



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03711/2015

THE IMMIGRATION ACTS

Heard at Field House
On 27 June 2018

Decision & Reasons Promulgated
On 11 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

JUNAID SHER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mrs P Heidar, Solicitor, AA Immigration Lawyers
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, whose date of birth is 14 May 1999, appeals from the decision of the First-tier Tribunal (Judge Swinnerton sitting at Hatton Cross on 28 March 2017) dismissing his appeal against the decision of an Entry Clearance Officer to refuse him entry clearance under Rule 297. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

Reasons for the Grant of Permission to Appeal

2. Permission to appeal was refused by First-tier Tribunal Judge Osborne, who held that, contrary to what was stated in the grounds, in a careful and well-reasoned decision and reasons, the Judge had set out the pertinent issues, law and evidence relating to the facts of the appeal; and that the findings made by the Judge were properly open to

him on the basis of the evidence. He did not specifically find what was in the best interests of the appellant, but he clearly considered the duty under section 55 of the Borders, Citizenship and Immigration Act 2009, and he had conducted an appropriate assessment of the appellant's rights under Article 8 ECHR together with the adequate assessment of proportionality.

3. In a renewed application for permission to appeal to the Upper Tribunal, Upper Tribunal Judge Blum granted permission to appeal for the following reasons: *“(1) Although s55 of the Borders, Citizenship & Immigration Act 2009 does not apply to children outside the UK It is arguable that the Judge was nonetheless under a broader duty to identify the appellant's best interest and that she failed to do so. (2) It is also arguable that the Judge failed to adopt the approach identified in AA (Somalia) -v- SSHD [2007] EWCA Civ 1040 to the earlier decision of Judge Hanratty who allowed the appeal of the appellant's brother under Article 8, although there has clearly been a significant change to the assessment of proportionality since Judge Hanratty's decision. (3) Although the ground challenging the Judge's assessment of "compelling and compassionate circumstances" is of less merit, I nonetheless grant permission given that the Judge's reasoning at [24] is relatively short and without detailed consideration of the background evidence suggesting increased pressure on Afghans living in Pakistan.”*

Relevant Background

4. The appellant is a national of Afghanistan, who has resided for a number of years in Pakistan with his mother and some of his siblings. In the summer of 2015 he applied for entry clearance to settle with his father in the UK. His father had entered the UK on 21 June 2001 and was now a British citizen. He had been issued with a British passport in 2009.
5. On 10 August 2015 an Entry Clearance Officer gave his reasons for refusing the appellant entry clearance under paragraph 297 of the Rules. His father was present and settled in the UK, but he noted that the appellant had a parent who currently resided with him in Pakistan. Furthermore, he failed to demonstrate that his father has sole responsibility for him. In addition, he failed to establish that there were serious or compelling circumstances that made his exclusion undesirable. Accordingly, he was not satisfied that the appellant met the requirements of sub-sub-paragraphs (a)-(f) of sub-paragraph (i) of paragraph 297 of The Rules.

The Hearing Before, and the Decision of, the First-tier Tribunal

6. Both parties were legally represented before Judge Swinnerton. Mrs Heidar appeared on behalf of the appellant. The Judge received oral evidence from the appellant's father. He said that his family had been living in Pakistan for 16 years. The appellant had been in education in Pakistan until 2014. He had four children in the UK: two who lived with him, and two children lived separately. In answer to questions from the Judge, the sponsor stated that the appellant was aged two when he came to the UK, and that he had been back to Pakistan on 10 occasions since then. He maintained contact with the appellant on Viber, and he made decisions about his upbringing as his mother was not able to do that.

7. In his subsequent decision, the Judge set out his findings of fact at paragraphs [21] to [26]. The sponsor and the appellant's mother had eight children together in total: four of whom lived in the UK, and four of whom lived in Pakistan. The children were aged from 7 to 28. The sponsor had visited Pakistan each year since 2002, apart from in 2009, 2010, 2012, 2014 and 2016. The sponsor had last visited Pakistan in 2015. He had been continuing to provide financial support to the appellant and his other family members in Pakistan by making regular transfers of money to the family in Pakistan.
8. However, the Judge was not persuaded that the sponsor had had sole responsibility for the appellant's upbringing. He found that the appellant's mother, with whom he had lived for the past 16 years, and to whom the sponsor remained married, exercised responsibility for his upbringing "*as well*" and that the responsibility of the upbringing of the appellant was shared between father and mother, despite the mother having some medical issues.
9. At paragraph [24], the Judge observed that the appellant was now 17, and would be 18 next month. The evidence of his mother in her statement was that he was not able to find employment in Pakistan, and was not in education, and he was very demotivated as he was associating with other young Afghans who were influencing him in a negative way. Additionally, there was objective evidence showing the position of Afghans in Pakistan becoming more difficult, due to the action of the authorities in Pakistan, and due to their treatment as second class people. He had no reason to doubt that the appellant was experiencing the difficulties claimed by his parents, but he did not find that such difficulties constituted serious or compelling family or other considerations which made the exclusion of the appellant undesirable.
10. While his mother had some medical issues, they did not prevent her from taking care of the appellant and the other children, and he did not consider that the developmental employment difficulties experienced by the appellant were serious and compelling.
11. At paragraph [25], the Judge turned to address an alternative claim under Article 8 ECHR. He was currently living with his two sisters, aged 7 and 28, and younger brother aged 15, as well as with his mother. The sponsor sent regular financial support for his wife and four children living in Pakistan, which varied from £200 in June 2016 to £750 in November 2016. No evidence had been provided that such financial support would not continue. The sponsor had been able to visit the appellant regularly since 2001 and, generally, on an annual basis. Taking into account the overall circumstances of the appellant, he did not consider that the decision of the respondent to refuse entry clearance was disproportionate.

The Hearing in the Upper Tribunal

12. At the hearing before me to determine whether an error of law was made out, Mrs Heidar developed the arguments advanced by her in the grounds of appeal. In the light of the Judge's acceptance of the difficulties faced by the appellant, it was perverse, she submitted, for the Judge not to find that these difficulties constituted serious and compelling considerations which made the exclusion of the appellant undesirable. Alternatively, the Judge had not given adequate reasons for holding that the appellant did not qualify for entry clearance on this basis.

13. Mr Walker acknowledged that the Judge's findings were brief, but he submitted that they were sufficient. He sought to distinguish the decision of Judge Hanratty in 2010 allowing the appeals of two older brothers of the appellant on the basis that the appellant was older than they were at the relevant time; and, moreover, the assessment of proportionality had changed since 2010.
14. In reply, Mrs Heidar agreed that the assessment of proportionality had changed since 2010 in that it now required a more in-depth approach, which was lacking in Judge Swinnerton's approach.

Discussion

15. I do not consider that the Judge erred in law in not using as his starting point the determination of Judge Hanratty promulgated on 16 September 2010, in which he allowed the appeals of two older siblings of the appellant on human rights grounds. It is apparent from the extract from his determination cited in the grounds of appeal that a key finding of Judge Hanratty was that the siblings were not able to go to school, and so did not have any education and were left loitering around the street with nothing to do and were susceptible to bad influences. However, the sponsor's evidence in this appeal was that the appellant had attended school until 2014. So he had been able to go to school in 2010 and in subsequent years unlike, apparently, his older siblings.
16. Moreover, it was not established before Judge Swinnerton that the appellant was now unable to continue his education. The unchallenged finding of fact made by the Judge at paragraph [24] was that the appellant was not "*currently*" in education. The Judge did not find that the appellant was unable to undertake further study if he wished to do so.
17. Another key finding of Judge Hanratty quoted in the grounds of appeal is as follows: "*I find that to leave him in Pakistan when the opportunity beckons for them to come to the UK does prejudice the family life of these appellants in a manner sufficiently serious to amount to a breach of a fundamental family life protected by Article 8.*" In the same passage, the Judge also said that it breached their human rights because as it was disproportionate to deny them the opportunity to join their father who could maintain and accommodate them in the UK.
18. Having regard to the developing jurisprudence in Article 8 claims, I do not consider that it would be open to a Judge now to allow the appeals of the siblings on the basis set out by Judge Hanratty. It is not simply that a more in-depth approach to the assessment of proportionality is now required, but also that a clearer focus on the crucial distinction between family and private life is also required.
19. The centre of the siblings' family life in 2010 was in Pakistan with their mother and other siblings. So in reality the apprehended interference was primarily with the siblings' private lives in that the effect of the refusal decision was to deny them the opportunity to enjoy a better life in the UK, including better prospects for their education, employment and personal development. From a family life perspective, although the grant of entry clearance to the UK would enable them to develop what was currently a very attenuated family life with their father, it would – and did –

shatter the family life which they had established with their mother and remaining siblings in Pakistan.

20. The Judge rightly dealt with the Rules first before going on to consider an Article 8 claim outside the Rules. The Judge's findings of fact on the issue of sole responsibility are not challenged by way of appeal. The finding that the sponsor did not have sole responsibility for the appellant's upbringing involved a rejection of his evidence to the contrary. Accordingly, the Judge's assessment of whether Rule 297(i)(f) was met in the alternative must be seen in the context of the Judge not finding the evidence of the sponsor credible in all respects. In the circumstances, I do not consider that it was perverse for the Judge to accept that the appellant was experiencing the difficulties claimed by his parents, but not to find that such difficulties constituted serious and compelling family or other considerations which made the exclusion of the appellant undesirable.
21. It is clear that the Judge's reasoning is that the difficulties faced by the appellant were counterbalanced by the fact that the appellant lived in a stable family unit with his mother and other siblings, that his mother was able to care for him and to share responsibility for his upbringing (despite the sponsor's evidence to the contrary which he rejected) and that the family in Pakistan would continue to be financially supported by the sponsor.
22. Accordingly, I consider that it was open to the Judge to find that the developmental and employment difficulties experienced by the appellant were not such as to meet the high threshold for entry clearance under Rule 297(i)(f).
23. Although the Judge did not conduct a best interests assessment as part of the exercise of assessing proportionality, this does not constitute a material error as realistically there could not be a different outcome under the proportionality assessment than there was under Rule 297(i)(f). If there were not serious and compelling family or other considerations which made the exclusion of the appellant undesirable, it followed that there were not sufficiently compelling circumstances to justify the appellant being accorded Article 8 relief outside the Rules.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed

Date 2 July 2018

Judge Monson

Deputy Upper Tribunal Judge