IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004854

First-tier Tribunal No:
HU/54237/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25 August 2023

Before

UPPER TRIBUNAL JUDGE PITT

Between

SSM
(ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr E Fripp, Counsel, instructed by Ata & Co Solicitors
For the Respondent: Ms McKenzie, Senior Home Office Presenting Officer

Heard at Field House on 7 August 2023

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 issued on 14 January 2022 of First-tier Tribunal Judge Row which refused the appellant's appeal brought on Article 8 ECHR grounds in the context of an entry clearance application.

Background

2. The appellant is a citizen of Afghanistan, born in 2007. He is 16 years old.

3. The appellant applied for entry clearance on 27 January 2020. He applied as the dependent child of someone recognised as a refugee under paragraph 319X of the Immigration Rules and on Article 8 ECHR grounds. His sponsor was his older brother, SNM. SNM has been recognised as a refugee.

4. The appellant applied for entry clearance at the same time as his sister-in-law, ZM. ZM is married to the sponsor, SNM. ZM was granted entry clearance and came to the UK in October 2021 to join SNM.

5. The appellant was refused entry clearance on 6 April 2021. The application was refused because it was not accepted that the appellant was related as claimed to the sponsor. It was not accepted that he had been living with ZM prior to her departure from Afghanistan. It was not accepted that the departure of ZM from Afghanistan would leave the appellant in compelling or exceptional circumstances which made his exclusion undesirable. A guardianship order obtained on 20 October 2020 in favour of ZM was not found to attract weight where it had been obtained immediately prior to the entry clearance application. The ECO did not accept that there were no other family members who could care for the appellant in Afghanistan. The sponsor had indicated in his asylum claim that the appellant and ZM were living with the appellant's maternal uncle (GS, who was also ZM's father). GS would be able to assist the appellant. The respondent found that the decision did not breach the appellant's rights under Article 8 ECHR.

Decision of the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal. The appeal was heard on 28 June 2022. By the time of the hearing before the First-tier Tribunal it had been accepted, following the provision of DNA evidence, that the appellant was related as claimed to the sponsor. On the day of the hearing it was agreed between the parties that in addition to the

provisions of paragraph 319X of the Immigration Rules, that paragraph 319XAA should also be considered.

7. The First-tier Tribunal set out findings on the appellant's circumstances in paragraphs 12 to 22 of the decision:

> "**Consideration of Evidence and Findings**
>
> 12. The sponsor is said to have left Afghanistan in 2014. He came to the United Kingdom in 2015 and claimed asylum. He said that he was at risk from the Taliban and from relatives because of a land dispute. His application was refused but was allowed on appeal in 2019. He now has limited leave to remain as a refugee.
>
> 13. His wife ZM joined him in October 2021.
>
> 14. The appellant's case has varied over time. It is said that his mother and father were killed in a bomb explosion in 2016. In his application, completed by his solicitors presumably on the instructions of the sponsor, it was stated that after that he had gone to live with the sponsor's wife ZM. She had been granted leave to come to the United Kingdom and was this would leave him in Afghanistan on his own as a 13-year-old. It was said that he had been living solely with her. There were no other relatives in Afghanistan able to care for him. She was the only responsible person providing for his day-to-day care, bundle 2 page 52, paragraphs 4 and 9.
>
> 15. To give those assertions their most charitable interpretation, they do not appear to be factually correct. The respondent pointed out in the refusal letter that the sponsor had in his asylum interview said that after the death of his parents in 2016 his wife ZM and the appellant had gone to live with the appellants uncle, ZM's father, at his home. It was not true that the appellant was to be left on his own in Afghanistan. It was not true that he had no other relatives there.
>
> 16. That having been pointed out in the refusal letter the family changed tack. In a further submission dated 16 December 2021, written by the appellant's solicitors, page 16 bundle 1, it was said that the appellant had been living with ZM, but when she came to the United Kingdom on 25 October 2021 he had gone to live with his uncle. His uncle no longer wished to have him, and he faced the prospect of having nowhere to live.
>
> 17. The sponsor and his wife made statements dated 26 June 2022. In those statements they are silent as to when the appellant went to live with his uncle. It is implied that he was living with ZM before she came to the United Kingdom. The uncle, GSN, is again silent as to when the appellant came to live with him.

18. Each of those witnesses asserts that, as well as having no one to look after him in Afghanistan, the appellant is at risk of being recruited by the Taliban and of being attacked by other family members due to a land dispute. These assertions were not made in the application and were not made in the further submissions of 16 December 2021. They were made for the first time in the statements served in the bundle the day before the hearing.

19. The sponsor gave evidence. In cross-examination he said that his wife and the appellant had been living with GSN since his parents were killed and 2016. This is what he had said in his asylum interview and which the respondent had pointed out in the refusal letter.

    Can the Appellant Meet the Requirements of Paragraph 319X?

20. It is accepted that the sponsor cannot meet the maintenance requirements. This is because the sponsor is dependent upon public funds. I consider the requirements of the exceptional circumstances under paragraph 319XAA.

21. It is said that the appellant's parents are both dead. No death certificates have been produced but the respondent seems to accept this. It is not the case that the appellant has no family other than in the United Kingdom that could reasonably be expected to support him. According to the latest version of the sponsor the appellant has been living with his uncle and his family in Afghanistan since 2016.

22. The appellant therefore cannot meet the requirements of paragraph 319XAA".

8. The First-tier Tribunal went on to consider the Article 8 ECHR claim n paragraphs 23 to 40 of the decision:

"**Article 8 ECHR**

The Welfare of the Child

23. The appellant is not in the United Kingdom but I consider his welfare anyway. It is a primary, although not the primary, nor a paramount, consideration.

24. If it is the case that the appellant is going to be left in Afghanistan with no one to look after him, at risk from the Taliban and family members because of a land dispute, then it would be in his best interests to come to the United Kingdom. I am not however satisfied that this is the case.

25. It is for the appellant to establish what his circumstances are in Afghanistan. I am not satisfied that the sponsor, ZM, or GSN are telling the truth about that. For whatever reason they have chosen to conceal

his true situation in Afghanistan. They have persisted in this until the sponsor eventually conceded in cross-examination that the appellant had been living with his uncle and his family in Afghanistan since 2016.

26. The allegations concerning risk from the Taliban and the land dispute are not inconsistent with background information about Afghanistan. The sponsor was granted asylum based on the risk to him from the Taliban and because of the land dispute. These issues were raised very late in respect of the appellant.

27. The sponsor left Afghanistan in 2014. If there were to be problems for the appellant concerning a land dispute those problems would have manifested themselves before now. They have not. The Taliban now form the government of Afghanistan. They are no longer involved in conflict with the security services of the former regime. The war has ended.

28. The appellant has lived in Afghanistan all his life. It would be a significant matter to remove him from the family he has lived with for six years, from a country which he has lived in all his life, even if that country is Afghanistan. The sponsor says that he has supported the appellant financially up to now. He could continue to do so.

29. There is no guarantee that if the appellant comes to the United Kingdom he will fare well. Not every child who comes to these shores does. ZM chose to leave the appellant behind in Afghanistan. She presumably thought the arrangements for his care were satisfactory and demonstrated where her priorities lay.

30. In the absence of reliable evidence about the appellant's situation in Afghanistan, on the evidence before me, I find that his best interests are served by his staying where he is. He is in his own country with family members who have looked after him for many years and who have done so successfully.

Proportionality

31. I accept that the appellant has a family life with his brother and sister-in-law. The decision interferes with it. In assessing proportionality I adopt the balance sheet approach commended by Lord Thomas at paragraph 83 of **Hesham Ali and SSHD [2016] UKSC 60**.

32. I have found that the appellant does not meet the requirements of the Immigration Rules for entry clearance. This weighs against him in assessing proportionality.

33. Whilst I accept that the appellant has a family life with the sponsor and his wife he also has a family life with his uncle, aunt, and cousins in Afghanistan. This reduces the effect of the interference.

34. I have found that based on the information which the sponsor has chosen to provide that the best interests of the appellant are to stay where he is. This weighs against him in assessing proportionality.

35. I take into account those matters which I must have regard to by virtue of section 117B of the **Nationality, Immigration and Asylum Act 2002**.

36. The appellant does not speak English. I do not weigh that against him as he is 14 years old. He would be likely to learn English quickly. This has a neutral effect.

37. The appellant is not financially independent. He would not be expected to be as a child. However the sponsor is not able to support himself and his existing family without access to public funds. If the appellant came to the United Kingdom he would inevitably be a further burden on the taxpayer. This weighs against him in assessing proportionality.

38. The maintenance of effective immigration controls in the public interest. Reasonable provisions are made within the Rules to enable children to come to the United Kingdom to join relatives in appropriate circumstances. The appellant does not meet those requirements. This weighs against him in assessing proportionality.

39. Taking all these matters into account I find that the public interest in refusing entry clearance to the appellant outweighs any interference with such family life as he has with his brother and sister-in-law.

40. Whilst I accept that the appellant has a family life in the United Kingdom which is interfered with by the decision under appeal I find that the decision is legitimate. I further find that such interference is necessary in a democratic society both for the economic well-being of the country and for the protection of the rights and freedoms of others and that the interference is proportionate to these legitimate public ends on the facts of this appeal."

Grounds of Appeal

9. The appellant was granted permission to appeal to the Upper Tribunal on all grounds in a decision dated 21 November 2022.

10. The appellant's first ground argued that the First-tier Tribunal had erred in the proportionality assessment by failing to take into account the accepted country conditions as set out in the respondent's Country Policy and Information Note (CPIN) on Afghanistan. The CPIN set out relevant evidence on the humanitarian crisis in Afghanistan as well as the Taliban's active interest in those associated with former security forces. The sponsor and the adult sons of GS with whom he was living in Afghanistan had all been members of the security forces before leaving the country. The proportionality assessment was also in error in failing to weigh the distress of the sponsor and ZM at being separated from the appellant who had become their de facto child after the death of the parents of the appellant and sponsor's parents and sister in a bomb attack in 2016.

11. The appellant's second ground argued that the judge erred in the exceptional circumstances assessment that was required under paragraph

319XAA of the Immigration Rules. It was not open to the judge to find that the appellant had family other than his UK relatives who could reasonably be expected to support him.

12. The appellant's third ground was that the judge made an error of fact when finding that the evidence about the appellant's circumstances had "varied over time" (paragraph 14), that the evidence had "changed tack" (paragraph 16), that the witnesses were not "telling the truth" and had "chosen to conceal his true situation in Afghanistan" and had "persisted" in doing so "until the sponsor conceded in cross-examination that the appellant had been living with his uncle and his family in Afghanistan since 2016" (paragraph 25) and that there was an "absence of reliable evidence about the appellant's situation in Afghanistan". These errors added force to the first and second grounds as the conclusion that the sponsor and his wife were untruthful meant that the assessment of risk for the appellant in Afghanistan and whether he was in exceptional circumstances was conducted on an incorrect factual basis and curtailed as a result.

Discussion

Preliminary Issue

13. On the morning of the hearing before me the appellant applied for a new document to be admitted. This was a letter dated 7 August 2023 from the appellant's legal representatives stating that the sponsor had always provided them with consistent instructions that the appellant and ZM were living together at GS's house in Mazar-e-Sharif after the death of the appellant and sponsor's parents. The legal representatives drew attention to the fact that the entry clearance application forms of the appellant and ZM showed them living with GS. The legal representatives maintained that it was their oversight that the fact of the appellant and ZM living with GS, although included on the application forms, had not been explicitly referred to in the cover letter provided with the entry clearance applications. There had been no intention to mislead either the respondent or the Tribunal in that regard.

14. The respondent opposed admission of this document. It was entirely outwith the standard directions issued when permission was granted. There had been no formal application as required under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended). The document was very late, the findings on the consistency of the sponsor and ZM's evidence being made in the First-tier Tribunal decision issued in August 2022, nearly a year before this document was produced. No explanation had been provided for its late submission. The document was in the form of a letter but a witness statement was necessary to support the matters put forward.

15. It was my view that the letter from the appellant's legal advisers was provided very late. The findings of the First-tier Tribunal which it sought to address had been made a year earlier. There was no explanation for this

very extensive delay. There was no explanation for the absence of a Rule 15(2A) application or the information put forward being in letter form rather than a properly attested witness statement. Even after consideration of the overriding objective for there to be a fair and just hearing, I did not find that it was in the interests of justice to admit the letter given the extent of the delay and there being no explanation for the delay. The letter from the appellant's legal representatives dated 7 August 2023 was not admitted.

Ground 3

16. Mr Fripp suggested that ground 3 should be taken first as, if made it, it added force to the first two grounds.

17. It is not disputed that the evidence before the First-tier Tribunal included the sponsor's evidence from his own asylum claim. The sponsor stated in response to question 14 of his asylum interview that the only immediate family members he had living in Afghanistan were his spouse and his little brother. He was asked whether he had cousins or aunts or uncles there and replied that he had just one maternal uncle. In question 17 he was asked where his spouse and little brother lived. He replied that they lived in Mazar-e-Sharif city ". It is undisputed that this is where GS lives. The sponsor was asked in question 20 who helped to support the appellant and ZM. The sponsor replied:

> "My spouse is my maternal uncle's daughter she stays with them and there (sic) family in the past my father used to support them but two years ago when there was a suicide attack in the embassy of Germany I lost my five family members in that explosion. I lost my five family members. My father, mother, my sister and two of her children".

18. It is also common ground that when the appellant and ZM applied for entry clearance in January 2020, they both provided the address of GS when asked where they were living. They stated that they lived "in the house of [GS]". The appellant's application form also stated that he was living with ZM, "his brother's wife". In addition, the covering letter to the applications indicated that ZM had been looking after the appellant since he lost his parents and was the "only responsible person who has been providing the necessary day-to-day care" to the appellant. The sponsor had been providing financial assistance to them both. It was stated that the appellant "does not have any other close family members in Afghanistan and cannot live there as a child without supervision".

19. Following the refusal of entry clearance, the appellant's representatives provided further representations dated 16 December 2021. Those representations covered the DNA test which led to it being accepted that the appellant and sponsor were related as claimed. The further representations of 16 December 2021 also stated:

> "The appellant who is 14 years old, is the brother of the sponsor [SNM] who holds five years leave to remain as a refugee in the United Kingdom. The appellant is currently in Afghanistan staying with his maternal uncle who is also the sponsor's father in-law in Mazar-e-Sharif. Prior to this, the appellant was residing with the sponsor's wife Mrs [ZM]. She was granted leave to enter under the family reunion provisions and entered the UK on 26 October 2021. The appellant and Mrs [ZM] saw each other for the last time on 25 October 2021 in Afghanistan. From this date, the appellant is living with his maternal uncle who is above the age of 60 and relying on the support of someone else.
>
> The maternal uncle has been in contact with the sponsor to state that he is unable to take care of the appellant and that an alternative arrangement should be made. The sponsor has been sending money to his uncle in order to keep the appellant under his supervision. However, the current situation of Afghanistan is such that the appellant may not be able to be looked after by his uncle even with financial support from the UK".

20. The sponsor said this in his witness statement dated 26 June 2022:

> "5. My brother is currently being looked after by my uncle who is also my wife's father. Sadly, my parents passed away on 11 November 2016 as a result of a bomb explosion in Mazar-E-Sharif. My brother was only 9 at the time and my wife [ZM] took responsibility for him as we did not have any other family members. When it was time for my wife to join me in the UK after her grant of visa it was a time of happiness and sadness, it was difficult for my brother to separate from her. For five years my wife looked after him and she became a mother figure to him.
>
> 6. I feel very guilty about my brother being with my uncle as he is elderly himself; he has to support his own family and I know my brother has been a burden on him. There was no other choice as we do not have any other family in Afghanistan. If I was to leave my brother to fend for himself then he would most likely be taken advantage of. My uncle cannot give my brother the guidance and emotional support that my wife and I are able to give him. Since my wife has arrived in the UK, her mind is continuously on my brother, and she is becoming increasingly stressed & anxious."

21. The sponsor's evidence at the First-tier Tribunal hearing, set out in paragraph 19 of the decision, was that the appellant and ZM lived with her father, GS, after his parents were killed in 2016.

22. In my judgment this evidence was not capable of being characterised as varying or changing tack or being untruthful on the basis of the reasoning provided in the First-tier Tribunal decision. The evidence that the appellant went to live with his sister-in-law after the death of his parents and sister and that they lived with her father, GS (his maternal uncle) is consistent from the sponsor's asylum claim onwards and in the entry clearance applications. The further representations of 16 December 2021 and witness statements provided for the First-tier Tribunal do not contradict the

evidence that the appellant was cared for by ZM from 2016 onwards whilst living in her father's home. Nothing in the various accounts provided stated that after 2016 the appellant was living "solely" with ZM as stated in paragraph 14 of the decision. The further submissions of 16 December 2021 and witness statements did not state that only after ZM came to the UK did the appellant go to live with GS as stated in paragraph 16 of the decision. The sponsor's evidence at the hearing was in line with his previous evidence and so it was not correct to find that only in cross-examination was it "conceded" that the appellant and ZM had been living in GS's home.

23. I therefore did not find that the First-tier Tribunal took a correct approach when finding that the sponsor, his wife and GS were trying to "conceal" the appellant's circumstances as stated in paragraph 25 of the decision. It is not correct that the sponsor "persisted" in stating anything other than that the appellant had lived in GS's home since 2016. This was his evidence at all times. I found that the third ground had merit.

24. Even though the evidence of the appellant being cared for by ZM from 2016 onwards at her father's home was consistent, that was not determinative of the appeal. It remained for the First-tier Tribunal to decide whether to accept that the appellant could no longer be cared for by GS, whether he was in exceptional circumstances and whether the decision amounted to a disproportionate interference with the appellant's family life. Those assessments were made in the context of the highly adverse credibility findings and conclusion that there was no "reliable evidence" on the appellant's situation in Afghanistan, however; see paragraphs 25 and 30. I accept Mr Fripp's submission that the assessments on exceptional circumstances and proportionality, challenged in the first and second grounds, are undermined by the error identified above and also cannot stand.

25. For all of these reasons, it was my conclusion that the decision of the First-tier Tribunal disclosed a material error on a point of law such that it had to be set aside to be re-made. The nature of the error of law that has been identified is such that the core findings on the appellant's circumstances in Afghanistan must be remade afresh. Where the extent of the fact-finding and decision making that must now be made is so extensive, it is appropriate for this case to be re-made in the First-tier Tribunal.

Notice of Decision

26. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be re-made afresh.

27. The re-making of the appeal will take place in the First-tier Tribunal.

S Pitt
Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 August 2023