IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-004419
UI-2022-004421

First-tier Tribunal Nos: EA/13568/2021
EA/13570/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 1st of February 2024

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE METZER KC

Between

MAJID ALI CHOUDHARY (1)
MARIYA TABASSAUM CHOUDHARY (2)
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: The appellants did not attend and were not represented
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 24th January 2024

DECISION AND REASONS

1. These written reasons reflect the oral decision which we have given at the end of the hearing.

Background

2. We begin by explaining the context in which there is no attendance by the appellants and the nature of the witness evidence that we heard from Mr Khalid Mahmood. The fuller background is set out in our previous orders and directions dated 10th August 2023 and subsequently on 23rd October 2023, both of which were issued following adjourned hearings. At the first adjourned hearing, Mr Mahmood had attended as a representative via CVP in Pakistan, but the hearing had to be adjourned because of a difficulty with internet connections, which Mr Mahmood indicated was not uncommon. It subsequently transpired that Mr

Mahmood wished to give witness evidence. As a consequence, we wrote to the appellants in or around 10 October 2023 in the following terms:

> "[Mr Mahmood] is based in Pakistan, as are the appellants, although they have a sponsoring relative, understood to be in the UK. Noting Agbabiaka (evidence from abroad; Nare guidance) [2021] UKUT 00286 (IAC), the error of law hearing has been listed a hearing at Field House, at which Mr Mahmood can give evidence (he has a company address registered in London, of which he is a director and there is no suggestion that he cannot enter the UK to attend the hearing). As per 5(iv) of BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC), a legal representative should, as a general rule, not present the appeal before the Upper Tribunal, as an advocate must never assume the role of witness. Mr Mahmood relies on Paragraph 6.3 of Presidential Guidance Note 2012. No.3, for unrepresented claimants, contained in a section, "Sponsor as representative," for the proposition that the Tribunal Procedure Rules do not prevent individuals from acting both as representative and as a witness in the same appeal, so long as that person is not in the business of providing immigration services.
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> Taking each point in turn, Mr Mahmood is not the sponsor, the importance of which was stressed in HH (Sponsor as representative) Serbia [2006] UKAIT 00063. The sponsor is a Mr Muhammad Nawaz, said to be exercising treaty rights in the UK, whom the appellants wish to join.
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> We bear in mind that a family friend may seek, other than in the course of business, to represent a party (see RK (entitlement to represent: s. 84) Bangladesh [2011] UKUT 409 (IAC). Mr Mahmood is clearly providing immigration services and advice. The documents produced by him include detailed, specific legal representations on behalf of the appellants (so "immigration services", for the purposes of section 82(1) of the Immigration and Asylum Act 1999). They also refer to him attending on and "appraising" one of the appellants of a relevant statutory provision in connection with their application for entry clearance (so "immigration advice'" for the purpose of section 82(1) of the 1999 Act). We do not accept that he is not doing so other than in a course of business, whether for profit or not (see: section 82(2)(b) of the 1999 Act). In the appellants' application for permission to appeal ('IAUT-1') , Mr Mahmood is described as the appellants' representative, of Convergent Management Consultants Ltd, and uses company letter-headed notepaper in his capacity as "director." He has also applied to this Tribunal on 16th March 2023 for costs totalling some £20,545, signed by him in his capacity as director, with items broken down in a way similar to time costs for discrete elements of work, for example "issue/statements of case - £4,345" and "witness statements - £1,560". While section 84 of the 1999 Act would not prevent him from providing otherwise regulated immigration advice or services from outside the UK, Mr Mahmood seeks to do so at a hearing in the UK and he does not suggest that he is registered. Even if he were so registered, Mr Mahmood's reliance on HK (Interviewer as advocate: unfair?) Ethiopia [2006] UKAIT 00081 is misplaced. As that case makes clear, where a professional representative is a witness, it may be inappropriate for them to conduct the advocacy. That is echoed in BW. We reiterate that it remains open to the appellants to ask the sponsor or other family members in the UK to make representations, while

Mr Mahmood attends to give evidence. I do not, however, permit him to conduct advocacy at the hearing.

3. At the second adjourned hearing on 23rd October 2023, the appellants instructed Loxford Solicitors who, in turn, instructed Mr J Gazzain of Counsel. Mr Mahmood was present to give evidence. It was at that hearing that the appellants' application for wasted costs was withdrawn and we also confirmed that at the time as Loxford Solicitors had been instructed, it was not appropriate for either this Tribunal or the respondent to be required or communicate directly with Mr Mahmood. However, Mr Gazzain had to apply for an adjournment because he had not received all of the relevant documents and was unable to answer a question, originally posed by Upper Tribunal Judge Reeds when she had granted permission on 5th January 2023, of what evidence had been filed or had been before the First-tier Tribunal Judge, Judge Groom (the 'Judge').

4. Following on from the second adjourned hearing on 23rd October 2023, Loxford Solicitors then ceased to act, and it was at that stage that the Tribunal administration began liaising directly with the appellants themselves. We received correspondence from the appellants directly on 15th January 2024, indicating that Mr Gazzain was no longer available, they could not afford to instruct another barrister, and in particular, blaming Loxford Solicitors for not providing Mr Gazzain with material for the hearing. The appellants said that they relied upon the wisdom and judgment of this panel as unrepresented appellants. They had submitted honest applications with supporting documents at all times, although they had learned from Mr Mahmood of discrepancies not disclosed to them prior to his involvement. We observe that these appear to relate to earlier visa applications which need not trouble us.

5. We recite this background first, to explain Mr Mahmood's attendance as a witness, and second, our decision to proceed with the hearing in the appellants' absence. There was no application to adjourn the hearing again and it was clear that the appellants wished to proceed. In the absence of the appellants' attendance, we remind ourselves that at this stage, we are only considering whether the Judge erred in law, and Mr Mahmood's evidence is only relevant to the extent that it relates to that question. It is not for us to question him unless it is necessary to decide that issue.

6. Mr Mevin objected to Mr Mahmood's witness statement, on the basis that almost all of it contained legal submissions, thereby attempting to circumvent our refusal of a right of audience. It also contained a number of comments in relation to the evidence before the Judge, as well as reiterating the wasted costs application, which was previously withdrawn.

7. We decided as a preliminary issue that it was appropriate to admit Mr Mahmood's witness statement, but with clear limitations. We accept Mr Melvin's submission that much of the witness statement contains legal submissions. It is not appropriate, where we have clearly set out that we are not willing to grant a right of audience to Mr Mahmood, for us to place any weight on these particular aspects of his witness statement. Similarly, the witness statement provides a duplicative commentary on what Mr Mahmood says are self-proven documents. He seeks to comment on the reliability or authenticity of documents. In this second regard, we also place no weight on those comments, particularly where first, Mr Mahmood does not purport to be an expert in the authenticity of

particular documents, and second (and more importantly) he is clearly not an independent witness, even if he were expert, because as he confirms at §12 of his statement, the first appellant is a personal family friend. Our only reason to consider the statement was a limited part of which describes an earlier part of the litigation history, as it progressed, up to §25 of the statement, which we have found of assistance. For the avoidance of doubt, to explain clearly for the appellants' benefit, the admission of witness evidence in an error-of-law hearing is a relatively rare occurrence. The only possible relevance in this case was whether the Judge had made a mistake of fact, the evidence in relation to which satisfied the principles in principles in Ladd v Marshall [1954] 1 WLR 1489, as applied in Akter (appellate jurisdiction; E and R challenges) [2021] UKUT 00272 (IAC) or because the evidence demonstrated a procedural error. There had been a dispute as to what evidence was or was not before the Judge.

The Judge's decision under appeal

8. Having dealt with the preliminary issues, we turn to the substance of the appeal before us and the challenge the Judge's decision promulgated on 2nd February 2022. In it, the Judge referred at §1 to the appellants as siblings, who as adult Pakistani citizens claimed to be the niece and nephew respectively of a Portuguese uncle, said to be exercising treaty rights in the UK. At §2, the Judge recorded that the application by the first appellant was made on 18th December 2020 for a Family Permit under the Immigration (EEA) Regulations 2016 and the second appellant made hers on 28th December 2020. The applications were refused on 22nd July 2021 and 11th March 2021 respectively. At §3, the Judge recorded that the applications were refused on the basis that the appellants were not family members; were not related to the sponsor as claimed; that there was not sufficient evidence that the sponsoring uncle was exercising treaty rights in the UK; and finally, the respondent was not satisfied that the appellants were dependent on the sponsor, as they claimed. The Judge recited the legal burden of proof at §4, which is not disputed, and referred to a bundle at §5 which included appeal forms, grounds of appeal and respondent's Reasons for Refusal Letters. We pause to observe that it appears from Mr Mahmood's witness statement that prior to the hearing, the Tribunal was concerned that the respondent had not prepared a bundle in advance of this appeal and in circumstances, the respondent was limited to relying upon the contents of the refusal letters. We also add, in case there is any suggestion that the Judge erred in considering the appeal on the papers only, that in the IAFT-6 Form (application to appeal to the First-tier Tribunal) the appellants only sought a decision on the papers.

9. The Judge went on to analyse the evidence and noted, at §6, copies of birth certificates for the appellants and appellants' mother, although the certificates had a reporting or entry date years after the birth dates; and a family registration document at §7 which was not an original document. The Judge reminded herself of the relevant case law, Tanveer Ahmed v SSHD at §8 and was concerned that neither the birth certificates nor family registration certificates were original documents; were copies and with no other supporting documents said to attest to the authenticity of those copies. The Judge considered at §10 DNA evidence of the first appellant but none for the second appellant. While she accepted that the first appellant was related as claimed, she did not accept at §11 that the second appellant was related.

10. With regard to the sponsor's exercise of treaty rights, at §12, the Judge concluded that there was sparse evidence, in particular a single letter from MB Training Limited, which indicated that the sponsor had worked since December 2019 as an "admin assistant" but did not name any individual who drafted or signed the letter, nor did it confirm the hours of work or rate of pay. No contract had been produced. At §13, the Judge referred to a very limited number of pay slips, one referring to furlough pay and two wage slips, one of which even predated the purported start of the sponsor's employment. Also, at §13, the Judge recited limited bank statements and it was unclear from the bank statements as to any entries with regard to employment for MB Training Limited. As a consequence, at §14, the Judge concluded that on balance, she was not satisfied that the sponsor was exercising treaty rights.

11. At §§15 to 16, the Judge then went on to consider the appellants' dependency on the sponsor. There were a number of money transfers said to demonstrate financial dependency. Some were not in the name of the appellants and moreover the respondent was unable to verify these transfers via the money transfer organisation. The university fee notes had not specified who had paid those fees. At §16, the Judge noted that there was an absence of documentary evidence demonstrating the financial circumstances of the appellants and the sponsor in terms of detailed income or household expenditure, which required the financial support of the sponsor for the essential living needs of both appellants. At §17, the Judge concluded that she was not satisfied either of the claimed relationship between the second appellant and the sponsor; or that the sponsor was exercising treaty rights; or that dependency had been proven.

The Grounds of Appeal and the Grant of Permission

12. The appellants' initial grounds of appeal were considered and rejected by Judge Welsh of the First-tier Tribunal but were renewed and considered by Upper Tribunal Judge Reeds. We do no more than summarise the gist of the appeals which, as Judge Reeds had commented, were somewhat unclear and discursive. They referred at §7 to DNA evidence now having been adduced in relation to the first appellant, although this was something that the Judge had plainly been conscious of. There was a recitation of evidence at §10, with regard to biometric data. The grounds also suggested that the Judge's consideration of financial support was an error of law pursuant to Section 82 of the Nationality, Immigration and Asylum Act 2002. The grounds then sought to criticise the respondent at §12 (of no relevance to whether the Judge erred in law) and reiterated that the evidence was "self-proving" and "duly verified and attested" and no doubts had been raised in the "grounds. The Judge "can be said" to have fallen into error by compartmentalising the evidence and failing to look at all of the issues of credibility in the round. This was exacerbated, the grounds asserted, because neither appellant was claiming asylum and therefore did not need to rely upon a false document. The grounds also referred at §16 to an additional exhibited letter from MB Training Ltd, clarifying an administrative error. We add that this has been referred to subsequently as Appendix 'CH2', which post-dates the Judge's decision and confirms that the sponsor's start of employment in the original letter was an error, although it did not provide any further employment details, the absence of which had concerned the Judge. The grounds asserted there was no question surrounding the credibility of the appellants.

13. In granting permission to appeal, Judge Reeds was concerned in relation to two aspects. The first was in relation to whether the Judge had erred in concluding that the second appellant was not related as claimed, in circumstances where even though there was no DNA evidence, the same family registration documents existed. Second, she was concerned about an additional letter from MB Training Limited which referred to an error and a witness statement from the appellants dated 19th October 2021 which was before the Judge setting out their position concerning their dependency upon the sponsor, although we also note, as Mr Melvin pointed out, that the sponsor had produced no witness statement. In granting permission, Judge Reeds pointed out that the weight of any witness evidence would need to be considered in the context of materiality and she issued directions as to what evidence had been before the Judge, as it was not entirely clear to her.

Evidence before the Judge and the Respondent's Reply

14. The respondent's position in relation to the evidence before the Judge was that there were two bundles: a 64-page bundle; and a 51-page bundle . The Judge had referred to birth certificates and family registration documents in the 64-page bundle and the DNA evidence in the 51-page bundle. The initial letter from MB Training was contained in the 64-page bundle as were the pay slips, limited bank statements which were said not to reveal salary from MB Training Ltd, and money transfers although not only in the names of the appellants. The university fee notes only appeared in the 51-page bundle, although as the respondent's position statement summarises, it did not specify who paid for the fees. We are content that that the respondent has summarised accurately what documentation was before the Judge. In contrast, even now, the appellants have not adequately answered that basic question, instead sending to the respondent by email a series of document links, many of which plainly post-dated the Judge's decision. We are grateful to the respondent's work in analysing what documents were before the Judge, which was in contrast to the confusing and unnecessary series of submissions previously made on the appellants' behalf.

15. In reply to the appellant's appeal, the respondent argued that the Judge's findings on the nature of the relationship between the second appellant and the sponsor could not be said to be an error of law. The Judge was unarguably entitled to conclude that the absence of DNA evidence was important, but in any event, it was not material to the appeal, bearing in mind the two other areas where the Judge had found against the appellants. In relation to the sponsor's exercise of treaty rights, the Judge considered the evidence before her, and where this was an appeal on the papers, it was striking that there was no witness statement from the sponsor. The Judge had not acted irrationally and there was no error of law in the Judge's analysis of financial dependency.

Discussion and Conclusions

16. We remind ourselves first, in relation to the question of evidence and the weight to be attached to it, that is intensely case-specific, and we should not substitute our view for what we would have decided. In relation to the absence of DNA evidence, the Judge had plainly decided that that was a material factor where it had been adduced for the first appellant. The only way that sensibly that could be regarded as an error would be if such a consideration was impermissible, in other words that it was perverse. We conclude that it was not perverse. It was

open to the Judge to consider the absence of evidence in respect of one appellant where it had similarly been adduced in respect of the other, regardless of another family registration document. However, we also accept the respondent's submission that as the Judge had found against the appellants on the other two grounds, any error would have been immaterial.

17. We turn then to the question of the Judge's analysis of the sponsor's exercise of treaty rights. First, in the grounds of appeal the appellants had sought to adduce additional evidence and we bear in mind the Ladd v Marshall principles, together with the additional flexibility we have to admit new evidence. There is no explanation for why it had not been adduced earlier in circumstances where the appellants knew that this was a paper appeal, but in any event, it would not have had an important influence on the result, nor was it apparently credible, when the Judge had commented on other aspects of the letter: the letter not identifying the author, that it did not confirm basic terms and conditions of employment, which we remind ourselves (and take judicial notice of) the legal requirement on employers to provide a written statement of particulars under section 1 of the Employment Rights Act 1996. Second, the Judge had also reached her conclusion in the context of receipts of salary from MB Training Ltd. We therefore decline to admit the new evidence relating to MB Training Ltd, which in any event disclosed no error.

18. We turn finally to the issue of the appellants' claimed dependency on the sponsor and an issue that had concerned Judge Reeds, when she granted permission, as to whether the Judge had failed to consider a joint witness statement of the two appellants. We remind ourselves that a judge can be assumed to have considered all of the evidence, and there is no need to recite it all. Indeed, in analysing the evidence, including bank statements and the like, all of these were exhibited expressly to the joint witness statement on behalf of the appellants. We do not criticise the Judge, let alone regard her as having erred in law for failing to recite some paragraphs within the joint witness statement, which having reviewed them ourselves appear to be largely bare assertions as to what the family circumstances are in Pakistan, without substantial detail. There is said to be a family property at §9, and then limited other comments about financial and emotional dependency between §§9 and 12. They add little more, nor do they address the Judge's concerns. Instead, the Judge had focused her analysis on the more specific evidence, namely bank statements, money transfers and university fees. The Judge did not omit an analysis of the relevant evidence, and the Judge's reasons were adequately explained.

19. In the circumstances, the appellants' appeals disclose no error of law. They fail and are dismissed. We reiterate that we have not considered, or do we regard it as appropriate to consider any further application by the appellants for wasted costs, contained in Mr Mahmood's statement, in circumstances where such an application was expressly withdrawn by Mr Gazzain on a previous occasion and where nobody with legal authority or rights of audience is instructed to appear before us today. The respondent has also confirmed that it is not seeking its costs and will instead pursue its concerns about Mr Mahmood's conduct (about which we need say no more) via other channels.

Notice of decision

The Judge did not err in law in reaching her decision.

The appellants' appeals fail and are dismissed.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31st January 2024