Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/26732/2016
HU/26730/2016

THE IMMIGRATION ACTS

Heard at Birmingham
On 5 December 2016

Decision & Reasons Promulgated
On 18 December 2018

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

A and T
(ANONYMITY DIRECTED)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr M Azmi (Counsel)
For the Respondent: Mr D Mills (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The claimants have appealed, with the permission of a Judge of the First-tier Tribunal, to the Upper Tribunal from a decision of the First-tier Tribunal ("the tribunal") which it made after a hearing of 25 October 2017 and which it communicated to the parties on 15 November 2017. The tribunal decided to dismiss the appeals of each claimant from decisions of the entry clearance officer, taken on 14 November 2016,

refusing to grant them entry clearance to come to the UK with a view to settlement and to join their sponsor.

2. The tribunal had made an anonymity direction. It did not say why but I think it was probably because, at the time it heard the case, one of the claimants was a minor. The written grounds contain a rather discrete request for that to be continued but not for that reason. Nothing was said about anonymity. I am not wholly convinced that such is necessary but, in the circumstances, I have decided to continue to grant anonymity to each claimant.

3. At the outset of the hearing, bearing in mind that the claimants are represented by Coventry Law Centre (I think sometimes known as Central England Law Centre) I disclosed that I had previously been employed by Coventry Law Centre albeit not for many years. I asked whether either representative had concerns about me dealing with the case in such circumstances (though I suppose my concern was largely directed towards Mr Mills). In the event, both confirmed they had no objections and, accordingly, matters proceeded.

4. The two claimants are mother and son. A is the mother of T. A was born on 1 January 1957 (though the sponsor in a witness statement suggests it is possible she was born on a date earlier than that) and T was born on 1 January 2000. They are both Sudanese nationals and the evidence indicates that they live in a refugee camp in Sudan. Their UK based sponsor, Whom I shall call U in order to preserve anonymity, has been granted refugee status in the UK. The evidence before the tribunal was to the effect that he was undertaking part-time employment (paragraph 13 of the tribunal's written reasons) and that he had received some counselling due to the impact upon him of his being separated from his family members in Sudan (paragraph 8). A is the mother of U. T is U's younger brother.

5. Entry clearance having been refused, the claimants appealed to the tribunal. There was a single oral hearing encompassing both appeals and at which both parties were represented. The tribunal received oral evidence from the sponsor and from two additional witnesses.

6. The tribunal, first of all, as was required of it, considered whether or not either of the claimants could bring themselves within the terms of the relevant Immigration Rules which the tribunal identified as being paragraph 319V with respect to A and paragraph 319X with respect to T. It concluded that, with respect to each claimant, the requirements concerning maintenance and accommodation were not met. That part of the tribunal's decision has not been the subject of any further challenge. The tribunal noted in its written reasons that the sponsor had lost contact with the claimants in 2010 but had regained such contact in April 2016, that A suffers from diabetes and back pain, that U regards himself as being responsible for the claimants and sends money to them, and that T was, at the time the tribunal heard the appeal, still a child.

7. The tribunal asked itself what might be in the best interests of the then child claimant T. As to that, it said this:

> "The second Appellant is a child and I take account of his bests interests as a primary consideration. Both he and his mother are in Darfur and I accept the evidence given that they are living in refugee accommodation. Although he is with his mother, as a child he is struggling to cope with looking after his mother who is ill whilst being in a place away from home. The sponsor is his elder brother and as a family unit, the second appellant's best interests would I find be best served by having both financial and emotional support that only his brother could give at this time. I find that given the unsettled situation of the first and second appellant, their current accommodation and lack of funds for daily living that the best interests of the second appellant are to be with his brother and mother and given that the sponsor cannot return to Sudan that family unit should be in the UK."

8. Pausing there, although the closing sentence to that paragraph might have been a little clumsily worded, I do not think it is possible to interpret what was said as an indication that the tribunal was actually seeking to decide, at that point in its written reasons, that Article 8 required the family unit to be in the UK. Rather, what was being said was that it would be in the best interests of the then child claimant if that family unit were to be located together in the UK. Nobody sought to urge upon me a different interpretation.

9. The tribunal then explained that it regarded Article 8 as having been engaged. It moved on to its assessment of proportionality. Pausing again, there has never been any suggestion to the effect that the two claimants might be unable to negotiate their way through the first two stages of the "Razgar" process or that the Secretary of State could not negotiate his way through the third and fourth ones. So, the matter boiled down to an assessment as to proportionality. As to that the tribunal said this:

> "18. The maintenance of immigration control is a powerful factor that is in favour of the Respondent. The Immigration Rules are not met in this case and on the evidence before me neither appellant would be independent financially and would rely on public funds. Section 117B(iii) is therefore a public interest factor that is relevant in this case. Against that is the fact that it is in the best interests of the second appellant to be part of a family unit where he is supported by his older brother to look after his mother. In addition, it was argued that the sponsor is emotionally very distressed and indeed suffering mentally by the whole situation and the fact that his only family is in Darfur in these circumstances. Both witnesses gave credible evidence about how the sponsor desperately wanted his family to join him and I accept their testimony as well as the sponsor's in that regard. I do not find that he has failed to integrate however, given how well he has done, in not only securing qualifications but also working and being a valued member of the community. On balance however, I find that the factors that are against the appellants outweigh those that are in their favour and I must dismiss the appeals under Article 8 outside of the Rules."

10. It is really that paragraph which has been targeted in the context of the appeal to the Upper Tribunal. In the written grounds of appeal of 2 January 2018, it was contended, in summary, that the tribunal had failed to have proper regard to what was said in *AT and Another (Article 8 ECHR - Child Refugee - family reunification) Eritrea* [2016] UKUT 227 (IAC); had failed to provide an appropriately reasoned and detailed assessment with respect to proportionality; had failed to follow the approach in *R (on the application of MM (Lebanon) v SSHD* [2017] UKSC10; and had failed to take account of the fact, when

assessing the public interest in the maintenance of immigration control, that the Immigration Rules made provision for cases to be allowed under Article 8 of the ECHR.

11. Permission to appeal was granted and the granting judge relevantly said this:

> "1. The Appellants, mother and son, respectively born on 01/01/1957 and 01/01/2000, nationals of Sudan, applied for permission to appeal, out of time, concerning the decision of First-tier Judge N Asjad promulgated on 15/11/2017 (the Decision) dismissing their appeals on human rights grounds.
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> 2. Permission to appeal is granted for the following reasons:
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> (i) there was found that the Appellants had failed to show they met the material provisions of the Immigration Rules 319V and 319X with reference to adequacy of maintenance and accommodation all other parts having been met;
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> (ii) there was found to be family life between the Appellants and their sponsor son/brother, a refugee in the UK, and that the Respondent's decision had amounted to an interference with that family life, the centre issue appearing to have been identified as one of proportionality;
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> (iii) there was further found that given the Appellants situations *inter alia* living in refugee accommodation in Darfur, the minority of the second Appellant and the first Appellant having health problems that 'the best interests of the second Appellant to be with his brother and mother and given that the Sponsor cannot return to Sudan, that family unit should be in the UK. …' (para 16). Additionally, there was reference to 'credible evidence' about the Sponsor 'desperately' wanting his family to join him an being emotionally distressed by the separation (para 18);
>
> (iv) notwithstanding foregoing findings, the proportionality assessment was navigated in brief terms with there appearing the Appellants' failure to have met the Immigration Rules with reference to its financial provisions a determinant in the assessment, absent there appeared as asserted of regard to material authority before the Judge AT & An (Article 8) ECHR-Child Refugee-Family Reunification) Eritrea [2016] UKUT 227 (IAC), and more generally, MM (Lebanon) v SSHD [2017] UKSC 10, and that where families are separated in circumstances not of their choosing the need for full assessment and particular regard to the question of harsh consequences, of which there appeared together a lacuna in the judicial assessment, and thereby in totality arguably an inadequacy of reasoning on the facts consistent with statute, principles of refugee family reunification, and the applicable authorities."

12. Permission having been granted there was a hearing before the Upper Tribunal (before me) so that it could be considered whether or not the tribunal had erred in law and, if so, what should flow from that. Representation was as stated above and I am grateful to each representative.

13. Mr Azmi argued that the positive findings (from the perspective of the two claimants) which had been noted at paragraph 16 had not been properly incorporated into the proportionality consideration at paragraph 18 of the written reasons. The tribunal had

failed to accord sufficient weight to those factors, it had failed to properly consider the fact that the family members were being forced to live apart rather than doing so by choice, and had not attached sufficient weight to its view that it would be of the best interests of the then child claimant to live in the UK with his mother and his brother. It was hard to understand from what it had said, argued Mr Azmi, what weight the tribunal had attached to the various specific relevant considerations. It had, in effect, treated the position under the Immigration Rules as being determinative. If a tribunal does not give an indication of the weight which has been given to individual factors then its reasons will be inadequate.

14. Mr Mills, for the Secretary of State, noted the reference to the decision in *AT* in the grounds and expressed the view that it was surprising that the tribunal had not mentioned that case at all. But there were differences between that and the instant case in that *AT* involved a UK based sponsor who was still a child and was seeking to bring his parents to the UK. So, the factual situation obtaining here was dissimilar. The tribunal had appreciated that this was a "forced separation" case. The weight the tribunal chose to attach to competing factors was, absent perversity, a matter for it. The requirements of the Immigration Rules had not been met and that was significant particularly bearing in mind that there are public purse considerations. Differently constituted tribunals might have reached a different outcome but the outcome reached by this tribunal was not irrational or perverse. All of the relevant issues had been considered.

15. I have decided that the tribunal's decision did not involve the making of an error of law. It follows that its decision must stand.

16. I shall deal, first of all, with the points made on behalf of the two claimants by Mr Azmi. It does seem to me that the tribunal took account of all relevant matters. Mr Azmi did not argue that the tribunal had failed to actually consider any factors other than the "forced separation" one. As to that, the tribunal did appreciate that this was a case where the family members were not living apart from each other by choice. That is recognised at the foot of paragraph 16 of its written reasons. It did not expressly repeat that when conducting its proportionality balancing exercise at paragraph 18. It would have been better had it done so. But I am not persuaded that, having identified that matter at paragraph 16, it would have then lost sight of it when conducting its proportionality assessment. It can be taken, therefore, that it did bear that matter in mind. It is true that the tribunal did consider that the best interests of the then child claimant would lie in living with a reunited family in the UK. But the best interests of a non-British child are not, of themselves, determinative. Mr Azmi did not argue that they were. The best interests position was a matter to be properly taken into account but the tribunal did that as is clear from what it said at paragraph 18 of its written reasons. I do not accept that the tribunal was required to explain the particular amount of weight it was giving to every particular relevant factor which it had identified. I do accept it could have said a little more than it did in its rather succinct paragraph 18. But it is clear from that paragraph that it identified the factors which weighed in favour of the claimants and those which weighed against the claimants and then reached an overall view as to which were the more persuasive. There is nothing unlawful about that approach and, indeed, what it was doing was carrying out the balancing exercise which was required of it. In doing that it

did not treat the public interest considerations under the Immigration Rules as being decisive of the Article 8 situation outside the rules. Had it done so it would not have had to say any more than that the Rules were not met.

17. As to any points in the written grounds which Mr Azmi chose not to develop, the tribunals written explanation for its ultimate conclusion was brief but, in my judgment, it was, as a matter of law, adequate. Perhaps it was no more than that but adequacy is the standard required. The case was not factually on all fours with *AT* but, in any event, there is nothing in what the tribunal had to say which demonstrates that it did not follow the approach taken in *AT*. As to what was said about *MM Lebanon*, the tribunal did follow a two stage process by asking itself whether there was compliance with the Immigration Rules and then conducting a merits based assessment outside the rules. It was performing that function at paragraph 18 of its written reasons. The tribunal was entitled to attach weight to the failure to comply with relevant requirements of the Immigration Rules.

18. I do accept that this is a case where a differently constituted tribunal might well have reached a different outcome on the same material. As I commented at the hearing, this was perhaps a "tough" outcome. But I am not able to say that it was one which was perverse or which no properly directed tribunal, acting rationally could have reached. Accordingly, I find myself unable to interfere with the tribunal's decision.

19. Perhaps there might be some hope, though, for the sponsor and the claimants. It may be that, in due course, the claimant will find himself in a position to maintain and accommodate the two claimants within the terms required by the Immigration Rules. If so, perhaps a fresh application for entry clearance might be made. I do not regard anything I have decided as precluding the possibility of a successful entry clearance application in the future either under the Rules or under the terms of Article 8 outside the Rules.

20. For the reasons set out above the appeal of the first claimant fails and the appeal of the second claimant fails too.

Decision

The decision of the First-tier Tribunal did not involve the making of an error of law. Accordingly, that decision, with respect to both claimants, shall stand.

I continue the grant of anonymity given to the two claimants by the First-tier Tribunal. I do so under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, no report of these proceedings shall name or otherwise identify the claimants nor any family member of those claimants. Failure to comply may lead to contempt of court proceedings.

Signed: Date: 11 December 2018

Upper Tribunal Judge Hemingway