IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-001676
UI-2024-001677
UI-2024-001678
UI-2024-001679
UI-2024-001680
First-tier Tribunal Nos:
HU/02025/2022
HU/02026/2022
HU/02029/2022
HU/02031/2022
HU/02034/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 16th of July 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

(1) SBS
(2) NS
(3) AS
(4) SKS
(5) SNS
(ANONYMITY ORDER MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr J Gajjar, Counsel
For the Respondent: Ms Julie Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 24 June 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellants are 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. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellants appeal to the Upper Tribunal against the decision of the First-tier Tribunal Cartin promulgated on 22 September 2023 ('the Decision'). By the Decision, Judge Cartin dismissed the appellants' appeals on human rights grounds against the decision of an Entry Clearance Officer to refuse to grant them entry clearance to entry clearance to the UK for the purposes of settlement with their sponsor, who is a recognised refugee.

Relevant Background

2. The appellants are all nationals of Afghanistan. The first and second appellants are the parents of the third to fifth appellants, who are children under the age of 18.

3. The first appellant, Mr SBS, was born on 28 August 1961. The second appellant, Mrs NS, was born on 30 April 1971. The third appellant, Miss AS, was born on 20 March 2011; the fourth appellant, Master SKS, was born on 17 February 2013; and the fifth appellant, Master SNS, was born on 5 January 2014.

4. Their applications for entry clearance made on 20 May 2022 were sponsored by Mr SSS, whose date of birth is 30 December 1996. Although his relationship to the third to fifth appellants was originally disputed, at the time of the appeal hearing in the First-tier Tribunal it was accepted that Mr SSS was the older son of the first and second appellants, and that the third to fifth appellants were his siblings.

5. The basis of the applications was set out in a covering letter from SMA Solicitors dated 15 June 2022. Mr SBS had been the bread-winner until an injury had left him disabled and unable to perform his daily tasks, which included standing up and walking. He was now being cared for by his wife. This included cleaning, bathing, taking medication, etc. This had been confirmed by the local representative, the local religious Imam and village elders and locals. They also expressed their concerns in the event that Mr SBS and the remaining applicants remained any longer in Afghanistan in the state in which they were currently living. The family was dependent upon the financial support of his son, the sponsor, who lived in Great

Britain. They desperately needed the financial support of their son, and it would be very good if they could live with the sponsor.

6. In a letter dated 19 August 2020, the Imam of the Grand Mosque of Aghaz village confirmed that Mr SBS had unfortunately fallen while working on a building site and had suffered serious injuries to his legs, to the extent that he is now disabled. This incident happened about nine months ago, during the month of Asad 1399 (July/August 2020). After treatment in hospital, he had been at home ever since. He was no longer able to work, or even to attend the Mosque for daily prayers.

7. In an undated letter, a village resident whose first name was Abdullah said that he was a close friend of Mr SBS and had known him for 20 years. He could confirm that Mr SBS's condition was not very stable. He always came to him to have tea, and he talked about the hardships of his life. He confirmed that Mr SBS had a leg injury and was not able to work. He desperately needed the financial support of his son, who lived in the UK. It would be very good if he lived with his son. The whole family needed the financial support of their son.

8. The applications for entry clearance were refused on 15 November 2022. The applications of the first and second appellants were considered under the Immigration Rules relating to adult dependant relatives, contained in Appendix FM. In the refusal decision directed to the first appellant, it was noted that he had provided a letter from what appeared to be a representative of his local village in Afghanistan who stated that he had had a fall at work, and as a result he was unable to work. It was noted that he currently resided with his spouse and children, and that his sponsor had been providing him with financial assistance from the UK. No evidence had been submitted to suggest that his spouse was unable to provide him with the level of care that he might require, or that his sponsor's financial assistance in the UK could not continue. On the evidence that had been submitted with the application, they were satisfied that he was currently in receipt of suitable care in the country in which he resided, and nothing submitted with his application suggested that the care that he might require was not affordable. As a result, his application had been refused under paragraph EC-DR.1.1(d) of Appendix FM of the Immigration Rules with reference to E-ECDR.2.4 and 2.5.

The Hearing Before, and the Decision of, the First-Tier Tribunal

9. The appellants' appeals came before Judge Cartin sitting at Taylor House on 27 July 2023. The hearing was conducted remotely on the Cloud video platform. Both parties were legally represented, with Mr Nath of Counsel appearing on behalf of the appellants.

10. In the Decision, the Judge's findings of fact began at para [15]. At paras [20] to [24], the Judge discussed the evidence relating to the extent of Mr SBS's disability. At para [25] he found that the evidence did not support a finding or description of the first appellant being someone who is bed-

ridden. On balance, he found that he was evidently capable of standing, sitting and manoeuvring himself as shown in the photographs, and it was an exaggeration to say that he was bed-ridden.

11. At para [28] the Judge did not accept that it is more likely than not that he used a wheelchair. The photographic evidence undermined this assertion.

12. At para [29] the Judge accepted that the first appellant was less able than he previously was; that he was unable to work; and that he had mobility problems and some care needs as the result of his injuries. However, he did not accept that he required "*round the clock*" care. There had been scant detail of what assistance and support he needed, and therefore he could not conclude that he required long-term personal care to perform every-day tasks.

13. At para [30] the Judge said that still less could he conclude that the necessary support was not available to him in Afghanistan. Reliance was heavily placed upon the second appellant being his Carer. However, he was quite sure (for the reasons given already) that his reliance upon her had been significantly exaggerated. It was submitted that she was not able to leave the house without her husband to chaperone her. This, however, was not borne out by the evidence. Firstly, her husband did leave the house and was mobile. Secondly, women only required a chaperone if travelling more than 75km, as shown in the UNHCR report submitted by and relied upon by the appellants.

14. The Judge concluded at para [30] that the first appellant did not meet the ADR Rules, and at para [32] that there was simply no evidence that the second appellant had any long-term personal care needs. Vague reference was made to her having ill health, but nothing was elaborated on in this regard. So, the second appellant also did not meet the ADR Rules.

15. At paras [33] to [35] the Judge gave his reasons for finding that he was not satisfied, on the balance of probabilities, that the relationship between the third, fourth and fifth appellants and their sponsor-brother was such as to amount family life within the meaning of Article 8. At para [36] he said that even if he was wrong in this regard, he did not consider that he could reasonably conclude that the exclusion of these children from the UK was undesirable. He recognised that remaining in Afghanistan, with the return of the Taliban, would be highly unwelcome. Indeed, for the third appellant, life under the Taliban was likely to be far from that which she would wish for herself, with her rights and freedoms being significantly inhibited by the regime. He appreciated that her opportunities would be severely restricted as a woman in her home country:

> "Nevertheless, all the children are still just that. They live in the country of their nationality and birth. They live with their parents. They have never met (meaningfully at least) their sponsor-brother. In those circumstances, their exclusion is not undesirable. The status quo of life in Afghanistan will simply

> continue, albeit under a regime with which they may not agree. Regrettably, that is the case for many millions of people around the world. This is not of itself a good reason for three children to be extracted from all they have ever known to be sent to a foreign country to live with a family member who is essentially a stranger to them. I would not therefore find that Rule 297 is met, even if their human rights were engaged."

16. The Judge went on to consider proportionality, setting out firstly the factors weighing in favour of a grant of leave, and secondly the factors weighing against a grant of leave. The Judge concluded at para [40] that the factors in favour of immigration control outweighed the factors in favour of respecting the appellants' family lives. Their family life did not outweigh the need for immigration control.

The Grounds of Appeal to the Upper Tribunal

17. In the application for permission to appeal, four grounds were advanced. Ground 1 was that the Judge had reached irrational conclusions on the first appellant's medical condition. Ground 2 was that the Judge had reached arguably irrational conclusions relating to the situation of the second appellant. Ground 3 was that the Judge had reached arguably irrational conclusions as to the third, fourth and fifth appellants; and Ground 4 was that the Judge had failed to consider the children's best interests in accordance with *Mundeba (s55 and paragraph 297(1)(f)* [2013] UKUT 00088.

The Reasons for the Grant of Permission to Appeal

18. Permission to appeal was refused by the First-tier Tribunal, but following a renewed application for permission to the Upper Tribunal, permission was granted by Upper Tribunal Judge Fiona Lindsley on 16 May 2024.

19. She observed that it was arguable that the best interests of the children had not been placed in the balance, and also that there were serious and compelling family considerations, based upon the country of origin evidence regarding the position of women and girls in Afghanistan, which made the third appellant's exclusion from the UK undesirable - and possibly those of the other male children appellants. In these circumstances it was arguable that the appeals of the first and second appellants had been wrongly assessed, as even if they were correctly assessed as not meeting the Adult Dependant Rules, on the evidence submitted it ought to have been weighed in their favour that they had a family life relationship with an appellant or appellants who do meet the Immigration Rules.

The Error of Law Hearing in the Upper Tribunal

20. At the hearing before me to determine whether an error of law was made out, Mr Gajjar developed the grounds of appeal. On behalf of the respondent, Ms Isherwood submitted that a material error of law was made

out. The Judge had considered all the evidence, including the oral evidence, and had given adequate reasons for the findings which he had made. In reality, the error of law challenge was simply an attempt to re-argue the case.

21. After briefly hearing from Mr Gajjar in reply, and after hearing from both representatives on the issue of future disposal if an error of law was made out, I reserved my decision.

Discussion and Conclusions

22. Given the nature of the error of law challenge, which includes a challenge on rationality grounds, I consider that it is helpful to set out the guidance given by the Court of Appeal in *T (Fact-finding: second appeal)* [2023] EWCA Civ 475 as to the proper approach which I should adopt to the impugned findings of fact made by Judge Cartin:

> 56. The most-frequently cited exposition of the proper approach of an appellate court to a decision of fact by a court of first instance is in the judgment of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5:
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> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many.
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> (i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
> (ii) The trial is not a dress rehearsal. It is the first and last night of the show.
> (iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
> (iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
> (v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to the evidence (the transcripts of the evidence),
> (vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.
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> 115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has

> acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2022] EWCA Civ 1039 [2003] Fam 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] UKCLR 1135."
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> 57. More recently, Lewison LJ summarised the principles again in *Volpi and another v Volpi* [2022] EWCA Civ 464 at paragraph 2:
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> i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

23. In Ground 1 it is submitted that the Judge has irrationally concluded that while the appellant has had a fall and that he is in need of some medical attention, it is nonetheless his condition has been exaggerated and he does not need a wheelchair.

24. The contention that the Judge's finding on this issue is irrational is supported by reference to various photographs showing the first appellant in a wheelchair. It is also submitted that the fact that the appellant is also photographed sitting in a chair cannot rationally mean that it is more likely than not that he does not use a wheelchair, as it is possible for wheelchair users (with or without assistance) to move from a wheelchair to a chair or bed. The photograph said to be showing the first appellant raising his pelvis appears – it is submitted - to show an object under him supporting him.

25. I consider that the case advanced under Ground 1 is merely argumentative. At para [21] the Judge acknowledged that there was conflicting photographic evidence. Whereas there were photographs of the sponsor's father in a wheelchair, there were also other photographs which (in his view) pointed to a lesser degree of disability. The Judge said: "*He is reflected in some photographs with one leg crossed across the other. He is standing unaided in other photograph and in a further image he can be seen raising his pelvis from the bed with his feet planted on the bed.*"

26. While it may be arguable that the first appellant is not in fact raising his pelvis from the bed, this is a minor consideration in the context of the further discussion upon which the Judge embarks in paras [20] to [24]. At para [22] the Judge refers to a letter provided in English from an unknown author at the Farooqi Pharmacy. This speaks to Mr SBS visiting alone, and of the author's advice to him that he should be accompanied by someone. It also refers to an enquiry made of the first appellant as why he has not gone abroad to live with the sponsor when his leg injury is "*completely healed*". The Judge says that the obvious implication of this evidence is that the first appellant can get around without support from others, and that the expectation is that his leg will heal.

27. At para [23] the Judge discusses the letter from Abdullah, the close friend of the first appellant, whose letter was provided in support of the application (see above). The Judge observes that there is no mention of the first appellant being accompanied by others or using a wheelchair: "*Regrettably, the sponsor's efforts to rescue this aspect of the case, were unpersuasive. He suggested that people talk of his father's leg injury improving so as to make his father feel better. However, the letter is not addressed to his father. It is presumed it has been prepared for others to understand his condition or to assist with a visa application. This is not therefore an explanation I accept.*"

28. At para [24] the Judge goes on to address the sponsor's suggestion that talk of his father going for tea, when in fact he is bed-ridden, can be explained by the author's lack of education. The sponsor insisted that Abdullah was referring to when his father previously visited him before his injury: "*Having read the brief statement, this gloss on the evidence is not sustainable. The subject matter is the first appellant's condition and how they discussed the hardships of life together. The author confirms the leg injury and the need for financial support. It does simply not make sense when referring to past visits without also clarifying that there had been a change of circumstances because of the injury.*"

29. It is submitted that the Judge's assessment of the letter from Farooqi Pharmacy overlooks an important feature of the letter which undermines the safety of the Judge's assessment. This is that the document before the First-tier Tribunal was translated on 15 June 2021. While this is true, it does not in any way undermine the safety of the Judge's findings at para

[22], because, according to the application, the injury occurred the previous year, in July/August 2020. There was no medical evidence before the Tribunal to the effect that the first appellant's condition had deteriorated since 15 June 2021.

30. As to the Judge's analysis of the implication of the evidence from Abdullah, there is no merit whatsoever in the submission that the Judge's rejection of the sponsor's attempt to explain away Abdullah's evidence is irrational. Nor is there any merit in the submission that the Judge placed excessive weight on the discrepancies in the evidence that were engendered by Abdullah's letter. The question of how much weight to place on a particular piece of evidence is exclusively the province of the Trial Judge.

31. The Judge gave cogent reasons for finding that the first appellant did not qualify for entry clearance as an adult dependant relative under Appendix FM, and so Ground 1 is not made out.

32. Ground 2 is that the Judge's finding of fact on the second appellant is arguably irrational because the Judge overlooked the fact that the objective evidence which he cited went on to state that women are compelled to stay at home.

33. The passage from the UNHCR Report cited in Ground 2 states that girls in Afghanistan have been banned from secondary school and women from tertiary education. Women and girls have been banned from entering parks, public bars, gyms and sports clubs for four months. Women have been banned from working in NGO offices. Since the takeover of Afghanistan by the Taliban in August 2021, women have been wholly excluded from public office and the judiciary. Today, Afghanistan's women and girls are required to adhere to a strict dress code and are not permitted to travel more than 75km without a mahram. They are compelled to stay at home.

34. It is apparent from the passage relied upon that women and girls are not literally compelled to stay at home in all circumstances, and that was not the case that was advanced before the First-tier Tribunal. The case that was advanced was that the second appellant was unable to leave the house, without her husband to chaperone her. The Judge gave adequate reasons for rejecting this case at para [30]. As correctly stated by him, women only require a chaperone if travelling more than 75km.

35. In the light of that evidence, the Judge held that the second appellant was able to leave the home without her husband to attend to his 'care needs', which were non-specific.

36. The extract from the report cited in the grounds of appeal does not in any way undermine this finding. It does not say that women are not permitted to leave home in order to go to a pharmacy or to go shopping, for example.

37. In conclusion, the Judge gave adequate reasons for rejecting the case put forward in the First-tier Tribunal that the second appellant's ability to act as a Carer for the first appellant was compromised by the fact that she could not leave the family home without him, and so Ground 2 is not made out.

38. In Ground 3 it is submitted that the following finding made by the Judge at para [34] is irrational: "*Whilst I accept that the children of the family are dependent upon their parents who are in turn dependants of the sponsor, this is not the same as them being dependent on him themselves.*"

39. There is no irrationality in this finding. The Judge did not dispute that all the appellants were financially dependent upon the sponsor. He reasonably observed that the children did not have a direct dependency relationship with the sponsor, in that it was their parents who, although he did not spell this out, had the responsibility for caring for them as their Primary Carers

40. The Judge went on to find that there was no evidence of telephone communications between the siblings and the sponsor, and that his witness statement was silent on the contact and communication he had with them. In the circumstances he was not satisfied that the relationship between the siblings and their sponsor-brother was such as to amount to family life within the meaning of Article 8.

41. It is not suggested that this finding was not open to the Judge for the reasons which he gave, and so Ground 3 is not made out.

42. As to Ground 4, the Judge did not overtly conduct a 'best interests' assessment, but I consider that he effectively performed this exercise in para [37] when addressing whether the exclusion of the children from the UK was undesirable pursuant to Rule 297(i)(f).

43. Given that the children did not enjoy family life with the sponsor; and given that it was unarguably in their best interests to remain in the same household as their parents wherever their parents happened to be; and given that their parents did not qualify for entry clearance as adult dependant relatives, it was open to the Judge to find that the requirements of Rule 297(i)(f) were not met, for the reasons which he gave in para [36].

44. As the Judge had addressed the interests of the children in his discussion of Rule 297 at para [36], I do not consider that the Judge materially erred in law in not revisiting the issue when considering the factors weighing for and against a grant of leave in the assessment of proportionality.

45. The proposition was that the family should be granted entry clearance as a unit, not that the third appellant had such a compelling case that her best interests demanded that she be granted entry clearance, with the rest of the family in tow. Accordingly, it was reasonable for the Judge to

focus in his proportionality assessment on the situation for the family as a whole.

46. The Judge acknowledged at para [38](ii) that life for the family in Afghanistan, since the return of the Taliban regime, might well be uncomfortable or less than stable. However, he observed that this was not a Refugee Convention appeal, and there was no basis for the conclusion that the family faced a risk of serious harm from the regime. While it might be the view of the family that they would all have a better life in the UK than in Afghanistan, this was not an argument which carried much weight. Article 8 did not provide *carte blanche* people to make unchecked decisions on where to live. Some of the sponsor's more troubling assertions of the situation in Afghanistan were not supported by the objective evidence before him. While he was therefore sympathetic to the family's circumstances, it was not a factor deserving of anything other than little weight.

47. At para [39] the Judge identified as one of the factors weighing against a grant of leave that the appellants did not meet the Immigration Rules, and that a failure to meet them counted against a grant of leave.

48. In conclusion, the Judge gave adequate reasons for dismissing the appellants' appeals on human rights grounds, and no material error of law is made out.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision of the First-tier Tribunal stands. This appeal to the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal made an anonymity order in favour of the appellants, and I consider that it is appropriate that the appellants continue to enjoy anonymity for these proceedings in the Upper Tribunal.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
10 July 2024