



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/03055/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 13 July 2017**

**Decision & Reasons
Promulgated
On 27 July 2017**

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

**QS
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P Heidar, Solicitor, AA Immigration Lawyers
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Afghanistan. On 17 May 2017 I set aside the decision of First-tier Tribunal Judge Rowlands for error of law. I concluded that Judge Rowlands had not properly addressed the appellant's family circumstances. I directed that the case be listed for a further hearing in

the Upper Tribunal and that the appellant's brother and sister-in-law be both afforded an opportunity to give evidence that is tested in cross-examination.

2. At the further hearing the appellant's representative, Ms Heidar, called the appellant's brother, Mr F Rahman. He confirmed the truth of his witness statement and in reply to cross-examination from Mr Wilding, he said that the appellant's parents died when she was young and she had been looked after by her sister (his wife) until 2004, when the latter went to the UK as his wife. Between 2004 and 2014 (when she applied for entry clearance) her aunt was looking after her, but was finding it increasingly difficult because of her age and health problems. The aunt had heart problems and was paralysed in her legs and had a wheelchair. His aunt had various medicines for her medical problems, but they had not made her better and he believed she would die soon. His understanding was that the aunt could not look after the appellant and he and his wife were particularly concerned that the aunt could not protect her against harms such as rapes, kidnappings and forced marriage as her aunt's household had no male protector. Because she was old, neighbours and distant relatives in her village provided some help to her.
3. The witness said he sent money every month to the appellant, although at the date of decision he was still sending it to the aunt.
4. Mr Wilding asked whether there had been any direct threats to the appellant at the date of decision. Mr Rahman said there had not been, but he was constantly worried harm could come to her as in Afghanistan women are subjugated. Mr Rahman said that at the date of application the appellant was still at school; since then he had arranged for a private tutor to come to her house.
5. Mr Rahman said the appellant loved to go out but because of the security problems she could not go.
6. In submissions Mr Wilding said that there were only really two issues outstanding. One was whether the appellant's parents were in fact dead; the other was whether the appellant met the requirements of paragraph 297(1)(f) of the Immigration Rules. Mr Wilding said that in relation to the expert report from Dr Giustozzi, there was the need for a degree of caution. Most of its analysis focussed on the situation in Kabul whereas the appellant's home area was in Jalalabad. As regards the documentary evidence relating to the poor health of the aunt, the letter from the Ministry of Public Health gave no specific information about the treatment the aunt required for her paralysed hands and legs. The statement that she needed "enduring rest" was unhelpfully vague. The appellant had not established that her circumstances were compelling. At the date of decision she was living with her aunt and was in education, but notwithstanding the understandable worries Mr Rahman and his wife had

about her situation, she had not been subjected to harm and the evidence did not establish that she would be.

7. Mr Wilding said that he concurred with the submission made at the previous hearing by Mr Kotas, that if the appellant failed to meet the requirements of paragraph 297, she would not be able to show that there were compelling circumstances outside the Rules warranting a grant of entry clearance.
8. Ms Heidar submitted that as regards the appellant's parents, the appellant had submitted credible documentary evidence to show they were deceased. The witness, Mr Rahman, had given credible evidence. The focus of Dr Giustozzi's report on the likely problems the appellant faced was not confined to Kabul and there was a reference to Jalalabad. It was clear that after the appellant's sister left for the UK in 2004, the appellant's aunt had been able to look after her with no apparent problems for some years but by the date of application she could no longer do so. The fact that she was in a wheelchair spoke volumes about her inability to care for and protect the appellant. There had been specific proposals made by people in the village regarding the appellant and marriage against her will. Compared with Kabul, which at the date of decision was relatively safe, Jalalabad was insecure. The aunt could not control the appellant's activities nor movements and in this way the appellant's welfare and best interests were not being catered for.
9. As regards Article 8, Ms Heidar said that its requirements could not be equated with paragraph 297(i)(f). When assessing Article 8 it was necessary to have regards to family and private life considerations, whereas that was not so under paragraph 297(i)(f). Given that the appellant's parents were deceased and the appellant's aunt could no longer look after her, it would not be in the public interest to deny the appellant entry clearance.
10. Ms Heidar said that the judge had accepted that the appellant had shown there would be adequate maintenance and accommodation.

My Assessment

11. The ECO did not accept that the appellant met the maintenance and accommodation requirements of the Rules, but there is no longer any dispute regarding this matter. The FtT judge found that these requirements were met and the respondent did not submit any response disputing that finding. It was a finding that took account of further evidence provided by the sponsor and his wife as to their financial circumstances and their accommodation situation.
12. The ECO did not accept that the appellant had produced sufficient evidence to establish that her parents were deceased. Although appearing to accept that her parents were dead the FtT judge made no clear findings on this matter. However, the evidence before him included

death certificates, a letter from the Public Health Directorate confirming their death and an expert report from Dr Giustozzi which explained that he had forwarded the death certificates to one of his researchers based in Kabul who contacted a doctor at the hospital where the deaths were recorded who confirmed the certificates were genuine. The respondent has not adduced any evidence to contradict this body of evidence. I am satisfied that the appellant has shown her parents are deceased.

13. As a result of the appeal proceedings thus far, Mr Wilding accepts that the appellant lives with her aunt in Jalalabad and that the only remaining issue concerns whether or not the appellant meets the requirements of paragraph 297(i)(f) on the basis that she has a relative (her sister and brother-in-law) present and settled in the UK “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”. It is not in dispute that the appellant’s sister and brother-in-law are present and settled in the UK and that at the date of application the appellant was a child.
14. On the basis of the documentary evidence and the further oral evidence I heard from the appellant’s brother-in-law I am satisfied that after her parents died the appellant was looked after by her sister until 2004 when the latter left for the UK. I am further satisfied that from 2004 until the date of application the sister and brother-in-law in the UK have continued to provide for her financially and also to take the important decisions about her upbringing. I do not understand Mr Wilding to dispute that this is the case and it has been the consistent evidence of the appellant, her aunt, her sister and brother-in-law in their witness statements. In her written statement the aunt states at paragraph 3 that:

“Her sister in the UK sends her money which enables me to buy food, clothes and all other associated costs. I have to ask her sister’s permission for any decisions in her life.”
15. Mr Wilding asked a number of questions of Mr Rahman regarding the financial aspects of his and his wife’s support of the appellant and in my judgement Mr Rahman’s answers were satisfactory.
16. Mr Wilding also asked a number of questions to Mr Rahman about the health and physical capacity of the appellant’s aunt; his replies were to the effect she was wheelchair-bound and in declining health with not long to live. Whilst I am prepared to accept that the aunt is paralysed in one of her hands and legs and may be wheelchair-bound, I am not persuaded that her medical condition is extremely serious or that, in Mr Rahman’s words, she is likely to die soon. In any event, whatever might be the situation in 2017 I have to decide what the facts were at the date of decision in January 2015. The evidence produced by the appellant establishes that the aunt is elderly and that one of her hands and legs are paralysed. I am also prepared to accept the description in the letter from

the Public Health Directorate that she needs constant treatment and is unable to look after herself.

17. At the same time, it is clear to me from the witness statements that through one means or another the aunt gets help with her own care and that hers is a functioning household. It is also clear that the appellant plays a part in the daily life of the household, performing chores, but that these did not prevent her from going to school (she was still attending school at the date of the application and decision).
18. The only two aspects of the evidence that are not sufficiently clear concern: the extent to which the appellant was receiving care and supervision at the date of decision; and the extent to which she was receiving adequate protection against a range of harms, in particular the threat of forced marriage.
19. In relation to the extent of the care and supervision of the appellant, my starting point is that because she was still a minor at the date of decision her welfare and best interests must be treated as a primary consideration, notwithstanding that she is applying to enter the UK: see **Mundeba (s. 55 and para 297(I)(f)) [2013] UKUT 0088 (IAC)**.
20. Whilst the witness statements strongly reflect the subjective view of the appellant, her aunt and sister and brother-in-law, their terms are somewhat vague and elusive when it comes to piecing together the precise nature of her social and economic environment. It does seem clear to me, however, that as a result of the close involvement of her sister and brother-in-law in ensuring the appellant is properly cared for, that her aunt's household is economically secure and through one means or another it is a stable household. There is also help from fellow-villagers who include distant relatives. Further, whilst the aunt herself increasingly feels she cannot supervise the appellant, at the date of decision the appellant was being sent to school and there has been no mention of the appellant being neglected or mistreated. Even though the aunt physically handicapped and burdened by her own medical problems, the appellant's sister and brother-in-law are involved in all the important decisions in the appellant's life. The sister and brother-in-law (Mr Rahman) were (and are) clearly (and understandably) worried that the appellant's situation would (will) change for the worse, as a result of the aunt's age and poor health, but the evidence falls short of establishing that at the date of decision there were no longer stable arrangements for the child's care. The appellant herself clearly feels that her own views are increasingly divergent from those of her aunt (the former believing that women and girls should be able to live full lives; the latter holding conservative views), but it is very clear from Mr Rahman's evidence that he and his wife are sympathetic to the appellant's viewpoint and are in a position to act to assist the appellant (as they have done, post-decision by getting her a home tutor to ensure her education continues after she finished school).

21. That leaves the issue of sufficient protection of the appellant. Mr Rahman's oral evidence highlighted his worries that the appellant at the date of decision when she was a young woman would be vulnerable to acts such as rape, abduction and forced marriage. The expert report from Dr Giustozzi, albeit largely focused on Kabul, identified the vulnerable position of women and young girls in Afghanistan. The evidence of Dr Giustozzi also highlighted that Jalalabad is an area of the country where, in early 2015, there was a significant level of insecurity due to armed conflict. At the same time, the evidence of both on this matter was generalised. Given that Mr Rahman and his wife are accepted as the two persons who take all the important decisions in the appellant's life, it is a reasonable inference that they were satisfied the appellant could be safely maintained and accommodated in her aunt's house, albeit with help from neighbours and extended family. There is no suggestion that they took any steps to relocate the appellant to somewhere safer within the area or to another area of Afghanistan.
22. The only specific evidence of possible harms concerns proposals of marriage which would amount to forced marriage. The evidence of the aunt at paragraph 5 of her witness statement was that:

"Elderly men in our village have also asked for her hand in marriage and I always make some excuse up. I will not be able to stop their advances and I'm afraid she will be forced into marriage. They can see I'm old and frail and will take advantage."
23. I regret that I do not consider this squares with the objective facts. As already noted, it was also the aunt's evidence that "I have to ask her sister's permission for any decisions in her life" and that the sister and Mr Rahman were closely involved in ensuring adequate care and control of the appellant. It is inconceivable on that evidence that any decisions about the appellant's marital status could be made without consultation with them and it is unrealistic to consider that they would not be in a position to rebuff any unwanted offers of marriage.
24. I have read the undated witness statement for the appellant which, because it refers to having the help of a home tutor, must have been written post-decision. It is difficult not to feel sympathy with the appellant's situation, as in the statement she clearly feels "suffocated" by having to live with her aunt and that "I hate my life". It is clear that one of the driving considerations in the appellant's view of her life is that her sister, when she left for the UK in 2004, "promised she would take me with her". Yet for one reason or another no application was made until the appellant was approaching adulthood. If the appellant had been several years younger at the date of application, it would have been necessary to consider that she was going to face increasing problems in receiving proper care and supervision in her aunt's household, but at the date of decision, as I have already found, I do not consider that her social and economic environment had deteriorated to the extent that there existed

“serious and compelling family or other considerations” which made her exclusion from the UK undesirable. Whilst the post-decision evidence can be considered as to what light it sheds on her circumstances at the date of decision, what it shows is that even though the appellant has been feeling increasingly frustrated with her present circumstances, she has been able to continue her education and she has shown herself to be an intelligent young woman of strong views about the position of women. The post-decision evidence sheds light back on the situation at the date of decision in demonstrating that because of her education and views she was a person likely to reach adulthood (as she now has) without experiencing a deterioration in her social and economic environment sufficient to engage paragraph 291(i)(f). For the above reasons I do not consider that she has shown she meets the requirements of the Immigration Rules.

25. Whilst in the abstract it is quite possible for an appellant unsuccessful under the Immigration Rules to succeed on Article 8 grounds on the basis of compelling circumstances outside the Rules, the factual matrix in this appeal is not such that the appellant can show such compelling circumstances. They are circumstances that deserve sympathy but not ones that bring the appellant within any relevant legal framework.

Notice of Decision

26. For the above reasons:

The FtT judge has already been found to have erred in law and his decision has been set aside.

The decision I re-make is to dismiss the appellant’s appeal.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date:27 July 2017

H H Storey

Dr H H Storey
Judge of the Upper Tribunal