Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/26518/2016**

HU/26521/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 March 2018	**On 09 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MISS SAWERA ASGHAR – FIRST APPELLANT
MISS AMMARA ASGHAR – SECOND APPELLANT
(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Bagral, Counsel.
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The Appellants are citizens of Pakistan who appealed against decisions of the Respondent refusing their applications for entry clearance to join their father in the United Kingdom. That decision was appealed and following a hearing, and in a decision promulgated on 19 October 2017, Judge of the First-tier Tribunal A Kelly, dismissed the appeals. The Appellants sought permission to appeal which was granted by Judge of the First-tier Tribunal Osborne in a decision dated 15 January 2018. His reasons for so granting were: -

> "1. The grounds seek permission to appeal a decision and reasons of First-tier Tribunal Judge A Kelly who in a decision and reasons promulgated 19 October 2017 dismissed the Appellants' appeal against the Respondent's Decision refusing their applications for entry clearance to join their father in the UK.
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> 2. The grounds assert that the judge adopted an approach to and treatment of the evidence which was unfair. The judge wrongly considered the guardianship order. The Respondent did not challenge the reliability of the guardianship order. The judge found that the order cannot be relied upon. That approach is unfair as the guardianship order was not challenged and no concerns were raised at the hearing. The Appellants were therefore denied an opportunity to address the concerns which were only raised in the Decision. The judge relied upon the delay between the grandparents' death and the date of application. Neither the ECO nor the Presenting Officer raised this as an issue. The delay was not inordinate. The judge could and should have raised this as an issue in the hearing; to fail to do so was a further unfairness.
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> 3. In an otherwise careful decision and reasons it is nonetheless arguable that if the judge had any concerns about the authenticity/reliability of the guardianship order then those concerns should have been raised at the hearing when an explanation could have been provided. It is at least arguable that the judge's failure to do so amounts to an arguably material error of law.
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> 4. This arguably material error of law having been identified, all the issues raised in the grounds are arguable."

2. Thus, the appeal came before me today.

3. Ms Bagral expanded upon the grounds seeking permission to appeal emphasising that this was primarily a challenge to the fairness of the procedure adopted by the Judge at the hearing which renders her decision unsustainable. The Appellants are sibling children born in 1998 and 2002 and are the daughters of their Sponsor father who is present and settled in the United Kingdom. Their application for entry clearance was to join him following their abandonment by their mother in 2008 and residing with the Sponsor's parents, since deceased. It was not accepted by the ECO that the Sponsor had sole responsibility for the Appellants or that there were serious or other family considerations that made their exclusion undesirable.

4. The nub of Ms Bagral's submissions is that the Judge's approach and treatment of the evidence was unfair in that the Judge took issue with evidence not put in issue by the Respondent thereby denying the Appellants an opportunity to address the Judge's concerns. Consequently, the Appellants have been deprived of a fair hearing. The consideration of

the “guardianship order” is erroneous. The court in Pakistan awarded the Sponsor guardianship of the two Appellants. That order is within the Appellants’ bundle and was submitted along with the application to the Entry Clearance Officer (ECO). The ECO acknowledged in the decision that no challenge was made to the reliability of this document. At the hearing, while the Sponsor was asked about the order during cross-examination, the Home Office Presenting Officer (HOPO) did not challenge the reliability of the order either in cross-examination or in his submissions. The Appellants’ case therefore proceeded on the basis that the order was not in issue. However, the Judge found that the order could not be relied on at paragraph 23 of her decision noting several deficiencies with the evidence. Ms Bagral’s submission is that this is fundamentally unfair as the evidence was not challenged and the Judge did not raise her concerns at the hearing. The failure to do so has deprived the Appellants of an opportunity to deal with those concerns which may have been addressed by the Sponsor given that he was involved in the obtaining of the order. These were not incidental matters but ones material to the Judge’s decision. Additionally, the Judge rejected the order on the basis that it is “poorly worded”, “poorly spaced” and contains “ungrammatical statements” but only identifies one such statement and fails to direct herself that she should not consider the documents from a UK standpoint. The Judge does not give allowance for the fact that this order is produced by a foreign country and there is no evidence to support the Judge’s assumption that the document could not be relied on because it was in English and not Urdu. Further the Judge has taken the point that the order was made by the court in 2015 but not signed until the following year as indicative of its unreliability but has failed to consider the Sponsor’s evidence that it took him a year to obtain the document. Had the Judge aired her concerns at the hearing it is probable that the Sponsor would have been able to explain the delay further to the Judge’s satisfaction. Finally, in relation to this first ground (unfairness) the Judge has relied on the delay between the grandparents’ death and the date of application. Neither the ECO nor HOPO raised this as an issue. If the Judge was unclear about the reasons for this delay then it was incumbent on her to seek clarification and to enable the Sponsor to address it. Again, the failure of the Judge to do so gives rise to unfairness.

5. Ms Bagral, with less force, also relied on grounds two and three. That at paragraph 22 of her decision the Judge’s findings are not in accordance with the evidence and, in any event, the failure of the Sponsor to obtain a copy of the witness statement the mother provided to the court and a statement confirming that she did not object to the applicants coming to the United Kingdom, when the Sponsor’s evidence was that the statement was provided to the court by the mother and that he did not know about the mother’s whereabouts, caused the Judge to misconstrue the evidence. She was accordingly wrong to conclude that it was reasonably open to the Sponsor to obtain such evidence. Finally, the judge has misdirected herself in law when stating that she recognises “that it is particularly important in entry clearance cases involving children that the Immigration Rules are strictly applied”. This direction is plainly wrong and suggests that the

Judge applied a restrictive approach to her consideration of the evidence in the appeal.

6. Mr Wilding urged me to accept that the Judge had not dismissed the issue of the guardianship order "out of hand" but had given clear reasons why it was rejected. The order was before the ECO but had not been accepted. He asserted that the Appellants' Counsel was treating the document as "determinative" which it is plainly not. Further the Judge's conclusion at paragraph 25 of her decision is not unfair and what Counsel for the Appellants is putting forward is no more than a disagreement. No evidence has been brought forward today to answer the question of delay, the relevant date in the appeal is the date of hearing and the Judge cannot be said to have acted unfairly. As to the Judge's findings not being in accordance with the evidence there is here no mistake of fact. The Judge has made findings that were open to be made. Finally, it was incumbent upon the Judge to record that the appeal failed under the Immigration Rules and all that the Judge has done is to reflect the weight that should be given to the public interest in a case of this nature. There is, he concluded, no material error of law.

7. I reject Mr Wilding's submissions. I find that the Appellants have been denied an opportunity to address the concerns which were only raised in Judge Kelly's decision. Had the Judge any concerns about the authenticity or reliability of the guardianship order then those concerns should have been raised at the hearing when an explanation could have been provided by the Sponsor. Likewise, the Judge could and should have raised the issue of "delay" between the grandparents' death and the date of application at the hearing. These two factors themselves amount to procedural unfairness such as to render Judge Kelly's decision unsustainable. In those circumstances grounds two and three are redundant as the decision cannot stand. The Appellants have been deprived of a fair hearing.

Decision

The making of the decision in the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh pursuant to Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Direction 7(b) before any Judge aside from Judge A Kelly.

No anonymity direction is made.

Signed Date 5 April 2018.

Deputy Upper Tribunal Judge Appleyard