



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/24536/2016
HU/23928/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14 August 2018

Decision & Reasons Promulgated
On 3 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

DD
DD
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Aslam, Counsel

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants appeal against the decision of First-tier Tribunal Judge Zahed promulgated on 2nd March 2018 dismissing the Appellants' human rights appeals on the basis of paragraph 297 of the Immigration Rules and Article 8 ECHR. The Appellants appeal against that decision with permission having been given by First-tier Tribunal Judge Hollingworth for the following reasons:

“At paragraph 15 of the decision the Judge states that the Judge found that the Appellants would not have succeeded in their immigration appeal as the first Appellant was over 18 at the date of application and the Sponsor did not have sole responsibility for them. It is arguable that the footing for the Judge’s credibility findings was insufficient for the conclusions reached. The Judge has drawn inferences upon the affidavits as stated at paragraph 11 of the decision. At paragraph 10 of the decision the Judge has referred to [MD], the aunt of the Appellants, stating that it was best that their father took them as their mother clearly shunned them to save their marriage. The affidavit of [EM], the Sponsor’s uncle, stated that their mother prioritised her new marriage over the girls to an extent of finding no time for them. It is arguable that the inference from these affidavits as quoted was that the mother of the Appellants played no role in their lives. The Judge found that the Appellants’ mother had not abandoned them as claimed and that inconsistency had arisen. It is arguable that inconsistency has not in fact arisen or if it has that it is immaterial. The Judge made findings in relation to the sending of money by the Sponsor. Reference is made in the permission application to the factual basis put forward to the Judge in this context. At paragraph 7 of the decision the Judge noted the Sponsor was not entitled to lawfully work in the UK until he obtained his ILR that he came on a student visa and then became an overstayer. The evidence referred to in the permission application dates from 2007. It is arguable that the Judge had set out an insufficient analysis of the evidence relating to the making of key decisions. Given the state of the evidence in relation to the involvement of the mother of the Appellant it is arguable that the foundation for the conclusion reached in respect of Section 55 is unsound. At paragraph 18 of the decision the Judge noted that the Appellants had not submitted any pictures of them with their Sponsor and the Judge found that although family life may exist with the father it was very tenuous at best. It is arguable that the Judge has set out an insufficient analysis of the degree of dependency or emotional support or real support in relation to a finding of family life between the Sponsor and DD (the first Appellant) in view of her age at the date of application. It is arguable that a fuller analysis was required in respect of the existence or otherwise of family life between the sponsor and DD given her age. It is arguable that a fuller analysis was required of the application of Section 117. It is arguable that the proportionality exercise has been affected in the light of the factors advanced in the permission application.”

2. I was not provided with a Rule 24 response by the Respondent but was given the indication that the appeal was resisted.

Error of Law

3. Having heard submissions from both representatives I do find there was a material error of law such that the decision should be set aside. My reasons for so finding are as follows.
4. In respect of the Grounds of Appeal, Mr Aslam embellished them by highlighting findings of fact which did not sit well against the evidence that was before the First-tier Tribunal Judge, in particular Mr Aslam pointed to the fact that the Sponsor’s witness statement reflected that the children (I use that term collectively to refer to both the adult Appellant as well as the minor child given that the adult child of the

Sponsor has turned 18 relatively recently) had not lived with their mother since at least after the divorce whereby they subsequently lived with the Sponsor's mother (until presumably 2013 when she passed away) and thereafter were overseen by the Sponsor's cousin until she moved away in 2015 to get married. In comparison the judge's decision at paragraph 6 reflects that the Appellants lived with their mother "at his mother's house" which does not sit well against the statement from the Sponsor that the children lived with his mother alone and not with their own biological mother at all.

5. Further to that the judge made a subsequent statement at paragraph 18 that the children have lived with their mother "throughout their lives". Mr Kotas made the insightful submission that this could have been implicit from the judge's assessment of the adverse sole responsibility assessment the implication of which is that the children's mother must still retain responsibility. However, even if that were so, without the judge stating in clear terms and giving explicit reasons why he rejects the Sponsor's evidence that the children were not living with first their grandmother and then being overseen by their aunt and were not living with their mother since after the divorce as all the evidence pointed, to in my view such a finding would not be adequately reasoned and represent a material error of law.
6. Mr Aslam also pointed also to other mistakes of fact such as that the Sponsor had attained his indefinite leave to remain after ten years' lawful leave and was not an overstayer and had worked lawfully throughout his time in the United Kingdom which again did not sit well against paragraph 7 of the decision which states that the Sponsor was not entitled to lawfully work in the UK until he obtained his ILR as he came on a student visa and then became an overstayer. Mr Kotas did not attempt to defend these findings as being lawfully reasoned and open to the judge to find.
7. Further to that Mr Aslam also pointed to pages 29 and 30 of the Appellant's Bundle whereby various affidavits confirmed that the Appellants lived "alone" as opposed to with their mother and also confirmed that the Appellants were being "shunned" by their biological mother. This added to my concern that the judge had not taken all of the evidence into account before potentially (if that is what happened here) rejecting the Sponsor's account and the evidence on the papers that the Appellants had lived apart from their biological mother since the divorce in 2000.
8. I was less impressed with the grounds concerning sole responsibility. Mr Kotas made the valid observation that the judge had made findings in respect of the Sponsor not knowing the name of the schools that the Appellants attend and whilst that would not defeat the sole responsibility issue, in and of itself, it does point to a lesser knowledge of their day-to-day lives being familiar to the Sponsor than one would expect given there was daily contact between the children and Sponsor. However in that same breath I also note that the judge has not paid consideration to Article 8 through the lens of the *Razgar* proportionality approach. I note for example that in paragraph 19 the judge says that any interference is proportionate with a legitimate aim of immigration control because this is not a removal case. That is unsatisfactory as there is at least one child involved in this appeal and therefore there needs to be

consideration of whether the child's exclusion would be undesirable, which would need to take place under the lens of Article 8 outside the Rules. Notwithstanding that, the judge also noted at paragraphs 2 and 15 of the decision that the first Appellant was no longer a child and was over 18 at the date of application and consequently the Immigration Rules could have no relevance to an assessment of her Article 8 family life with her Sponsor. Therefore the adult child's appeal fell to be determined outside the Rules entirely and not be virtue of sole responsibility.

9. In light of the above findings I set aside the decision of the First-tier Tribunal in its entirety.

Notice of Decision

10. The appeal to the Upper Tribunal is allowed.
11. The appeal is to be remitted to the First-tier Tribunal to be heard by a differently constituted Bench.

Directions

12. I make the following directions for the further administration of this appeal upon remittal.
- (a) The appeal is to be remitted to Taylor House for re-hearing.
 - (b) No interpreter is required and the only witness that is said to give evidence will be the Sponsor.
 - (c) A time estimate of two hours has been given.
 - (d) An anonymity direction is made given that there is a child involved in this appeal and given that the contents of this decision will be published online.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 31 August 2018

Deputy Upper Tribunal Judge Saini