Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers:
HU/06961/2018
HU/07178/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 December 2018	

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

Md. AZHAR KHAN and
FATIMA KANEEZ
(ANONYMITY DIRECTION NOT MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms. S Ferguson of Counsel instructed by Burney Legal, solicitors
For the Respondent: Ms J Isherwood of the Specialist Appeals Team

DECISION AND REASONS

The Appellants

1. The Appellants are husband and wife, born respectively in 1941 and 1944. They are both citizens of Pakistan. On 22 July 2016 they entered as

visitors on two year multi-visit visas. Neither of them are in good health and they live with their daughter, Saima Sheikh who is their Sponsor.

The SSHD's Original Decision

2. On 20 January 2017 they applied for leave to remain on the basis of their private and family life in the United Kingdom. On 5 March 2018 the Respondent refused the applications under the Immigration Rules. The Appellants did not meet the time critical requirements of paragraph 276ADE(1) of the Immigration Rules and the Respondent considered there were no very significant obstacles to their re-integration into Pakistan on return. Reference was made to the various medical reports on each of the Appellants and the Respondent concluded that although they may not have immediate family in Pakistan it was reasonable to expect their daughter and son-in-law and their daughter in the United States to continue maintaining them with funds sent from the United Kingdom and the United States. There were no exceptional circumstances to warrant the grant of leave under Article 8 of the European Convention outside the Immigration Rules.

Proceedings in the First-tier Tribunal

3. On 16 March 2018 the Appellants lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are entirely generic referring to evidence to be submitted later.

4. By a decision promulgated on 24 August 2018 Judge of the First-tier Tribunal S. Aziz dismissed the appeals on all grounds.

5. On 18 October 2018 Judge of the First-tier Tribunal Judge Gibb granted the Appellants permission to appeal on the grounds principally that it was arguable the Judge had erred in his approach to the medical evidence about the Appellants' fitness to fly and his assessment of the threshold to show that family life exists and to the proportionality of the decision to the State's obligation to respect the Appellants' private and family life, in particular with regard to the Appellants' grandchildren. He further had concerns about the Judge's questioning of the Sponsor in relation to her e-mail account and her apparent inability to access it and the absence of a full assessment of the extent to which the Appellants met or did not meet the relevant requirements of the Immigration Rules.

Proceedings in the Upper Tribunal

6. The Appellants attended the hearing, in wheelchairs, with their daughter. I was informed that although the daughter spoke English, each of the Appellants has very little English. The Sponsor confirmed they were living with her family at her home address.

7. Ms Isherwood referred to the Respondent's response of 22 November 2018 under Rule 24 of the Procedure Rules. She rightly pointed out that it

appeared to relate only to the issue whether the Judge's questioning about the Sponsor's e-mail account had been so pro-active as to amount to "entering the arena". The response refers to the record of proceedings made by the Judge. Regrettably, the record is illegible. Ms Isherwood submitted that the response did not deal with the other aspects of the grounds upon which permission to appeal had been granted. Nonetheless, she would not seek to go behind it.

8. I adjourned the hearing into Chambers with a view to a frank discussion about the Judge's decision. Following the discussion, the parties reached a consensus that the Judge's decision was not sustainable and should be set aside. On resuming the open hearing, I informed the Appellants that I found there were material errors of law in the Judge's decision and that for the reasons given in this decision I had decided it was appropriate to set aside the Judge's decision and to direct the appeal be heard afresh with none of the Judge's findings retained.

Reasons

7. I now give those reasons. The Judge dealt with the "fitness to fly" issue at paragraph 65. Having noted the evidence, he then stated there was no evidence the husband could not be escorted by one of his family in the United Kingdom. This would appear to assume a voluntary departure but neither party suggested that possibility had been canvassed at the hearing.

8. Neither at paragraph 68 nor elsewhere does the Judge make any acknowledgment of his duty under s.55 Borders, Citizenship and Immigration Act 2009 with regard to the Appellants' grandchildren although he does make a finding at paragraph 69.

9. The Judge erred at paragraph 68 in setting out the relevant threshold to assess the Article 8 claim outside the Immigration Rules. *MF (Nigeria) v SSHD [2013] EWCA Civ. 1192* is a deportation case. The Appellants face removal but not deportation. The relevant citation would have been the judgment in *R (Agyarko) v SSHD [2017] UKSC 11.*

10. The Judge did not state the extent to which the Appellants did not meet the relevant Immigration Rules. Failure to assess this in any detail infected any assessment of the proportionality of removal of the Appellants which to a considerable extent will go to the assessment of the proportionality of the decision under appeal. A consideration of s. 117B of the 2002 Act is not sufficient for this purpose: see paragraphs 70 and 71 of the Judge's decision.

11. The Judge found the Sponsor to be an unreliable witness on the sole basis of her ignorance of the password to access her e-mail account. The Sponsor is recorded at the hearing before the Judge as giving an explanation which may or may not be credible but given her age and background is certainly plausible. An adverse finding on this point alone

did not constitute adequate reason for the extensive adverse credibility findings against the Sponsor which the Judge made. Further, it was that finding alone which enabled the Judge to invoke the jurisprudence of *Tanveer Ahmed *[2002] UKIAT 00439*.

12. For these reasons I find the Judge's decision contains errors of law such that it is unsafe and should be set aside in its entirety with no findings of fact preserved. At the end of the hearing I handed back to Ms Ferguson for the Appellants their bundles which had previously been served and filed so that for any resumed hearing her instructing solicitors will have the opportunity to create a consolidated paginated and properly indexed bundle.

13. Having regard to the extensive fact-finding which will be necessary at the resumed hearing and s.12(2)b Tribunal's, Courts and Enforcement Act 2007 and paragraph 7.2 of the practice statement of 10 February 2010 as amended, I direct the appeal is remitted to the First-tier Tribunal for hearing afresh.

15. The Appellants will note that the Respondent has filed and served the judgment in *Ribeli v ECO-Pretoria [2018] EWCA Civ. 611* and will be relying upon it at any resumed hearing, in particular paragraphs 66-72.

Anonymity

14. There was no request for an anonymity direction and having considered the error of law appeal, I find none is required.

SUMMARY OF DECISION

The decision of the First-tier Tribunal contains errors of law and is set aside. The appeal is remitted for hearing afresh.

No anonymity direction is made.

Signed/Official Crest Date 10. xii. 2018

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal