Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/15875/2017
HU/00215/2018
HU/00216/2018

THE IMMIGRATION ACTS

Heard at Field House
On 7 June 2019
Prepared 10 June 2019

Decision & Reasons Promulgated
On 20 June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

MRS D A (FIRST APPELLANT)
MASTER S Sh S (SECOND APPELLANT)
MASTER S Sa S (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr E Dolan, of Counsel instructed by Messrs Aston Bond Law Firm
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellants appeal with permission against a decision of Judge of the First-tier Tribunal Fowell who, in a determination promulgated on 17 August 2018, dismissed the appeals of the appellants against decisions of

the Entry Clearance Officer to refuse them leave to enter under the provisions of the Immigration Rules and Article 8 of the ECHR.

2. The first appellant, who was born on 24 December 1978, is the mother of the second and third appellants who were born on 18 May 2001 and 15 August 2002. They are citizens of Afghanistan who are living in Pakistan. The first appellant's husband and the father of the second and third appellants is missing and presumed dead: he was last seen in 2016. The first appellant applied for entry clearance as the dependent relative of her brother, Dr T A, who is settled here as are their two brothers and their parents. All of the first appellant's family in Britain now have British citizenship, and they wish the first appellant and her children to join them.

3. The notice of refusal of the first appellant's application stated:-

- "You have not made any statement or provided any evidence you require long term personal care to perform everyday tasks. I therefore refuse your application under Appendix FM to the Immigration Rules paragraph E-ECDR.1.1(E-ECDR.2.4).
- I have considered your rights under Article 8 of the ECHR. Article 8 of the ECHR is a qualified right proportionate with the need to maintain an effective immigration and border control and decisions under the Immigration Rules are deemed to be compliant with human rights legislation. Although you may have a family life with the sponsor I am satisfied the decision is proportionate under Article 8(2). I note that no satisfactory reason has been put forward as to why the sponsor in the UK is unable to travel to Pakistan to be with you. I am therefore satisfied the decision is justified by the need to maintain an effective immigration and border control.
- It has also been considered whether the application raises any exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the ECHR, might warrant a grant of entry clearance to the United Kingdom outside the requirements of the Immigration Rules. You have not raised any such exceptional circumstances, so it has been decided that your application does not fall for a grant of entry clearance outside the rules".

4. The first of the brothers to come to Britain entered in 2000 and although his application for asylum was unsuccessful he obtained indefinite leave to remain and in due course became a British citizen. He has worked in Britain undertaking intelligence work and has also worked on behalf of the International Security Assistance Force in Afghanistan. His parents were attacked and threatened in 2012 and on that basis his two brothers, who were in Britain as students, sought and were granted asylum. Their parents and therefore the parents of the first appellant entered as elderly dependent relatives. The judge described the three brothers as talented and successful individuals who had made an important contribution to

society in Britain. In paragraph 9 of the determination, having set out the basis of the claim the judge stated that:-

> "It is not enough however for Mrs A to show that the rules are or were met … the only right of appeal is on human rights grounds".

The judge then set out the terms of Article 8. The judge noted the evidence of the sponsor who stated that the first appellant suffered from depression, anxiety and anorexia and had been seen by a psychiatrist. She was always tearful and anxious about her future in Pakistan and was on medication. His evidence was that she was now living in Peshawar and spoke Farsi and basic Pashtu, but it was recognisable that she was not from Pakistan. It was submitted that the children would come within the provisions of paragraph 297 of the Immigration Rules but in any event the principal appellant could succeed as a dependent relative given her illnesses. It was emphasised that the three brothers would be at risk if they returned to Pakistan. Reference was made to the position of single women in Pakistan including a Home Office Country Policy and Information Note headed "Women fearing gender based harm/violence, Pakistan, February 2016".

5. From paragraphs 19 onwards of the determination the judge set out his findings and conclusions. In paragraph 20 he stated that "the decision of the Home Office can only be overturned on human rights grounds. This requires there to be family life between the appellant and her brother". The judge then set out relevant case law before pointing out that the principal appellant had never shared a home with her brother or any of her brothers since childhood and that although financial support was accepted, the judge pointed out that there was no evidence of visits by any of the brothers and stated that there is nothing to indicate a real risk of harm to them if they visited her in Peshawar. He accepted that the first appellant was receiving counselling before concluding that the medical treatment which the first appellant was receiving was not a real basis to suggest the original decision was incorrect under the Immigration Rules. The judge then considered the position of the children, but pointed out that they would not be entitled to come to Britain without their mother and there was no evidence of extreme circumstances which would mean that that would be appropriate in any event. The judge pointed out that the family had moved to Peshawar in 1993 long before the children were born and that they were now aged 16 and 17.

6. The ju6dge noted difficulties faced by lone women in Pakistan and then said that the dependent relative Rules applied only to parents of the sponsor and therefore that route was not open to her. Having again referred to the application of Article 8 of the ECHR the judge stated that the appellant could not be said to be exercising family life with the sponsor and therefore could not meet the basis requirements of Article 8.1. He then dismissed the appeal.

7. The grounds of appeal firstly pointed out that the judge had erred in stating that the Rules only applied to elderly dependent relatives and had

ignored the fact that paragraph ECDR.2.1 of the Rules had stated that an applicant must be:-

> "(a) parent aged 18 years or over;
>
> (b) grandparent;
>
> (c) brother or sister aged 18 years or over;
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> (d) son or daughter aged 18 or over of a person ("the sponsor") who is in the UK."

It was argued that as the judge had completely missed out sub-Sections (b), (c) and (d) of the Rules submitted that the error in omitting sub-Section (c) had led the judge into error when the judge had stated that:-

> "Since Mrs A is not the parent of her sponsor that route is not open to her, even if the other conditions were satisfied".

It was stated that that error had led the judge to fail to engage with the material which was produced at the hearing regarding the appellant's health conditions, her inability to perform everyday tasks and the precarious and dangerous situation she found herself in as a lone Afghan woman in Pakistan.

8. The second ground of appeal related to the application of the country guidance in **SM (Lone Women - Ostracism) Pakistan [2016] UKUT 00067(IAC)**. It was submitted that any assessment of international protection required a specific assessment of the nature, source and scope of the risk to the applicant at the date of the hearing, taking into account whether the woman in question would have family support or a male protector, was educated, wealthy or older or capable of internal relocation to one of the larger cities. The grounds also argued that the judge had not properly taken into consideration the medical evidence relating to the appellant and the difficulties the appellant's brothers would have in visiting her in Pakistan.

9. Judge of the First-tier Tribunal Blundell granted permission stating:-

> "2. This is an unusual case. The first appellant seeks entry clearance to join her brothers in the UK. The second and third appellant's – her sons – seek to accompany her. It was submitted that the first appellant could meet the Adult Dependent Relative ("ADR") Requirements of Appendix FM; that the second and third appellants met paragraph 297; and that their continued exclusion was in breach of Article 8 of ECHR.
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> 3. It is clearly arguable that the judge erred in the way suggested in ground one. He proceeded at [31] - [32], on the basis that the ADR provisions only apply to parents, whereas paragraph E-ECDR2.1 is not so confined. I consider the other grounds to be less meritorious but nevertheless arguable. Notwithstanding the apparent merit in ground one, it is only with circumspection that I have granted permission. The judge concluded at [24] that there is no family life in existence between the first appellant and the sponsors in the UK. Applying the decision of the Upper Tribunal in

> Charles [2018] Imm AR 911, it might legitimately be suggested that any error in relation to the Rules was immaterial as a result of that finding. The remaining grounds might bear on the sustainability of that finding, however, and it is consequently appropriate to leave the question of materiality for the Upper Tribunal".

10. This appeal first came before Deputy UT Judge Peart in the Upper Tribunal on 14 December 2018. He adjourned the appeal but in his directions stated that family life was still of relevance and directed that the appellant's representatives serve a skeleton argument addressing how it was that given acceptance that there was no family life at present Article 8 family life was still relevant. The appeal again came before Judge Peart and was again adjourned by him because the skeleton argument had not been submitted. At that hearing, he stated that there would have to be a decision on whether or not there should be a wasted costs order. I confirm for the avoidance of doubt that I do not consider that a wasted costs order would be appropriate in the circumstances of this case.

11. At the hearing before me, Mr Dolan stated that he wished to argue that the appellant should succeed both within and outside the Rules. He pointed to the error of law that the judge had made in stating that an adult sister could not meet the requirements of the Rules. He stated that dependency was an element of family life. He stated that the first appellant was a lone female and head of the household and that she was in danger in Pakistan because of her family associations. Her husband had been abducted in February 2016 and that she was living in a rented house in Huydabad. He stated that there were exceptional compassionate circumstances in this case particularly because of her brother's previous employment and the fact that he would not be able to return to Pakistan.

12. Mr Melvin relied on a Rule 24 statement stating that Article 8(1) was not engaged and there was nothing to show the Rules could be met. It was impossible to see how any appeal could succeed. He stated that there was nothing to state that the appellant's brothers could not go to Pakistan to see her and there was nothing to indicate exceptional and compassionate circumstances. There was in effect no family life with which there could be interference. He stated that the finding in the determination that there were nothing more than normal family ties between adult siblings had not been challenged in the grounds of appeal.

Discussion

13. When granting permission, Judge at the First-tier Tribunal Blundell correctly pointed out that the judge had erred in law in his consideration of paragraph ECDR.2.1 of the Rules. It is possible for a sister of a sponsor to qualify as a dependent relative. The central issue before me, however, is whether or not that error was material and that the first appellant could qualify for leave to enter under the dependent relative provisions of the

Rules and under the provisions of Article 8 of the ECHR. While I consider that the judge could have considered in greater detail the circumstances of the first appellant and her sons in Pakistan, the judge did consider the factors set out in paragraph E-ECDR.2.4 of the Rules and was entitled to reach the conclusion that the first appellant did not require, as the result of age, illness or disability, long term personal care to perform everyday tasks in the country where she is living. Other factors to be taken into consideration would of course have been that the first appellant has lived in Pakistan since 1993 long before her sons were born and that her sons have grown up there. Indeed she was living in Pakistan with her husband until 2016 when he disappeared. She is not a person who is living in a camp but is living in a rented house and she receives funds from Britain which are sufficient for her to have an appropriate standard of living.

14. In these circumstances I can only conclude that there was no error of law in the judge's decision to conclude that the appellant would not qualify for leave to enter as a dependent relative. She simply does not meet the threshold required by the rules. This is of course a human rights appeal and central to that issue is whether or not the appellants' rights under Article 8 are infringed by the decision. It appeared to have been put to Judge Peart that there was potential for the first appellant's rights under Article 8 to be engaged, but the reality is that the judge was correct to conclude that there is no interference with the rights of the first appellant under Article 8 – she has not lived under the same roof as her parents or siblings for well over twenty years, having formed her own family unit with her husband. Her sons have never lived with their grandparents or uncles. I can only conclude that the judge was correct to find that Article 8 was not engaged, but in any event the judge did go on to consider whether or not the decision was proportionate and concluded that it was. Given all the facts of this case that was a conclusion which was fully open to him. I would add that given the length of time that the first appellant has lived in Pakistan the country guidance in **SM** which applies to lone women being returned to Pakistan rather than women who have always lived there or lived there most of their lives is not relevant to her particular situation. Indeed, there is nothing to indicate that this appellant's position in Pakistan is insecure. It follows therefore that the first appellant cannot qualify for leave to enter either under the Rules or under the provisions of Article 8 of the ECHR outside the Rules. Given that the second and third appellants are living with their mother in Pakistan it is simply not the case they could come within the provisions of paragraph 297 of the Immigration Rules and furthermore the reality is that they cannot qualify under the provisions of Article 8 outside the rules. The determination of the Upper Tribunal in **Charles [2018] IAR 911.** is also clearly applicable. I therefore conclude that there is no material error of law in the determination of the judge in the First-tier Tribunal and that his decision dismissing this appeal shall stand.

Decision.

This appeal is dismissed under both the immigration rules and under the provisions of Article 8 of the ECHR.

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: 13 June 2019

Deputy Upper Tribunal Judge McGeachy