Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/12425/2018
HU/12430/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th April 2019	**On 23rd April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

HACER [K]
[O K]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Alam, Counsel instructed by 12 Bridge Solicitors
For the Respondent: Ms S Jones, Home Office Presenting Officer

DECISION AND REASONS

1. The Respondent refused the application for leave to remain which had been made by the Appellants on 24 May 2017. They are a mother and son, the son now being almost 12 years old. The 1st Appellant's husband came here lawfully for the purposes of work. There is an adult son also within the family who has a separate

application for leave to remain. These Appellants had arrived in the United Kingdom on 8 October 2014 to join the 1st Appellant's husband.

2. The appeal against the refusal of the application was dismissed by Judge Aujla sitting at Taylor House on 8 January 2019. Permission to appeal against that decision was granted by Upper Tribunal Judge Smith on 11 March 2019.

3. The basis of the grant of permission was that it is arguable that the judge has erred in failing to consider the financial position of the family as at the date of the hearing. Judge Smith went on to say that whilst this might not enable the family to meet the Rules based on the date of application, it is arguably material to the overall assessment outside the Rules (having particular regard to Section 117B). She went on to say that she accepts that the error in this regard (if established) may not be material because the 1st Appellant still fails the English language requirement, but it is for me to determine the position as regards materiality.

4. The Respondent did not file a Rule 24 notice. Ms Jones placed reliance upon the decision and argued that the judge did not materially err in any respect. As the English language requirement had not been met by the 1st Appellant, the case fell apart because the Rules were not met irrespective of income requirements.

5. Mr Alam argued that the judge did err in not looking at the evidence as at the date of the hearing as this was a human rights appeal. Whilst the 1st Appellant and her husband did not have adequate income when combined, they were placing reliance on the income of the adult son to enable them to meet the relevant requirements. The 2nd Appellant does not have to meet the English language requirements. If his appeal succeeds, then that is relevant in relation to the 1st Appellant. The Article 8 assessment was inadequate because of the lack of reference to, or consideration of, s55 of the Borders, Citizenship, and Immigration Act 2009.

6. Ms Jones in response argued that this was ill-conceived as the 2nd Appellant has only been here for 4 years. He was 7 when he arrived and he is now 11. He is not a British citizen. It would be the expectation that he would stay with his mother. There was nothing exceptional in this case. There was sufficient within the decision to show that s55 considerations were borne in mind because the judge was aware of the child's position.

Judge Aujla's decision

7. It is noted at [12] that as regards financial requirements, reliance was placed on the income of the 1st Appellant's adult son. The judge sets out the legal framework from [15 to 17] and notes that human rights issues are considered at the date of hearing. He makes specific reference to s117 of the Nationality, Immigration, and Asylum Act 2002 and the various considerations within that. He notes the burden and standard of proof in relation to human rights appeals. The judge summarises the financial information that was before him and the oral evidence and submissions.

8. In the findings section, the judge notes at [27] that the Appellant did not challenge the calculations set out in the Respondent's decision letter which were based on the pay slips submitted by the Appellants. The judge went on to identify at [28] that the 1st Appellant's husband's weekly income fell short by £55.93 per week which meant that the family would qualify for a contribution from Universal Credit and that therefore public funds were required. At [29] the judge noted the reliance on the adult son to make up the shortfall. The judge found that he was not part of the family unit, and his finances should not be taken into account as he was an independent adult and not responsible for maintaining his mother and sibling but only responsible for himself even though he lived as part of the family. The judge went on to therefore find that the Rules were not met as the financial requirements were not met. The judge went on at [30] to consider the English language requirement and the lack of medical evidence to show that the 1st Appellant could not undertake the relevant test. The judge therefore found that the Respondent's findings were open to them on the evidence and were valid and sustainable at [31].

9. At [32] the judge decided that there were no exceptional circumstances to justify overlooking these requirements of the Rules. He said that the family knew that they could only qualify for indefinite leave to remain if they met the Rules. The judge noted the requirements to be considered under s117 of the 2002 Act. He noted that the ability to speak English is a public interest consideration.

10. The judge at [33] noted that the English language requirement did not apply to the 2nd Appellant but the financial requirement did. The judge dismissed the appeals.

Discussion

11. The judge was entitled to find that, in relation to the 1st Appellant, the Rules were not met as the English language requirement had not been met and there was no cogent evidence of her inability to learn English.

12. I am satisfied that the judge materially erred in relation to the financial assessment of the family for the following reason. The adult brother had always lived with the Appellants. Even though he was over 18 (at the date of hearing he was 20), there is no bright line as to when a young person is no longer to be considered part of a family household.

13. In relation to the 2nd Appellant, if his older brother's financial position was incorporated into the finances of the family such as to mean the family would not be reliant on public funds, then he met the Rules and when looking at Article 8 through the prism of the Rules, his appeal could have been allowed.

14. The fact that the 2nd Appellant may have met the Rules is a circumstance that should have been taken into account when considering whether there were compelling circumstances such as to mean that the 1st Appellant's appeal could have been considered outside the Rules. It was argued by Ms Jones that the 2nd Appellant should stay with the 1st Appellant in the normal course of events. I do not agree because if he met the Rules and wished to stay here with his father, then that is a

factor that should have been considered within the assessment of whether or not compelling circumstances existed for the 1st Appellant to be able to stay as well. There is no assessment anywhere within the decision of the impact on the 2nd Appellant of separation from either of his parents and possibly his brother. I do not agree that the s55 assessment in relation to the 2nd Appellant is implied within the decision. There is nothing in the decision that looks at what circumstances he would face in Turkey. I am satisfied that the s55 assessment was inadequate as that is a factor that must be considered on the 1st Appellant's human rights appeal.

15. I am therefore satisfied that the judge materially erred in relation to the assessment of the family finances and the impact that had on the 2nd Appellant as to whether he met the Rules. I am also satisfied that it also adversely impacted on the assessment as to whether compelling circumstances existed such as to mean Article 8 could be met in relation to both Appellants. I am satisfied that these errors are such that they amount to material errors of law.

16. Having heard submissions from both representatives I am satisfied that it is appropriate to remit the matter to the First-tier Tribunal with no findings being preserved as the core financial and s55 assessments have not been done.

17. I direct that the matter be remitted to be heard at Taylor House not before Judge Aujla.

18. No anonymity direction is made.

Deputy Upper Tribunal Judge Saffer
18 April 2019

FEE AWARD

I make no fee or costs award as the matter is ongoing.

Deputy Upper Tribunal Judge Saffer
18 April 2019