



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/02872/2019
HU/02873/2019

THE IMMIGRATION ACTS

**Heard at Bradford via Skype
On 2 September 2020**

**Decision & Reasons Promulgated
On 7 October 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**RWG
RMG
(Anonymity direction made)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sihota of Reiss Solicitors.

For the Respondent: Mrs Petersen Senior Home Officer Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellants appeal with permission a decision of First-tier Tribunal Judge Ince ('the Judge') promulgated on 12 December 2019 in which the Judge allowed the appeal of the mother of the above appellants but refused their appeals for the reasons set out in the determination under challenge.

2. Permission to appeal was granted by another judge of the First-tier Tribunal on the basis this was a complex appeal in which the above appellants were children at the date of application for entry clearance but adults by the date of the hearing, their mother had also applied for entry clearance but had not applied until after the appellants and yet there were two younger children who like their father in the United Kingdom (the sponsor) are British citizens. Permission was granted for the reasons given in the grounds dated 20 December 2019 with reference to the decision in PD and others (Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 00108.

Background

3. The appellants are citizens of Pakistan, the first appellant having been born on 21 November 2000 and his brother, the second appellant, on 19 November 2001.
4. On 9 November 2018 when the first appellant was aged 17 and the second appellant 16 they made applications for entry clearance which were refused on 22 January 2019 on the basis that although they met all the other requirements of Appendix FM of the Immigration Rules ('the Rules') they did not meet the relationship requirement. Their appeals against the decision were lodged on 13 February 2019.
5. In relation to the appeals under the Rules the Judge at [29-34] sets out the reasons why the appellants could not succeed.
6. This is a human rights appeal in which the Judge sets out a self-direction that it is necessary to consider the position of the appellants at the date of decision under the Rules which was 22 January 2019. At [30-31] the Judge writes:
 30. The next question is whether they satisfy paragraph E- ECC.1.6. This provides that one of their parents must either [i] be in the UK with limited leave to enter or remain or that [ii] entry clearance as a partner or a parent is being granted, or has been granted, to that parent. This person can only be their mother (because their father is a British citizen and therefore cannot be a person granted only "*limited leave to enter or remain*"). Under sub-paragraph 1.6 (a) their mother's partner must also be their other parent (which is the case - the sponsor is the other parent). Accordingly, under this rule, only if their mother had already been granted a visa or was in the process of applying for one, would she fall within the rule. The difficulty for the brothers is that their mother had not yet made such an application by the time their decisions were made. Accordingly, on a strict interpretation of the rules, they do not satisfy paragraph E- ECC.1.6 (a).
 31. That leaves the other alternatives, namely (under E- ECC.1.6(b)) that their parent (namely their mother) has had and continues to have sole responsibility for their upbringing [which cannot be satisfied since the sponsor says that he has had such responsibility - my conclusion is that they had joint responsibility, which is usually the case where both parents are alive and involved to some extent in their children's lives] or (under E - ECC.1.6(c) that there are serious and compelling family or other considerations which make exclusion of the brothers undesirable [which I consider cannot be satisfied since the alternative would be that they remained in Pakistan with almost all of their family together with an extended family, accommodation and a means

of support, which I consider cannot amount to circumstances which would satisfy the provisions of the paragraph].

7. The Judge also finds the appellants cannot meet the requirements of paragraph 297(1) as their mother had not applied to come to the UK at the same time and thus could not have been admitted at the same time; and due to the position regarding the issue of sole responsibility and serious and compelling considerations as referred to above.
8. The Judge was satisfied the appellants met the financial requirements of Appendix FM.
9. The Judge considered the merits of the appeal pursuant to article 8 ECHR in a properly structured manner concluding that so far as the appellants mother was concerned any interference with her protected rights would not be proportionate. In relation to the appellants article 8 rights at [57-58] the Judge writes:

57. In respect of the brothers, I have found that they had failed to satisfy your requirements of Appendix FM. Moreover, I note that I have found that, under paragraph E-ECC.1.6 (C) that there were no serious and compelling family or other considerations which made exclusion of the brothers undesirable on the basis that they would be remaining in Pakistan with almost all of their family together with an extended family, accommodation and a means of support - they were not alone nor were they in danger of destitution.

58. I appreciate that they almost satisfied the Immigration Rules (it was, essentially, a question of timing that was against them); that they were exempt from the English language requirements and that they would have been able to live in the UK without recourse to public funds, but as young Pakistani males who were soon to reach adulthood, remaining in Pakistan in the apparently comfortable and safe circumstances that they enjoy and having spent almost all of their juvenile lives without the company of their father, I consider that the scales come down conclusively in favour of the Respondent on this point. I therefore find that the Respondent has demonstrated that refusing their applications to come to the UK is not disproportionate. I therefore dismissed their Human Rights appeals under Article 8.

Error of law

10. Mr Sihota relied upon the grounds drafted by Mr Caswell a barrister who represented the appellants before the Judge. Those grounds assert the Judge erred by failing to consider, having dismissed the appellants appeal under E-EC.1.6, whether the appeal should be allowed pursuant to GEN 3.2 and GEN 3.3 of Appendix FM, thereby failing to make any or any relevant findings of fact as to what was in the best interests of all the relevant children. It is asserted the Judge failed to take into consideration the interests of six such relevant children and failed to make findings whether the appellants mother would simply refuse to travel to United Kingdom if that meant permanently breaking up her family and permanently leaving behind two of her children in Pakistan, and in failing to give any adequate consideration to and/or adequate findings of fact as to whether the sponsor's brother in Pakistan will be content for his nephews to

remain a financial burden on him even after they became young adults, and in failing to assess the impact the refusal of the appellants appeal will have on the whole family.

11. GEN.3 sets out the provision relating to exceptional circumstances in Appendix FM in the following terms:

GEN.3.1.

(1) Where:

(a) the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1. or E-LTRC.2.1. applies, and is not met from the specified sources referred to in the relevant paragraph; and

(b) it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of entry clearance or leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal could result in unjustifiably harsh consequences for the applicant, their partner or a relevant child; then

the decision-maker must consider whether such financial requirement is met through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE (subject to the considerations in sub-paragraphs (3) to (8) of that paragraph).

- (2) Where the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1. or E-LTRC.2.1. is met following consideration under sub-paragraph (1) (and provided that the other relevant requirements of the Immigration Rules are also met), the applicant will be granted entry clearance or leave to remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1. or D-LTRC.1.1. or paragraph 315 or 316B of the Immigration Rules.

GEN.3.2.

(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.

(3) Where the exceptional circumstances referred to in sub-paragraph (2) above apply, the applicant will be granted entry clearance or leave to enter or remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2., D-LTRPT.1.2., D-ECDR.1.1. or D-ECDR.1.2.

(4) This paragraph does not apply in the context of applications made under section BPILR or DVILR.

GEN.3.3.

(1) In considering an application for entry clearance or leave to enter or remain where paragraph GEN.3.1. or GEN.3.2. applies, the decision-maker must take into account, as a primary consideration, the best interests of any relevant child.

(2) In paragraphs GEN.3.1. and GEN.3.2., and this paragraph, "relevant child" means a person who:

(a) is under the age of 18 years at the date of the application; and

(b) it is evident from the information provided by the applicant would be affected by a decision to refuse the application.

12. The Judge make a specific finding there are no such circumstances arising in this case such as to amount to a breach of article 8 ECHR. There was no evidence before the Judge that the mother would refuse to travel to the United Kingdom as the evidence given by the sponsor to the Judge was that there are family members in Pakistan, namely his brother, who lives on the family farm with not only the appellants but also two other children of the sponsor who he confirmed he was unable to bring across to the United Kingdom at this point for economic reasons. Those children are minors. It was therefore always the intention of the family unit that the mother of the above appellants would be leaving members of her family in Pakistan if she was granted leave to enter the United Kingdom with her two other British national children who were not the subject of this appeal. There was no evidence before the Judge to show that if the appeals of the appellants were refused their mother would refuse to travel to the United Kingdom and remain in Pakistan.
13. The assertion the Judge failed to give adequate consideration and make adequate findings as to whether the sponsors brother in Pakistan will be content for the above appellants to remain a financial burden on him is a submission contrary to the evidence given by the sponsor who stated he provides for members of his family who remain in Pakistan. The sponsor works in the United Kingdom and ensures that his family members are adequately cared for, both those in the UK and those remaining on the family farm with his brother. There is no evidence that the uncle had any objection to the continuing arrangement, or any objection being raised if the appeals were refused. The Judge's finding that the appellants could remain in Pakistan in apparently comfortable and safe circumstances is a reference to the position in which they will remain in Pakistan with their uncle on the family farm.
14. It is not made out on the information available to the Judge that the impact of the refusal on the whole family was such as to make the respondents decision disproportionate. Article 8 questions are intently fact specific and there was simply not enough before the Judge to

suggest the only reasonable finding available was for the appeals to be allowed.

15. The appellants, when challenging the decision outside the Rules, refer to PD and others asserting the Judge did not consider and determine the article 8 appeals holistically and jointly, but rather sequentially and independently, thereby failing to take all material facts and considerations into account and failing to consider adequately the possibility that the effect of the refusal of the appeals would stultify the effect of the decision to allow the appeal of their mother.
16. Mrs Peterson in her submissions referred to the fact PD concerned an in-country appeal where there was a qualifying child and in which it was not found to be proportionate to separate all the members of that family on the facts. The issue in PD was whether the other family members could remain in the United Kingdom based on one appellant's appeal, that of the qualifying child, being allowed, which is a factually different scenario from this appeal. There is merit in that submission.
17. It is also clear that the Judge has taken into account the fact there are six children of the sponsor but there was insufficient evidence to make out any adverse impact arising from the decision, sufficient to warrant the appeal being allowed. There was, specifically, no evidence that the effect of the refusal of the appeal would stultify the effect of the decision in the mother's appeal or that additional weight should be given to the factors relied upon by the appellant in relation to this appeal, beyond that given by the Judge.
18. It is clear when reading the decision as a whole that the Judge did take into account the family situation including the fact the appellants mother had decided to leave other children in Pakistan. It is not made out the Judge failed to consider the matter holistically with the required degree of anxious scrutiny required.
19. The assertion the Judge erred by taking into account irrelevant considerations in refusing the appeals, in part as a result of a failure to satisfy E-EC.1.6(C) as the appellants did not to satisfy need to satisfy the provision as they had already been found to satisfy ECC 1.6(a) has no arguable merit. The Judge's finding at [30] of the decision is that contained in the final paragraph namely that on a strict interpretation of the Rules they did not satisfy E-EC.1.6(a). There is no finding by the Judge that the primary provision was satisfied. If it had been found to be satisfied there would have been no need to have considered later provisions of the Rules. The Judge gives adequate reasons for why it was found E-EC.1.6(a) could not be satisfied which was on the basis the above appellants mother had not been granted a visa and was not in the process of applying for one by the date the above appellants applications had been refused. As the Judge reminds himself, under the Rules the relevant date is the date of decision which in relation to the above appellants appeals was a date prior to their mother making her own application for leave to enter the United Kingdom.
20. It is not made out the Judge did not consider the evidence adequately. It is not made out the Judge's findings are not supported by sufficient

reasoning. It is not made out the Judge's conclusions either under the Rules or pursuant to article 8 ECHR are contrary to the evidence, are unreasonable, unlawful, irrational, or outside the range of findings reasonably open to the Judge.

21. Whilst it is appreciated that the intention of the sponsor and the appellants mother was to bring their family members to the United Kingdom article 8 does not give a person the right to choose where they wish to live. In this case the Judge gives adequate reasons to support the conclusion the appellants had not established a right to enter the United Kingdom. On that basis no legal error material to the decision to dismiss the appeal is made out. The decisions shall stand.

Decision

- 22. There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

23. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 3 September 2020