IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Appeal Nos: UI-2023-000162 (HU/50165/22)
UI-2023-000163 (HU/50166/22)
UI-2023-000164 (HU/50168/22)
UI-2023-000165 (HU/50170/22)
UI-2023-000166 (HU/50171/22)
UI-2023-000167 (HU/50172/22)
UI-2023-000168 (HU/50174/22)

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7 August 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

PS + 6

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Ms L. Simak, Commonwealth Solicitors
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

Heard at Field House on 24 July 2023

Anonymity:

Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify any of the Appellants or any member of their family. This direction applies to, amongst others, both the Appellants and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. The Appellants are all nationals of Afghanistan. They are respectively a mother born in 1984 and her 6 children, who range in age from 3 to 21. They seek entry clearance to the United Kingdom because they want to come here to be reunited with S, the son of PS and the brother of the remaining Appellants. S has been recognised as a refugee.

2. The ECO had refused all of these applications invoking a general ground for refusal that none of the applications were supported by a tuberculosis certificate. PS and her eldest child – now an adult - were further refused with reference to the Adult Dependent Relatives provisions in Appendix FM, and the position of the minor children followed. By the time that the appeal got before Judge Easterman, sitting as a judge of the First-tier Tribunal, the Respondent had revised his position to acknowledge that the parts of the rules which should have been applied were those relating to refugee family reunion, specifically paragraph 319V. The applications were nonetheless, the Respondent maintained, properly refused. Judge Easterman agreed and the appeals were dismissed.

3. It is against Judge Easterman's decision that this appeal was brought. On the 20th April 2018 the matter came before me, sitting at Field house. The Applicants were on that occasion represented by Ms White of Counsel and the Respondent by Senior Presenting Officer Basra. Having heard the submissions of the parties I found that Judge Easterman had erred in law in his approach to the appeals and set his decision aside. My reasons for that decision are set out below under the heading Part 1: Error of Law. On the 24th July 2013 the matter came back before me for submissions on disposal. I reserved my decision and I now give that, with my reasons, below under the heading Part 2: the Re-Made Decision.

Part 1: Error of Law

4. I begin by noting that although these were human rights appeals, it was common ground that the Appellants' ability or otherwise to meet the requirements of the rules relating to refugee family reunion was an important part of the decision-making. If the Appellants could show that they met the requirements of the rules, then absent countervailing factors they would be able to show that the decisions to refuse them entry were disproportionate. Judge Easterman therefore quite properly set his reasoning against the framework of the rules.

5. The relevant paragraph of the Immigration Rules to the applications of PS and her adult daughter was 319V. I have here omitted those parts of the rule that are not relevant and have highlighted the matters in issue:

> 319V. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person with limited leave to enter or remain in the United Kingdom as a refugee or beneficiary of humanitarian protection are that the person:
>
> (i) is related to a refugee or beneficiary of humanitarian protection with limited leave to enter or remain in the United Kingdom in one of the following ways:
>
> …

> (d) **a parent or grandparent under the age of 65 if living alone outside the United Kingdom in the most exceptional compassionate circumstances**; or
>
> …
>
> (f) the son, daughter**, sister,** brother, uncle or aunt **over the age of 18 if living alone outside the United Kingdom in the most exceptional compassionate circumstances; and**
>
> (ii) is joining a refugee or beneficiary of humanitarian protection with limited leave to enter or remain in the United Kingdom; and
>
> (iii) **is financially wholly or mainly dependent on the relative who has limited leave to enter or remain as a refugee or beneficiary of humanitarian protection in the United Kingdom**; and
>
> (iv) **can, and will, be accommodated adequately, together with any dependants, without recourse to public funds, in accommodation which the sponsor owns or occupies exclusively**; and
>
> (v) **can, and will, be maintained adequately, together with any dependants, without recourse to public funds**; and
>
> vi) **has no other close relatives in his own country to whom he could turn for financial support**; and
>
> (vii) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity, or, if seeking leave to remain, holds valid leave to remain in another capacity.

6. The first issue arising concerns whether PS and her adult daughter could properly be said to be "living alone outside the United Kingdom in the most exceptional compassionate circumstances".

7. Considering the first part of that test, Judge Easterman had regard to the fact that PS and her adult daughter lived with each other as well as the other children in the family and held that on a plain English reading of the text, their mutual presence in the household defeated each other's claims.

8. I am satisfied that in reaching this conclusion the Tribunal erred in failing to have regard to the decision, specifically relied upon by the Appellants, in KC & Ors (Morocco) v SSHD [2007] EWCA Civ 327. In that case the Court of Appeal recognised that an adult's claim could not sensibly be defeated by pointing to the fact that she lived with a young child. The Court suggested that the focus should be on whether there was another person present in the household who was able to offer a degree of support. Here, the other adult in the household was the eldest daughter who had, on the apparently unchallenged evidence, been severely traumatised by being kidnapped by the Taliban. She was therefore herself extremely vulnerable, and given Afghani cultural norms it is debatable whether she would have regarded herself as competent to offer her mother advice or support about the predicament they faced. The other members of the family were minors. If the Tribunal did give consideration to whether any of these people could properly be held to defeat their mother's application by virtue of their presence in the house, it is not reflected in the decision.

9. As to the second part of the test, whether they were living in the most "exceptional compassionate circumstances", the First-tier Tribunal found there to be "very little evidence of how the family is living". As it understood the evidence,

they had left Afghanistan for Pakistan in order to make the visa applications and they were now living there. Evidently unsure as to whether that was in fact the position, the Tribunal goes on to say "even if they were living in Afghanistan they are living together as a family and there was no evidence of mistreatment but merely of fear of mistreatment". The grounds clarify that the applications were in fact made online from Afghanistan, but the family only later travelled to Pakistan in order to enrol their biometrics at the British embassy. As to the point about mistreatment, the Appellants submit that the First-tier Tribunal here appears to have overlooked the evidence that four members of this family have already suffered direct ill-treatment at the hands of the Taliban: the Sponsor and another brother were forced to flee because of the threat of forced recruitment, the eldest daughter was subjected to a terrifying kidnap for the purpose of forced marriage to a Taliban fighter, and as the Tribunal itself accepted [at its §56], the father had been shot by the Taliban for being a collaborator with foreign forces. An uncle who had previously offered assistance had been blown up by an ISIS bomb. Against that background, it is submitted that it was perverse for the Tribunal to dismiss the family's concerns as 'mere' fear.

10. That is a high test, but I am satisfied that here it is made out. On any measure kidnap with a view to forced marriage is actual harm, and given their recent history the 'mere' subjective fear experienced collectively by the Appellants was objectively well founded: that is not a test to be equated with whether they were living in "the most exceptional compassionate circumstances" but it is surely one that answers that question. That the Appellants were living illegally in Pakistan – as it is expressed in the evidence "in hiding" there – in order to avoid returning to that situation was a matter that speaks for itself.

11. The next matter put in issue by the ECO was whether the appellants were wholly or mainly financially dependent on S, or whether there were other close relatives in Afghanistan to whom they could turn for such support. The First-tier Tribunal was satisfied that the father of the family had fled to whereabouts unknown after he was shot by the Taliban, and was prepared to accept that another relative, who had previously been offering some financial support to the Appellants, had been killed in a bomb attack in Kabul. There has been no cross-challenge to those findings in the Appellants' favour and they are preserved.

12. That leaves the ability of S to adequately maintain and accommodate his mother and siblings once they arrive. S had provided documentary evidence that he had £40,000 in savings and had been working two jobs, one in Iceland and one in Aldi. I have to say that I did not find the Tribunal's conclusions about whether this was sufficient to meet the *KA (Pakistan)* threshold very easy to understand. It had already concluded that other elements of the rule could not be met and so noted that maintenance and accommodation had become a "less important issue". Perhaps for that reason its analysis of the evidence was brief, and couched in fairly ambiguous terms. It was accepted that the "Appellant clearly still has a job working with Iceland" (for which I read "Sponsor"). In respect of Aldi the Tribunal noted that payslips have been produced but that the HOPO "was right to point out" that the contract appeared to have expired. A conclusion of sorts is then expressed that "it may well be perfectly plausible that the Sponsor does continue to work for them but it should not have been impossible for him to produce payslips confirming that and/or something from the management of that business to do say so". As for the substantial savings the Tribunal regards it as "clear" that he has them, but not how he got them. Ultimately the Tribunal considered it impossible to know whether the S's financial evidence was sufficient

to meet the required threshold because it had no evidence about how much extra accommodation would cost to rent.

13. The grounds make various criticisms of the Tribunal's analysis here, but in truth the findings fall to be set aside because they are ambiguous and incomplete. Whilst I do not agree with the author of the grounds that the source of those savings was "irrelevant" it is not at all clear to me that the Respondent ever challenged the Sponsor's claim that this money was actually his. Clear findings need to be made about a) what the appropriate income threshold comparator was (the ECO's own analysis was, it is accepted, flawed for miscalculation), b) what the Sponsor's current income is and c) how he proposes to accommodate his mother and siblings once they arrive.

14. For those reasons I set the decision of the First-tier Tribunal, insofar as it related to the adult Appellants, aside, save where preserved. It followed that the appeals of the children must also be remade, since it was agreed that in the context of these human rights appeals, their positions were dependent upon that of their mother.

Part 2: the Re-Made Decision

15. As I note above, these are human rights appeals, but an important part of the assessment will be to work out the extent to which the Appellants met the relevant rules relating to refugee family reunion. That is because the appeals have proceeded on the uncontested basis that there is a family life at stake here, and that the refusal to grant entry clearance amounts to an interference with, or lack of respect for, that family life. The only question remaining is whether the decisions are proportionate, and the rules were certainly relevant to that enquiry.

16. All of the Appellants fall to be refused 'under the rules' on the grounds that they failed to produce certificates confirming that they are free of tuberculosis. Paragraph A39 of the Rules states:

> "Any person making an application for entry clearance to come to the UK for more than six months… having been present in a country listed in Appendix T for more than six months immediately prior to their application, **must present**, at the time of application, a valid medical certificate issued by a medical practitioner approved by the Secretary of State for these purposes, as listed on the Gov.uk website, confirming that they have undergone screening for active pulmonary tuberculosis and that this tuberculosis is not present in the applicant".

17. As Mr Basra established at the first hearing, both Afghanistan and Pakistan are countries listed in Appendix T. No certificates have been produced. The Appellants therefore fail to meet this mandatory requirement.

18. The next paragraph relating to the adult Appellants (mother PS and eldest daughter NS) is paragraph 319V of the Rules.

19. Paragraph 319V (i) sets out the relationship requirements to be met. In the case of mother PS it is not in issue that she is the mother of her son, or that she is under the age of 65. In the case of sister NS it is not in issue that she is related as

claimed to the Sponsor or that she is over the age of 18. What remains in issue is whether these Appellants are "living alone outside the United Kingdom in the most exceptional compassionate circumstances".

20. I have already alluded to the circumstances in which the family found themselves living in Taliban controlled Afghanistan in Part 1 above. The facts set out in greater detail are as follows. The family are from Kunduz, and between 2003 and 2006 the then head of the household, the husband of PS and father of the children Mr HS, was working with the German forces stationed there and engaged in reconstruction work. This incurred the hostility of the local Taliban. In 2015 the Taliban took Kunduz, and seized the eldest son S from the family home to fight for them. He was able to escape them and get out of the country, and in November 2017 he reached the UK where he claimed asylum. His claim was accepted and he was granted refugee status. In 2018 the father of the family HS was on his way to mosque when he was attacked and shot by members of the local Taliban. He managed to escape, injured, but went into hiding. As Judge Easterman accepted, his whereabouts have remained unknown since then. The family have had no further contact with him, and so do not know whether he is alive or dead.

21. After the shooting the family continued to live in their village in Kunduz, receiving some social and financial support from the brother of father HS, but life became increasingly difficult. In the spring/summer of 2021 the situation in Afghanistan became extremely unstable. Taliban forces were gaining ground on Afghan government territory, ISIS had embarked on a bombing campaign and it was apparent that the US led coalition were planning to leave. It was in this period that three more events of note happened to this family. In June 2018 the second eldest son decided to escape Taliban control, and possible recruitment, while he could: he made it out of the country as far as Turkey. In July the next eldest, daughter NS, was seized by a local Taliban fighter who wished to marry her. She was able to escape after only a week, but I have no reason to doubt the evidence of her brother that she has been traumatised by that event. Then on the 26th August 2021 the brother-in-law of PS, who had helped her after her husband's disappearance, was killed in the deadly ISIS bomb and gun attack on the perimeter of Kabul Airport.

22. These applications were made a matter of weeks after that final event, in which the family's last male protector in Afghanistan was killed. At the date of the applications PS was therefore a female head of a household that had previously been identified as collaborators with coalition forces. The minor children under her care were her twin boys aged 11, another son aged 10, and two daughters aged 6 and 3. Her daughter NS, then aged 20, was traumatised by her recent experience. Her two adult sons were faraway overseas. I can readily accept the evidence of the Sponsor that his mother felt "totally alone and helpless" and that the whole family were from that point "in grave fear". Indeed the applicable country guidance at the time indicated that this was a family who would have qualified for refugee status had they managed to reach the UK to make a claim, since even Kabul would have been unacceptably dangerous: AS (Safety of Kabul) Afghanistan CG [2020] UKUT 130 (IAC), AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163(IAC). In those circumstances I do not consider that it would be appropriate to find this requirement of the rule defeated because the Appellants – particularly the adult Appellants – have each other to turn to. As minors and women in a deeply conservative and patriarchal society they are all equally vulnerable.

23. I have no hesitation in accepting that in Afghanistan the family were living in the most exceptional compassionate circumstances, and that if they were compelled to return to that country, they would be again. The question is however raised by Judge Easterman: what about in Pakistan?

24. In a human rights appeal the question is whether the decisions *are* unlawful under s6(1) of the Human Rights Act 1998. This means that the focus for enquiry should be the circumstances at the date of the appeal. As of the date of the hearing before me, the Appellants remain in Peshawar, where they are living illegally as unregistered migrants. They travelled to Pakistan in order to enrol their biometrics at the British embassy, and have, understandably in light of what I say above, chosen to remain there until this appeal is determined.

25. I know very little of their circumstances other that this. They are Afghans. Pakistan is not a signatory to the Refugee Convention and ceased accepting humanitarian claims to remain from Afghan citizens some years ago. I accept on the balance of probabilities that the Sponsor is telling the truth when he says that his mother and siblings have no legal right to be in Pakistan.

26. In the most recent Country Policy and Information Note on Pakistan, *Actors of Protection* (May 2013, v 3.0) it is recorded that the US State Department Human Rights report for 2022 has this to see about the way that Afghans are treated by the police in Pakistan [at 5.1.2]:

> "Police reportedly detained individuals to extort bribes for their release or detained relatives of wanted individuals to compel suspects to surrender. Ethnic minorities, stateless persons, Afghans, and refugees in the country who lacked official identification documents reported arbitrary arrests, requests for bribes, and harassment by police authorities. There were also reports police, including officers from the Federal Investigation Agency (a border control, criminal investigation, counterintelligence, and security agency), made arrests to extract bribes"

27. The position of women living without male protectors is equally precarious. In another CPIN, *Women fearing gender-based violence* (November 2022, v 5.0) the Respondent's country information unit record that Pakistan is ranked by Thompson Reuters as the sixth most dangerous country and the fourth overall worst for women in the world [at 5.2.1]. The status of women varies greatly according to their class, level of education, whether they are from the city or country and their economic power. I am satisfied that an uneducated Afghan women from a village, who is living illegally and subsisting on remittances from her son in the UK is on balance more likely than not to be at the 'most vulnerable' end of that spectrum.

28. Having had regard to that evidence, and to Ms Simak's submission that the family as a whole remains vulnerable to possible removal to Afghanistan, I am satisfied that the test in 319V (i) would also be met if the family are deemed to be 'living' in Pakistan.

29. Paragraph 319V (ii) requires that the Sponsor be a refugee. That requirement is accepted as being met.

30. Sub-paragraph (iii) requires that the Appellants be financially wholly or mainly dependent upon their Sponsor. This matter was decided in their favour by Judge Easterman and there has been no cross appeal.

31. Sub-paragraph (iv) of the rule is concerned with whether the Appellants can and will be adequately accommodated by the Sponsor. Since the date of the first hearing before me there has been some developments in respect of this requirement. The Sponsor has now spent a substantial part of his savings on buying a house to accommodate his family, and in a skeleton argument dated the 30th June 2023 the Respondent expressly accepts that this requirement has been met. I should note for the sake of completeness that I have been provided with copies of the land registry certificate, mortgage agreements and statements, and a housing report confirming that there will not be over occupancy should the Appellants come to live there.

32. The next issue, arising at 319V (v), is whether the Appellants can and will be adequately maintained. As I note in Part 1 of this decision, neither the evidence nor the positions of the parties on this matter were particularly clear, no doubt why the decision of the First-tier Tribunal was couched in the terms that it was. I have now been greatly assisted in this regard by the respective representatives: the Appellants' solicitor has submitted a further bundle of evidence including bank statements and up to date pay slips, and Mr Basra, on behalf of the Respondent, has evaluated that evidence. Mr Tufan was content to adopt his colleague's calculations. The agreed position between the parties is as follows:

- The Sponsor continues to have two jobs. He works in Aldi, and in Iceland
- His weekly income slightly varies but over, for instance, the past three months it has worked out at £771.75 net per week
- Once the Sponsor's monthly mortgage repayments and council tax have been deducted, he is left with an average of £515.43 net per week
- If this family were in receipt of income support their combined household income would be £540.90 net per week
- The household income is therefore currently £25.47 net per week less than the family would be getting under income support rates

33. Applying the test formulated in KA (Adequacy of Maintenance) Pakistan [2006] UKAIT 00065 the Appellants would fail to meet the requirements of the rule were the Sponsor's income their only resource. To meet this shortfall, the Appellants point to the Sponsor's remaining savings. His bank statement, tallied with the mortgage statements, indicate that he used some £23,000 as a deposit for his new house. He is left with just over £15,000. The Appellants point out that if that money was gradually drawn upon to meet the £24.47 weekly shortfall, it would still last over 11 years. They submit that this is sufficiently 'adequate' to meet the requirement at 319V(v).

34. What then is the Respondent's position on these savings? As I note above, Judge Easterman alluded to the possibility that the money kept in the Sponsor's account may not actually have been his. Perhaps because the bulk of that money has now been invested in a property in the Sponsor's sole name, that is not an idea now adopted by the Respondent. Rather Mr Basra's written submissions question whether he is able to readily access it. As Mr Tufan points out, sometimes savings

can be subject to onerous rules about when they can be withdrawn: it might be, for instance, held in an account requiring a long period of notice. Although I have not been provided with the terms and conditions of the Sponsor's bank account I feel confident in concluding that this is not such an account, since the statements bear the heading "Instant Access Account". I am satisfied that the money in the account is accessible, that it belongs to the Sponsor and that he is able to use it to meet the shortfall in his earnings in order to support his family.

35. The final substantive question raised by paragraph 319V of the rules is whether the Appellants have any close relatives in their country to whom they could turn for financial support. This matter was resolved in their favour by Judge Easterman and that finding is undisturbed.

36. Having made those finding under the rules, I am now able to proceed to make an assessment of proportionality. I begin by recognising the public interest in refusing entry clearance.

37. Section 117A of the Nationality, Immigration and Asylum Act 2002 provides that in a human rights appeal I must have regard to the considerations listed in s117B.

38. Section 117B(1) states that the maintenance of effective immigration controls is in the public interest. These Appellants cannot meet the requirements of the rules because they did not provide a valid tuberculosis certificate. The failure to meet the requirements of the immigration rules is an important matter that I must give significant weight to. Further, I recognise that this particular requirement is plainly in the rules for the protection of public health, and that the lack of certificates is a significant countervailing factor in the appeals.

39. Section 117B(2) provides that it is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English are less of a burden on taxpayers, and are better able to integrate into society. None of these Appellants can speak English. That is a matter that I must give weight to.

40. Section 117B(3) provides that it is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent. Mr Tufan accepts that they have proven that to be the case, and invites me to treat this as a neutral factor. I do however bear in mind that five of these Appellants are children, who will attend school on arrival. All of the Appellants will require medical care at some point, and this will very likely be provided by the NHS. This is a factor that I have placed some weight on.

41. The remaining considerations under s117B are not applicable in these entry clearance appeals.

42. I now turn to consider the matters weighing in favour of granting entry clearance.

43. The Appellants squarely acknowledge that they have not provided TB certificates as they are required to do. They submit, however, that there is good reason for that. They explain that they were unable to find, in Afghanistan, a medical practitioner approved by the Home Office. I note in this regard that the

Gov.UK website lists a single test centre for Afghanistan. Whether or not that centre is still operational under the Taliban is unknown. What I do recognise is the inherent difficulty that PS and NS would have faced as two single women, with 5 children in tow, from a family associated with opposing the Taliban, making the 300km journey from their home in Kunduz into the capital and seeking certificates approved by the British government. As for Pakistan, where the family are now living illegally, the position is complicated by the fact that none of the Appellants can produce a valid Pakistani identity document needed in any interaction with officialdom. Having regard to all of these factors I am satisfied that there were good reasons why this requirement of the rule has not been met.

44. Mr Tufan is quite right when he says that there is no principle that a 'near miss' under the rules should itself be a matter than renders a decision disproportionate. He does however accept that the ability of the Appellants to meet the substantive requirements of the provisions relating to refugee family reunion is a powerful matter weighing in their favour. I have found that those requirements are met. Even if I am wrong to conclude that these claims are not defeated by the 'living alone' requirement in 319V(iii), it seems to me that the extremely precarious position that these women and children find themselves in is itself enough to justify a grant of entry clearance on human rights grounds. Even if I accept Mr Tufan's suggestion that they may somehow be able to regularise their position in Pakistan, they would still be Afghan refugees in a country where that class of person is subject to discriminatory harm including targeting by the police. They would still be a female-headed household headed by women in a country where to live alone as a woman is inherently dangerous. This is a family that have already been through significant trauma, stemming from the decision of the father to spend three years working with the western coalition to help reconstruction efforts in Kunduz. I have given due weight to the public interest, and I accept that the rules are ordinarily the correct benchmark in assessing Article 8, but in the extraordinarily compelling circumstances of this case, I find that it would be a disproportionate response to refuse them entry today. Article 8 requires that they should be permitted them to reunite with their son and brother in the United Kingdom.

Notice of Decision

45. The decision of the First-tier Tribunal is set aside to the extent identified above.

46. There is an order for anonymity.

47. The decision in the appeals is remade as follows: the appeals are allowed on Article 8 grounds.

Upper Tribunal Judge Bruce
26th July 2023