Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/08405/2013
OA/08404/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 14th November 2014	**On 2nd December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MISS FARKHUNDA AZIZI
MISS HUSNA AZIZI

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms G Loughran (Counsel)
For the Respondent: Mr T Wilding (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellants' appeals against decisions to refuse them entry clearance to enable them to join their father in the United Kingdom were dismissed by First-tier Tribunal Judge A J Parker ("the judge") in a determination promulgated on 13th May 2014. The appellants are citizens of Afghanistan. Their application was made from Pakistan, where they have lived since 2001. Their mother also appealed against a similar adverse decision but, sadly, she has since passed away.

2. Before the First-tier Tribunal, it was conceded on the appellants' behalves that they could not meet the requirements of the rules. The Entry Clearance Officer ("the ECO") had found that the appellants' sponsor, their father, could not show that he had the minimum income required of £24,800 per annum. He was unable to produce a self–assessment tax return or bank statements showing that the requirements of the rules in Appendix FM-SE were met. It was also conceded that the appellants could not show that the requirements of the rules in Appendix FM and 276ADE were met, in relation to family life and private life.

3. The judge took into account findings made in an earlier appeal, heard in August 2011, as a starting point. The appellants' father visited them every year from 2002 and began full-time employment in 2010. The judge noted the claim made by the appellants' sponsor that he cannot live in Pakistan as he is not allowed to do so and when he travels there he is issued with visas which are valid for 45 days. He also took into account a submission made by the appellants' Counsel that the financial requirements of the rules would have been met the year before the applications (they were made in December 2012) and in the year following the decision to refuse entry clearance, in early March 2013. It was submitted on the appellants' behalves that their appeals should be allowed under Article 8 of the Human Rights Convention. The judge found that section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") did not apply in out of country applications but, even if it did apply, it would not help the appellants. He made an assessment in the Article 8 context, having found that the requirements of the rules were not met, and concluded that refusal of entry clearance was a proportionate response. The appeals were dismissed.

4. An application for permission to appeal was dismissed by the First-tier Tribunal and then renewed. On 1st October 2014, an Upper Tribunal Judge granted permission, finding that it was arguable, inter alia, that the judge may have failed to assess the best interests of the minor appellant and may have erred in his conclusions.

Submissions on Error of Law

5. Ms Loughran adopted the grounds in support of the application for permission to appeal and the skeleton argument which had been before the First-tier Tribunal. The first ground concerned section 55 of the 2009 Act. The judge failed to consider the best interests of the minor appellant and declined to properly consider relevant submissions following his error that the section 55 duty did not apply to children abroad. Ms Loughran said that this was a clear error which appeared at paragraph 18 of the determination. The judge noted that one of the appellants was 16 years of age. Although he went on to make an assessment "even if (the duty) did" apply, the case of Mundeba [2013] UKUT 00088 showed that the best interests of children abroad do need to be assessed. The judge made no mention of this case and plainly got it wrong. He then went on to consider "MN" but must have meant here the decision in MM (Lebanon), regarding financial requirements. There was a material error here where the judge found that the financial thresholds were apparently more

relevant than the best interests of the minor appellant. He clearly did not treat her interests as a primary consideration.

6. The second ground concerned family life in Pakistan. The judge erred in this context at paragraphs 13, 14 and 18 of the determination. It was irrational to require evidence that a British citizen, the appellants' father, could not live in Pakistan. The sponsor had no links to that country. There was evidence before the Tribunal that showed an absence of immigration status in Pakistan so that the appellants remained there illegally. The judge failed to give proper weight to this evidence in finding, at paragraph 14, that there was nothing to show that the sponsor and family members could not continue to reside in Pakistan. The judge applied the wrong test. As the appellants had spent many years in Pakistan, he appeared to draw an inference that they could continue to do so. At paragraph 18, the judge ignored the evidence that the children could not live with their father in Pakistan without remaining there illegally. Their father gave evidence that he had suffered difficulties in Pakistan, having to pay bribes and having been detained and having had difficulty in obtaining visas. This was all material evidence regarding whether he could return to live with his daughters. The third ground was similar, but in relation to Afghanistan. The judge found that the sponsor had exceptional leave to remain and so there was no reason why he could not return to Afghanistan, as he was not a refugee. However, the case was argued on Article 8 grounds and there was no need to meet an Article 3 or a Refugee Convention threshold. The judge misdirected himself in law and there was no proper consideration of proportionality.

7. The fourth ground concerned Gulshan. The judge made a misdirection here and it was not clear whether he properly considered the Article 8 case outside the rules. He appeared to get the Gulshan test wrong, referring to "undue hardship", rather than whether the consequences flowing from the adverse decisions would be "unjustifiably harsh". Ms Loughran submitted that there was a difference between the two. He failed to take into account the sponsor's inability to live in Afghanistan or Pakistan and appeared to look only at Article 3 in assessing whether the sponsor could join his daughters. Insofar as Gulshan proposed an intermediate test or threshold, it was clear that the judge failed to apply it properly. The proportionality assessment was contained in paragraphs 20 to 22 of the determination but here, the judge failed to refer to the appellants, mentioning instead only "the appellant" in paragraph 21. At paragraph 22, the judge found that refusal of entry clearance would cause "no more than mere hardship or obstacle" but there were three appellants to consider and the youngest appeared not to feature in the assessment. There was also no proper consideration of the sponsor's financial circumstances, in the Article 8 context. At paragraph 14, the judge appeared to consider the "choices" made by the family in their immigration history but this was not consistent with the Razgar approach. Although findings of fact were made before paragraph 21, there was no proper assessment of the proportionality of the adverse decisions and the judge failed to attach weight to the decision in MM. Ms Loughran also relied on ground 5, as it appeared in the original application. The judge failed to record in the determination that the sponsor is a British citizen, who could not and should not be

expected to leave the United Kingdom. He misunderstood the submissions made on the appellants' behalves and failed to attach appropriate weight to the evidence.

8. Mr Wilding said that the Secretary of State's stance was that there was no material error of law. Notwithstanding use of "appellant" in the singular, for example in paragraph 21 of the determination, it was clear that all three appellants were considered at all material times, paragraphs 8, 9 and 12 showing that the judge engaged with the circumstances of all of them. So far as section 55 of the 2009 Act was concerned, the judge was not wholly inaccurate in his statement that the duty did not apply to children abroad but, in any event, he went on to find, rationally, that it did not assist the appellants.

9. It was accepted that the requirements of the rules were not met and so the appellants' case was advanced on an Article 8 basis in the light of that. The relevant findings made by the judge were contained in paragraph 12 onwards. The children had been living in Pakistan for fifteen years and received regular visits from their father. The judge considered all the salient features of the case and there was nothing material missing from his assessment. Contrary to the submissions made on the appellants' behalves, paragraph 19 was clearly a summary at the end of the overall assessment. Nor did the judge err in finding that the sponsor could continue to return to Pakistan and reside with his daughters, should he wish to do so. On this, the decision of the Court of Appeal in VW and AB, or more precisely AB, was directly on point. The judge took this into account as a relevant factor. The ECO did not suggest in refusing entry clearance that the only remedy available was for the sponsor to visit his children in Pakistan.

10. The judge had in mind all the evidence, made plain that the requirements of the rules were not met and took the financial position into account in his assessment. He was entitled to observe, at paragraph 18, that a further application might be made.

11. When properly considered, the detailed submissions made on the appellants' behalves simply reargued the case. It was said that the sponsor should not have to visit the family in Pakistan and that the inability to meet the requirements of the rules was not determinative and was no bar to success under Article 8. It was, however, clear from the decision of the Court of Appeal in MM that the financial requirements of the scheme were lawful. In essence, the judge found that the status quo could continue, pending a further application. There was no immediate reason why the sponsor could not live in Pakistan or Afghanistan and his apparent ability to meet the requirements of the rules now would mean that any period of separation would be relatively short. The judge did not overlook any material factors.

12. The apparent reliance on Gulshan was a red herring. Even assuming that there is no intermediate test or threshold, the judgment of the Court of Appeal in Haleemuddin showed that the rules formed part of the Article 8 assessment. In most cases, the rules would cater for Article 8 considerations. Read overall, it was clear that paragraph 19 of the determination was simply part of the reasoning process and not

a brief dismissal of the section 55 duty. The best interests of the minor appellant were clearly considered and taken into account.

13. Nor did the judge err in relation to the difficulties the sponsor might face in returning to Pakistan. The proper test was not simply whether he was able to return to that country. The judge concluded that the need to maintain immigration control was an important part of the assessment in this context and, again, paragraph 22 followed his earlier findings. Overall, there was no material error of law.

14. In a brief response, Ms Loughran said that the best interests of the minor appellant were a primary consideration and not properly considered at any point. The proper test was not simply whether the appellants were living in Pakistan. There was no basis for inferring what the best interests of the minor appellant were and a judge might infer that they were served by the grant of entry clearance to enable her to join her father here. It was plain that other findings might be made, including a finding that the minor appellant was in dire circumstances. There was simply insufficient to show that a best interests assessment was made by the judge.

15. So far as VW and AB was concerned, it was not argued on the appellants' behalves that it could never be appropriate for a person to return to a country without status. Here, there was no proper consideration of that aspect, amounting to an error of law. The judge made no clear finding that the status quo could continue. The only consideration of the sponsor's financial circumstances appeared in paragraph 18 and was limited to consideration of an application under the rules. In limiting his assessment to whether it was possible for the sponsor to return to Pakistan or Afghanistan and whether he might be at real risk there, the judge erred as this was not properly part of the Article 8 assessment. There was no consideration of whether it would be proportionate for the family to live in another country.

Conclusion on Error of Law

16. It is clear from the determination that the judge's findings appear from paragraph 12 onwards and, as Mr Wilding submitted, paragraphs 18 to 22 represent the culmination of his assessment. So far as the first ground relied upon is concerned, the judge's finding that the section 55 duty does not apply in out of country applications might, at first sight, give the appearance of an error, in the light of T [2011] UKUT 00483 and Mundeba [2013] UKUT 00088. However, he went on to find that the duty would "not assist" in the case and, again, it is clear that the first part of paragraph 19 builds upon his earlier findings. He had the family's circumstances clearly in mind, including the fifteen years or so the appellants have lived in Pakistan. He took into account the regular visits made by the appellants' father and the financial support he provided, which he was entitled to find would continue. It is also clear, as Mr Wilding submitted, that the judge did weigh in the balance as a relevant factor the absence of leave or status in Pakistan and the difficulties that the appellants' sponsor has suffered in the past. This was also a factor in AB (Somalia) [2009] EWCA Civ 5. Overall, I conclude that the judge did properly assess the best

interests of the minor appellant, as part of his overall assessment of the family's circumstances and that he did not err materially in this regard. A sensible reading of the determination shows that underlying his conclusion that section 55 did not assist were his findings that the requirements of the rules were not met and that the relationships between the family members which had continued for many years could be maintained in the future, allowing for a further application for entry clearance in the light of the sponsor's improved circumstances. I do not accept the submission that the judge's consideration of "MN" in the High Court shows that he failed to properly take into account section 55 of the 2009 Act.

17. Nor did the judge err, as contended in the second ground, in relation to family life in Pakistan. He clearly took into account the sponsor's evidence regarding an absence of status, the short-term visas relied upon during the regular visits, his British citizenship and the difficulties faced in 2012 (for example). He was entitled to draw an inference from the evidence before the First-tier Tribunal that the particular arrangements in place could continue in the future, in the light of refusal of entry clearance. The observation he made at paragraph 22 that the adverse decisions would cause no more than mere hardship or obstacle was open to him in the light of the settled arrangements in place since 2001, notwithstanding the precariousness of the immigration status of the appellants in Pakistan. Similarly, I conclude that ground 3 is not made out, in relation to life in Afghanistan. The grant of exceptional leave to remain to the sponsor is not a formal barrier to return to the country of his nationality and the judge was entitled to take into account, in this context, the savings amassed by him.

18. I agree with Mr Wilding that ground 4, regarding an apparent error in relation to Gulshan, is a red herring. Contrary to what appears in the written grounds in support of the application for permission to appeal, the determination reveals that the judge made an assessment under the rules and outside them, as paragraphs 20 to 22 show. It may now be doubted that there is an intermediate threshold before an Article 8 assessment outside the rules is required, in the light of MM and Others [2014] EWCA Civ 985 (at paragraph 135 of the judgment in particular). In any event, it is clear that the judge took his earlier findings of fact, regarding the family arrangements currently in place, into account in his Article 8 assessment. There is no merit in the suggestion that any intermediate threshold has not been applied.

19. Although more precision would have been welcome in the last few paragraphs of the determination, the use by the judge of the singular "the appellant" in those paragraphs does not obscure his reasoning, so as to give rise to material error. In the same ground, it is contended that the judge failed to attach weight to MM but the author of the grounds had in mind here the judgment of the High Court. The Court of Appeal's judgment appeared about a month after the grounds were prepared and the financial requirements of the rules were found to be lawful. It is clear from the determination that the judge gave weight to the failure to meet those requirements, as he was entitled to.

20. Ground 5 is also not made out. Contrary to what appears at paragraph 32, the judge did record and take into account the sponsor's British nationality (see paragraph 13). It is contended in rather general terms that the judge overlooked case law relating to Afghanistan and misunderstood the submissions made on the appellants' behalves. However, a careful reading of the determination shows that the judge did have all the salient features of the case in mind and he referred to the skeleton argument and submissions made by Counsel in making his findings and reaching his conclusions.

21. I conclude that no material error of law has been shown and the decision of the First-tier Tribunal will stand.

22. The appellants' sponsor said at the end of the hearing that the dismissal of the appeals had caused him sadness. He mentioned his wife's (the appellants' mother's) sudden death. I have no doubt that my conclusion that the decision made by the First-tier Tribunal shall stand will come as a disappointment. However, it is apparent from the case put to the judge that the appellants' father's circumstances are now improved and robust and so there is nothing to show any real impediment to a further application which has real prospects of success. The evidence before the judge suggested that their father may not have been well served by advisors in the past but he appears now to be in good hands and much of the preparatory work can be undertaken without delay.

DECISION

The decision of the First-tier Tribunal contains no material error of law and shall stand.

Signed Date

Deputy Upper Tribunal Judge R C Campbell