



**Upper Tribunal
(Immigration and Asylum Chamber)**
001078 HU/53308/2022

Case No's: UI-2023-

UI-2023-001079

HU/53309/2022

UI-2023-

001080 HU/53495/2022

UI-2023-

001081 HU/53499/2022

UI-2023-

001082 HU/53500/2022

UI-2023-

001083 HU/53501/2022

THE IMMIGRATION ACTS

Heard at Field House

On 8 June 2023

Decision & Reasons

Promulgated

On 1 September 2023

Before

UPPER TRIBUNAL JUDGE PITT

Between

ENTRY CLEARANCE OFFICER

and

**FF
FAK
MFF
EF
SF
MFZ**

(ANONYMITY DIRECTION MADE)

Appellant

Respondents

Representation:

For the Appellant: Ms Nolan, Senior Home Office Presenting Officer
For the Respondent: Mr Nicolson, Counsel, instructed by Times PBS

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant (and any member of his family) 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 or other person. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against the decision dated 10 March 2023 of First-tier Tribunal Judge Howard which allowed the respondents' Article 8 ECHR appeals.
2. For the purposes of this decision, I refer to the respondents as the appellants and to the Entry Clearance Officer (ECO) as the respondent, reflecting their positions before the First-tier Tribunal.

Background

3. The appellants are all citizens of Afghanistan. The first and second appellants are husband and wife. The third, fourth and fifth appellants are their children and they were minors at the date of the entry clearance application. The sixth appellant is a cousin of the first appellant who has been treated as an adopted child of the family for many years after being orphaned.
4. All of the appellants applied to come to the UK as the relatives of JF, a British national. JF is the brother of the first appellant. He is the brother-in-law of the second appellant. He is the paternal uncle of the third, fourth and fifth appellants. He is cousin of the first appellant and the sponsor and has lived with the first and second appellants as a child of their family for many years. He was an adult at the time of the entry clearance application.
5. The appellants applied for entry clearance on 22 November 2011. The first, second and sixth appellants applied as adult dependent relatives under Appendix FM of the Immigration Rules. The children applied under paragraph 319X of the Immigration Rules as nephews of a sponsor with leave to remain as a refugee. All of the appellants asserted that they were entitled to entry clearance under Article 8 ECHR.

6. The applications were refused in decisions dated 28 April 2022, 20 May 2022 and 24 May 2022. It was not accepted that the adults had the requisite relationship with the sponsor. It was not accepted that they were in need of long-term personal care. It was not accepted that it had been shown that the sponsor could provide adequate maintenance and accommodation or that the sponsor was able to be financially responsible for them for 5 years after they came to the UK. It was not accepted that there was evidence showing the family were at immediate risk in Afghanistan. The family were in Pakistan and they could remain there. It was not accepted that the unjustifiably harsh test under GEN.3.2.(2) of Appendix FM was met.
7. The ECO also did not accept that there were serious and compelling family or other circumstances that made exclusion of the children undesirable. They were living with their parents and their best interests were to remain in that family unit. It had not been shown that the maintenance and accommodation requirements were met. It was not accepted that the children had a family life with the sponsor so Article 8 ECHR was not engaged.
8. The appellants appealed the refusals of entry clearance and the appeals came before First-tier Tribunal Judge Howard on 10 January 2023. In addition to witness statements from the first two appellants and the sponsor and other documents in the appellant's bundle, Judge Howard heard oral evidence from the sponsor.

Decision of the First-tier Tribunal

9. The First-tier Tribunal found that the appellant's met the provisions of paragraph GEN3.2.(2) of Appendix FM, concluding that the decision would lead to unjustifiably harsh consequences and that the decision amounted to a disproportionate interference with the family life of the appellants and the sponsor.
10. In paragraphs 11 to 16 the First-tier Tribunal summarised the oral evidence of the sponsor:

"Evidence

11. The sponsor [JF] sets out the familial relationship between all the appellants and [MFZ]. The familial relationships are not disputed.
12. The sponsor told me of the contractual relationship his brother had with both NATO and US forces in Afghanistan . He worked as a security contractor. He told me that their father, [SF], was himself a soldier in the Afghan army. He also told me about the work his sister-in-law did as a media reporter in Afghanistan and how this has exposed her to vilification by the Taliban.
13. He told me that since the Taliban resumed control in Afghanistan their lives have been in constant danger and as a consequence they have fled to Pakistan where they currently reside unlawfully. Initially they

had temporary permission to remain in Pakistan, but that expired in April 2022 and as a consequence of the hardening of attitudes toward Afghan migrants Pakistan, they have not sought to renew the permission for fear of being summarily removed back to Afghanistan.

14. The sponsor told me that the appellants are now effectively in hiding in Pakistan. They are living near Peshawar; in accommodation they do not own. They have been near Peshawar since the applications the subject of this appeal were refused.
15. He also told me that the circumstances in which [FF] and [FAK] currently find themselves living is having a seriously detrimental effect of their mental health.
16. Both [FF] and [FAK] have also provided witness statements, but of course they were not cross-examined. They repeat that spoken of by the sponsor.”

11. In paragraphs 17 and 18, Judge Howard set out his initial findings:

“17. The evidence of the sponsor and that provided from the first and second appellants satisfies me it is more likely than not that they have removed themselves from Afghanistan and are now living unlawfully in Pakistan.

18. Further support for this finding is to be found in the respondent’s decision in the case of [FF], where the respondent posits the notion that there is no reason why the appellants cannot remain in Pakistan.”

12. Having found that the family were living in Pakistan, the First-tier Tribunal set out the next issue to be addressed in paragraph 19:

“Thus the first issue I must address is whether it would be reasonable for them to return to Afghanistan.”

The judge went on in paragraphs 19 to 22 to find that it was unjustifiably harsh for the appellants to be expected to return to Afghanistan. He reached this conclusion on the basis of the family profile of involvement with the army of the previous regime, their work with foreign organisations including NATO and the US military and the second appellant’s profile as a woman working in the media including appearing on television, these profiles giving rise to risks of serious difficulties under the Taliban regime.

13. In paragraph 23, the First-tier Tribunal also concluded that the family could not be expected to remain in unlawful and precarious circumstances in Pakistan.
14. In paragraphs 24 to 26, Judge Howard found that the provisions of GEN.3.2.(2) were met, that is, that there were exceptional circumstances which rendered refusal of entry clearance a breach of Article 8 ECHR because the refusal would result in unjustifiably harsh consequences.

15. Judge Howard went on to conduct an Article 8 ECHR assessment in paragraphs 28 to 31 of the decision. He set out his findings using the well-known Razgar questions. He said this in paragraph 30(1):

“(1) Will the proposed refusal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?”

The first appellant's brother, the sponsor, is lawfully settled in the UK. He is a British citizen who was originally granted entry clearance as a spouse. He has remained in the UK lawfully since. He has however, and as the holder of a British passport, made a significant number of family visits to Afghanistan. The purpose of those visits was to maintain the family links with his mother and father; and his brother and his family (the appellants). Since the appellants fled Afghanistan that is something he has been unable to do. Similarly he cannot visit them in Pakistan as officially they are not there. They cannot visit him in the UK. He is now restricted in his contact with the appellants to occasional telephone calls.

In so far as family life is concerned the refusal to grant entry clearance will prevent the appellants and their brother and uncle from maintaining the family life that was extant before the appellants fled Afghanistan.”

16. In paragraphs 30(2) to 30(5) the First-tier Tribunal found that the interference had consequences sufficient to engage Article 8 ECHR, was in accordance with the law and was a disproportionate interference with the family lives of the appellants and sponsor. Judge Howard said this in paragraph 30(4):

“(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?”

The first public interest I must consider is economic. Will the presence of the appellants be a burden to the British taxpayer? The sponsor is in employment. He has both an income and very considerable savings which he would utilise for the support and maintenance of the appellants. Both the first and second appellants are educated and have always worked. There is no reason to suppose that, like the sponsor, they would not work in the UK. There is therefore no suggestion in this case that there would be any recourse to public funds and I am satisfied this is the case. While the first and second appellants are struggling with their mental health, these are not chronic conditions, but ones which have their roots in their current parlous circumstances. One relieved of those circumstances I am satisfied their mental health will improve. I am satisfied they would not make disproportionate demands on the NHS. The balance of the economic argument is neutral. The remaining public interest cited is effective immigration control. **Mostafa (Article 8 in entry clearance) [2015] UKUT 112** gives guidance to the amount of weight to properly be attached

to this public interest where the Immigration Rules were in fact met at the time of the decision. The weight to be attached, on the facts as I have found them to be is limited. The interference is not necessary.

Grounds

17. Permission to appeal on all grounds was granted by the First-tier Tribunal on 13 April 2023. The respondent's grounds stated:

"Ground one: Failing to take into account and/or resolve conflicts of fact or opinion on a material matter.

1. At [19] the FTTJ finds that the family are living illegally in Peshawar, Pakistan. This is despite the sponsor's evidence that they are living in Afghanistan, the appellant's brother and sister-in-law state the same in their witness statements of October 2022. It is therefore submitted that the FTTJ has made a material error in respect to the evidence. If the appellant's left Afghanistan in November 2021 on temporary visas as claimed, they have evidently returned. Furthermore, the sponsor has been visiting them in Afghanistan [30]. There is no evidence that they experienced any problems leaving Pakistan, nor that they experienced any problems between the Taliban taking control of Afghanistan in August 2021 and their claimed departure, nor since their evident return. In any event the general situation in Afghanistan is insufficient to demonstrate that the appellant's qualify for international protection.

2. It is therefore submitted that the FTTJ has made a fundamental error in respect to the appellants' current situation, such as to infect the subsequent findings that the appellants meet the requirements of Appendix FM GEN. 3.2. and the finding that a grant of leave under Article 8 is justified on the basis of exceptional circumstances.

Ground two: Making a material error of law

3. In any event, there is no evidence of additional dependency such that the relationship between the sponsor and appellants engages Article 8 of the ECHR. Nor has the FTTJ given adequate scrutiny to s.117B of the Nationality, Immigration and Asylum Act 2002. The findings at [30, (4)] do not amount to a reasoned finding that the six appellants will not be a burden on taxpayers, nor has any consideration been given as to how the appellants will integrate into UK society."

Discussion

18. I considered the grounds of appeal in the context of the many authorities on the approach of an appellate tribunal or court to reviewing a first instance judge's decision. There is a need to "resist the temptation" to characterise disagreements of fact as errors of law, as it was put by Warby LJ in AE (Iraq) v Secretary of State for the Home Department [2021] EWCA Civ 948. Warby LJ recalled the judgment of Floyd LJ in UT (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1095 at [19]:

"... although 'error of law' is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter.

19. The constraints to which appellate tribunals and courts are subject in relation to appeals were recently (re)summarised by the Court of Appeal in Volpi v Volpi [\[2022\] EWCA Civ 464](#) in these terms, per Lewison LJ:

"2. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

20. Ground 1 challenges the finding of the First-tier Tribunal in paragraph 19 of the decision that the appellants were living in Pakistan. I accept, as submitted by Mr Nicolson, that Ground 1 misstates the evidence that was before the First-tier Tribunal. The witness statement of the sponsor was

that the family were living in Pakistan, not Afghanistan. Nothing in his witness statement indicated that the appellants had returned to Afghanistan.

21. Further, the sponsor's oral evidence is set out above and clearly addressed the difficulties the appellants were facing in Pakistan, not Afghanistan. The grounds were also incorrect in asserting that the sponsor had been visiting the family in Afghanistan since the Taliban had taken over in the summer of 2021. The sponsor's evidence was that he had visited the family in Afghanistan and had not been able to visit them in Pakistan; see paragraph 30(1) of the decision. The assertion in Ground 1 that the appellants had not experienced problems since they returned to Afghanistan and that their situation there did not show that they required international protection is therefore also misconceived, the latter not being a live issue in this appeal.
22. Ground 1 does identify correctly that the witness statements dated 26 October 2022 of the first and second appellants referred to them living in Afghanistan. Ms Nolan submitted that where this was so, the decision showed a "failure to resolve a conflict of fact". It was common ground between the parties, however, that the sponsor had been cross-examined on this point and that his evidence had been that the appellants were in Pakistan and he did not know why their witness statements said otherwise. The decision shows that the sponsor gave clear evidence on the appellants being in Pakistan. That evidence provided a rational basis for finding that the appellants were in Pakistan. The weight given to that evidence was a matter for the judge and entitled him to make a finding that the appellants were living illegally in Pakistan in precarious circumstances.
23. Where that was so, it appeared to me that, read fairly, this was not a situation where the First-tier Tribunal could be said to be "plainly wrong" or that Judge Howard reached a decision "that no reasonable judge could have reached." He can be assumed to have taken the whole of the evidence into account and it is accepted that this included the evidence of the sponsor on the appellants being in Pakistan and the statements to the contrary in the witness statements being inexplicable where the family were at risk in Afghanistan and were in fear of going back there. An absence of specific reference to these parts of the witness statements of the appellants is not, in my judgment, sufficient to show that the First-tier Tribunal overlooked them.
24. The First-tier Tribunal judge could have set out more expressly that he held in mind that there were statements from the first and second appellant referring to them living in Afghanistan. In the context of all of the evidence before the First-tier Tribunal the absence of express reference is not capable of amounting to a material error on a point of law. The decision is sufficient where it shows that the First-tier Tribunal placed weight on the evidence of the sponsor as to the appellants being in Pakistan. The grounds are again misconceived in suggesting that the First-tier Tribunal found that the family would face difficulties in Pakistan on the

basis of only the “general” situation in Afghanistan where it is clear that Judge Howard considered the personal profiles of the appellants the sponsor and the father of the first appellant and sponsor serving for the previous regime in the Afghan army.

25. For these reasons, I did not find that Ground 1 had merit.
26. I also found that Ground 2 was misconceived in asserting that there was no evidence of “additional dependency” such that the test for the existence of family life could be said to be met. The evidence before the First-tier Tribunal was that the sponsor had “made a significant number of family visits to Afghanistan” and that the “purpose of those visits was to maintain the family links with his mother and father; and his brother and his family (the appellants)”; see paragraph 30(1) of the decision. He maintained his relationship with them via telephone after they went to Pakistan. He has been providing financial support for an extended period. As recorded by the First-tier Tribunal at paragraph 30(4) the sponsor’s financial evidence showed that he was working and had significant savings, his bank statements showing consistently high savings which were in excess of £79,000 immediately prior to the entry clearance applications.
27. In my judgment, the First-tier Tribunal had evidence before it on which it was entitled to place weight and proceeded to make a rational finding that finding that the relationships of the appellants and sponsor went beyond the normal emotional ties and amounted to family life, not unsurprising given the events the family had gone through, and that there was real, committed or effective support from the sponsor; Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 and Jitendra Rai v Entry Clearance Office Delhi [2017] EWCA Civ 320 applied.
28. The grounds also submit that the First-tier Tribunal failed to apply correctly the provisions of s.117B of the Nationality, Immigration and Asylum Act 2002. The First-tier Tribunal addressed the potential burden to taxpayers expressly in paragraph 30(4) of the decision, finding that the sponsor can support the appellants and that the first and second appellants, professional, educated individuals, were unlikely to be a burden to the taxpayer and would work and that the “economic argument is neutral”. Also, the assessment is not limited to the provisions of paragraph 117B as the First-tier Tribunal went on correctly to weigh the earlier finding that the provisions of paragraph GEN.3.2.(2) were met, finding that this weighed on the appellants’ side of the balance. The grounds do not show that the First-tier Tribunal erred in law regarding paragraph 117B or in the wider proportionality assessment.
29. For all of these reasons, my conclusion is that the decision of the First-tier Tribunal does not disclose a material error on a point of law.

Notice of Decision

30. The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed: S Pitt
Upper Tribunal Judge Pitt

Date: 1 August 2023