IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004044
UI-2023-004045
UI-2023-004046
UI-2023-004047
UI-2023-004048
UI-2023-004049
First-tier Tribunal No: HU/58744/2022
HU/58737/2022
HU/58743/2022
HU/58739/2022
HU/58741/2022
HU/58742/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 30th of November 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SJJ
MJ
SSJ
RJ
SKJ
SMJ
(ANONYMITY ORDER MADE)

Appellant

and

AN ENTRY CLEARANCE OFFICER (SHEF/2399170)

Respondent

Representation:
For the Appellant: Mr Nicholson, instructed by Times PBS, Solicitors.
For the Respondent: Ms Rixom, a Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 17 November 2023

Order Regarding Anonymity

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

No-one shall publish or reveal any information, including the name or address of the appellants', 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 AND REASONS

1. The appellants' appeal with permission a decision of First-tier Tribunal Judge Bircher ('the Judge'), promulgated following a hearing at Newcastle on 30 May 2023, in which the Judge dismissed their appeals on human rights grounds.

2. The appellants' are all citizens of Afghanistan. The first appellant was born on 16 February 1959. He is married to the second appellant who was born on 15 October 1968. The third appellant is their eldest son born on 13 September 1993 who is married to the fourth appellant who was born on 26 January 1999. The fifth appellant is the second eldest son of the first and second appellants who was born on 16 December 1993. The sixth appellant is the third youngest son who was born on 8 November 2000. There are other family members referred to by the Judge at [2] who are not parties to this appeal.

3. The Judge refers, as a preliminary issue, to an application being made for an adjournment of the substantive hearing which the Judge refused [5-9].

4. The Judge's consideration of Article 8 ECHR and whether there are exceptional circumstances which would render refusal of entry clearance a breach of a protective right commences from [11]. The Judge's findings in support of her conclusions are set out from [14].

5. The Judge notes the Sponsor is a British citizen. It is also noted that the appellants have relocated from Afghanistan to Pakistan where they have visas which allow them to live legitimately in Pakistan, at least in the short-term. Having analysed the evidence the Judge concludes that although the appellants have been placed in a difficult situation in having to leave Afghanistan for Pakistan there were no exceptional circumstances, and it was not found to be unduly harsh for the appellants to remain in Pakistan [17].

6. At [18] the Judge records that having considered whether there were any compelling compassionate factors identified as being exceptional circumstances that warranted a grant of discretionary leave, she did not find the same had been made out. The appeal was dismissed pursuant to Article 8 ECHR.

7. The appellants sought permission to appeal. Ground 1 asserted the Judge erred in law in failing to grant the application for an adjournment. The grounds refer to the application having been made to enable the appellants to provide evidence of their relationship to the UK based Sponsor. It is asserted the Judge erred in finding the appellants had had 12 months to obtain this information as that is factually incorrect as it was only 7 months.

8. Ground 2 asserts the Tribunal erred in law in failing to have regard to relevant evidence and in failing to provide evidence in support of its findings. Reference is made to the production of the passports and visas showing one of the appellant's documents indicated a renewal or extension by the authorities in Pakistan with, in

reality, there being no evidence indicating it was possible to extend or renew a visit visa in Pakistan so the holder would be entitled to remain in the country for longer than 60 days. The Ground pleads the Judge erred in law in failing to indicate the reasons for its confidence in the appellants ability to establish themselves in Pakistan. The Grounds assert Pakistan is not a signatory to the Refugee Convention in any event.

9. Permission to appeal was granted by another judge of the First-tier Tribunal on 20 September 2023, the operative part of the grant being in the following terms:

> 2. The grounds assert that the judge made an error of law in that in relation the adjournment application he firstly relied on a factually wrong time period since the refusal of the Appellants' applications and wrongly directed himself as to the Overriding Objective in relation to the words avoiding delay "wherever possible." It is further averred that the approach to the assessment of the Appellants' position in Pakistan was flawed as baseless assumptions were made and there was a failure to refer to objective evidence.
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> 3. In the consideration of exceptional circumstances it was arguably an error of law to fail to refer to any of the objective evidence in the bundle at pp AOB 120-150(referred to in paragraph 10 of the grounds). Since the judge made a finding of fact that there is no need for the Appellants to be living in hiding (without reference to the objective materials) this arguably infects the whole of the article 8 exercise. Arguably that is a material error (even though the evidence of family life being engaged is sparse) because the judge has arguably failed to properly reason and find express conclusions as to whether his decision is based on family life not being engaged at all or proportionality.

10. In a Rule 24 response filed by the Secretary of State dated 11 October 2023 it is stated:

> 2. The respondent opposes the appellant's appeal. In summary, the respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately.
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> 3. The grounds mischaracterise the approach of the FTTJ in refusing the adjournment application. The hearing before the FTTJ took place on 30/05/23. As noted by the FTTJ at [5] the applications were made on 08/04/22 with the assistance of the representatives throughout the whole process [6], thus by the date of hearing the appellants have had since the application date a period of 12 months to gather evidence. In any case, whether it is 7 months or 12 months, both are considered to be 'ample time'. Further as noted at [7], the Tribunal had already refused a previous application to adjourn in March 2023- the grounds simply ignore this and the actual merit of the application in the first place.
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> 4. Likewise the grounds mischaracterise the FTTJ consideration and application of the overriding objective. It is noted that Rule 2 (3) of the First Tier Tribunal Procedural Rules state: The Tribunal must seek to give effect to the overriding objective when it (a) exercises any power under these Rules…. (emphasis added). Thus it is incumbent on the Tribunal to apply the principal as identified by the FTTJ so far as compatible with proper consideration of the issues, and in the view of the FTTJ the matter could be dealt with fairly and justly. It is submitted that the full consideration of the issue of adjournment should be read as a whole.
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> 5. The second ground raises an immaterial point. The appeal could not succeed under the Rules, and was thus pursued solely on an Article 8 basis outside the rules. The grounds do not challenge the bulk of the material findings- for example: [14] the absence of evidence to show the sponsor is related to the appellants; the absence

of evidence of contact [14]; the contradictory evidence of the sponsor that the appellant had never applied to extend their visa in Pakistan as opposed to the statement of the first appellant; how little the sponsor knew of the appellants [16]; that the appellant and sponsor are not related as claimed [17]; the best interests of the children are best served living with their parents [17]; and, that the arrival of the appellants would place a significance burden on the public purse [17]. These are not an exhaustive citation of the findings made against the appellants.

6. Given the aforementioned findings, it is submitted that even if Article 8 was engaged (it is not accepted that it is) the FTTJ clearly found the evidence to be both lacking in credibility as to their circumstances or lacking in weight to establish a case of a disproportionate breach.

Discussion and analysis

11. It is necessary to consider the basis on which the Entry Clearance Officer (ECO) refused the applications for entry clearance made on 8 April 2022.

12. The ECO notes the appellants applied for entry clearance to the UK under Appendix FM to the Immigration Rules on the basis of the family life between them and the UK based sponsor. It was concluded the first appellant could not qualify under the adult dependent relative route as he could not meet the requirements of E-ECDR.2.1 to E-ECDR.2.3. The first appellant claimed that the Sponsor was his niece-in-law but the ECO specifically states that he had failed to provide any documents to confirm that he is related as claimed. It was therefore not found that he could meet E-ECDR.2.1. The failure to provide evidence of the claimed relationship between the UK sponsor and individual appellants is repeated in each of the refusal notices. I therefore reject the submission made at the hearing on the appellants behalf that the issue of the relationship was something of which the appellants were unaware required specific evidence until later on in the proceedings. The refusal notices are dated 18 October 2022. The challenge to the claimed relationship would therefore be something of which all the appellants would have been aware shortly after this date when they receive their individual decisions. As the Rule 24 response also notes, the appellants are represented.

13. Returning to the determination, the Judge records at [5] to an application being made by the appellant's representative before the Judge, who was not Mr Nicholson, for an adjournment for three reasons. These were firstly, as the interpreter was an Iranian Farsi and not Afghan Dari interpreter, secondly in order to enable the three youngest children's appeals to be linked to this appeal in the event their applications were refused by the Home Office, and thirdly to obtain additional documents to support the claimed relationship.

14. The Judge notes in that paragraph the chronology in relation to the date of refusal and notice of lodging of appeal on 16 November 2022, and finds the appellants have had ample time to gather and collate documentary evidence in support of their applications.

15. At [6-7] Judge writes:

6. The Tribunal recognises the circumstances in which the appellants claim to have left Afghanistan and therefore it may prove difficult get some of the documentation. However, the appellants and the legal representatives have had 12 months to gather such information. There is no documentary evidence to even indicate that best endeavours were used to obtain such documentary evidence. It is striking how

little documentary evidence has been provided. The appellants have been represented throughout this process as demonstrated by the application letter dated 11 th May 2022 and furthermore the first appellant is highly educated as are his eldest son (BA in Political Science) and second eldest son (BA in Law). It is not beyond the realms of possibility that they PA/50687/2023 3 could have obtained or at least endeavoured to obtain documents, photographs etc which would support their claim to be related to the sponsor. The Tribunal is also satisfied that the appellants and their legal representatives have already had a lengthy period of time to obtain such documents in support of the application and whilst some documents have been produced none of these relate to the family relationship which they claim exists between the sponsor and the appellant. The Tribunal has also noted that there have been various applications for an adjournment. On the 15.02.2023 the appellants legal representatives requested an extension of the prescribed time limits in order to upload the bundles and enable the first appellant a further period of time to confirm the contents of their statements. On the 20.02.2023 this request was granted.

7. However, on the 1st March 2023 a further extension was requested on the basis that the legal representatives were awaiting final instructions from the sponsor and the legal representatives required a further period of time to prepare for the hearing. This application was refused on the 02.03. 2023. On the 22nd March 2023 the legal representatives requested an adjournment on the basis that the Home Office had not decided the applications for 3 of the children. On the 25.05.2023 this application was refused on the grounds that it was not in the interests of justice to delay the listing of an appeal due to a pending application for a different appellant.

16. As with any application for an adjournment, the principal guiding any decision whether to grant or refuse an application is that of fairness. The Judge was entitled to take into account the time that had lapsed in which the information could have been obtained, what steps had been taken to obtain the evidence during that period, and whether the party seeking the adjournment application had acted reasonably in all the circumstances.

17. The application for permission to appeal challenges the Judges decision on the basis of an error of fact in the Judge claiming the appellants had 12 months to gather the information together relating to their claimed relationship when this was in fact only 7 months. The Judge records a previous application an adjournment having been refused indicating that why such an adjournment was justified had not been provided.

18. The grounds refer to the decision of E&R v Secretary of State the Home Department [2004] EWCA Civ 49. It is not disputed that the Court of Appeal in that case found a mistake of fact giving rise to unfairness could amount to a material error of law. That decision did not establish, however, that to making a mistake of fact alone would be sufficient. The Court of Appeal set out the ordinary requirements for a finding of unfairness which would arise from the mistake of fact in the following terms:

i) there must have been a mistake as to an existing fact including a mistake as to the availability of evidence on a particular fact;
ii) the fact or evidence must have been established, in the sense that it was uncontentious and objectively verifiable;
iii) the appellant (or his advisers) must not have been responsible for the mistake; and
iv) the mistake must have played a material (not necessarily decisive) part in the Adjudicator’s reasoning.

19. The hearing took place on 30 May 2023 in which the appellants challenged the decision of the ECO dated 18 October 2022. Whilst between the applications being made on 8 April 2022 to 30 May 2023, 12 months may have expired, it must be accepted that it would only have been from the refusal that the appellants would have been aware, as must have been their professional representatives, that their claimed relationship to the UK based sponsor was not accepted and was a point in dispute.

20. Following the lodging of the appeal directions were given to the parties by the First-tier Tribunal for them to prepare and file all the evidence they were seeking to rely upon in support of their appeal. The finding of the Judge is that the appellants had ample time to obtain the evidence they were now claiming they needed the adjournment for. On the basis the material before the Judge that is a sustainable finding. The Judge notes at [6] that there was no documentary evidence to even indicate that best endeavours were used to obtain the documentary evidence and that it was striking how little documentary evidence had been provided. The Judge finds that it is not beyond the realms of possibility that the appellants could have obtained or at least endeavoured to obtain documents which would support their claim to be related to the sponsor. Those findings are not challenged in the grounds seeking permission to appeal.

21. The fact there may have been 7 months rather than 12 months on the chronology does not establish material legal error. The Judge considered the factual matrix, the overriding objective, and the fairness of the decision before concluding as she did. I find no material legal error made out in relation to Ground 1. There is no challenge in the grounds to the refusal of the application for an adjournment on any other ground.

22. Ground 2 asserts failure by the Judge to have regard to the evidence and failing to provide evidence to support her findings. This relates to a challenge to the status of the appellants in Pakistan and whether they had legitimised their position or had permission to stay in Pakistan, the lack of ability to apply for refugee status in Pakistan as that country is not a signatory to the Refugee Convention, and a reference to country information.

23. It is important not to lose sight of the application the Judge was considering. The application was made under Appendix FM of the Immigration Rules which was unsuccessful on the basis there was no proof of the claimed relationship with the UK based sponsor. At [17] the Judge specifically finds that she is not satisfied that the sponsor is related as claimed to the appellants given the lack of documentation and the sponsors lack of knowledge about their circumstances. That is a finding within the range of findings reasonably open to the Judge on the evidence. No material legal error has been established in relation to the same. That finding is fatal to the application under the Immigration Rules. The Judge was properly entitled to dismiss the appeal on that basis.

24. The Judge went on to consider the merits of the appeal outside the Immigration Rules setting out a correct legal self-direction at [11-13] of her decision.

25. The first of the Razgar questions is whether Article 8(1) is engaged. This requires an individual to establish on the evidence that they have either a private or family life recognised by Article 8.

26. In relation to a private life claim. I reject the submission by Mr Nicholson that that is a relevant factor in this appeal. This is an entry clearance case. In

Secretary of State for the Home Department v Abbas [2017] EWAC Civ 1393 the Court of Appeal found there was no obligation upon an ECHR state to allow an alien to enter its territory to pursue private life. Article 1 of the ECHR only requires a contracting state to protect human rights within its own jurisdiction.

27. In relation to family life, whilst Mr Nicholson referred to the witness evidence and the claim the sponsor was sending funds to the appellants in Pakistan, that in itself does not establish a relationship sufficient to engage Article 8 on the basis of family life. There is a clear distinction to be drawn between family life in colloquial sense and family life within the meaning of Article 8 (1). As found by Sedley LJ in S v UK [1984] 40 DR 196, "neither blood ties nor the concerning affection that ordinarily goes with them are, by themselves altogether, in my judgement enough to constitute family life. Most of us have close relatives of whom we are extremely fond and who we visit, or who visit us, from time to time; but none of us would say on those grounds alone that we have a family life with them in any sense capable of coming within the meaning and purpose of Article 8".

28. So far as the submission made by Mr Nicholson of funds being remitted was an attempt to argue family life on the basis of financial dependency, it was established in Kugathas v Secretary of State for the Home Department [2003] INLR 170 by the Court of Appeal that in order to establish family life it is necessary to show that there is a real committed or effectively support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. It was a key element in this case together with subsequent cases dealing with this issue that there is an established familial relationship. In the current appeal of the Judge has made a specific sustainable finding that the claimed family relationship was not established on the evidence.

29. This is not a case such as that the considered by the Court of Appeal in Uddin [2020] EWAC Civ 338 in which that court reiterated that the irreducible minimum of family life was whether support was real or effective or committed, and that those principles were not limited birth families, with the test within a foster family being no different. In that case support had been provided by foster parents to an unaccompanied asylum seeking minor, which in which the factual matrix and nature of support and ties that developed was found by the Court of Appeal to amount of a protected right recognised by Article 8 on the facts. In the current appeal that degree of relationship between the UK based sponsor and the appellants is not established at all on the facts. That is supported by the Judge's specific finding that the sponsor knew so little about the appellants.

30. As there is no basis for arguing a case of a protected private life, and the evidence supported the Judge's finding that family life had not been established on the facts, Article 8(1) was not engaged. As noted in Rule 24 response, a lot of the points therefore relied upon in Ground 2 are therefore irrelevant. I find no legal error made out in the Judge's dismissal of the appeal pursuant to Article 8 ECHR on the basis that no right protected by that provision was made out on the facts.

31. The Judge goes on at [18] to consider if whether there are compelling compassionate factors which were identified as being exceptional, sufficient to warrant a grant of discretionary leave outside Immigration Rules are ECHR. The Judge does not set out on what basis she considers it appropriate to make findings in relation to the Secretary of State's residual discretion which it is open

to the Secretary of State to exercise as she sees fit. The application to the ECO was made on the basis of the Immigration Rules and considered by the Judge on that basis and outside the rules by reference to Article 8 ECHR. If the Judge was looking to consider factors that may have been relevant to an assessment under Article 8 (2) that was arguably irrelevant in a case in which it had not been established that Article 8 was even engaged.

32. Whilst the situation for Afghan migrants in Pakistan may be submitted by Mr Nicholson and set out in the ground seeking permission to appeal, that is not relevant to the issues before the Judge. This is not a protection appeal, and it was not established there is any basis for considering matters beyond the matrix of the human rights application. Any error in the Judge doing so is not material as the appeal was dismissed in any event.

33. Having considered the evidence before the Judge, the determination, the pleadings, and submissions made by both advocates, I find it has not been made out that the Judge's determination is infected by material legal error sufficient to warrant the Upper Tribunal interfering any further in this matter. The Judge's findings are within the range of those reasonably open to her on the evidence and are supported by adequate reasons.

Notice of Decision

34. No material legal error has been made out in the decision of the First-tier Tribunal. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 November 2023