



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/13828/2018 (V)  
HU/13830/2018 (V)  
HU/13831/2018 (V)  
HU/13832/2018 (V)

**THE IMMIGRATION ACTS**

Heard by Skype for Business via Field House  
On 5<sup>th</sup> May 2021

Decision & Reason Promulgated  
On 26<sup>th</sup> May 2021

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

ZD (1)

AD (2)

AMD (3)

RD (4)

(ANONYMITY ORDER MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

**Representation:**

For the Appellant: Mr R Jesurum, of Counsel, instructed by Lawrence & Co  
Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

**Interpretation:** Mr A Janbaz in the Pushtu/ Pashto language

## DECISION AND REASONS

### *Introduction*

1. The appellants are citizens of Afghanistan: the first appellant is the mother of the second, third and fourth appellants. Their dates of birth are 1962, 2003, 1998 and 1999 respectively. They reside in Pakistan with no lawful status having fled from the Taliban after the killing of the first appellant's husband/ father of the second, third and fourth appellants, who was a district governor in Afghanistan. They have applied to come to the UK to join OD, the sponsor, who is the son of the first appellant and sibling of the other appellants. He was granted refugee status and five years leave to remain on 26<sup>th</sup> June 2014, and indefinite leave to remain in October 2019. AGD, brother of the sponsor, also a son of the first appellant and sibling of the other appellants, also had leave to remain in the UK as a recognised refugee and now is a British citizen who supports the application of the appellants. DNA evidence has shown that the relationships between the appellants and the sponsor, OD, is as claimed.
2. The appellants applied for entry clearance to join the sponsor, and were refused in a decision dated 15<sup>th</sup> November 2018. At the same time OD's wife and four children applied to join him. They were also refused, but when DNA evidence showed that they were related as claimed they were granted entry clearance and joined him in the UK. The appeal of these appellants against the refusal of entry clearance to join OD was dismissed by First-tier Tribunal Judge Meah, but there was an appeal to the Upper Tribunal and the decision of Judge Meah was set aside and remitted to the First-tier Tribunal for remaking, with no findings preserved. The appeal was remade and again dismissed, this time by Judge of the First-tier Tribunal Andonian, in a decision promulgated on 13<sup>th</sup> September 2019. Permission to appeal was granted, and a Panel found that the First-tier Tribunal had erred in law for the reasons set out at Annex A to this decision.
3. The matter comes before me now to remake the appeal. The hearing was held via a remote Skype for Business hearing in light of the need to reduce the transmission of the Covid-19 virus, and in light of this being found to be acceptable by both parties, and being a means by which the appeal could be fairly and justly determined. There were no significant issues of audibility or connectivity in the hearing.
4. Mr Jesurum for the appellant accepted at the error of law hearing that there is no challenge to the dismissal of the appeal by reference to the Immigration Rules at paragraph 319, and the Panel found that there was no error in this decision-making so the remaking of the appeal focuses solely on the appeal considering Article 8 ECHR outside of those Rules. The

bundles were served late so the hearing was adjourned by two hours to give Mr Walker time to read them. He confirmed that he was ready to proceed after this time.

*Evidence & Submissions – Remaking*

5. The appellants called the following witnesses to give evidence. Their key evidence from their written statements and oral evidence is, in short summary, as follows. They all confirmed their identities, addresses and that their statements were true and correct to the best of their belief, and their evidence to the Upper Tribunal in support of this appeal
6. OD, settled refugee living in the UK, is the principal sponsor of the appellants. He came to the UK and was granted refugee status without an appeal by the respondent in June 2014. He joined his younger brother, AGD, who had come to the UK as a minor in 2006, and who is now a British citizen and married with two children. OD works as a taxi driver. He is married with five children. The appellants are his mother and three younger siblings, the youngest of whom is AD who is now just 18 years old, his sisters, AMD and RD, are unmarried young adults aged 23 and 22 years old respectively.
7. In October 2006 OD's father was assassinated by the Taliban, and in October 2007 OD fled Afghanistan with the appellants and his wife to a place near Peshawar in Pakistan. OD became head of the family following his father's death and took on responsibility for the care of the appellants. In Afghanistan he had been living with his wife, whom he married in April 2006, and the appellants as part of an extended household.
8. In Pakistan the appellants, OD, his wife and their children were accommodated by HZG in the village of Ikramullah Khan, in the Karkhano district about two hours from Peshawar. When OD left Pakistan HZG had given the appellants two rooms in his house, but this was not supposed to be a long- term arrangement. HZG expected OD to take care of his own family, as head of the household, and obtain visas for them to join him in the UK when he got refugee status there in 2014. HZG helped in this way as he was a good person and friend of OD's father and understood their plight. In the past, after OD came to the UK, messages from the appellants were got to him via HZG when he went to the city of Peshawar as telephone and internet reception were poor in the village where they lived. OD currently has no way of direct contact with the appellants and just has information about the appellants through people who travel to Pakistan from the UK: in recent times news has been brought by Dr H who is an Afghan refugee and WM who is a student in the UK from Afghanistan but who is normally resident in Pakistan.

9. OD has supported the appellants financially in Pakistan by sending money to people who agree to accept it on their behalf and taking larger amounts when he has travelled. He cannot send it directly to the appellants as they have no status in Pakistan, he has provided evidence of five recent money transfers of approximately £50 each via Western Union to a number of trusted individuals in the period October 2020 to February 2021. He has also recently sent £400 with Dr H and £400 with Mr J. Sometimes his brother, AGD, also sends money.
10. From 2017 HZG wanted the appellants to leave his home. HZG asked OD formally in letters dated March and September 2018 to remove the appellants from his home. In July 2019 HZG had a stroke and became bedridden. HZG died on 24<sup>th</sup> February 2020 and his brother JG became aggressive to the appellants, blaming them for adding stress to HZG and causing his death, and demanding that they leave HZG's house. The appellants now live in an animal shelter, which is provided to them by the uncle of their friend WM. It is not properly fit for human habitation and has no water supply or electricity.
11. The appellants also have problems due to the operation of terrorist groups in the area, and as a result AD has not been able to attend school and has been deprived of an education. OD has been AD's father figure since he was four years old, when his biological father died, and has been brought up with OD's own children in one family unit. OD has maintained his family ties to all the appellants via yearly visits in the period 2014 to 2017 after getting refugee status in the UK. AD has medical problems which cause dangerous bleeding, and this is a concern to OD. In the past AD has only been able to access hospital in the past with the help of HZG, although even then the police tried to stop them as they did not have documentation. OD is also concerned that AD has become depressed since his wife and children left Afghanistan, something that HZG told him before he died. OD's children and wife are also affected by the break-up of their family, with the appellants left in Afghanistan, and his eldest son has written a letter about his distress. OD understands the first appellant, his mother, is also depressed, has heart problems and high blood pressures, she has lost weight and was recently in hospital with Covid-19.
12. OD is also worried that the Pakistani authorities will deport the appellants to Afghanistan despite their being refugees with no regard to whether they are at risk in that country. If the appellants returned to their village in Shamspoor in the district of Surkhroud, Nangahar they would be at risk from insurgents and the Taliban, particularly as they would be without a male head of family. OD is afraid his siblings would be sexual abused by militants and his sisters forced into marriage. OD is not a rich man, and also could not afford to support the appellants properly in Afghanistan.

13. OD did not apply for entry clearance for the whole family until February 2018 as he was advised he was only entitled to bring his wife and children, and not his mother and siblings, and did not want to split up the family. The appellants and his wife and children have lived all of their lives as a joint family from the point of his marriage in Afghanistan until his wife and children travelled to the UK, following their grant of entry clearance, in February 2019. He applied for the whole family to come to the UK when he had some ability to provide support and accommodation in the UK and at a point when HZG was asking more insistently that he move the appellants out of his accommodation. OD cannot return to Afghanistan as he is a refugee, and cannot live in Pakistan with the appellants as he has no right to reside there, and like the appellants would be vulnerable to removal to Afghanistan, and without any means to support himself and the appellants.
14. OD says if the appellants were allowed to come to the UK he would now be able to accommodate them: he now has a three bedroom flat with two reception rooms: his children are all young and they would have sufficient space. He has also produced evidence dated April 2021 that if they were to join him that the property would not be statutorily overcrowded from McLaren Environmental Services Ltd, which is at page 112 of the consolidated bundle. Further, his brother AGD could also provide accommodation to his sisters if need be as he has a three bedroom property, and sufficient space. OD could also support his family including the appellants using his income from work, universal credit and child benefit, and savings of £2000. He also believes that his appellant siblings would be able to get work within the Afghani/Pakistani community. He has obtained a written offer of work dated April 2021 for the second appellant, AD, from Pizza GoGo, as a kitchen assistant working full time on the minimum wage, along with evidence of the existence of this company and witness statements from the manager and from the owner; and also letters offering unskilled work to the third and fourth appellants from Fresh Market, also dated April 2021, along with evidence of that company existing and witness statement from the owner.
15. AGD is the son of the first appellant and sibling of the second, third and fourth appellants, and brother of OD, the principal sponsor. He is a British citizen, who was granted refugee status when he came to the UK, and lives in the UK with his wife and three young children. He is happy to accommodate his sisters or mother in his two bedroom property with sitting room if they are permitted to come to the UK, as he, his wife and his three young children all sleep in one room. He works as a black cab driver, and has income from this work, a government Covid grant, tax credits and child benefit. He confirms that people within his community will provide simple packing and cleaning jobs for his appellant siblings if they are permitted to come to the UK.

16. He confirms that OD's delay in applying for entry clearance from 2014 to 2018 was caused by the fact he was told he could not bring the appellants. He confirms he has provided some financial support to the appellants over the years, and that OD, his family and the appellants lived as one family. OD kept in touch with the appellants after he obtained refugee status in the UK by visits for the following periods: September 2014 to December 2014, September 2015 to December 2015, September 2016 to December 2016, August 2017 to November 2017, October 2018 to November 2018. He confirms that HZG ran out of patience providing the appellants with accommodation, and demanded that OD remove them from his home. AGD last travelled to Pakistan in November/December 2016 to see the appellants and found that the place was insecure, and he himself was threatened by the Pakistani army even though he had documents. His younger brother, AD, has not had schooling there because of the dangers from insurgents and risks of him being brain washed by fanatics. The appellants situation is now even worse as they have been thrown out of their accommodation with HZG after his death by his family and live in a place not fit for human habitation. It would not be safe for the appellants to return to Afghanistan as the family would have no male protector and the Taliban continue to pose a threat in their home area. It is very worrying that currently they do not even have phone contact with the appellants. AGD gave evidence that the separation from the appellants weighs heavily on his brother, OD, who is under a lot of pressure and stress as he is responsible as the head of the family and father-figure to AD.
17. Dr H is a citizen of Afghanistan, recognised refugee and qualified medical doctor working as a lecturer in international public health at City University. In Afghanistan he worked as a senior public relations adviser in government, and also in a very senior role managing the health service with some 5000 staff beneath him. He has a Master's degree in global health from University College London. He came to the UK in May 2018 and was recognised as a refugee in March 2019 by the respondent without having to attend a court. He remembers that he met OD in 2005 when OD's father was the district governor of his area, and he knew OD's father from when he would visit him with his father as a child. OD's father was a very good friend of his, and he knows that the appellants and their family lived well in Afghanistan before his death. After OD's father was killed in an explosion caused by terrorists he has felt an obligation to look out for the family in memory of his friend.
18. Dr H explains that OD asked him to go and see the appellants when he travelled to Pakistan in March 2020, and gave him £400 to take to the appellants. He was in Pakistan between March and June 2020. He was deeply affected by his visit to the appellants. He had travelled to Pakistan to see his father who was ill in a coma in hospital there, but before going to see

his father he went to see the appellants and found that their situation was terrible. He was shocked to see them live like that, in a way that he had not seen people live before. He found them living in a remote part of Peshawar in distressing and depressing circumstances compared even to normal life in war torn Afghanistan. There was no electricity and no potable water. The first appellant told him that they lived there to avoid detection as they had no papers to live in Pakistan. The place was a donkey shelter used by nomads which smelt badly of donkey dung. The second appellant, AD, was confined in this place due to the threat of his being taken by insurgents, and Dr H was concerned for his health. AD was bleeding from the back passage due to haemorrhoids, having been operated on by an unqualified local healer. Dr H fears that AD is at risk of infection due to the unhygienic circumstances he is living in and his problems with bleeding. He believes that the appellants are vulnerable due to the insurgents who are active in the area and the fact that they have no male protector since the illness/death of HZG. The first appellant is also depressed. He believes that they should be permitted to come to the UK.

19. WM is a citizen of Afghanistan and dependent of a recognised Afghan refugee who went to Pakistan 40 years ago. WM is currently studying for Master's degree in data science at the University of Essex. He came to the UK in March 2021 and has permission to remain as a student until February 2022. He has known OD for about ten years, and thus got to know him in Pakistan before he travelled to the UK and obtained asylum.
20. WM is aware that the appellants were helped by HZG when he was alive, and he believes that HZG did an honourable thing to take them on and provide for them, especially as he had to protect three women. However, HZG wanted OD to take over the task, and things became very difficult when HZG got sick. HZG died, having been ill for some time, in February 2020. HZG's brother JG believes that the stress of caring for the appellants led to HZG's death and is very angry about them having lived with him, and when asked by WM said he did not have HZG's death certificate but would refuse to give it to OD even if he had it. As JG was so cruel and angry the appellants had to leave HZG's home.
21. OD asked WM for help getting the appellants a place to live in Pakistan but it was very difficult as they have no status there, and so have no right to live there, work or have a bank account, and further they cannot seek help from the police or use the hospital. It is also not possible for them to have a mobile phone as a Pakistani ID card is needed to buy a SIM card in Pakistan. No one wanted to help them with accommodation, and it was only with difficulty that he persuaded an uncle to allow them to use a shelter he had used for his animals. This place is very remote, about 2 hours from Karkhano. There is no kitchen, running water or electricity, and the water

they drink is not fit for human consumption. There are no actual doors or windows in the structure, just holes. The appellants are all depressed, and the second appellant has problems with bleeding from haemorrhoids which were treated by an unqualified doctor. It is also insecure as there are lots of insurgents in the area, and these pose a particular risk to the second appellant. WM is aware that OD sends money to support the appellants: WM has taken money to them himself and so has Dr H. He is aware of Dr H's visit to the appellants as he gave him directions to find the shelter where they live. However, money can only buy food and not a proper life for the appellants in Pakistan.

22. NK is a British citizen of Afghan origin who came to the UK in 2010. He had permission to remain on humanitarian protection grounds originally. AGD is his best friend in the UK, who helped him when he had severe mental health problems, and so out of friendship he makes the offer of employment as a kitchen porter to the second appellant, AD. He is the manager of the business PizzaGoGo and is in a position to make the offer. It is a genuine offer of employment and the job genuinely exists.
23. There are also written statements from two further people who did not attend the Upper Tribunal to give evidence. Firstly, Mr FF who is a British citizen of Afghan origins and who has lived in the UK since 1998. He knew AGD and OD's father and feels sorry for the appellants and wants to help the family. He owns a supermarket, TW Fresh Market Limited, and is able to offer cleaning jobs to the third and fourth appellants, and confirms that the offers are genuine and that the job genuinely exists. Secondly, Mr RS who confirms that he is the owner and director of PizzaGoGo and confirms that he supports the job offer made by NK, and that he is also a friend of AGD.
24. The original expert report of Dr Giustozzi, renowned expert on Afghanistan, for these appellants is dated 7<sup>th</sup> March 2018. Dr Giustozzi sets out his experience and publications, and confirms his overriding duty to the court. He states that the appellants would be at risk of attack from the Taliban if they were to resettle in areas where the Taliban is active such as their home area of Nangarhar, and that the police would not be able to protect the appellants if they were to return. With respect to Pakistan Dr Giustozzi confirms that the Pakistani authorities have increasingly been harassing Afghans living on their territory. From around 1999 the Pakistani authorities were restricting the admission of new refugees and the majority of refugees were not properly registered with UNHCR due to the behaviour of the Pakistani police. In April 2006 UNHCR deregistered all Afghan refugees on Pakistani territory, however Afghans continued to enter Pakistan with the result that there are large numbers of unregistered Afghan refugees in Pakistan. It is therefore plausible that the appellants have lived in Pakistan



since 2007 without being registered. It is also the case that the appellants could be deported from Pakistani for being there without documentation, that there are increasingly frequent crackdowns on Afghans living illegally in Pakistan, and that the Pakistani government does not accept any new Afghan refugees so there is no possibility of obtained refugee visas to lawfully remain there. It is also very difficult for a woman to rent a property as in 2011 the Peshawar district administration issued an order barring the renting of accommodation to women living alone. Dr Giustozzi confirms in his updating email of 29<sup>th</sup> April 2021 that the dangers for the family in Pakistan remain the same and that the risk in Afghanistan from the Taliban in the form of targeted killings has increased since the autumn of 2020.

25. The respondent reasons for refusal in the entry clearance refusal notices are that the appellants do not have family life with the sponsor OD, and that any interference with a private life relationship with OD and AGD is proportionate as they resided for four years apart from the time OD gained refugee status in the UK and there is insufficient evidence of their circumstances in Pakistan to find that the refusal to issue entry clearance is a disproportionate interference with their Article 8 ECHR rights. Mr Walker said he had no instructions to concede the appeal but it was accepted for the respondent that the appellants were related as claimed due to the DNA evidence; and further he accepted that there was now credible evidence about there being sufficient financial support and accommodation in the UK for the appellants, and about the appellants' living circumstances in Pakistan. Mr Walker submitted that I should make a decision on the evidence before me.
26. It is argued by Mr Jesurum in oral submissions and in his skeleton argument, in short summary, as follows.
27. It is submitted firstly that the appellants and sponsor have real, effective and committed family life, and that there are more than normal emotional bonds between them. It is clear from the evidence that they formed a household prior to the sponsor's entry to the UK, indeed that this existed from birth for OA and the appellants as they had spent their whole lives together, first in Afghanistan and then in Pakistan, until he was forced to flee to the UK as a refugee in 2014. It is argued that family life continues in light of their past cohabitation; in light of the fact that OA remains head of the household with his sibling appellants being unmarried young adults and his mother a widow and he having taken on the role of father to the second appellant from the age of four years; as a result of the regular financial support provided by OA; and as a result of OA's regular and lengthy visits to Pakistan prior to Covid-19 making these impossible. The only element missing at present is contact but it is argued that this is reflective of the appellants' current desperate circumstances, which mean

that visits and phone contact are impossible due to the pandemic and the fact the appellants cannot buy a phone SIM without a Pakistani ID card and have no electricity to charge a phone in any case. Lack of contact is therefore not due to a lack of a bond between them but their circumstances.

28. It is argued secondly that refusing entry clearance to the appellants is a disproportionate interference with their right to respect for family life.
29. It is argued that there are insurmountable obstacles to family life being reconstituted elsewhere because they cannot reconstitute their family life in Afghanistan because OD is a refugee who has an ongoing well founded fear of persecution in that country, reflected in the decision of Judge Metzger with respect to AGD; and further they cannot have family life in Pakistan because he and they would be/are at risk of refoulement and without any status or right to live there.
30. Reliance is placed on material evidence, particularly the witness evidence from OD, Dr H, WM, AGD, the medical evidence, the country expert report from Dr Antonio Giustozzi and country of origin reports from Human Rights Watch which supports the contentions that the appellants would be at real risk of serious harm in Afghanistan, and that they are at real risk of expulsion to serious harm in Afghanistan by the Pakistan authorities and living in unduly harsh circumstance in Pakistan. In Pakistan the appellants are living in terrible poverty without the basics of a private life. They are undocumented and therefore facing difficulties accessing basic services and moving around in Pakistan with being harassed, and lived in fear of arrest and deportation to Afghanistan where they would be at real risk of serious harm. The situation in Pakistan, and lack of option to return to their country of nationality Afghanistan, is therefore highly material to the proportionality of the decisions under Article 8 ECHR.
31. In addition, it is argued that the best interests of the second appellant, AD, who although no longer a child is only just 18 year old and has had a deprived childhood, being uneducated and unwell, and thus should be afforded the protections given to children as a very young adult, are also highly material when considering the proportionality of the decision to refuse entry clearance. His medical difficulties, his lack of access to education and employment, the risk of ill-treatment, refoulement, and restriction on his movements in Pakistan due to his lack of status there, and the precariousness and poverty of his accommodation all auger for his being allowed to join the sponsor, OA, in the UK. It is argued that the sponsor stepped in as AD's father figure when his biological father was murdered in Afghanistan when he was just four years old, and thus in all of the circumstances it is also plainly in his best interests to be with the father figure who raised him.

32. It is also submitted that the family reunion policy of the respondent gives examples where exceptionally broader family reunion should be allowed in accordance with Article 8 ECHR, and although the examples are not similar to the facts of this case, that there are compelling and exceptional compassionate features of the same gravity in this case. It is argued that the medical difficulties of the first and second appellants, and the desperate poverty in which the appellants currently find themselves, which shocked Dr H who is a family friend but also a qualified public health professional who had held a senior position in the Afghan health service, mean that refusal of entry clearance would be disproportionate in accordance with the policy of the respondent for grants outside of the Immigration Rules.
33. It is acknowledged, having regard to s.117B of the Nationality, Immigration and Asylum Act 2002, that weight must be given against the appellants due to their inability to speak English. However the credible evidence of the job offers for the second, third and fourth appellants and earnings of OA and AGD and their sufficient accommodation means that it should be accepted that they would not financially reliant upon the state, and so would be financially independent of taxpayer. This is therefore a neutral matter.
34. It is argued that although weight must be given to the fact that the appellants cannot meet the requirements of the refugee family reunion Immigration Rules, and their inability to speak English the weight of the other factors: the genuine family life bonds between members of a pre-flight refugee family; the fact of there being insurmountable obstacles to family life anywhere else; the precarious circumstances and absolute poverty in which they live in Pakistan; and their inability to return to Afghanistan due to a well founded fear of persecution means that the appeal should be allowed as ultimately the refusal of entry clearance is a disproportionate interference with their right of respect to family life.
35. At the end of hearing I indicated that I would allow the appeal on Article 8 ECHR grounds, but I did not give an oral judgement.

*Conclusions – Remaking*

36. Mr Walker conceded that the evidence in this appeal is credible. I find that the witness evidence and documentary evidence before me, which was very detailed, heartfelt and consistent, is reliable and thus evidence on which weight can be placed.
37. The first issue to determine is whether the sponsor, OD, and the appellants have an Article 8(1) ECHR family life relationship. They are all adults and this must therefore be a relationship that amounts to real, effective or committed support, and thus something more than normal emotional ties, as per the tests in Rai v ECO Delhi [2017] EWCA Civ 320 per Lindblom LJ at

paragraphs 17, 36-37 and Kugathas v SSHD [2003] EWCA Civ 31 per Aden LJ at paragraph 25.

38. I find that there is a family life relationship, showing real, effective and committed support, for the following reasons. The sponsor, OD, and his wife, after marriage, lived together as a family with the appellants in their country of origin in Afghanistan. They then fled together to find safety Pakistan after the death of OD's, and the second, third and fourth appellants' father and first appellant's husband at the hands of the Taliban. They then lived together in Pakistan with his father's friend HZG for seven years until the sponsor left to claim asylum in the UK, with OD's wife and children remaining with the appellants for a further five years, until they joined OD in the UK in February 2019. There are therefore very many years of cohabitation for OD, his wife and children and the appellants and I find that they perceived themselves as one family, with OD as the head of that family after his father's death. I accept the evidence that he was viewed as a father figure by the second appellant, and is missed as such, having brought him up from the age of four years, and the evidence that he has continued to be the person responsible for keeping everyone safely housed and financially supported after they fled to Pakistan.
39. Although OD left Pakistan to claim asylum in 2014 he returned, after obtaining refugee status in the UK, for substantial visits of three months to the appellants in 2014, 2015, 2016 and 2017. He also kept in touch whilst HZG was alive and well by sending and receiving messages through him. OD has also sent regular financial support via people travelling or when he travelled, and to trusted people via Western Union, to pay for food and other living expenses. OD is clearly deeply troubled and saddened by his failure to reunite the appellants with himself, his wife and children in the UK, from his own evidence and that of the other witnesses. The appellants have no other family of their own, in the sense that the first appellant is a widow, and the second, third and fourth appellants are all very young adults who have not formed separate family units or lived independently. I find that OD has shown long-term real committed support, both in the sense of shouldering responsibility, for instance sorting out the current accommodation when it became impossible for them to remain in the house of HZG after his death due to the hostility of JG, and in providing financially for the appellants by taking money when he travelled, sending it through friends when they travelled and transferring smaller amounts via Western Union; and that his relationship goes a long way beyond normal emotional ties of an adult son with his mother and siblings, particularly in relation to the second appellant with whom I accept he has father/son type relationship. Whilst OD cannot currently visit or have phone contact with the appellants this is due to the pandemic and their accommodation being without electricity/ phone SIM cards not being available without a

Pakistani ID card, and I find this, as Mr Jeserum has submitted, is not reflective of there being no family bond between them.

40. I must now go on to consider whether the interference with that family life which refusal of entry clearance to the appellants represents is disproportionate in all of the circumstances.
41. As accepted by Mr Jeserum there are matters which weigh against the appellants. They are unable to meet the requirements of the Immigration Rules for refugee family reunion, and there is a public interest in the maintenance of immigration control and the refusal of those who cannot meet those Immigration Rules, applying s.117B(1) of the Nationality, Immigration and Asylum Act 2002. In addition, it weighs against the appellants that they cannot speak English, applying s.117B(2) of the Nationality, Immigration and Asylum Act 2002.
42. I find that it is a neutral matter that the appellants would be financially independent of the taxpayer, applying s.117B(3) of the Nationality, Immigration and Asylum Act 2002. This is because I find, as was accepted by Mr Walker for the respondent, that they can be accommodated without recourse to public funds as they have provided credible evidence that their living with OD would not make his new flat statutorily overcrowded, and in light of the fact that AGD is also willing to provide accommodation too. I also find that the full time job offers for work which will not require skill or English language on the minimum wage made to the second, third and fourth appellants, who are all young adults, are for real work and made in good faith by businessmen in the Afghan community who are able to make those offers and who are motivated by being close friends of AGD and aware of the compassionate circumstances of the appellants. The letters are supported with evidence of the businesses and of course NK gave oral evidence in support of his offer. In addition, both OD and AGD are in work, and OD has £2000 worth of savings.
43. Weighing in the appellants favour are the following matters. Firstly, it weighs heavily in the appellants favour that I find that family life cannot take place anywhere else in the world. OD is a recognised refugee with indefinite leave to remain in the UK. The evidence of Dr Giustozzi is that he remains at real risk of serious harm from the Taliban if he were to return to Afghanistan; it is also the view of Dr Giustozzi that the appellants would be at risk of serious harm from the Taliban were they to return home. Family life, I find therefore, cannot take place in Afghanistan. OD has no right to live in Pakistan, as, like the appellants, I find he was never granted any permission to be there as a refugee, or in any other capacity, at any point (and of course he has in any case been absent from that country now for seven years): this is his evidence and accords with the expert evidence from

Dr Giustozzi which I set out above. It is also clear from the report of Dr Giustozzi that it is not the current policy of the Pakistani authorities to grant permission to remain to Afghan refugees, and indeed they are often arbitrarily deported for being in Pakistan without authorisation. This evidence is supported by that of Human Rights Watch Reports from 2016 and 2017. In this context accept the evidence of OD, AGD, WM and Dr H that the appellants live with no legal status, and that this has led to them having almost no private life in Pakistan and driven them to hide in very remote locations in extremely impoverished circumstances. I find that family life cannot therefore take place in Pakistan, as OD cannot be expected to join the appellants as he has no right to reside there, would not be safe from refoulement there and the given the fact that the circumstances in which the appellants live are unduly harsh.

44. Secondly, I find, that it weighs in the appellants favour that there are compelling compassionate circumstances. The totality of the evidence from the witnesses, supported by pictures taken by WM, is that the appellants are living in desperate absolute poverty in an animal shelter with no doors or windows, no electricity, no running or even potable water, no access to communications with OD or other family and due to their lack of status/fear of expulsion to Afghanistan / fear of militants operating in this remote area (matters supported by the expert and country of origin evidence) the second appellant, AD, has had no education during his childhood and they have no proper access to medical services. The situation is so desperate that Dr H felt that it was exceptionally distressing to witness even in the context of someone who has lived in Afghanistan and worked at a senior level in health services in Afghanistan, and further Dr H expressed particular concern as a medical doctor for the second appellant who is at risk of infection as he lives in insanitary conditions and is bleeding.
45. Thirdly, I find that the strength of the family life described at paragraphs 38-39 above, and the features that OD has been the father figure to the second appellant, AD, since he was four years old, who is now just entering adulthood as an 18 years old having had a childhood deprived of education and lived in fear of insurgents, and current suffering from medical problems, and the fact that the appellants are all pre-flight family of OD also weighs strongly in their favour.
46. Ultimately, weighing all of the evidence, I find that the decision to refuse entry clearance is a disproportionate interference with the appellants' and OA's right to respect for family life for the following reasons. I find the public interest in the maintenance of immigration control due to the appellants not being able to fulfil the requirements of the Immigration Rules and the disadvantage to their integration of their currently being unable to speak English is outweighed by the following factors: the fact that family

life cannot take place elsewhere; the fact that there are compelling compassionate circumstances relating to the appellants' living circumstances which include the dire poverty in which they live, the second appellant's untreated medical problems, and the precariousness of their status in Pakistan which lays them open to expulsion to Afghanistan where they face a well founded fear of persecution; and the strength of the family ties which includes the second appellant's father/son bond with OA.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. The Panel set aside the decision of the First-tier Tribunal dismissing the appeal on human rights grounds.
3. I re-make the appeal by allowing it under Article 8 ECHR.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the sponsor and his family who are recognised refugees and the appellants who appear also to be refugees and who live without documentation in Pakistan.

Signed: *Fiona Lindsley*  
Upper Tribunal Judge Lindsley

Date: 7<sup>th</sup> May 2021

## Annex A: Error of Law Decision

### DECISION AND REASONS

#### *Introduction*

1. The appellants are citizens of Afghanistan: the first appellant is the mother of the second, third and fourth appellants. Their dates of birth are 1962, 2003, 1998 and 1999 respectively. They reside in Pakistan with no lawful status having fled from the Taliban after the killing of the first appellant's husband/ father of the second, third and fourth appellants, who was a district governor in Afghanistan. They have applied to come to the UK to join Mr OD, the sponsor, who is the son of the first appellant and sibling of the other appellants. He was granted refugee status and five years leave to remain on 26th June 2014, and was awaiting a decision on his application for indefinite leave to remain at the time of the hearing before the First-tier Tribunal. Mr AGD, brother of the sponsor, also a son of the first appellant and sibling of the other appellants, also has leave to remain in the UK as a recognised refugee and supports the application of the appellants. DNA evidence has shown that the relationships between the appellants and the sponsor is as claimed.
2. The appellants applied for entry clearance to join the sponsor, and were refused in a decision dated 15<sup>th</sup> November 2018. At the same time Mr OD's wife and four children applied to join him. They were also refused, but when DNA evidence showed that they were related as claimed they were granted entry clearance and joined him in the UK. The appeal of these appellants against the refusal of entry clearance to join Mr OD was dismissed by First-tier Tribunal Judge Meah, but there was an appeal to the Upper Tribunal and the decision of Judge Meah was set aside and remitted to the First-tier Tribunal for remaking, with no findings preserved. The appeal was again dismissed, this time by First-tier Tribunal Andonian, in a decision promulgated on 13<sup>th</sup> September 2019.
3. Permission to appeal was granted by Upper Tribunal Judge Allen on 27<sup>th</sup> February 2020 on the basis that the grounds had sufficient merit to make it appropriate to grant permission.
4. The matter came before us to determine whether the First-tier Tribunal had erred in law. The hearing was held at a remote Skype for Business hearing in light of the need to reduce the transmission of the Covid-19 virus, and in light of this being found to be acceptable by both parties, and being a means by which the appeal could be fairly and justly determined. Unfortunately, part way through the hearing Judge Lindsley's computer screen froze, and



so she had to share that of Mrs Justice Eady for the rest of the hearing, but this did not in any way affect her ability to participate in the hearing.

*Submissions – Error of Law*

5. In grounds of appeal to the Upper Tribunal, drafted by Mr Gordon Lee, for the appellant, and in written and oral submissions from Mr R Jesurum, it is argued for the appellants, in summary, as follows.
6. There are two issues to determine in this appeal. Firstly, whether the appellants could meet paragraph 319 of the Immigration Rules, and secondly whether, if they could not meet paragraph 319, their exclusion was a disproportionate interference with Article 8 ECHR when considered more widely.
7. Mr Jesurum clarified that there is no challenge to the dismissal of the appeal by reference to the Immigration Rules, although some of the findings on factual matters which led to that dismissal are challenged. It is, however, argued that the First-tier Tribunal erred in law in the determination of the wider Article 8 ECHR appeal in the following ways.
8. Firstly, and primarily, it is argued that there was a failure to take into account material evidence, particularly the witness statement of the sponsor's brother who resides in the UK, Mr AGD, the letter from the appellants' landlord in Pakistan, the medical evidence, updated country expert report from Dr Antonio Giustozzi and country of origin evidence about the conditions faced by Afghan refugees in Pakistan. When looking at the appeal outside of the Immigration Rules on Article 8 ECHR grounds, it was particularly relevant to consider, arising out of that evidence, the fact that the appellants were undocumented and therefore faced difficulties moving around in Pakistan and with being harassed, and lived in fear of arrest and deportation to Afghanistan where they would be at real risk of serious harm. The situation in Pakistan was highly material to the proportionality of the decisions under Article 8 ECHR, and, it is argued, the First-tier Tribunal failed to engage with this evidence at paragraph 53 of the decision in reaching its conclusion.
9. It is argued that the First-tier Tribunal secondly erred in law by failing to consider the best interests of the second appellant, AD, who was and remains a child, when considering the proportionality of the decision to refuse entry clearance. There should have been consideration of his medical difficulties, his lack of access to education and employment, the risk of ill-treatment, refoulement, and restriction on his movements in Pakistan due to his lack of status there, and the precariousness of his accommodation. It is also argued that the sponsor stepped in as AD's father figure when his

biological father was murdered in Afghanistan when he was 3 years old, and that it is plainly in his best interests to be with the man who raised him.

10. Thirdly, it is argued, that the approach to Article 8 ECHR is insufficiently structured. In particular, there is no finding as to whether the appellants and sponsor have family life. It is said that it is clear from the evidence that they formed a household prior to the sponsor's entry to the UK, and it is argued that family life continues in light of their difficulties and the sponsor's visits to Pakistan. It is argued that they cannot reconstitute their family life in Afghanistan because Mr OD is a refugee, and they cannot do this in Pakistan because he and they would be/are at risk of refoulement and without any status there, and that this also was highly pertinent to the decision on proportionality. This is because this is a different type of balancing process to one where there is a place where family life could take place, but is not of the choosing of the parties. There was a failure to follow a Razgar, step by step approach by the First-tier Tribunal, and this led to material defects in the decision.
11. Fourthly, it is argued, that the First-tier Tribunal erred in the assessment of credibility due to a failure to give reasons and by virtue of a failure to take into account relevant material evidence. The First-tier Tribunal rejected the letters offering two of the appellants work without explaining why they rejected as credible the sponsor's evidence regarding these offers of work being genuine; although Mr Jesurum accepted that the findings on the letters themselves cannot be challenged, he maintained the wider issue of whether the third and fourth appellants might obtain work and become self-sufficient was not properly determined with regard to all of the evidence. The First-tier Tribunal required there to be "definite" evidence that the appellants needed identity documents to rent a property in Pakistan, which applied the wrong standard of proof and also failed to consider the evidence in the country expert report and background country of origin reports. In finding that the appellants could continue to live in their current home there was a failure to consider the letter from the landlord and evidence of the sponsor about his serious ill-health, and that his younger brother wanted the appellants to leave in these circumstances. It was also wrong to say that the family had fled after the "alleged murder of the sponsor's father in Afghanistan in 2006", at paragraph 36 of the decision, when this had been found to have taken place, and was reflected in the sponsor's grant of refugee status.
12. In a skeleton argument drafted by Mr C Avery, dated 8<sup>th</sup> June 2020, and in oral submissions by Mr Melvin for the respondent it is argued, in summary, as follows. In relation to the first ground: it is said that it does not follow simply because evidence is not directly cited that it was not taken into account by the First-tier Tribunal, and it was clear that the First-tier Tribunal

did focus on the day to day problems for the appellants in Pakistan. The First-tier Tribunal was entitled to take into consideration the fact that the appellants had managed to reside in Pakistan for a long period of time, for the past 13 years, and had not applied to join the sponsor for a period of four years after he left Pakistan, and the fact that the appellants had managed to obtain medical treatment and had accommodation; further, it was contended by Mr Melvin, thousands of Afghans had found that it was safe enough for them to return home to Afghanistan from Pakistan.

13. In relation to the second ground, the best interests of the second appellant, AM, as a child, were considered as his situation was considered as part of the wider group of appellants, and this was a lawful approach. Even if the sponsor had been a father figure at one point in time, seven years had now elapsed, and the relationship was now reduced to the transfer of funds.
14. In relation to ground three, it is argued that it is not an error of law to fail to have a structured approach so long as all elements were covered in the decision. All relevant issues were determined. Mr Melvin argued that the First-tier Tribunal had concluded that family life did not exist, and looked at the proportionality of any interference as well.
15. In relation to the fourth ground it is argued that this is simply any attempt to re-argue the case, the findings on the employment letters were open to the First-tier Tribunal and the finding that the appellants had not shown they were likely to be made destitute any time soon likewise.
16. At the end of the hearing we told the parties that we concluded that the First-tier Tribunal had erred in law in determination of the wider Article 8 ECHR appeal and would set aside all the factual findings but preserve the decision that the appellants could not meet the requirements of the Immigration Rules at paragraph 319, but that our full reasons would be sent in writing. Mr Jesurum submitted that the extent of fact finding was such that it would be appropriate to remit the appeal to the First-tier Tribunal but we concluded that the appeal should be re-made in the Upper Tribunal as it would ultimately turn only on a limited number of issues.

#### *Conclusions – Error of Law*

17. It was correctly understood by the First-tier Tribunal that the key issues to determine in the appeal were whether the appellants could meet the Immigration Rules at paragraph 319, or whether the decision was a disproportionate breach of Article 8 ECHR, as is set out at paragraph 6 of the decision. The requirements of paragraph 319(v) are set out at paragraph 21 of the decision, and there is further mention of the need to look at Article 8 ECHR more generally at paragraph 22 of the decision. It is noted that the requirements under paragraph 319(v) of the Immigration Rules would be

that the appellants had to be living alone in the most exceptional compassionate circumstances; they must be financially dependent on the refugee sponsor; and must be able to be accommodated and supported adequately without recourse to public funds in the UK; and there must be no relative to whom they could turn to for support in their country of origin.

18. In determining the appeal under paragraph 319(v) the First-tier Tribunal looks, at paragraphs 32 to 50 of the decision, at the issues of accommodation and medical treatment, and the issues of financial support and accommodation in the UK. No challenge is made the findings that the sponsor could not accommodate the appellants adequately if they were to come to the UK, and it is noted that the sponsor accepts that he lives in overcrowded accommodation in this country. We therefore uphold the decision of the First-tier Tribunal that the appellants did not succeed in their human rights appeal by reference to the Immigration Rules.
19. Looking at the reasoning for the factual findings: reasonable reasons are given for not giving weight to the letters from the manager of Go Go Pizza offering employment to the third and fourth appellants, at paragraph 46 to 48. The conclusions that the appellants still currently lived with their landlord H Gul, despite the fact that he was unwell and his brother, J Gul, would like them to leave, at paragraph 40 of the decision, and that they have accessed medical treatment when needed through their friends, are sufficiently well reasoned and were also open to the First-tier Tribunal.
20. In determining the appeal more broadly on Article 8 ECHR grounds we find however that firstly there is a material error of law in failing to decide whether the appellants have family life with the sponsor, and whether refusal of entry clearance is an interference with that family life relationship. It is not possible to conclude that this issue was determined at paragraph 51 of the decision: all that is decided in that paragraph is that there were not “exceptional compelling compassionate circumstances” in this case justifying the entry of the appellants based on a private or family life application. The starting point of this decision needed to be a decision on whether family life currently existed between the sponsor and his family and the appellants, based on the evidence of cohabitation as a single household in Afghanistan, flight together to Pakistan in 2007, then the sponsor leaving for the UK in 2014, and his wife and children joining him in 2019, in the context of the evidence about on-going visits, telephone calls and financial support. Then it needed to be decided whether refusal of entry clearance interfered with the family life that existed. Neither of these vital tasks were undertaken by the First-tier Tribunal.
21. The First-tier Tribunal did conduct a proportionality exercise at paragraph 53 of the decision, with a proper direction to look at the matter holistically.

It was lawfully open to the First-tier Tribunal to consider against the appellants that to date the appellants had found accommodation and accessed medical treatment for the second appellant in Pakistan, and that if they came to the UK they would probably be reliant on public funds for accommodation. It was also clearly to be weighed against the appellants that they could not meet the Immigration Rules, although this was not explicitly done.

22. We find, however, that there was a failure to consider material evidence before the First-tier Tribunal going to the precarious residence of all of the appellants in Pakistan in the expert report of Dr Guistozzi, the background country of origin reports, and the specific unchallenged evidence of the witness Mr AGD about problems with the Pakistani police when he visited, and thus their vulnerability to refoulement to Afghanistan where there was evidence of an on-going real risk of persecution due to the unlawful killing of the husband of the first appellant and father of the sponsor and other appellants by the Taliban. It also needed to be considered whether any family life could take place elsewhere if the appellants are not admitted to the UK, as this again was material to the proportionality of the decision. There was further a failure to consider the best interests of the second appellant, AD, who was at the time of hearing and remains a child, and with respect to whom - on top of the evidence regarding danger due to his precarious residence in Pakistan - there was evidence that the sponsor had taken on the role of father, and, further, with respect to whom, there was evidence he had not been able to access education. These best interests ought to have been a primary consideration in determining the appeal, and we find that they were not considered as such. We find that the evidence omitted from consideration was highly material to the balancing exercise, and it cannot be said, if it had been weighed in the balancing exercise, that the appeal could not have been determined differently.
23. In these circumstances we set aside all of the factual findings of the First-tier Tribunal, as the factual scenario in which the appellants are now living has moved on and the Article 8 ECHR appeal must be determined at the date of the new hearing, but preserve, as mentioned above, the finding that the requirements of the Immigration Rules could not be met, which has remained unchallenged in the appeal.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. We set aside the decision of the First-tier Tribunal dismissing the appeal on human rights grounds and the factual findings of the First-tier Tribunal.
3. We adjourn the re-making of the appeal and find that it should be remade in the Upper Tribunal.

**Directions**

- (i) The remaking hearing will consist of a remote Skype for Business hearing.
- (ii) A revised bundle containing only up to date and relevant evidence, including updating materials, should be filed and served ten days prior to the remaking hearing.
- (iii) If an interpreter is required the Upper Tribunal must be notified when the notice of hearing is sent out.
- (iv) The time estimate is 3 hours.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We do so in order to avoid a likelihood of serious harm arising to the sponsor and his family who are recognised refugees and the appellants who appear also to be refugees and who live without documentation in Pakistan.

Signed: *Fiona Lindsley*  
Upper Tribunal Judge Lindsley

Date: 20<sup>th</sup> November 2020