Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001741
HU/15389/2019

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 18 October 2022	**On 27 November 2022**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

PAINDA KHAN
(Anonymity direction not made)

Appellant

and

AN ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Kannangara of Counsel.
For the Respondent: Mr A McVeety, a Senior Home Office Presenting Officer.

DECISION AND REASONS

Background

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Juss ('the Judge') promulgated on 7 October 2021 in which the Judge dismissed the appellant's appeal against the refusal of his application for leave to enter the UK. The application was refused under the relevant immigration rule. As there is no right of appeal against a refusal under the Rules this is a human right appeal.

2. The appellant is a male citizen of Afghanistan who was born on 26 April 2003 who lives in Logar Province in Afghanistan at the address provided in his visa application form.

3. The Judge notes the core of the appellant's case at [3] in the following terms:

> 3. The essence of the Appellant's claim is that he has a family life with his brother, Anar Khan, in the UK. He has made his application for entry clearance on 6 March 2019 when he was 16 years of age and therefore a minor. He puts his claim under paragraph 297 (i) (f) of the Rules on account of his circumstances in Afghanistan, maintaining that his mother died on 29 November 2018, so that he is now alone there without any close family members in Afghanistan. In addition, he fears the current upheaval in Afghanistan given the government takeover by the Taliban. However, the way that the appellant puts his case on this score is that the circumstances in Afghanistan at present time are such that, there are exceptional and compelling circumstances, such that the appellant's exclusion is undesirable.

4. The Judge records an application being made for an adjournment by the Presenting Officer due to the changing situation in Afghanistan although that was opposed by the appellant's representative and refused by the Judge.

5. Having considered the evidence the Judge sets out his findings of fact from [22] of the determination, the relevant parts of which are in the following terms:

> 24. First, and most importantly, the evidence is simply not there that this appeal falls to be allowed because 'there are serious and compelling family or other considerations which make exclusion undesirable….' Thus, although I am satisfied that the Appellant is related to his sponsoring brother (see latter's WS at §5 dated 20th March 2020, referring to DNA Report), I do not accept the reason given by the sponsor for no longer wishing to look after the Appellant on the basis that 'in Afghanistan's uncertain environment it is not easy to keep a young boy safe when there are (sic) recruitment potential by Taliban in the area' (§6). He states that his father died before he himself came to the UK (§7). Nevertheless, although he maintains that 'I have been responsible for financially supporting my mother and brother' because 'I have been sending money through friends going to Afghanistan' (§8) I am not satisfied that the evidence bears this out. I come to this conclusion notwithstanding a letter from the lawyer, Saida Wali, written on behalf of the Uncle (A/B at p. 5) that 'he was sending me about 30,000 Rupees per month for the live (sic) accommodation of his brother….'' The law and order and human rights situation in Afghanistan currently many be 'very bad' (§10) as he puts it but the Appellant has not demonstrated a personal risk of ill-treatment to him.
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> 25. Second, the reference to the Appellant's other brother's appeal (which is being relied upon) being allowed does not

help in this appeal. Not only is each case different but that was an application was under para 317. Surprisingly, none of the other family members are mentioned in that determination.

26. Third, the Appellant came to the UK in March 2003. That is also the year that his brother was born in April 2003 in Afghanistan. It is therefore not credible that he could have provided his details of his brother, the Appellant, in the way that he has done. There is a credibility issue here as there is with the Appellant initially maintaining that he had been granted asylum when he had been refused asylum.

27. As for the Appellants' Article 8 rights, he cannot succeed under paragraphs 276ADE to 276DH (private life) for the reasons given above. The question of whether there are "exceptional circumstances" is the next question. I do not find that there are. This is because as the decision in Agyarko [2017] UKSC 1 explains, "the European Court's use of the phrase 'exceptional circumstances' in this context was considered by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192 (paragraph 56). The Supreme Court goes on to say that, "Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of the Immigration Rules, only where there are 'insurmountable obstacles' or 'exceptional circumstances' as defined." (Paragraph 57).

28. The Supreme Court provides helpful guidance when it goes on to say that, "The Secretary of State has not imposed a test of exceptionality in the sense that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she had defined the word 'exceptional', as already explained, as meaning circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate." (Paragraph 60).

29. I am satisfied that there will not be 'unjustifiably harsh consequences' to the Appellant, for the reasons I have already identified above, if he were to continue to live in Afghanistan as he is doing now. He has not been able to show he is at risk in Afghanistan. He has spent his formative years there. There is no evidence that he is vulnerable. There is no question of any difficulty arising of his not being able to re-integrate into Afghan society.

6. The appellant sought permission to appeal asserting, inter alia, the Judge has made a misdirection in law when assessing the current

situation in Afghanistan given the takeover by the Taliban and its consequences and should have considered the best interests of the appellant that needed to be seen in the context of the current situation. The grounds assert that nowhere in [22 – 29] does the Judge made any findings about the situation of the appellant and made no findings regarding best interests of the child under section 55 of the UK Borders Act. It is also asserted a misdirection in law in relation to article 8 family life/proportionality making legal error in reaching the conclusions on the issue of family life between the appellant and family members, failing to adopt the correct legal approach and in failing to conduct proper balanced proportionality assessment. The Grounds also argue the Judge has made a fundamental misdirection of law by failing to take into consideration that the appellant has no family life in Afghanistan as all his siblings are in the UK and also failed to take into account human rights of those family members in accordance with Beoku-Betts [2008] UKHL 39

7. Permission to appeal was granted by another judge of the First-tier Tribunal on 29 November 2019 on the basis that all grounds are arguable, without explaining the thinking of that judge as to why this was so.

Error of law

8. The application for entry clearance was refused by the Entry Clearance Officer (ECO) in a decision dated 2 July 2019 for the following reasons:

> You have stated that you are applying to join your Brother, Ansar Khan. You have provided a passport and Biometric Residence Card for your sponsor to show that he is present and settled in the UK.
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> You have provided a Eurofins DNA document that confirms that you and your brother are biologically related as claimed.
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> You have stated that your Mother is deceased and this is why you wish to join your Brother now.
>
> You have provided a death certificate dated 11/11/2018 that states that your Mother is deceased. The whereabouts of your father has not been raised within your application and you have stated that you are currently residing with your Uncle, Shirdad. You have provided a letter from your Uncle stating that he is only able to care for you for 4 months. However, the reason as to why he cannot care for you for a longer period of time is not known. I also note that you have provided a birth certificate registering your birth on 16/10/2018. I note that this certificate states that it was your Uncle that registered your birth. Given that your Mother was alive at this time, it is unclear why your Uncle would be registering your birth specifically 15 years after your stated date of birth. I am not satisfied that you have demonstrated the whereabouts of your Father or why your current care conditions cannot continue.
>
> Given the above I am also not satisfied that there are serious and compelling family or other considerations which make your exclusion undesirable and that suitable arrangements have been made your care.

> I therefore refuse your application under paragraph 297(i)(f) of the Immigration Rules.
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> I have considered your rights under Article 8 of ECHR. Article 8 of the ECHR is a qualified right, proportionate with the need to maintain an effective immigration and border control and decisions under the Immigration Rules are deemed to be compliant with human rights legislation. I am not satisfied that you have demonstrated you are related as claimed to your sponsor or that you have a family life with them. I am therefore satisfied the decision is justified by the need to maintain an effective immigration and border control.

9. In a review conducted by an Entry Clearance Manager on the 18 November 2019 it is written:

> I have reviewed the assertions set out in the grounds of appeal, however I note that the appellant has failed to supply any further supporting evidence alongside the appeal papers to be considered in the course of this review.
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> Based on the refusal notice, I am satisfied the original decision to refuse was correct. The decision is therefore in accordance with the law and the Immigration Rules and I am not prepared to exercise discretion in the appellant's case.
>
> I have considered, under paragraphs GEN 3.1. and GEN 3.2. of Appendix FM as applicable, whether there are exceptional circumstances in the appellant's case which could or would render refusal a breach of Article 8 of the ECHR because it could or would result in unjustifiably harsh consequences for the appellant or the appellant's family. In completing this assessment, I have also taken into account, under paragraph GEN 3.3. of Appendix FM, 51 the best interests of any relevant child as a primary consideration. Following a thorough assessment of the appeal I am satisfied that there is no basis for such a claim.
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> Additionally, I have a duty to safeguard the best interests of children in the United Kingdom under Section 55 of the Borders, Citizenship and Immigration Act 2009. Although the appellant currently resides in Afghanistan and are not present in the UK, I confirm that I have adhered to the spirit of this statutory duty when conducting this review. In light of the supporting documents submitted, the assertions in the grounds of appeal and the circumstances of the appellant in Afghanistan, I am satisfied that the decision to refuse entry clearance is in the child's best interests.
>
> Given all of the above considerations, I maintain the ECO's initial decision to refuse entry clearance.

10. It is not made out the Judge failed to consider the evidence with the required degree of anxious scrutiny. The Judge had the benefit of being able to assess both the written and oral evidence in coming to his conclusions.

11. The suggestion the Judge erred in failing to take into account section 55 is without merit. The Judge noted the appellant's date of birth of 26 April 2003 which meant that at the date of the appeal hearing on 26 August 2021, and at the date of the promulgation of the decision on 7

October 2021, the appellant was 18 years of age and therefore an adult.

12. Mr Kannangara was asked during the course of his submissions what evidence it is alleged the Judge failed to take into account relating to the country situation but his only reference was to the witness statement of the appellant's brother, his sponsor. I indicated I would look at that evidence again in light of his submission after the hearing and have done so. A full examination of all the material before the Judge which appeared in the appellant's bundle, including the sponsor statement, does not establish arguable legal error in the Judge's conclusions. What the submission amounts to is that the Judge did not give the weight to that evidence that the appellant would have preferred. The submission is really that had the Judge given the evidence greater weight the appellant could have succeeded, but that is no more than disagreement and fails to establish any arguable error. The weight to be given to the evidence was a matter for the Judge. It has not been shown that the assessment of the material or the weight attributed was in any way irrational, unlawful, or unreasonable in all the circumstances.

13. The application was made under paragraph 297 of the Immigration Rule as the appellant was a child at the date the application was made. It is not disputed before the Judge that the appellant could make such an application to join his brother in the UK but the issue that arose is whether the appellant could satisfy all the requirements of paragraph 297(f) which reads:

> (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and 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; 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) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and
>
> (v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and
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> (vi) holds a valid United Kingdom entry clearance for entry in this capacity; and
>
> (vii) does not fall for refusal under the general grounds for refusal.

14. The Judge's finding, following the analysis of the evidence, that there were not serious and compelling family or other considerations which make exclusion undesirable has not been shown to be a finding outside the range of those available to the Judge. There is no case law

that establishes that as a result of the Taliban regaining power in Afghanistan such a conclusion could not have been made by the Judge. Whether such circumstances make exclusion desirable is fact specific depending on the circumstances of the individual appellant. The Judge at [24 -26] highlights concerns arising from the evidence in relation to this aspect including the fact that the appellant had not demonstrated a personal risk of ill-treatment in Afghanistan. The appellant's family may want to bring him to the United Kingdom where he may have a different/better life than he will have in Afghanistan, but that is not required test. No legal error is made out in the Judge's conclusions in relation to the inability of the appellant to satisfy the relevant immigration rule, as found by the ECO.

15. The Judge considered article 8 specifically from [27] and considered whether the appellant had established exceptional circumstances, referring to the Supreme Court decision in Agyarko as the authority for his approach, and the question of whether there would be justifiably harsh consequences to the appellant flowing from the refusal at [29]. The Judge is criticised in relation to his findings concerning the existence of family life and whilst the Judge has not set out findings by reference to the five specific questions asked in Razgar, the issue the Judge did consider relevant is the fifth of those questions that of the proportionality of the decision. The Judge specifically finds the appellant cannot succeed on private life which is a sustainable finding. The Judge must therefore have accepted that family life recognised by article 8 is engaged in the relationship between the appellant and his brother, as otherwise there would have been no need to consider the proportionality of the decision. Although the decision may not have been structured as most would have been, and as a result caused concern in the mind of the author of the grounds seeking permission to appeal, it is clear when reading the determination that the Judge did focus on the core question at [27 – 29], especially as the appellant was unable to meet the requirements of the Immigration Rules which set out the criteria the United Kingdom accept entitles a person such as the appellant to enter if they can be met.

16. I find the appellant has failed to establish arguable legal error material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in relation to this matter.

Discussion

17. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

18. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No-one shall publish or reveal any information,

including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Signed……
Upper Tribunal Judge Hanson

Dated 19 October 2022