Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Nos.: UI-2023-004676
UI-2023-004677
UI-2023-004678
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First Tier No's: HU/56085/2022; IA/08730/2022
HU/56086/2022; IA/08733/2022
HU/56088/2022; IA/08734/2022
HU/56092/2022; IA/08735/2022

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 6th December 2023	**On 16th January 2024**

Before

DEPUTY UPPER TRIBUNAL JUDGE R THOMAS KC

Between

ENTRY CLEARANCE OFFICER

Appellant

and

MRS KHANAM AHMADZAI
MR SAIFULLAH AHMADZAI
MR NAZAR AHMADZAI
MISS HAJRA AHMADZAI
[NO ANONYMITY DIRECTION MADE]

Respondents

Representation:

For the Appellant: Mr Z Nasim of counsel, instructed by Crown & Mehria Solicitors.
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. This is an appeal by the Entry Clearance Officer ('the Appellant') against a decision of First-tier Tribunal Judge Dineen, promulgated on 19th March 2023. The requisite extension of time and permission to appeal was granted by the First-tier Tribunal on 24th October 2023.

Anonymity

2. No anonymity direction was made by the First-tier Tribunal. Considering the facts of this case and the circumstances of the Respondents, there is no reason for making a direction.

Background

3. The appellants are the wife and (eldest) three of the children of Yaqutshah Ahmadzai ('the sponsor'). The sponsor married the first appellant (Khanam Ahmadzai) in 2000. He arrived in the UK in 2001. He sought protection as a refugee and, while he was never recognised as such, in 2002 he was granted exceptional leave to remain for four years and, in 2009, became a British citizen.

4. Having been granted leave to remain, the sponsor would travel to Pakistan every year from 2003 to meet his wife and, as the years passed, his growing family, who would travel from Afghanistan to meet him. The youngest six children are British citizens.

5. In 2021, as the situation in Afghanistan deteriorated, the sponsor travelled to Pakistan because he was concerned for his family. In August 2021, he travelled across the border to find his family and make arrangements for them to leave the country. He gave evidence about his contact with the FCDO during this period and advice he received to evacuate his family to a neighbouring safe country. Using agents, he and his family managed to travel to Pakistan.

6. Mrs Ahmadzai and all nine children have remained in Pakistan since then in precarious circumstances. It is accepted that the six youngest children, as British citizens, do not need entry clearance. An application for leave to enter in respect of Mrs Ahmadzai and the three eldest children was made on 3rd December 2021 and refused on 19th August 2022.

7. The application was refused on the grounds:

(i) That whilst the sponsor was a naturalised British citizen, the family reunion provisions in the Immigration Rules did not apply because "*In accordance with paragraphs 352A-FJ of Part 11 of the Immigration Rules, nothing in paragraphs 352A to 352FI shall allow a person to be granted leave to enter or remain in the UK as the partner or child of a person who has been granted refugee status, or granted humanitarian protection under the immigration rules in the UK on or after 30 August 2005, if the person granted refugee status or person granted humanitarian protection* ***is a British citizen***".

(ii) It was not accepted that the sponsor and Mrs Ahmadzai had been in a genuine and subsisting relationship before the sponsor had left Afghanistan.

(iii) Lack of supporting financial documentation meant that on the evidence submitted it was not accepted a level of dependency had been demonstrated that would "*warrant a grant of leave outside the rules*".

(iv) Addressing the best interests of the children, it was said that the British citizen children could travel to the UK and "*I therefore do not believe that they would be left in a conflict zone or dangerous situation which would warrant you a grant of leave to enter or remain outside the Immigration Rules on ECHR Article 8 grounds nor have you submitted any relevant information and evidence that would prove otherwise. I therefore have not identified any exceptional or compassionate circumstances*". In relation to the non-British citizen children (who were making the application) the issue of their separation from other siblings and/or their mother that this would cause was not addressed. It was said they could turn to their mother and siblings in Pakistan for support and that it was in their best interests to remain in their mother's care.

8. A review of the decision was conducted and the grounds of refusal maintained. In particular:

(i) Mrs Ahmadzai and the three eldest children had made no previous application to join the sponsor in the UK and "*there is no evidence to show that they have ever been part of [the sponsor's] family unit*".

(ii) Discrepancies in the sponsor's account "*have not been satisfactorily explained so it is not proven that the [sponsor] and [his wife] are married, as is claimed*" or "*part of a genuine and subsisting relationship*".

(iii) The evidence that was provided does not show a genuine family life.

(iv) It followed from the above that "*the evidence provided does not show that there are circumstances in this case which would warrant a grant of leave outside the rules*".

The hearing in the First-tier Tribunal

9. The Appellant was not represented. The Respondents did not have a legal representative, but the sponsor attended and gave evidence. He had lodged a statement dated 12th December 2022 and a bundle of supporting evidence, including evidence of his previous travel. His statement contained what might be described as an emphatically expressed rejection of the reasons for refusal.

10. The *Decision and Reasons* of Fist-tier Tribunal Judge Dineen records that it was accepted the application under paragraph 352A-D of the Immigration Rules could not succeed and that "*the appellants should succeed under article 8 ECHR*". FtTJ Dineen specifically notes (albeit in summary form) the evidence that addresses the reasons for refusal, in particular as to the genuine nature of the relationship, the very difficult circumstances faced by the family in Pakistan, and the best interests of the children (see paragraphs 12-16).

11. FtTJ Dineen found the "*detailed account*" given by the sponsor "*clearly establishes family life for the purposes of Article 8*" and that "*[s]ince the sponsor and six of the children of the family are British citizens, the [ECO's] decision clearly constitutes interference with family life*". The best interests of the children are addressed, including the negative impact of separation of siblings and parents and because of a finding that "*the position in Pakistan is precarious and unsatisfactory*". He then addresses the relevant 'unjustifiably harsh consequences' test with reference to Appendix FM (GEN.3.1 and GEN.3.2) and then the provisions of section 117B of the Nationality, Immigration and Asylum Act 2002. The conclusion reached was that the interference with family life was disproportionate.

The grounds of appeal to the Upper Tribunal

12. The first ground of appeal addressed language used by the FtTJ that the application had been refused / could not succeed because "*the sponsor is no longer a refugee*":

> At [7] and [10] the FTTJ outlined the case as the sponsor being a person who was 'no longer a refugee'. The refusal decision and SSHD review (para 6) outlined that the sponsor has never been a refugee. Whilst it may be considered immaterial to the concession that as a consequence the requirements of para 352 could not be met, it is relevant to the overall approach conducted by the FTTJ and the assessment made under Article 8.

13. The second ground of appeal is framed as a "*Failure to resolve points in conflict and provide adequate reasons*" and essentially is in two parts: Firstly, that the FtTJ did not engage sufficiently with the concerns raised in the refusal decision and the review as to the genuine and subsisting nature of the marriage and of the existence of family life. This, in turn, is said to contaminate any decision as to the proportionality / best interests of the children. Secondly, that while the FtTJ did make reference to section 117B, it is said he erred in his approach to the proportionality assessment.

Discussion and decision on error of law

Extension of time

14. Mr Nazim submitted the extension of time had not been or should not have been granted by the First-tier Tribunal and that I should refuse the extension. He submitted that whilst the extension application is dated 5th April 2023 and the grounds are dated 6th April 2023, these were not in fact lodged correctly until 18th April 2023. It appears that the grounds and accompanying extension application were initially lodged on 6th April but with the incorrect case reference number. His submission was twofold: firstly, that the decision was promulgated on 19th March 2023 and there was a 14 day time limit and the delay is simply "not good enough" having regard to the requirements of procedural rigour and that, secondly, either the First-tier Tribunal had not granted the extension or, alternatively, it had not engaged sufficiently with the issues.

15. Mr Lindsay noted this was a point that had not been raised in the Rule 24 response and, indeed, had not been raised at all before the morning of the hearing. A written application should have been made for permission to make the argument. In any event, he argued that the authorities are clear: that a decision by Fist-tier Tribunal to extend time can only be challenged by way of judicial review, even if both parties agree it amounted to an error of law. Only if the judge has overlooked the question of timeliness and any explanation for delay will the grant be conditional upon the Upper Tribunal exercising a discretion to extend time: Ndwanyi (Permission to appeal; challenging decision on timeliness) [2021] UKUT 00378 (IAC). He noted also the time limit was in fact 28 days given Rule 33(3) of The Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum Chamber) Rules 2014:

> Where an appellant is outside the United Kingdom, an application to the Tribunal under paragraph (1) must be sent to the Tribunal so that it is received no later than 28 days after the date on which the party making the application was sent the written reasons for the decision.

16. He notes the rule makes reference to “the appellant” being outside the UK but also to “the party making the application” which indicates the longer time limit applies to both parties.

17. It is unnecessary to resolve the substantive arguments. The first paragraph of the grant of leave engages with the requirement for an extension of time and the reasons given by the appellant for seeking that extension. There is a clear implication that in granting leave the First-tier Tribunal found this explanation sufficed for the required extension of time. Certainly, it cannot be said the issue of timeliness was overlooked. It follows the only remedy would be a challenge by way of judicial review.

18. I do not therefore interfere with the decision of the First-tier Tribunal to grant leave and the necessary extension of time. It follows that I must now consider the substantive grounds of appeal.

Ground 1

19. Mr Linsday acknowledged in discussion that the first ground was not his strongest point. The reasons for refusal letter highlighted (then) Rule 352FJ to the effect that the rule on family reunion does not apply to a British citizen. The phrase “*no longer a refugee*” arises in the decision as shorthand for the position of the sponsor who had sought protection as a refugee but was now a British citizen having initially been given exceptional leave to remain (but not recognised as a refugee). Whatever the merits of employing that shorthand, Mr Lindsay was bound to concede - as was recognised in the pleaded ground - it was not material to the decision below given the application was no longer pursued on this basis.

20. The broad submission that this was somehow “*relevant to the overall approach*” on the Article 8 assessment (the pleaded ground) or evidence of, as Mr Lindsay put it, “*a lack of anxious scrutiny*” is wholly unpersuasive. No error of law arises.

Ground 2

21. The FtTJ had faced a situation where neither party was legally represented. The Appellant chose not to take up the opportunity to test the evidence being presented in support of the application.

22. The first aspect of the complaint under this ground is that the FtTJ did not engage sufficiently with the Appellant’s case in the refusal letter and the review. Mr Linsday argued that whilst the FtTJ did note in the decision that the Respondent’s case was outlined in the first of those documents, there was no mention of the review and this was a more serious error when the Respondent was not represented. I do not find this to be a material error in

circumstances where there that review does not raise any wholly new grounds and concludes by maintaining the grounds of refusal and relies on the reason for refusal letters.

23. As to the substantive failure to engage with those concerns, Mr Lindsay submitted firstly that FtTJ had not made a credibility finding but had instead assumed he had to accept the evidence because it was not challenged in cross-examination and secondly, that the concerns about lack of documentary evidence raised in the refusal letters were not addressed.

24. I am not persuaded by this argument. The FtTJ explains in the decision that he considered all the evidence in the round (paragraph 18). He had the sponsor's "*detailed account*" as well as the documentary (in particular in relation to the sponsor's travel) and objective evidence that was provided in support. The FtTJ plainly makes findings ("*I find...*" in paragraph 19), as a result of having considered this evidence. Furthermore, the overarching concerns raised in the reasons for refusal letter / review as to the existence of a genuine and subsisting family life were addressed in the evidence and the FtTJ has made findings as to the existence of family life and of the conditions faced by the family in Pakistan sufficient to inform his conclusions.

25. Mr Lindsay accepted that the Respondents could be said to have a strong case on the facts, but argued that if the "critical lens" of the approach in the reasons for refusal letter and the review had been adopted, the FtFJ might have reached a different decision on the existence of family life and that might have meant he reached a different decision as to the proportionality of the interference, including any separation between parents / siblings as a result of the British citizen children being entitled to come to the UK. He submitted the decision was short and did not demonstrate the necessary evidential rigour.

26. I accept there is a minimum requirement to identify the correct test and to apply the relevant evidence to that test in a way that resolves issues between the parties and demonstrates the evidence relied upon was sufficient to meet the standard of proof. Whilst the decision was short, I am not persuaded that minimum standard was not met. The FtTJ considered and weighed the evidence and made findings on the key issues in dispute, addressing the correct test.

27. Mr Linday's final argument was that even if the FtTJ had assessed the evidence correctly and applied that evidence correctly to the exceptional circumstances / unjustifiably harsh consequences test, in doing so he erred in his approach to section 117B and the overall assessment of proportionality by not having first considered and then rejected not only (by concession) paragraph 352-D but also the other routes under the Rules relevant to Article 8. This, he submitted, was the required approach in TZ (Pakistan) [2018] EWCA Civ 1109 (see paragraph 34 with reference to the

requirement to first consider the 'insurmountable obstacles' test under the Rules).

28. In applying GEN.3.2 it is implicit that such an approach has been followed because the FtTJ must have first reached the conclusion the application "*does not otherwise meet the requirements of this Appendix or Part 9 of the Rules*". On the particular facts of this case, I am not persuaded the FtTJ's approach amounts to a material error of law. The circumstances are unusual: (i) The six youngest children are British citizens and do not require entry clearance. (ii) The family is already displaced and the FtTJ reached a conclusion (for which there was subjective and objective evidence) that their position in Pakistan was 'precarious' (the evidence having been they had no right to permanent residence and the children were unable to attend school). The (then paragraph 276ADE(1)(vi)) question of whether there were 'insurmountable obstacles' to the British citizen father and children continuing family life in Pakistan in those conditions with the non-British citizen wife and eldest three children was not an issue in dispute. (iii) The FtTJ had correctly given anxious consideration to the best interests of the children. (iv) The objections in the reasons for refusal letter and the review concentrated on a factual rejection of the existence of a genuine and subsisting relationship between husband and wife and between father and children. The FtTJ had considered evidence that addressed and, on his findings, met those concerns. (v) The Article 8 application in the skeleton argument had been approached pursuant to GEN.3.2.

DECISION

The decision of First-tier Tribunal Judge Dineen promulgated on 19th March 2023 did not involve the making of a material error of law.

The appeal is dismissed.

No anonymity direction is made.

Signed: Richard Thomas **Date: 5th January 2024**

Deputy Upper Tribunal Judge R Thomas KC