IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000499
UI-2023-000500
UI-2023-000501

First-tier Tribunal No: HU/52691/2022
HU/52692/2022
HU/52693/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

15th November 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Mrs Hanadi Sultan Mohammed Al-Dalali
Mr Abdul Hameed Mohammed Abdul Hameed Al-Hajri
Mr Yazen Mohammed Abdul Hameed Al-Hajri
(no anonymity order made)

Appellants

and

Entry Clearance Officer, Sheffield Hub

Respondents

Representation:

For the Appellant: Mr Greer, Counsel instructed by Sheffield Hallam University Refugee Family Reunion Law Clinic
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

Heard at Phoenix House (Bradford) on 3 November 2023

DECISION AND REASONS

1. The Appellants are all nationals of Yemen. They are respectively a woman born on the 10th January 1995, and her adopted sons born on the 27th December 2004 and the 1st January 2006. They seek entry clearance to join their Sponsor (S) in

the UK. He is the husband of the First Appellant and the adopted father, and biological uncle, of the Second and Third Appellants.

2. For the purposes of this appeal this family's story began in March 2021 when S claimed asylum in the United Kingdom. He told officers that although he was married to his wife (A1) and had fathered two children by her (C1 and C2), he was in fact sexually attracted to men. He had had relationships with men in Yemen and in the UK. He feared persecution in Yemen as a result of this sexual orientation. His claim was accepted and he was granted refugee status.

3. Then on the 14th September 2021 five people in Yemen made applications for entry clearance as the refugee Sponsor's family members. They were his wife (A1), his biological children (C1 and C2) and his nephews, the sons of his late brother whom S and A1 had adopted in 2016 (A2 and A3).

4. On the 17th March 2022 the Entry Clearance Officer granted C1 and C2 visas to enter the United Kingdom as the children of a refugee. A1 was refused a visa on the grounds that her marriage to S could no longer be subsisting. A2 and A3 were refused on the grounds that their Yemeni adoption documentation was not accepted by the UK so they could not be regarded as his children.

5. The Appellants appealed and on the 5th January 2023 the matter came before First-tier Tribunal (Judge O'Hanlon). A1 relied on paragraph 352A of the Immigration Rules and Article 8; her adopted sons relied on paragraphs 319X and 319XAA, Article 8 and Home Office policy. At the date of the appeal before Judge O'Hanlon C1 and C2 remained in Yemen with their mother. I am told that they have since joined their father in the UK.

The First-tier Tribunal Decision

6. Judge O'Hanlon began by addressing A1's claim that she could meet all of the requirements of paragraph 352A of the Immigration Rules. It was accepted that A1 is the wife of a refugee and that the marriage existed at the time that he left Yemen. The only matter placed in issue by the Respondent arose under sub-paragraph (v): it had to be shown that '*each of the parties intends to live permanently with the other as their partner and the relationship is genuine and subsisting'*. Given that S had left his wife to claim asylum in the UK as a gay man, the Respondent concluded that it could be inferred that this marriage was no longer subsisting. A1 and S gave evidence that notwithstanding S's sexual interest in men, they remained committed to each other, and wanted to raise their children as a couple. S averred before the court that he loved his wife and wanted to stay married to her, albeit in recognition of the fact that he did not find her sexually attractive.

7. The Tribunal rejected the Respondent's analysis as simplistic. Just because S had engaged in extra marital affairs, with men, did not mean that his marriage could not survive. It directed itself to various Tribunal authorities about what a marriage is, concluding that any analysis must include "an assessment of the current relationship between the parties and a decision as to whether in the broader sense it comprises a marriage that can properly be described as subsisting". Turning to the facts here it concludes:

> 64. In the circumstances of this particular case, notwithstanding my finding that the Sponsor's sexuality and infidelities do not of themselves mean that the marriage of the First Appellant and Sponsor cannot be described as genuine and subsisting, I do not find having considered all of the evidence before me that the marriage of the First Appellant and Sponsor is genuine and subsisting. The marriage of the First Appellant and Sponsor is formally continuing. My assessment of the current relationship between the First Appellant and Sponsor leads me to conclude that in the broader sense, the marriage between the First Appellant and Sponsor cannot properly be described as subsisting. It is clear from the Sponsor's asylum interview and indeed from his witness statement that he struggled with his sexuality for several years prior to informing his wife of the position. At Paragraph 25 of his witness statement of 27th September 2021 the Sponsor states that the First Appellant now knows of his sexuality and that she intends to stand by his side. In her witness statement, the First Appellant states at Paragraph 12 that the Sponsor had recently confided in her that he was bisexual and she goes on to say that if he would not change she will accept his bisexuality. The Sponsor, at Question 48 of his asylum interview, stated that although there was no sexual attraction between the First Appellant and himself the First Appellant was his best friend and they shared a life together with mutual understanding. This suggests that the Sponsor sees the First Appellant as a best friend rather than a partner. The Respondent's position is that there are no provisions under family reunion for "friends" and I find that to be the case. Having considered all of the evidence before me as to the relationship between the First Appellant and the Sponsor whilst it is the case that their relationship is a valid marriage which formally continues I do not find, as referred to in GA (Ghana) (previously cited) that the relationship between the First Appellant and Sponsor in the broader sense comprises a marriage that can properly be described as subsisting. Although there may be an ongoing relationship between the First Appellant and Sponsor I do not find that the nature of that relationship can properly be described as a marriage which is genuine and subsisting and that accordingly, the First Appellant does not satisfy the requirements of Paragraph 352A of the Immigration Rules.

8. The decision then turns to the case for A2 and A3. It had been argued on behalf of these Appellants that they should have the benefit of paragraphs 319X, read with 319XAA of the Rules. Both of these provisions are now deleted but it is agreed between the parties that they were in force at the relevant times for the purpose of this appeal. Paragraph 319X reads:

> *319X. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the child of a relative with limited leave to remain as a refugee or beneficiary of humanitarian protection in the United Kingdom are that*

(i) the applicant is seeking leave to enter or remain to join a relative with limited leave to enter or remain as a refugee or person with humanitarian protection; and:

(ii) the relative has limited leave in the United Kingdom as a refugee or beneficiary of humanitarian protection and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and

(iii) the relative is not the parent of the child who is seeking leave to enter or remain in the United Kingdom; and

(iv) the applicant is under the age of 18; and

(v) the applicant is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(vi) the applicant can, and will, be accommodated adequately by the relative the child is seeking to join without recourse to public funds in accommodation which the relative in the United Kingdom owns or occupies exclusively; and

(vii) the applicant can, and will, be maintained adequately by the relative in the United Kingdom without recourse to public funds; and

(viii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity or, if seeking leave to remain, holds valid leave to remain in this or another capacity.

9. The Tribunal rejected the applicability of this provision to A2 and A3 on the basis that they are not the children of S. Having heard the evidence the Tribunal was prepared to accept that the brothers were the *de facto* adopted children of S and A1. It directed itself to Home Office policy which states that although *de facto* adoptees are not covered by the rules, decision makers should grant entry clearance where they are satisfied that there are exceptional compelling circumstances. Turning to that question, the Tribunal noted that the boys remained in Yemen, where they had always lived, with their adoptive mother. It could not be said that this was an unjustifiably harsh situation. Although it "may be preferable" for them to grow up in the UK given the "background situation" in Yemen, the public interest factors set out in s117B of Nationality, Immigration and Asylum Act 2002 weighed heavily against them. Their appeals could not succeed on Article 8 grounds.

10. Finally the Tribunal returns to the case for A1, and her family and private life. Noting the public interest factors in s117B, and in particular the fact that she could not meet the requirements of the rules, the Tribunal concludes that the refusal of entry clearance would not be disproportionate.

Errors of Law: Discussion and Findings

11. The grounds identify several alleged errors in the approach of the Tribunal, but for reasons which will become clear, I need not address all of them. That is because I have found, and to some degree Mr Diwnycz has accepted, that the decision below is flawed for errors in approach. I remake the decision by allowing each of the appeals.

12. I begin with the position of A1. Ground 1 is that the Tribunal's conclusions about her marriage to S were irrational and unsustainable. Mr Greer submits that the Tribunal has failed to have regard to all of the evidence on this matter, in particular the evidence of S and A1 set out in the interview conducted by an independent social worker. There the couple talk frankly about what they mean to each other and why the wish the marriage to continue notwithstanding S's infidelity. They speak of their seven years of happy marriage, of their love and respect for each other and their strong desire to continue to being their children up together. The fact that they refer to each other as a 'best friend' should not negate any of that. Mr Greer submitted that as a matter of common knowledge many marriages continue to thrive without the parties to them engaging in sexual activity.

13. I need not address this ground in any detail since Mr Diwnycz for the Respondent thought it to have merit. Having conducted a sensitive analysis of the ECO's argument, and having properly directed itself to the applicable authorities, it does appear from its reasoning that the Tribunal reduced the meaning of marriage to a union that must involve sex. In doing so it overlooked detailed and important evidence about what it means to these two individuals. To them it is companionship, the joint enterprise of raising their children, and yes, friendship. Marriage, particularly in Islam, is a social contract above all else, and that is what these two people are adhering to. Many marriages in this country would be regarded as subsisting without the parties having sex with one another. The evidence of S and A1 was accepted in its entirety, and it was their evidence that they continued to regard each other as husband and wife, and intended to live together in that way for the sake of their children. The fact that they described each other as "best friends" was wrongly allowed to obscure the fact that their children, and their family unit, remained of paramount importance to them both. In view of Mr Diwnycz's position I set the decision of the First-tier Tribunal aside and allow A1's appeal on the basis that she meets all of the requirements of paragraph 352A of the Rules. Her marriage remains genuine and subsisting.

14. The case for A2 and A3 was not as simple, because they have been adopted in Yemen, which is not a country that appears in the schedule to The Adoption (Recognition of Overseas Adoptions) Order 2013. The Tribunal properly considered the evidence that they had nevertheless been adopted as far as this family, and Yemeni law, was concerned, and found them to be the *de facto* adoptees of their parents. That is not a conclusion that has been challenged by the Respondent before this Tribunal. Nor was it in contention that the boys were also the biological relatives of S. From these facts Mr Greer asks me to draw several legal conclusions but the most straightforward of these is that as the *relatives* of S, they should have had the benefit of paragraph 319X of the Rules, a provision which was in force at both date of decision and date of the First-tier Tribunal appeal.

15. The Tribunal concluded that paragraph 319X had no application to the boys because they were not the 'children' of the Sponsor, but as 319X explains, it relates not just to children and parents, but to children and other relatives:

> *319X. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom* ***as the child of a relative*** *with limited leave to remain as a refugee or beneficiary of humanitarian protection in the United Kingdom are that*

16. The accepted facts were that S is the biological uncle of A2 and A3. In those circumstances, Mr Diwnycz accepted, paragraph 319X had application to them whether or not their adoption was recognised by the UK:

> *(i) the applicant is* ***seeking leave to enter or remain to join a relative with limited leave to enter or remain as a refugee*** *or person with humanitarian protection; and:*

17. Of the remaining requirements of the rule, only one was in issue:

> *(ii) the relative has limited leave in the United Kingdom as a refugee or beneficiary of humanitarian protection and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and*

18. S is a refugee. The circumstances are that these children, the biological children of his brother, were adopted by him and his wife over 6 years ago because their parents had died. They had lived together as a family unit with S and his wife, but also with their cousins/*de facto* adopted siblings C1 and C2. Because S needed to leave Yemen due to a well founded fear of persecution there is now, whichever way you look at it, a family split. Either S is here without his wife and children, or he is here without his wife and some of his children, or both parents are here with their biological children and their adoptive sons are left behind in a war zone. The Respondent's own country background evidence on Yemen, contained in the December 2021 Country Policy and Information Note reads:

> 2.4.10 In general the humanitarian situation is so severe that a person is likely to face a real risk of serious harm because conditions amount to torture or inhuman or degrading treatment as defined in paragraphs 339C and 339CA(iii) of the Immigration Rules / Article 3 of the European Convention on Human Rights (ECHR). However, each will case need to be considered on its facts, with the onus on the person to demonstrate that they face a real risk of serious harm.

There is nothing in the evidence to indicate that these two teenage boys, either with their adoptive mother or without her, would fall outwith the generality of that risk. It follows that there are serious considerations which make their exclusion undesirable and the appeal can be allowed on human rights grounds, it being disproportionate to refuse leave because they meet the requirements of paragraph 319X, a rule that was in force at all material times.

19. I need not therefore address Mr Greer's alternative argument concerning 352D.

20. I would just add this. I have set out the Tribunal's reasoning in some detail above in order to illustrate the order in which it addressed the appeals before it. It dismissed A1's under the rules, and then dismissed those of her adopted sons *inter alia* on the grounds that they could remain in Yemen with her, before returning to A1 and her Article 8 rights which could be succinctly disposed of on the basis that she could remain in Yemen with her adopted sons. It is never easy to untangle the web of competing and complimentary rights in linked family appeals, and certainly there can be no criticism of the Tribunal taking the rules first: PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC). What it must however do, in the final analysis, is stand back and assess the family circumstances as a whole.

21. In this case three facts stood prominently from all others. This was a family split from necessity, not choice: S is unable to return to Yemen due to a well-founded fear of persecution. C1 and C2 have, in recognition of their father's position, already been given entry clearance. The effect of the decision to deny their mother and adoptive brothers entry clearance meant that a choice had to be made on behalf of these young children: let them be with one parent, or the other. With those two facts in mind, it is immediately obvious that the family life rights of C1 and C3 have in the First-tier Tribunal's decision been subsumed by the detail of the rules, and entirely overwhelmed by the 'public interest' considerations in s117B. Even giving those matters the weight that they are each due I cannot think that in the particular circumstances of this case it would be in the public interest to deny these children what is manifestly in their best interests – to be with both of their parents, and all of their siblings. That family unity can, by virtue of S's protection needs, only be achieved in the UK. The third matter is this: any family members left behind in Yemen are in a war zone, part of a population facing a devastating humanitarian crisis. Nowhere in its analysis of the rules or proportionality more widely does the Tribunal engage with that uncontested country background material. It was quite plainly a factor highly relevant to both, and given the terms in which the CPIN is couched, I find it to be sufficient to render the decisions disproportionate. Accordingly I would in the alternative allow all of these appeals with reference to Article 8 'outside of the rules'.

Decisions

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

23. The decisions in the appeals are remade as follows: the appeals are allowed on human rights grounds.

24. Although I have not considered it necessary to identify the refugee Sponsor there is no order for anonymity relating to the Appellants.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
6th November 2023