Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11996/2018
HU/12004/2018

THE IMMIGRATION ACTS

Heard at Birmingham
On 16th September 2019

Decision & Reasons Promulgated
On 25th September 2019

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

[A A]
[N A]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Ahmed, Counsel instructed by BLC Solicitors
For the Respondent: Mr C Howells, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are nationals of Pakistan. They are sisters now aged 15 and 16. On 30 October 2018 they made an application for indefinite leave to enter the UK for settlement as the children of a parent settled in the United Kingdom. Their applications were refused by the respondent on 10 May 2018 and those decisions were maintained following review by an Entry Clearance Manager on 11 December

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2018. Their appeal was heard by First-tier Tribunal judge Aziz on 19 February 2019 and dismissed for the reasons set out in a decision promulgated on 5 March 2019.

The decision of F*t*T Judge Aziz

2. The background to the applications and the reasons given by the respondent for refusing the applications are set out at paragraphs [2] to [9] of the decision. The evidence received by the Tribunal is set out at paragraphs [11] to [58] of the decision. The appellant's father and sponsor Mr [FP] did not give evidence because of his vulnerability and mental health. The Judge confirms, at [72], that he draws no adverse inference against the appellant's father for his failure to give evidence. Instead, the Tribunal heard evidence from the appellant's paternal uncle Mr [FR]. His evidence is set out at paragraphs [21] to [54] of the decision. The Judge's findings of fact and conclusions are set out at paragraphs [68] to [100] of the decision.

3. It is uncontroversial that the appellant's father arrived in the UK with his son *(the appellants brother)* who was at the time about three years old, in 2009. The Judge noted the claim being advanced is that the appellant's mother, Sadia Noreen went missing in March 2009 and has not returned. The Judge noted, at [70], that neither party sought to submit evidence as to the information provided by the appellant's father in his application for a visit visa made in 2009 regarding the family circumstances in Pakistan, and in particular, what was said about the care of the appellant's whilst their father was visiting the UK.

4. The Judge found, at [68], that Mr [FP] is the biological father of the appellants. At paragraphs [69] to [91], the Judge considered the claim made by the appellants that their mother disappeared in March 2009 and that since that time, their father has had sole responsibility for their upbringing. At paragraph [78], the Judge stated:

> "… I am not persuaded that the evidential burden has been discharged and that the Tribunal has been persuaded that the appellants' mother simply walked out on her three children a decade ago and they have not heard anything from her. In such circumstances I am not persuaded that she can be presumed dead and the appeal cannot succeed under paragraph 297(i)(d) of the immigration rules."

5. At paragraphs [79] to [91] of the decision, the judge addressed whether in the alternative, the appellants can satisfy the requirement set out in paragraph 297(i)(e) of the immigration rules. That is, one parent is present and settled in the UK and has had sole responsibility for the child's upbringing. The judge considered the evidence regarding the mental health of the appellants father and at paragraph [81], stated that he could not accept *"... That the sponsor has been or is even capable of exercising genuine parental responsibility over any of his children since the onset of his severe mental health problems ..."*. The judge considered the diagnosis of paranoid schizophrenia that has been made and the evidence given by the appellants' paternal uncle, [FR] as to the arrangements for the care of the appellants brother, and the way in which decisions are made concerning the parenting of the appellants and their brother. At paragraphs [89] to [91], the judge stated:

> "89. ... I simply do not believe Mr [R] when he asserts that despite having taken custody of his son for all the reasons which he has cited, that the sponsor is still exercising sole responsibility over the child. I simply do not believe him when he says that the sponsor still exercises sole responsibility over each of his children and that when he is able to find the right moment, he speaks to him calmly about a parenting issue, that they have a discussion, but that it is the sponsor who makes the final decision and dictates what should be done. I find that he is embellishing his evidence in order that it fit within the requirements of the immigration rules.
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> 90. If any of the above does not materially undermine the appellants' appeals, then the following does. In a moment of candour, Mr [FR] indicated in his evidence that after the appellants arrive in the United Kingdom they will move in with him and his wife and that he will apply for a residence order through the Family Court as he did for the sponsor's son. I find this to be the true position in these appeals and Mr [R] is to be credited for such honesty. However, such evidence undermines the entire basis upon which these applications are being made. Namely, that the appellants will come to the United Kingdom and reside with their father who will be exercising parental responsibility over them. The fact Mr [R] needs to act in this way demonstrates to the Tribunal that the sponsor is not capable of exercising parental responsibility over the appellants.
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> 91. For the above reasons, I am not persuaded that the sponsor is exercising sole responsibility over the appellants and as such, their appeals cannot succeed under paragraph 297(i)(e) of the immigration rules."

6. At paragraphs [92] to [96] of the decision, the judge addressed whether in the alternative, the appellants can satisfy the requirement set out in paragraph 297(i)(f) of the immigration rules. That is, one parent is present and settled in the UK and there

are serious compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care. The Judge considered the current arrangements. The judge noted, at [92], the evidence that the appellants are currently living in a house which has been inherited by their father and paternal uncle, [FR]. The appellants are being supported by their paternal aunt, [TN] and her husband, [MA]. The judge referred to the affidavit of [TN] and [MA], noting that they ensure that the girls are safe and act on instructions from Mr [A] and Mr [R]. At paragraph [95], the judge stated:

> "there is very little on the evidence before the tribunal to suggest that there are serious and compelling family or other considerations which made the appellants' exclusion from the United Kingdom undesirable in line with paragraph 297(i)(f) of the immigration rules. The evidence from the sponsor and his siblings all makes reference to the children being safely looked after and cared for in Pakistan. They are attending school and are being financially supported from the United Kingdom. I am not satisfied that the circumstances of the appellants are such that it engages paragraph 297(i)(f) of the immigration rules."

7. Having concluded the requirements of paragraph 297 of the immigration rules could not be met by the appellants, the judge went on to consider whether an Article 8 claim can succeed outside the rules. At paragraph [98], the judge stated:

> "it is said that the appellants are being cared for by their paternal aunt and her husband in Pakistan. Assuming that this is correct (and leaving aside my finding that I am not persuaded that the appellant's biological mother did disappear without trace in 2009), then they are being accommodated in a family home which is jointly owned by the sponsor. They are attending school and settled. They are being financially supported from the United Kingdom. There is nothing on the evidence before the tribunal to suggest that there are any exceptional or compelling circumstances which would warrant consideration of the applications outside of the immigration rules. The best interests of the children of for them to continue being cared for by their family in Pakistan."

8. At paragraphs [99] to [100], the judge stated:

> "99. … If compassionate and compelling circumstances do exist, they have not been properly put. That much is clear from the way that these appeals have been brought. I have found that the evidence has been embellished in order that it fit within the immigration rules and that the true position as to the motives behind these applications was revealed towards the end of examination-in-chief, when [FR] confessed that once the children arrive in the United Kingdom that they will not be living with their father (as was stated in the application forms and by their counsel at the appeal hearing). The appellants would be living with him and his

> wife and he will seek to make applications to the Family Court that residence orders be made in their favour. Ms Edwards rightly pointed out in her submissions that no evidence has been submitted dealing with any sort of assessment having taken place as to whether [FR] and his wife are suitable guardians and whether it is in the appellants' best interest to be moved to a foreign country and be raised by family members abroad. These are important considerations in any Article 8 ECHR assessment.
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> 100. It appears that having taken custody of the sponsor's son, that [FR] now seeks custody of the sponsor's two daughters. This appears to be the real motive behind the applications. If that is indeed the case, then the applications should have been made on that basis and supported by appropriate evidence, rather than what has been done, which is to put forward a false narrative that once the appellants arrive in this country that they will be living with their biological father who will be exercising sole responsibility over them."

The appeal before me

9. The appellants advance a number of grounds of appeal. First, they allege that the decision is infected by procedural impropriety and procedural unfairness. They claim that the conduct of the judge gave a perception that the judge had entered the arena in the conduct of the proceedings. Second, the judge made a fundamental misdirection in law in failing to determine the appellant's human rights appeals under Article 8. Third, the judge erred in the application of paragraph 297 of the immigration rules. The appellant's claim that the requirements of paragraph 297(i)(d) are met because there was sufficient evidence that the whereabouts of the appellant's mother had not been known since she had gone missing in 2009, and there was a "presumption of death". They claim the presumption of death had not been rebutted by the respondent. Furthermore there was no evidential basis upon which the judge could properly reach the conclusion that he did at paragraph [81] of the decision, that the sponsor has not been or is not capable of exercising genuine parental responsibility over his children since the onset of his severe mental health. Finally, in reaching the decision, the judge failed to have regard to the best interests of the children.

10. Permission to appeal was granted by Upper Tribunal Judge Pickup on 20th June 2019. Upper Tribunal Judge Pickup observed:

> "… Whilst the Judge adequately dealt with all the issues arising under the rules, it is arguable that the consideration of family life outside the Rules pursuant to

> article 8 ECHR was inadequately addressed, including the best interests of the children. It may be that on the inadequate evidence in this case no different outcome may be achieved. However, Article 8 was dealt with in a perfunctory way that is arguably unsustainable."

The matter comes before me to determine whether the decision of First-tier Tribunal Judge Aziz should be set aside as erroneous in law, and if it is set aside, to remake the decision.

11. Mr Ahmed submits that the judge took the immigration rules as being determinative of the appeal. He refers to paragraph [98] of the decision in which the judge stated that "*... There is nothing on the evidence before the tribunal to suggest that there are any exceptional or compelling circumstances which would warrant consideration of the applications outside of the immigration rules.".* Mr Ahmed submits that the failure to meet the rules is not the end point, and the judge failed to properly address the Article 8 claim outside the immigration rules.

12. Mr Howells submits that it was open to the Judge to conclude that the appellants are unable to satisfy the requirements of paragraph 297 of the immigration rules for the reasons set out in some detail, in the decision. He accepts that the judge does not adopt the five-stage approach referred to in Razgar, but he submits that is immaterial. He submits it is implicit from a careful reading of the decision, that the judge concludes that the refusal of entry clearance is not disproportionate to the legitimate aim of immigration control.

13. After hearing submissions, I informed the parties that in my judgement the decision of F*t*T Judge Aziz is infected by a material error of law, such that I set aside the decision.

14. The only ground of appeal available to the appellant was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. The judgment of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 confirms that the fact that the immigration rules cannot be met, does not absolve decision makers from carrying out a full merits-based assessment outside the rules under Article 8, where the ultimate issue is whether a fair balance has been struck between the individual and

public interest, giving due weight to the provisions of the Rules. Although the appellant's ability to satisfy the Immigration Rules was not the question to be determined by the FtT Judge, it was capable of being a weighty, though not determinative factor, when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

15. In my judgement, the judge erred in his assessment of the Article 8 claim. The appellants were not required to establish any exceptional or compelling circumstances which would warrant consideration of the applications outside of the immigration rules. The fact that the immigration rules were not met did not absolve the judge from carrying out a full merits-based assessment outside the rules under Article 8. I accept, as Mr Ahmed submits, the failure to satisfy the requirements of the immigration rules was capable of being a weighty, though not determinative factor in an assessment of whether the respondent's decision amounts to a disproportionate interference with the appellants' right to enjoyment of family and private life in the UK. It follows that in my judgment, the decision of the judge to dismiss the human rights appeal is infected by error of law. It cannot stand and I set it aside.

Re-making the decision

16. Directions were issued to the parties in advance of the hearing before me, reminding the parties that the Tribunal is empowered to permit new or further evidence to be admitted in the remaking of a decision, and, in any case where this facility is sought, the parties must comply with Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. No such application has been made by the appellants and I declined the oral application made by Mr Ahmed to remit the matter for hearing afresh before the First-tier Tribunal. No further witness statements have been made by the appellants, their father or their paternal uncle. I have been provided with no explanation, let alone a satisfactory explanation, as to why any new evidence could, with reasonable diligence, not have been made available to the First-tier Tribunal on the initial appeal, and why no application to adduce evidence in accordance with the

Tribunal Rules, has been made. There has been no Notice sent to the Tribunal and served upon the respondent, as required by the directions issued to the parties, indicating the nature of any evidence that the appellants wish to reply upon. The parties were on notice of the presumption that, in the event of the Tribunal deciding that the decision of the First-tier Tribunal is to be set aside as erroneous in law, the remaking of the decision will take place at the same hearing.

17. The only ground of appeal available to the appellant is that the respondent's decision is unlawful under s 6 of the Human Rights Act 1998. As to the Article 8 claim, the burden of proof is upon the appellants to show, on the balance of probabilities, that they have established a family life with their father and brother and that their exclusion from the UK as a result of the respondent's decision, would interfere with that right. It is then for the respondent to justify any interference caused. The respondent's decision must be in accordance with the law and must be a proportionate response in all the circumstances.

18. First-tier Tribunal Judge Aziz found that Mr [FP] is the biological father of the appellants. F*t*T Judge Aziz was not persuaded that the appellant's have established that their mother simply walked out a decade ago and they have not heard anything from her. He was not persuaded that the appellant's mother can be 'presumed dead'. The appellants' father has lived in the UK since 2009. Although the appellants have remained living in Pakistan apart from their father and brother since 2009, I find that the appellants enjoy family life with their father. I also find that the decision to refuse the appellants leave to enter, may have consequences of such gravity as to engage the operation of Article 8, and I accept that the interference is in accordance with the law, and that the interference is necessary to protect the economic well-being of the country.

19. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved. I should make it clear that in reaching my decision, I have had regard to s55 Borders, Citizenship and Immigration Act 2009 that requires the respondent to make arrangements for

ensuring that her functions in relation to immigration, asylum or nationality are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK. I take into account the decision of the Supreme Court in ZH (Tanzania) -v- SSHD [2011] UKSC 4. Lady Hale noted Article 3(1) of the UNCRC: which states that "in all actions concerning children, whether undertaken by ... courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.".

20. Although a primary consideration, it does not follow that it is automatically in the interests of any child to be permitted to enter the United Kingdom, irrespective of age, family background or other circumstances. As a starting point it is plainly in the best interests of the appellants to be with both their parents. FtT judge Aziz was not persuaded that the appellants biological mother did disappear without trace in 2009. That was a finding open to the judge and there is no reason for me to depart from that finding. In any event, the appellants have been separated from their father and brother since 2009. He has visited the appellants on four occasions since he was granted leave to remain in the UK and he regularly speaks to them on Skype. The appellants have also been able to maintain contact with their brother.

21. I have carefully considered the Affidavit of [MA] and [TN], the appellants paternal aunt and her husband. They confirm that the appellants' father is now permanently living in the UK with the appellants' brother, however the appellants are living in Pakistan. They confirm that both girls are enrolled at a local school and living in the same village, in a house adjacent to their house, that is jointly owned by the appellants father and Mr [FR], their uncle. They confirm that the appellants father and their paternal uncle are responsible for all decisions regarding the appellants and they support and send money from the UK. [MA] and [TN] confirm that they always ensure that the appellants are safe.

22. It is generally in the interests of children to have both stability and continuity of social and educational provision, and the benefit of growing up in the cultural norms of the society to which they belong. They have that stability in the current

arrangements. The appellants' father has a long-standing diagnosis of paranoid schizophrenia, a severe and enduring mental illness. In view of their father's health, a Contact and Residence Order was made by the High Court Family Division on 24th August 2011, that the appellants brother shall reside with Mr [FR] and [MB], his paternal uncle and aunt, and they will make the appellant's brother available for contact with his father, such contact to be supervised by Mr [FR]. It is in my judgement clear from the evidence that the appellants will not in fact be living with their father, but arrangements will have to be made for them to be cared for by their paternal uncle and aunt, in much the same way as the arrangements for their brother. That much is clear from the evidence given by Mr [FR] before F*t*T Judge Aziz. In my judgement, it cannot be in the best interests of the appellants to uproot them from the stability that they now enjoy, to an uncertain future in the UK.

23. As I have said in my error of law decision, the ability to satisfy the immigration rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative factor, when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

24. The appellants are unable to satisfy the requirements of the immigration rules for the reasons set out at some length by F*t*T Judge Aziz. Having carefully considered the evidence whilst I accept that the appellants might prefer to continue their relationship with their father and brother together in the UK, that does not equate to a right to do so in law. On the evidence before me, there are no exceptional circumstances capable of establishing that the refusal of entry clearance for settlement amounts to a disproportionate interference with the appellants right to enjoyment of family life. Having carefully considered the evidence before me, and taking all the relevant factors into account including the best interests of the appellants I find that the decision to refuse the applications for leave to enter is not disproportionate to the legitimate aim of immigration control. Accordingly, I dismiss the appeal on Article 8 grounds.

25. Having set aside the decision of the First-tier Tribunal, I remake the decision, dismissing the appellants appeal on Article 8 grounds.

Decision:

26. The decision of the First-tier Tribunal Aziz is set aside.

27. I remake the decision, dismissing the appeal on human rights grounds.

28. No anonymity direction was made by the F*t*T.

Signed Date 23rd September 2019

Upper Tribunal Judge Mandalia

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and there can, in the circumstances, be no fee award.

Signed Date 23rd September 2019

Upper Tribunal Judge Mandalia