Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/18516/2019**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On the 21st October 2021	**On the 16th November 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

SAMIULLAH KHAN

Appellant

and

ENTRY CLEARANCE OFFICER, SHEFFIELD

Respondent

Representation:
For the Appellant: Mr K Khashy, Hoole & Co Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Afghanistan who was born on 1 December 2008. On 1 May 2019, he made an application for entry clearance to join his brother, Izzatullah Khan ("the sponsor") for settlement under para 297 of the Immigration Rules (HC 395 as amended). On 14 October 2019, the Entry Clearance Officer ("ECO") refused the application. On 10 January 2020, the Entry Clearance Manager maintained the ECO's decision to refuse the appellant entry clearance.

The Appeal to the First-tier Tribunal

2. The appellant appealed to the First-tier Tribunal.

3. In a decision sent on 18 December 2020, Judge Suffield-Thompson dismissed the appellant's appeal under Art 8 of the ECHR. The judge did was not satisfied that the appellant met the requirement in para 297(i)(f) that there were: "serious and compelling family or other considerations which make exclusion of the [appellant] undesirable and suitable arrangements have been made for the [appellant's] care ...". The judge went on to find that, in addition, the appellant could not succeed under Art 8.

The Appeal to the Upper Tribunal

4. The appellant sought permission to appeal to the Upper Tribunal on two grounds. First, the judge had failed to consider medical and other evidence concerning the appellant's mental health and whether he was, as a result, not attending school. Secondly, in finding that the appellant could continue to live in Afghanistan, in particular with a neighbour, the judge had wrongly found the sponsor's evidence implausible, namely that the appellant could not continue to live with his neighbour as he was approaching puberty and his neighbour had young daughters whom it would be culturally not permitted for the appellant to associate with.

5. On 1 September 2021, the First-tier Tribunal (Judge Scott-Baker) granted the appellant permission to appeal on both grounds.

6. The appeal was listed for hearing at the Cardiff Civil Justice Centre on 21 October 2021. The appellant was represented by Mr Khashy and the respondent by Mr Howells. Both representatives made oral submissions in support of their respective parties' case.

The Judge's Decision

7. Before the judge, the appellant continued to rely on para 297(i)(f) which I have set out above. A number of matters were found in the appellant's favour by the judge. At para 19, she accepted that the appellant was a citizen of Afghanistan and a child. She also accepted that the sponsor was the appellant's biological brother. She also accepted that both the appellant's parents were deceased. In particular, she accepted the evidence that, most recently, the appellant's mother had died in September 2017. She also accepted that the appellant could be accommodated and cared for by the sponsor in the UK (see para 31).

8. The principal issues before the judge concerned whether the appellant could continue to live in Afghanistan either with family members of his brother or with a neighbour; and whether the appellant suffered from mental health problems which had, inter alia, meant that he no longer attended school.

9. As regards the issue of where the appellant could live in Afghanistan, the evidence led on behalf of the appellant (prior to the hearing) through the sponsor was that the appellant's mother had passed away in 2017 and that thereafter the sponsor had made arrangements for the appellant to live with a neighbour, who was a friend of the appellant's mother. At the hearing, the sponsor gave oral evidence that, in addition, at some point in time the appellant went to live with the family of the sponsor's wife (she lived with her parents) for a two to three week stay but that had not worked out and subsequently the appellant had returned to live with the neighbour. However, as regards living with the neighbour, the sponsor's evidence was that it was no longer possible because the appellant was reaching puberty and it would be culturally inappropriate for the appellant to live with his neighbour who had two daughters of a similar age (see para 6 of his statement dated 18 September 2020).

10. As regards the issue, the judge made the following findings at paras 26–27 (there are two paragraphs numbered "27") as follows:

> "26. The Sponsor stated [in] his statement that the Appellant had lived with his mother and when his mother passed away, in 2017, the Sponsor made arrangements for the Appellant to live with a neighbour, who is a friend of the Appellant's mother. However, at the hearing he told the court that his brother had gone to live with his wife and in-laws but that due to the Appellant's mental health issues and bad behaviour it did not work out. Nowhere does he say that in his witness statement, and I find it strange that he neglected to say something of such significance in his witness statement. This is crucial evidence that he omitted. It is not unreasonable to suggest that the Appellant can happily live with his brother's wife and in-laws and I find that it is more likely than not that the Sponsor told the court about this alleged two to three week stay as to stop the court from finding this as an alternative solution. I do not find the Sponsor's evidence credible on this point.
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> 27. I also note on the application form it asks for the Appellant's address and there is no mention of this other address on the form.
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> 27. The Sponsor has stated that the Appellant cannot remain with the neighbour any longer than the age of 14 years as he has daughters of a young age and that once the Appellant reaches puberty due to their culture, he cannot stay in the house with young women who are not related to him. Firstly, I had no objective background to show that this was the case. Secondly, I had no evidence from the neighbour that this is the case. The Sponsor said that he had been told this by the neighbour on the phone. I find implausible that this was not raised at the very outset of the arrangement as it would have been foreseeable to everyone that the placement could not be permanent if the neighbour has young daughters. Yet the Sponsor claims that it has only been raised as an issue now. The Sponsor has provided various documents from Afghanistan to support the Appellant's case so I find he could have asked the neighbour for a letter to confirm why he can no longer care for the Appellant. I do not accept that the neighbour is not prepared to allow the Appellant to live there due to his oncoming puberty, if that is where he is really living".

11. Then at para 30, the judge concluded:

> "I find that the [Appellant] can either remain safely with the neighbour or with the in-laws depending on where he is living".

12. As regards the second issue concerning the appellant's mental health, the judge dealt with this at para 28 as follows:

> "28. I now turn to the Sponsor's claim that the Appellant has mental health issues. He told the Tribunal that he just sees a normal doctor in the village and he is not under a psychiatrist. He thought he was on medication but he provided no evidence of this to the court. He said that he is not in school due to his health issues but again I had no independent evidence of this. The Sponsor could have provided translated medical evidence but I had nothing before me. The Sponsor states that this is why the Appellant is not in school, but I find that there are many reasons why a young man of 12 may not be in education in Afghanistan so his being out of school does not corroborate that he has mental health issues".

13. As a consequence, taking into account those findings the judge found that the appellant could not meet the requirement in para 297(i)(f). Further, having regard to those findings and the best interests of the appellant, the judge found that there would be no breach of Art 8.

The Appellant's Grounds

14. Mr Khashy relied upon the two grounds upon which permission had been granted.

15. Ground 1 contends that the judge erred in para 28 of her decision by failing to take into account evidence – she said there was "no evidence" – relating to the appellant's mental health, his medication (if any) and whether or not his health issues prevented him attending school.

16. In para 7 of the grounds Mr Khashy relied upon five pieces of evidence: (a) from the Swedish Committee for Afghanistan Mental Health Programme (pages 162–163 of the bundle) which diagnosed the appellant as suffering from depression and epilepsy and also set out medication he was receiving; (b) evidence from an elder of the appellant's village which states that the sponsor pays for the appellant's living expenses and that the appellant visits his local health clinic for mental health treatment, there are no specialists available at the clinic and the appellant suffers from anxiety and depression since the loss of his mother (page 149 of the bundle); (c) a letter from the Education Ministry stating that the appellant suffered from mental health issues due to family loss and that he attends a clinic and is unable to attend school (page 152 of the bundle); (d) a letter from the Jamurith Hospital stating that the appellant has lost all his family members, is suffering from anger and depression at all times and that he needs better care and treatment (page 155 of the bundle); and (e) a letter from a Dr Orikhil of the Jamhorat Hospital stating that the appellant has lost all his family members, has mental health problems and is not able to study and needs health and mental care (page 161 of the bundle).

17. Mr Khashy submitted that this evidence had not been taken into account by the judge and her findings at para 28 of her decision were, as a consequence, unsustainable.

18. Ground 2 contends that the judge erred in finding that the appellant could live with family members in Afghanistan or with a neighbour.

19. As regards the former, the judge erred in finding that the sponsor's evidence was not credible on the basis that he had failed to mention that the appellant had lived with the sponsor's family in his witness statements, those statements only provided an outline of the appellant's circumstances. The sponsor had been "open and frank" during his evidence and the judge had otherwise accepted what he had said.

20. As regards the evidence concerning the appellant living with his neighbour, it is contended that it was not implausible that the appellant would not be able to live permanently with his neighbour who had young daughters. The sponsor had stated that the arrangement was temporary in his first witness statement dated 23 May 2019 (at para 8) and had referred to the problem now, as the appellant approached puberty, of him remaining in the neighbour's house in his second statement dated 18 September 2020 (at para 6).

Discussion

21. I will take each of the grounds in turn.

22. As regards ground 1, at para 28 of her determination, which I set out above, the judge stated that there was "no evidence" of any medication that the appellant was said to be taking. Further, there was "no independent evidence" that his health issues prevented him from attending school.

23. In my judgment, the judge was in error in failing to take into account evidence contained in the appellant's bundle which both related to his health condition (including medication) and also evidence that related to whether he could attend school as a result. That evidence, which is set out in para 7 of the grounds and which I have summarised above, was evidence that both supported, at least to some extent, what was being said about the appellant's mental health including that he was suffering from "anxiety and depression" (see the letter from the village elder at page 149) and that he also suffered from epilepsy and was receiving treatment (see the evidence from the Swedish Committee for Afghanistan Mental Health Programme at pages 162–163). Likewise, the letter from Dr Orikhil (at page 161), albeit without much detail, refers to the appellant suffering from mental health problems (page 161). In addition, the letter from the Jamurith Hospital (at page 151) refers to the appellant suffering from anger and depression. Finally, there is a letter both from the Education Ministry (at page 152) which refers to the appellant suffering

from mental health issues and being unable to attend school. That is also referred to in Dr Orikhil's letter (at page 161).

24. It may well be that this evidence was not the most cogent evidence given its relative brevity. But it was some evidence and it was independent evidence in the sense that it did not emanate from the appellant or the sponsor. It was evidence from medical personnel, state institutions and a village elder in Afghanistan. The judge was, therefore, wrong to fail to take into account this evidence and to say that there was "no independent evidence" on these issues. Of course, Mr Howells is correct that this evidence dates back to 2018. But, that did not make it evidence which the judge could ignore. Indeed, as Mr Khashy submitted the explanation for it being in 2018 was that the application for leave was made online on 1 May 2019 and this evidence was, at that time, not that old and the best that could be then obtained.

25. What view the judge would have taken of this evidence and what findings she would have made on it is pure speculation. It was, however, evidence that merited consideration by the judge in assessing whether the appellant suffered from mental health problems and those problems resulted in him being unable to attend school. That issue was highly relevant to the question of whether there were "serious and compelling" circumstances under para 297(i)(f) and whether a breach of Art 8 was established. The judge erred in law in para 28 in reaching her adverse finding and, in my judgment, that finding was material to her overall finding that the appellant could not establish the requirement in para 297(i)(f) or that the decision breached Art 8 of the ECHR.

26. It is not, therefore, in my judgment strictly necessary to determine whether in addition ground 2 is made out. Its relevance lies rather in whether the judge's findings made in relation to whether the appellant could live either with his brother's family in Afghanistan or with a neighbour should be preserved. Whilst I do not accept all of the points made in the grounds and relied upon by Mr Khashy, there are sufficient difficulties with the judge's reasoning that have led me to conclude that her findings in paras 26–27 should not be preserved.

27. As was explored at the hearing, the judge's reasoning in para 27 turns, in large measure, upon the sponsor's failure to mention in his two witness statements in May 2019 and September 2020, that the appellant had lived for a two or three week period with his (the sponsor's) family but that that had not worked out. The absence of reference to that in his witness statements led the judge to doubt whether that incident had ever occurred and, in particular, whether living with the sponsor's family would be feasible in the future. Nowhere in the judge's determination is the evidence recorded as to precisely when the sponsor said, at the hearing, that two or three week period occurred. Obviously if it did not occur until after the witness statements were prepared, it would be wrong to criticise the sponsor for not including them in those statements. By contrast, if the two to three week stay with his family did occur before one or more of the

witness statements, it might well be a reasonable point for the judge to take that he did not mention that until the hearing.

28. Neither Mr Khashy nor Mr Howells was able to assist me as to what, if any, was the sponsor's evidence at the hearing before the judge as to when this two to three week stay with the sponsor's family was said to occur. Neither representative could identify in their papers any record of the evidence on this issue. There is no record of this evidence either in the judge's determination or indeed in the Tribunal file.

29. Mr Howells submitted that this was not a point raised directly in the grounds which were drafted by Counsel who had been present at the hearing. He submitted that if experienced Counsel did not take this point, then it was likely that the judge's reasoning could not be faulted on the basis that the sponsor had said these matters had occurred after his witness statements had been drafted and filed. There is some merit in that submission. However, in my judgment, if the judge is to rely upon a juxtaposition of the time the witness statements were filed and the date on which it is said the two to three week stay occurred, it was incumbent upon her to set out that evidence clearly as part of her reasoning in para 26. She simply says that "crucial evidence" was "omitted" from the sponsor's statement.

30. In any event, Mr Howells accepted that the judge's reasoning in the first paragraph numbered 27 was unsustainable. There the judge criticised the appellant (in reality the sponsor) for not including in the application form the address both of the neighbour and of the sponsor's family as places where he lived. However, Mr Howells accepted, on reading the application form at questions 23–24 when setting out the address at which the appellant said he had lived from birth, he had set out a village address without reference to any particular property or house within that village. Mr Howells accepted that that address covered both the house of the neighbour and of the sponsor's family. The judge had, therefore, been wrong to take into account an apparent omission of the address of the sponsor's wife's family home.

31. For these reasons, the judge's findings in paras 26 and the first paragraph 27 are unsustainable and should not be preserved.

32. Whilst there is less merit in the remaining parts of ground 2 which challenge the judge's finding in the second numbered paragraph "27" concerning the appellant's account that he lived with a neighbour and could no longer do so, there is no doubt that the appellant's case has always been that he lived with a neighbour for some period of time and the evidence was that it would be temporary. There was no background evidence or expert evidence concerning the cultural situation of a male individual such as the appellant living in the home of a neighbour with daughters. Likewise, there was no supporting evidence from the neighbour and, indeed, the only document submitted from the neighbour (at page 44 of the bundle) makes no reference to the appellant being

unable to live with him (the neighbour) on the basis put forward by the sponsor in his second witness statement at para 6 and at the hearing.

33. Neither representative made any specific submissions on whether any findings should be preserved if only one of the grounds was made out. In reality, on remittal the Judge of the First-tier Tribunal will be considering the credibility of the sponsor's evidence and making appropriate findings on the appellant's circumstances in Afghanistan. Those circumstances will, of course, now take into account the significant change in the government in Afghanistan since the initial hearing in this appeal. It would, in my judgment, be wrong to preserve a single finding (in the second numbered paragraph "27") which is based upon an assessment of the credibility of the sponsor given that the other findings which, like any findings in relation to the other issues, will, in fact, also turn upon the credibility of the sponsor assessed by the judge at the remitted hearing. In my view, justice requires that the judge at the remitted hearing make all relevant factual findings in respect of the appellant's reliance upon para 297(i)(f) and under Art 8.

34. For these reasons, therefore, the judge materially erred in law and her decision cannot stand and none of her findings are preserved.

Decision

35. The decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 involved the making of an error of law. That decision cannot stand and is set aside.

36. Given the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Suffield-Thompson. None of the judge's findings are preserved.

Signed

Andrew Grubb

Judge of the Upper Tribunal
28 October 2021