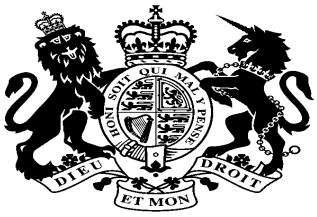

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04911/2017
HU/04913/2017

THE IMMIGRATION ACTS

Heard at Field House
On 16 April 2019

Decision & Reasons Promulgated
On 27 June 2019

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

S K and A K
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
It is appropriate to make an anonymity order because the case involves protection and child welfare issues. Unless and until a tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellant and to the respondent.

Representation:
For the appellants: Mr E. Fripp, instructed by Morden Solicitors
For the respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appealed the respondent's decision dated 27 February 2017 to refuse a human rights claim in the context of an application for entry clearance as the adult dependent children of a refugee.

2. First-tier Tribunal Judge Davey dismissed the appeal with reference to the immigration rules and Article 8 outside the rules. The Upper Tribunal set aside the First-tier Tribunal decision on 15 January 2019 (annexed). The appeal was listed for a resumed hearing before this panel to remake the decision.

3. The panel heard evidence from the appellants' parents and their younger sister. It is not necessary to set out the evidence in any detail because the family circumstances are not in any serious dispute and their evidence is a matter of record. Where it is necessary to make findings of fact we shall give reasons for our findings with reference to the evidence.

4. The background was summarised at [3] of the previous Upper Tribunal decision:

> "3. … The appellants' father was recognised as a refugee because he had a well-founded fear of persecution as an Ahmadi. After he was granted refugee status he applied for his wife and five children to be reunited with him in the UK. His wife and the three children who were still under 18 years old were granted entry clearance. The two older children (the appellants) were refused entry clearance because they were over 18 years old. The family took the difficult decision to join the sponsor in the UK leaving the appellants behind [5]. The judge went on to consider the evidence given by the appellants and the other witnesses as to their situation in Pakistan and the effect of family separation. The appellants are living with their elderly grandmother and attend university in Pakistan. They both claimed to have received threats from members of the Khatme Nabuwat group at university because of they are Ahmadi [6-7]."

Legal Framework

5. The immigration rules make provision for a refugee to be reunited with family members who formed part of their family unit before they fled their country of origin. The rules distinguish between close pre-flight family members and other pre-flight family members. In the case of close family members such as a spouse or children under 18 years old a refugee does not have to show that they can adequately maintain and accommodate family members (paragraph 352D of Part 11 of the immigration rules). In the case of other dependent family members, the rules require them to meet additional requirements including maintenance and accommodation (paragraph 319V of Part 8). A range of post-flight family members can apply for leave to enter (but not leave to remain) under the immigration rules but must meet the additional requirements contained in the rules (paragraph 319L-319U of Part 8). Other post-flight family members must apply for leave to remain through the usual immigration rules for family members (Appendix FM).

6. The appellants' younger siblings were granted entry clearance under paragraph 352D of the immigration rules. It may be worth setting out the requirements to place the other considerations in context.

> '352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who currently has refugee status are that the applicant:
>
> (i) is the child of a parent who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
>
> (ii) is under the age of 18; and
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum; and
>
> (v) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and
>
> (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.'

7. It is accepted that the appellants did not meet the requirements of paragraph 352D of the immigration rules for entry clearance as the children of a refugee because they were over 18 at the date of the application.

8. Paragraph 319V contains provisions allowing entry of other dependent relatives of a refugee in certain specified circumstances. The relevant parts are as follows:

> '319V. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person with limited leave to enter or remain in the United Kingdom as a refugee or beneficiary of humanitarian protection are that the person:
>
> (i) is related to a refugee or beneficiary of humanitarian protection with limited leave to enter or remain in the United Kingdom in one of the following ways:
>
> …
>
> (f) the son, daughter, sister, brother, uncle or aunt over the age of 18 if living alone outside the United Kingdom in the most exceptional compassionate circumstances; and
>
> (ii) is joining a refugee or beneficiary of humanitarian protection with limited leave to enter or remain in the United Kingdom; and

(iii) is financially wholly or mainly dependent on the relative who has limited leave to enter or remain as a refugee or beneficiary of humanitarian protection in the United Kingdom; and

(iv) can, and will, be accommodated adequately, together with any dependants, without recourse to public funds, in accommodation which the sponsor owns or occupies exclusively; and

(v) can, and will, be maintained adequately, together with any dependants, without recourse to public funds; and

(vi) has no other close relatives in his own country to whom he could turn for financial support; and

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

9. Paragraph GEN 1.1. of Appendix FM of the immigration rules makes clear that the rules contained in Appendix FM reflect the respondent's position as to how the balance will be struck between an applicant's family and private life and relevant public interest considerations. However, the provision makes clear that the rules relating to family and private life under Article 8 contained in Appendix FM only apply to family members of a refugee when they do not meet the requirements of Part 11 i.e. the rules relating to refugee family reunion.

> 'GEN.1.1. This route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British Citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection **(and the applicant cannot seek leave to enter or remain in the UK as their family member under Part 11 of these rules)**. It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others (and in doing so also reflects the relevant public interest considerations as set out in Part 5A of the Nationality, Immigration and Asylum Act 2002). It also takes into account the need to safeguard and promote the welfare of children in the UK, in line with the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009.' [emphasis added]

10. The observation made by the Upper Tribunal at [10] of the previous decision needs to be amended slightly because paragraph 319V is contained in Part 8 of the immigration rules relating to 'family members' and not Part 11. Nevertheless, paragraph 319V is a discrete area of the immigration rules providing entry for certain categories of dependent family members of a refugee which pre-dated the introduction of Appendix FM. Paragraph 319V was inserted into the immigration rules on 04 July 2011 (HC 1148). Appendix FM was not introduced until July 2012

(HC 194). Although Appendix FM contained provisions for adult dependent relatives, paragraph 319V provides a separate scheme for dependent relatives of a person who had been recognised as a refugee. For this reason, in our assessment, it is still correct to say that paragraph 319V is not one of the provisions identified by Appendix FM of the rules as reflecting the Secretary of State's view of where the balance should be struck for the purpose of Article 8 of the European Convention.

Decision and reasons

11. The appellants can only appeal on the ground that the decision to refuse entry clearance was unlawful under section 6 of the Human Rights Act 1998. Following changes made by the Immigration Act 2014 the Tribunal is no longer restricted to considering evidence appertaining to the date of the decision in an entry clearance appeal (section 85 of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002")). We consider the position as it stands at the date of the hearing.

Best interests of the children

12. The best interests of children are a primary consideration, but not the only consideration. The appellants have three siblings who are under 18 years old. Their parents provide them with the care and support they need. The children are not dependent upon the appellants for support. However, the children are used to the appellants being a part of the family unit. Naturally they are upset by the ongoing separation from their siblings. The oldest of the minor children attended the hearing to give evidence. She was clearly upset by the separation from her brother and sister. Although we do not consider that the appellants have a key role to play in the care and support provided to the other children, as members of the family unit, they form an important part of their lives. For this reason, we conclude that it is only marginally in the best interests of the minor children to be reunited with their siblings.

Article 8(1) – family life

13. The appellants must show that their right to family life with family members in the UK is engaged within the meaning of Article 8(1) of the European Convention. An adult usually needs to show that their relationship entails something more than the normal emotional ties one might expect between adult relatives: see *Kugathas v SSHD* [2003] INLR 170.

14. The Court of Appeal in *Singh v SSHD* [2016] Imm AR 1 reviewed the domestic and European case law relating to family life between adult relatives. Sir Stanley Burnton came to the following conclusion in the leading judgment.

> "24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited

> approvingly in *Kugathas* did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."

15. The context in which this assessment is made is slightly different because it involves refugee family reunion. In the past, the Tribunal has recognised that the disruption to family life caused by someone having to flee persecution is of a different nature to a person who may leave their country voluntarily or the natural changes to family life that occur as children grow up and form independent lives: see *H v ECO (Addis Ababa)* [2004] UKIAT 00027.

16. The appellants are the adult children of a person who has been recognised as a refugee. The first appellant is 21 years old. The second 20 years old. Before their father left Pakistan to seek asylum in the UK they formed part of a close family unit with their parents and younger siblings. As with many young adults of their age, they continued to be dependent upon their parents as they moved from school to university. They lived in the family home with their mother and siblings while studying. The evidence given by the witnesses was consistent in saying that the appellants continued to live in the family home with their grandmother after their mother took the difficult decision to join their father in the UK with the younger children. Their father continues to send what money he can for their upkeep and says that other relatives in Pakistan are not able to provide additional financial support. There is no evidence to suggest that either of the appellants have established an independent life through work or marriage.

17. We are satisfied that the circumstances of this case are such that the appellants continue to maintain a family life with their parents and younger siblings within the meaning of Article 8(1). But for their father having to flee Pakistan due to a well-founded fear of persecution the appellants would still be living with their parents in the family unit. It seems clear that the intention was for all the remaining family members to travel together to be reunited with the refugee sponsor. Even though the appellants have now been separated from their close family members they remain dependent upon their parents for support and accommodation. We are satisfied that the appellants continue to maintain a family life with their parents and younger siblings. We conclude that the decision to refuse entry clearance showed a lack of respect for their right to family life which was sufficiently grave to engage Article 8(1) of the European Convention.

Article 8(2) – proportionality

18. Article 8 of the European Convention protects the right to family and private life. However, it is not an absolute right and can be interfered with by the state in certain

circumstances. It is trite law that the state has a right to control immigration and that rules governing the entry and residence of people into the country are "in accordance with the law" for the purpose of Article 8. Any interference with the right to private or family life must be for a legitimate reason and should be reasonable and proportionate.

19. The immigration rules relating to refugee family reunion contained in paragraphs 352D and 319V are not said to reflect the respondent's position relating to Article 8 of the European Convention. However, it is unlikely that any weight could be placed on public interest considerations if the appellants meet the requirements of the immigration rules for entry clearance as family members: see *OA and Others (human rights; 'new matter'; s.120) Nigeria* [2019] UKUT 00065.

20. We turn to consider whether the appellants meet the requirements of paragraph 319V. The Entry Clearance Officer (ECO) was not satisfied that they were financially wholly or mainly dependent on their father (paragraph 319V(iii)). The ECO was not satisfied the appellants produced enough evidence to show that they would be adequately maintained and accommodated without recourse to public funds (paragraph 319V(iv)-(v)).

21. Having heard from the appellants' father and mother, and after having reviewed the documentary evidence, we are satisfied on the balance of probabilities that the appellants are likely to be wholly or mainly financially dependent on their father. The appellants were part of the family unit before their father left the country and up until the time their mother and younger siblings joined him in the UK. They continue to live in the family home in Pakistan with their grandmother. It is not disputed that both appellants are students in Pakistan. There is no evidence to suggest that they have any income of their own. The bundle contains evidence to show that their parents send remittances from the UK. This is consistent with the evidence given by the witnesses, whose evidence on this issue was unchallenged. We have been given no reason to doubt the evidence given by their parents, who told us that no financial assistance is provided by other relatives in Pakistan. For these reasons we are satisfied that the appellants meet the requirements of paragraph 319V(iii) of the immigration rules.

22. The evidence relating to the availability of adequate maintenance and accommodation is less clear. Paragraph 319V does not form part of Appendix FM, which includes specified financial requirements. As such, we find that the principles outlined in *KA & Others (Adequacy of Maintenance) Pakistan* [2006] UKAIT 00065 apply.

23. Little evidence or argument was put forward to explain how or why the accommodation would be adequate within the 'room' and 'space' standards of the Housing Act 1985. It is likely that a three-bedroom house with a sitting room is just sufficient to accommodate two adults (man and wife), two adults (not man and wife) and three girls (who are said to share one bedroom). However, no evidence has been produced about the accommodation to show that the sponsor owns or occupies it

exclusively. There is no copy of the tenancy agreement and little evidence about the property. For these reasons, we conclude that the appellants failed to produce sufficient evidence to show on the balance of probabilities that they meet the requirements of paragraph 319V(iv) of the immigration rules.

24. The evidence shows that the appellants' father is the only member of the family who works. His witness statement provides nothing more than a bare statement that he would be able to maintain and accommodate his children. At the hearing, he told us that he works in an electrical wholesale shop. He is in training and plans to start his own business. His P60 shows that he earned a gross income of £16,825 from his employment in the year ending 05 April 2018. His up to date wage slips indicate an average monthly net income of around £1,260. The appellants' father said that he pays £1,750 a month rent for the three-bedroom property where he lives with his wife and three children, which clearly exceeds his monthly income. He told us that he supports his family with additional assistance from public funds. Even if the sponsor is entitled to additional support, no details have been provided. There is no bank statement or any schedule to explain the household income and expenditure to assess whether it is adequate to maintain two additional adults in the household. For these reasons, we conclude that insufficient evidence has been produced to show on the balance of probabilities that the appellants meet the requirements of paragraph 319V(v) of the immigration rules.

25. At the hearing, Ms Isherwood argued that the appellants were not living alone in the most exceptional compassionate circumstances. We note that this was not one of the reasons given by the ECO for refusing the application. We do not consider it necessary to make findings on this issue because, for the reasons already given, we conclude that the appellants do not meet the requirements of paragraph 319V of the immigration rules in any event.

26. Section 117B of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002") sets out a number of public interest considerations that a court or tribunal must take into account in assessing whether an interference with a person's right to respect for private and family life is justified and proportionate. In *AM (Section 117B) Malawi* [2015] UKUT 260 the Upper Tribunal found that the duty to consider section 117B only extended to the provisions that were relevant to the facts of the case. Many of the provisions outlined in section 117B are directed towards those who apply for leave to remain while in the UK and are less relevant to those applying for entry clearance from outside the UK.

27. Section 117B(1) states that the maintenance of an effective system of immigration control is in the public interest. The appellants do not meet the requirements of the immigration rules for refugee family reunion.

28. The public policy considerations relating to English language (section 117B(2)) and financial independence (section 117B(3)) apply to those who seek to "enter and remain" in the UK i.e. the public interest considerations apply to applications for entry clearance as well as in-country applications for leave to remain.

29. Although there is no direct evidence to show the exact level of English the appellants speak, we take judicial notice of the fact that English is an official language in Pakistan and that both appellants are educated to degree level where they are likely to be taught, to some extent, in English. Although their father used an interpreter when he gave evidence at the hearing, it was clear that he understood many of the questions before they were interpreted and that he had a working knowledge of English. The appellants' sister, who is not much younger than them, attended the hearing and said that she did not need the assistance of the interpreter. We find that it is reasonable to infer from this overall picture that the appellants are likely to be able to speak a minimum level of English such that they would be less of a burden of tax payers and would be better able to integrate into society.

30. We have already noted that the evidence relating to their father's income is rather limited. However, we are satisfied that there is no evidence to suggest that the appellants would become an additional financial burden on the tax payer. As a refugee, their father is entitled to any additional support he already receives at public expense. Both appellants are young people who are educated to degree level. The cost of absorbing two additional adults into an existing household is not likely to be wholly unaffordable for their father, the expenses would largely consist of some additional food and periodic expenses for clothing and other personal needs. The appellants are educated to degree level and are likely to be able to find work, if permitted, to contribute towards the family income. The rest of the public interest considerations outlined in section 117B have no application to the facts of this case.

31. We turn to consider whether there are any other compelling or compassionate circumstances that might justify a grant of entry clearance on Article 8 grounds outside the rules.

32. The fact that the application is made in the context of an application for refugee family reunion is relevant. The appellants' father entered the UK on 06 May 2016 and claimed asylum. A letter from the Ahmadiyya Muslim Association UK dated 14 July 2016 confirmed that enquiries were made with their headquarters in Pakistan. The District President of Lahore confirmed that their father was attached to an auxiliary organisation called Majlis Ansarullah, which looked after the affairs of male members from the age of 40 years old. He also served in the community as the zonal leader of Majlis Ansarullah and was responsible for organising various activities such as preaching, reformation, education and finance. He was the Vice President at the local level and Secretary Maal at the local level (organiser for raising funds and keeping accounts of the donors). The evidence showed that the appellants' father had some prominence at a local level and was involved in activities to support the Ahmadi faith. As a result, the respondent recognised that he had a well-founded fear of persecution in Pakistan.

33. The appellants are the children of a person who is likely to be known as an active member of the Ahmadi faith in Lahore. They are Ahmadi but it is not suggested that they hold any particular position in the same way as their father. Although the evidence contained in their witness statements is not particularly detailed, it is

plausible that they could have faced threats and harassment from Islamic groups. It is likely that people in the local community will be aware of their father's activities as a local organiser.

34. The appellants both describe an incident in November 2018 where the second appellant was stopped and threatened by members of an Islamic group (Khatme Nabuwat). The second appellant says that the men grabbed him by the collar and started to slap him. They called him an infidel and an unbeliever. They threatened to kill him if he did not denounce his faith. The men seemed to be aware of the appellants' father. They accused him of receiving religious training in the UK. They would teach him a lesson by targeting the appellant instead. Both appellants say that they were shocked and scared by this incident. Their father considered whether he might have to return to Pakistan to support them. In the end, their mother decided to return to provide them with emotional support. The appellants have produced evidence to show that their mother booked a flight to travel to Pakistan on 28 December 2018. A copy of her passport shows an entry stamp on 29 December 2018 and a return stamp for entry to the UK on 11 February 2019.

35. In her statement, the appellants' mother says that she found her children in a state of despair. While she was in Pakistan she noticed that they had a loss of appetite and would often skip meals. They wanted to sleep in the same room as her. Her son woke up a few times feeling frightened. He told her that he had nightmares that Khatme Nabuwat were after him. She found it difficult to leave them in Pakistan but she had to return to her other children in the UK. Since she returned to the UK her health has worsened. She suffers from emotional trauma knowing that her children are alone in Pakistan and may be in danger. The whole family feels "broken and torn apart". A letter from her GP dated 22 March 2019 states that she has "ongoing problems with anxiety" relating to her continuing separation from her children who are in Pakistan. Her GP said that they have attempted to reduce the severity of these symptoms, but it did not alleviate the underlying problem, which was the continuing stress caused by family separation.

36. The letter written by the appellants' sister, who attended the hearing, also provides compelling evidence of the effect of the family separation. She said that she is close in age to her siblings and they used to spend a lot of time together. She could not explain "how painful and difficult journey of our lives we [are] going through as a family". It is affecting their mental health and wellbeing. When she looks at her mother crying and feeling helpless it is "the most heartbreaking situation you can ever go though." Our observations of the witness at the hearing bore out her written evidence. She was tearful and obviously deeply upset by the situation throughout the time she spent in the hearing. We are satisfied that the evidence shows that the continued separation of appellants from the core family unit is affecting all members of the family in a negative way.

37. In *MN and others (Ahmadis – country conditions – risk) Pakistan* CG [2012] UKUT 00389 the Upper Tribunal found that Pakistani legislation restricts the ability of Ahmadis to openly practice their faith and is used by non-state actors to threaten and harass

Ahmadis. The Tribunal found that those Ahmadis who wished to express their faith openly were likely to be at risk of prosecution for blasphemy. Those who were willing to practice their faith on a restricted basis in private could do so without infringing Pakistan law. Even if an Ahmadis was found to be in the category of persons whose behaviour was not, in general, likely to put them at risk on return to Pakistan, consideration still needed to be given to whether that person might still be targeted by non-state actors on return for reason of their prominent social or business profile.

38. We note that the Court of Appeal in *WA (Pakistan) v SSHD* [2019] EWCA Civ 302 recently considered the guidance outlined in the headnote of *MN (Pakistan)* and observed that it did not stimulate the reader to address the question of "why" a person may choose to practice the Ahmadi faith discreetly: see *HJ (Iran) v SSHD* [2011] 1 AC 596. Although the amendment to the guidance by the Court of Appeal is important, it is not strictly relevant to our assessment given that we are not determining protection claims. However, the background relating to the treatment of Ahmadis in Pakistan, described by the Court of Appeal as an "oppressed religious minority", is relevant to our assessment of whether there are compelling compassionate circumstances to be weighed in the balance under Article 8.

39. This is not a protection claim. The appellants could not show that they meet the requirements of Article 1A(2) of the Refugee Convention or Article 2(c) of the Qualification Directive (2004/83/EC) because they are not outside their country of origin. The Article 8 claim is being considered in the context of an application for refugee family reunion in circumstances where their father has been recognised to have a well-founded fear of persecution as an active Ahmadi. The purpose of refugee family reunion is not only to maintain the unity of the family, but in certain circumstances, to ensure that family members are not left behind who may be placed at risk by the activities of the main applicant. It is possible to found a refugee claim based on risk arising from membership of a family as a particular social group: see *SSHD v K* and *Fornah v SSHD* [2006] UKHL 46.

40. In assessing whether the decision to refuse entry clearance is justified and proportionate we take into account the individual circumstances of the case, which indicate that the children are likely to be known in the local area as the family members of an active Ahmadi. The account of the second appellant being threatened by members of an Islamic group is plausible in light of the background evidence and the country guidance.

41. We also take into account the evidence showing that all members of the family are distressed by their continuing separation. In part, the distress is caused by the severing of family ties. However, the root of the separation is not because of a natural process of the two adult children moving away from the core family unit to lead independent lives. The root of the separation was the need for their father to flee the country because he had a well-founded fear of persecution. The rest of the family did not choose to move to the UK for economic reasons thereby taking the chance that they could not continue their family life with the appellants. They were forced into

the current situation through no fault of their own because the main applicant is a refugee.

42. Having weighed the public interest considerations against the circumstances of the appellants and their family members we conclude that the circumstances giving rise to the father's refugee status, including recent threats from Islamic groups, give rise to compelling compassionate circumstances that render the decision to refuse entry clearance as the dependent family members of a refugee disproportionate even though they do not meet the strict requirements of the immigration rules. We conclude that the decision shows a lack of respect for the appellants' right to family and private life that does not strike a fair balance under Article 8 of the European Convention.

43. We conclude that the decision to refuse a human rights claim is unlawful under section 6 of the Human Rights Act 1998.

44. Given the length of time since the entry clearance application was made, and the precarious situation the appellants are in, we encourage the respondent to give effect to this decision as soon as possible.

DECISION

The appeals are ALLOWED on human rights grounds

Signed  Date 26 June 2019
Upper Tribunal Judge Canavan

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04911/2017
HU/04913/2017

THE IMMIGRATION ACTS

Heard at Field House
On 15 January 2019

Decision Promulgated

……

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

S K and A K
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the appellants: Mr E. Fripp, instructed by Morden Solicitors
For the respondent: Ms J. Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are brother and sister. They appealed the respondent's decision dated 27 February 2017 to refuse a human rights claim in the context of an application for entry clearance for the purpose of refugee family reunion.

2. First-tier Tribunal Davey ("the judge") dismissed the appeal in a decision promulgated on 21 June 2018. The judge noted that the appellants appealed the respondent's decision to refuse their applications for entry clearance with reference to paragraphs 352D (refugee family reunion) and 319V (other dependent relatives of a refugee) of the immigration rules [2]. The applications were refused because they were over 18 years old and therefore did not meet the requirements of paragraph 352D(ii). The applications were also refused under paragraphs 319V(iii)-(v) because they failed to submit evidence of the sponsor's financial situation to show that they were dependent on the sponsor and that adequate maintenance and accommodation would be available [3]. At [4] the judge stated:

> "4. At the hearing no issue was taken over the issue of maintenance and accommodation, given the evidence that had been provided and the fact that the Appellant's Sponsor had refugee status. What was essentially asserted was that they were not living independent lives, they had not married, were not away from the family circumstances and were not in relationship with third parties. They were entirely supported by their adult Sponsor and mother and they were emotionally dependent upon them as well."

3. At [5] he outlined the background to the application. The appellants' father was recognised as a refugee because he had a well-founded fear of persecution as an Ahmadi. After he was granted refugee status he applied for his wife and five children to be reunited with him in the UK. His wife and the three children who were still under 18 years old were granted entry clearance. The two older children (the appellants) were refused entry clearance because they were over 18 years old. The family took the difficult decision to join the sponsor in the UK leaving the appellants behind [5]. The judge went on to consider the evidence given by the appellants and the other witnesses as to their situation in Pakistan and the effect of family separation. The appellants are living with their elderly grandmother and attend university in Pakistan. They both claimed to have received threats from members of the Khatme Nabuwat group at university because of they are Ahmadi [6-7].

4. The judge found that the provisions of the immigration rules were intended to be compliant with Article 8 of the European Convention [12]. He stated that it was accepted that the appellants could not succeed under the rules [14]. However, no clear statement is made as to whether the appellant's legal representative made an express concession on this point. The judge went on to make the following findings:

> "14. The position therefore is that it is accepted that the Appellants cannot succeed under the Rules and the question raised is whether or not the circumstances in the light of the case law, particularly that of Agyarko [2017] EWCA Civ 11 and Hesham Ali [2016] UKSC 471 are such that is shows this is the kind of case of which there will always be a few which can succeed under Article 8. Having considered those matters I find that the concerning circumstances are not sufficiently significant, looking at this matter through the prism of the ECHR compliant Rules, to engage with Article 8 outside the Rules. It is a hard decision but that is simply the

consequence of the way in which the Secretary of State now seeks to apply Article 8 and to challenge any decision made upon it.

15. Having looked at the matter I appreciate that the anxieties of the Sponsor and his wife are genuine. They came to the United Kingdom in the circumstances with the limitations that were put upon them by choice or limited choice so far as the Sponsor's wife is concerned. I similarly understand that the Appellants' siblings in the UK would like to be reunited with their older brother and sister. Whilst I fully understand those matters and the submissions made as to what can happen to them if they get to the United Kingdom it did not seem to me that those are sufficient to show that the ECO's decision is disproportionate.

16. I accept that the Appellants and their parents had a family life and private life together in Pakistan some years ago and that has been broken. The Appellant's have their ageing grandmother, accommodation, university studies and each other for moral support. It is plain that they have others who are concerned about them and presumably know the family. It does not seem to me that the Sponsor and his wife and children could have come to the United Kingdom from a total vacuum of contact with their local area or families. In the circumstances I do not regard the Appellants as likely to be isolated in the circumstances where they currently live. On the face of it I do not see that their circumstances, accepting their evidence as to threats of unspecified kind that they have received from KN are concerning and troubling but it did not seem that those are significant in the assessment of proportionality."

5. The appellants appeal the First-tier Tribunal decision on the following grounds:

   (i) The First-tier Tribunal failed to make findings as to whether the appellants met the requirements of paragraph 319V of the immigration rules.

   (ii) The First-tier Tribunal mischaracterised the relevant rules relating to refugee family reunion as rules intended to reflect the respondent's position in relation to Article 8 of the European Convention.

   (iii) The First-tier Tribunal failed to conduct a structured assessment of Article 8 outside the rules and failed to consider relevant matters such as (i) country guidance relating to the treatment of Ahmadis in Pakistan and (ii) the significance of the refugee family reunion context of the appeal.

   (iv) The First-tier Tribunal failed to consider the best interests of the other children in the family i.e. the appellants' younger siblings.

Decision and reasons

6. After having considered the grounds of appeal and the submissions made by both parties I conclude that there is merit in some of the grounds of appeal although others are not made out. The First-tier Tribunal decision involved the making of an error of law and must be set aside.

7. The respondent did not serve a rule 24 response to the grant of permission. On the morning of the hearing Ms Isherwood handed up a copy of the Home Office

Presenting Officer's note of the proceedings before the First-tier Tribunal, which indicated that the appellants' representative, Mr Janjua of Morden Solicitors, conceded that the appellants *"do not meet the Immigration rule namely provisions relating to family re-union, because they were over the age of 18. Rep will be relying on Article 8."* His submissions, which appear to be noted incompletely, because no mention is made of submissions on Article 8, were summarised as follows: *"The Rep accepted that the family's income is below the required rent, and hence they are struggling financially."*

8. I considered whether it was appropriate to adjourn in order to allow time for the appellants to respond to this evidence by way of a statement from the representative who was present at the First-tier Tribunal hearing, but after having considered the other points, it was not necessary to delay matters further given that there was sufficient merit to other grounds. I only note that the judge's summary of the arguments put forward at [4] of the decision are somewhat opaque and did not clearly summarise what concessions were made by the appellant's representative in relation to the rules, if any. Although it was properly conceded by Mr Fripp that the appellants could not meet the requirements of paragraph 352D of the immigration rules because they are over 18 years of age, the requirements of paragraph 319V allow adult children living alone in the most exceptional compassionate circumstances to join a refugee in the United Kingdom if they are financially wholly or mainly dependent on the refugee sponsor and will be maintained and accommodated adequately. No clear findings were made on these matters to explain why the appellants did not meet the requirements of paragraph 319V of the immigration rules.

9. I find that there is force to the argument that the judge erred in considering the immigration rules relating to refugee family reunion and other dependent relatives of refugees as a reflection of the respondent's position under Article 8 of the European Convention. The Refugee Convention and the European Convention are distinct mechanisms although they may intersect. Paragraph GEN 1.1. of Appendix FM of the immigration rules makes clear that the rules contained in Appendix FM reflect the respondent's position as to how the balance will be struck between an applicant's family and private life and relevant public interest considerations. However, the provision makes clear that the rules relating to family and private life under Article 8 will only apply to family members of a refugee when they do not meet the requirements of Part 11 i.e. the rules relating to refugee family reunion and other dependent family members of a refugee:

> "GEN.1.1. This route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British Citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection **(and the applicant cannot seek leave to enter or remain in the UK as their family member under Part 11 of these rules)**. It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life

> and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others (and in doing so also reflects the relevant public interest considerations as set out in Part 5A of the Nationality, Immigration and Asylum Act 2002). It also takes into account the need to safeguard and promote the welfare of children in the UK, in line with the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009." [emphasis added]

10. This is consistent with international refugee law, which makes a distinction between family reunion for existing family members of a refugee and 'post-flight' family members. Paragraphs 352D and 319V of Part 11 of the immigration rules provide for existing family members of a refugee to enter the UK if they meet the relevant requirements. A 'post-flight' family member would have to apply for leave to remain under Appendix FM e.g. the spouse of a refugee where the relationship began after the refugee entered the UK. For these reasons I conclude that the judge was wrong to begin, as his starting point, with the statement that the immigration rules relating to family reunion were a reflection of the respondent's position relating to Article 8 of the European Convention. This error may not have been material if an adequate assessment outside the rules was then undertaken, but for the reasons given below, I conclude that those findings were also flawed.

11. Dr H.H. Storey, who granted permission to appeal, found that the grounds relating to the First-tier Tribunal's assessment of Article 8 outside the rules were arguable and noted that the statement made at [14] that the appellants' case did not even engage with Article 8 outside the rules "is particularly problematic". I agree.

12. The judge did not conduct a structured assessment of Article 8 according to the five-stage approach outlined by the House of Lords in *Razgar v SSHD* [2004] INLR 349. No findings were made as to whether the appellants' relationship with their family members in the UK had additional elements of dependency over and above the usual relationship between adult relatives in order to engage their right to family life under Article 8(1): see *Kugathas v SSHD* [2003] INLR 170. Although the appellants are over 18 years old the evidence given by the witnesses was that they remained part of the family unit and continued to be financially dependent on their parents. Although the judge accepted (after he had already concluded that the decision was not disproportionate) that the appellants had a family life with their parents "some years ago", this took the form of a statement rather than a clear finding as to whether the nature of the relationship, at the date of the hearing, was such that it engaged Article 8(1).

13. In assessing the proportionality of the decision the judge took into account what was said about the problems the appellants faced in Pakistan. Both appellants said that they received threats from supporters of the Khatme Nabuwat group at university. Despite the fact that they had legal representation, this aspect of their case was not prepared properly. The witness statements were confined to bare statements with no detail as to when the threats were made or the nature of the incidents. Nor was any

background evidence put forward about the nature of the Khatme Nabuwat group. No other evidence was included in the appellants' bundle about the situation faced by Ahmadis in Pakistan. In light of the rather vague evidence contained in the appellants' witness statements it was clearly open to the judge to find that the threats were of an "unspecified kind" [16].

14. However, despite the deficiencies in the preparation of the appellants' case, I accept that the judge erred in failing to consider the import of the appellants' situation and the overall context of the case as an application for refugee family reunion when assessing the proportionality of the decision.

15. It was not disputed that the appellants' father was recognised as a refugee because he had a well-founded fear of persecution as an Ahmadi. This was a highly relevant factor in assessing what the appellants said about the difficulties they faced at university. It is not clear whether the appellants' representative put forward arguments relating to the general situation facing Ahmadis in Pakistan. There is nothing in the evidence or the First-tier Tribunal decision to suggest that he did. However, an experienced First-tier Tribunal judge of the Immigration and Asylum Chamber, as the judge is in this case, would be fully aware of the situation faced by Ahmadis in Pakistan and the relevant country guidance. The Upper Tribunal in *MN & Others (Ahmadis – country conditions – risk) Pakistan* CG [2012] UKUT 389 concluded that legislation is used to threaten and harass Ahmadis and that they are also subject to attacks from non-state actors from sectors of the majority Sunni Muslim population.

16. This was not an appeal brought on Refugee Convention grounds, nor could it be because the appellants are not outside their country of nationality. Despite the lack of evidence, there were important factors that were capable of being given weight in the proportionality assessment under Article 8. Firstly, the appellants' father has a well-founded fear of persecution as an Ahmadi. Consideration might needed to have been given to whether this fact might give rise to a potential risk to family members remaining in Pakistan. Secondly, the appellants' account of threats made by non-state actors from a Sunni majority group, albeit general in nature, was at least consistent with the evidence relating to the treatment of Ahmadis in Pakistan and the relevant country guidance. Having noted that the appellants were "extremely scared and worried that they would be targeted" [7] the judge needed to give adequate reasons to explain why he concluded that these factors were not significant to the proportionality assessment having accepted that the threats were "concerning and troubling". The reasoning at [16] fails to engage with the serious nature of the situation for Ahmadis in Pakistan in the context of this particular case, which involved an application for family reunion as a dependent adult family member of a refugee where the appellants also claimed to have been threatened.

17. For the reasons given above I conclude that the First-tier Tribunal decision did not engage properly with the legal framework and there was a lack of reasoning relating to relevant factors. On the evidence currently before the Upper Tribunal it is not clear whether there was a full concession relating to the immigration rules at the First-tier

Tribunal hearing, but given the lack of clarity surrounding this issue the whole decision is set aside and will be remade at a resumed hearing in the Upper Tribunal.

Directions

18. The parties are given permission to serve any further evidence relied upon, including up to date detailed witness statements. Bundles shall be filed (in duplicate to the Upper Tribunal) at least **two weeks** before the next hearing.

19. The appellant's representatives shall confirm which witnesses will be called to give evidence and whether they require the assistance of an interpreter at least **two weeks** before the next hearing.

20. The parties shall file skeleton arguments (in duplicate to the Upper Tribunal) at least **seven days** before the next hearing. The arguments shall include:

    (i) Submissions on the nature and scope of paragraph 319V of the immigration rules and its interaction with Article 8, if any, including submissions on the respondent's policy "Family Reunion: for refugees and those with humanitarian protection".

    (ii) Submissions on the interaction of refugee family reunion issues and Article 8 outside the rules, in particular, how the context of refugee family reunion should be assessed as part of an Article 8 proportionality assessment.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside

The appeal will be listed for a resumed hearing in the Upper Tribunal

Signed  Date 12 February 2019
Upper Tribunal Judge Canavan