



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004833
First-tier Tribunal Nos:
HU/57760/2022
IA/10887/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 March 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MJP
(ANONYMITY ORDER MADE)

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Mr D Bazini, Counsel; AA Immigration Consultants
For the Respondent: Ms H Gilmour, Senior Home Office Presenting Officer

Heard at Field House on 1 March 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (and/or other person). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. Further to a previous Error of Law hearing on 14 December 2023, I issued a decision finding that errors of law had been established in the decision and reasons given by the First-tier Tribunal promulgated on 22nd October 2023 in the manner in which the Appellant's human rights appeal was allowed, those errors being agreed by consent by both parties (appended to this decision).
2. Accordingly, I set aside the decision and directed that the matter be relisted for remaking for any judge of this Tribunal. The error of law decision is appended hereto for ease of reference. By chance, this matter came before me once more.
3. As stated in my previous decision, given the limited scope of the appeal pertaining to consideration of the Appellant's application for entry clearance outside the Immigration Rules under Article 8 ECHR, given that the Appellant fled Afghanistan for Iran and was deported back to Afghanistan and was keen that the matter be disposed of swiftly, and given also that the matter was to be retained in the Upper Tribunal so that it could be remade at the earliest opportunity and in the interests of justice - despite almost all of my directions not being complied with, primarily relating to the documents that I wish to have put before the Upper Tribunal in consolidated and resubmitted bundles - I proceeded to hear this matter in the interests of justice in order to reach an expeditious outcome.
4. I have before me the following documentation:
 - (a) A stitched bundle of documents numbering 396 pages, which was also before the First-tier Tribunal;
 - (b) A supplementary bundle split into two parts. The first part numbering 58 pages and the second part numbering 39 pages, thus giving a total of 92 pages according to the index of that supplementary bundle, which was also before the First-tier Tribunal, and;
 - (c) A separate, recently submitted supplementary bundle which numbers 46 pages and contains an additional statement from the sponsor, money transfer receipts over fourteen pages and a chat history over the course of 28 pages.

Aside from the above subjective evidence, both parties also put before me, and sought to rely upon, the most recent Country Policy and Information Note (CPIN) entitled "Afghanistan: fear of the Taliban", version 3.0, published April 2022.

5. At the outset of the hearing, both parties agreed that the scope of the appeal was confined to a consideration of Article 8 ECHR outside the Rules given that the Appellant accepted that he could not meet the Immigration Rules, including the Adult Dependent Relative (ADR) Rules that the Entry Clearance Officer had considered in the refusal of entry clearance (of their own volition, this not being relied upon by the Appellant in his application).

Evidence

6. I heard evidence from the Sponsor, who adopted his three witness statements and who was asked supplementary questions by Mr Bazini in evidence-in-chief, and was then cross-examined by Ms Gilmour, re-examined by Mr Bazini and also asked clarificatory questions by myself, with both parties having the opportunity

to ask any questions arising from my own. I then heard closing submissions from both parties, following which I indicated that I would reserve my decision, which I now give.

7. I formally record that I have taken all of the abovementioned documentary evidence and the oral evidence fully into account (the oral evidence being set out in my Record of Proceedings and not rehearsed here or in my findings, save as necessary). In reaching my decision, but shall only set out the parts that are relevant to my findings upon the Article 8 analysis that I need to resolve as specified above. I record my gratitude to both representatives for their detailed submissions which I also set out only insofar as relevant to my analysis of the materials and findings thereupon.

Findings

Factual Background

8. The undisputed factual background of this appeal is as follows. The Appellant is a 34 year old citizen of Afghanistan, his date of birth is 22nd March 1989. On 13th April 2022, he applied for entry clearance to the UK, which was refused primarily on the basis that he did not qualify as an Adult Dependent Relative. The Appellant indicated he wished to come to the UK to join his Sponsor, namely his brother Mr Abdul Wahid Sultani, a British citizen and a resident of Harlow, Essex. This is an appeal against the refusal of entry clearance dated 19th October 2022 with particular reference to a review of the Entry Clearance Officer's decision performed by the Respondent and included within the stitched bundle, dated 17th May 2023 which maintained the decision on the basis that Article 8 was not infringed by refusing entry clearance. To succeed in the appeal the Appellant must demonstrate that the decision to refuse him entry clearance is unlawful as being incompatible with Article 8 ECHR on the premise that the decision is disproportionate.
9. The parties accepted before me that the Afghan Citizens' Resettlement Scheme (ACRS) and the Afghan Relocations and Assistance Policy (ARAV) did not have any relevance or bearing upon the Article 8 appeal that I needed to decide.

Article 8 ECHR

10. I turn to the first issue of whether or not Article 8 is engaged between the Appellant and his Sponsor. The relevant test is that set out in the much cited judgment of the Court of Appeal in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31. At [17] of the judgment, Lord Justice Sedley sets out that family life requires dependency which should be read down as meaning "support" in the personal sense; and that support should be, "real" or "committed" or "effective", which represents the irreducible minimum of what family life implies, and thus what the Appellant needs to show. As to whether or not there is real, committed or effective support, I turn to the evidence advanced in the documents before me. The Appellant's Bundle before the First-tier Tribunal merely contained a witness statement from the Appellant's brother at pages 2 to 5, which sets out that the Sponsor made an application for his brother, the Appellant, to join him in the UK on the basis of his exceptional circumstances following the Taliban rule and government of Afghanistan and due to the Appellant's former employment for the Counterterrorism Intelligence Services. Turning first to the evidence of support, I note in the statements in the supplementary bundle from the Appellant and Sponsor that they mention that

the Appellant is being supported by his brother and that he is very close to him and that he used to live with him before he went to the UK and that they have maintained a very close relationship, speaking to each other virtually every day and since the development of the Appellant's parents' situation following the Taliban regaining power in Afghanistan. The Appellant describes their relationship as becoming even closer as a result of his dependency. The Appellant further details that due to his situation he is financially and emotionally dependent on his brother, they speak on occasion even up to four times a day and he has no other means of financial support.

11. The Sponsor equally confirms all of the above, in particular that they have a very strong relationship between them and that the Appellant is both financially and emotionally dependent on him and that he is not living with his family as the Respondent believes and he cannot live with them out if his fear of the Taliban and that he is living in hiding in Afghanistan. The Sponsor confirmed that he spoke with the Appellant regularly and that the Appellant, had confirmed to him that he is in depression and depends on the Sponsor emotionally, thus evidencing a heightened emotional bond between the Sponsor and Appellant contributing to further evidence of real, effective or committed support between the two, and indicative of family life. The final statement provided by the Sponsor in the most recent supplementary bundle again confirms that the Appellant is still financially and emotionally dependent on him, that they are in daily contact with each other, or when that cannot happen the Sponsor is in contact with the Appellant's friends, and that the Sponsor sends money to either the Appellant or his friends, who will collect the money on his behalf and give it to him as well as the money being used for the Appellant's basic needs. Alongside that, there are money transfers in the bundle which show various sums of money being sent by the Sponsor to persons in Afghanistan, those sums ranging from £195 up to £1,000, primarily in 2023, but equally going as far back as March 2022 until the present date, totalling approximately £6,000. Given the above evidence which I accept in entirety and given the oral evidence of the Sponsor who has also given credible evidence before me, I accept, based upon the history between the two brothers, the increasing dependency, the money transfers and the description of how the Sponsor has been supporting his brother, the Appellant, since 2022 that the Appellant has been unable to work owing to his being in fear of his safety and having to go into hiding and thus being unable to support himself financially.
12. Ms Gilmour for the Respondent did not challenge the Sponsor's account of sending money to the Appellant but merely ventilated the method by which it happened and how it came to pass. I also pause to note that there is and there never has been any challenge to the fact that the Appellant and Sponsor are brothers. I further accept the Sponsor's evidence that the Appellant is presently in hiding in Malistan near Ghazni in a mountainous region, which can be reached by foot, that he is living in tents and also staying in collapsed and derelict buildings where possible. Consequently, given that the Appellant is unable to work and is not living with his family and is living in hiding in the conditions mentioned above, I find that the amounts of money sent by the Sponsor to the Appellant are significant indications of his support and that the finances being provided go beyond the minimum of what is required for real, committed or effective support. I thus find that Article 8 family life is engaged between the Appellant and the Sponsor for the above reasons.
13. Turning to the interference in that family life, I find that the interference is a grave one, and more than a technical interference, particularly given the

egregious situation that the Appellant finds himself in and the precarious situation he faces in Afghanistan.

14. The interference is, as in almost all cases, one that is made in accordance with the law and in the public interest, as decided by the Entry Clearance Officer in their decision-making capacity. The inference is necessary in a democratic society given that it is a decision reached by the Entry Clearance Officer in their capacity as an officer of the Respondent and the Home Office statutorily charged with maintaining immigration control, as in the majority of appeals.
15. In respect of the public interest as quantified by the Appellant's application and its failure, in line with the Court of Appeal's judgment in TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109, I note that the Appellant has failed to meet the Immigration Rules governing entry clearance under the Immigration Rules (in particular as an Adult Dependent Relative) and given that failure, I place significant weight upon his inability to meet the Rules. I also turn my attention to the public interest outside the Rules under Article 8 ECHR, and thus apply the public interest, as I am required to do, in its full measure, giving full weight and recognition to section 117B(1) of the Nationality, Immigration and Asylum Act 2002, reflecting that the maintenance of effective immigration controls is in the public interest. In addition to that, I place weight upon the fact that it is in the public interest that entrants to the United Kingdom are able to speak English, and I bear in mind that the Appellant is unable to do so as a public interest consideration that goes against him. I also take into account that under s.117B(3), the Appellant is not financially independent; however, I temper that finding whilst also recognising that he is unlikely to be a burden on taxpayers and also will be able to integrate into society given that he is wholly financially dependent upon his Sponsor and given that his Sponsor has demonstrated that he has adequate accommodation waiting to receive him in the UK, which represents the public interest on one side of the balance.
16. Turning to the Appellant's interests on the opposing side of the scales, I must first turn my attention to the background facts of his application and the reasons for his seeking entry clearance to join his Sponsor. The Appellant has set out, since the outset of his application that he is a military officer at the Ministry of Foreign Affairs under the Afghan government prior to the rule of the Taliban. He was responsible for counternarcotics and detection director in Jahgori District Security Command in Ghazni Province from March 2016 up to the 2nd February 2019. From 2nd February 2019 until 27th July 2019, the Appellant was also responsible for education and training of Waghaz District Security Command of the Ghazni Province. From 27th July 2019 he was working in the Counter Terrorism Directorate or the Ministry of Interior Affairs. In August 2021, when the Taliban took over control of Afghanistan, it is at that point that the Appellant faced a disruption to his livelihood and his employment in counterterrorism, given that his former prey had taken control of the state itself. I accept all of this particularly as the Respondent has never sought to challenge the Appellant's employment or his background as a former intelligence officer in counterterrorism in any way whatsoever. In addition, I also note that the Appellant's bundle contains, at pages 6 to 34, evidence of the Appellant's employment, in particular, an appreciation letter from the head of counternarcotics in Jahgori and a further appreciation letter from the Ghazni Province Police Commandant and a further letter from the Ghazni Provincial Council, a further letter from the Directorate of Internal Security, all showing appreciation for his work from the Ghazni Province Police Commandant

department, the Deputy Ministry of Security Affairs and the Directorate of Counter Crime of the Appellant.

17. I also further note, in particular, that at page 19 of the Appellant's bundle, two letters from the Taliban are reproduced (often described as warning letters), the first of which identifies the Appellant *by name* and that he was a key figure in the fight against drugs within the Jaghori district and that he captured one of the Taliban's agents (who was responsible for many of the Taliban's targeted killings of government employees) and who was languishing in custody due to the Appellant and confirmation that the Appellant should accordingly be killed on identification.
18. A further warning letter specified that the Appellant was involved in counternarcotics and had captured one of the Taliban's special agents and the letter instructed that the Appellant be terminated upon capture (including his brother). Given the Respondent's silence on this evidence and given its content, I give full weight to the above evidence and find, without hesitation, that the documents reflect the Appellant's history and his true position in counternarcotics and counterterrorism for the former Afghan government and accept readily that he would be at risk from the Taliban as the warning letters reflect and as he confirms in his witness statement. Thus, I further find that the Appellant would necessarily need to go into hiding, as he has done, and as he is still is succeeding in doing, at present.
19. Ms Gilmour's attack on the Appellant's Article 8 claim, at its strongest, sought to challenge the Appellant's ability to travel within Afghanistan, particularly having been deported from Iran in approximately March 2023. On this issue, I note that the Sponsor gave unhesitating evidence which confirmed that the Appellant had also travelled from the Iran-Afghanistan border to Kabul to see his wife and children, before then going into hiding. When asked how long the journey from the border to Kabul would have taken by car, the Appellant stated that it would be a matter of twelve to thirteen hours in a vehicle to get from the border where he was deported to the capital. The Sponsor also confirmed that, by contrast, it took the Appellant one month to reach Kabul, a journey which he made by a combination of travel via vehicle and on foot. It is the Respondent's case that the Appellant would not have been able to make this journey due to the CPIN confirming that uniformed, and ununiformed, Taliban soldiers man checkpoints at unspecified places in the capital and throughout Afghanistan. The difficulty with this submission is that there is no evidence about the route that the Appellant took from the border to Kabul, nor do we know whether he attempted to pass through a checkpoint either, whether by vehicle or on foot, or whether perhaps he sought to evade the checkpoint. Thus, in the absence of evidence demonstrating that the Appellant passed through a checkpoint which he would not have been able to do if he was wanted as he claims, the Respondent has not established this point by way of cross-examination or other evidence, for example.
20. On balance, I find that given the Appellant's background in counterterrorism and counternarcotics and his experience with the Taliban, and having also captured one of their special agents, it would seem contrary to all rational thought for the Appellant to attempt to pass through a checkpoint, and given the absence of any evidence demonstrating that he did in fact do so, I do not find that the mere existence of checkpoints manned by uniformed, and ununiformed, Taliban soldiers at unspecified locations in the country is sufficient to

demonstrate that he would have been captured were he travelling openly from the border to Kabul to Ghazni, on the balance of probabilities. I further bear in mind that it is reported in the CPIN, and therefore commonly known, even in the UK, that shootings do also occur at checkpoints, and on balance I note that this is a matter which the Appellant may likely have known, being on the ground in Afghanistan, which might lend motivation to his avoiding such checkpoints. In any event, the account given, that the Appellant has managed to remain in hiding and has visited his wife and children in Kabul whilst evading detection or capture, is one which I find to be plausible particularly in the light of his previous employment history and likely expertise in counterterrorism and counternarcotics and the likely skillset inherent to one so employed at a senior level.

21. I pause to note that there was no evidence before me as to how long the Appellant spent visiting his wife and children in Kabul, in any event. I have no indication as to whether his visit lasted a matter of minutes, hours, days, weeks or months as there was no cross-examination eliciting evidence on this issue. Equally there was no evidence pointing to the fact that the Appellant had spent a significant amount of time in Kabul either.
22. Therefore, in summary, I accept that, as confirmed at 6.4.15 of the CPIN, that the Appellant, as an Afghan previously employed in the Intelligence Services, would be less likely to be forgiven and still be at risk; and I also accept Mr Bazini's submission that the fact that it took the Appellant one month to get to Kabul instead of the twelve to thirteen hours by car the Sponsor said it would take, demonstrates on balance that he would have exercised caution in getting to the capital and remaining inconspicuous during his time there, and thereafter when going into hiding, some two to three hours away (by car) in the mountains near Ghazni.
23. I further note, that there is no challenge to the evidence that the Appellant is presently in hiding along with a cohort of people he previously worked with in the Intelligence Forces, which is also consistent with the background evidence as to the categories of persons likely to be hiding, such as members of the Intelligence Forces and members of the judiciary etc..
24. Therefore, on the Appellant's side of the balance, I find that there is a real need for him to enter the UK to join his sponsoring brother whom he is emotionally and financially dependent upon and supported by. Notwithstanding the public interest measured by his failure to meet the Immigration Rules and the findings I have already made in respect of ss.117B(i) to (iii) above, I find that the interference in family life in refusing entry to the Appellant would result in unjustifiably harsh consequences for the Appellant.
25. I thus find that the refusal of entry clearance is a disproportionate interference with the Appellant's Article 8 rights.

Notice of Decision

26. I therefore allow the Appellant's appeal against the refusal of his entry clearance on the basis that it is a disproportionate interference with his Article 8 rights, and given the Appellant's current predicament, I encourage the Respondent to issue the relevant entry clearance at the earliest opportunity.

Case No: UI-2023-004833
First-tier Tribunal Nos: HU/57760/2022
IA/10887/2022
P. Saini

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 March 2024

APPENDIX: ERROR OF LAW DECISION

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

Case No: UI-2023-004833

First-tier Tribunal Numbers: HU/57760/2022

THE IMMIGRATION ACTS

Determination Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

**MJP
(ANONYMITY DIRECTION MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr D Bazini, Counsel, instructed by AA Immigration Consultants
For the Respondent: Ms S McKenzie, Senior Presenting Officer

Heard at Field House on 14 December 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION BY CONSENT AND DIRECTIONS

1. Although this is the Secretary of State's appeal, for ongoing ease of reference and comprehension, I shall refer to the parties as they were constituted before the First-tier Tribunal.

2. Pursuant to Rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and by the consent of the parties the following order is made:
- (i) Upon the parties' agreement that the decision of the First-tier Tribunal promulgated on 22nd October 2023 discloses material errors of law, it is hereby ordered by consent as follows.
 - (ii) The First-tier Tribunal Judge committed errors of law in the manner described in the Grounds of Appeal as pleaded in that, having noted that the Appellant accepted he could not meet the Immigration Rules as an Adult Dependent Relative at §7 of the Decision, it was not open to the Judge to then remit the decision back to the Entry Clearance Officer for reconsideration of the Afghan Resettlement Scheme as this disposal was inconsistent with Charles (human rights appeal: scope) Grenada [2018] UKUT 89 (IAC) at headnote (iii) and [46] which sets out the correct approach to human rights appeals under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 following the amendment to that section by the Immigration Act 2014 effective 6 April 2015, namely as follows:
 - (iii) Following the amendments to ss.82, 85 and 86 of NIAA 2002 by the Immigration Act 2014, it is no longer possible for the Tribunal to allow an appeal on the ground that a decision is not in accordance with the law. To this extent, Greenwood No. 2 (para 398 considered) [2015] UKUT 629 (IAC) should no longer be followed.
- ...
46. The correct approach to adopt in a human rights appeal under section 82(1)(b) is as follows. As section 84(2) makes clear, and as is reflected in the present notice of decision, served in compliance with the Immigration (Notices) Regulations 2003, the decision being appealed is the decision to refuse the claimant's human rights claim. Section 84(2) provides that the only ground upon which that decision can be challenged is that "the decision is unlawful under section 6 of the Human Rights Act 1998". Section 6(1) of the 1998 Act provides that it "is unlawful for a public authority to act in a way which is incompatible with the Convention rights".
- (iii) The parties also noted and agreed that the Judge failed to consider Article 8 ECHR outside the rules.
3. As a consequence of the above agreed errors, which I also approve, the decision is hereby set aside in its entirety and thus requires remaking *de novo*.
4. As the Appellant does not claim to meet the Immigration Rules, given the limited scope of the appeal pertaining to consideration outside the Immigration Rules under Article 8 ECHR, given that the Appellant fled Afghanistan for Iran and is keen that this matter be disposed of swiftly, and given that and both representatives encouraged me to retain this matter in the Upper Tribunal, I find that it is in the interests of justice for this matter to be retained here and for the remaking to place at the earliest opportunity subject to the following directions.

Directions

5. I make the following directions for the continuation of this appeal:

- (1) The appeal is to be retained in the Upper Tribunal.
- (2) No later than three weeks before the date of resumed hearing, the Entry Clearance Officer shall file and serve (via CE File) its Bundle to include the material referred to in the grounds of appeal to the Upper Tribunal, namely, a copy of the "Support for British and non-British nationals in Afghanistan - GOV.UK" Policy (<https://www.gov.uk/guidance/support-for-british-and-non-british-nationals-in-afghanistan>) as it appeared at the time of entry clearance as well as dates upon which the path is said to have been commenced and closed, and any other material upon which the Entry Clearance Officer seeks to rely.
- (3) No later than one week before the date of resumed hearing, the Appellant shall file and serve (via CE File) an up-to-date Appellant's Bundle to include all materials upon which he seeks to rely as well as, including an up-to-date Appeal Skeleton Argument (if so advised)
- (4) An Afghan interpreter is required.
- (5) Only one witness (the Sponsor, the Appellant's brother) is to be called according to the evidence before the Upper Tribunal (at present).
- (6) The time estimate given is three hours.
- (7) No special directions have been requested.
- (8) I maintain the anonymity direction as already made by the First-tier Tribunal.
- (9) This matter can be listed before any Upper Tribunal Judge or Deputy Upper Tribunal Judge.
- (10) This matter is to be listed in accordance with Mr Bazini of Counsel's diary with the assistance of his clerks (immigration@no5.com) for the first available date after 1st February 2024.

Anonymity

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 his 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.

P. Saini

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber