consider the alternative head of claim, i.e. whether there were compelling family or other considerations which would make exclusion undesirable. No reason has been provided, just a bare assertion. He submitted that it is not known what conclusion the Tribunal would have come to had the correct test been properly applied, that they may have come to a different decision and thus the errors are material.

Mr Parkin further sought to rely on the third ground of appeal and whilst the judge at [47] noted the decision in Mundeba he simply failed to apply it in practice nor provide any reasons for not engaging with Section 55 and the guidance provided in Mundeba.

Ms Aboni submitted in response that there was a Rule 24 response dated 20 November 2018. This provides as follows:

> *"The Respondent opposes the Appellants' appeal ... The Respondent submits that whilst the judge asked questions of the Sponsor and his wife about the timing of their relationship and that this was not relevant to the entry clearance application of the children this appears to have been something that snowballed during the hearing because of the conflict in the evidence between the witnesses rather than an impermissible attempt by the judge to introduce another reason for refusal. In any event, the judge gave cogent reasons for finding the Sponsor did not have sole responsibility for the Appellants nor that there were reasons that made their exclusion undesirable. It is clear the judge rejected the Sponsor's claim about the children to be untrue and referred to contradictory and unsupported evidence specifically on those points."*

In respect of the first issue, she submitted that this was not an attempt by the judge to introduce another reason for refusal but rather an attempt to clarify the issues. However, this snowballed due to the fact that there was inconsistent evidence between the witnesses. She submitted this did not affect or impact on the judge's findings regarding the application for entry clearance

and the refusal other than that the Sponsor found the witnesses were unreliable. She pointed out that the judge did not make findings as to the history of the Sponsor and his entry to the UK but did focus on the issue of sole responsibility under the Rules and gave adequate reasons for finding that the Sponsor did not have sole responsibility.

She submitted the judge was entitled to find that the evidence was weak and unreliable, that the documents were inconsistent and that the evidence was incredible and implausible as to the children's circumstances and their relationship with their mother, particularly the claim that she had never had any responsibility for the children despite living in the same household.

Ms Aboni submitted there were also issues with the documentary evidence, highlighted by the judge at [69] to [72], and that the judge gave adequate reasons for finding that the Sponsor did not accept sole responsibility at the date of refusal. She submitted it was open to the judge to find there were no compelling family or other considerations.

Ms Aboni further submitted as regards Article 8 and Section 55 whilst the judge did not expressly cite Section 55 it is clear from [47] that he had the judgment in Mundeba in mind and it was open to him to find that the Appellants had lived in Pakistan all their lives. She submitted there was no material error and the decision should be upheld.

In reply, Mr Parkin submitted if one looks at [75] it simply cannot rationally be said that the matter in relation to the genuineness of the marriage or the lack thereof was irrelevant in respect of the judge's considerations of the issues material to the appeal. He submitted perhaps more significant still, the judge failed to give reasons in respect of paragraph 297(i)(f) and had failed to give proper consideration to that subparagraph.

He submitted that there was clearly some confusion by the judge as to the alternative heads of claim under (e) and (f) and that one of these had received no consideration when the appeals could have succeeded on that basis. He submitted that the decision required setting aside and being remitted for a hearing *de novo*.

I reserved my decision, which I now give with my reasons.

Findings and Reasons

I have concluded that the decision of First tier Tribunal Judge Aziz does not contain material errors of law and should be upheld.

My reasons for so finding are as follows:

18.1. The Judge gave clear and sustainable reasons for finding the evidence of the Sponsor and his wife not to be credible. He made these findings not only in relation to their relationship and marriage, due to the multiple discrepancies in their evidence but also most pertinently in respect of the key issue of sole responsibility at [54]-[72]. Therefore, whether or not it

was procedurally fair for the Judge to make findings in respect of the Sponsor's relationship, his findings in respect of sole responsibility have neither been challenged nor undermined by the grounds of appeal. For the avoidance of doubt, I find that the Judge did not act in a manner which was procedurally unfair as the numerous and substantial discrepancies that arose in respect of the relationship between the Sponsor and his British wife emerged as a consequence of their oral evidence and it was incumbent upon the Judge to address this in his findings.

18.2. The grounds of appeal asserted that the Judge erred in failing to consider whether there were serious and compelling family or other considerations which make exclusion of the child undesirable, pursuant to paragraph 297(i)(f) of the Rules. I note that the Judge did in fact consider this sub-head of the Rule at [77] where he held:

> *"I do not accept that the sponsor has ever exercised sole responsibility over the appellants at any point in his life. I agree entirely with the respondent when they argue that the current arrangements have been put in place in order to circumvent the Immigration Rules and to facilitate their travel to the United Kingdom. For the same reasons, I find that there are no serious and compelling family or other considerations that would make their exclusion from the United Kingdom undesirable. I am not persuaded that the requirements of paragraph 297(i)(f) have been met."*

Given that there has been no challenge to the manner in which the Judge reached this finding and given he did expressly consider this aspect of paragraph 297(i)(f) of the Rules, I find no error of law in this respect either.

18.3. The remaining ground of appeal contains a challenge on the basis that the Judge failed to consider the best interests of the Appellants. The oldest Appellant is now an adult aged 19, thus technically given that this was a human rights appeal and the date of consideration is the date of hearing, his best interests are no longer in issues, however, his brother remains a minor aged 16. As Mr Parkin acknowledged, the Judge did direct himself with regard to the decision of the Upper Tribunal in <u>Mundeba</u> (Section 55 and paragraph 297(i)(f)) [2013] UKUT 00088 (IAC), the headnote of which is set out at [3] above, however, his submission was that the Judge failed to apply it.

18.4. I note that headnote (v) of *Mundeba (op cit)* provides:

> "*As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor. Change in the place of residence where a child has grown up for a number of years when socially aware is important: see also <u>SG</u> Nepal [2012] UKUT 265 (IAC)."*

At [78] of his decision, the Judge considered Article 8 outside the Rules and found that there was no exceptional or compelling circumstances which would warrant consideration of the applications outside the Rules; that the Appellant live in Pakistan with their mother and attend school or college and there was nothing preventing this from continuing. I find that the Judge has, in effect, applied (v) of the headnote in *Mundeba*. The decision in *Mundeba* does not in any event mandate that a child's best interests operate as a trump card in an entry clearance appeal

18.5. I further find that, whilst it is the case that the Judge did not go on to make a specific finding in respect of the Appellants' best interests, it is apparent from the nature and extent of the Judge's reasoned findings that this would not have made any material difference to the outcome of the appeal.

Notice of Decision

The appeal is dismissed.

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

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.

Signed Rebecca Chapman Date 9 June 2019

Deputy Upper Tribunal Judge Chapman

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Rebecca Chapman Date 9 June 2019

Deputy Upper Tribunal Judge Chapman