



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03803/2018 (V)

THE IMMIGRATION ACTS

Field House
On 29th September 2020

Decision & Reasons Promulgated
On 6th October 2020

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

[M A V]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Bazini, of Counsel, instructed by Ata & Co Solicitors

For the Respondent: Mr S Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Afghanistan born in 2011. He applied for entry clearance to come to the UK with his adopted mother and two siblings to join his adoptive father, who is a British citizen, in April 2017. The application, along with those of his mother and siblings, were refused on 15th November 2017. His appeal against that decision was dismissed on all grounds by First-tier

Tribunal Judge Chana in a determination promulgated on the 1st February 2019. The same determination allowed the appeals of his adopted siblings and adopted mother as it was found that the only issue in their appeals, that there was insufficient accommodation and support, should be determined in their favour. It was accepted also that these children were in fact British citizens by descent from their father who was a British citizen at the time of their births.

2. Permission to appeal was granted by Upper Tribunal Judge Coker on 26th February 2020, and I found that the First-tier Tribunal had erred in law for the reasons set out in my decision of 2nd July 2020 in a decision made on the papers. In that decision, which is appended to this decision as Annex A, I set aside all of the findings in relation to this appellant as well as the decision, so this appeal is to be remade de novo.
3. Directions were then sent out for the remaking hearing to take place by way of a Skype for Business remote hearing in light of the need to reduce the transmission of the Covid-19 virus, and in light of this being found to be acceptable by both parties, and being a means by which the appeal could be fairly and justly determined. It was not possible for me to join the Skype hearing from the judges' screen so I had to conduct the hearing from the court clerk's computer, but there were no other significant technical issues of connectivity or audibility in the hearing.
4. Mr Clarke explained at the start of the hearing that he was not in a position to advance a case on behalf of the Secretary of State as the decision of 15th November 2017 had been withdrawn before the First-tier Tribunal so he would not be cross-examining the witness, Mr [V], or relying upon the skeleton argument drafted by his fellow senior presenting officer, Mr Avery, or making any oral submissions. He did however indicate that, without advancing any case for the respondent, he thought the correct legal framework was paragraphs 309A and 314 of the Immigration Rules, and thus that set out in Mr Avery's skeleton argument. He also made it clear that he accepted that it was entirely proper for the appeal to proceed.
5. The appellant's sponsor and contended adopted father, Mr [ASV] gave evidence and there were submissions from Mr Bazini. Mr Bazini explained, and Mr [V] confirmed in answer to questions from myself, that his wife was not giving evidence as planned because their youngest child ([YV], born in 2018 after the date of the original application) had inadvertently swallowed a coin and was in hospital having some investigations as he had become unwell and his wife was with him. Mr [V] left the hearing having given his evidence so that he could join his wife and youngest son in the hospital.

Submissions – Remaking

6. In short summary the evidence of Mr [V], as set out in his statements and oral evidence, who says that he is the appellant's de facto adopted father, is as follows.

7. The appellant's biological parents were killed in a bomb blast away from home in Kabul in November 2014 in which the appellant was also seriously injured, at a time when the appellant and his biological parents were all living in the [V]'s home as his parents worked for the [V] family. When his parents were killed his adoptive parents sought permission from the appellant's paternal aunt to adopt him as they had grown close to him and she lived in poverty and could not care for him due to being disabled, and thus since the age of three years, now a period of almost 6 years, Mr [V] says that they have brought the appellant up as their child with the same love and attention as their own biological children. The appellant's name prior to the death of his parents was [MA], with [A] being the first name, after he became part of the [V] family they added their surname to his original name.
8. There is no possibility under Afghan law to adopt a child so instead Mr [V] obtained guardianship of the appellant, as set out in the declarations of the appellant's biological paternal aunt, Mrs [R], and the headman of the Paghman District of Kabul, Mr Mohammad Aman, where they were residing. The appellant had no original birth certificate as he and his parents were displaced people who had escaped conflict with the Taliban in the Afghan district of Midan Shahr, and in any case this is quite common in Afghanistan. With the documents from the headman of Paghman district and Mrs [R], the appellant's paternal aunt, Mr [V] was able to obtain a Tazkira and a passport for the appellant as from these documents he was then seen as his legal responsibility. The Tazkira and passport both reflect that the fact that the appellant is now seen as Mr [V]'s son.
9. The appellant's adoptive family consists of the following members: Mr [ASV], his wife Mrs [SV] and their children, Ms [BAV] (born in February 2013), Ms [BV] (born in July 2015) and [YV] (born in 2018). Mr [V] entered the UK in 2002 and became a British citizen. In 2012 he returned to Afghanistan and married his wife in the Paghman district of Kabul. Mr [V] wished to bring his wife and first child to the UK but an entry clearance application was refused on the basis of his income in 2014. He continued his family life with his wife and children by visits to Afghanistan until they were able to enter the UK, and tried again to reunite the family in the UK by making this entry clearance application for his family in 2017.
10. On 24th October 2019 after Mrs [V] and the three biological children of the family were granted entry clearance due to their appeal having been conceded, so they travelled to the UK to join Mr [V]. Mr [V] felt that he had to move these family members to the UK at that point due to the difficulties he had had in obtaining entry clearance, but he was greatly saddened by having to leave his adopted child, the appellant, behind. As the appellant had no original biological family he has been left with Mr [V]'s sister, her husband and their 8 children, with this family being given £1000 to care for him until he can be brought to this country. The [V]s have kept in contact with the appellant using mobile phones and WhatsApp and had intended to visit him too, but the global

coronavirus pandemic has made visits impossible. The appellant is greatly missed by his parents and siblings, particularly [BAV]. Mr [V] is worried that his sister and her family in Afghanistan cannot look after the appellant well due to their struggle to provide for their own children. He is also concerned that he is being taunted by other children in Afghanistan as a reject due to his history of losing two families, and that he is vulnerable due to his past and facial scars. There has been no contact with the appellant's biological paternal aunt due to Mr [V] being uncertain of her whereabouts and the conflict in Maidan Shahr making it hard to travel there, and enquiries in the Baharestan district of Kabul, where she had mentioned once that she stayed, bringing no result.

11. Mr [V]'s evidence is that in spite of the coronavirus pandemic he has continued to earn well as a taxi driver working for Uber and his other minicab firm Bolt, and that that he currently earns up to £800 per week from this work. He continues to live in the same three bedroomed house with an additional living room, kitchen and bathroom as he did when his case was heard before the First-tier Tribunal, and so there is more than sufficient space for the appellant to join them. Currently his two daughters share a bedroom, his two year old son sleeps in the same bedroom with him and his wife and thus there is a spare bedroom for the appellant. He believes he can properly accommodate and support the appellant without recourse to public funds.
12. It is argued by Mr Bazini argues that the evidence of Mr [V] and the documents shows that the appellant has been the subject of a de facto adoption which meets the requirements of the Immigration Rules at paragraph 309A as the appellant had lived with his adopted mother, Mrs [V], with Mr [V] making frequent visits to the family home in Afghanistan, for a continuous period of two years and seven months (and thus longer than the 18 month required period in the Immigration Rules) prior to the making the application for entry clearance in July 2017 and for this entire period Mr and Mrs [V] had assumed the role of parents, and there had been a genuine transfer of parental responsibility.
13. It is argued by Mr Bazini that there is evidence that the appellant's parents had both died in a bomb blast in the Darlaman district of Kabul on 16th November 2014 as this is set out in the petition and agreement of Mrs [R] (paternal aunt of the appellant) and in the statement of the Paghman district headman, Mr Mohammad Aman, granting Mr [V] guardianship of the appellant. Further in both documents it is stated that his only relative, his paternal aunt, Mrs [R], was unable to care for him due to her being disabled and impoverished. The history of the bomb blast is also strongly supported by pictures of the appellant as a young boy with injuries, bandages and facial scarring, some of which show him to be in hospital. There are also pictures of the appellant together with the [V]'s biological children and with his adopted parents which show that they have been treating him as a child of the family. The appellant's passport and Tazkira were issued by the Afghan authorities in 2015: the Tazkira states that Mr [V] is the appellant's son and includes his surname, the passport gives the appellant

the [V] surname, and thus these documents are evidence that Mr [V] has been officially recognised as having parental responsibility based on the declarations of the aunt and headman.

14. It is argued by Mr Bazini that the Immigration Rules at paragraph 314 which permit entry clearance to be issued for limited leave to enter with a view to settlement of an adopted child of a parent settled in the UK or given limited leave to enter with a view to settlement are also met. It cannot be contested that 314(i)(a) is met as Mr [V] is settled in the UK and Mrs [V] has been given limited leave to enter with a view to settlement. It is also clear that paragraphs 314(ii) and (iii) are met as the appellant is under the age of 18 years and is not leading an independent life.
15. Mr [V], it is argued, is able to accommodate and support the appellant without recourse to public funds as he is earning very well as a minicab driver and has sufficient space in his home, and his Lloyds Bank statements in the bundle corroborate his earnings and his tenancy agreement and landlords letter that his house is sufficiently spacious, and in addition it is noted that Mr [V] currently has more than £18,000 worth of savings, so paragraph 314(iv) is met.
16. The provisions with respect to the de facto adoption at paragraph 314(v) are also argued to be met. This is because the appellant is treated equally with other children of the family; there has been a genuine transfer of parental responsibility to Mr and Mr [V] due to his original parents inability to care for him as they had died; the adoption broke all ties with his original family; and was not one based on convenience to arranged for the appellant's admission to the UK. It is argued that the adoption was clearly not one of convenience as it happened three years prior to the application to admit the appellant to the UK and the evidence as set out above shows conclusively that it was due to his parents death and his biological family's inability to care for him, and that he is an equal member of the [V] family. Further it is clear that Mr [V] has been very honest in revealing the background to the appellant's inclusion in the family as the Tazkira and passport documents could simply indicate he is their biological son, and so Mr [V] would not have needed to provide this history if he were not being honest and straightforward about the circumstances and there was an issue of convenience or trafficking.
17. I indicated to Mr Bazini that he did not need to make submission with respect to allowing the appeal outside of the Immigration Rules on Article 8 ECHR grounds because I was satisfied that the appellant had shown on the balance of probabilities that the requirements of the Immigration Rules were met, and as such there was no public interest in denying the appellant entry as such denial clearly interfered with his family life with his adopted family and was disproportionate when he could meet the requirements of the relevant Immigration Rules.

Conclusions – Remaking

18. The Immigration Rules at paragraph 309A and 314 provide for the admission to the UK with entry clearance of a child who is the subject of a de facto adoption where the provisions of those Rules are met.
19. I accept that the evidence of Mr [V] and the documentation he has produced (the statement and petition of the appellant's paternal aunt, the guardianship statement of the headman of the Paghman district of Kabul, the Tazkira for the appellant, the passport for the appellant and the photographs) shows that on the balance of probabilities the appellant is able to meet the requirements of the Immigration Rules for the reasons set out by Mr Bazini. I find that Mr [V] is an honest witness, and the documentation submitted for this appeal is consistent and reliable.
20. I am satisfied, on the balance of probabilities, that the appellant's parents died in a bomb explosion in Kabul away from home in November 2014, and that he was injured in that explosion, was treated in hospital and since that time has been cared for by Mr and Mrs [V] in their home in Kabul and treated as their son. I accepted that at the end of 2014 Mr [V] obtained a statement from the appellant's paternal aunt about her inability to care for the appellant, and that he was granted guardianship by the headman of his district, which in turn enabled him to obtain a Tazkira and a passport for the appellant as his own son in 2015. I find that the appellant's de facto adoption therefore took place on the basis of his original parents inability to care for him as they were deceased and in the context of no other biological family member being able to step in to provide a family and ties with that family having come completely to an end, as is further evidence by the current short-term care arrangement for the appellant with Mr [V]'s sister and her family.
21. I find that Mr and Mrs [V] have full parental responsibility for the appellant, taking care of him in every way from the time of his biological parents' death and that Mr [V] has been recognised by the Afghan authorities as his father, and that both of his parents treat him as an equal with their three biological children. The photographs, Tazkira, passport and the evidence of Mr [V] satisfies me of these facts. I am satisfied that this was not an adoption of convenience for immigration purposes as it took place due to the tragic death of the appellant's biological parents and in circumstances where the appellant already lived with the [V] family, and where for reasons of love and human kindness Mr and Mrs [V] took over the role as his parents. I also find that this de facto adoption took place more than two and a half years prior to the application for entry clearance.
22. I am also more than satisfied that there is accommodation and maintenance which will mean that the appellant will not have recourse to public funds and will live in the rented house with his adoptive family and no others. This was found to be the case by the First-tier Tribunal in relation to the appeal for this

adoptive mother and two siblings. The Lloyds bank statement for September 2020 shows Mr [V] bringing in £2600 from minicab work for Bolt and Uber for this month, and the closing balance on the account on 23rd September 2020 is over £20,000. The tenancy agreement and landlords letter reflect that Mr [V] rents the accommodation, for £900 a month, and it has the various rooms as he has claimed. I find therefore that he has shown he can accommodate and support the appellant without recourse to public funds.

23. In these circumstances I find that the appellant and the [V] family have family life relationships protected under Article 8 ECHR as outlined above with him as an equal adopted son of the family, that the refusal of entry clearance interferes with that family life, and that the interference is not proportionate as the appellant is able to fulfil the requirements of the Immigration Rules and so there is no public interest in his exclusion from the UK.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal dismissing the appeal of this appellant and all of the findings of fact in relation to him.
3. I remake the appeal allowing it on Article 8 ECHR grounds.

Signed *Fiona Lindsley*
Upper Tribunal Judge Lindsley

30th September 2020

Annex A: Error of Law Decision and Directions

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Afghanistan born in 2011. He applied for entry clearance to come to the UK with his adopted mother and two siblings to join his adoptive father in April 2017. The application, along with those of his mother and siblings, were refused on 15th November 2017. His appeal against that decision was dismissed on all grounds by First-tier Tribunal Judge Chana in a determination promulgated on the 1st February 2019, the same determination allowed the appeals of his adopted siblings and adopted mother.
2. Permission to appeal was granted by Upper Tribunal Judge Coker on 26th February 2020 on all grounds on the basis that it is arguable that the First-tier Tribunal erred in law in failing to make findings as to whether the appellant had lived and been brought up by the sponsoring family unit, and finding it arguable that not being formally adopted did not preclude family life existing between the appellant and the sponsoring family.
3. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules to decide matters fairly and justly directions were sent out to the parties by Upper Tribunal Judge Mandalia by email on 30th April 2020 seeking written submissions on the assertion of an error of law with a view to determining that issue on the papers, and giving an opportunity for any party who felt that a hearing was necessary in the interests of justice to make submissions on that issue too. Submissions were not received from the appellant's solicitors, Times PBS Ltd, but were received from the Secretary of State in response to these directions.
4. The matter came before me to determine whether it is in the interests of justice to decide this matter without a hearing and if so to determine whether the First-tier Tribunal has erred in law. I find that it is appropriate to determine whether there is an error of law on the papers despite the fact that nothing further has been received by those instructed by the appellant as the appeal is conceded by Ms A Fijiwala of the Specialist Appeals Team, for the Secretary of State.

Submissions – Error of Law

5. In the grounds of appeal it is argued, in short summary as follows. It is contended that the First-tier Tribunal erred in law in not making clear findings as to whether the appellant had lived with his adoptive family (sponsor and other appellants) since 2014, which is supported by a lot of photographs although no consideration is given to them, whilst disbelieving other matters (such as the history of the deaths of the appellant's parents and adoption) but

not making a finding as to whether it would be in his best interests to remain with this family given that he had potentially lived with them from the age of 3 years, or consideration as to what the alternatives would be for him if he were left in Afghanistan without them.

6. There is also no proper consideration as to whether the appellant had been adopted by the sponsor, because even if it were not believed that the appellant's parents were dead he still could have been adopted. The First-tier Tribunal wrongly asserts that the document from the headman of Pagman district concerning the guardianship of the child contains inconsistent information when it does not, and further it was not considered in the round with the other evidence, such as the appellant's passport with his surname name changed to that of the sponsor and other appellants which was apparently accepted as genuine and would indicate that the Afghan authorities were satisfied he had been adopted by them.
7. There was also a failure to consider the photographs of the appellant in hospital injured and scarred, which supports the contention that he and his parents were in a bomb blast, and that the parents were killed as recorded in the document from the headman. There is also a failure to consider the petition by the paternal aunt of the appellant, and an irrational finding that this person would not be the appellant's only relative as all families are large in Afghanistan. Other conclusions with respect to the aunt and the appellant are also argued to be speculative and unsupported.
8. Ms Fijiwala for the Secretary of State in her letter of 18th May 2020 in response to the directions of Judge Mandalia does not oppose the appeal, and accepts that the First-tier Tribunal made speculative findings which are not supported by evidence in respect of the consideration by reference to the Immigration Rules and accepts that there was no substantive consideration generally in relation to Article 8 ECHR. She therefore invites the Upper Tribunal to set aside the decision of the First-tier Tribunal and list the matter for a remote remaking hearing.

Conclusions – Error of Law

9. I find that the First-tier Tribunal Judge failed to accurately consider the evidence before her, and made speculative and irrational findings on that evidence when considering the history put forward by the sponsor on the appellant's behalf. The First-tier Tribunal failed thereby properly to consider the appeal by reference to the Immigration Rules, and also failed to reason the Article 8 ECHR appeal by reference to the full facts of the case and the appellant's best interests as a child. I set aside the decision in relation to this appellant and also all of the findings of fact which relate to the appellant at paragraphs 24 to 37 of this decision.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal dismissing the appeal of this appellant and all of the findings of fact in relation to him.
3. I adjourn the remaking of the appeal.

Directions - Remaking

1. Having regard to the Pilot Practice Direction and the UTIAC Guidance Note No 1 of 2020, the Upper Tribunal is provisionally of the view that the forthcoming hearing in this appeal might properly be held remotely, by Skype for Business, on a date to be fixed.
2. **No later than 14 days** after these directions are sent by the Upper Tribunal (the date of sending is on the covering letter or covering email):
 - (a) the parties shall file and serve by email any objection to the hearing being a remote hearing at all/by the proposed means; in either case giving reasons; and
 - (b) without prejudice to the Tribunal's consideration of any such objections, the parties shall also file and serve:
 - (i) Skype contact details and a contact telephone number for any person who wishes to attend the hearing remotely, which might include the advocates, the original appellant or an instructing solicitor; and
 - (ii) dates to avoid in the period specified.
3. **If there is an objection to a remote hearing**, the Upper Tribunal will consider the submissions and will make any further directions considered necessary.
4. **If there is no objection to a remote hearing**, the following directions supersede any previous case management directions and shall apply.
 - i. **The parties** shall have regard to the Presidential Guidance Note: No 1 2020: Arrangements During the Covid-19 Pandemic when complying with these directions.
 - ii. **The parties** shall file with the Upper Tribunal and serve on each other (a) an electronic skeleton argument and (b) any rule 15(2A) notice to be relied upon within **28 days** of the date this notice is sent.
 - iii. **The appellant** shall be responsible for compiling and serving an agreed consolidated bundle of documents which both parties can rely on at the hearing. The bundle should be compiled and served in accordance with the Presidential Guidance Note [23-26] at least **7 days before the hearing**.

5. The parties are at liberty to apply to amend these directions, giving reasons, if they face significant practical difficulties in complying.
6. Documents or submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents.
7. Service on the Secretary of State may be to [email] and to the original appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

Signed *Fiona Lindsley*
Upper Tribunal Judge Lindsley

2nd July 2020