



**UT Neutral citation number:** [2023] UKUT 00085 (IAC)

R (on the application of MRS and FS) v Entry Clearance Officer  
(Biometrics - entry clearance - Article 8)

IN THE UPPER TRIBUNAL  
RESERVED JUDGMENT FOLLOWING HEARING

Field House,  
Breams Buildings  
London  
EC4A 1WR

Heard on **10 May 2022**  
Promulgated on **20 June 2022**

**THE QUEEN  
(ON THE APPLICATION OF)  
MRS (1)  
FS (2)**

Applicants

and

**ENTRY CLEARANCE OFFICER**

Respondent

**BEFORE**

**UPPER TRIBUNAL JUDGE LINDSLEY**

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Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, 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 applicants or members of their family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Mr D Chirico and Ms C Robinson, of counsel, instructed by the Coram Children’s Legal Centre appeared on behalf of the Applicants.

Mr B Keith, of counsel, instructed by the Government Legal Department, appeared on behalf of the Respondent.

1. *It is open to the respondent, in line with Article 8 ECHR, to have a biometric discretion policy that gives significant weight to the public interest and proper legitimate aims which justify biometrics and that only exceptional, in the sense of very compelling cases, can outweigh that interest.*
2. *It is incompatible with Article 8 ECHR for the respondent’s policy: Family Reunion: for refugees and those with humanitarian protection policy version 5 31<sup>st</sup> December 2020, to direct decision-makers that only applicants with extraordinary, and therefore rare, unique or unusual circumstances, can succeed.*

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**ON AN APPLICATION FOR JUDICIAL REVIEW**  
**FINAL JUDGMENT SUBJECT TO CORRECTIONS**  
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**JUDGE LINDSLEY:** This judicial review application was made on 15<sup>th</sup> February 2022 and is a challenge to the refusal of the respondent to defer the collection of biometric information (scans of finger prints and face) in Pakistan from the Afghan applicants until after in principle decisions, subject to biometric enabled security checks, are made to grant entry clearance for refugee family reunion, if such decisions are indeed made, and in the alternative to the refusal of the respondent to arrange for the collection of biometrics through another embassy or international agency in Afghanistan rather than from a visa application centre in Pakistan.

2. At the point in time when the application for judicial review was made the challenge was to decisions of 18<sup>th</sup> January 2022 in relation to the first applicant and of 1<sup>st</sup> February 2022. The grounds were amended to challenge a subsequent decision of 18<sup>th</sup> February 2022 relating to the second applicant. These decisions were replaced by

the respondent with two decisions dated 28<sup>th</sup> March 2022, so the challenge which is argued before me is to these decisions.

3. Permission, anonymity and expedition was granted by Upper Tribunal Judge Bruce on 15<sup>th</sup> February 2022, which was amended on 18<sup>th</sup> February 2022, with case management directions which should have led to the full judicial review hearing taking place within 28 days of that order. Further case management directions were given by Upper Tribunal Lawyer Bakshi on 3<sup>rd</sup> March 2022 and by me on 9<sup>th</sup> March 2022 with the aim of achieving a full hearing date on 30<sup>th</sup> March 2022.
4. On 15<sup>th</sup> March 2022 Upper Tribunal Judge Lindsley made further directions staying the judicial review as the respondent wished to make the above mentioned new decisions and agreed to provide details of her policy for the deferment and waiver of the collection of biometrics in this context. As these new decisions maintained the refusal to grant the applicants' requests the hearing on 30<sup>th</sup> March 2022 became a case management review hearing at which it was agreed that the full judicial review hearing would take place on 10<sup>th</sup> May 2022.
5. These directions had to be varied in an order of Upper Tribunal Judge Lindsley dated 20<sup>th</sup> April 2022, which crossed a consent order of the parties dated 22<sup>nd</sup> April 2022, due to the respondent being unable to keep to the timetable for the filing and service of the detailed grounds of defence.
6. At the hearing on 10<sup>th</sup> May 2022 I granted applications from both parties to admit small additional amounts of late evidence with the agreement of the other party. I have considered all the evidence in the permission and trial bundles together with the helpful submissions of both counsel in making this decision.
7. The challenge of the applicants is, in brief summary, firstly that the policy of the respondent with respect to the deferment of

biometric information from the applicants is unlawful because the “exceptional and extraordinary” circumstances requirement applied is unlawful on public law grounds and because it breaches Article 8 as it fails to strike a fair balance and/or misdirects decision-makers as to how they should proceed in reaching decisions which are compatible with Article 8 ECHR.

8. Secondly, it is argued, that the decisions are unlawful because there is a failure to have regard to relevant considerations, particularly the best interests of a child and the fact that Article 8 ECHR family life is engaged, and because an even higher threshold than required by the policy, as now clarified, was applied. Further, when this Tribunal steps into the position as primary decision-maker in determining whether the decisions breach Article 8 ECHR, it will be found that the respondent failed to strike a fair balance and that the decisions are a disproportionate interference with the procedural and substantive components of the applicants’ and sponsor’s right to respect for family life as protected by Article 8 ECHR. In the alternative, it is argued, if it were found that the policy requiring “exceptional and extraordinary” circumstances is lawful and Article 8 ECHR compliant then this test is, contrary to the decisions of the respondent, met on the facts of this case.

9. The background circumstances of this case as outlined by the applicants are, in summary, as follows. The first applicant says he was born in July 2004 and is therefore 17 years old. He is the brother of the sponsor, RS. RS is a citizen of Afghanistan who was recognised as a refugee in the UK in September 2017 on the basis of a claim that he feared the Taliban, and has limited leave to remain until September 2022. The history given both now and in RS’s asylum claim made in 2016 in the UK is that the first applicant and RS left Afghanistan together in 2015 as they were afraid of forced recruitment into the Taliban but were separated in January 2016 in Iran by people smugglers, and did not make contact again until the

Summer of 2021 by which time the first applicant was back in their home region of Afghanistan, Laghman. The first applicant currently lives with his sister-in-law (the second applicant), RS's post flight wife, and her minor younger brother. In September 2021 the first applicant made, through a pro bono representative, an online application for refugee family reunion outside of the Immigration Rules, and sent a request that he be allowed to postpone the giving of biometrics until and if an in-principle decision was made to grant entry clearance as he was unable to make three dangerous trips back and forth to Pakistan. The first applicant has a Tazkira, Afghan identity card, but no passport. He has not made an application for a passport as he fears approaching the Taliban who are now the government in Afghanistan. He is suffering from mental health problems including PTSD, depression and suicidal ideation.

10. The second applicant was born in March 2002, and thus is 20 years old. As mentioned above she is the post-flight wife of RS the sponsor. She married him formally in October 2021 in a ceremony in Pakistan. She travelled to Pakistan in September 2021 illegally. She did this with the assistance of the first applicant and her minor brother (who both remained on the Afghan side of the border) and a smuggler who enabled her to cross the border. Both the first applicant and the second applicant's minor brother were beaten by the Taliban in this process. Whilst she was in Pakistan, in November 2021, through a pro bono representative, she made an outside of the Immigration Rules refugee family reunion application online and attempted to book an appointment to give her biometrics at the Pakistani visa application centre. However, there were technical failures, reflected in email correspondence between her then representative and the UKVI technical helpdesk, which meant that she was not given an appointment to provide biometrics. RS had to return to the UK and she could not stay in Pakistan without him so returned to Laghman in Afghanistan. She is now over five months pregnant, with a due date in August 2022. She has had a difficult

pregnancy with health complications including bleeding. She is also suffering from a variety of mental health problems including anxiety, depression and suicidal ideation. She requested that the respondent defer the recruitment of her biometrics on 10<sup>th</sup> December 2021 as she argues it is not safe or reasonable for her to make the dangerous trip to Pakistan simply to do this with no in principle decision to grant entry clearance for onward travel to join her husband RS in the UK. She has a Tazkira and applied for a passport from the Afghan authorities in January 2022, but has had no response to that application.

11. It is common ground between the parties that by virtue of the Immigration (Biometric Registration) Regulations 2008 at Regulation 3A a person who is subject to immigration control and makes an application for entry clearance must apply for the issue of a biometric immigration document. Under Regulation 5 of these Regulations where an application for the issue of such a biometric document is made an authorised person may require the applicant to provide a record of his fingerprints and a photograph of his face. It is therefore common ground that Regulation 5 creates a discretion: the authorised person has a discretion to require this information or to waive that requirement. As found by Upper Tribunal Judge Norton Taylor in R (SGW) v SSHD [2022] UKUT 15 (IAC) Regulation 8 deals with “the when, where and how, as to the enrolment of biometric information” and does not preclude the possibility that “enrolment may occur after an application for entry clearance has been substantively considered”.
12. The respondent’s policy “Family reunion: for refugees and those with humanitarian protection policy version 5 of 31<sup>st</sup> December 2020” states on page 12 that security and identity checks must be completed on the applicant and their sponsor before considering the application. It is said that this applies to all applicants over the age of five years, with those under five only having to provide a photograph.

This guidance was found to be unlawful in R (SGW) v SSHD because it “fails to confirm the existence of any discretion as to the provision of biometric information when a person makes an application for entry clearance, save in respect of children under 5 years of age.” The first witness statement of Mr Burt, deputy policy lead on biometric policy for the Border Security and Identity Policy Unit, indicates this guidance has now been updated to include a reference to the fact that there is a discretion as to whether biometric information is provided before or after entry to the UK. It is said by Mr Burt that updated family reunion guidance is still however “under review”.

13. In the detailed grounds of defence the respondent has clarified that the test for a waiver or deferral of the requirement to enrol biometric information where an applicant cannot travel to a normal enrolment centre in the entry clearance process is “exceptional and extraordinary circumstances”, and is a deliberately high threshold that will rarely be met. The respondent has identified the under- five year olds; so called “stretcher cases”, where the applicants are physically unable to provide biometrics; and people with diplomatic status as those who may meet this test.
14. From the witness evidence of Mr Burt it would also appear that in principle decisions pre-capture of biometrics might very occasionally be made where there is very compelling evidence that absolutely confirms the identity of an applicant. It might be that this last category is reflective of the outcome of the High Court decision in R (JZ) v SSFCDA, SSHD & SSD [2022] EWHC 771 (Admin) where interim relief was granted to the applicants requiring the respondent to defer biometric recruitment until after the substantive consideration of the Afghan applicant’s application for entry clearance in the case of an Afghan judge who was a person known to the US and UK authorities who wished to come to the UK to join his brother, a British citizen living in the UK, under the ARAP scheme. Mrs Justice Lieven found his being a known and documented individual differentiated his case

from many others. It is notable however that the application was not only for JZ but also his wife and six children, with respect to whom there was apparently no information that they individually were known to the respondents except via their relationship to JZ himself.

15. Slightly curiously the test for exercise of this discretion actually applied to these applicants in the decisions of 28<sup>th</sup> March 2022 is “very exceptional and extraordinary circumstances”, a test which was also set out in a letter of 14<sup>th</sup> March 2022 from the respondent requested by the applicants’ solicitors in these proceedings to clarify the current policy. The respondent argues that it has been decided that the “very” added nothing to the ultimate meaning and so is now deleted, and that the two tests are in reality the same, and so “exceptional and extraordinary circumstances” is and has been the test for discretion at all material times in relation to the decisions in the applicants’ cases.
16. At this stage it is helpful to clarify that these applicants do not seek to postpone collection of biometrics until they are in the UK. They are willing to provide them in Pakistan once the substantive applications have been considered and indicative decisions made, subject to security checks following biometric enrolment, so that they have only to make one dangerous journey to Pakistan if they are granted, and none if they are refused, rather than three hazardous journeys in the case of a grant. They are further willing to give alternative biometric information outside of the respondent’s recruitment system, such as provide a passport compliant type photograph, or even potentially finger-prints to supplement this process (although exactly how they would do this by themselves is not made clear).
17. The applicants have also argued in their claim that they would be willing to give biometrics in Afghanistan via a functioning embassy such as that of Qatar or through an international agency such as the UNHCR, Red Cross or IOM. I find however that there is no evidence



before me of any embassy or international organisation being in an agreement with the respondent to take biometrics in Kabul so that option is not available at the current time, and therefore I will not give further consideration to this matter. Mr Chirico indicated he understood my position on this issue at the hearing and did not seek to persuade me of the viability of pursuing this aspect of the applicants' case.

18. When I look at the legality of the "exceptional and extraordinary circumstances" biometric discretion policy of the respondent it will therefore be with respect to whether this is lawful with respect to the applicants' proposal that biometrics be collected only after a positive indicative decision is made subject to security checks following biometric enrolment in Pakistan and thus prior to entry to the UK.
19. It is the common position of both parties that this policy must be Article 8 ECHR compliant. It is relevant to explore what this means in the context of family reunion. As is held by the House of Lords in Huang v SSHD [2007] UKHL 11; [2007] Imm AR 571, at paragraphs 17 and 18 of the judgment, where there is family life and the refusal of entry clearance interferes with that family life, to be lawful the interference must be proportionate, which in turn means it must be justified; the justification must be rationally connected to the legitimate aim; the steps taken must be the minimum required to achieve the legitimate aim; they must strike a fair balance between the right to respect for family life and that aim; and not place an additional requirement of exceptionality.
20. It is accepted by the applicants that there is a legitimate aim set out by the respondent in the taking of biometrics to assist preventing individuals involved in serious criminality, including acts of terrorism, being able to travel to the UK by their biometric details being checked against other datasets such as watchlists and fingerprint collections. The applicants argue, and I accept their argument, that the challenge that they bring does not limit the protection in respect

of this legitimate aim. If permitted to come to the UK the applicants will give their biometrics in Pakistan and these checks with other datasets can therefore be done before they enter the UK.

21. As such the legitimate aim in this case is limited to fixing the particular applications with the applicants' biometric data from the start, and helping thereby to prevent immigration fraud. There was some discussion in the hearing about what this ultimately prevents. It is easy to see that if refused in principle without biometrics being taken entry clearance applicants with no family connection to the UK, such as students, visitors and business people, might reinvent themselves as different people therefore addressing the refusal reasons with a fake identity and an "improved" application without declaring the past unsuccessful one, and thus deprive the respondent of a way of identifying dishonest applicants. It is not impossible that a family applicant might do the same, although they would then also have to involve a fake new sponsor, as, for instance, an applicant could not plausibly make a new application in a new identity as the spouse of the same sponsor. I find that this is a legitimate aim applicable in the current applications, although when striking a fair balance with any interference with family life consideration would have to be given to the greater complexity of the fraud needed to take advantage of the lack of biometrics being taken at the start of the entry clearance process, and thus, I find, the probable lesser likelihood of it taking place.

22. There was a suggestion from Mr Keith that if biometrics are not taken at the start then positive in principle decisions might be taken under duress or bought by people traffickers for their clients. Ultimately, I do not find reliance can be placed on this as there was no data or even particulars before me about possible exploitation of in principle decisions by people traffickers, and this is not a matter raised as a justification in the respondent's evidence from Mr Burt or in the decisions under challenge.

23. As a statutory framework and Immigration Rules framework for Article 8 ECHR cases has been enacted by parliament the Supreme Court has revisited the meaning to be given to a requirement of exceptional circumstances within the Immigration Rules in the case of Hesham Ali v SSHD [2016] UKSC 60; [2017] Imm AR 484. The Supreme Court holds at paragraph 38 of the judgment that the word must be understood to mean very compelling circumstances requiring a departure from the general rule and they “need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary”. The role of the Tribunal is described at paragraph 50 as being to establish whether the Article 8 ECHR claims is sufficient strong and compelling to outweigh the strong public interest identified by parliament and the respondent, the strong public interest in that case being the deportation of foreign offenders.
24. Mr Keith, for the respondent, accepted before me that the use of the word “extraordinary” in the biometric discretion policy was not a word which was consistent with the Article 8 ECHR caselaw. I find that it is clear from the first witness statement of Mr Burt at paragraphs 10 and 23 that the policy aims to reduce the feared large numbers of ordinary Afghans who would argue it was unsafe and unreasonable for them to make multiple dangerous trips to Pakistan. It is clear from the detailed grounds of defence at paragraph 47 that it is the respondent’s view that this test will be “rarely met”. The policy therefore leads a decision-maker to look for the factually unusual and not to balance compelling circumstances going to the right to respect for family life against the public interest in preventing immigration fraud.
25. I find that the biometric discretion policy applied by the respondent in this particular context is unlawful as it breaches Article 8 ECHR as it misdirects the decision-making caseworker as to how they should proceed in reaching the decision in line with the third category of illegality in policies identified at paragraph 46 of R (A) v

SSHD [2021] UKSC 37 (which appears at paragraph 84 of the Upper Tribunal decision in R (SGW) v SSHD when identifying the standards to be applied by a court when conducting a judicial review of a policy document issued by government because the policy includes a misleading statement of law.

26. It would be open to the respondent, in line with a proper Article 8 ECHR balancing exercise, to outline that significant weight must be given to the public interest and proper legitimate aims which justify biometrics, and that only exceptional in the sense of very compelling cases can outweigh that interest, but not to direct decision-makers that only applicants with extraordinary, and therefore rare, unique or unusual, circumstances can succeed. This is simply incompatible with the Article 8 ECHR case law I have outlined above. It follows that I find that the policy therefore fails to ultimately provide for a fair balance under Article 8 ECHR, and the decisions in relation to the applicants are unlawfully made through application of an unlawful policy.
27. It also follows that relevant Article 8 ECHR considerations are not properly considered by application of the policy and irrelevant considerations, caused by a condition narrowing the pool of potential applicants by reason of some unusual feature in their case, have been unlawfully given weight. As such the respondent has unlawfully fettered her discretion to partially defer the collection of biometrics by application of this policy in making the decisions under challenge.
28. In terms of the actual decisions under challenge I find that they are unlawful as they fail to provide reasoned decisions on the following relevant matters: whether the applicants and sponsor have family life relationships; they fail to engage substantively with the best interests of the first applicant who contends that he is a child in the context of the respondent accepting that the spirit of s.55 applies in entry clearance cases and Article 8 ECHR being informed by the Convention on the Rights of the Child making the best interests a

primary consideration; they fail to weigh the vulnerability of the first applicant as a person for whom there is history of fear of the Taliban like his sponsor RS (which has been accepted in relation to RS) and the vulnerability of the second applicant based on medical evidence provided to the respondent; and they fail to engage sufficiently with the expert evidence in the report of Mr Foxley dated 4<sup>th</sup> March 2022.

29. Mr Foxley's expert opinion (and Mr Keith confirmed for the respondent that his expertise is not in dispute) is in very brief summary as follows. Travel within Afghanistan to a border crossing raises multiple dangers in the form of improvised explosive devices and unexploded ordnance, criminality and check points established by local militias, Taliban, illegal armed groups and criminals and from local armed disputes. He states that travel in the applicants' home district of Laghman is "extremely hazardous" and entering Pakistan illegally is "costly, unpredictable and very risky". Mr Foxley also sets out, at paragraph 23 of his report, the advice of the FCDO as of 2<sup>nd</sup> March 2022 that: "All travel throughout Afghanistan is extremely dangerous".
30. It is also, I find, relevant to note that the evidence of Mr Burt, at paragraph 21 of his first statement, includes the fact that organisations such as the Red Cross and UNCHR have been told by the Taliban that they cannot assist enabling people to leave the country, providing further evidence that to leave Afghanistan is, at least generally, to act contrary to the Taliban's wishes.
31. The decisions also fail to engage with the offer by the applicants to provide some other sort of identity evidence such as a passport compliant photograph of the applicant to mitigate the chance of the applicants being able to make other future applications in other identities. I accept that such evidence could not be uploaded into the "closed loop" biometric system as described by Mr Burt, and would be of lesser worth than an officially issued passport copy including a photograph as possessed by the applicants in (JZ), but the

respondent has not explained why it would be of no worth at all in ensuring that the same applicants issued with the in principle decision were the same people who register their biometrics in Pakistan. It is notable that, according to the first witness statement of Mr Burt at paragraph 6, such non-system biometrics appear to have been seen as having some protective effect by the respondent during the emergency evacuation from Afghanistan, “Operation Pitting”, where wet fingerprints were taken prior to full biometrics in some cases and so can be assumed to have had some protective value for the public interests engaged.

32. The decisions also on their face, at paragraph 5, apply a different test to that set out in the policy at the time they were made: they were, as noted early in my decision, made on the basis of a higher test of “very exceptional and extraordinary circumstances” being required for the partial deferment requested. I accept however that it is hard to understand what “very” added to make the standard of exceptional and extraordinary higher. I find that this error was ultimately not material, and the test as now expressed is for practical purposes the same as that applied to the applicants.
33. I now move on to make findings, as primary decision-maker, going to my assessment under Article 8 ECHR.
34. I am firstly asked by Mr Chirico, for the applicants, to find that the applicants have shown on the balance of probabilities that they have proven their identities, and relationship to their sponsor, RS. The evidence going to this issue is as follows: the various witness statements of the sponsor including those in his original asylum claim which clearly reference the first applicant and his deep concern for him; RS’s attempts to find the first applicant via the Red Cross in 2018 after his recognition as a refugee in the UK; the psychiatric report of Dr Nuwan Galappathie, consultant forensic psychiatrist who sets out the first applicant’s history and current state of mind; the marriage certificate of RS and the second applicant; medical

evidence regarding the pregnancy of the second applicant from Springhar University Teaching Hospital and her psychological state; and the letters of Ms Sarah Hammad, psychological counsellor at South London Refugee Association with respect to the mental health problems and anxiety of the sponsor, RS. I am satisfied having read the totality of this evidence that the applicants are the younger brother and wife of RS.

35. RS is accepted by the respondent as being 22 years old. I do not find that I have sufficient evidence to find that the first applicant is 17 years old but I do find that he is between the ages of 17 and 20 years, and RS's younger brother and so a minor or a very young adult. The evidence RS gave in his original asylum statement with respect to the first applicant's approximate age would make his age now between 19 and 20 years. It is also relevant to making a finding of family life, and thus whether there is greater than normal dependency, between RS and the first applicant to consider the evidence of Dr Galappathie that the first applicant is a highly vulnerable individual given his depression, anxiety and PTSD. I accept the consistent history given since the asylum statement made by RS in 2016 that they fled Afghanistan together in 2015 due to a fear of recruitment into the Taliban in circumstances where their parents were both dead, and were separated by people smugglers in Iran with the result that RS only made it to France, and then to the UK to join his maternal aunt, and the first applicant was forced to return to Afghanistan. I find that the original asylum statement and the psychological evidence from both Dr Galappathie and Ms Hammad supports the finding that they have a close family life relationship, despite their period of separation, due to being the only surviving members of their original nuclear family and their shared history of danger, loss and trauma and their resulting mutual mental health vulnerabilities.

36. I also accept that the second applicant has shown that she is the wife of RS, and that they are in a genuine and subsisting relationship from the marriage certificate, RS's statements, the evidence from Springhar University Teaching Hospital with respect to the second applicant's pregnancy, and the letters from RS's psychological counsellor at South London Refugee Association. They are both suffering psychologically commensurate with being separated in difficult circumstances at this key time in their marital relationship with the nearing birth of their first child, and further RS is trying to obtain his indefinite leave to remain early so that he can be available to go to Pakistan to assist her should entry clearance be issued. I therefore find that RS and the second applicant also have a family life relationship.
37. I find that RS and the applicants cannot have family life anywhere other than the UK as they are Afghan citizens without a right to live elsewhere and RS is a UK recognised refugee from Afghanistan who cannot therefore be required to live in Afghanistan.
38. In this context I find that the refusal to permit the applicants to defer the recruitment of their biometrics until after an in-principle substantive decision interferes with the applicants' right to respect for family life. The right to family life contains a procedural component to ensure processes are fair, and that the process as a whole must provide sufficient protection for the applicant's interests.
39. I find that the respondent requires, on the facts of this case, that multiple trips are made to Pakistan, first to register biometrics and then if successful to collect visas. In the context of the dangers of travel in Afghanistan and into Pakistan high-lighted in the evidence of Mr Foxley, set out above at paragraph 29 in this decision, and in the context of the applicants being a young adult pregnant woman and a justifiably fearful minor boy/ very young adult man who are suffering from psychological conditions including anxiety, depression and suicidal ideation, this system amounts to a significant interference



with the right to family life being genuine and effective for the applicants.

40. JZ is supportive of this position. As Mrs Justice Lieven accepted at paragraph 46 of the judgment in JZ the risks of that applicant and his family crossing Afghanistan and entering Pakistan are great, even though those applicants actually held passports and visas, and whilst she found that it was difficult to precisely quantify she found that risk to be considerable, and a rational consideration in coming to this conclusion was (as set out at paragraph 51 of the judgment) if the risk was minimal why would the applicants not have simply gone to Pakistan to register their biometrics? I adopt this reasoning. I find that the applicants and sponsor are desperate to be reunited, as reflected in their statements and the psychological evidence relating to all three of them, and they would not have taken these proceedings with the inherent distressing delay they have caused if the biometric procedure did not, in their view and understanding as Afghan citizens on the ground who had already been through the process of getting the second applicant from their home area of Afghanistan into Pakistan and back, pose a considerable risk to their safety.
41. This interference with the applicants' right to respect for family life is in accordance with the law.
42. When considering whether the interference is proportionate I give significant weight to the public interest in maintaining the integrity of the immigration control system, and ensuring that applicants cannot make future applications without their past history of applications being linked to them via biometrics. I acknowledge that what is being requested increases the risk that the applicants would potentially be in a position to do this, and that if refused there would be less protection against detecting false second applications being made by these people. However, I find on the facts of this case, where the applicants would have not only to reinvent themselves with new Tazkiras, which might be fairly easy given what is said by Mr Burt at

paragraph 22 of his first statement, but also find a new family sponsor in the UK to join, that the potential for abuse is not as high as it would be in non-family relationship applications. Any new false applications would also ultimately be vulnerable to challenge to the truth of their relationships as unlike in the true case, where ultimately DNA evidence would prove their relationships to RS (for the second applicant via her as yet unborn child), this would not be possible in relation to any second applications with a new fake sponsor.

43. On the other side of the balance are the strong family life relationships of the applicants with their sponsor, RS, which can only take place in the UK; the fact that it is credible that the first applicant fears the Taliban who are now in power as this was the basis RS said they both left Afghanistan in 2015 and the evidence on which he was recognised as a refugee; the fact that both applicants are vulnerable young people without older family protectors; the fact that both applicants and the sponsor, RS, are in a poor psychological state, and the second applicant is experiencing a difficult pregnancy. With respect to the second applicant there is also the factor that she has already been to Pakistan and made efforts to enrol her biometrics as required by the respondent, prior to substantive consideration of her application, which were thwarted by technical failures in the respondent's system.

44. I find on the particular facts of this case that the fair balance falls in favour of the applicants. Mr Keith, for the respondent, accepted that there were some compelling compassionate features in the applicants' situation. I find it is not a proportionate interference with their right to respect to family life in all of the circumstances outlined above to require three dangerous trips back and forth to Pakistan to make their applications to join RS, a first round trip to register biometrics and a third single trip to collect visas if the applications are successful rather than just one after an in principle positive decision subject to biometrics and security checks.

45. This leaves just one issue to be determined. If I am wrong in my findings above, and the policy with respect to the discretion to partially waive biometrics until after an in principle decision to grant but with recruitment and security checks before entering the UK is lawful, in the sense of being compatible with Article 8 ECHR, and thus properly includes a requirement of extraordinary circumstances, on the facts do these applicants succeed?
46. I do not find being a child, a young adult person or a pregnant woman can properly be described as extraordinary, as many people are either children, young adults or pregnant women. These are ordinary conditions. Sadly, also many people in Afghanistan suffer from mental health conditions, and live in precarious circumstances without protective older relatives. The dangers travelling within Afghanistan to the border would also be common to all, and many Afghans fear the Taliban having a history of opposing them or simply wishing to live their ordinary lives contrary to their values. As such I cannot find that the first applicant's circumstances are extraordinary.
47. However, I do find that it is clearly extraordinary, in sense of rare and unusual, for the second applicant to have travelled, experiencing the dangers I find routinely prevail when travelling from Afghanistan to Pakistan, to make an application and register biometrics at the visa application centre and to have been refused the opportunity to do so due to no fault of her own and indeed in circumstances where her representative did all they could to report the error via the online process advised but to no avail. I find that her other circumstances are very compelling (being a very young, mentally unwell pregnant woman with no older male relative in Afghanistan, and a husband (RS) with mental health problems, facing a dangerous trip involving people smugglers to enter Pakistan and being only able to have family life via an entry clearance application to the UK due to her husband's refugee status) and that she meets this test of exceptional and extraordinary circumstances for the exercise of discretion in her

favour, and that therefore the decision of the respondent in refusing the request errs in law as it is contrary to Article 8 ECHR even if this policy can be lawfully applied to guide discretion.

**Relief**

48. I quash the decisions dated 28<sup>th</sup> March 2022 (and if necessary the previous decisions of 18<sup>th</sup> January, 1<sup>st</sup> February and 18<sup>th</sup> February 2022) refusing the applications for the first and second applicant for biometrics to be recruited in Pakistan after substantive decisions on their applications for entry clearance.
49. I make a declaration that the respondent's policy on the exercise of discretion to defer the recruitment of biometrics until after substantive decisions made on entry clearance applications but prior to entry to the UK is unlawful as it fails to guide decision-makers to take proper account of the Article 8 ECHR rights of the applicants.
50. I make a mandatory order that the respondent proceed to consider the applications for entry clearance of the first and second applicants substantively on an expedited basis, and provide them with these decisions which, if positive, will be subject to their enrolment of biometrics in Pakistan and security checks thereafter.

**Signed:** Fiona Lindsley

Upper Tribunal Judge Lindsley

**Dated:** 24<sup>th</sup> May 2022