



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-000084
UI-2024-000085
First-tier Tribunal Nos:
HU/55291/2023
HU/52736/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 03 April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

ENTRY CLEARANCE OFFICER

Appellant

and

**Bibi Shireen SAIDI
Farah Naz SAYEDI
(NO ANONYMITY ORDERS MADE)**

Respondents

Representation:

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer

For the Respondents: Mr M Osman of Times PBS Ltd

Heard at Field House on 19 February 2024

DECISION AND REASONS

Introduction

1. These are linked appeals against decisions of First-tier Tribunal Judge Nightingale signed on 1 December 2023 allowing on human rights grounds appeals against decisions dated 16 and 17 January 2023 to refuse entry clearance.

2. Although before me the appellant is the Entry Clearance Officer and the respondents are Ms Saidi and Ms Sayedi, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to the Entry Clearance Officer as the Respondent and Ms Saidi and Ms Sayedi as the Appellants.
3. The Appellants are citizen of Afghanistan. Their respective dates of birth of given as 22 April 1975 and 10 May 1987. They are said to be mother and daughter.
4. I pause to note that hitherto nobody had questioned that if they are related as claimed the First Appellant would have been delivered of the Second Appellant shortly after her 12th birthday. Although I made this observation to the representatives at the conclusion of submissions, because this has not been raised previously - and therefore not addressed - I place no reliance upon it in my consideration of the issue of 'error of law'. However, in circumstances where the decisions in the appeals will require to be remade, it may be that this issue will require further exploration in due course.
5. The Appellants' applications for entry clearance were made to join their 'Sponsor', Mr Sayed Fayaz Sayeedi (d.o.b. 20 November 2002), who has been granted limited leave to remain as a refugee in the UK. He is said to be the son of the First Appellant and the brother of the Second Appellant.
6. The Appellants sought to make their applications under the so-called 'family reunion route', as family members of a recognised refugee. This was misconceived: as pointed out in the Respondent's decision letters *"since 09/07/2012, applications by family members other than children or partners to join a sponsor holding refugee status in the UK have been considered under the Adult Dependent relative requirements of Appendix FM of the Immigration Rules"*.
7. Accordingly, the Respondent considered the applications in the first instance with reference to the Immigration Rules relating to Adult Dependent Relatives. The Respondent found that the Rules were not met because there was no evidence of any long-term personal care needs as a result of age, illness, or disability. It may be observed that no such evidence was advanced because that was not the purported basis of the applications; indeed no such evidence has since been advanced in the course of the appeal proceedings.
8. The Respondent also was not satisfied that evidence had been produced to show that the Appellants were related to the Sponsor as claimed. Further, it was not accepted that the Sponsor was able to maintain the Appellants in the United Kingdom without recourse to public funds. The Respondent found there to be no exceptional circumstances that would result in unjustifiably harsh consequences in refusing the applications.

9. The Appellants appealed to the IAC.
10. There was no attendance at the appeal hearing on behalf of the Respondent.
11. On appeal it was not argued on the Appellants' behalf that they could satisfy the requirements of the Adult Dependent Relative rules, and in particular it was accepted that maintenance and accommodation requirements could not be met. Reliance was placed on Article 8 with particular reference to paragraphs GEN.3.1 and 3.2 of Appendix FM. (E.g. see Decision of the First-tier Tribunal at paragraph 7.)
12. The Appellants' appeals were allowed on human rights grounds for reasons set out in the 'Decision and Reasons' of First-tier Tribunal Judge Nightingale.
13. The Respondent sought permission to appeal to the Upper Tribunal. Permission to appeal was granted by First-tier Tribunal Judge Lester on 7 January 2024. In material part the grant of permission states:

"In the findings the judge appears to have accepted that the sponsor and applicants were related but did not state that they had found this, nor did they set out the evidence that had led them to such a finding. It appears to have been totally missed. The other issues raised by the respondent [in the Grounds of Appeal] do not appear to have been dealt with in the findings either. In the circumstances the respondent does appear to have an arguable case in relation to an error of law and permission is granted."

(See further below in respect of the "other issues raised by the Respondent".)

Consideration of the 'error of law' challenge

14. In the premises it is to be acknowledged that it is not incumbent upon a First-tier Tribunal Judge to set out analysis of every detail of an appeal. However, key issues of contention between parties must be addressed. The issue of the relationship between the Appellants and the Sponsor is a key issue because it is foundational. In the circumstances, in my judgement a clear finding in this regard was required.
15. The Judge accepted the Sponsor to be a credible witness (paragraph 27), and on that basis accepted evidence in relation to financial and emotional support constituting family life. The Judge's assessment in this regard will of necessity have been based on an 'in the round' consideration of all the evidence - including, as the Judge expressly identified, the manner in which the Sponsor presented his oral evidence.

16. However, material to such an 'in the round' consideration of the Sponsor's overall credibility should have been a clear consideration of the foundational question of whether the claimed mother/son and sister/brother blood relationships had been proven on a balance of probabilities.
17. As noted above, this was clearly put in issue by the Respondent in the decision letters. Moreover the substance of the decision letters was repeated in the Respondent's Review of 21 November 2023 - prepared at a time, as was noted in the Review, when the Appellants had failed to comply with repeated Directions to file evidence in the appeals.
18. An Appellants' bundle was subsequently filed. The Skeleton Argument therein does not expressly address the issue of the absence of any supporting evidence of the blood relationship. (Nor does the Judge's summary of the oral submissions advanced on behalf of the Appellants make any reference to their advocate addressing this issue.) The witness statements of the Sponsor and the Second Appellant are also silent on the issue: they merely proceed on the premise that there are such relationships without addressing the Respondent's concern that the relationships have not been proved.
19. It is only in the witness statement of the First Appellant that any express attempt is made to address the issue: see paragraph 1.8 -

"It is stated in the refusal letter that: "You have not provided any documentation to evidence of your relationship. You have not provided any official documentation such as birth certificates or family registration documents issued by official authorities confirming that you are related as claimed to your sponsor" I am not able to provide this as any documentation was left in Afghanistan when we fled to Pakistan. We only took the necessities and did not have time to sort through our documentation prior to leaving. As we are in hiding, we are unable to retrieve these documents in Afghanistan."
20. I recognise that it is not a prerequisite to establishing any particular fact that a supporting document be produced. However, where supporting documentary evidence might be available, but is not produced, it becomes a legitimate source of enquiry as to the reason for non-production of possibly probative documentary evidence. Herein, the Respondent has relied upon non-production of evidence, and the First Appellant has proffered an explanation. What is missing is any ruling by the Judge.
21. The First Appellant's explanation required some scrutiny. For example, it was not seemingly the case that the Appellants left behind their passports or the 'tazkera' documents produced at pages 25-27 of their appeal bundle; alternatively, if these documents had been left behind, it is apparent that the Appellants had subsequently been able to obtain them from Afghanistan. Yet further it is not apparent that the Appellants fled

urgently from Afghanistan, so much as their relocation was – it is said – arranged by the Sponsor, which suggests an element of deliberation and planning: indeed, the date of issue of the identity documents is so approximate to the date of relocation that it suggests that they were obtained for that very purpose.

22. In all such circumstances without any express consideration of these matters by the First-tier Tribunal Judge, I am not persuaded that it is inevitable that such evidence would have been accepted. Be that as it may and in any event, scrutiny of this aspect of the appeal was a necessary factor in evaluating the overall credibility of the Sponsor and the testimonies of the Appellants.
23. In all the circumstances I find that the First-tier Tribunal Judge failed to address, resolve, or give reasons in respect of, a key foundational issue of fact in the proceedings. Not only was this a material error of law in itself, but it also had a material impact on the overall credibility assessment. In consequence the decisions of the First-tier Tribunal require to be set aside.
24. The remaking of the decisions in the appeals will require reappraisal of all of the available evidence, including the testimony of the Sponsor. In all the circumstances it was common ground between the parties that the most appropriate forum for such an exercise is the First-tier Tribunal: the appeal will be remitted accordingly.
25. For completeness I note one of the “*other issues raised by the Respondent*” was in respect of evidence of TB screening. This was not a matter raised in the decision letter but was raised in the Respondent’s Review. I acknowledge that it is not addressed by the First-tier Tribunal. However, I would not have been minded to find material error of law in this regard. The requirement of advanced TB screening before entering the UK is not material to a consideration of the existence of family life and the extent of any interference in consequence of the Respondent’s decision; moreover, by the date of any appeal proceedings such certification is almost always out of date. The reality is that a successful appellant will have to obtain and produce an up-to-date TB screening certificate consequent upon an appeal being allowed before entry clearance is issued. The public interest is protected by this additional post-appeal measure.
26. The second ‘other issue’ raised by the Respondent in the Grounds of Appeal is premised on evidence that was not before the First-tier Tribunal suggesting an inconsistency between the evidence advanced in support of the Appellants’ appeals and the substance of the Sponsor’s asylum claim. Because this evidence and any arguments based on it were not before the First-tier Tribunal, such matters cannot substantiate an ‘error of law’ submission. Insofar as the Respondent wishes to rely upon such matters, he is at liberty to do so during the process of remaking the appeal further

to the remittal to the First-tier Tribunal that is the consequence of my decision herein.

27. The ongoing management of the appeal will be a matter for the First-tier Tribunal. It will also be a matter for the parties as to what if any further evidence they may wish to rely upon, and what particular submissions they may wish to advance before the First-tier Tribunal. Such matters might include:

(i) The materials the Respondent has sought to rely upon, pursuant to a rule 15(2A) application, in respect of the Sponsor's asylum claim;

(ii) A further Respondent's Review addressing the material filed by the Appellants that post-dated the deadline set in the First-tier Tribunal and also the Respondent's Review of 21 November 2023. Such further Review ought also to articulate the Respondent's case arising from the details of the Sponsor's asylum claim in so far as any reliance is to be put on this.

(iii) Consideration of the age difference between the Appellants.

28. I also note that reference is made in the documents to two children of the First Appellant and two children of the Second Appellant, who are said also to have made applications for entry clearance, but in respect of whom there have been no decisions. It seems to me likely that some consideration will need to be given to the position of these persons, three of whom are still minors. At present it is unclear what arrangements will be made for them in the event that either or both of the Appellants are granted entry clearance and they are not; equally the possibility of them being granted leave 'in line' with their respective claimed mother may be a matter to be factored in to the overall proportionality balance and public interest considerations. In this context it is to be recalled that it was acknowledged that the Sponsor could not meet the maintenance and accommodation requirements in respect of the Appellants. In the absence of anything further it is presently unclear what arrangements are proposed in the UK to protect the best interests of any minors. Beyond this, I leave it as a matter for the parties as to what if anything they may wish to present in this regard, and otherwise to the ongoing management of the appeal by the First-tier Tribunal, and the decision making of the next Judge.

Notice of Decisions

29. The decisions of the First-tier Tribunal contained a material error of law and are set aside.

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30. The decisions in the appeals are to be remade before the First-tier Tribunal, with all issues at large, by any Judge other than First-tier Tribunal Judge Nightingale.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

1 April 2024