



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/03433/2020**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On the 10 February 2022**

**Decision & Reasons
Promulgated
On the 30 March 2022**

Before

**UPPER TRIBUNAL JUDGE BLUM
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

Between

**MR SALAAL KHAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G. Dingley, counsel instructed on a public access basis

For the Respondent: Mr D. Clarke, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan, born on 20 November 2001. On 7 November 2019, he made an application for entry clearance to join his father who is present and settled in the United Kingdom. This application

was refused in a decision dated 5 February 2020 and the Appellant appealed against that decision. His appeal came before First tier Tribunal Judge Abebrese for a remote hearing on 29 March 2021, when the Appellant was represented by Mr Dingley and there was no appearance by or on behalf of the Respondent. The Sponsor, Mr S. Aziz, was present and gave evidence.

2. In a decision and reasons promulgated on 18 May 2021, the Judge dismissed the appeal. An in time application for permission to appeal to the Upper Tribunal was made on 21 May 2021 on the basis that:

(i) the Judge erred in law in allowing the appeal orally at the hearing on 29 March 2021 and then subsequently dismissing it in writing;

(ii) the Judge made perverse findings on matters that were material to the outcome;

(iii) the Judge made perverse findings of fact and conclusions arising from the unchallenged evidence of the Sponsor and contemporaneous documents.

3. Permission to appeal was granted by First tier Tribunal Judge Parkes in a decision dated 21 June 2021, where he stated *inter alia*:

"I have not had the opportunity to listen to the recording of the hearing but as permission is being granted it should be made available to the Upper Tribunal Judge who hears the case... On the basis that the appeal was allowed orally but dismissed then if the Judge changed his mind the case should have been recalled. In the circumstances the grounds are arguable although the perversity ground has little merit."

Hearing

4. At the hearing before the Upper Tribunal, no recording of the hearing was available but copies of a transcript of the hearing were provided to the parties. This provided materially as follows:

"I can give an indication that at the moment I am inclined to allow the appeal ...you should of course wait for ... the written decision ... on the basis of what I have said ... my written decision is reserved until then."

5. Mr Dingley submitted that whilst it would have been better to have watched the video recording of the hearing in order to observe the body language, the transcript supported his understanding of what had taken place at the hearing; that the Judge had made a firm indication that the appeal would be allowed and that the Appellant consequently had a legitimate expectation that his appeal would be allowed. In response to a question from the Upper Tribunal as to how the Appellant had relied upon a legitimate expectation to his detriment, Mr Dingley submitted that the

Sponsor had communicated the Judge's indication at the hearing to the Appellant who expected to be able to join his father in the United Kingdom.

6. With regard to the second ground of appeal, Mr Dingley submitted that it was perverse for the Judge to make a negative credibility finding against the Sponsor because he has not visited Pakistan since 2010 when he applied for and was granted refugee status in the UK: [14] and [19] refer. Whilst no specific evidence was before the First tier Tribunal Judge or the Upper Tribunal attesting as to the Sponsor's immigration status in the United Kingdom, he made reference to it in his witness statement and oral evidence and Mr Clarke helpfully confirmed that the Sponsor was granted asylum on 3 August 2010 following an appeal; he was granted ILR on 27 July 2015 and on 10 October 2018 he was granted British citizenship. Mr Clarke therefore accepted that the Sponsor was a refugee until he was granted British citizenship.

7. With regard to Ground 3 of the grounds of appeal, which is a challenge to the Judge's adverse credibility findings against the Sponsor, despite his evidence being unchallenged, Mr Dingley submitted that this perhaps raises an interesting academic debate given that the Respondent chooses whether to send a representative or not and the Judge proceeded in the absence of a Presenting Officer. He submitted that the Judge could have clarified issues but chose not to do that, therefore, there was no basis whereby he could reach negative credibility findings, following the decisions in MNM (Surendran guidelines) [2000] UKIAT 00005 and MS (Sri Lanka) [2012] EWCA Civ 1548 which he submitted bound the Upper Tribunal.

8. In his submissions in response, Mr Clarke on behalf of the Respondent accepted that the Judge did not provide reasons for his findings at [20] that the Sponsor made the application for entry clearance for his son at a time when he required assistance due to health concerns following an accident and that it was not credible that the Appellant had been subjected to physical and mental abuse at the hands of his uncle or other family members.

9. Mr Clarke further accepted that the Judge went beyond the scope of the case that the Respondent advanced and that he agreed there are material errors that undermine the credibility findings. It was not the Respondent's case that the Sponsor could visit the Appellant but rather that they could meet in another country, not Pakistan. However, he did not agree that, in light of the caselaw, the Judge had made an unambiguous promise that he would allow the appeal and thus there was no legitimate expectation and Ground 1 was not made out.

10. In terms of Ground 3, Mr Clarke disagreed with the suggestion that MS could render the Surendran guidelines obsolete given that in MS the Presenting Officer was present: [14] and [16] refer, whereas the

Surendran guidelines are a completely different matter where the Respondent puts forward the decision letter and the guidelines make clear it is for the Judge to invite the representatives to ask questions themselves. Mr Clarke submitted that the Judge was entitled to form his own view of credibility: see [4] of the guidelines.

11. Mr Dingley submitted that if we were to find errors of law in the decision of the First tier Tribunal we could go on to allow the appeal outright as credibility was not, in fact, in issue: see [14], [16] and [18] of MS, but otherwise the appeal should be remitted to the First tier Tribunal for a hearing *de novo*.

12. Mr Clarke submitted that, contrary to Mr Dingley's submission, credibility was and is in issue and a remitted *de novo* appeal was required.

13. We reserved our decision which we now give with our reasons.

Findings and reasons

14. We were not persuaded that the transcript of the recording of the appeal supported Mr Dingley's submission that the Judge definitively stated at the end of the hearing that he would allow the appeal, but rather that he was "*inclined*" to allow it. Clearly there is a material distinction between an intention or inclination and the actuality of an event or decision. For that reason we do not find that the appeal was, in fact, allowed and consequently the decision of the Vice-President in PAA (FtT: Oral decision - written reasons) Iraq [2019] UKUT 00013 (IAC) does not apply.

15. Whilst we have no hesitation in reaching that decision we would strongly discourage Judges of the First tier Tribunal from giving indications of their thinking at the conclusion of appeals. Either the Judge should make an informed decision allowing the appeal in clear terms with reasons provided or the decision should be reserved.

16. With regard to the second ground of appeal, we are grateful for Mr Clarke's assistance in confirming that the Sponsor had been granted refugee status on 3 August 2010 and his concession, with which we agree, that the Judge went beyond the scope of the Respondent's case as set out in the refusal decision that the Appellant and Sponsor could have met in a third country. The Judge's findings at [14] and [19] that the Sponsor could have visited the Appellant we find are vitiated by material error of law in that the Sponsor had been granted refugee status in the United Kingdom and cannot have been expected to return to his country of origin, regardless of whether or not he was still receiving threats.

17. As to the third ground of appeal, we agree with Mr Clarke's submissions regarding the relevant jurisprudence. It is clear from MS (Sri Lanka) [2012] EWCA Civ 1548 at [14] that throughout the course of the litigation in both the First tier and Upper Tribunals, the Respondent had the opportunity to cross-examine the Appellant but did not take that

opportunity. This is factually distinct from the current situation where there was no Presenting Officer present. In these circumstances the Surendran guidelines are applicable ie. the Judge should request the Appellant's representative to put questions pertinent to credibility, if that has been raised in the refusal decision or arising from the papers.

18. We agree, however, that the Judge has gone beyond the scope of the refusal decision, which was concerned with the question of sole responsibility and the absence of contact between the Sponsor and Appellant from 2009 to 2019 and made adverse findings on the Appellant's credibility without asking Mr Dingley to put such matters to him in the course of the hearing. This include: whether the fact that the Sponsor and his former wife had a bitter divorce would have been a barrier to the Sponsor visiting his son [17]; whether or not the Sponsor was receiving threats in Pakistan [19]; whether the Appellant has been subject to physical or mental abuse by his uncle or other family members [20]; whether the Appellant has been kept away from his father [21]. None of these points were contained within the refusal decision and were not raised with the Sponsor by the Judge either directly or through Mr Dingley. This was clearly unfair to the Sponsor and the Appellant. Therefore, we find that Ground 3 is also made out.

Decision

19. We find material errors of law in the decision and reasons of First tier Tribunal Judge Abebrese. We set that decision aside and remit the appeal for a hearing *de novo* before the First tier Tribunal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

20 February 2022