JR/5466/2018 & JR/4567/2018

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

23 October 2019

Before:

UPPER TRIBUNAL JUDGE BLUNDELL

Between:

THE QUEEN
(on the application of)
AUMAS & MAMAS

Applicants

- and -

IMMIGRATION OFFICER, HEATHROW

First Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Second Respondent

Baldip Singh, instructed by **Amnesty Solicitors**, for the **Applicant**

Zane Malik, instructed by the **Government Legal Department**, for the **Respondent**

Hearing date: 1 October 2019

JUDGMENT

JUDGE BLUNDELL:

1. The applicants are dual Syrian/Sudanese nationals who were born on 10 June 1999 and 14 January 2001 respectively. They seek judicial review of: (i) the decisions made by the first respondent on 2 April 2018 to cancel their leave to enter the

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United Kingdom and (ii) the decisions made by the second respondent on 8 May 2018 to affirm the Immigration Officer's decisions on Administrative Review.

2. The claim form identified only the Secretary of State as the respondent but the challenges brought were evidently to the decisions I have identified above. I am satisfied that no prejudice is caused by directing under rule 9(1) that the Immigration Officer be added as a respondent and I do so direct.

Background

3. The applicants are brothers. Their father is MS and their mother is RMS. On 31 May 2017, the father made an application for entry clearance as a Tier 1 (Investor) Migrant, under paragraph 245EB of the Immigration Rules. The mother applied for entry clearance as the Family Member of a Relevant Points Based System Migrant, under paragraph 319C of the Immigration Rules. The applicants and their three younger siblings (aged 13, 8 and 7 at the date of the decisions under challenge) applied for entry clearance as the children of relevant PBS Migrants, under paragraph 319H of the Immigration Rules. Those applications were all successful, and entry clearance was granted on 3 October 2017, valid until 3 February 2021 in each case.

4. The applicant's father is also a dual Syrian/Sudanese national. He is a businessman who has invested substantial sums in the UK. He also has significant business interests in Kuwait and is required to travel regularly as a result of his business interests. Both applicants wish to study in the UK, ultimately with a view to entering the medical profession. Their parents are fully supportive of their aspirations.

5. The applicants arrived in the UK with their father on 25 October 2017. All three left the UK five days later and then returned on 2 January 2018. The applicants were enrolled at a boarding school in Oxfordshire. They started term on 5 January 2018. Their father left the United Kingdom again. On 16 March 2018, they left the UK to spend half term with their family in Kuwait. They returned on 2 April 2018, arriving at Heathrow Airport. They were questioned by Immigration Officers at Heathrow Terminal 3, following which they were issued with notices entitled *Notice of Cancellation of Leave to Enter*. For reasons which will become apparent, I need not set out the terms of those notices.

6. On 10 April 2018, the applicants sought administrative review of the first respondent's decisions. The Secretary of State responded to the applications on 8 May 2018. She maintained the decisions made by the Immigration Officers but she amended the reasons given. (These amended decisions confusingly bear the date 2 April 2018 but Mr Malik confirmed on instructions that they were the amended decisions which had been 'backdated'). The two amended decisions are in materially identical terms. The decision in respect of the first applicant is in the following terms:

> You have presented a United Kingdom biometric residence permit number RG 384 8388 which had effect as leave to enter the United Kingdom on 3 October 2017 but I am satisfied that false representations were employed or material facts were not disclosed for the purpose of obtaining the leave, or there has been such a

> change of circumstances in your case which has removed the basis of your claim to admission. I therefore cancel your continuing leave. I therefore cancel your leave to enter in accordance with paragraph 321A(1) of the Immigration Rules.
>
> In order to qualify for this leave one of the requirements as per paragraph 319H(f) was for both of the applicant's parents to be lawfully present (other than as a visitor) in the UK, or being granted entry clearance or leave to remain (other than as a visitor) at the same time as the applicant or one parent must be lawfully present (other than a visitor) in the UK and the other is being granted entry clearance or leave to remain (other than as a visitor) at the same time as the applicant.
>
> Since the grant of your leave until your most recent arrival on 2 April 2018 your father has spent only seven days in the UK from a total of two visits. Your mother during this same period has only spent a total of four days having arrived on 25 October 2018 and by your admission lives in Kuwait.
>
> In your Visa Application Form you stated you would be residing at [London, W6], the same address as provided by your mother and father. However, you have been enrolled as a full-time student at [~], an international boarding school since 5 January 2018 and residing at [Oxford, OX3].
>
> Therefore taking the above into account it would appear that your mother's leave was obtained in order to facilitate your leave to enter the UK to attend boarding school as she returned back to Kuwait after a mere four days in the UK. Furthermore your circumstances since the issue of your entry clearance have changed as a result neither of your parents residing with you in the UK and therefore you attend and reside at a boarding school full-time.

7. The first applicant applied for another Administrative Review on 22 May 2018, which was ultimately refused on 25 June 2018. Pre-action correspondence between was concluded on 11 June 2018, with the second respondent maintaining the decisions under challenge.

8. Claims for judicial review were issued on 13 August 2018 (first applicant) and 2 July 2018 (second applicant). Judge Pitt directed that the claims should be linked and anonymised. Judge Bruce granted limited permission to apply for judicial review on 12 March 2019. She considered it arguable that the decisions under challenge misconstrued paragraph 319H of the Immigration Rules insofar as they required the sponsor to be continuously present in the UK and, further, that it was arguable that there had been no change of circumstances because the leave of the parents had been left undisturbed. She did not consider the grounds to be arguable insofar as they related to paragraph 321A(2), because the decisions under challenge did not invoke that provision.

Legal Framework

9. Paragraph 319H is in Part 8 of the Immigration Rules and appears under a sub-heading of *Children of Relevant Points Based System Migrants.* The paragraph contains the requirements for entry clearance or leave to remain. Sub-paragraphs (b) and (f) are both relevant. Those sub-paragraphs provide as follows:

> (b) The applicant must be the child of a parent who has, or is at the same time being granted, valid entry clearance, leave to enter or remain, or indefinite leave to remain, as:
> (i) a Relevant Points Based System Migrant, or
> (ii) the partner of Relevant Points Based System Migrant.
> or who has obtained British citizenship having previously held indefinite leave to remain as above.
>
> (…)
>
> (f) Both of the applicant's parents must either be lawfully present (other than as a visitor) in the UK, or being granted entry clearance or leave to remain (other than as a visitor) at the same time as the applicant or one parent must be lawfully present (other than as a visitor) in the UK and the other is being granted entry clearance or leave to remain (other than as a visitor) at the same time as the applicant, unless:
> (i) The Relevant Points Based System Migrant is the applicant's sole surviving parent, or
> (ii) The Relevant Points Based System Migrant parent has and has had sole responsibility for the applicant's upbringing, or
> (iii) There are serious or compelling family or other considerations which would make it desirable not to refuse the application and suitable arrangements have been made in the UK for the applicant's care.

10. I need not set out much of the Immigration Act 1971. It is common ground that the applicants held leave to enter, as conferred by their entry clearance, when they left the United Kingdom on 16 March 2018. Equally, it is common ground that they held leave to enter when they returned to the UK on 2 April 2018. The Immigration Officers at Terminal Three were nevertheless entitled (under paragraph 2A(2) of Schedule 2 to the 1971 Act) to examine the applicants for the purposes of establishing, *inter alia*, "whether there has been such a change in the circumstances of his case, since that leave was given, that it should be cancelled". In the event that they were satisfied that there had been such a change, section 10B of the 1971 Act gave the Immigration Officer power to cancel that leave.

11. Paragraph 321A of the Immigration Rules provides the grounds upon which leave to enter or remain which is in force is to be cancelled at port or while the holder is outside the United Kingdom. It provides that leave is to be cancelled when, *inter alia*, "there has been such a change in the circumstances of that person's case since the leave was given that it should be cancelled".

12. The leading authority on the cancellation of leave under paragraph 321A(1) is SSHD v Boahen [2010] EWCA Civ 585; [2010] INLR 632. Pitchford LJ (with whom Thomas and Mummery LJJ agreed) considered a number of interlocking

provisions in that case. At [36]-[40], under the sub-heading "Change of Circumstances", Pitchford LJ considered the correct approach to paragraph 321A(1). At [37], he said this:

> [37] The context of the illustrations in the guidance is important. What is envisaged is that, while the visa holder's intention may remain to enter for the authorised purpose, the factual basis upon which the visa purpose was founded has been undermined. Accordingly, leave to enter to take up employment may have been undermined by withdrawal of the offer of employment; leave to enter for study may have been undermined by withdrawal of sponsorship; or leave to enter as a child for settlement may have been undermined by the permanent departure of the child's sponsor from the UK. In other words, had the entry clearance officer been aware of these eventualities, he would not have issued the visa for the purpose he did, however genuine the application was. There is, in my opinion, no underlying premise to these examples that the change of circumstances must be permanent, nor is there, in any event, a true comparison to be made between the examples given and Mr Boahen's case, in which the visa holder had, on the immigration officer's finding, evinced an intention to visit for purposes other than that authorised. The only legitimate analogy lies, in my view, in the judgment of the probable effect of the circumstances as they have turned out to be upon the mind of an entry clearance officer considering the original application. It is legitimate to ask whether, if the entry clearance officer had known that the applicant would use the visa for purposes other than those authorised, whether mistakenly or deliberately, he would have issued it. In the light of the development with which the chief immigration officer was faced in Mr Boahen's case, the question she had to consider was whether the entry clearance should continue, or the visa holder should be required to make a further application. Consideration of cancellation on the ground of change of circumstances required an assessment from the immigration officer of all the circumstances including, for example, whether there remained a continuing legitimate purpose for the visa holder's visits with which the visa holder could and should be entrusted for the remainder of the period of validity. The purpose of the power of cancellation is to ensure proper immigration control, and the use of a visa by a visa national for a visit whose purpose is unauthorised is, on the face of it, a serious matter.
> [emphasis supplied]

13. The Secretary of State has published guidance on the General Grounds for Refusal in Part 9 of the Immigration Rules. The relevant section for present purposes is section 3 of 5; Considering Entry at UK Port, version 29, valid from 11 January 2018. At page 59 of that guidance, under the sub-heading Change of Circumstances, the following appears:

> When a passenger's circumstances have changed since their leave to enter or remain was given, you must consider whether the change is great enough to justify you cancelling the leave under paragraph

321A(1) or V9.2. For example, when a passenger with leave to enter for employment has had their offer of employment withdrawn.

Submissions

14. The grounds which were originally settled by counsel (not Mr Singh) advanced five challenges to the respondents' decisions. They are helpfully summarised at [3] of those grounds, in the following way:

    (i) R has unlawfully misapplied the Immigration Rules at paragraph 319H(f);
    (ii) R misdirected himself in finding that cancellation was justified under paragraph 321A(1);
    (iii) R's decision contains material factual errors;
    (iv) R has unlawfully failed to discharge the children duty as contained in section 55 BCIA 2009;
    (v) R's cancellation decisions are tainted by procedural unfairness.

15. The third of these grounds was abandoned by Mr Singh during the hearing. As pleaded, the ground was based on a suggestion that the respondents had erred in concluding that the applicants' parents had spent seven days (in the case of the father) and four days (in the case of the mother) in the UK since they had been granted entry clearance. In Mr Malik's skeleton, it was submitted that this calculation was entirely accurate, and that the error was to be found in the grounds, which took account of time the father had spent in the UK after the decisions under challenge. At my request, Mr Singh took specific instructions on this point and accepted that the respondents' calculations were correct.

16. The fifth ground was also abandoned and I propose, in those circumstances, to say very little about it. In reliance on the Upper Tribunal's decision in Fiaz [2012] UKUT 57 (IAC); [2012] Imm AR 497, it was originally submitted that the respondents had erred in failing to consider whether it would be more appropriate to curtail the applicants' leave, rather than cancelling it with immediate effect. Having considered Mr Malik's response to this ground, however, Mr Singh accepted that it could not prosper.

17. Developing the remaining grounds, Mr Singh submitted as follows. The crux of the applicants' case concerned the respondents' construction of paragraph 319H(f). The respondents had erred, he submitted, in concluding that this paragraph required both parents to be physically present in the United Kingdom. The intention behind the paragraph was simply to ensure that the parents were permitted to be in the UK. The applicants' father was a businessman operating in a global market who was required to travel extensively. It was understandable, in those circumstances, that the children would be enrolled at boarding school in the UK. The parents were not required to be in the UK because the first applicant was over eighteen at the date that they returned to the UK and he could be the responsible adult for his brother. The respondents were aware of the family's circumstances and should have been cognisant of the fact that the father was a high net worth individual who was required to travel. The respondents' decisions were not in keeping with the purpose of the legislation. The applicants' parents should be permitted to depart from the United Kingdom freely without concern about their children. The Rules did not impose a requirement of continuous

residence and the respondents had been wrong so to conclude. Mahad [2009] UKSC 16; [2010] 1 WLR 48 required the Tribunal to adopt a sensible construction of the Rules and it did not further their overall purpose to require the children and the parents always to be together in the UK. To adopt the opposite construction was to overlook the nature of the world and the need for international businessmen such as the father to travel extensively. The proper construction was that 'lawfully present in the UK' meant nothing more than 'has leave to enter or remain in the UK'.

18. In developing ground two, Mr Singh submitted that the respondents had erred in concluding that there had been such a change of circumstances that cancellation was justified. The Entry Clearance Officer had been aware of the intentions of the sponsor. I asked Mr Singh whether the Visa Application Forms and associated paperwork were to be found in any of the bundles filed in this judicial review. He confirmed that the applications had not been lodged and, in fact, that there was no evidence of what had been provide to the ECO. In those circumstances, I sought to explore with Mr Singh what were said to be the circumstances presented to the ECO and to the Immigration Officer at Terminal Three. Mr Singh confirmed on instructions that the ECO had been told that the family home would be at [London W6]. He confirmed that the circumstances presented to the IO were as follows. The address at So Sienna Apartments was no longer available. Due to the delay in processing the entry clearance applications, the family had been required to change their plans and they were not able to relocate to the UK *en famille* as they had hoped. The parents had remained with the applicants' siblings in Kuwait until 13 June 2018. There was no fixed family address in the UK when the applicants returned to the UK in April 2018. When the father had visited the UK on business, he had stayed in hotels. On any rational view, submitted Mr Singh, there had not been such a change of circumstances that it was appropriate to cancel the applicants' leave to remain.

19. In relation to ground four, Mr Singh submitted that the respondents' decisions had failed to take account of the applicants' best interests as a primary consideration. At the date of the decisions, the second applicant was a minor and the disruption to his education had not been taken into account. The respondents could have made further enquires of the parents, and would then have understood that the family did intend to relocate to the UK as a whole. Had that been understood, it could not rationally have been thought that there had been such a change of circumstances that it was proper to cancel the applicants' leave.

20. I indicated to Mr Malik that I had read his skeleton and did not need to hear from him. He wished to address me briefly nevertheless. He submitted that "lawfully present in the United Kingdom" could not have the meaning contended for by Mr Singh because such a construction would render paragraph 319H(b) of the rules otiose. It was that paragraph, and not paragraph 319H(f) which required the sponsoring parents to have leave to enter or remain in a qualifying category. The requirement in 319H(f) was an additional requirement, the only sensible construction of which was that the sponsor should be physically present, and lawfully so. Had the Secretary of State intended the construction for which Mr Singh contended, she could very easily have achieved that result, just as she could have used plain words to exclude third party support in Mahad: [28] of Lord Brown's judgment refers.

21. Mr Malik also submitted that the witness statements in the applicants' bundle had not been before the decision makers. In any event, the relevant point in time was when the decisions under challenge were actually taken and it was clear – and accepted by the applicants – that the parents were not in the UK at the material time. According to the mother's witness statement, it was only in June 2018 that she and the younger siblings relocated to the UK.

22. Mr Singh did not wish to respond to Mr Malik's submissions.

Discussion

23. Before turning to consider the grounds which were pursued by Mr Singh, I should note that it was agreed by counsel at the outset of the hearing before me that this was not a "precedent fact" case. It is agreed that the decisions taken by the respondents are to be reviewed on traditional public law grounds.

Ground One – Construction of Paragraph 319H(f)

24. The proper approach to the construction of the Immigration Rules is well established. In Odelola [2009] UKHL 25; [2009] 1 WLR 1230, Lord Hoffman said that it was necessary to consider the language of the Rule construed against the relevant background, which involved consideration of the Immigration Rules as a whole and the function which they serve in the administration of immigration policy: [4]. In Mahad [2009] UKSC 16; [2010] 1 WLR 48, having cited what Lord Hoffman had said in Odelola, Lord Brown added at [10] that the Rules are not to be construed strictly, as in the case of a statute or a statutory instrument but "sensibly according to the natural and ordinary meaning of the words used". In the same paragraph, he stated that the Secretary of State's intention in formulating the Rules was to be "discerned objectively from the language used, not divined by reference to supposed policy considerations".

25. Applying that approach, I can dispose relatively shortly of Mr Singh's suggested construction of paragraph 319H(f). He submitted that what was required by that provision was nothing more than that the sponsoring parent or parents had leave to enter or remain in the United Kingdom. That submission is obviously wrong, for the reason given by Mr Malik. It is paragraph 319H(b) which stipulates that the sponsoring parent or parents must have leave to enter or remain as a relevant PBS Migrant. The plain and ordinary meaning of 319H(f), set in that context, is to add an additional requirement. The additional requirement is not that the sponsor has a lawful right to be present in the UK; it is that they are (or will be) actually physically present in the UK.

26. That such a requirement appears in this context is wholly unsurprising. The Rule governs the circumstances in which a child will be admitted to, or permitted to remain in, the UK as the child of a relevant PBS Migrant. The Rule applies to all children of PBS Migrants, in whatever Tier the parent or parents are admitted. As is clear from paragraph 319AA, a relevant PBS Migrant is a migrant granted leave as a Tier 1 Migrant, a Tier 2 Migrant, a Tier 4 (General) Student or a Tier 5 (Temporary Worker) Migrant. Individuals in all of these Tiers are permitted to sponsor their children, amongst other family members, in order that they can live

together in the United Kingdom whilst the Relevant PBS Migrant studies, works or undertakes business activities.

27. Looking at the Rules more widely, the requirement that a sponsoring parent is (or will be) actually present in the UK is to be found in a number of other locations. Paragraph 297 of the Rules requires that one or both parents be 'present and settled' (or being admitted for settlement on the same occasion). Paragraph 310 is in similar terms. In Appendix FM, the Relationship Requirements for Eligibility for entry clearance as a child include a requirement, at E-ECC 1.6, that "One of the applicant's parents must be in the UK with limited leave to enter or remain…". It is quite straightforward to discern the intention behind the Rules from the language used. In common with the other Rules I have mentioned, paragraph 319H permits children who meet the requirements of the Immigration Rules to remain with their parents when their parents migrate to the UK on a temporary or permanent basis. That reflects the trite principle that the best interests of a child is to be with the parent or parents who are responsible for his upbringing. In the event that the parent or parents are elsewhere, the best interests of the child are likely to be served by remaining with their parents in that other country.

28. The Rules do make provision for some children to be in the UK whilst their parents or guardians are abroad, however. Tier 4 of the PBS makes provision for Child Students. In the case of such students, however, paragraph 245ZZA(f) provides very specific requirements (further developed at paragraph 245ZZE) for the situation in which "a foster carer or a relative (not a parent or guardian) of the applicant will be responsible for the care of the applicant".

29. Drawing these threads together, the position adopted in the Immigration Rules is clear from the language used. When a child is admitted to the UK, the default position is that his or her parent(s) or guardian must be present in order to care for the applicant. Where the parent or guardian is not present, there are specific and detailed requirements in the Immigration Rules to ensure that the best interests of the child are protected. What is not envisaged by the Rules, on any sensible construction, is that a sponsoring parent with settlement or another form of leave should live in a country other than the UK whilst the child is present here. The safeguarding rationale behind these provisions is self-evident. It is imperative, for example, that a child in the UK should have a parent (or, in the case of a Child Student, a foster carer or relative) to take immediate responsibility for that child in the event of medical or other emergency.

30. Mr Singh also submitted that the respondents had erred in construing paragraph 319H as requiring the sponsoring parent to be *continuously* present in the UK. I readily accept that there is no such requirement in paragraph 319H(f). That provision requires consideration of the circumstances obtaining at the time that the application for entry clearance or leave to remain is made, and a decision is made at that time on the circumstances described. The paragraph could not contain a requirement of continuous residence in the UK, since the decision maker makes a decision on eligibility for entry clearance or leave to remain at a single point in time. The difficulty with the submission is that the respondents did not construe paragraph 319H in the way suggested by the applicants. What the respondents asked themselves, and what they were required to ask themselves, was whether the circumstances had changed to such an extent from those described to the ECO

that it was proper to cancel the applicants' leave. That was not to construe paragraph 319H(f) so as to require continuous residence on the part of the sponsoring parent; it was to consider the question posed by paragraph 2A(2) of Schedule 2 to the 1971 Act and paragraph 321A(1) of the Immigration Rules in the manner required by her published policy.

31. Submissions were made in the grounds and by Mr Singh before me that the Immigration Rules under which the father was granted leave did not require him to be continuously resident in the United Kingdom. Again, considering paragraph 245EB, I readily accept that to be the case. Again, however, that does not assist the applicants. Whether or not there was any such requirement, what the respondents were required to consider was whether there had been such a great change of circumstances since the entry clearance was given that it was appropriate to cancel *the applicants'* leave to enter. Their father was free to travel as he wished whilst retaining his leave to enter throughout. Unless he was outside the UK for more than two years[1], or unless his travel impinged upon his ability to meet the requirements of the Immigration Rules in a future application for leave to remain, it was entirely permissible for him to travel as he did. In the event that such travel was legitimately considered to represent a change of circumstances in *the applicant's* cases, however, it necessarily begged the question posed by paragraph 2A(2) of Schedule 2 to the 1971 Act and paragraph 321A(1) of the Immigration Rules.

32. In the circumstances, ground one is not made out. The respondents did not misconstrue the Immigration Rules under which the applicants or their father were granted entry clearance.

Ground Two – Change of Circumstances

33. By this ground, it is submitted that the respondents erred in concluding that there had been such a change of circumstances that cancellation under paragraph 321A(1) was appropriate. As Mr Singh accepted before me, however, the respondents' decisions can only be challenged on public law grounds. It is not submitted, as I understand it, that the respondents misdirected themselves in law in their approach to paragraph 321A(1). The submission Mr Singh is constrained to make is, instead, that it was irrational for the respondents to conclude that there had been such a change in circumstances that the leave should be cancelled.

34. At [54] of the grounds, the Tribunal is invited to consider the question posed by Pitchford LJ at [37] of Boahen: had the circumstances presented to the Immigration Officer been known to the Entry Clearance Officer, would the latter have made the decision she did? In order to consider the ground in that way, it was necessary for me to explore with Mr Singh what had been said to the ECO and what had been said to the Immigration Officer at Terminal Three. That exercise proved unnecessarily difficult because I do not have the applicants' Visa Application Forms or transcripts of the interviews which took place at Terminal Three. As Mr Malik noted, the witness statements which were prepared for this hearing were not before the decision makers.

[1] In which case the leave would lapse under Article 13 (4) of the Leave to Enter and Remain Order 2000

35. On instructions, however, Mr Singh was able to confirm that it had been stated in the Visa Application Forms that the family intended to live together in the UK at the [London, W6]. A deposit had been paid for that property. Their applications for entry clearance had not been considered as swiftly as they would have liked, however, and it had been necessary to 'stagger' the arrival of the family so as to ensure that the education of each of the children was not unduly disrupted. As a result, the applicants had been brought to the UK by their father in January 2018 and placed in the boarding school in Oxfordshire. He left the UK shortly thereafter and the rest of the family remained in Kuwait. The applicants then completed half a term of school and returned to Kuwait to be with the rest of the family. I asked Mr Singh whether the family home was still So Sienna Apartments when the applicants returned to the UK in April 2018. I understood him initially to submit that the property was still available at that stage. When I asked whether there was evidence which confirmed that to be the case, Mr Singh needed time to take instructions. When he returned, he confirmed that the So Sienna Apartments address was not available to the family in April 2018; the delay in processing the visa applications meant that it had not been taken up by the family. Mr Singh confirmed that there was no family address in the UK in April 2018, and that the applicants' father had stayed in hotels when he was in the UK.

36. In the grounds and in Mr Singh's oral submissions, much is said about the fact that the applicants' father is required by his business interests to travel. The fact that he does so could not, it was submitted, amount to a sufficiently serious change of circumstances to justify cancelling the applicants' leave. I agree, and insofar as it was submitted by Mr Malik (at [22]-[24] of his skeleton) that the respondents' decisions were justified simply on the basis that the Relevant Points Based System Migrant (the father) was out of the UK when the applicants returned on 2 April 2018, I do not accept that submission. The Immigration Officer was not reconsidering the decision of the Entry Clearance Officer to assess whether or not the requirements of paragraph 319H were met. Paragraph 2A(2) of Schedule 2 to the 1971 Act does not entitle an Immigration Officer to perform such an exercise and paragraph 321A(1) does not entitle an Immigration Officer to cancel leave on the basis that the Immigration Rule under which leave was given is no longer met for some reason. The Immigration Act and the Immigration Rules could have provided a power on this basis but they do not do so, and the enquiry required by the relevant provisions is necessarily more nuanced. There is every reason for a more flexible approach, not least the fact that sponsors (whether in the UK under the PBS or otherwise) might need to travel.

37. The point can be illustrated with a short example from a different part of the Immigration Rules. It is a requirement of Appendix FM of the Immigration Rules that a sponsoring spouse is *present and settled* in the United Kingdom. The first of those words obviously bears the meaning I have set out in considering ground one. Suppose that an individual was granted entry clearance on the basis that all of the requirements of the Immigration Rules – including the presence of the sponsor in the UK – were satisfied. That individual enters the UK and she and the sponsor set up a home together in this country. One year after the entry of the visa national, the sponsor's mother falls ill in another country and the couple travel there to be with her. She passes away whilst they are there and they attend the funeral. The British national stays on for a little longer to deal with her estate whilst the visa national returns to the UK to resume her life here. It would plainly

be absurd for the Immigration Officer to cancel her leave on the basis that the sponsor is not physically present in the UK at the point of her return. As I have said, a more flexible and nuanced approach is necessarily required in order to decide whether there has been such a change of circumstances that the leave should be cancelled. It could not, in these circumstances, sensibly be suggested that the factual basis upon which the visa purpose was founded has been undermined, as Pitchford LJ put it at [37] of Boahen.

38. But the change of circumstances in this case was not simply that the applicants' father was out of the UK when they returned from half term in Kuwait. He was not in the UK and he had spent virtually no time in this country since being granted entry clearance. The applicants' mother and siblings remained in Kuwait at that time and there was no family home in the UK. There was no one in the UK to look after the applicants, therefore, and there was nowhere for them to live in the event that there was a problem at school which prevented them remaining there. Asking the question posed by Boahen, the answer could not be clearer. If the ECO was told that there would be no parent lawfully present in the UK and no family home in this country, entry clearance would obviously have been refused. Had the ECO concluded otherwise, he or she would have undermined the safeguarding rationale which underpins the Immigration Rules, as discussed above.

39. I do not lose sight of the fact that the first applicant was an adult when the applicants returned to the UK in April 2018. Mr Singh understandably emphasised this, and submitted that this was not a case of young children who needed to be looked after. I can accept that but it is by no means a complete answer to the question of whether there had been such a change of circumstances that cancellation was appropriate. The respondents had a statutory duty to safeguard and promote the welfare of children in the UK and there is no evidence before me to show that there were any adequate mechanisms in place to safeguard the welfare of the second applicant in the event that there was an emergency which necessitated his leaving boarding school. Mr Singh submitted that the respondents should have made enquiries before reaching the decisions they did but he was not able to suggest how such enquiries might have shed a different light on the stark circumstances disclosed to the Immigration Officer; there was no parent or family home in the UK.

40. In the circumstances, I conclude that the decisions taken by the respondents on 2 April 2018 and 8 May 2018 were rational. As is clear on the face of the decisions, they were not simply made on the basis that the applicants' father was temporarily outside the UK on business. There was, instead, a holistic consideration of all the relevant circumstances in order to decide whether there had been such a change of circumstances that it was necessary to cancel the extant leave to enter. In light of the circumstances which were presented to the Immigration Officer, it was entirely rational to conclude that there had been such a change of circumstances.

Ground Four – Best Interests of the Second Applicant

41. By this ground, it is submitted that the respondents failed to take proper account of the best interests of the second applicant, who remained a minor at the date of the decisions under challenge. It is submitted in particular that the respondents

failed to consider the disruption to the second applicant's education, and that further enquiries could have been made before cancelling their leave.

42. Mr Malik accepts as he must, at [34]-[35] of his skeleton, that the respondents neglected in either decision to make reference to the best interests of the child or to section 55 of the Borders, Citizenship and Immigration Act 2009. Citing AJ (India) [2011] EWCA Civ 1191; [2011] Imm AR 10, however, he submits that the absence of any such reference is not fatal to a decision; what matters is the substance of the attention given to the overall wellbeing of the child. Adopting that approach, Mr Malik submits that the decisions were inevitable.

43. As will already be apparent, I consider that to be correct. It would have been preferable, to my mind, if the decision-maker had undertaken a best interests assessment in respect of the second appellant, weighing relevant matters for and against the cancellation of leave. Had that taken place, however, the respondents would have considered the damage to the second applicant's recently-commenced education in the UK but would inevitably have concluded that his best interests were to be with his parents. As I have sought to demonstrate, that safeguarding presumption underpins the Immigration Rules as a whole. In the case of children who are sent to boarding school in the UK, there are different safeguards which must be satisfied. In the case of the second applicant, there were no parents, no family home and no identified foster carer. Had a detailed best interests assessment taken place, either on 2 April or 8 May 2018, the outcome would inevitably have been the same.

44. I add this. The question before the Immigration Officer and then the Secretary of State was not whether these two students should ever be allowed to remain in the United Kingdom. It was whether the factual basis upon which their entry clearance was granted had been undermined or whether the ECO would have granted entry clearance if she had been aware of the circumstances in April 2018. For the reasons I have given, I come to the clear conclusion that the decisions reached by the respondents were lawful and rational when they concluded that there had been such a change of circumstances that it was appropriate at that point in time to cancel their leave to enter as the Children of a Relevant Points Based System Migrant. That did not prevent the applicants making a future application for entry clearance. Either applicant would have been at liberty to return to Kuwait and to apply for entry clearance under Tier 4 of the Points Based System. As I have explained, those applications could have been made even if their parents wished to remain in Kuwait. What they could not do was to continue residing in the UK as the children of a relevant PBS migrant in the circumstances I have considered above.

45. In the circumstances, this application for judicial review is refused.

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JR/4567/2018

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

THE QUEEN
(on the application of)
AUMAS & MAMAS

Applicants

- and -

IMMIGRATION OFFICER, HEATHROW

First Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Second Respondent

Before Upper Tribunal Judge Blundell

Application for judicial review: substantive decision

Having considered all documents lodged and having heard Mr Singh, of Counsel, instructed by Amnesty Solicitors, on behalf of the Applicant and Mr Malik, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 1 October 2019, it is hereby ordered that:

Order
The application for judicial review be dismissed.

Permission to appeal to the Court of Appeal
There having been no application, permission to appeal to the Court of Appeal is refused because there is no arguable error of law in the Upper Tribunal's decision.

Costs
The applicants shall pay the respondent's costs, to be assessed if not agreed

Signed:

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Upper Tribunal Judge Blundell

Dated: **23 October 2019**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).