Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/12478/2013

<u>THE IMMIGRATION ACTS</u>

Heard at Field House	**Determination Promulgated**
On 22nd September 2014	**On 29th September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MASTER A A
(ANONYMITY DIRECTION MADE)

<u>Appellant</u>

and

ENTRY CLEARANCE OFFICER, TASHKENT

<u>Respondent</u>

<u>Representation</u>:

For the Appellant: Mr N Paramjorthy (Counsel)
For the Respondent: Mr S Kandola (HOPO)

<u>DETERMINATION AND REASONS</u>

1. This is an appeal against the determination of First-tier Tribunal Judge Halliwell promulgated on 21st May 2014, following a hearing at Newport on 12th May 2014. In the determination, the judge allowed the appeal of Master A A. The Respondent Secretary of State now applies for, and was

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granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Uzbekistan, who was born on 19th September 2004, and has just reached the age of 10 years, at the time of this hearing. He appeals against the decision of the Respondent Entry Clearance Officer dated 10th May 2013, refusing his application for leave to remain in the UK.

The Appellant's Claim

3. The Appellant's claim is that his father was resident in the UK on a two year visa which expired in January 2014. He had applied for ILR, but on account of some confusion, it had been decided that he did not meet the requirements. His current wife is a British national and he and his wife live together with their daughter and baby son. The Appellant is the child of the father's first wife, who was being looked after by the Appellant's paternal grandmother, but could no longer do so, because of ill-health. The Appellant's father had originally entered the UK on a student visa in 2005. He had made an application for his first wife and children to enter as dependants. That was refused.

4. Subsequently his marriage broke down. His first wife, the Appellant's mother, was granted legal custody of the Appellant and his sister. The Appellant's mother moved to Yapan with her daughter. The Appellant himself remained in Kokand city, and was cared for by the father's mother. The Appellant's mother worked long hours in Yapan and her daughter was largely cared for by her own parents who are also elderly.

5. Initially the Appellant's paternal grandmother was in a position to look after the Appellant, but her health deteriorated over the last two years, and she is in need of constant medical attention for her heart condition. Given that the Sponsor has had full financial responsibility for his son, an application was made for him to enter to join the sponsoring father in this country.

The Judge's Findings

6. At the outset, the judge observed how the Entry Clearance Officer had held that the Appellant could not meet the financial requirements of Appendix FM of the Immigration Rules (see paragraph 3). That being so, at the beginning of the hearing, he raised with Counsel, Mr Paramjorthy, the issue whether the requirements of Rule 297 of HC 395 were going to be addressed. The sponsoring father had resided in the UK under the terms of a two year spouse's visa, having married his second wife, who was a British citizen.

7. The determination records that,

> "After a short recess, Counsel for the Appellant confirmed that the application under Rule 2 and 7 no longer proceeded, and the case proceeded under Article 8 only. Both Counsel confirmed that in dealing with the financial requirements, the Entry Clearance Officer had confused the papers of two different cases ...." (see paragraph 4.1).

8. Thereafter, in addressing himself to the "applicable law" the judge recorded that this was an entry clearance appeal from abroad by virtue of Section 85(5) of the 2002 Act, and although in a normal case where the Immigration Rules apply, the circumstances appertaining to the date of the decision to refuse have to be considered, "as the appeal proceeds on human rights grounds only this evidential restriction does not apply" (see paragraph 6).

9. The judge considered the evidence and observed that the Appellant's mother could no longer look after the Appellant, as could neither his paternal grandmother who was in ill-health. He had evidence that, "a medical certificate is produced, and she is struggling to care for the Appellant. Sometimes the Appellant is in consequence not able to attend school, but has to go with his grandmother to her medical appointments".

10. The evidence was that all responsibility for the Appellant had been devolved on the sponsoring father (see paragraph 10). Currently the Appellant spent his time with his mother at weekends, but was being cared for by his grandmother, who had made the schooling arrangements (paragraph 17).

11. By the time of the hearing before Judge Halliwell, it was recorded that, "that situation has now changed" because "the mother has made it clear, as appears from the court papers, and the evidence before me, that she cannot care full-time for the Appellant" (paragraph 18). The reference to the "court papers" was a reference to the fact that,

    > "The matter was brought before a district judge in Uzbekistan who, having reviewed the case, and heard from a child welfare officer on behalf of the Appellant, concluded that there should be a transfer of custody and upbringing from the mother and to the Sponsor. That order was made, just over a month ago, on 3rd April this year" (paragraph 19).

12. The judge then went on to summarise the position by noting that, "the question is therefore whether the wider Article 8 human rights jurisdiction is engaged on the facts of this case" (paragraph 22). He summarised the position further by setting out in six indented subparagraphs the facts that the Appellant was a 9 year old boy, whose care and upbringing had been transferred by a local court to the sponsoring father, thereby removing the present uncertainty as to the welfare, care, and upbringing of this child.

13. As for the sponsoring father, he was now "substantially now settled in the UK". This is because he had leave for a further two years and, will in all probability be granted ILR within that time" given that he is married for

the second time with a British citizen spouse. Consideration was given to the fact that the grandmother had failing health, which was causing the Appellant's schooling to be disrupted "and his day-to-day care hindered, and the fact that his mother is not able to care full-time for him". The judge concluded that the best interests of the Appellant "would be served by him now coming to live with his father".

14. Thereafter, the judge applied the five step approach in **<u>Razgar</u>** (see paragraph 21) before concluding that the balance of considerations fell in favour of the Appellant because "there is little or no legitimate public benefit to be achieved by prohibiting the Appellant from coming to live with his father here" (paragraph 22).

15. The appeal was thereafter specifically allowed "on human rights grounds" (see paragraph 22).

<u>Grounds of Application</u>

16. The grounds of application state that the Appellant could not meet the requirements of Immigration Rules as the Sponsor did not have settled status. If the judge was to allow the appeal under Article 8, he had to show that there were exceptional circumstances, which he had not done. Following the case of **<u>Gulshan</u> [2013] UKUT 00640 (IAC)** it was necessary to show that there were compelling reasons for allowing the appeal outside the Immigration Rules.

<u>Submissions</u>

17. At the hearing before me on 29th September 2014, Mr Kandola, appearing on behalf of the Respondent Secretary of State, submitted that the judge had fundamentally erred in law by having regard to changed circumstances when he stated (at paragraph 18) that "that situation has now changed", in referring to the fact that the grandmother could no longer look after the Appellant. This is because this was an entry clearance application, and in all such cases, consideration must be given to the facts at the date of the decision by the Entry Clearance Officer.

18. Second, the judge failed to give proper consideration to **<u>Gulshan</u> [2013] UKUT 00640** when he allowed the appeal, because that required an expressed finding of exceptional circumstances, which would enable the judge to transfer himself out of the Immigration Rules into the realm of freestanding Article 8 jurisprudence. No such case had been made out. Third, given that this was the case, the reference to there being "no legitimate public benefit" (at paragraph 22) was misconceived.

19. For his part, Mr Paramjorthy, appearing on behalf of the Appellant, submitted that this was a appeal, not under the Immigration Rules as has been wrongly assumed, but under freestanding Article 8 jurisprudence. He had been Counsel at the hearing before the First-tier Tribunal Judge. He specifically remembers having been asked at the very outset whether the Rules were engaged, and after a short recess, it had been agreed that the appeal was only proceedings on the basis of Article 8 jurisprudence. That

being so, it was unnecessary to make a finding of "exceptional circumstances" because this was not a requirement under Article 8 jurisprudence. Finally, the Sponsor did now indeed have indefinite leave to remain, as the judge had predicted, and his final summary of facts could not be faulted in this regard.

20. In reply Mr Kandola submitted that given that the Sponsor now had indefinite leave to remain, the proper course of action was for the sponsoring father to apply again to have his son join him in the UK when he would succeed. However, the use of Article 8 in these circumstances was misconceived. The court order of April 2013 was simply not foreseeable and it was wrong for the judge to take into account the changed circumstances at paragraph 18.

No Error of Law

21. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside this decision. My reasons are as follows.

22. First, this was indeed as Mr Paramjorthy has submitted, an appeal on the basis of Article 8 alone. This being so the restriction under Section 85(5) of the 2002 Act did not apply and it was open to the judge to consider the situation as at the date of the hearing before him, namely, on 12th May 2014. This being so the judge was fully entitled to have regard to the court order by the district judge in Uzbekistan dated 3rd April 2014, just over a month before he made his own determination in this case.

23. Second, and in any event, there were clear findings of "exceptional circumstances" by the judge (although they are not referred to as such because the judge was deciding this case on the basis of freestanding Article 8 jurisprudence only) when he observers that the Appellant's grandmother is no longer able to look after him and that the mother can also not provide full-time care. The judge had a medical report (at page 36) testifying to the grandmother's failing health. The judge recorded that, "the nature of her condition is such that it will not improve, and already the Appellant is missing schooling because of his grandmother's health" (paragraph 18).

24. Similarly, there were exceptional circumstances in the finding that there had been a "transfer of custody and upbringing from the mother to the Sponsor" such that the judge was able to conclude that the sponsoring father now had "sole responsibility for the Appellant. He takes part daily, albeit online, in the Appellant's upbringing, supports him financially, and now has legal custody and decision making by order of the local Family Court" (paragraph 19). In short, the ultimate findings of the judge, as summarised carefully at paragraph 22, were entirely sustainable.

Decision

25. There is no material error of law in the original judge's decision. The determination shall stand.

26. An anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 26th September 2014