IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-002523
UI-2024-002524
UI-2024-002527

FtT Nos: HU/60470/2022;
LH/01197/2024
HU/60471/2022; LH/01198/2024
HU/60473/2022; LH/01199/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 31 December 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

Miss M.M.
Mstr. O.M.
Mstr. E.M.
(ANONYMITY ORDERS MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr M Osmani of Counsel instructed by Times PBS
For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

Heard at Field House on 13 August 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellants are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellants, likely to lead members of the public to identify the Appellants. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. These are linked appeals against decisions of First Tier Tribunal Judge Ficklin dated 17 March 2024 dismissing each of the Appellants' appeals against decisions of the Respondent dated 7 December 2022 refusing applications for entry clearance.

2. The Appellants are citizen of Afghanistan. They are siblings aged 12, 11, and 7 respectively. The applications for entry clearance were made on 7 December 2021 alongside applications by the Appellants' parents and a paternal uncle. All applications sought entry clearance to join H (the Sponsor) – a paternal uncle of the Appellants with British citizenship.

3. The Appellants' applications were refused for reasons set out in 'reasons for refusal' letters ('RFRLs') dated 7 December 2022. For reasons that are unclear the applications of the parents and uncle were not determined at this time and, at the date of the hearing before the First-tier Tribunal, still remained outstanding: see Decision at paragraphs 1 and 12.

4. The Respondent considered the applications with reference to paragraph 352D of the Immigration Rules: in this context the RFRLs state:

> "*Your application has been considered under 352D of the Immigration Rules as your application is on the basis of your relationship to your sponsor, who has leave to remain in the UK, as this is the application you have applied for. In order for your application to be considered under any other Immigration Rules for example under Part 8 or Appendix FM, you will need to pay the appropriate fees or apply for a fee waiver, as you have been invited but declined to do so.*"

5. The Respondent, citing paragraph 352FJ, concluded that the Appellants did not satisfy the requirements of paragraph 352D because the Sponsor had been a naturalised British citizen since May 2021 and therefore was ineligible to sponsor the applications under the Rules relating to 'refugee family reunion'. The Respondent in any event found against the Appellants because "*no evidence to show that you are related to your Sponsor as claimed has been submitted, and nor has any evidence that you lived with your sponsor as part of a family unit as claimed, or of any contact you may have had during the entire period your sponsor has been in the UK*".

6. The Respondent went on to consider whether there were any exceptional circumstances such as would constitute a breach of Article 8. In this context the decision-maker repeated that the Appellants had not demonstrated a pre- or post-flight relationship with the Sponsor. In considering the needs of the children pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009 it was stated that it was in the children's best interest to continue living with their parents. It was also stated that "*There are other avenues that would allow you to be reunited*

with your sponsor, as this refusal does not preclude another application through another avenue".

7. Further to this it may be noted that the Respondent's Review of 28 November 2023 reiterated that the Appellants did not satisfy the requirements of paragraph 352D, also commenting "*As this is not contested in the ASA the R assumes it is accepted*".

8. Contrary to paragraph 1 of the Decision of the First-tier Tribunal, the applications were not refused under Appendix FM of the Immigration Rules.

9. At the appeal hearing on 15 February 2024, conducted remotely using the Cloud Video Platform, the First-tier Tribunal heard evidence from the Sponsor and submissions from the representatives. In the premises I note the following passages and/or features of the Decision of the First-tier Tribunal:

    (i) The Judge accepted that the Appellants were related to the Sponsor as claimed: see paragraph 13.

    (ii) "*[The Appellants] live with their parents and a paternal uncle in a large city in Pakistan*" (paragraph 8).

    (iii) "*The Sponsor financially supports them and there is evidence of his payslips and money transfer receipts in the bundle*" (paragraph 9).

    (iv) Further, the Judge stated "*I accept that the Appellants are in the situation they claim*" (paragraph 16). In context this appears to have encompassed an acceptance regarding the parents' former occupations – the father working for a multinational company providing services to UK government military forces until 2021, and the mother working in journalism; and that they were effectively in hiding in Pakistan because of their perceived risk from the Taliban in Pakistan and also because they consider they would be at risk of being removed to Afghanistan.

    (v) "*They are not safe in Pakistan*" (paragraph 17).

    (vi) "*It seems to me that this is an unusual case where the Appellants' best interests clearly do not at the moment lie with their parents. That is because the situation for Afghans in Pakistan, particularly with the profiles [of the parents], is precarious and dangerous*" (paragraph 19).

    (vii) The unjustifiably harsh consequences threshold adverted to in paragraph GEN.3.2.(2) was met: see paragraph 17 - although applicability was contingent upon the engagement of Article 8.

10. However, the First-tier Tribunal dismissed the Appellants' appeals because the Judge found that "*Article 8 is not engaged*" (paragraph 17) for the reasons articulated at paragraphs 18 and 19.

Challenge

11. The Appellants applied for permission to appeal to the Upper Tribunal which was granted on 25 May 2024 by First-tier Tribunal Judge Mills. In material part the grant of permission to appeal is in these terms:

> "*4. The appellants now seek permission to appeal, contending that Judge Ficklin has erred in law through adopting an unduly restrictive definition of 'family life', when there was evidence of the sponsor providing substantial financial and other support to the household in which the appellants lived. It is also contended that the Judge has failed 'to accord primacy to the best interest of the children', having found that it was firmly in their best interest to come to the UK given the precariousness of their current living situation.*
>
> *5. I find that the first ground of the challenge does identify an arguable error of law in the Judge's decision, such that permission should be granted. I do not limit the grant, such that all grounds may be argued.*"

12. In a Rule 24 response dated 5 June 2024 drafted by Mr Parvar, which – for reasons which are unclear - had not reached the Tribunal prior to the hearing, it was conceded that the First-tier Tribunal had "materially erred with the Article 8 assessment", with particular reference to paragraph 7 of the Grounds.

13. Paragraph 7 of the Grounds are in these terms:

> "*The FTTJ acknowledge that there is evidence of financial dependency, but failed to consider the regularity and substantial amount of money, the Sponsor provides. The judge failed to consider that since August 2022, the Sponsor has been financially supporting the appellants every month. The FTTJ only stated that it "seems to me to be a step too far to find that the financial dependence meets these criteria" without explaining as to whether or not the financial support is not real, committed or effective or why they are not.*"

14. Specifically, the Respondent conceded "*There is a lack of adequate reasoning to support the Judge's finding at [18] that the evidence of support does not amount to ties above those expected in normal adult relationships*".

15. Mr Parvar emphasised that the concession in this regard did not amount to an acceptance that Article 8 was engaged. The Respondent did not accept that Article 8 had been shown to be engaged and to that extent this was still a live issue notwithstanding the concession in respect of the evaluation of the First-tier Tribunal.

16. The Rule 24 response went on to make criticisms of other aspects of the Judge's findings, in particular with regard to the acceptance of the claim that the Appellants were residing illegally in Pakistan, and/or that there was an inadequacy of reasoning as to the Appellants being "*not safe in Pakistan*" and/or being "*at risk of detention/removal/refoulement*" - findings which were material to the conclusion of 'unjustifiably harsh

consequences'. (For the avoidance of any doubt Mr Parvar clarified before me that the reference in the Rule 24 response to paragraph 13 of the Decision was in error and should be ignored.) However, it is to be noted that there is no formal cross-appeal in this regard.

17. No concession was made in respect of Ground 2. In circumstances where the Respondent's concession is in substance that the Decision of the First-tier Tribunal requires to be set aside and the decision in the appeal remade, it is not strictly necessary for me to consider Ground 2 *qua* a ground of appeal. Nonetheless I make some brief observation on it, having had the benefit of hearing some further articulation of it in discussion with Mr Osmani.

18. Ground 2 is to a large extent premised on the establishment of family life with the Sponsor. However, paragraph 10 adverts to the possibility that Article 8 could be engaged without pre-existing family life. It was this, curious, aspect of the Ground upon which I entered into a discussion with Mr Osmani.

19. It seems to me that Mr Osmani advances a novel submission: an applicant or appellant is to have the benefit of the 'unjustifiably harsh consequences' provision of GEN.3.2 even where there is no relationship engaging Article 8 with a person present in the UK. In short it is proposed that where the circumstances are such that the applicant's Article 8 rights are breached – including private life rights (for example relating to personal integrity) irrespective of the existence of family life with a UK-based sponsor - then entry clearance should be granted. In other words, where an applicant's Article 8 rights are being violated in the location where they have made the application for entry clearance to an extent that the failure to grant entry clearance would result in unjustifiably harsh consequences, that is sufficient basis to grant entry clearance, or to allow an appeal on Article 8 grounds, irrespective of there being any family life with the UK-based sponsor. This, it was said, was particularly pertinent in the instant cases where the Judge had found that the best interests of the children was that they be removed from their current situation: as such, any outcome other than a grant of entry clearance would be to disregard the primary consideration of best interests.

20. Given that the Respondent had conceded the challenge in respect of Ground 1, I did not hear full argument on this point. As such I express here no more than preliminary observations. The approach advocated would mean that any person anywhere in the world who found themselves to be in straitened circumstances would potentially be able to succeed on an application for entry clearance irrespective of any connection with the UK. In the premises it is to be recalled that Appendix FM provides a "*route… on the basis of… family life with a person who is a British citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection…*" (GEN.1.1). In so far as the wording of GEN.3.2. (2) does not express any limitation on what is meant by "*a breach of Article 8*", it seems to me even if a person with no family connection to the

UK is able to demonstrate extremely adverse consequences of being left where they are, any such breach of their personal integrity resulting from personal circumstances, or actions of third parties, or the failure of mechanisms of foreign states, would not constitute a breach of Article 8 because the proportionality balance would favour the UK, it being in the public interest generally to limit entry to those with a connection to the UK, and not to admit anybody in seriously straitened circumstances.

21. Be that as it may, for the reasons already explained, the Appellants' challenge succeeds by reference to Ground 1.

Remaking the Decisions in the appeals

22. The issue of family life between the Appellants and the Sponsor requires to be revisited. As adverted to at paragraph 7 of the Grounds this will require a consideration of the regularity and quantum of financial support provided by the Sponsor. Also, in order to evaluate whether such support is effective, real and/or committed, it may be necessary to give consideration to the particular circumstances of the Appellants – and thereby specifically their parents and other uncle, and to what extent they may have other sources of finance. In this latter regard it will perhaps be important that documentary evidence be provided in respect of the up-to-date position with regard to the entry clearance applications of the parents and uncle. It might also be assumed that evidence in relation to their applications will assist in authoritatively determining what, if any status, they have in Pakistan. All such matters will allow a contemporaneous evaluation of the consequences of refusing entry clearance to the Appellants in the event that it is established that family life exists between the Appellants and the Sponsor.

23. Given the scope of the issues that will require to be considered, and also bearing in mind the protection inherent in the Appellants not losing an onward right of appeal, I am just persuaded that the appropriate forum for remaking the decisions in the appeals is the First-tier Tribunal.

24. I do not propose to make any specific Directions – ultimately that will be a matter for the First-tier Tribunal. The parties will now be alert to the utility of providing any further evidence in respect of dependency on the Sponsor and any further evidence in respect of the present circumstances of the Appellants including in respect of their parents.

Notices of Decisions

25. The decisions of the First-tier Tribunal contain a material error of law and are set aside.

26. The decisions in the appeals are to be remade before the First-tier Tribunal before any Judge other than First-tier Tribunal Judge Ficklin with all issues at large.

I. Lewis
Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)
17 December 2024