Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07773/2014

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Decision and Reasons Promulgated**
On 14 May 2015	**On 5 June 2015**

Before

The President, The Hon. Mr Justice McCloskey

Between

SUNDAS ZAHRA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Mr N Ahmed, of Counsel, instructed by Syeds Solicitors

Respondent: Mr I Richards, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal originates in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*") dated 20 January 2014, whereby the application of the Appellant, a national of Pakistan aged 19 years, for indefinite leave to remain in the United Kingdom was refused. The Appellant's ensuing appeal to the First tier Tribunal ("*FtT*") was dismissed under both the Immigration Rules and Article 8 ECHR.

2. The impugned decision of the Secretary of State hinged on paragraph 298 of the Immigration Rules. This provides, under the rubric "Requirements for indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom", in material part:

> "*The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom are that he:*
>
> *(i) Is seeking to remain with a parent, parents or a relative in one of the following circumstances .....*
>
> *(d) One parent or a relative is present and settled in the United Kingdom 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 ....*"

The family unit in question has three members: the Appellant, her biological mother and her step father and sponsor to whom her biological mother was married (by a second marriage) in 2004, when the Appellant was aged 8. The Appellant has been lawfully present in the United Kingdom since 2011, living with her step father. During 2011 – 2015 her mother has resided with the Appellant's sister in Pakistan, visiting the United Kingdom intermittently.

3. The second material provision of the Immigration Rules in this context is paragraph 6, which provides a definition of "*parent*", which includes:

> "*The step father of a child whose father is dead .....*"

By the impugned decision it was determined, firstly, that the Appellant's step father did not satisfy this definition as there was no evidence that her biological father was dead. The second limb of the Secretary of State's decision entailed a rejection of the Appellant's case under Article 8 ECHR. As noted above, the decision was affirmed by the FtT.

4. Upon the hearing of this appeal it was conceded that neither the Secretary of State's decision nor that of the FtT is sustainable in law on the ground that both failed to consider the question of whether the step father is a "*relative*" of the Appellant and neither engaged with the Appellant's case that she is related to the step father through the relationships of both uncle and second cousin. It is not disputed that the relationships linking the Appellant and her stepfather are those of uncle/niece and second cousin. These are blood connections. I consider that the word "*relative*" should be construed according to its natural and ordinary meaning, namely a person related by blood or marriage. This construction is satisfied in the Appellant's case by virtue of the two aforementioned relationships. This was acknowledged by Mr Richards on behalf of the Secretary of State. Thus I conclude that on these rather unusual facts the Appellant's stepfather is her "*relative*".

5. It is appropriate to highlight one discrete issue which was not the subject of argument. In both its heading and the introductory words, paragraph 298 of the Rules employs the terminology "*the child of a ..... relative"*. By virtue of paragraph 298(i), it is necessary for such child to be "*seeking to remain with a ..... relative*". In the qualifying circumstances which are then specified, a relative features in paragraph 298(i)(d) only. As the analysis above demonstrates, in the particular circumstances of this case the Appellant's stepfather satisfies the definition of "*a relative .... present and settled in the United Kingdom*" as he is her uncle and second cousin. However, the issue which was not addressed in argument is whether the Appellant is his child. This is a separate, cumulative requirement which was not invoked on behalf of the Secretary of State in this case.

6. Clearly, the Appellant and her stepfather are not related by blood as parent and child. Furthermore, they are not related by marriage. Rather, the members of this family unit who are related by marriage are the Appellant's mother and her stepfather/uncle. Furthermore, having regard to the definition of "*parent*" in paragraph 6 of the Rules, the Appellant's stepfather/uncle could not qualify as her "*parent*" absent evidence that her biological father is deceased.

7. This leaves but one remaining question to be determined, namely whether, within the compass of paragraph 298(i)(d), the Appellant's case satisfies the "*serious and compelling family or other considerations*" test. Neither the Secretary of State's decision nor that of the FtT engages with this test. The following step by step analysis seems to me appropriate in cases of this kind.

8. **The First Question**: are the family or other considerations advanced "*serious and compelling*"?

I consider that the standard of "*serious and compelling*" is illuminated by comparing and contrasting the terms of this requirement with that in which other comparable requirements are phrased in the Immigration Rules. These include the standards of "*very compelling*", "*exceptional*" and "*insurmountable obstacles*". I am satisfied that the standard of "*serious and compelling*" establishes a threshold, or hurdle, lower than any of these. Giving these words their natural and ordinary meaning, a family or other consideration will satisfy this requirement if it is something more than trivial, minor or peripheral and is persuasive to the extent of eclipsing other factors. Considerations will not satisfy this standard if they are merely attractive or desirable, from whatever perspective.

9. **The second question**: if serious and compelling family or other considerations are demonstrated, would exclusion of the child be undesirable?

In considering this, the second, question one's attention is drawn mainly to the standard of "*undesirability*". This word too is to be given its ordinary and natural meaning. In my view this entails a threshold which is not particularly elevated. "*Undesirable*" is to be contrasted with, for example, other familiar standards such as "*harsh*" or "*unduly harsh*". It prescribes a threshold which is lower than each of these. Furthermore, I consider that the question of

whether exclusion would be "*undesirable*" is to be viewed from the perspectives of all members of the family unit concerned. These will not necessarily be determinative since, having determined all material facts and identified all relevant considerations, undesirability will entail an objective assessment by the Tribunal.

10. **The third and final question**: if the first two questions are answered affirmatively, have suitable arrangements been made for the child's care?

Once again, the adjective in this clause, "*suitable*", is the key word. The exercise of according its ordinary and natural meaning conjures up synonyms such as "*adequate*" or "*appropriate*". Furthermore, "*suitable*" does not, in my judgement, erect a unduly high threshold. Finally, bearing in mind section 55 of the Borders, Citizenship and Immigration Act 2009, I consider that this requirement directs attention to what is suitable for the child concerned. This may require a satisfactory social services assessment or comparable evidence in some cases. Section 55 also applies, though less forcefully, to the determination of the second question above. The obligation to have regard to the statutory guidance, enshrined in section 55 (3), must also be given effect.

11. Notably, in paragraph 298 of the Rules there is no mention of public interest and no factors of this *genre* are included, with the result that there is no balancing exercise to be performed. However, cases involving Article 8 ECHR are to be contrasted. Thus if Article 8 is invoked, a balancing exercise will be necessary if an interference with the right protected is demonstrated, since this will trigger a proportionality assessment. Furthermore, in such cases effect must be given to the new regime contained in Part 5A of the Nationality, Immigration and Asylum Act 2002, specifically section 117A(2)(a) and section 117B. This raises the potentially intriguing question, which did not arise in the present case, of whether a person seeking indefinite leave to remain in the United Kingdom will have better prospects of a successful outcome, whether initially or in any ensuing appeal, by not invoking this much maligned Convention right. In this context, it is appropriate to observe that a court or tribunal's duty to have regard to the mandatory statutory factors arises only where it is required – the statutory language - to determine whether a decision under the Immigration Acts breaches a person's right to respect for private and family life under Article 8. This question will, foreseeably, arise in paragraph 298 appeals.

12. In the present case, all of the undisputed evidence points firmly to a finding that the absence of the Appellant's mother from the family unit in the United Kingdom has proved to be considerably longer than initially envisaged. Originally, the family's plans for the future contemplated the reunification of the mother and two daughters with their stepfather in the United Kingdom. However, following the arrival of the three ladies, these plans were thrown into disarray. One of the daughters returned to Pakistan and a family crisis materialised there, requiring the mother to return for the purpose of providing protection and supervision. Thus the family unit was fractured and their plans were blighted. Subsequent visits by the mother to the United Kingdom have been authorised but have been limited. The mother continues to make efforts to satisfy the exacting requirements for re-entering and residing in the United

Kingdom. It is common case that all of the entry requirements, save that relating to English language, are satisfied. The most likely outcome appears to be that she will be successful in her efforts.

13. I consider it appropriate to take into account the involuntary and unexpected fragmentation of the family unit which will be rectified to a considerable extent by re-unification, a scenario which will be rendered impossible if the Appellant is required to leave the United Kingdom, which would exacerbate the fracture that has already developed. Applying the disjunctive requirements of paragraph 298(i)(d), all of these considerations are plainly of a "*family*" nature and, in my view, they readily attract the adjectival appellation "*serious and compelling*", giving effect to the approach set out above. For essentially the same reasons, exclusion of the Appellant would be "*undesirable*". Thirdly, and finally, there has at no time been any issue about the suitability of the arrangements for the Appellant who, in any event, was now no longer a child when her application was determined, though her case was considered as if she were, by virtue of paragraph 298 (vii) of the Rules. At the hearing the Secretary of State's representative was not disposed to seriously contest the evaluative analysis set forth above.

DECISION

14. Giving effect to the analysis, findings and conclusions rehearsed above:

(a) The decision of the FtT is set aside.

(b) I remake said decision by allowing the Appellant's appeal.

(c) A fee award is payable.

Signed: Edward McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: **17 May 2015**