



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/08903/2015
HU/13262/2015

THE IMMIGRATION ACTS

Heard at Field House
On 30 May 2018

Decision & Reasons Promulgated
On 29 June 2018

Before

THE HON. LORD UIST
UPPER TRIBUNAL JUDGE DAWSON

Between

(1) RIFAT ARA ARJU
(2) NUSRAT JAHAN IKBAL ESHA
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Singer, instructed by Paul John & Co Solicitors
For the Respondent: Mr E Tufan, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. These appellants (mother and daughter) are nationals of Bangladesh where they were born respectively on 25 March 1973 and 4 August 1997. They have been granted permission to appeal the decision of First-tier Tribunal Judge Nicholls. For reasons given in his decision dated 24 April 2017 he dismissed their appeals against the decisions of the Entry Clearance Officer (ECO) dated 18 September 2015 refusing their

applications to join the sponsor (the first appellant's husband and second appellant's father) in the UK. As to the first appellant, the decision under appeal was a refusal for entry clearance as a partner under Appendix FM of the Immigration Rules. This was on the basis that the first appellant had not passed an English language test, and furthermore, the ECO did not consider the application raised any exceptional circumstances with respect to family life with reference to Article 8 that warranted a grant of leave outside the rules.

2. As to the second appellant, the refusal was with reference to paragraph 297 of the Immigration Rules on the basis that although it was acknowledged the second appellant had maintained family life with both parents during the previous eleven years following her sponsoring father's move to the United Kingdom on 10 January 2004, the ECO was not satisfied he had had sole responsibility for the second appellant's upbringing, something for which the first appellant had taken main responsibility in Bangladesh. Furthermore, the ECO considered the second appellant had not provided serious and/or compelling family or other reasons. There was no evidence that her emotional development was being neglected or that she was developing other than normally having lived with her mother for most of her upbringing. The ECO addressed Article 8 and concluded in respect of the second appellant also that the circumstances did not warrant a grant of leave outside the Rules.
3. The applications were made online on 14 July 2015.
4. In respect of the burden and standard of proof, Judge Nicholls explained at [3] of his decision:

"In human rights appeals arising from immigration decisions it is for the Appellant to show that there has been or will or may be an interference with his or her human rights. The relevant date for consideration is the date of hearing of the appeal. The standard of proof is on a balance of probabilities and if that interference is established, and the relevant Article permits, it is then for the Respondent to show that the interference was justified. In assessing public interest considerations under article 8 of the ECHR I must apply the provisions of Part 5A of the Nationality, Immigration and Asylum Act 2002, which, where relevant are considered in more detail below."

5. He noted in his findings that it was conceded by counsel for the appellants that the first appellant could not meet the requirements of the Immigration Rules because she had not passed the specified English language test. He went on to conclude at [12]:

"... I find, therefore, that the first appellant does not meet the requirements of Appendix FM in that respect. With regards to the second Appellant, who is still treated as a child for these purposes, it was not argued that her father in the UK had had sole responsibility for her upbringing, although counsel did argue that the ECO in refusing her application had not "seriously considered" whether there were any serious or compelling family or other reasons why her exclusion from the UK would be undesirable. In that respect, counsel has not given sufficient weight to the second bullet point on page 2 of the ECO's decision where it is noted that there was no evidence of any such factors. Accordingly, I do not accept that submission."

6. The judge also heard argument that the ECO's decision was unlawful because there was no consideration of the best interests of the child as specified in section 55 of the Borders, Citizenship and Immigration Act 2009. He readily acknowledged that the decision did not mention section 55 or the best interests, but he considered, taken as whole, the position of the second appellant had been looked at. To illustrate this the judge noted at [13]:

"...It does, for instance, consider whether there was evidence of the second Appellant's "emotional development" being neglected. The language is not particularly helpful but that is one of the factors which should be considered when assessing the child's best interests. In addition, I note that the entry clearance manager in a review dated 6 May 2016 specifically mentioned the principles under section 55 and assessed those factors in terms of "exceptional circumstances"."

7. He then went on to carry out the best interests exercise himself in the following terms at [14]:

"In this appeal I must consider the best interests of the second Appellant, nominally still a child, as a primary consideration. She was 17 years and 11 months old at the date of application, which is a fact I must bear in mind. It is a general principle that, wherever possible, children should be brought up by both parents in a stable and secure environment. Counsel argued that those best interests were to be brought up in the UK. The logical conclusion of such an argument is that every child in the world should be brought up in the UK if at all possible, which is an absurd argument. The second Appellant has, according to the evidence, always lived with her mother and has had the benefit of both regular contact and visits from her father. That was a family life which the first Appellant and the sponsor chose to adopt in 2004 and which they have chosen to continue ever since, until this application was submitted in July 2015, some 11 years later. During that time, the majority of the "bringing up" of the second Appellant as a child has been completed."

8. By way of conclusion of his consideration of the case under the Rules, at [15] the judge recorded:

"Because it is accepted that the second Appellant has not been the sole responsibility of the UK sponsor, her father, I find that her application did not meet the requirements of paragraph 297(1)(e). With regard to sub-paragraph (f) of paragraph 297, I find that there is no evidence before me of serious and compelling family or other reasons why entry clearance to the UK should be granted. I agree with the ECO in that respect. The compelling circumstances identified in his submissions by counsel for the Appellant do not demonstrate those reasons. I find that neither of the applications by either of the Appellants met the terms of the relevant Immigration Rules."

9. After directing himself as to the approach to be taken the judge set out his conclusions under Article 8 at [18] and [19] as follows:

"18. As I have indicated, the principles under article 8 of the ECHR require a fair balance to be struck between the public interest in the control of immigration and the rights of the individual. In this appeal, there are no factors in the history of either of the two Appellants or of the sponsor which would serve to increase or

enhance the weight which must be given to the control of immigration, but that weight is, nevertheless, substantial. It has received parliamentary endorsement in section 117B [of the] Nationality, Immigration and Asylum Act 2002, as have the specific terms of the Immigration Rules. I have set out above my conclusions about the best interests of the second Appellant as a child and I take into consideration the voluntary arrangement of the family life which the first Appellant and the sponsor began in 2004. Counsel for the Appellant's rightly pointed out that the second Appellant should not be made a 'victim' of errors or actions by her parents but that is not a key issue in this appeal. The sponsor explained why he and his wife had chosen to delay the applications for entry clearance. Whether those were or were not good reasons is not for me to say.

19. There is some evidence that the first Appellant has medical issues but that evidence also confirmed that she is in receipt of medical treatment in Bangladesh and there is no evidence to suggest that treatment will not continue. I find that there is no evidence that there are medical reasons why the first Appellant should be allowed to settle in the UK. The second Appellant is, according to her father, in the middle of a university degree in micro-biology which she can pursue for the next few years. There is a question in her best interests whether it is right for that course to be disrupted at this stage. There is no evidence to suggest that there need be any change in the existing arrangements which have served this family for 11 years up to the date of application. Weighing up the various factors, I find that they do not demonstrate the sort of exceptional, or compelling conclusions which would show that the interference with article 8 rights was unduly harsh or unreasonable. I find that the decision by the ECO not to grant entry clearance to either of the two Appellants was not an unlawful interference with article 8 rights of themselves or of their sponsor."
10. There are two grounds of challenge. The first is that the judge had misdirected himself over the material date for consideration of the evidence and reference is made to section 85(5) of the Nationality, Immigration and Asylum Act 2002 which mandated the judge to "consider only the circumstances appertaining at the time of the decision to refuse".
11. At this early point we note Mr Singer's concession that this reference to section 85(5) was misconceived in the light of the amendments to section 85 in the Immigration Act 2014.
12. The second ground is that the First-tier Tribunal erred by failing to properly consider and give primacy to the best interests of the second appellant. Reference is made to error by the judge in his approach at [14] of his decision which we have set out above. It is argued that the judge imposed "his own artificial cut-off point" on when the best interests of a child should be given proper weight which was contrary to the UN Convention on the Rights of the Child (UNCRC). It is contended there was a failure to identify the child's best interests. A further limb of the ground is a failure to consider whether the refusal of entry clearance had the effect of "punishing the second appellant for the immigration decisions made by her father and the inability of her mother to pass an Appendix O approved English language test". It is argued that the judge should have asked himself whether the conduct of the second appellant's

parents and subsequent changes to the law had resulted in her being unfairly prejudiced and suffering an historic wrong. The grounds conclude:

“28. The failure to make proper findings on the second Appellant’s best interests means, it is submitted that the decision on Article 8 ECHR cannot be said to be safe in relation to either Appellant.

29. It is respectfully submitted that the above grounds are properly arguable and permission to appeal should be granted.”

13. Permission was granted by First-tier Tribunal Judge Pooler who considered the grounds were arguable on the basis that there was some uncertainty whether the judge assessed the evidence at the appropriate date and furthermore it was arguable that he erred in his assessment of the best interests of the second appellant. He concludes:

“4. The grounds bring into sharp focus the difficulties facing the Tribunal when it has to decide an out-of-country human rights appeal in circumstances which have changed since the date of decision. They refer at [8] to cases which were decided prior to the coming into force of the Immigration Act 2014, which amended not only s84 of the Nationality, Immigration and Asylum Act 2002 (grounds of appeal) but s85, on which the appellant relies at [7].”

14. Before turning to our analysis of the submissions and the issues in this case we set out the relevant law. Paragraph 27 of the Immigration Rules is in these terms:

“An application for entry clearance is to be decided in the light of the circumstances existing at the time of the decision, except that an applicant will not be refused an entry clearance where entry is sought in one of the categories contained in paragraphs 296-316 or paragraph EC-C of Appendix FM solely on account of his attaining the age of 18 years between receipt of his application and the date of the decision on it.”

15. The provisions of paragraph 297 of the Immigration Rules relevant to the issues in the second appellant’s case are as follows:

“297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:

(i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:

...

(e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child’s upbringing; or

(f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make

exclusion of the child undesirable and suitable arrangements have been made for the child's care; and

(ii) is under the age of 18;

... "

16. Section 82(1) provides a person 'P' may appeal to the Tribunal where

" ...

(b) The Secretary of State has decided to refuse a human rights claim by P or

..."

Section 84(2) provides:

(2) An appeal under Section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998."

Section 85(4) of the Nationality, Immigration and Asylum Act 2002 provides:

"(4). On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision."

17. The background circumstances are that the first appellant's husband left for the United Kingdom in 2004 where after a period of time as a student and subsequently in employment, he obtained indefinite leave to remain. The second appellant was 7 years old at the time he left and according to the first appellant's statement, her husband visited Bangladesh some eleven to twelve times during this period. She explained in her statement dated 5 April 2017 that her husband was able to sponsor her since 2007

"... but he did not because at that time he did not feel we needed to come to the UK as my daughter was small. Since 2015 my elder daughter has gotten married and this has caused loneliness amongst me and my daughter as she no longer with us. We are living with my sister's family and do not have a place of our own. This makes us very embarrassed sometimes to live with them as my husband is not staying with us to support us."

18. It appears that the first appellant failed to pass the English language test after two attempts. The sponsor's statement dated 4 April 2017 explains that she received a letter saying that she had failed the exam taken on 23 May 2015 but when she went to re-book the test in March 2017 she was told that her previous result "was valid". It is not clear what further steps were taken by the first appellant in respect of this development. In any event it is not disputed that the first appellant failed the test on which she relied for her entry clearance application which is the subject of this appeal.

19. As to her health, the sponsor refers to her having diabetes, high blood pressure and other medical conditions. The bundle of documents before the judge included diagnostic reports of varying kinds issued by the Islami Bank Hospital, a medical doctor and diagnostic labs. There was no accompanying medical report explaining the meaning of the material provided.

Discussion

20. Mr Singer's skeleton argument and his submissions strayed beyond the grounds of challenge to the First-tier Tribunal's decision. The focus of the former is in respect of the treatment of the Article 8 claims by the judge. At the hearing, Mr Singer sought to enlarge the grounds by arguing a failure by the judge to take into account best interests in assessing the claim under paragraph 297(1)(f) and made reference to the Tribunal's decision in Mundeva (s.55 and para 297(i)(f)) [2013] UKUT 88 (IAC). The guidance then given by the Tribunal was in following terms:

- “(i) The exercise of the duty by the Entry Clearance Officer to assess an application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require.
- (ii) Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is “an action concerning children...undertaken by...administrative authorities” and so by Article 3 “the best interests of the child shall be a primary consideration”.
- (iii) Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55.
- (iv) Family considerations require an evaluation of the child's welfare including emotional needs. ‘Other considerations’ come in to play where there are other aspects of a child's life that are serious and compelling for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social backgrounds and developmental history and will involve inquiry as to whether:-
 - a. there is evidence of neglect or abuse;
 - b. there are unmet needs that should be catered for;
 - c. there are stable arrangements for the child's physical care;

The assessment involves consideration as to whether the combination of circumstances are sufficiently serious and compelling to require admission.

- (v) As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important: see also SG (child of a polygamous marriage) Nepal [2012] UKUT 265 (IAC) [2012] Imm AR 939.”

21. In addition, Mr Singer sought to open up the grounds in respect of the first appellant’s circumstances under Article 8 and relied on the text in the grounds at [28] quoted above although he acknowledged the limited scope of the argument in the application on this aspect.
22. The grounds are silent on the judge’s assessment of the case under the Rules and paragraph 297 is not mentioned. There is no dispute that responsibility for the second appellant has been shared by the sponsor and the first appellant. We do not see any basis for permitting an enlargement to the ground particularly as the judge undertook the best interests exercise in [13] and [14] of his decision *before* concluding in [15] that there was no evidence before him of serious and compelling family or other reasons. Accordingly, our focus is on the grounds as made under the umbrella of Article 8 coupled with the best interests exercise in that context.
23. We turn to the first ground relating to the material date for consideration of the evidence. The judge’s direction at [3] is as follows:
- “3. In human rights appeals arising from immigration decisions it is for the Appellant to show that there has been or will or may be an interference with his or her human rights. The relevant date for consideration is the date of hearing of the appeal. The standard of proof is on a balance of probabilities and if that interference is established, and the relevant Article permits, it is then for the Respondent to show that the interference was justified. In assessing public interest, consideration under article 8 of the ECHR I must apply the provision of Part 5A of the Nationality, Immigration and Asylum Act 2002, which, where relevant, are considered in more detail below.”
24. As now accepted, the ground of challenge is flawed in that it makes reference to a superseded provision of the 2002 Act. A point to add is that the ground relies on AS (Somalia) and Another v ECO Addis Ababa [2008] EWCA Civ 149 although this decision was appealed to the House of Lords: AS (Somalia) & Anor v SSHD [2009] UKHL 32.
25. The approach required to be taken by the ECO pursuant to Rule 27 is to decide an application “... in the light of circumstances existing at the time of the decision”. There is however an exception which refers, *inter alia*, to paragraph 297 whereby an application will not be refused “... solely on account of [an applicant] attaining 18 years between receipt of his application and the date of the decision on it”. Giving the words their ordinary meaning, it is not open to an ECO to refuse an application under the rule simply because majority is reached whilst an application is pending. This means that the assessment of sole responsibility and/or serious or compelling circumstances in the alternative must be carried out based on circumstances existing

at the time of decision but refusal cannot simply be made if the appellant becomes an adult in the intervening period between the application and its consideration. If, for example, evidence of sole responsibility existed at the time of application but this was no longer so by the time the decision was reached, it would be lawfully open to an ECO to refuse an application on that basis irrespective of the age of the applicant. Conversely, in respect of serious and compelling circumstances, were these to arise subsequent to the date of application and they existed at the date of decision, this too may lead to a different result brought about by intervening changes.

26. Section 85(4) permits consideration of any matter the tribunal considers relevant to the substance of the decision including matters since arising. Thus, for example, if the ECO did not accept that family life existed at the time of decision but new evidence showed that it had continued for an applicant into adulthood, it would be properly open to a judge to take this into account when deciding human rights grounds.
27. We do not consider the judge erred by reference to the relevant date for consideration being the date of the hearing of the appeal. Statute expressly permits this.
28. We turn to ground 2 which challenges the best interests consideration in the article 8 exercise. Paragraph [15] of the second ground of challenge is in these terms:
 - “15. The FTJ did not make a clear finding of whether it was in the best interests of the second Appellant to be reunited with her father in the UK and come to live with him here with her mother on a permanent basis, or whether it was more in her best interests to remain in Bangladesh without her father and only with her mother.”
29. We have considered Mr Singer’s submissions on this point. The duty under section 55 (the spirit of which is to be applied to overseas applications) comes to an end on someone reaching majority. The best interests role as a current primary consideration fades from view if by the time of the hearing of an appeal an appellant has ceased to be a minor. The fact that the second appellant reached majority before the ECO’s decision is inescapable. There may be continuing family life after adulthood and that may involve a retrospective best interests exercise in order to understand the current position. This may be relevant to the consideration under the rule and the proportionality exercise. The effect of paragraph 27 is not to preserve an appellant’s status as a child for the purposes of examining article 8 components under paragraph 297 or outside the rule on an artificial basis after adulthood has been reached. It is correct that the judge did not express a final conclusion on where the best interests lay although it is clear from his consideration of the circumstances that these lay with maintaining the status quo. In our view he was correct to view those through the prism of the second appellant’s age at the date of application. In our view an analysis of paragraph 297(i)(f) would be incomplete without taking into account where they lay at the date of application in the light of the prohibition on an age-based refusal. We conclude that, based on the inference we have drawn above, the judge’s approach to the best interests aspect was legally correct. Even if we were persuaded that the best interests required the presence of both parents, there was nothing to show that the first appellant’s husband could not re-join his family in Bangladesh.

30. A further limb to the second ground argues that the judge at [18] of his decision refused to consider as a material issue whether the refusal of entry clearance had the effect of punishing the second appellant for:
- (i) the immigration decisions made by her father (who, had he known how the law would have changed, testified that he would have brought her over the UK [sic] at an earlier point in time); and
 - (ii) the inability of her mother to pass an Appendix O approved English language test.
31. Paragraph [23] of the grounds continue:
- “23. It is contended that the FTJ ought to have asked himself whether the conduct of the second Appellant’s parents and the subsequent changes in the law, had resulted in Nusrat being unfairly prejudiced and suffering a historic wrong. If she had not suffered this injustice, she would have been able to enter the UK at an earlier point in time before she attained her majority. It is contended that such an argument would have been capable of attracting weight in the balancing exercise under Article 8 ECHR: AP (India) v SSHD [2015] EWCA Civ 89; NH (Female BOCs, exceptionality, Art 8 para 317) British Overseas Citizens [2016] UKAIT 00085; Patel, Modha & Odedra v ECO (Mumbai) [2010] EWCA Civ 17.”
32. Despite Mr Singer’s forceful argument on this aspect which he contended fed into the serious and compelling circumstances under paragraph 297(i)(f) we are not persuaded there is any merit in this ground. The second appellant’s parents chose a course of action and whilst that may have resulted in a lost opportunity to be educated in the United Kingdom and for the second appellant to have been with her father here, that is not a matter for which the State can accept responsibility nor is it a factor in the proportionality exercise owing to a complete absence of evidence of the second appellant having been disadvantaged as a result. We are not persuaded that this factor coupled with the difficulties encountered by the first appellant’s mother in passing the English language test bring them within the scope of the unjustifiably harsh consequences referred to by the Supreme Court in MM (Lebanon) and Others v SSHD [2017] UKSC 10.
33. The ECO acknowledged that the second appellant had maintained a family life with both parents during the preceding eleven years. Thus he accepted that Article 8 was in play. In our view the judge carried out a correct direction as to the proportionality exercise in [18] of his decision both as to this factor and also the first appellant’s medical circumstances.
34. We drew the parties’ attention to the recent Court of Appeal decision in TZ (Pakistan) and Another v SSHD [2018] EWCA Civ 1109 in which the Senior President of Tribunals gave guidance as to the approach to be taken to Article 8. He observed at [33]:
- “33. This means that a tribunal undertaking evaluation of exceptional circumstances outside the Rules must take into account as a factor the strength of the public policy in immigration control as reflected by the Secretary of State’s test within the Rules.

The critical issue will be genuinely whether the strength of the public policy in immigration control in the case before it is outweighed by the strength of the Article 8 claim so that there is a positive obligation on the state to permit the applicant to remain in the UK. The framework or approach in *R (Razgar) v SSHD* [2004] UKHL 27 is not to be taken to avoid the need to undertake this critical balance.”

35. Mr Singer accepted in his submissions that there was an article 8 component within paragraph 297 as to sole responsibility and serious and compelling circumstances in the alternative. The rule is therefore a statement of the Secretary of State’s policy as to the public interest and informs the weight to be given to this aspect in any proportionality assessment. The article 8 considerations of this case required an enquiry to see whether, on the same facts, there were exceptional circumstances outside the Rules whereby the refusal resulted in an unlawful breach under article 8. We are not persuaded that there is anything in the case before us that was not captured by the article 8 considerations under paragraph 297 which we consider were lawfully reached by the judge as to both appellants. The “historic injustice” point has no relevance. The evidence shows that the second appellant suffered no detriment by remaining in Bangladesh with her mother where she has evidently flourished in the light of her now being at university. There was no evidential basis on which she could have succeeded under the rule and nothing to show that the refusal by the ECO was unlawful on human rights grounds. In our view the proportionality exercise undertaken by the judge in [18] and [19] of his decision was the correct one leading to a conclusion rationally open to him on the findings he had made. We are not therefore persuaded that there was error in his decision which we uphold.

NOTICE OF DECISION

This appeal is dismissed.

Signed

Date 27 June 2018

UTJ Dawson

Upper Tribunal Judge Dawson