IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004886

First-tier Tribunal No:
HU/00430/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 1st of October 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE HOFFMAN

Between

MR HAZRAT ALI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs K Alikhail, sponsor
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at Field House on 23 August 2024

DECISION AND REASONS

1. The appellant appeals against a decision of the respondent made on 11 November 2021 to refuse him entry clearance to the United Kingdom as the parent of his British citizen children and partner of his British citizen wife, Kadrah Alikhail ("the sponsor").

2. His appeal against that decision was dismissed by the First-tier Tribunal. For the reasons set out in the decision of Deputy Upper Tribunal Judge Haria, promulgated on 3 June 2024, that decision was set aside.

Background

3. The appellant and the sponsor were married in Afghanistan in 2016. The sponsor, who is of Afghani origin, had come to the United Kingdom in 2007 with her mother, father and siblings and later obtained British citizenship. The couple then lived together in Afghanistan for a period before the sponsor returned to the United Kingdom for the birth of her first child. They had at that point lived in Kabul but she and her first daughter then returned to Afghanistan to be with the appellant and at times they lived in Pakistan where he was employed. The sponsor and her daughter returned to the United Kingdom for the birth of the second child, but they have not been able to live together as a family with the appellant since then.

4. The Secretary of State's case is, as set out in the refusal letter, that the appellant cannot meet the requirements of the Immigration Rules for entry as the parent of a British citizen child as that route is applicable only when the marriage between the parents had broken down. It is the Secretary of State's case also that the appellant cannot meet the requirements of Appendix FM as the spouse of a British citizen because the financial requirements cannot be met.

5. The Secretary of State's case is also that any interference there may be in the family life between the appellant and his wife and children is proportionate and thus the refusal of entry clearance is not in breach of the appellant's rights pursuant to article 8 of the Human Rights Convention.

The Hearing

6. At the outset of the hearing, as the appellant is unrepresented, as was the sponsor, we explained that it needed to be shown is that any interference between the family life that exists outweighed the public interest in maintaining an effective immigration control. We explained that we would ask the sponsor for some information about her marriage, about how she and her children and her husband keep in contact and any difficulties there would be for all concerned if entry clearance was not granted.

7. On that basis we put a number of open questions to the sponsor, and she was cross-examined. Subsequent to that, Mr Terrell made submissions.

8. The sponsor confirmed that she had come to the United Kingdom in 2007 with her parents and siblings. All of them still live in London and are British citizens. They live together but she lives alone with her own two children.

9. The sponsor explained that she had travelled to Afghanistan for her wedding, which had been arranged between her and the appellant, and that she had lived in Afghanistan after the wedding for about two years and then came back to the United Kingdom. She explained that the

appellant is manager of a food store in Kabul and had left Afghanistan about four years ago, moving to Pakistan where he works in a similar job. His parents continued to live there and he does go to Afghanistan to visit them. She believed that he had his visa in Pakistan, which was of five years length but would be coming to an end soon.

10. The sponsor confirmed that she is in receipt of universal credit, housing benefit and council tax credit. She does not work and looks after the daughters who are currently 4 and 6. She confirmed they have no health problems. The sponsor explained that her parents live about ten minutes away on foot.

11. The sponsor said that she is in regular contact with her husband using WhatsApp and that they make video calls. The children speak to him as well and he sends her money from time to time. She said it was very hard for them to be separated without their father and it is difficult for her, increasingly, when for example she has medical problems due to an ear problem. She said it is difficult and expensive to obtain visas for Pakistan from the United Kingdom and that they had not been together as a family since March 2022. She said it would not be possible for them to go to Pakistan or to Afghanistan as there would be no proper education for the children and she would be unable to work and they had spent all their lives here. She said it was very hard for her to live without her husband. She had got very, very tired; that her children need their father and that the appellant needs the children.

12. In cross-examination the sponsor confirmed that she had spent about a year and a half living with the appellant in Pakistan and that the last time she had been in Pakistan with him was for about four months. At that point it had been possible to visit because the children were not in school. She said they had looked into schooling in Pakistan but it would not be the same as in the United Kingdom and that her eldest daughter had learned so much in her English primary school in the last two years. She said that the appellant intended to work if he came to the United Kingdom. She said that she was going to go to college now that the children would both be in school, the younger one started nursery in September, that she would go two days a week and she hoped he had a part-time job. She said she wanted to do GCSEs but could not work full-time as she looked after the children. She said that her family do help.

13. Mr Terrell drew attention to the fact that Judge Haria had preserved the findings from Judge Meah at paragraphs [16] to [21] in respect of financial requirements. He submitted considerable weight should be attached to the Immigration Rules: in particular there was a public interest in the family not having to live on less than the relevant applicable level of benefits. He accepted that there was family life and that it would be unreasonable to suggest that either the sponsor or the children should go to live in Pakistan or Afghanistan. He submitted that, however, there were a number of factors taken into account. The appellant had never lived

here and that what would in effect happen were entry clearance refused would be a continuation in the status quo. In essence the decision did not interfere with the way the family life is being enjoyed up to now. He submitted further that it was open to the appellant to apply to come to the United Kingdom on a proper basis and that this was not a case in which the public interest in maintaining immigration control was outweighed.

14. The sponsor explained that her husband would be able to get a job, life was very hard for her and the children and bringing them up on her own had become increasingly difficult.

The Law

15. These are appeals brought from outside the United Kingdom in which it is argued that the refusal of entry clearance is in breach of article 8 of the Human Rights Convention. It is for the appellant to prove his case to the civil standard.

16. It is established law that the jurisdiction of the Human Rights Convention is primarily territorial, but, as the Court of Appeal observed in SSHD v Abbas at [16]- [17] and also [19] where the Court of Appeal held:

> 19. The passage from *Khan* set out above recognises the unitary nature of a family for article 8 purposes with the consequence that the interference with the family life of one is an interference with the rights of all those within the ambit of the family whose rights are engaged. That is a feature of family life recognised, for example, in *Beoku-Betts v Secretary of State for the Home Department* [2009] AC 115 which held that the rights of all family members, and not only the person immediately affected by a removal decision, must be considered in the article 8 balance. As Lord Brown of Eaton-under-Heywood observed:
>
> > "Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of the removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims." (paragraph [20]).
>
> Lady Hale put it this way:
>
> " … the central point about family life … is that the whole is greater than the sum of its individual parts. The right to respect for family life of one necessarily encompasses the right to respect for family life of others, normally a spouse or minor children, with whom the family life in enjoyed." (paragraph 4)

17. Although these observations are technically obiter, they are an accurate statement of the law endorsed by the Lord Chief Justice and the Senior President of Tribunals.

18. In remaking the decision, we bear in mind the principles set out in Agyarko v SSHD [2027] UKSC 11. We have taken into account also the case law of the European Court of Human Rights.

19. Sections 117A and 117B of the 2002 Act apply to these appeals but there is no need to set them out in full. Paragraph GEN 3.2 of the Immigration Rules requires that, where an application which has been considered under Appendix FM and does not meet those requirements, it must also be considered whether refusal of entry clearance would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family members whose rights are evident.

20. Our starting point is the facts from the First-tier Tribunal's decision which had been preserved. In summary, in paragraphs 16 to 21 Judge Meah observed that the appellant had made the wrong application and should have applied to join his wife but we consider that we are entitled and indeed must, as a public authority, bearing in mind the best interests of the children, make an assessment pursuant to Article 8 looking at the factual matrix as a whole. In that respect we adopt the reasoning set out at paragraph 32 of Judge Haria's decision.

21. We accept that there is a family life between the appellant, the sponsor and their children. While we note also that there was no challenge to any of the sponsor's evidence before us and although there was some confusion over the times she spent in Afghanistan and Pakistan, this was resolved and we do not consider it is material. We observe also that the sponsor has a hearing problem and was understandably nervous facing a panel on her own without representation. Mr Terrell did not submit that we should draw any adverse inferences from this.

22. We note Mr Terrell's concession that it would be unreasonable to expect the sponsor and children to go to Pakistan or Afghanistan. We consider that that was an appropriate concession to make given the well-known difficulties that there exists for women and girls in Afghanistan and the unchallenged observation that it would be difficult for the sponsor and her daughters to get visas for Pakistan. The appellant's leave to remain there is limited and there is no guarantee that it would be able to continue there, not least because of the difficulties there would exist over education. The older daughter was only 6 years old, she has now spent two years in education in the United Kingdom and it would be very difficult for her to adjust.

23. We accept that there is a close family life between the appellant and his daughters maintained by the use of regular, daily video chats via WhatsApp. That of course, given the age of the children, and the nature of a father-daughter relationship is no substitute for the actual physical presence.

24. However, we do not accept the respondent's submission that the current situation is a continuation of the status quo. We bear in mind and we take judicial note of the changes that have taken place in Afghanistan since the country came under the control of the Taliban on 15 August 2021. Prior to that the evidence before us is that the sponsor was able to travel to Afghanistan to be with her husband and did so for extended periods after their marriage. That is no longer possible and the appellant's position in Pakistan would appear precarious.

25. We start with a best interests analysis of the children's circumstances. Although the evidence is limited, it appears to us that there is no health problems and they are both living happily in the United Kingdom. They have extended family living nearby. The younger daughter is about to start nursery school. We consider that their lives in Afghanistan would be wholly different and on no view could it be in their best interests to go to live there or for that matter to live in a precarious basis without access to proper education in Pakistan, a country which neither their father nor mother are citizens. It is also in their best interests that they live together as a family and, in reality, on the particular facts of this case, the only place in which that can reasonably take place is the United Kingdom given the acceptance that it would be unreasonable to expect them or their mother to live in Afghanistan in the current situation or for that matter in Pakistan given the precariousness of the situation. This is a situation which has changed; extended visits are no longer viable. Nor is that situation likely to change. These are clearly matters which weigh in favour of the appellant.

26. There are, however, significant factors which weigh heavily against the appellant. First, we note that the appellant cannot meet the requirements of the Immigration Rules. There is no prospect of those being met in the near future given that the sponsor does not work and is reliant entirely on benefits. We accept, as Mr Terrell submitted, that there is a significant public interest in families not been expected to live below the current level of benefits – see KA and Others (Adequacy of maintenance) Pakistan [2006] UKAIT 00065 and Yarce (adequate maintenance: benefits) [2012] UKUT 425.

27. We accept the evidence that the appellant does speak some English at least to the relevant requirement level required by the Immigration Rules. But that is a neutral matter. Whilst we note that it is said he may be able to get employment, that is to a degree speculative and there is no indication of what level of income he would obtain.

28. In assessing whether the public interest is outweighed in this case, we have weighed the factors set out above and all those referred to us by the Secretary of State and the sponsor. We have taken the factors into account cumulatively and assessed the family life that exists as a whole. We are, on the particular facts of this case, bearing in mind the family life which had existed prior to the Taliban takeover, persuaded that it can no

longer continue in that way with extended visits either to Afghanistan or Pakistan, due to the change in circumstances, and as the children's education would be significantly disrupted.

29. Taking all of these factors into account cumulatively, and weighing them, given also that on the facts of this case that the only place where family life in its proper sense of physical proximity can be enjoyed is the United Kingdom, that the consequences for the family of the appellant not being physically present with his children as they develop, that in the unique and particular circumstances of this case that the public interest in the maintenance of immigration control is outweighed and that therefore the refusal of entry clearance amounts to a disproportionate interference with the appellant and his family's Article 8 rights.

30. Accordingly, for these reasons we allow the appeal on Article 8 grounds.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error and we set it aside.

(2) We remake the appeal by allowing it on human rights grounds.

Signed Date: 30 September 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal