Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/02404/2013
OA/02407/2013, OA/02410/2013
OA/02411/2013, OA/02414/2013
OA/02415/2013, OA/02416/2013
OA/02419/2013, OA/02422/2013
OA/02425/2013, OA/02427/2013

THE IMMIGRATION ACTS

Heard at 10pm Field House	**Decision & Reasons Promulgated**
On 13th June 2017	**On 29th June 2017**

Before

UPPER TRIBUNAL JUDGE
The Hon Mrs Justice Cheema-Grubb DBE
Upper Tribunal Judge Kate Eshun

Between

AYSHA K.
MASTER HIKMATULLAH K.
MISS FARIA K.
MASTER SAUD K.
MISS SHANAI K.
MASTER FAHAD K.
MISS SEEMAB K.
MASTER TALHA K.
MISS UJALA K.
MISS GHATOL K.
MASTER ATTAL K.
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D. Ball
For the Respondent: Mr P Deller

DECISION AND REASONS

Mrs Justice Cheema-Grubb

1. We shall outline our decision in brief terms, having come to the clear conclusion that the appeal should succeed.

2. This is an appeal against refusal of entry clearance by the Entry Clearance Officer in Islamabad. The appellants are all nationals of Afghanistan and comprise eleven full siblings born between 25 January 1995 and 21 June 2005. Their older sister, [QK], born on 1 November 1981 in Kandahar Afghanistan is the sponsor for their applications. She worked for aid agencies in Afghanistan between August 2008 and November 2008. She won a scholarship to complete a Master's degree in public policy. She and her husband moved to Germany to pursue this academic course however in her absence her father developed psychiatric problems which resulted in his being incapable of looking after her siblings. Subsequently her mother abandoned the children and had to be looked after by others.

3. The sponsor returned to Afghanistan and took formal legal responsibility for all the appellants in November 2010. She completed her Master's degree through visits to Germany but also continued to work in Afghanistan for example as Gender Adviser to the High Peace Process. There is no dispute that she was forced to flee Afghanistan because of threats issued against her in connection with her work. She arrived in the UK in March 2012. On 19 June 2012 she was recognised as a refugee. In light of the work she had been doing in Afghanistan, the same work that had exposed her to risk she was nominated for the International Peace Prize by the United Nations Development Project.

4. In mid 2012 her husband and 11 siblings applied for Family Reunion. The appellants had to prove on the balance of probabilities that they met the requirements of the UK Immigration Rules. The sponsor's husband was successful but the appellants were all refused entry to the UK on 7 November 2012. The primary reason given for refusal was that they are not her children for the purposes of the UK Immigration Rules because Afghan adoptions are not recognised under the Hague Convention and did not meet the requirements to be recognised as de facto adoptions.

5. They appealed to the First-tier Tribunal and in a determination promulgated on 25

October 2013 FT Tribunal Judge Seelhoff dismissed the appeals. He did so having heard evidence from the sponsor and finding her to be "broadly credible having been internally consistent with the evidence given when the sponsor claimed asylum as summarised in her screening and full asylum interviews. There has been no challenge to the evidence that the appellants' mother left the family home in 2010, and no challenge to the evidence that the appellants' father is mentally ill. Most importantly there is no challenge to the court documents that confirm that the sponsor was appointed the appellant's legal Guardian in Afghanistan." He also found that there was family life between the appellants and the sponsor however a relationship of *in loco parentis* such that the relationship between the sponsor and his siblings should be treated as akin to that of a parent and dependent children was not demonstrated to his satisfaction. Consideration of the FT Tribunal judge's reasoning is illuminating. He considered that he was unable to allow the appeal under the Immigration Rules because the appellants were not children of the sponsor as defined in cases of de facto adoptions in paragraph 309A.

6. Paragraph 309A read in material part,

"*For the purposes of adoption ... A de facto adoption shall be regarded as having taken place if:*

(a) At the time immediately preceding the making of the application for entry clearance under these rules the adoptive parent or parents have been living abroad (in applications involving two parents both must have lived abroad together) for at least a period of time equal to the 1st period mentioned in subparagraph (b) (i) and must have cared for the child for at least a period of time equal to the 2nd period material in that subparagraph;

(b) and during the time abroad, the adoptive parent parents have:

i. lived together for a minimum period of 18 months, of which the 12 months immediately preceding the application for entry clearance must have been spent living together with the child; and

ii. have assumed the role of the child's parents, since the beginning of the 18 month period, so that there has been a genuine transfer of parental responsibility"

7. As the sponsor had been in the United Kingdom for the 5 month period prior to the applications the requirements of 309A could not be satisfied. Furthermore, the requirements under the Immigration Rules were available as a test of durability of the relationship and although the sponsor and her husband had demonstrated they were the sole legal guardians of her siblings with a relationship that was likely to go beyond what is normal for siblings, the relationship was not equivalent to them being parents. Although, because the sponsor was a refugee she could not be expected to return to Afghanistan and in that way the refusal of visas for the appellants interfered with the sponsor's Article 8 family rights

because her husband felt bound to stay in Afghanistan to care for the appellants,

"…. the sponsor's husband has a visa so that interference is limited and it is a choice that he has stayed and not visited the [Sponsor.]"

8. He also observed that the refusal of the entry clearance officer

"… serves the UK public interest for considerable economic reasons. Although the sponsor is work earning £32,000 a year a family with 11 children could expect to be housed in a 6 bedroom property at public expense ... Rent on a 6 bedroom property could easily run to £500 a week albeit benefit caps would kick in for the family. Even accounting for the sponsor's income the family is likely to need a considerable top up from public funds to make ends meet in the short term. The refusal is also in keeping with the wider needs of the refugee convention and the system of refugee protection as the burden on receiving states would be far higher than expected to take responsibility for large extended families on a regular basis.

... In respect of the children's best interests I do acknowledge that in many ways they would be better off in the UK and living with the sponsor but this finding is not determinative of the Article 8 appeal

On the evidence before me I found that the decision to refuse leave is proportionate and does not represent a breach of the appellant's Article 8 rights or those of their sponsor. I will note for the sake of future applications that had I been presented with sufficient evidence to corroborate the assertions made about the nature of the relationship between the sponsor and her siblings I might have reached different conclusion."

9. The applicant appealed. Permission was refused initially and upon renewal. However Mr Justice Holman granted the appellants permission to apply for judicial review on 22 May 2014 on the basis, inter-alia that it was highly arguable that having found Article 8 to be engaged the FT Tribunal judge did not perform the obligatory balanced analysis of the competing Article 8 factors. Rather, he leapt to consideration of the economic interests of the state. Permission to appeal to the Upper Tribunal was granted on 10 December 2014 by Vice President Ockelton.

10. In a decision and reasons promulgated on 16 April 2015 Deputy Upper Tribunal Judge Monson noted that the Secretary of State had conceded the error of FT Tribunal Judge Seelhoff at the outset of the hearing. The proceeded thereafter by way of a hearing for a fresh decision to be made considering the circumstances at the date of the original refusal decision. After reviewing the findings of fact judge Monson was satisfied that no additional findings of fact were required. At the heart of the appellants' submissions was the fact that there was no one else to look after the children apart from the sponsor and in the fact specific circumstances it could not be right that the proportionality question was resolved against the appellants because there were 11 of them rather than one or two. Judge Monson concluded (not controversially) that questions 1 and 2 of the *Razgar* test should be

answered in the appellants favour because the effect of the refusal decision was to prevent family reunion with their sister who had assumed parental responsibility for them. Questions 3 and 4 of the *Razgar* test however should be answered in favour of the SSHD and so the critical question was whether the decision was proportionate.

11. Unfortunately, Deputy Upper Tribunal Judge Monson also fell into error. He declared,

"44. The effect of the refusal decision is that the status quo is maintained, with the appellants being looked after by the sponsor's husband. The status quo was not disturbed by the sponsor's husband being granted entry clearance under the rules, as it was a matter of choice whether the sponsor's husband took advantage of the grant of entry clearance. At the date of decision he was not compelled to abandon the appellants, leaving them without the day-to-day care of a responsible adult relative.

45. Clearly the sponsor and her husband would much prefer to be together, rather than to be kept apart by force of circumstances. But from the perspective of the appellants the impact on them of the refusal decision was not as stark as has been suggested. Their emotional dependency on the sponsor's husband is likely to be greater than their emotional depend dependency on the sponsor, as he is the responsible adult who has had continuous and direct day-to-day contact with them, whereas family life with the sponsor has been punctuated by long periods of absence, and she only assumed sole responsibility of them in substitution for the appellants' actual parents a relatively short time before she fled the country.

46. On the Article 8(2) side of the equation, there are 2 strands of the public interest which are strongly engaged. The 1st is the protection of the country's economic well-being, and the 2nd is the intrinsic public interest recognised in subsection (1) of section 117B of the 2002 Act, which is the public interest in effective immigration control. The greater the financial burden on the UK taxpayer consequential upon the admission of the appellants, the stronger is the justification in refusing entry clearance on financial grounds. Just as it is recognised in the jurisprudence that the United Kingdom cannot be National Health Service for the whole world, by parity of reasoning the United Kingdom cannot be a guardian of the interests of minor children throughout the whole world. There are sound policy reasons for not admitting relatives of refugees unless such relatives can bring themselves within the scope of the applicable rules or policies relating to the admission of relatives of refugees."

12. The appellants sought to appeal but were refused permission. Thereafter they pursued an appeal to the Court of Appeal and on 21 February 2017, the respondent having conceded that the Upper Tribunal had erred, the appeal was allowed and remitted to the Upper Tribunal. The matter proceeded before us as a re-determination on submissions only. Both sides were content that we should consider the evidential findings made by FT Tribunal Judge Seelhoff.

13. It is also agreed that the circumstances to be considered were those present in 2012. Events thereafter are of interest but not direct relevance. Further consensus is found in the application of the Immigration Rules, the fact that as Afghanistan is a non-Hague Convention country the only route to entry for these appellants is by virtue of rights under Article 8 ECHR. The essence of these were described with lucidity by counsel for the respondent as the sponsor having taken responsibility for the children, being stranded in the UK and her husband in Afghanistan being left "holding the babies". As a consequence the husband is unable to enjoy family life with his wife the sponsor: she likewise. As the First Tier Tribunal found there can be no doubt that the children's best interests lie with the grant of entry. It is urged on their behalf that the reason that the sponsor cannot rely on de facto adoption, namely that being a refugee who axiomatically has had to flee her country of origin, she has not satisfied the periods of residence with the children, should be a factor in the proportionality assessment. Finally, it is argued that the children themselves are being treated less favourably because they are the adopted children of a refugee.

14. Mr Deller, has accepted that the Court of Appeal remitted this decision to the Upper Tribunal because this specialist tribunal is better placed to apply the section 117(2)(b) Nationality, Immigration and Asylum Act 2002 considerations.

"PART 5AArticle 8 of the ECHR: public interest considerations

117AApplication of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117BArticle 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society."

15. We agree with Mr Deller's careful and rational submissions that while the sponsor's husband's situation has been mischaracterised by previous Tribunal judges as a voluntary choice between remaining in Afghanistan to look after dependent children and enjoying his and the sponsor's right to family life as a couple, the fact that the appellants find themselves in this situation is not determinative. We are quite satisfied that if the acute dilemma they face amounted to an unanswerable factor requiring visas for the appellants then the Court of Appeal would have said so. In carrying out the exercise that we are required to do we conclude that no single feature of this case compels success for the appellants. However, we are persuaded, in the end firmly persuaded, that the Entry Clearance officer's decisions in the case of each of the eleven appellants in 2012 amounted to disproportionate interference with Article 8 rights.

16. The public law duty to engage with all material evidence required the decision maker to have proper regard to the particular, distinct position of this sponsor vis a vis her particular siblings. She had done all she could to gain legal custody and responsibility for them. They had no one else, as the First Tier Tribunal Judge found, except her husband. There can be no real suggestion that the situation of the sponsor and her husband was designed or devised in order to force the decision-maker to grant the visas. They had no humane option: the sponsor had fled Afghanistan and her husband could readily have joined her but for his compassionate and commendable commitment to the appellants. The vulnerability of a large family of children, some of them as young as 7-9, in a setting such as they were in, is self-evident. To observe that their best interests, a primary concern, lay in not being abandoned is to do no more than recognise the obvious. S.55 Borders, Citizenship and Immigration Act 2009 provides that the SSHD has a duty to have regard to the welfare of children within the UK and (as for entry clearance and other such decisions) the application of Article 8 must be consistent with the UK's obligations under international law: ZH (Tanzania) v SSHD [2011] UKSC 4.

17. The difficulty of a refugee ever being able to act as a sponsor under the de facto adoption rules has been recognised in previous cases such as MK (Somalia) & Ors v ECO [2008] EWCA Civ 1453 but the dual factor of the sponsor's inability to meet

the requirements of 309A in this case together with the very same circumstances depriving her of her right to family life with her husband is a deprivation beyond such examples.

18. These powerful circumstances then met the substantial counter-vailing considerations of overall immigration control and specific public interest matters such that the likely if not inevitable financial consequences of an extended family joining the population of the UK. These features are striking in this case because the UK will potentially take on a significant social care burden arising from a decision of the sponsor to seek refugee status which was not compelled by any action of this country.

19. However, as already noted. We are quite certain that, taking the facts as found by the FF Tribunal Judge the consequence is that the Entry Clearance Officer's decisions engaged Article 8 ECHR and amounted to a disproportionate interference.

20. The appeals of the appellants are allowed. We are not making a recommendation that entry clearance is granted but we expect the ECO to deal with this matter expeditiously.

Conclusion

21. The appeals of the appellants are allowed.

Signed: _____

Mrs Justice Cheema-Grubb DBE

Dated: **29th June 2017**

Notice of Decision

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed Date **29th June 2017**

Mrs Justice Cheema-Grubb DBE

TO THE RESPONDENT
FEE AWARD

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable (adjusted where full award not justified) for the following reason.

Signed Date **29th June 2017**

Mrs Justice Cheema-Grubb DBE