



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-004539
UI-2023-004540
First-tier Tribunal Nos: HU/55790/2022
HU/55792/2022
LH/03058/2023
LH/03059/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 17th of May 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(i) A.S.A.

(ii) A.K.A.

(ANONYMITY ORDER MADE)

Appellants

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms E Rutherford (Counsel)

For the Respondent: Mr C Bates (Senior Home Office Presenting Officer)

Heard at Birmingham Civil Justice Centre on 15 March 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellants] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellants, likely to lead members of the public to identify the appellants (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Chohan promulgated on 21st September 2023, following a hearing at Birmingham CJC on 11th September 2023. In the determination, the judge dismissed the appeal of the Appellants. The Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are sibling brothers. Both are citizens of Afghanistan. The first Appellant was born on 21st March 2004 and the second Appellant was born on 21st March 2006. Both have applied to join their elder sponsoring brother in the UK, Mr Mahram Alizada. Both have been refused.

The Appellants' Claim

3. The essence of the Appellants' claim is that when the sponsoring brother was in the UK, both he and the two Appellants were cared for by their uncle, given that their father was apparently deceased, and the whereabouts of the mother was also unknown. In 2016, the Sponsor and his uncle left Afghanistan and came to the United Kingdom. The Sponsor claimed asylum and in 2018 he was granted refugee status. The Appellants were now in the care of a man called "Jawed". The Appellants' claim to join their sponsoring brother has been rejected by the Respondent under paragraph 319 of the Immigration Rules. The Appellants contend that this refusal is unlawful.

The Judge's Findings

4. The judge gave the background to the Appellants' claim by pointing out that, "after the sponsoring brother and the uncle had in 2016 left Afghanistan and come to the UK, the appellants were left in the care of 'Jawed'." The judge explained that:

For a while, it is claimed that the sponsor lost all contact with the appellants. Then, the sponsor met a man in the United Kingdom, Mr Hosien Mohammadi, who was travelling to Afghanistan. The sponsor asked Mr Mohammadi to find out about his brothers in Kabul. As it happened, Mr Mohammadi managed to find the appellants and contact was then made with the sponsor. It transpired that the appellants were being looked after by a stranger, Mr Mohammad Ali. The sponsor then began to support the appellants financially by making money transfers. It is now claimed that Mr Ali can no longer look after the appellants and hence, this application'." (At paragraph 2).

5. The judge went on to record, that by the time of the hearing before him, there was a DNA report, which the Home Office representative before him acknowledged, had confirmed that the Appellants were indeed the younger brothers of the Sponsor so that the relationship was no longer in issue (at paragraph 4). This meant that the only issue was "whether there are serious and compelling family or other considerations" (at paragraph 4).
6. With respect to the documentation before him, the judge observed that "the appellants had submitted their original passports, original tazkiras and other documentation" and that "I have considered the documentation and I have no reason to doubt the genuineness of the documentation" (paragraph 8). With

respect to “the core issue in this appeal” (at paragraph 10) the judge observed that “there is no evidence on the uncle”, although “It is claimed that the whereabouts of the uncle is not known” (paragraph 10). The judge went on to record that initially the Appellants were left in the care of ‘Jawed’. They then moved to Kabul. The Sponsor then instructed Mr Hosien Mohammadi to locate the Appellants in Kabul. The judge noted that, “It does seem that the appellants were living with a complete stranger, a Mr Mohammed Ali” and that this person “has provided a witness statement” although he “provides no details of the appellants’ circumstances in Kabul”. The judge went on to hold that, “I find it incredible that the sponsor did not insist on seeking greater detail about the appellants’ personal circumstances” (paragraph 11). The judge went on to note that the Sponsor’s evidence was that once the Appellants had been located the Sponsor began to make money transfers to the Appellants, although there were “only two money transfers, dated 15 October 2019 and 17 December 2019 were produced during the hearing” (paragraph 12).

7. The judge also recorded that the oral evidence of the sponsoring brother was that Mr Ali owned a shop where the Appellants have work and, “the sponsor stated that the appellants were not paid for helping out, but they were provided with food and accommodation by Mr Ali”. Nevertheless, the position now is that, “it is now claimed that Mr Ali can no longer look after the appellants”, and that there is a “very short witness statement from Mr Ali, but it is lacking in substance and detail” (at paragraph 13). The judge concluded that “the difficulty in this case is that there is no evidence in respect of the appellants’ circumstances in Afghanistan”, and that “the picture portrayed is that the appellants are in difficult circumstances”. However, the judge held that “the appellants have not claimed to have had any problems or that Mr Ali has ill-treated them in any way” (at paragraph 15). With respect to Article 8, the judge held that there were no unjustifiably harsh consequences for either the Appellants or the Sponsor in making this refusal. The appeal was dismissed.

The Grant of Permission

8. Following a refusal of permission by the First-tier Tribunal, the Upper Tribunal granted permission to appeal on 4th December 2023. The Grounds of Appeal had laid particular emphasis on the fact that the key authority in relation to the operative legal provision under which the Appellants sought to join their sponsoring brother was **Mundeba (s.55 and para 297(i) (f)) Democratic Republic of Congo [2013] UKUT 88** which the judge had not referred to. In the grant of permission, the Upper Tribunal said that it was “unclear therefore as to whether the correct legal test for serious and compelling family and other considerations had been applied” (at paragraph 3).

Submissions

9. At the hearing before me on 15th March 2024, Ms Rutherford submitted that the core issue here was whether there were “serious and compelling family or other considerations” as required by paragraph 297(i)(f) of HC 395. The judge had not referred to the critical case of **Mundeba** and appears therefore not to have applied the principles of that case. Nevertheless, the judge had made it clear that, “it does seem that the appellants were living with a complete stranger, a Mr Mohammed Ali” (at paragraph 11). The judge had an explanation before him that Mr Mohammadi, although providing a witness statement, had provided “no details of the appellants’ circumstances in Kabul” and the reason for this was

“because he thought he, the sponsor, would become upset and anxious” (at paragraph 11). The judge wrongly refers to this as “pure speculation” given that the judge had explained that, “the picture portrayed is that the appellants are in difficult circumstances” (at paragraph 15), Ms Rutherford submitted that the judge's finding that, “the appellants are provided with food and shelter by Mr Ali and indeed, they work in his shop” meant that they had satisfied the provisions of paragraph 297(i)(f) in that their condition was serious and compelling because they were living with a stranger.

10. For his part, Mr Bates made two observations. First, that there was no family life between the sponsoring brother in the UK and the two Appellants' children in Afghanistan. The judge had correctly identified (at paragraph 10) the core issues at the outset. He, therefore, cannot be faulted for having misapplied the law. It was the sponsoring brothers and the uncle's decision to leave the children behind. Given that there was no evidence on the uncle, the oral evidence of the sponsoring brother alone could not be accepted. The children had initially been left with a "Jawed". They are currently being looked after by Mr Muhammed Ali who, in his witness statement, does not explain how he ended up having the children with him. Even so, there was no evidence that the Appellant children were lacking in essential care. The judge was right to say that it was “incredible” that the Sponsor did not seek greater clarification about the circumstances of the Appellant children. Furthermore, although it was being maintained (at paragraph 12) that the sponsoring brother was sending financial remittances, there were only two such remittances in October and December 2019 of money transfers. There were other difficulties. The suggestion that the Appellants “help out” in Mr Ali's shop was evidence given only orally and was not included in any of the previous witness statements. The sponsoring brother was not saying that the children were being forced to work in Mr Ali's shop. This was not a case of involuntary servitude at his hands. Therefore, the judge was right to concluded that there were no serious and compelling circumstances involved in this case, such as to not justify the refusal by the Secretary of State of their application to enter the UK.
11. In reply, Ms Rutherford submitted that the plain facts were that although the two Appellant children had been left with someone who was known to the family, the judge had accepted that he was a “stranger” and the evidence before the Tribunal was that he was no longer able to look after them. The judge had been satisfied about the documentation before him and he was satisfied that the DNA evidence showed the sponsoring brother and the Appellants to be related as claimed. The appeal should have been allowed.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error of law such that the decision should be set aside. My reasons are that the judge does not show that he has followed the strictures in **Mundeba**. The judge had accepted that, “It does seem that the appellants were living with a complete stranger, a Mr Mohammed Ali” (paragraph 11) and the judge also appeared to have accepted that, “the appellants were not paid for helping out, but they were provided with food and accommodation by Mr Ali” (paragraph 13). In these circumstances, it was essential for the judge to demonstrate that the legal principles in **Mundeba** were being applied where paragraph 297(i)(f) of HC 395 was in consideration.

Remaking the Decision

13. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. In particular, I remake this decision on the basis of the grant of permission by the Upper Tribunal on 4th December 2023. That grant made it clear that it was accepted by the First-tier Tribunal that the Appellants “applied as children to enter the UK to join their older brother who is a refugee in this country and also that they are Afghan citizens” (at paragraph 1). The grant of permission further makes it clear that, “it is said at paragraph 15 of the decision that there is no evidence of the children’s circumstances but also that they are living with a stranger and working without pay in his shop”, so that it was arguable that “in such circumstances it was irrational not to find that there were serious and compelling family or other considerations ...”.
14. I find indeed that on the accepted evidence there was indeed serious and compelling family or other considerations. The Appellants only had to prove their claim on a balance of probabilities and on the evidence before the Tribunal they had done so. The grant of permission had observed (at paragraph 4) that it was arguably “irrational to find that there were no compelling family and other considerations” because it was “accepted by the First-tier Tribunal that the children were working for a stranger in exchange for food and accommodation and in the context of the country of origin evidence relating to Afghanistan ...”.
15. I would only add that it bears remembering that what **Mundeba** made clear (at paragraph 34) was also that:
- “34. In our view, ‘serious’ means that there needs to be more than the parties simply desiring a state of affairs to obtain. ‘Compelling’ in the context of paragraph 297(i)(f) indicates that considerations that are persuasive and powerful. ‘Serious’ read with ‘compelling’ together indicate that the family or other considerations render the exclusion of the child from the United Kingdom undesirable. The analysis is one of degree and kind. Such an interpretation sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition that may be”.
16. In this case, and on a balance of probabilities, given the finding of the judge that the Appellants were living with a stranger, working in his shop, not being paid but given food in return, this was not a case simply of the wish of the parties wanting to be together. It is a case where the sponsoring brother and the uncle – all of whom lived together at one time – had fled Afghanistan and the sponsoring brother was now a refugee in this country, with the two Appellants being left behind. On the facts of this case, this appeal succeeds.

Notice of Decision

17. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

Satvinder S. Juss

Deputy Judge of the Upper Tribunal

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Immigration and Asylum Chamber

13th April 2024