IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-000599
UI-2024-000600
UI-2024-000601
UI-2024-000602
UI-2024-000603
First-tier Tribunal No:
HU/52829/2023
HU/52819/2023
HU/52826/2023
HU/52830/2023
HU/52829/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 June 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

TASLEEM AZIZ
ABDUL KAMMAL
AJAB JAN
AZAN MUHAMMAD
MOHAMMAD ALI
(no anonymity order made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Iqbal
For the Respondent: Ms H Gilmore

Heard at Field House on 24 April 2024

DECISION AND REASONS

1. These are the appeals of Tasleem Aziz (born 14 September 1973), Abdul Kammal (born 24 April 2002), Ajab Jan (born 19 September 2003), Azan

Muhammad (born 31 October 2004) and Mohammad Ali (born 14 October 2005), citizens of Pakistan, against the decision of the First-tier Tribunal of 21 December 2023 dismissing their appeals, brought against the Respondent's refusal on 14 February 2023 of their entry clearance applications (made on 25 January 2022).

2. The family relationship underlying the applications is more complex than usual. The Sponsor, also a Pakistan citizen, claimed asylum in the UK due to persecution on account of his same sex gender preference. He was born and worked in Kuwait. His marriage to Mrs Aziz had been insisted upon by his family. They married in August 1999, and he would return to Pakistan to visit Mrs Aziz from time to time. He relocated her to Kuwait in 2001 where they intermittently had marital relations and where in due course their children were born (from 2003 to 2005, as noted above). He had continued to have relationships with men throughout their marriage.

3. Mrs Aziz and the children returned to Pakistan in 2009 to live with her brothers; thereafter he occasionally visited them there. In December 2019, in Kuwait, he was detected in homosexual activity with a young man by a security officer who said he would report this to the police; both he and his partner fled the country. The Sponsor returned to Pakistan to see his wife, children and his own relatives, but during that period was again detected in same-sex activities at the family home, at which point his relatives, particularly his brothers who were devout believers well-connected in the Islamic community, wanted to murder him. Fearing his relatives would track him down in Pakistan, he fled the country and arrived in the UK in August 2020, claimed asylum, and was granted refugee status on 26 April 2021.

4. The applications were made on the basis of the refugee family reunion route. They were refused because the Respondent believed that the history of the marriage as described by the Sponsor indicated the relationship was not a genuine and subsisting one given that at his asylum interview he had said he had had no contact with the Appellants since arriving here and that his wife would not be joining him here, there was no independent evidence that he had financially supported her, and no evidence of a subsisting relationship by way of communication records. The Immigration Rules did not provide a route for persons with international protection needs abroad – for they were expected to claim asylum in the first available safe third country.

5. The Sponsor's witness statement for the appeal hearing below explained that he had visited Pakistan around three times annually from 2009 to mid-2019, to see his wife and children, spending 15-20 days on each visit; he was fully involved in his sons' upbringing. He had led "a closeted and dual life", given that homosexuality was punishable by death, concealing his "true self" from his family, appearing to be "a devoted family man" while secretly maintaining relationships with homosexual partners, both before and during his marriage. He had not

consummated his marriage until placed under substantial pressure from his family to have children. He understood the pain he had caused his wife over the years. After his own relatives' discovery of his gender preference in 2020, the Appellants, who too had been unaware of this fact, were socially ostracised; doctors would even refuse to treat his sons. At his asylum interview he had said he did not believe he would ever reconcile with his family because of his embarrassment; but as time passed, he had realised he could not live without his sons, but after a difficult conversation they had eventually forgiven him. They were now in daily telephone contact and he sent them around £300 monthly from his earnings.

6. The First-tier Tribunal made these findings of fact

(a) Until March 2020 the Appellants and Sponsor formed a single family unit, albeit that they lived apart much of the time; from January 2021, their relationship was restored following their reconciliation, at a distance.
(b) There was no evidence that the Sponsor's sons suffered from any physical or mental disability or condition such that serious adverse consequences would follow, or that their ability to study and obtain appropriate qualifications would suffer.
(c) The Appellants' witness statements did not mention any social ostracism or other problems from the Sponsor's family.
(d) Whilst aspects of the Sponsor's narrative were of concern, it would be wrong to revisit the facts underlying his asylum claim, which were unchallenged by the entry clearance refusals. Nevertheless it was not accepted that the Appellants were in danger from their relatives when leaving Pakistan: the evidence was that they were living with Mrs Aziz's aunt and uncle.
(e) The Sponsor had been sending £300 monthly since September 2023, and smaller sums since January 2022 or earlier.
(f) It was unsurprising that there had been a period of relationship breakdown between the Sponsor and the Appellants given the history above. However they had now reconciled.
(g) The Sponsor held genuine feelings of love and affection for Mrs Aziz.
(h) The Appellant's sons were financially dependent upon him. However they were not emotionally dependent upon him, at least to the degree that their feelings towards him did not go beyond that normally to be expected of young men of their respective ages towards their father.
(i) The Appellant's sons were not part of his family unit when he left Pakistan given that at that time their relationship had broken down.

7. The First-tier Tribunal dismissed the appeals because

(a) There was no objective evidence that the families of gay men were socially ostracised in Pakistan.

(b) Mrs Aziz would not be able to resume cohabitation with the Sponsor, given that the appeals of the children failed; but even if that decision was wrong, she had no intention to live with the Sponsor permanently, considering that the evidence was that cohabitation should continue only for so long as was necessary for them to "co-parent" their sons. She would not leave her sons in Pakistan given her wish to reside with the Sponsor flowed from that co-parenting wish.

(c) The appropriate legal test for each of the Sponsor's children, given all were adults by the hearing date, was that under Rule 352DB. They were not living independently and were unmarried. Given the Sponsor's remittances to them, which would foreseeably continue if their applications were refused, and the fact that upon their studies finishing they would be able to work albeit it in comparatively poor occupations, they would not be destitute if Mrs Aziz obtained entry clearance. The refusal would not have any adverse consequences on their mental or physical health or impair their ability to study and live their lives for the immediate future. They would not suffer any hostility, discrimination or prejudice in their education. Being unable to live with their father simply restored them to the same position they were in from 2009 and which would have continued via his occasional visits from Kuwait had the events leading to his departure from Pakistan to seek asylum not taken place. If they were granted entry clearance, they would not foreseeably have their leave extended and so would not be remaining in the UK long-term in any event, and in the UK would presumably leave the family unit to work independently, and swiftly end their dependency on their father.

8. Grounds of appeal contended that the First-tier Tribunal had erred in law by

(a) Questioning facts ostensibly underlying the Sponsor's grant of refugee status.

(b) Assessing the Sponsor's son’s applications as if all of them were adults, when the appropriate focus was on the application date at which time two were still minors, and thus depriving them of the benefit of consideration of their best interests.

(c) Failing to apply the appropriate tests for children under Rule 352DA: the Appellant and his sons could only live, outside the UK, in Kuwait or Pakistan, both conservative Islamic countries where homosexuality is banned, which was relevant to the assessment of insurmountable obstacles to life abroad.

(d) Overlooking relevant evidence that often homosexuals in Pakistan are subjected to honour killings due to the shame and embarrassment bought on the family, which necessarily implied that families suffered ostracism and discrimination.

(e) Finding that the Sponsor and Appellants were no longer part of the same family unit when he left Pakistan, because at that time the

former was escaping persecution and the family unit had suffered only a temporary interruption.

(f) Failing to consider financial considerations as part of the evaluation of the Sponsor's sons' asserted dependency upon him.

(g) Speculating unduly by assuming that the sons would leave the family unit soon, contrary to the evidence available which was that the parents intended to maintain responsibility for them.

(h) Containing so many double negatives and sub-paragraphs as to confuse the reader.

9. The Upper Tribunal granted permission to appeal on 18 March 2024, without restriction, though primarily on the basis that arguably two of the Appellants should have been treated as minors rather than adults.

10. Before me Mr Iqbal made submissions in line with the grounds of appeal, endeavouring as best he could to make sense of the dense language of the decision below. Ms Gilmore did not demur from the approach he encouraged.

Decision and reasons

11. Part 11 to the Immigration Rules provides:

> "**Family Reunion Requirements for leave to enter or remain as the partner of a refugee**
> **352A**. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the partner of a person granted refugee leave or refugee permission to stay are that:
> (i) the applicant is the partner of a person who currently has refugee status granted under the Immigration Rules in the United Kingdom; and ...
> (v) each of the parties intends to live permanently with the other as their partner and the relationship is genuine [and] subsisting; ...
> **Requirements for leave to enter or remain as the child of a refugee**
> **352D**. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who has refugee leave or refugee permission to stay are that the applicant:
> (i) is the child of a parent who has refugee leave or refugee permission to stay granted under the Immigration Rules in the United Kingdom; and
> (ii)
> (a) is under the age of 18; or
> (b) is over 18 and there are exceptional circumstances (within the meaning of paragraph 352DB);
> **352DA**. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain

with a parent who has temporary refugee permission to stay are that paragraph 352D(i) to (vi) has been met and:

a) there are insurmountable obstacles to the child and parent living together anywhere other than in the UK; and

b) a refusal of the application would breach the UK's obligations under Article 8 of the ECHR.

Granting leave to enter or remain under exceptional circumstances

352DB. Where the requirements of paragraph 352D(ii)(b) apply, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which may justify a grant of leave to enter or remain, for the same duration as the sponsor ("leave in line").

In the case of an adult child seeking to join a parent with refugee leave, refugee permission to stay, temporary refugee permission to stay, or humanitarian protection in the UK, criteria which may amount to exceptional circumstances include:

(i) they are dependent on the financial and emotional support of one or both or their parents in the country of origin or in the UK; and

(ii) the parent or parents they depend on is either in the UK, or qualifies for family reunion or resettlement and intends to travel to the UK, or has already travelled to the UK; and

(iii)

(a) the applicant is not leading an independent life; and

(b) they have no other relatives to provide means of support; and

(c) they could not access support or employment in the country in which they are living and would therefore likely become destitute if left on their own.

In the event of a refusal of leave to enter or remain on the basis the decision maker is not satisfied there are exceptional circumstances, consideration will also be given to whether refusal of the application would be a breach of Article 8 ECHR.

12. In the premises, I should note that the Judge in the First-tier Tribunal undoubtedly applied his mind conscientiously to the decision with which he was charged. But the ensuing decision is of dazzling complexity. There are paragraphs divided into multiple sub-paragraphs, cross-referenced to reasoning both earlier and later in the decision. Paragraph 29 has eleven sub-paragraphs of which three have further sub-sub-paragraphs. There is a system of footnotes which does not simply gloss the text by way of reference but adds layers of further reasoning, and there are lengthy digressions into issues that are then declared unnecessary for decision. Unfortunately as a result the decision simply defies comprehension, and there were moments during the hearing before me when it became apparent that neither myself nor the advocates could keep track of the flow of reasoning. I fear that nobody could really understand the decision aside from its author.

13. As already noted, before me the parties were agreed that the First-tier Tribunal had committed material errors of law, failing to have proper regard to the relevant legal regime and wrongly rejecting aspects of the evidence that were before it. I consider the parties were right to do so. The decision below is flawed for a number of distinct reasons. Leaving aside any disputed facts, the legal issues in this appeal were essentially whether the Appellants qualified

    (a) Under the Immigration Rules governing family reunion:
        - For the First Appellant (the Sponsor's wife), whether she and the Sponsor intended to live permanently with each other as spouses;
        - For the adult children (r352DB), whether they were emotionally and financially dependent on the Sponsor, were living independently of their parents, whether they risked destitution due to a lack of alternative family support, and/or whether the application's refusal was otherwise disproportionate to the family's private and family life.
        - For any minor children (r352DA), whether there were insurmountable obstacles to family life abroad and whether the decision was otherwise disproportionate.
    (b) Beyond the Rules, for the First Appellant, on the basis that the refusal was unjustifiably harsh (as recognised by UKVI policy), in the sense that it was disproportionate (for the other Appellants this residual consideration is factored into the Rules, as just noted).

14. Cutting to the chase, there are three significant error of laws in the decision below. Firstly, the First Appellant's witness statement sets out that "Ever since the revelation of my husband's homosexuality, I have been living in fear for the safety of my children and myself. In Pakistan, being a homosexual person is met with hostility, and even the family members face severe social repercussions and shame." If this evidence was accepted, it would doubtless have a very significant impact in determining the proportionality of the applications' refusals both within and outwith the Rules. It was in fact rejected because of a perceived lack of supporting objective evidence.

15. This is a surprising finding. The well-known public domain country evidence on Pakistan, which of course underlay the Sponsor's recognition as a refugee, indicates that there is familial pressure to comply with social norms, that LGBTi family members suffer discrimination within the family and in accessing housing and healthcare, that crimes against them are not reported to avoid dishonouring the family, and that they are disowned and forced into heterosexual marriage to preserve the family's reputation. Such material is presently found, for example, to take a neutral source, within the Respondent's own CPIN of April 2022. The First Appellant and Sponsor were not themselves forced into such a marriage, given that his family were unaware of his gender preference until relatively recently, but it is clear that the marriage took place because of the social

pressures on the Sponsor to comply with social expectations of that nature. Given these considerations I am satisfied that it was irrational to draw the inference that it was not plausible that the family of an "outed" gay man would suffer discrimination and social ostracism.

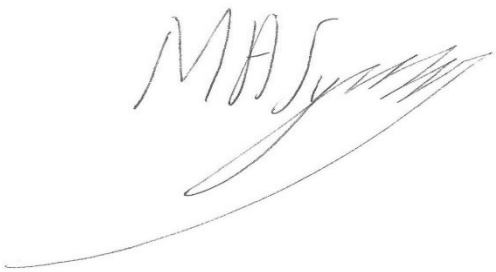
16. Secondly, the two youngest children were aged under 18 at the date of the Respondent's decision (given they were born October 2004 and October 2005, and the refusal was January 2022). The general position in immigration appeals is that matters are to be considered at the date of decision in so far as matters under the Rules are the focus (subject to contrary indication, of which in these particular Rules there is none). Thus they should have benefited from consideration under rule 352DA, which required an assessment of whether there were insurmountable obstacles to the family's life abroad. Plainly the issue of social ostracism due to discrimination on account of their father's sexual orientation was central to that enquiry. They were not required to demonstrate the prospect of destitution. Having directed itself to the wrong rule, it appears the Tribunal below did look at broader considerations than that, but in any event its finding is infected by the first error of law identified above.

17. Thirdly, given their minority at the relevant time, their best interests should have received express attention. This included the prospect of being raised by both parents rather than one alone. Section 55 of the Borders, Citizenship and Immigration Act 2009 imposes a general duty to ensure that immigration functions safeguard and promote child welfare (at least for children in the UK). SM Algeria [2018] UKSC 9 §19 cites the Respondent's policy confirming that that duty effectively applies in entry clearance cases too, and so policy in practice is broader than the statutory wording. The statutory guidance *Every Child Matters: Change for Children* was issued in November 2009. It explains that the s55 duty requires ensuring that children are growing up in circumstances consistent with the provision of safe and effective care, with a view to enabling them to have optimum life chances and to enter adulthood successfully. The finding that they would not remain long in the family unit fails to have regard to the possible benefits that co-parenting would foreseeably achieve by way of safe and effective care, and achieving optimal developmental outcomes. These "best interests" considerations were relevant at every point in the legal framework where Article 8 ECHR was in play. Time may now have moved on such that they have reached adulthood, but for so long as they potentially remain part of a single family unit, I do not think that a bright line should be drawn in a case where they have hitherto lost the opportunity to be raised by their father because of his well-founded fear of persecution.

18. This combination of legal errors requires that the appeals be re-heard. Given the scale of the fact finding when this takes place, there is no alternative than to remit the appeals for re-hearing before the First-tier Tribunal.

Decision:

The decision of the First-tier Tribunal contained material errors of law. I accordingly set it aside and remit the appeal for re-hearing.



Deputy Upper Tribunal Judge Symes
Immigration and Asylum Chamber

15 June 2024