IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006247
UI-2022-006248
First-tier Tribunal No: HU/50094/2022
HU/50093/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 August 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MUHAMMAD AFFAN
SIKANDAR ALI
(NO ANONYMITY ORDER MADE)

Appellant

and

AN ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Pipe, instructed by Immigration Justice Solicitors.
For the Respondent: Ms Z Young, a Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 24 July 2023

DECISION AND REASONS

1. The appellants', citizens of Pakistan born on 17 June 2008 and 15 February 2010 respectively, are brothers. They appeal with permission a decision of First-tier Tribunal Judge Pickering ('the Judge') promulgated following a hearing at Bradford on 27 September 2022, in which the Judge dismissed their appeals against the decision of an Entry Clearance Officer (ECO) to refuse their applications for leave to join their father ('the Sponsor') in the UK.
2. The Judge noted the appellants live with their mother and paternal grandparents in Pakistan. It was stated in 2021 their mother, Tasleem Bibi, had been diagnosed with pre-dementia and an underlying depressive illness and that the grandparents were no longer able to care for them due to their own deteriorating health. The Sponsor claimed to have sole responsibility for the care of the appellants', calling them daily, visiting them regularly, and take an active role in their education and well-being. The appellants' case is that their best interests are served by coming to the UK to live with their father.

3. The respondent's position before the Judge was that the appellants are cared for jointly by their mother and father, and that whilst the Sponsor has provided financial support this did not amount to sole responsibility and that the medical evidence provided was of limited value.
4. Having considered the evidence the Judge sets out her findings of fact from [13] of the decision under challenge.
5. The Judge notes that the appellants are 14 and 16 years of age respectively living with their paternal grandparents and mother in Pakistan, and that their mother and father are no longer in a relationship [16].
6. The Judge notes both appellants attend school with the school fees being paid by the Sponsor who also provides further financial support for their care, such as money for clothes and health care. The Judge accepts that even though the appellants' do not live with the Sponsor that did not diminish the loving relationship they have with him. It was accepted he has made regular trips to visit them [17].
7. The Judge accepted at [20] that the appellants' mother had in 2021 been diagnosed with pre-senile dementia and depression on the basis of a letter from Dr Ahmad. The Judge does, however, raise some concerns in relation to the weight to be placed upon that letter. At [21] the Judge writes:

> 21. That said, I have felt unable to accept the entirety of Dr Ahmad's letter in particular his opinion that the appellants' mother is unable to look after them. Dr Ahmad's letter has not provided enough information to explain why he came to this conclusion. The term dementia can encompass a wide range of symptoms which can vary from person to person. In the absence of more detail I have felt unable to attach weight to Dr Ahmad's views about the inability of the appellants' mother to care for them. I have not been able to gain any further insight from any other sources about the difficulties relating to the appellants' mother such as observations from her in-laws or the school. The sponsor was unable to explain what information Dr Ahmad had based his conclusion on either. I very much considered this to be that to the sponsor's credit that he did not seek to embellish upon or speculate in areas he did not have knowledge of.

8. Applying the facts as found to the law, and by reference to the case of TD the Judge accepted that both the Sponsor and the appellants' mother are involved in their upbringing and continue to do so and considers this is a case where both parents are playing active roles in the appellants' lives [23]. In relation to the ability of the appellants mother, the Judge finds that the evidence presented did not cause her to conclude that her condition had reached the stage whereby she was unable to care for the appellants'. On that basis the Judge did not accept the Sponsor had demonstrated that he had sole responsibility for them [24].
9. The Judge next considered if there are serious and compelling family or other considerations which made exclusion of the appellants' undesirable, directing herself to the appropriate guidance contained in Mundeba before concluding there was nothing in the evidence to show that their emotional needs were not being met, no evidence of their not being properly looked after at the present time, and that the burden of establishing serious and compelling circumstances had not been discharged [25].
10. In conclusion the Judge writes:

> 26. The appellants do not meet the IR. Whilst I acknowledge that their appeal is not against the IR there is nothing at the present time that caused me to conclude that the decision is contrary to their human rights. The refusal of entry clearance maintains the status quo whereby the appellants will continue to live with their

mother and grandparents as well as maintaining a very meaningful relationship with the sponsor.

11. The appellants' sought permission to appeal which was refused by another judge of the First-tier Tribunal on the 5 December 2022. The application was renewed to the Upper Tribunal.
12. Mr Pipe's grounds assert, in summary, (i) the Judge failed to make an assessment of Article 8 outside the rules, (ii) that given the positive findings that were made by the Judge this was a case where Article 8 is engaged yet there was no proportionality assessment considering the welfare of the appellants as a primary consideration, and (iii) asserting the Judge had failed to properly assess the Article 8 claim. The renewed grounds also assert the Judge refers to the decision maintaining the status quo but Article 8 is about the promotion of family life meaning the Judge has erred in her approach to the claim. It is also asserted the Judge erred in failing to make an assessment of what is actually in the best interests of the appellants' and then to treat that as a primary consideration in a proper proportionality balancing exercise.
13. The grounds further assert the Judge's findings on paragraph 297(i)(e) and 297 (i)(f) are inadequate and lack proper reasoning in failing to actually determine who has control and direction over the appellants lives and in failing to properly assess the case against the factors set out in TD.
14. The grounds assert the Judge has arrived at an irrational conclusion in relation to the weight to be placed on Dr Ahmed's letter, arguing that in light of the diagnosis the doctor would be able to provide an opinion on the caring capacity of the appellant's mother.
15. Permission to appeal was granted by a Judge of the Upper Tribunal on 6 February 2023, the operative part of the grant being in the following terms:

    1. This is a renewed application for permission to appeal by the appellants who are citizens of Pakistan who wish to come to the UK to join their father who is settled here. Their human rights appeal was dismissed in Bradford by the First-tier Tribunal.
    2. The grounds of challenge assert, in short summary as follows: that there is no Article 8 ECHR balancing exercise; that there are no findings on the best interests of the children; that is of no relevance that the decision maintains the status quo but this is an argument employed; that there are a lack of findings on relevant issues; and that the analysis of the evidence of the medical doctor, accepting some findings and rejecting others, is flawed.
    3. I find that the ground relating to the medical evidence to be less arguable than the others but permission is granted on all grounds. The appellants should be aware that they will need to show that the errors of law are ultimately material.

Discussion and analysis

16. There is, as part of the general reform process and desire for more effective and proportionate working practices, a focus upon Tribunals producing more relevant focused determinations. Guidance has recently provided in the case of TC (PS compliance, "issue-based" reasoning) [2023] UKUT 00164. That decision, written by a panel composed of the Presidents of both the Upper Tribunal and First-tier Tribunal noted in relation to First-tier tribunal substantive decisions:

    FTT substantive decisions

    60. In his 20 May 2021 speech, Judgment-Writing: A Personal Perspective, Lord Burrows described the 3 Cs (clarity, coherence and conciseness) as essential for a good judgment. Clarity and coherence will be best achieved through the identification of the principal controversial issues in the case, as set out above. A concise decision is

difficult to achieve when the issues are not carefully narrowed at an early stage, and then reflected in the ASA and review. The PS is designed to ensure that the procedural architecture is in place to ensure that the legal principles governing the quality and content of determinations are satisfied. Legal officers have been trained to ensure the PS is complied with by the parties and are supported by judges in this. If the issues have not been clearly and specifically narrowed before the substantive hearing, they must be clarified and where possible narrowed at the beginning of the hearing and before the evidence commences. In addition, both parties must be encouraged to make their submissions in a disciplined and structured way by addressing the relevant evidence and law applicable to each issue.

61. It follows from what has been set out above that FTT decisions should begin by setting out the issues in dispute. This is clearly the proper approach to appeals under the online reform procedure where at each major stage there is a requirement to condense the parties' positions in a clear, coherent and concise 'issues-based' manner. Had the FTT in the instant case outlined the issues in dispute, the focus upon the applicable law and the relevant evidence would have been more concise and particularised. This approach reduces the risk of making errors of law. We can illustrate this by reference to the FTT's approach to whether the appellant is a danger to the community. The FTT quoted verbatim from the relevant reports, sentencing remarks and the ASA without identifying and summarising the main evidence relevant to the issue. This led to an inadequately reasoned decision on the issue, despite a very lengthy decision.

17. In the Appendix to that decision it is written:

The following principles can be derived from the authorities in relation to the giving of reasons by the FTT and their subsequent scrutiny on appeal in the UT.

(1) Reasons can be briefly stated and concision is to be encouraged but FTT decisions must be careful decisions, reflecting the overarching task to determine matters relevant to fundamental human rights and/or international protection.
(2) The evidence relevant to the issues in dispute must be carefully scrutinised but there is no need to set out the entire interstices of the evidence presented or analyse every nuance between the parties.
(3) The reasons for a decision must be intelligible and adequate in the sense that they must enable the reader to understand why the matter was decided as it was, and what conclusions were reached on the 'principal important controversial issues'.
(4) It is not necessary to deal expressly with every point, but enough must be said to show that care has been taken in relation to each 'principal important controversial issue' and that the evidence as a whole has been carefully considered.
(5) The best way to demonstrate the exercise of the necessary care is to make use of 'the building blocks of the reasoned judicial process' by identifying the 'principal important controversial issues' which need to be decided, giving the appropriate self-directions in law on those issues, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected.
(6) Where there is apparently compelling evidence contrary to the conclusion which the judge proposes to reach that must be addressed.
(7) Where the parties agree on matters, there is no need for this to be rehearsed in any detail within the decision: the reasons must focus upon the issues that continue to be in dispute.
(8) The reasons need refer only to the main issues and evidence in dispute, not to every material consideration or factor which weighed with the judge in their appraisal of the evidence. But the resolution of those issues vital to the judge's conclusion should be identified and the manner in which they resolved them, explained.
(9) The reasoning should enable the losing party to understand why they have lost.
(10) The degree of particularity required depends on the nature of the issues falling for decision and the nature of the relevant evidence, including the extent to which it is disputed.

(11) The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law but inferences as to insufficiency of reasons will not readily be drawn.
(12) Experienced judges are to be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer to them specifically, unless it is clear from their language that they have failed to do so.
(13) Appellate restraint should be exercised when the reasons a FTT gives for its decision are being examined; it should not be assumed too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it.

18. The Judge referred at [6]'s to the two relevant cases in relation to assessment of the merits of the appeal under the Immigration Rules ('the Rules') namely TD (paragraph 297 (i) (e): "sole responsibility") Yemen [2006] UKAIT 00049 and Mundeba (s.55 and para 297(i)(f) Democratic and Republican Congo [2013] UKUT 88.

19. Guidance as to the approach to the question of "sole responsibility" at [52] of TD is in the following terms:

52. Questions of "sole responsibility" under the immigration rules should be approached as follows:

i. Who has "responsibility" for a child's upbringing and whether that responsibility is "sole" is a factual matter to be decided upon all the evidence.
ii. The term "responsibility" in the immigration rules should not to be understood as a theoretical or legal obligation but rather as a practical one which, in each case, looks to who in fact is exercising responsibility for the child. That responsibility may have been for a short duration in that the present arrangements may have begun quite recently.
iii. "Responsibility" for a child's upbringing may be undertaken by individuals other than a child's parents and may be shared between different individuals: which may particularly arise where the child remains in its own country whilst the only parent involved in its life travels to and lives in the UK.
iv. Wherever the parents are, if both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility.
v. If it is said that both are not involved in the child's upbringing, one of the indicators for that will be that the other has abandoned or abdicated his responsibility. In such cases, it may well be justified to find that that parent no longer has responsibility for the child.
vi. However, the issue of sole responsibility is not just a matter between the parents. So even if there is only one parent involved in the child's upbringing, that parent may not have sole responsibility.
vii. In the circumstances likely to arise, day-to-day responsibility (or decision-making) for the child's welfare may necessarily be shared with others (such as relatives or friends) because of the geographical separation between the parent and child.
viii. That, however, does not prevent the parent having sole responsibility within the meaning of the Rules.
ix. The test is, not whether anyone else has day-to-day responsibility, but whether the parent has continuing control and direction of the child's upbringing including making all the important decisions in the child's life. If not, responsibility is shared and so not "sole".

20. The Judge does not accept that the appellants had established on the evidence that their mother, or even their grandparents, did not play an active role in their lives. The findings of the Judge clearly show that it is her view that the evidence did not support a finding that this is one of those exceptional cases where, notwithstanding both parents being involved in the upbringing of the children, one of them showed they had sole responsibility, namely that the Sponsor in the UK was the one continuing to direct control and direction of the children's upbringing including making all the important decisions in the children's lives. The specific finding of the Judge that this had not been established on the

evidence has not been shown to be a finding outside the range of those available to the Judge.

21. In relation to the challenge to the weight the Judge gave to the report from Dr Ahmad, the Judge had within the appellant's bundle a letter written by Dr Ahmad dated 2 July 2021 in the following terms:

> Tasleem Haider Ali date of birth 10/01/1983 Resident of Haryana Bala Ghari Taj Muhammad P.O Box Charpariza Pershawar, CNIC # 17301-7001571-4 has been diagnosed with the case of Pre-Senile Dementia with underlying Depressive Illness. She is not able to take care of her children Name Mohammad Affan 13 years old and Sikander Ali 11 years old. Both these children need to be in the care of the nearest elder of the family.

22. At [20] the Judge accepts the diagnosis on the basis of the letter. At [21] the Judge expresses her inability to accept the entirety by particular reference to the opinion the appellants mother is unable to look after them based upon the paucity of evidence and reasoning as to why this should be so. The Judges foundation for such a conclusion is the that the evidence provided was, simply, insufficient to support the assertion being made. A submission that as Dr Ahmad knows his patient he will be able to make such a comment does not show the Judge's findings are outside the range of those reasonably open and available to her on the evidence. It may have been an opinion expressed by Dr Ahmad solely on the basis of what he has been told by the appellants mother. No material error is made out.
23. In relation to Article 8 and the best interests of the children, the Judge refers to the decision of the Upper Tribunal in Mundeba [2013] UKUT 88, the headnote of which reads:

> i) The exercise of the duty by the Entry Clearance Officer to assess an application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require.
> ii) Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is "an action concerning children...undertaken by… administrative authorities" and so by Article 3 "the best interests of the child shall be a primary consideration".
> iii) Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55.
> iv) Family considerations require an evaluation of the child's welfare including emotional needs. 'Other considerations' come in to play where there are other aspects of a child's life that are serious and compelling for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social backgrounds and developmental history and will involve inquiry as to whether:-
> a there is evidence of neglect or abuse;
> b. there are unmet needs that should be catered for;
> c. there are stable arrangements for the child's physical care;
> The assessment involves consideration as to whether the combination of circumstances are sufficiently serious and compelling to require admission.
> v) As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important: see also SG (child of a polygamous marriage) Nepal [2012] UKUT 265 (IAC) [2012] Imm AR 939 .

24. It cannot be said the Judge did not consider the correct guidance; she clearly states that she did at [25]. It is also important to read the determination as a whole. The guidance in TC is of interest in relation to this decision as the question is whether on this point the Judge did enough. The Judge makes a specific finding that there was nothing in the evidence to enable her to conclude that the appellants' welfare and needs were not being met, physical and emotional, and no evidence that they were not being properly looked after. It can be inferred from reading the decision that the Judge's finding is that the best interests of the children are that they remain in their mother's household in Pakistan where they are and have been throughout their lives. It is particularly not made out on the evidence that the children's best interests are that they should come to the UK to join their father. The basis for this claim was the assertion that the deteriorating health needs of the grandparents together with their mother's medical condition required it, but the Judge did not find this had been established on the evidence. Without these factors being proved there was nothing to support a claim the best interests of the children required anything other than their remaining where they are. No legal error is made out.
25. Mr Pipe's submission that the Judge failed to make an assessment of Article 8 outside the Rules, referring to the fact that Article 8 cannot be assessed within the Rules and must be assessed within the ambit of a structured human rights claim, is supported by the fact that in the determination there is no reference to Razgar or Article 8 ECHR in specific terms.
26. It was not disputed before me that on the Judge's findings Article 8 (1) is engaged on the basis of family life between the appellants' and their father.
27. The Judge's reference to the preservation of the status quo is criticised on the basis maintaining the status quo is not the purpose of Article 8, but it is noted the case law referred to in the grounds goes on to state that even though promotion of family life is the purpose of Article 8 ECHR, if the question is that of proportionality, the test to be applied is exactly the same as in another Article 8 appeals, namely the balance of the competing interests.
28. I do not accept the Judge failed to give adequate reasons or make proper findings in relation to the inability of the appellants to satisfy paragraph 297 of the Immigration Rules.
29. If one looks at the case advanced by the appellants' relevant to proportionality it will be that they wish to move to the UK to be with their father as a result of the inability of their mother to care for them. The children are being adequately cared for and the arguments suggesting otherwise are not made out. The Judge finds that the requirements of paragraph 297, which is a paragraph designed to support family reunion in certain circumstances, is not made out. In particular the Judge finds that sole responsibility has not been shown to be being exercised solely by the UK-based parent. The Judge finds the best interests of the children are to remain in the home that they have been all their lives and where they continue to live. The public interest, as reflected in the Immigration Rules, supports the Judge's findings.
30. Whilst the grounds of appeal suggest the Judge has procedurally erred in not addressing Article 8 as a separate distinct heading, insufficient evidence has been provided to show how had that exercise been conducted, the decision would have been any different. I find the Judge's finding would have been that the decision under challenge is proportionate. It is for that reason in the grant of permission to appeal by the Upper Tribunal the issue of the materiality of the alleged error has been highlighted.
31. Had it been found the Judge had failed to adequately deal with the merits of the appeal under the Immigration Rules the challenge to the Article 8 assessment would have had greater weight. This is not to say that the Rules are being

treated as determinative of a human rights claim, as clearly they are not, but the findings made within the assessment of the merits of the claim under the Rules are directly relevant to a finding concerning the proportionality of the ECO's decision, and the way in which it may interfere with any potential for the appellants to develop family life further with the father in the UK, in this appeal.

32. I find that although the Judge has erred in law in not setting out a freestanding Article 8 ECHR claim which, on the facts of this appeal, could have been in the very briefest of terms, such error is not material as it has not been made out that the decision would have been any different.
33. The grounds drafted by Mr Pipe also referred to the original grounds seeking permission to appeal which were refused. Those original grounds contain the assertion concerning the application of TD which has been dealt with above. They also refer to the weight the Judge gave to the evidence of Dr Ahmad which I have dealt with above. I have found no legal error in the finding of the Judge that that there are no serious and compelling family considerations which make exclusion of the appellants' undesirable. The assertion the Judge failed to have regard to the best interests of the children is not made out, as noted above.
34. The earlier grounds at [12] referred to the decision of the Court of Appeal in GM (Sri Lanka) [2019] EWCA Civ 1630 claiming that the Court of Appeal gave helpful guidance in relation to the approach of the court in Article 8 cases confirming that the test for an assessment outside the Rules is whether a fair balance is struck between competing public and private interests. That is not disputed. But the issue in any balancing exercises whether the decision under challenge has been shown to be proportionate or not. In this case it is not made out that had that exercise being conducted as a separate issue by the Judge the result would have been any different from the assessment under the Immigration Rules.
35. GM has also been further considered by the Upper Tribunal in Akter [2021] UKUT 00272 the headnote of which reads:

> (1) GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630 is not authority for the proposition that an appellate court or tribunal has a free-standing duty, derived from section 6 of the Human Rights Act 1998 (public authority not to act incompatibly with ECHR right), to disturb a decision of a lower tribunal. The jurisdiction of the appellate court or tribunal is governed by sections 12 and 14 of the Tribunals, Courts and Enforcement Act 2007, which depends on the lower tribunal having made an error of law before its decision can be disturbed on appeal.
>
> (2) A party who wishes to submit that a decision of a tribunal which is otherwise free from legal error should be disturbed on appeal on the basis identified by Carnwath LJ in E and R v Secretary of State for the Home Department [2004] EWCA Civ 49 should do so clearly, when seeking permission to appeal on that basis.
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> (3) In deciding whether the principles in Ladd v Marshall [1954] 1 WLR 1489, as applied by E & R, should be modified in exceptional circumstances, the ability to make fresh submissions to the Secretary of State, pursuant to paragraph 353 of the immigration rules, is highly material to the question of whether those principles should be diluted.

36. Having reviewed the evidence and decision under challenge, having listened to the submissions made by Mr Pipe on the appellants' behalf, I find the appellants' have failed to establish that the Judge has erred in law in a manner material to the decision to dismiss the appeal. Although it may have assisted if a short paragraph had been included in relation to Article 8 outside the Rules the decision would have been the same.

Notice of Decision

37. The First-tier Tribunal has not been shown to have materially erred in law. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 July 2023