



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17021/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House
On 22 March 2021

Decision & Reasons Promulgated
On 31 March 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

FAZAL AHMADZAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Coffey, Counsel instructed by Hunneewoth Solicitors

For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

DECISION AND REASONS

1. By my decision promulgated on 29 June 2020, I set aside the decision of Judge of the First-tier Tribunal Lucas promulgated on 15 July 2019. I now re-make that decision.

Background

2. The appellant is a citizen of Afghanistan born on 3 July 2001.
3. The appellant's father ("the sponsor") entered the UK in May 2001 (before the appellant was born) and claimed asylum. He was granted refugee status and became a British citizen in 2009.
4. On 10 May 2018 the appellant applied for entry clearance in order to join his father in the UK. On 6 August 2018 the application was refused. The respondent did not accept that the sponsor is the appellant's father, or that he has had sole responsibility for him. The application was refused under paragraph 297 of the Immigration Rules and under article 8 ECHR.
5. The appellant appealed to the First-tier Tribunal where the appeal was heard by Judge of the First-tier Tribunal Lucas on 26 June 2019. The appellant's case before the First-tier Tribunal was that (a) paragraph 297 of the Immigration Rules was satisfied because the sponsor, whose paternity had been established by DNA evidence, has had "sole responsibility" for the appellant; and (b) refusing the appellant entry clearance would be disproportionate under article 8 ECHR.
6. Judge Lucas found that the evidence did not establish that the sponsor has had sole responsibility under paragraph 297. However, he did not address article 8 ECHR. I found in my error of law decision that this was erroneous in law because although finding that the requirements of paragraph 297 of the Immigration Rules were not satisfied is relevant to an assessment under article 8 it is not determinative, as a father can have a family life within the meaning of article 8 with his son even if he has not had "sole responsibility" for him within the meaning of paragraph 297. I preserved the First-tier Tribunal's findings (at paragraphs 22 - 26 of the decision) concerning sole responsibility under paragraph 297 of the Immigration Rules and informed the parties that the re-making of the decision will be concerned with whether refusal of entry breaches article 8 notwithstanding that the appellant does not satisfy paragraph 297 for the reasons given in paragraphs 22 - 26 of the First-tier Tribunal decision.
7. The preserved findings of fact, in paragraphs 22 - 26 of the First-tier Tribunal decision, are as follows:
 - a. The sponsor is a refugee from Afghanistan but there is no evidence to show that he would have difficulty living in Pakistan, where his family, including the appellant, have lived since 2001. There is "an

element of choice” on the part of the sponsor in choosing to live apart from his family in Pakistan.

- b. There is little or no evidence to show that the sponsor had sole responsibility for the appellant during his years of growing up. The evidence of remittances, from 2017 – 2019, are contemporaneous with the application.
 - c. There is no evidence from independent professionals, such as teachers at the appellant’s school, to show the sponsor has had a role in the appellant’s life.
 - d. It is accepted that there are phone records showing frequent calls to Pakistan in 2019.
 - e. The appellant has had a family life with his mother and brother in Pakistan, where they have lived for many years, and there is no evidence to show that the family’s position has become precarious.
8. The appellant has an older brother, born on 3 August 2000, who also applied for entry clearance. His application was refused in August 2018 and his subsequent appeal was dismissed. The First-tier Tribunal judge in that case (Judge Khan) found that paragraph 297 of the Immigration Rules was not satisfied because the sponsor and his wife shared responsibility for the upbringing of the appellant’s elder brother. It was accepted that article 8(1) was engaged but not that refusing entry would be disproportionate.
9. The appellant claims that his mother died on 1 July 2020 and has provided a death certificate as confirmation. It is not accepted by the respondent that his mother died or that the death certificate can be relied upon.
10. At the hearing I heard oral evidence (remotely) from the sponsor through an interpreter. Mr Whitwell’s cross-examination was extensive and as a result I developed a far fuller (and somewhat different) picture of the relevant circumstances than emerges from a review of the written statements of the sponsor and appellant.
11. The appellant did not attend the hearing and therefore I did not have the benefit of hearing his oral evidence. As he lives in Afghanistan, I do not draw a negative inference from his non-attendance.

Evidence of the appellant

12. The appellant’s (brief) witness statement dated 20 October 2020 states that he lived with his mother until she died on 1 July 2020 of a heart attack whilst they were in Afghanistan attending a wedding.

13. The appellant states that his mother took care of him and he was dependent on her. He states that he is currently living with his grandmother and does not have any relatives or close family members who can provide for him.
14. He states that his father is the only one he has left when it comes to family and that he needs his father.

Evidence of the sponsor

15. In his witness statement dated 11 June 2019 the sponsor states that after he arrived in the UK his wife and children moved to Pakistan for safety reasons. He states that he kept in contact with and financially supported his family, and that the reason he did not sponsor his family to join him in the UK earlier is that he was not advised of his rights. He states that he takes decisions for his children. At paragraph 10 of the witness statement he states that “both of my children” have completed their school and that he wants them to come to the UK as they need their father in their life to guide them. He also states in the witness statement that he is employed in a burger shop earning £2,500 a month and is in a strong position to accommodate his children.
16. During cross examination the sponsor gave further information including, in particular, that:
 - a. He is illiterate and uneducated.
 - b. He has seven children, the youngest of whom (born in 2009) is a British citizen. He stated that he has four daughters, three of whom are married and one of whom is engaged.
 - c. His wife died on 1 July 2020, whilst visiting Afghanistan, of Covid-19.
 - d. Since the death of their mother, his three sons and unmarried daughter have lived with their maternal grandmother in a village near Kabul. They have three maternal uncles living in the village who are farmers, who provide financial support to the appellant’s grandmother.
 - e. He visited his children in Afghanistan recently and the only reason he did not go sooner following his wife’s death was the travel impediments caused by the Covid-19 pandemic.
 - f. He has visited his family in Pakistan frequently (at least once every two years) and several years ago spent three years with them.
 - g. The monthly remittance of £130 that he sends to Afghanistan is for his three sons (not just the appellant).

- h. He has adequate accommodation for his sons to live with him and sufficient income to support them in the UK.
- i. He would like his three sons to join him together in the UK. He was uncertain as to whether he would want his youngest son (who is a British citizen) to come if his other sons are not permitted to do so.

Submissions

17. Mr Whitwell submitted that the sponsor was not being truthful in his evidence. He supported this contention by commenting that (a) the sponsor's oral evidence that he has seven children, four of whom (including the appellant) live together with their grandmother, is inconsistent with the witness statements of both the sponsor and appellant which give the impression that the sponsor only has two children (his sons who applied for entry clearance) and that they are alone with their grandmother; (b) the witness statements omit to mention the presence of economically active uncles in the village where the appellant is now living; (c) in the appeal by the appellant's elder brother it is said (at paragraph 7 of Judge Khan's decision) that the appellant had three (rather than four) sisters, which is yet another inconsistency about the family; and (d) the sponsor gave a different cause of death for his wife than stated on the death certificate.
18. Mr Whitwell argued that the death certificate for the appellant's mother was not a reliable document. He observed that the section of the certificate where the location of death is inserted was not completed and that there was a gap of six weeks between the death and its registration. He referred to the respondent's background note on Afghanistan dated December 2020 where in paragraph 13.1 it is stated that it is easy to obtain forged documents, as well as valid documents with incorrect information.
19. Mr Whitwell submitted that the evidence does not support a conclusion that article 8(1) is engaged. He stated that the appellant is an adult and that there must be ties which go beyond the normal relationship between a parent and adult child. He argued that the timing of the appellant's entry clearance application (made at a time when he and his elder brother were at an age they could enter the labour market) indicates that the sponsor's reason for bringing his sons to the UK is for them to gain employment, not because of a family relationship. He argued that this is reinforced by the fact that the sponsor has not brought his youngest son (aged 11) to the UK even though there is no impediment to him doing so.
20. Mr Whitwell argued, in the alternative, that refusing entry would not be disproportionate under article 8 (2) because the appellant is not alone with his elderly grandmother but rather is living in a village with several uncles and in

a home with three siblings. He also submitted that weight should be placed on the fact that there is no evidence that the appellant speaks English or to show that he is experiencing harsh or difficult circumstances living with his family in Afghanistan.

21. Mr Coffey submitted that any apparent discrepancies in the sponsor's evidence can be explained by his illiteracy, lack of education, and reliance on interpreters; and that the sponsor has been a truthful witness. With respect to the death certificate, Mr Coffey maintained that no evidence had been submitted, or arguments made, which cast doubt on its validity.
22. He argued that article 8(1) is engaged because the evidence indicates that there exists a close and subsisting relationship between the sponsor and the appellant, where the sponsor provides financial support to the appellant (remittances of £130 a month) and speaks to him frequently. Mr Coffey submitted that this constitutes real, committed and effective support.
23. With respect to proportionality under article 8(2), Mr Coffey argued that the appellant's circumstances need to be considered alongside those of his siblings, as if the appellant were to succeed in his appeal then his brothers would follow him to the UK, and therefore it cannot be said that by coming to the UK the appellant would be separated from them. He noted, also, that although the appellant currently lives with one of his sisters, this will cease to be the case shortly given that she is soon to be married. Mr Coffey also argued that weight should be attached to the regular contact between the sponsor and appellant, the remittances from the sponsor of £130 a month, the death of the sponsor's mother which means that the appellant has no other parent, and the support that the sponsor will need from his son as he gets older.
24. Mr Coffey also argued that the public interest in effective immigration control is reduced because the sponsor could have sponsored his wife and children to come to the UK but did not realise that he had this option. Further points said by Mr Coffey to weigh in the appellant's favour are that the sponsor earns £30,000 a year and has a flat capable of accommodating him.

Findings of fact

25. The witness statements of the appellant and sponsor give a partial, incomplete and inaccurate impression of the appellant's circumstances in Afghanistan (and previously Pakistan). However, I am satisfied that this is not because they have been dishonest, but rather it is a reflection of the difficulties of an illiterate person, unfamiliar with what is required, in preparing a witness statement. The impression I have formed, having heard the sponsor give evidence, is that the evidence he gave at the hearing was truthful.

26. I make the following findings of fact:

- a. The sponsor came to the UK from Afghanistan whilst his wife was pregnant with the appellant. Shortly after the appellant was born, the appellant's mother moved to Pakistan with her children.
- b. The appellant is one of seven children (four daughters and three sons). The youngest child (a son, aged 11) is a British citizen.
- c. The appellant's mother died in July 2020.
- d. Three of the sponsor's daughters are married and live with their husbands.
- e. The other children of the sponsor live with their maternal grandmother in Afghanistan, and have done so since their mother died. They live in a village where there are wider family members including three uncles who work as farmers who financially support the appellant's grandmother.
- f. The sponsor has, for at least several years, sent funds (of around £130 a month) regularly to his family in Pakistan (now in Afghanistan). These funds are not just for the appellant. They are to support his unmarried children and, before she died, his wife.
- g. The sponsor has visited his family in Pakistan (now in Afghanistan) regularly and on one occasion for a period of three years.
- h. The sponsor earns approximately £2,500 a month and has a flat which could accommodate his the appellant.
- i. The sponsor did not seek to bring the appellant and his elder brother to the UK until 2018 (when they were almost adults) in part because he did not realise he could bring them earlier but also because by this time they were at an age where they could function independently. He did not bring his youngest son (who is a British national, aged 11) even though there was no impediment to do so. Moreover, even following his wife's death, he has not brought his youngest son to the UK, who instead remains in Afghanistan with his siblings, grandmother and uncles.

Analysis

27. There are two issues to be determined. The first is whether article 8(1) ECHR is engaged. If it is not, then the appeal cannot succeed. The second issue,

which only arises if article 8(1) is engaged, is whether refusing entry clearance to the appellant is proportionate under article 8(2).

Is Article 8(1) engaged?

28. Whether or not the appellant enjoys family life with his father under article 8(1) is a question of fact which requires consideration to be given to all of the relevant circumstances. As explained in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630 at [24]:

"24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8.

29. I accept that the appellant and sponsor have a relationship and a desire to live together in the UK, but the evidence does not show (on the balance of probabilities) that the appellant is provided with any real or effective support from the sponsor or that they have more than normal emotional ties. I reach this conclusion for the following reasons:

- a. Although the sponsor has been (and is) clearly able to reside with the appellant (and his siblings) in Pakistan – his evidence at the hearing was that on one occasion he spent three years with them in Pakistan– he has chosen to not do so and has lived separately from the appellant throughout nearly all of the appellant’s life.
- b. The sponsor regularly sends funds to his family in Pakistan (now Afghanistan), but his evidence at the hearing was not that these funds are solely for the appellant but rather they are for the family as a whole, which includes his 11-year-old son. There was no evidence before me indicating that the appellant is economically inactive and does not earn an income or explaining why, when he lives in a village with three uncles who are farmers, he is unable to support himself and relies on remittances from the sponsor. Having regard to the evidence given by the sponsor orally, and considering it as a whole, I consider it more likely than not that the remittances are primarily intended (and

used) for the sponsor's 11-year-old son, who is not in a position to earn an income, and not for the appellant and his elder brother.

- c. There was no evidence from the sponsor or appellant showing any emotional support between them. The appellant states in his witness statement that he wants to be with his father so that he is not "deprived of his love and care" but does not describe, at all, whether (and how) the sponsor has supported him emotionally or in any way throughout his life.

30. I am therefore not satisfied that the appellant has established, on the balance of probabilities, that his relationship with the sponsor engages article 8(1).

Is it proportionate under article 8(2) to refuse entry to the appellant?

31. As I have found article 8 is not engaged, it is not necessary to consider proportionality. For completeness, however, I have considered, in the alternative, whether refusing entry is proportionate.

32. Weighing against the appellant is that:

- a. The evidence does not show a particularly close relationship between the appellant and sponsor.
- b. The evidence does not show that the sponsor is without family support in Afghanistan or that he faces difficult circumstances. On the contrary, the evidence indicates that the appellant lives with several family members in a village where he has wider family, and that his wider family are farmers and generate an income. Moreover, the sponsor has decided to leave his youngest son (who is a British national) in Afghanistan with the same family as the appellant even though he could at any time bring him to the UK.
- c. The appellant is unable to establish a right to reside in the UK under the Immigration Rules and the public interest in the maintenance of effective immigration control weighs against him: Section 117B(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act")
- d. The appellant has not adduced evidence establishing he speaks English and his lack of English weighs against him: Section 117B(2) of the 2002 Act

33. Weighing in the appellant's favour is that:

- a. The appellant and the sponsor have a strong wish to reside together (with the sponsor's other sons) in the UK.

- b. The appellant has recently lost his mother and the sponsor is his only living parent.
- c. Had the sponsor been properly advised he would more likely than not have been able to bring his family to the UK when the children were younger.
- d. The appellant is unlikely to be a financial burden given the sponsor's income.

34. Weighing the considerations set out above, I am satisfied that denying entry to the appellant is proportionate.

Notice of Decision

35. The appeal is dismissed.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan

Dated: 23 March 2021