IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006412
First-tier Tribunal No:
HU/53656/2021
IA/09407/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 May 20223

Before

UPPER TRIBUNAL JUDGE LESLEY SMITH

Between

MOHAMMAD ABED HAIDARY
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr J Dhanji, Counsel instructed by eBiljana & Co solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on Friday 14 April 2023

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Beg dated 5 December 2022 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 1 April 2021, refusing him leave to enter to join his brother ("the Sponsor") who is settled in the UK.

2. The Appellant and the Sponsor are both Afghan nationals. The Appellant is a minor still living in Afghanistan. It is claimed that both his parents are dead and that he is living in conditions which amount to serious and compelling family or other reasons which make exclusion undesirable, under paragraph 297(i)(f) of the Immigration Rules ("Paragraph 297(i)(f)"). Although the Appellant and the Sponsor have never met (because the Appellant was born after the Sponsor left Afghanistan), the focus is on Article 8 ECHR. The only ground of appeal is whether the refusal to permit the Appellant to enter the UK breaches section 6 Human Rights Act 1998 but the issue whether the Appellant can satisfy Paragraph 297(i)(f) is relevant to that question.

3. The Judge accepted that the Appellant is related to the Sponsor. However, she did not accept evidence about the situation in which the Appellant is living in Afghanistan. She did not accept that both the Appellant's parents are dead or that the Appellant does not have other family members or friends who would take care of him in Afghanistan. The Judge did not therefore accept that Paragraph 297(i)(f) was met. She went on to consider Article 8 ECHR. She did not accept that family life exists between the Appellant and the Sponsor since they have never met. She also concluded that, even if family life did exist, interference with that family life by the refusal of leave to enter would not be disproportionate. The Judge therefore dismissed the appeal.

4. The Appellant appeals on six grounds as follows:

   Ground 1: the Judge failed to take into account some of the evidence or failed to give reasons for discounting it.
   Ground 2: the Judge made material errors of fact.
   Ground 3: the Judge failed to take into account relevant considerations.
   Ground 4: the Judge failed to provide adequate reasons for rejecting evidence.
   Ground 5: the hearing was procedurally unfair as the Judge failed to put certain matters to the Sponsor and his witness.
   Ground 6: the Judge took irrelevant matters into account.

5. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 24 January 2023 in the following terms so far as relevant:

   > "..3. The ground about the Judge not putting matters to an Appellant or witness carries less weight – there is a danger of entering the arena and being criticised for that. That said there is no doubt that the Appellant and Sponsor are brothers and the Appellant was born after the Appellant had left Afghanistan. It is not clear how pregnant the Appellant's mother would have been at the time of his departure. In the circumstances the grounds are arguable and none is excluded.
   > 4. The grounds disclose arguable errors of law and permission to appeal is granted."

6. The matter comes before me to decide whether the Decision does contain an error of law. If I conclude that it does, I must then decide

whether the Decision should be set aside in consequence. If the Decision is set aside, I must then either re-make the decision in this Tribunal or remit the appeal to the First-tier Tribunal for re-determination.

7. I had before me a core bundle of documents relating to the appeal, the Appellant's bundle ([AB/xx]) and Respondent's bundle before the First-tier Tribunal together with the Appellant's skeleton argument before the First-tier Tribunal and a few loose documents submitted by the Appellant to the First-tier Tribunal. I also had a witness statement from Araniya Kogulathas who was the barrister who represented the Appellant at the First-tier Tribunal hearing. She provides some limited evidence about what occurred at that hearing.

8. Having heard submissions from Mr Dhanji and Ms Isherwood, I indicated that I would reserve my decision and provide that in writing which I now turn to do.

DISCUSSION

9. Mr Dhanji made his submissions by way of three arguments. He indicated also that he did not rely on there being any procedural unfairness in the First-tier Tribunal hearing.

Failure to Take Account of Evidence/ Failure to Give Reasons

10. This argument focusses on the Appellant's first ground. The Appellant relied in his appeal on a statement from Abdul Ajan Haidari ("AAH") who is a friend of the Sponsor. He visited his family in Afghanistan in July 2020 and agreed with the Sponsor that he would try to trace the Sponsor's family whilst he was there. AAH's witness statement appears at [AB/29-32]. In that statement, he recounts how he discovered that the Appellant's and Sponsor's mother was dead, that the Sponsor had a brother (the Appellant) and how he found the Appellant living at a madrassa. He sets out the conditions in which the Appellant was living at the madrassa and also explains how he took the Appellant from the madrassa to obtain a DNA test and a birth registration certificate in order for the Appellant and Sponsor to make the application they did for entry clearance. AAH also gave oral evidence at the hearing.

11. The Appellant asserts in his first ground that the Judge did not take into account AAH's evidence and/or failed to give reasons for rejecting it.

12. The Judge noted at [19] of the Decision that the Sponsor and AAH had given evidence but did not intend to rehearse the evidence as it was set out in the record of proceedings. At [27] and [28] of the Decision, the Judge records the evidence about AAH's visit to Afghanistan and what happened there. Although the Judge there and in the following paragraphs sets out the evidence in that regard by reference to the Sponsor's statement, his evidence and that of AAH largely overlap. However, the Sponsor's evidence went beyond that of AAH and also had

to be compared with other documents which the Appellant had put before the First-tier Tribunal. It is by reference to those other documents that the Judge reached the conclusion that the Sponsor's evidence about certain key facts was not to be accepted.

13. I accept that the Judge did not find the evidence of AAH generally not to be credible. However, his evidence only went so far and in some regards was inconsistent with the Sponsor's evidence or was not accepted. This becomes particularly apparent when the Judge was considering the evidence about where the Appellant was living by the date of the hearing. She dealt with this at [40] to [42] as follows:

> "40. In his witness statement dated 28 March 2022, the sponsor stated that since the Taliban take over of Afghanistan in August 2021, the appellant now lives with Abdul Ajan Haidari's family. However, in evidence he denied this. He said the appellant continues to live in the madrassa. He said that he has been sending money for the appellant since he found out about his existence in 2002. The funds are sent to a teacher at the madrassa called Naseebullah. The sponsor has not provided any money transfer receipts showing that since 2020, he has been sending funds to the madrassa.
> 41. In the witness statement dated 29 March 2022, the sponsor stated that he cannot send money to the appellant as there is no place for the money to be sent. I find that the contradictions between his witness statement and his oral evidence cast further doubt upon his overall credibility. Abdul Ajan Haidari in his evidence also denied that the appellant lives with his family in Kabul. He said he only stayed with them for two days when he was in Kabul for the DNA test. He said he returned to the madrassa because the Malik (headman of the village) took responsibility for him. He did not say that his family members were unable or unwilling to look after him.
> 42. I find that the photographs of the madrassa with the appellant and Abdul Ajan Haidari could have been taken at any madrassa and do not provide cogent evidence that the appellant attends the madrassa or attends it on a residential basis. I attach limited weight to the letter from the Nomania Madrasa. The undated letter makes no mention of any dates when the appellant was enrolled at the madrassa. Nor does it mention that the sponsor has been sending funds to the madrassa since 2020."

14. On this issue, Mr Dhanji submitted that the Judge had also erred by failing to take into account the supplementary witness statement of the Sponsor dated 25 October 2022 which he said confirmed the account given by AAH that the Appellant had only stayed with AAH's family for a short time whilst the DNA test was being obtained and had then returned to the madrassa. That statement is one of the loose documents submitted to the First-tier Tribunal.

15. Ms Isherwood took me to that statement read alongside the Sponsor's first statement and AAH's statement on this issue. In his first statement at [AB/1], the Sponsor says that the Appellant had left the madrassa when the Taliban took control in August (2021) and that "Abdul's family kindly offered to look after him, but this arrangement cannot continue". By contrast, AAH says that he took the Appellant for "a few days to see [his] family" whilst he obtained a passport for the Appellant. He then

says that, having obtained the DNA test, he returned to the UK. He says that there is no-one to look after the Appellant. The Sponsor says in his second statement that the Appellant "still lives" at the madrassa without giving any indication of when, between March 2022 and October 2022, the Appellant had moved back there and giving the impression that the Appellant had lived throughout at the madrassa rather than staying with AAH's family. AAH's statement is dated January 2021 and so could not deal with events which occurred after that and the period when the Sponsor says that the Appellant had gone to live with AAH's family (that is to say after August 2021).

16. On all of the evidence and in particular the inconsistency within the Sponsor's evidence, the Judge was entitled to reach the conclusion that the Appellant was not living at the madrassa at the time of the hearing, whether he had or had not done so in the past. The Judge was entitled to accept the Sponsor's evidence that the Appellant was staying with AAH's family in March 2022 and reject the evidence that by October 2022, he was once again living in the madrassa. Having reached that finding, and in the absence of evidence from AAH that his family would not continue to look after the Appellant, the Judge did not have to consider AAH's evidence about the conditions in the madrassa where he said that the Appellant was living in 2020-2021.

17. Mr Dhanji submitted that AAH's evidence was central also to the issue whether the Appellant's and Sponsor's parents are still alive and that the Judge should have considered AAH's statement in this regard.

18. The Judge deals with this issue at [43] to [46] of the Decision as follows:

> "43. The letter from the headman of the village dated 31.8.20 states that the appellant's mother died two years ago. He does not state which illness she appeared to have, what her symptoms were, whether her daughter and son in law visited her before she died or who helped bury her. Her home remains in the village. It has been neither sold nor occupied by someone else.
> 44. Ms Kogulathas submitted that the appellant's parents are deceased and that deaths were not registered. She submitted that this should be viewed in the context of the environment in Afghanistan. Whilst I accept that there is not always the possibility of having deaths registered in Afghanistan, there is a lack of reliable other evidence of the death of the appellant's parents.
> 45. In evidence the sponsor said that his father was kidnapped by the Taliban in 2008, as he was a teacher. He said his body was found by the village authorities, but he could not remember when. There is no mention in the letter from the village headman, that the sponsor's father was kidnapped by the Taliban because he was a teacher and that it was the village authorities who found his body.
> 46. In taking the evidence in the round, I do not find that there is credible evidence regarding the circumstances of the claimed death of the appellant's parents. I attach little weight to the letter from the headman. I find that it was written on the instructions of the sponsor and Abdul Ajan

> Haidari. I find that there is no credible evidence that the appellant's parents are deceased."

19. The Sponsor himself could not give evidence about the claimed death of his mother as this is said to have occurred after he left Afghanistan. AAH's own evidence is predicated on what he was told. That information was given by the headman of the village whose letter the Judge considered. AAH's own evidence is therefore hearsay and the Judge did not have to consider it because she had before her the better evidence of the person who had given AAH that information. The Judge was however entitled to rely on gaps in that evidence as reason not to accept it on its face. Equally, she was entitled to rely on the lack of evidence in relation to the death of the Appellant's and Sponsor's father from the Sponsor himself as reason not to accept that either. The Judge was entitled on all the evidence taken together not to be satisfied that the Appellant's parents are dead.

20. Although I was not addressed on the point, I mention the Appellant's fourth ground which suggests that the Judge's comments regarding the letter from the headman being written on the Sponsor's and AAH's instructions contained an error of law. It is there submitted that the Judge was not entitled to that conclusion as there was not strong evidence of forgery. That misunderstands the point made. The Judge is not saying that the letter is forged but rather that the headman was told what to say in the letter by the Sponsor and/or AAH. In other words, the Judge considered that the letter was self-serving and as such provided insufficient evidence of the facts which it purported to confirm. The Judge was entitled to reach that conclusion on all the evidence on this issue.

21. Contrary to what is suggested in the first ground as pleaded, the Judge did have regard to AAH's evidence in relation to the issues on which his statement could assist. It was not disputed that AAH had assisted the Appellant to obtain a passport or DNA test. Even if AAH's evidence of finding the Appellant living in a madrassa in July 2020 were accepted, for the reasons above, there is no evidence that the Appellant was still living there apart from the Sponsor's supplementary statement which contradicted his earlier evidence that the Appellant was living with AAH's family.

22. The foregoing disposes of the first and fourth grounds as pleaded.

<u>Irrelevant Considerations</u>

23. Mr Dhanji drew my attention to [37] and [38] of the Decision which reads as follows:

> "37. The appellant himself made no mention of his mother's letters to Abdul Ajan Haidari when he met him, given that they were in her belongings. Nor is it clear why the headman of the village or the appellant's sister did not

> seek to sell the appellant's home, even if it was in a poor state. Yet the headman was prepared to store the appellant's family belongings and arranged for him to attend a madrassa.
> 38. I do not find it credible that he would do this bearing in mind that the appellant has an older sister and a brother-in-law living and working in Saudi Arabia. They clearly have funds because they paid an agent to take the sponsor to the United Kingdom. There is no credible evidence before me that they refused to take responsibility for the appellant who was and is a child.

24. Mr Dhanji submitted that the foregoing was not relevant to the credibility of the Sponsor's evidence. I disagree. As I pointed out, what is said at [37] is concerned with the permanency of those arrangements which in turn might be relevant to whether the Appellant was likely to return to live in the village and might also have a bearing on whether the Appellant's parents were indeed deceased. Even if, as Mr Dhanji pointed out, the headman of the village might not be entitled to sell the house (as to which there is no evidence), the Judge also found that the Appellant's sister could have done so if the house was no longer intended to be occupied by the Appellant's family. Mr Dhanji pointed out that the statement of Ms Kogulathas refers to the Sponsor having given his evidence about his sister and brother-in-law in the past tense, consistent with his case that he was no longer in contact. However, what is there said, has to be read with the Judge's findings at [34] and [35] of the Decision which rejected the Sponsor's evidence that he was no longer in contact with them for the reasons which she there gave.

25. As Ms Isherwood pointed out, the Judge, at [37] and [38] was simply making findings on the evidence she had and the issues which were relevant to the central question of the circumstances in which the Appellant is living. Whilst, as is said in the pleaded grounds, the Appellant's sister and brother-in-law had funded the Sponsor's travel to the UK many years ago, absent evidence that their circumstances had changed such that they could no longer support the Appellant, the Judge was entitled on the evidence to conclude that those relatives would still be able to assist the Appellant. Those paragraphs have to be read also with what is said at [33] of the Decision that "[t]here is no credible evidence why the sponsor's sister and brother-in-law did not take responsibility for the appellant following the claimed death of his mother".

26. The next issue is taken with what the Judge says at [51] of the Decision as follows:

> "The sponsor gave evidence that he did not have contact with his mother after he came to the United Kingdom. Abdul Ajan Haidari gave evidence that the sponsor asked him many times when he began working for him to look up his family in Afghanistan. Yet the sponsor himself visited Pakistan to get married in 2018. He said he went to see a friend who introduced him to his wife in Peshawar. There is no credible evidence before me as to why he

> did not ask his friend or any of his friend's contacts to look for his family in Afghanistan as it is just over the border from Pakistan. Afghanistan at that time had a recognised government under Ashraf Ghani."

27. This relates to a point pleaded at [27] of the grounds which asserts that the suggestion that the Sponsor's friends could have crossed from Pakistan to Afghanistan to look for the Sponsor's family was not material and speculative. However, that has to be looked at in context. The point being made at [51] of the Decision is that the Sponsor had made no effort to try to trace his family since he left Afghanistan including at a time when he himself had travelled to the neighbouring country. That was relevant to why the Sponsor would choose to ask AAH to trace his family in 2020.

28. Mr Dhanji also drew my attention under this heading to what is said at [52] of the Decision as follows:

> "I bear in mind that several times in his oral evidence, the sponsor inadvertently referred to his brother when speaking about his brother-in-law before he left Afghanistan…."

29. As Mr Dhanji accepted, if the Sponsor had muddled his brother-in-law with his brother when talking about more recent events that would add to the reasons why the Judge did not accept that he was no longer in contact with his sister and brother-in-law. What is said by the Judge at [52] however would appear to be the converse. It may be that the Judge meant to say that the Sponsor had indeed referred to his brother-in-law when speaking about his brother. However, whatever is meant by that sentence is not a material error given the other reasons for rejecting the Sponsor's credibility in that regard.

30. The foregoing matters under this heading subsume the Appellant's third and sixth grounds so far as pursued by Mr Dhanji and part of the second ground. For the reasons I have given, I do not accept that the Appellant has shown that there is any material error in this regard.

Errors of Fact

31. This is the Appellant's second ground. I have already dealt above with the evidence about where the Appellant now lives – whether back in the madrassa or with AAH's family and have explained why the Judge did not make an error and had regard to the evidence she was given when reaching the finding she did. I have also already dealt with the point raised about the current whereabouts of the Sponsor's sister and explained why the Judge was entitled on all the evidence to make the finding she did in that regard.

32. The first issue raised in the second ground as pleaded relates to what is said at [26] of the Decision as follows:

> "I do not find it credible that the sponsor was unaware that his mother was expecting a child when she was in her 9th month of pregnancy at the time that he left Afghanistan. I take into account cultural sensitivities and norms in the context of Afghan society. Nonetheless, I find that even if his mother wore loose clothing, it is likely that she would have shown a bump on her abdomen indicating that she is expecting a child, given the advanced nature of her pregnancy. I bear in mind that at the time that the appellant left Afghanistan, his sister was there to support his mother on a visit from Saudi Arabia with her husband."

33. It is said that this finding does not arise from the evidence as to the timing of the Sponsor's departure from Afghanistan and the stage of his mother's pregnancy at that time. I accept that to be the position. However, that does not take account of the final sentence from which it might be inferred that the reason that the Sponsor's sister was in Afghanistan at that time was to assist her mother with the birth (and the Sponsor would have known that). There is also an issue raised at [47] of the Decision about the timing of the Sponsor's discovery that he had a brother given the date on the Appellant's birth registration document, given the evidence that the Appellant was assisted with documentation by AAH who did not go to Afghanistan until July 2020 whereas the birth was registered on 3 December 2019 (see [AB/13]). That also has to be read with [27] of the Decision where the Judge refers to the Sponsor's evidence that it was AAH who had applied for the birth registration document for the Appellant (see [3] of his second witness statement).

34. The Appellant's second ground as pleaded and/or argued does not disclose any error of fact. The Judge was entitled to make the findings she did for the reasons she gave.

35. The Judge was entitled to make the findings she did at [52] of the Decision that, taking the evidence as a whole, the Appellant's parents were not dead, and he was not at the time of the hearing living in a madrassa. She was entitled to find that the Appellant was being supported by friends or relatives and was being funded either by the Sponsor and possibly also by his sister and brother-in-law. The Judge was entitled to conclude that Paragraph 297(i)(f) was not met. No issue was taken in the grounds as pleaded or argued orally concerning the Judge's Article 8 assessment.

CONCLUSION

36. For the foregoing reasons, the Appellant has failed to make out his case that the Decision contains any material error of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

NOTICE OF DECISION

The decision of First-tier Tribunal Judge Beg does not contain an error of law. I therefore uphold the decision with the consequence that the Appellant's appeal remains dismissed.

L K Smith

Upper Tribunal Judge Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 April 2023