Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/03453/2015
OA/03454/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th August 2017	**On 26th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

[M K]
[H K]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms P Heidar (Solicitor)
For the Respondent: Ms N Willocks-Briscoe (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The appellants are citizens of Afghanistan, the first born in April 2002 and the second in January 2000. Their appeals against refusal of entry clearance were dismissed by First-tier Tribunal Judge C M Phillips ("the judge") in a decision and reasons promulgated on 24th November 2016.

2. The appellants applied to accompany their adoptive mother to the United Kingdom and to join their adoptive father and sponsor here. The Entry Clearance Officer ("the ECO") found in each case that the requirements of the Immigration Rules ("the rules") were not met and, additionally, that refusal of entry clearance would not breach the Article 8 rights of the appellants or anyone else.

3. It was common ground before the judge that the appellants were the nephews of their sponsor in the United Kingdom. They applied for entry clearance on 29th October 2014, as dependants of his wife. She was granted a visa as a spouse on 28th January 2015, at the same time as the appellants' applications were refused. It was also common ground that the procedure for an overseas adoption set out in the rules was not followed. It was contended that the appellants' case should be assessed as a de facto adoption under paragraph 309A and paragraph 310 of the rules.

4. The judge found that the requirements of the rules in these contexts were not met. The evidence fell short of showing, inter alia, that the sponsor's wife had in fact lived with the appellants for the periods of time specified in paragraph 309A or that a genuine transfer of parental responsibility had occurred. Overall, the judge found that the burden of proof had not been discharged.

5. The appellants submitted that, in the alternative, if the requirements of paragraph 309A and 310 of the rules were not met, the applications should be considered under paragraph 297(i)(f) of the rules, as a family relationship between the appellants and their sponsor existed. The judge found here that the evidence was insufficient to show serious and compelling family or other considerations making the exclusion of the children undesirable. There were other persons willing and able to care for them, as shown by the fact that their sponsor's wife chose to travel to join him in the United Kingdom for a period of time, leaving the appellants in Afghanistan.

6. The judge went on to consider whether the appellants' circumstances merited entry clearance outside rules, in accordance with Article 8 of the Human Rights Convention. Here too she found that the appellants had not discharged the burden of proof and had not shown an established family life with their sponsor and his wife. The public interest in the maintenance of fair and consistent immigration control was not outweighed.

The Application for Permission to Appeal

7. It was contended that the judge failed to properly take into account the lateness of the Entry Clearance Manager's review, in relation to reports adduced by the appellants having not been produced earlier. Any delay was caused by the failure of service of the respondent's review statement. In addition, the judge failed to give sufficient weight to a police report

showing that the appellants' natural parents were reported as missing in Afghanistan in January 2012. She attached little weight to the report but her finding that it was not based on independent investigation was speculative and not properly reasoned. Similarly, although the report was not mentioned in a testamentary certificate ("the certificate") relied upon by the appellants, there was no real reason why it should have been. The police report was central to the appellants' appeal. So far as the certificate was concerned, the judge's findings here were insufficient. The appellants' expert, Dr A Giustozzi, found that it was authentic and confirmed that adoptions were not allowed by law in Afghanistan, although guardianship arrangements were. Nonetheless, the judge found that she had no expert evidence before her showing that the certificate was sufficient to allow the sponsor's wife to remove the appellants from Afghanistan. As it confirmed that she had guardianship of the appellants, following their parents' disappearance, the certificate was sufficient for this purpose.

8. So far as the rules are concerned, it was contended that the judge erred in finding that the sponsor had failed satisfactorily to explain why he chose not to follow the route set out in paragraph 309B. The rules showed that where a child is related to adoptive parents, consideration should first be given to whether he or she meets the requirements of paragraph 297 of the rules. The rules did not require evidence of contact and affection and the judge failed to assess the appellants' circumstances properly or consider their best interests as minors. The judge also erred in finding as a fact that the certificate contained both the sponsor's and his wife's names. The document contained only the wife's name as the appellants' legal guardian and she had lived with them and made the entry clearance applications. The wife had been living abroad for at least eighteen months. The judge also failed to give due weight to a statement from the appellants, regarding the disappearance of their parents.

9. Finally, it was contended that the judge erred in her Article 8 assessment as she made no findings regarding the appellants' current circumstances, save that she believed that no transfer of parental responsibility had occurred.

10. Permission to appeal was granted on 26th June 2017 by a First-tier Tribunal Judge. The grant is very brief and merely records that permission was granted on the basis that the judge may have erred in failing to apply the correct law and in failing to give sufficient weight to items of evidence including the police report and the certificate. The respondent provided a Rule 24 response on 10th July 2017. The appeal was opposed by the Secretary of State as the judge had carefully assessed the evidence before her, including the report from Dr Giustozzi. She was entitled to find that Dr Giustozzi's report did not amount to expert evidence confirming the accuracy or adequacy of the contents of the certificate or confirming the powers conferred by it. The judge's findings were consistent with the

conclusions in the report itself. The judge also properly considered paragraph 297(i)(f) of the rules.

Submissions on Error of Law

11. Dealing first with the weight given by the judge to parts of the evidence, Ms Heidar said that the police report was considered at paragraph 39 of the decision. The judge gave the report little weight, noting that it appeared to have been obtained in February 2012 but was not provided until October 2016. The fact that it was not produced until then was irrelevant. It clearly predated the decisions giving rise to the appeal. The judge found that it was not based on independent investigation but inevitably, the report would be based on what was said by the adoptive mother, regarding the disappearance of the appellants' parents. The certificate came from the Supreme Court of Afghanistan and the original was shown to the judge, who noted that it contained the sponsor's wife's name. Dr Giustozzi's report confirmed that the certificate was authentic and that there were no adoption proceedings as such available in Afghanistan. Paragraph 45 of the decision appeared to show that the judge found Dr Giustozzi not to be an expert but he had explained how the certificate was assessed and had status as an expert in these matters. Looking at the certificate in translation on page 13 of the appellants' bundle, although there was nothing expressly saying that the wife could remove the appellants from Afghanistan, this was implied because she had guardianship. There was no need for a specific clause on removal. Overall, it was clear that the judge had given insufficient weight to this evidence.

12. There was evidence before the judge showing the children living with their sponsor's wife but the decision did not show that the statement made by the children, at pages 9 and 10 in the appellants' bundle, was considered.

13. Afghanistan was not a signatory to The Hague Convention. Although de facto adoption was relied upon, it was accepted that the appellants' sponsor had not lived with the children for eighteen months before the application. However, his wife had done so. She applied with the children, for entry clearance. The appellants' application was refused, in part on the basis that the sponsor had not approached the United Kingdom authorities, as appropriate in an adoption case. Turning to paragraph 297(i)(f) of the rules, the judge's findings were insufficient. This was largely due, again, to a failure to give due weight to the police report, the certificate and the evidence given by the sponsor, and by his wife and children in their statements.

14. Ms Willocks-Briscoe said that the police report and the testament certificate were both considered and assessed by the judge, as was clear from paragraph 44 of the decision. She also took into account Dr Giustozzi's report and particularly paragraphs 4 to 8 of it. She took issue with the absence of any description or analysis of the powers bestowed on

the sponsor's wife. The Tribunal was asked to infer that the sponsor's wife had the same rights as would be given to an adoptive parent but Dr Giustozzi's report did not contain any evidence to this effect. There was no consideration in detail of Afghan law or any other international requirements. The document showed that an individual in a court in Afghanistan had looked at a document placed before him. He confirmed what the case was about and recorded that the numbers corresponded with what was held in Afghan records and that the stamps applied were correct. Given the importance of procedures for adoption, the judge was unable to find what guardianship entailed and whether it permitted the removal of the children from Afghanistan. The judge was mindful of the fact that adoption orders issued by an Afghan court are not recognised in the United Kingdom and was also mindful of the other routes available to the appellants and their sponsor. The case was presented on the basis that the children would join him. At paragraph 50, the judge assessed the evidence before her, including the oral evidence. She explained her reservations regarding the lack of supporting evidence that the requirements of the rules were met and highlighted the difficulties with the police report and certificate. Even if the requirements of Afghan law were met for the purposes of guardianship, that was not the relevant standard. The judge was entitled to find that the requirements of the rules were not met and that there was a lack of evidence substantiating the claim that the children had resided with the sponsor's wife for the required period. There was no independent evidence from a social worker or similar professional.

15. Turning to the police report, this did not disclose any investigation into the circumstances of the disappearance of the parents or the results of any investigation, if any were made. This was an important point as it bore on the issue of whether there had been a genuine transfer of parental responsibilities. This was relevant to paragraph 310 of the rules. The judge was entitled to consider the source of information and whether there was anything else supporting the claims. There was no other evidence showing that the parents were missing or presumed dead. Even if all that had been established, paragraph 297 of the rules still required serious or compelling circumstances to be shown. The judge dealt with this issue at paragraphs 53 and 54 of the decision. The correct approach was set out in the judgment of the Court of Appeal in MN [2008] EWCA Civ 38. Afghanistan has no equivalent to adoption so the first avenue, under paragraph 310 of the rules, was not available. De facto adoption, under paragraph 310(vi)(b) of the rules was considered by the Court of Appeal in paragraph 15 of the judgment but the judge in the present appeal found, correctly, that there was no period of residence with the adoptive parent for the required minimum period. If a court or Tribunal is not satisfied that a de facto adoption has taken place, there remains a procedure available under the Adoption and Children Act 2002. This again was considered by the Court of Appeal in MN. Overall, the scheme is framed so that if de facto adoption is available, the Adoption and Children Act 2002 is not

needed. If there is no de facto adoption, then the Adoption and Children Act 2002 procedure should be followed.

16. In the present appeal, there was no de facto adoption because the sponsor himself had not lived with the children. Only his wife had done so, in Afghanistan.

17. The Court of Appeal emphasised the importance of proper checks, at paragraph 32 of the judgment in MN.

18. The decision in SK [2006] UKAIT 00068 was also relevant as it showed the correct approach to the adoption rules. In essence, the scheme could not be segregated from the general law. Just because an arrangement is described as a de facto adoption, it does not follow that it is as a matter of law, where the requirements of the relevant rules are not met. Paragraphs 30 to 32 of SK make this clear.

19. In the present appeal, the judge began with paragraph 309A, looked at the evidence and noted the application naming both the sponsor and his wife. Only the wife had resided with the children so the requirements of the rules were not met. The police report and the certificate taken together showed that the arrangement might have been recognised in Afghan law but this was not sufficient to show a genuine transfer of parental responsibility or that the appellants' sponsor's wife had authority to remove them from Afghanistan. The judge noted that orders made in Afghanistan were not recognised by the United Kingdom and it was clearly important for the judge to be satisfied that the evidence showed that the children were properly adopted in some form. The judge found that the requirements of paragraph 309, overall, were not met. She moved to paragraph 310. The sponsor had not approached the authorities of the United Kingdom under the Adoption and Children Act 2002. Turning then to paragraph 297, the judge found that the arrangement showed that the children were being cared for and there was no evidence showing that their needs were not met. In those circumstances, the requirements of that paragraph were also not met.

20. In a brief response, Ms Heidar said that the appellants were not required to produce adoption orders as such and the requirements of Afghan law were met. The certificate came from the Supreme Court. There was no reason to doubt the validity of it and Dr Giustozzi's report showed that it was a genuine document. The judge added in her own requirement that the appellants have permission to leave Afghanistan to come to the United Kingdom. Dr Giustozzi concluded that the adoptive mother had full guardianship and if a person were given guardianship by their country of nationality, they would be permitted to bring children to the United Kingdom. This was logical. The children would go where the guardian went. The wife had made an application to join her husband. The only parent named in the certificate was the adoptive mother and the children were her dependants. They came under an arrangement which amounted

to de facto adoption. The appellants' sponsor had not lived in Afghanistan as he returned to the United Kingdom but it was his wife who had guardianship. The de facto adoption requirements could apply to one parent or both. Her evidence was that she had lived with the children since 2012. This was also the evidence of the child who made a statement. The judge made no findings about this. The best interests of the children were not properly considered under section 55 of the 2009 Act. The sponsor was not required to approach the authorities of the United Kingdom. He was the children's uncle. Even if there were no de facto adoption, paragraph 297(i)(f) of the rules applied. There were serious and compelling reasons showing why the exclusion of the children was undesirable. The sponsor's wife was not present at the First-tier Tribunal hearing as she was moving between the United Kingdom and Afghanistan, looking after the children.

Findings and Conclusions on Error of Law

21. I am grateful to the two representatives for the careful way in which they presented their cases. I find that no material error of law has been shown in the judge's decision and that it must stand.

22. The judge set out her material findings at paragraphs 32 to 57 of the decision. She began by recording what was accepted between the parties, regarding the circumstances in which the applications for entry clearance were made. She summarised the sponsor's wife's witness statement (at paragraph 36) and noted the results of DNA tests. The Entry Clearance Manager raised the issue of the disappearance of the appellants' parents and the judge made an assessment of the police report prepared in response. She gave it little weight, observing that it did not appear to be based on any independent investigation and was not referred to in the certificate which recorded the guardianship arrangements. In the written grounds, the judge's approach is described as speculative.

23. It is clear from the decision that the judge considered the report carefully. I find that she was entitled to give it little weight. It appeared before her in a separate bundle, with a DNA report. It is a brief document which, in translation, shows that it is nothing more and nothing less than a response to a "confirmation request" made by the sponsor's wife. It simply records a statement by her that her brother-in-law and his wife went missing on a highway on 15th January 2012, one week before the date of the police report. At the bottom of the document is a very short response to the "confirmation request" which records that two named individuals "went missing". The judge was perfectly entitled to find that the police report was not based on any independent investigation and she did not err in her

observation that the certificate makes no mention of it, although there is mention of the disappearance of individuals.

24. So far as the certificate is concerned, the judge was entitled to find that it does not show that the appellants' sponsor here has been awarded any rights in relation to the appellants. Only his wife is mentioned in it. That bears on the question whether the appellants' sponsor is an adoptive parent at all. Ms Heidar put the appellants' case on the basis that it was his wife who sought to present as an adoptive parent.

25. The important finding made by the judge about the certificate is that it falls short as evidence showing precisely which powers are conferred on the sponsor's wife and as evidence that she is entitled to remove the appellants from Afghanistan. Reliance was placed upon Dr Giustozzi's report and the judge's approach was criticised by Ms Heidar as including an apparent finding that he is not an expert. However, paragraph 45 of the decision shows that the judge has not questioned Dr Giustozzi's expertise as such. Her precise finding was that there was no expert evidence before her to show that the certificate was sufficient to empower the sponsor's wife to remove the appellants. A careful reading of Dr Giustozzi's report shows that this finding was open to the judge.

26. The operative part of the report is contained in paragraphs 4 to 8, on page 30 of the appellants' bundle. Dr Giustozzi's researcher in Afghanistan, based in Kabul, sent a scanned colour copy of the certificate to a head of department at the Fourth Zone Court Human Source Department. The document was checked and the head of department confirmed that it was genuine. Paragraph 8 then records Dr Giustozzi's view, which is unsourced, that adoptions are not allowed by law in Afghanistan. All that is allowed is guardianship and, he states, the document "concerns this" and is "the standard paperwork" issued in guardianship cases. Nowhere in the report is there an explanation of precisely what guardianship means in Afghanistan. Nor is there any description of the extent of the legal powers a guardian has in relation to children. The judge was properly cautious as the case concerns two young appellants. I do not accept Ms Heidar's submission that the fact of guardianship entailed an inference that the document was sufficient to enable the sponsor's wife to remove the appellants. The evidence fell short in this regard.

27. The grounds also contained a submission that the law was not applied correctly. I find that there is no merit here. The requirements of the rules in paragraphs 309A and 310 were not met. Ms Heidar did not seek to persuade me that they were. The judge found that the evidence did not show a genuine transfer of parental responsibility and that finding too was open to her. At paragraph 53 of the decision, she found the evidence before her insufficient to show that the appellants' parents have disappeared. The due weight to be given to the supporting evidence in this context, particularly the police report and the certificate, was a matter for her and no error of law has been shown in her approach.

28. So far as paragraph 297(i)(f) is concerned, the judge reviewed the evidence at paragraph 53, noting that it consisted largely of the certificate, the police report and evidence from the appellants, their sponsor and his wife. Her assessment was that this evidence was sparse and lacking in detail and did not show serious and compelling family or other considerations making the exclusion of the children undesirable. She was entitled to find that sources of support and care were available in Afghanistan, in the light of the sponsor's wife's decision to leave them for a time and to join her husband in the United Kingdom.

29. The judge's Article 8 assessment, made after consideration of the rules, was criticised as not including a finding regarding the appellants' current circumstances and the written grounds suggest that she made no finding regarding the parents being missing. This is not so. The judge had these issues in mind and found that the evidence was lacking. The Article 8 assessment is free from error. In the light of the adverse findings the judge made and the paucity of evidence showing compelling family or other considerations, she was entitled to find that the overall balance between the competing interests fell in favour of the respondent, leading to a conclusion that refusal of entry clearance was a lawful and proportionate response which did not breach the human rights of the appellants or anyone else.

30. In summary, the decision contains no material error of law and shall stand.

Notice of Decision

The decision of the First-tier Tribunal, containing no material error of law, shall stand.

Signed Date

Deputy Upper Tribunal Judge R C Campbell

Anonymity

The judge made no direction or order for anonymity and none has been sought before me. In these circumstances, I make no order or direction under rule 13 of the 2014 Procedure Rules.

Signed Date

Deputy Upper Tribunal Judge R C Campbell