Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/16169/2017
HU/16172/2017

THE IMMIGRATION ACTS

Heard at Fox Court	**Decision & Reasons Promulgated**
On 12th February 2019	**On 7th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

[Z R] (FIRST APPELLANT)
[T R] (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr D Lember instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are nationals of Afghanistan. They applied for entry clearance under paragraph 297 of the Immigration Rules to join their brothers, who are British nationals, in the United Kingdom. The Entry Clearance Officer refused their applications on 11th October 2017. The

Appellants' appeal against these decisions was dismissed by First-tier Tribunal Judge N M K Lawrence in a decision promulgated on 4th December 2018. The Appellants now appeal with permission granted by First-tier Tribunal Judge Grant-Hutchison on 31st December 2018.

2. The background to this appeal is that the Appellants claim that they have three brothers in the UK, the first of whom entered the UK in 2007 ([F], the Sponsor), the second brother ([W]) joined the first brother in 2010 and the third brother ([S]) subsequently joined the others in the UK. It is the Appellants' case that both sisters were separated from the family when the family home was attacked when they were young and that the two sisters were taken into the mountains by a man engaged in the attack and were used as slaves and abused for a number of years. They claim that they were brought to Kabul and found out that their brothers were alive. The Sponsor said that he was made aware that his sisters were alive towards the end of 2016/beginning of 2017. He has been to see them in Kabul. They are residing with a family friend and they are receiving financial support from their brothers in the UK.

3. The Entry Clearance Officer refused the applications on the basis that he was not satisfied that the Appellants were related to the Sponsors in the UK. The Entry Clearance Officer considered that there was no evidence of any serious, compelling or compassionate circumstances. The Entry Clearance Officer also considered the financial evidence and was not satisfied that the funds put forward would be genuinely available for the maintenance and accommodation of the Appellants in the UK without recourse to public funds. Accordingly, the Entry Clearance Officer refused the application under paragraph 297 of the Immigration Rules.

4. The First-tier Tribunal Judge firstly considered the provisions of paragraph 297 of the Rules. The judge noted that the Appellants had provided DNA evidence to show that they were siblings of [F] but considered that there was no evidence to connect them to [W]. The judge took into account a previous determination in relation to [S] who claims to be a brother of [F] and [W] but noted at paragraph 8 that the first Appellant stated that [S] is a cousin. The judge then concluded that the basis upon which [S] secured his appeal was a false one, that [F] and [W] lied to the Tribunal and that the representative who had also represented [S] in his appeal had misled the Tribunal.

Error of Law

5. The conclusion at paragraph 8 is centred on paragraph 2 of the witness statement of the first Appellant. There she said "I confirm that [F] and [W] [R] are my brothers and they are currently living in the UK. We also have my cousin, her family and younger brother [S] living in the UK". It is contended in the Grounds of Appeal that the judge misunderstood this sentence. It is accepted in the grounds that there was some ambiguity regarding the phrasing of this paragraph which might have suggested that [S] was the Appellants' cousin's younger brother rather than her younger

brother. However, it is contended that that ambiguity was insufficient to displace the prior findings of the First-tier Tribunal in the decision in relation to [S]'s appeal where that judge had found that [S], [F] and [W] were brothers. It is contended that, to the extent that that ambiguity was considered by the judge to have undermined the entirety of the case, he erred in failing to put that point to the parties during the course of the hearing.

6. At the hearing before me Mr Duffy accepted that this ground had been made out. He accepted that the judge's doubts about the interpretation of paragraph 2 of the first Appellant's witness statement should have been put to the parties during the hearing. Mr Duffy also accepted that there were some issues with the way in which the decision had been drafted.

7. The Appellants' bundle for the First-tier Tribunal contains a decision in relation to [F]'s appeal at H4 where First-tier Tribunal Boylan-Kemp considered [S]'s appeal and found that [F] [W] and [S] were brothers. In accordance with the decision in **Devaseelan [2002] UKIAT 00702** this should have been the starting point for First-tier Tribunal Judge Lawrence. Judge Lawrence referred to that decision at paragraph 7 but concluded at paragraph 8 that, because there was an apparent discrepancy between the judge's findings in [S]'s appeal and the first Appellant's witness statement, [F] and [W] lied to the Tribunal in their evidence. This is a very significant finding. I agree with Mr Duffy's concession that the judge erred in not ensuring that this apparent discrepancy was put to the parties. It is clear that this apparent discrepancy was crucial in the judge's subsequent conclusions. The judge reached the conclusion that the brothers were not witnesses of truth based on this apparent discrepancy. The judge also considered that this discrepancy cast doubts upon the representative's capacity also. At paragraph 14 the judge attached little weight to the DNA evidence because he considered that [F] and [W] are witnesses of falsehood noting that [F] lied twice to the Tribunal, firstly in support of his own appeal and in support of [S]'s appeal, this too was connected to the finding at paragraph 8. The judge again referred to his concerns about the role of the representative and his intention to refer her to the solicitor's regulatory authority at paragraph 18. It is clear that these significant adverse findings against the Appellants were based on the judge's reading of paragraph 2 of the first Appellant's witness statement and in my view it is clear that the judge erred in failing to put this to the Appellants and erred in failing to raise this at the hearing. In these circumstances I find that the judge made a material error of law in the decision and I set the decision aside.

8. I indicated that I would proceed to remake the decision at the hearing. I gave the parties time to prepare and Mr Duffy time to consider the further documentary evidence submitted as well as the documents submitted in connection with the appeal.

Re-Making the Decision

9. Mr Duffy accepted at the outset that the maintenance and accommodation provisions of paragraph 297 were satisfied on the basis of the evidence of support from the Sponsors and the third party. In his view therefore only paragraph 297(i)(f) was at issue. Paragraph 297 of the Immigration Rules sets out the requirements for indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom. Paragraph 297(i)(f) applies where;

> "(f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care"

10. Mr Duffy accepted that in this case there are two young girls living in Afghanistan with a family friend in circumstances where they previously were held as slaves and subject to abuse. He accepted that the DNA evidence and all of the evidence including the previous decisions indicated that their three brothers are in the UK and have all been granted status in the UK. He accepted that there were no significant arguments to be put forward to suggest that in these circumstances they did not meet the requirements of paragraph 297(i)(f). He accepted that the Sponsors had attended the hearing in the Upper Tribunal and were available for cross-examination but he did not consider it necessary to cross-examine them and indicated that he was content for me to remake the decision on the basis of the papers.

11. Mr Lemer submitted that there was sufficient evidence to show that the Appellants met the requirements of paragraph 297(i)(f). He referred to the previous decisions of the First-tier Tribunal in relation to the appeal of [S] and of [F] where the brothers' evidence was found to be credibile. Mr Lemer referred to the evidence in the Appellants' bundle in relation to the mental health of the two Appellants. In particular evidence that they have been receiving treatment and medication for mental health issues. Mr Lemer referred to the documents in Section D of the Appellants' bundle including evidence of remittances to Afghanistan to support the two Appellants and photographs of the Sponsor with the two Appellants. Mr Lemer further relied on the decision in **Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088 (IAC)** and contended that the guidance there should be followed in assessing this case.

12. In remaking the decision I have considered the provisions of paragraph 297. I accept Mr Duffy's concession in relation to the maintenance and accommodation provisions of 297(iv) and (v).

13. I accept Mr Duffy's positive obervations in relation to paragraph 297(i)(f). I accept on the basis of the DNA evidence which was before the First-tier Tribunal and the new DNA evidence submitted for the hearing before me that [F], [W] and [S] are all brothers and that the two Appellants are their siblings. There is no dispute that all three brothers are settled in the UK.

There was no challenge to the credibility of the claim by the first and second Appellant that they were taken away by a man who was engaged on an attack on the family home and grew up as slaves with his family and were abused physically and mentally until they escaped. I accept that the two girls are living with a family friend and being supported by the Sponsors in the UK. I accept that they are living in particularly challenging circumstances in Afghanistan. They have no family remaining in Afghanistan.

14. In my view there is sufficient evidence to show that there are serious and compelling family or other considerations which make exclusion of the Appellants undesirable. I find that the Appellants meet the provisions of paragraph 297. This paragraph is compatible with Article 8 of the European Convention on Human Rights and a weighty factor in assessing the proportionality of the refusal decision. In these circumstances I find that the appeal should be allowed on human rights grounds.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and I set it aside. I remake the decision by allowing the Appellants' appeals.

No anonymity direction is made.

Signed Date: 5th March 2019

A Grimes
Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I have allowed the appeal and had considered whether to make a fee award. I have decided to make no fee award in light of the fact that most of the evidence which has enabled me to allow the appeal was produced after the decision was made by the Entry Clearance Officer.

Signed Date: 5th March 2019

A Grimes
Deputy Upper Tribunal Judge Grimes