



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/05276/2013

THE IMMIGRATION ACTS

Heard at Field House

On 25th June 2014

Determination

Promulgated

On 26th June 2014

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MR FAWAD AZIZI

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Ms J Smeaton (instructed by Healys LLP)

For the Respondent: Ms A Holmes (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal, with permission by the Respondent with regard to a determination of the First-tier Tribunal (Judge Mathews) promulgated on 17th March 2014. For the sake of clarity and continuity however, I shall continue to refer to the Entry Clearance Officer as the Respondent and Mr Azizi as the Appellant.
2. In his determination Judge Matthews allowed the Appellant's appeal against the Entry Clearance Officer's refusal to grant him leave to enter under paragraph 297 of the Immigration Rules as a dependent relative of his brother.

3. The grounds assert that the Judge considered the case of Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088(IAC) at paragraph 22 but failed to engage with the considerations identified by Blake J therein as being the factors to consider when looking at whether there are serious family or other considerations which make exclusion undesirable. The grounds recite paragraph 37 Mundeba as follows:-

“Family considerations require an evaluation of the child’s welfare including emotional needs. ‘Other considerations’ come into 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 background 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 sufficiently serious and compelling to require admission”.

4. The grounds assert that the Judge failed to grapple with the issues mentioned in paragraph 37 in his assessment of the circumstances and limited his consideration of Mundeba to an analysis of Section 55 of the Borders, Citizenship and Immigration Act 2009 which, it is asserted, is clear from paragraph 22 of the determination.
5. The grounds assert that although at paragraph 35 the Judge said:-

“The Appellant’s best interests are not determinative of course, but when the point is simple family reunion, and that reunion is also with the brother that provides financial support, it must represent compelling family reasons making the Appellant’s exclusion undesirable.”

6. It is asserted that this finding indicates that the best interests of the child in this case were in fact determinative, contrary to what the judge had stated. It is asserted that it also ignores the comments of the Upper Tribunal in Mundeba that:-

"It is not the case that any 15-year-old orphan who has a sister in the United Kingdom must be admitted, irrespective of his actual circumstances or the prior history of the relations between the Appellant and the proposed carer."

7. The grounds go on to assert that the Judge carried out no analysis of the comparison with others in the community in Afghanistan, a key component of the ratio of Mundeba at paragraph 45 which is also quoted as follows:-

“Even if we had been persuaded that the judge had not accepted the sponsor’s evidence on this issue and had erred on the basis alleged, we do not consider that this was an error that would need the decision to be set

aside. Taking the circumstances of the appellant at its highest, he is being looked after by the Girl Guides Association who are meeting his basic needs including, significantly, medical care which we suspect may not be available to many orphans displaced by the civil war in the DRC. Although the appellant is not receiving an education, we do not consider, having regard to his age at the date of application and his age now, that this of itself is sufficient to create a serious and compelling consideration. The lack of opportunities that might exist for a teenager in the United Kingdom are unlikely to be of any relevance unless the cumulative effect is to undermine a child's welfare needs. In addition he has a mobile phone supplied by his sister, and receives regular remittances from her. Doubtless there are emotional exchanges between them given their family history and their re-discovery of each other but that is not sufficient to amount to serious and compelling circumstances that make his exclusion undesirable. In so far as a comparison is made with other children in his country of origin, it is a factor (albeit not a conclusive one) that his circumstances would appear to be reasonably catered for despite the loss of his parents".

8. Looking at the determination of the First-tier Judge in this case he set out at paragraph 10 the circumstances giving rise to the application and appeal. The Appellant, under 18 at the date of the application, had sought to join his brother in the UK. His brother is now a British citizen. He initially came to UK from Afghanistan in 2002 and unsuccessfully claimed asylum. He was however allowed to remain in the UK with discretionary leave due to his minority. However, in 2007 he was removed to Afghanistan and returned to live with his mother and brother, the Appellant.
9. While the Sponsor had been in the UK he had formed a relationship with a British citizen and gained entry to the UK in April 2009 as a spouse. He has remained since and is now a British citizen.
10. Whilst in the UK the Sponsor remained in contact with his mother and brother travelling back annually to visit them. During one of his trips to Afghanistan, in November 2011, his mother died suddenly. The Sponsor arranged for his brother to live with someone else sending money monthly to support him. However, due to interest by the Taliban the Appellant moved to Kabul and the Sponsor went to Afghanistan to try and assist. He sought police assistance. As a result the Sponsor took his brother to stay with a friend in Jalalabad and has continued to send money to him for his support. That accommodation is not available to the Appellant long term.
11. The Appellant is receiving medical attention for depression.
12. The First-tier Tribunal Judge heard evidence from the Sponsor. He found that the Appellant and Sponsor's mother had died as claimed based on photographic evidence of the grave, medical evidence and the death certificate. He accepted that the Sponsor was visiting Afghanistan at the time of his mother's death and arranged her burial and he also accepted that the Sponsor had found accommodation for his brother and had been sending money to cover his expenses.

13. The Judge accepted that as a result of threats made to the Appellant, the Sponsor contacted the police to seek their assistance and then arranged alternative accommodation for his brother. The Judge accepted that as a result the Appellant moved to live with another friend in Jalalabad and he also accepted on the basis of the oral evidence, medical report and prescriptions, that the Appellant is suffering from depression.
14. The Judge also accepted that there were no other family members in Afghanistan.
15. The Judge referred himself to the case of Mundeba at paragraph 22. He did not specifically however refer himself to the paragraphs mentioned in the grounds and recited above. However, those paragraphs stress the need for serious and compelling circumstances and a proper examination of all the facts and suggest that serious and compelling circumstances may include neglect or abuse, unmet needs and arrangements for the child's physical care. Mundeba makes clear that there must be a detailed examination of the Appellant's circumstances in such cases and being an orphan in and of itself is insufficient. However, although the Judge did not specifically spell out those factors he has clearly taken all matters into account and done as Mundeba requires. This is a case where the two brothers have been in constant contact. They lived in the same home from the Appellant's birth until he was 7 and then from when he was 12 until 14. After his mother died when he was 16 he has been supported by his brother who has been responsible for his care. The Judge made reasoned and sustainable findings that the mother is dead, that the Appellant had to relocate due to threats, that he suffers from depression and that the accommodation that he has currently is not available indefinitely and further that he has no other family in Afghanistan. I therefore find that even if the Judge had quoted all the cited paragraphs of Mundeba it would have made no difference to the outcome. This is clearly a case where the Judge was entitled to find that there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care. As a result the Appellant meets the requirements of paragraph 297 of the Immigration Rules.
16. It is not the case that the Judge has looked only at the best interests of the child although arguably that is precisely what paragraph 2971 (f) requires. The Judge has taken all factors into account and thus has followed the guidance of Mundeba.
17. I would point out that there is an obvious typing error at paragraph 36 of the First-tier Tribunal's determination where the Judge says that on the basis of the evidence produced he is "not" satisfied that the Appellant meets the requirements of the Immigration Rule applicable to him. That is clearly a typographical error because the preceding 35 paragraphs and following 2 paragraphs make clear that the Judge was satisfied that the Appellant met the requirements of paragraph 297 of the Immigration Rules.

18. Miss Holmes, while relying on the grounds, accepted that the conclusion of the Judge was properly open to him.
19. For the above reasons I find that there is no error of law in the First-tier Tribunal's determination, material or otherwise and I uphold its decision.
20. The appeal to the Upper Tribunal is dismissed.

Signed

Date 25th June 2014

Upper Tribunal Judge Martin