



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Case No: UI-2023-002273  
UI-2023-002274  
UI-2023-002292

First-tier Tribunal No: HU/60001/2022  
HU/60002/2022  
HU/60004/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued**

**27<sup>th</sup> October 2023**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

**Between**

**MS GUL BIBI SHIRZAD – 1<sup>st</sup> Appellant  
MR SOHAIL SHERZAD – 2<sup>nd</sup> Appellant  
MS KAINAT SHERZAD – 3<sup>rd</sup> Appellant**

**(Anonymity order not made)**

**Appellants**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Heard at Field House on 6 October 2023**

**Representation:**

For the Appellant: Ms M Benitez, counsel  
For the Respondent: Mr E Terrell, Home Office Presenting Officer

**DECISION AND REASONS**

## **The Appellants**

1. There are cross appeals in this case but for the sake of clarity I shall continue to refer to the parties as they were referred to at first instance. All three appellants are citizens of Afghanistan. The first appellant who was born on 31 May 1982 is the mother of the second and third appellants who were born on 25 May 2001 and 19 March 2003 respectively. The respondent appeals against a decision of Judge of the First-tier Tribunal Ripley sitting at Hatton Cross on 12 May 2023 in which she allowed appeals by the first and third appellants against decisions of the respondent dated 20 June 2022. Those decisions were to refuse the appellant's applications for entry clearance under article 8. The second appellant appeals against the same determination of the First-tier Tribunal which dismissed his appeal against the decision of the respondent.
2. The three appellants wish to join Mr Zarullah Sherzad who is the husband of the first appellant and the father of the second and third appellants. He is a citizen of Afghanistan with discretionary leave to remain in the United Kingdom and I shall refer to him as the sponsor.

## **The Appellants' Case**

3. The appellant's case was that they were all dependent on the sponsor financially. They were presently living in Jalalabad in Afghanistan where the sponsor had visited them. He stated he could not live permanently in Afghanistan having now lived in the United Kingdom for 20 years. The first appellant had worked as a women's rights activist in Afghanistan and neither she nor her daughter the third appellant were now able to leave their home. The third appellant would not be able to obtain an education because of restrictions placed by the Taliban government.

## **The Decision at First Instance**

4. At [28] the judge accepted that there was family life between all the appellants and the sponsor placing particular weight on the appellants financial dependency on the sponsor. The appellants were unable to satisfy the immigration rules primarily because of the sponsors immigration status, he did not have indefinite leave to remain and because of the lack of evidence of the second and third appellants knowledge of English. The judge thus considered the matter outside the rules under article 8 weighing the compassionate circumstances against the public interest.
5. The Taliban takeover had had different impacts on each of the appellants. The second appellant was studying business at university and had no specific claim to have any difficulties continuing with his life in Afghanistan. The appellants were not living in hiding in Afghanistan, see [38]. The first and third appellants were independent minded women who had lost their independence following the

Taliban takeover. The family were being supported with funds from the sponsor. They were unable to leave their family lives together in Pakistan because of the significant risk to the appellants there.

6. It was not proportionate to argue that the sponsor should return to Afghanistan. He had been absent for over 20 years which would arouse suspicion. The appellants have developed strong relationships with other family members in Afghanistan. The sponsor runs a successful business and could support the appellants. If the first and third appellants were to leave Afghanistan to come to the United Kingdom, the second appellant would still have familial support in Afghanistan. Although refusing the second appellant but allowing the first appellant would place the first appellant in the painful predicament of deciding whether to leave Afghanistan or stay, it would still not cause the second appellant later difficulties, see [52]. The first appellant would become eligible to join the sponsor in 2025 in any event. The judge placed particular weight on: (i) the family's inability to lead their family life abroad in Afghanistan or Pakistan; (ii) the denial of freedom and (iii) the particular vulnerabilities the first and third appellants faced as women. She allowed their appeals but dismiss the appeal of the second appellant.

### **The Onward Appeal**

7. In her grounds of appeal the respondent argued that the appellants were living safely in Afghanistan and had no issue with the authorities hence their ability to travel to and from Pakistan. Their position was no different to that of any other female in Afghanistan and the respondent's decision merely maintained the status quo. In granting permission to appeal the First-tier judge wrote that the trial judge had not explained why family life which had continued in the same way for 20 years would be disproportionately affected by the respondent's decision. The appellants filed a rule 24 response prepared by counsel who appeared before me but who had not appeared at first instance which argued that Afghanistan was not safe for the appellants.

### **The Hearing Before Me**

8. In consequence of the grant of permission the matter came before me to determine in the first place whether there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.
9. For the respondent it was acknowledged that the judge had placed weight on family life and the difficulties they faced. The grounds focused on the judge's point about denial of freedom which related more to a protection appeal than an entry clearance one. The judge had to balance the strength of the public interest against the impact on family life.

10. For the appellant counsel relied on her rule 24 reply. The judge accepted that the parties could not live in Pakistan. The judge had to consider how country conditions impacted on the appellants' ability to conduct their family life. The respondent did not challenge the judge's decision that the family could not live in Afghanistan together. In relation to the 2<sup>nd</sup> appellant's cross-appeal it was an error for the judge to find that the second appellant would have family support. It was not canvassed at the hearing. The judge's findings were flawed. There was no reference to the impact on the second appellant of being separated from the other two appellants.
11. In conclusion the respondent argued that there the second appellant's appeal attacked [45] and [46] of the determination and whether there were family members in Afghanistan. Other than the error in relation to the 1<sup>st</sup> and 3<sup>rd</sup> appellants the determination was a very careful one. The judge did not have to refer to every piece of evidence. Circumstances in Afghanistan were difficult but the context was quite important. The judge had considered economic circumstances see [40]. The judge was dealing with a sponsor who did not have indefinite leave to remain and could not therefore sponsor under the immigration rules. The second appellant was not a young child there was no evidence of economic hardship. He had family support in Afghanistan. The judge's findings were perfectly valid for the reasons given.
12. Finally in conclusion for the 2<sup>nd</sup> appellant counsel made two points. It was rejected that there were family members in Afghanistan who could support the second appellant. The judge should have taken into account the second appellant's age and explained how a lack of maturity would impact on the proportionality assessment in relation to the second appeal. The parties agreed that if there was an error in relation to both appeal and cross-appeal then the matter should be remitted back to the First-tier.

### **Discussion and Findings**

13. The judge distinguished the case of the 2<sup>nd</sup> appellant from the cases of the 1<sup>st</sup> and 3<sup>rd</sup> appellants primarily because of the impact of Taliban rule on female citizens of Afghanistan. The 2<sup>nd</sup> appellant was able to work in Afghanistan. As a male he would not experience any particular difficulties and would have the support of family members in Afghanistan. He would continue to receive funds from his father. Whilst it may be that there was no direct evidence before the judge on the issue of other family members, it was a reasonable inference for the judge to take. If the first appellant and her children had survived in Afghanistan for 20 years without the physical presence of the sponsor, there must be other family members available who were able to assist the appellants. There was no reason why that assistance would end if the 1<sup>st</sup> and 3<sup>rd</sup> appellants left Afghanistan but the 2<sup>nd</sup> appellant remained.
14. For the second appellant to succeed outside the immigration rules he would have to show that the consequences for him were he to remain in Afghanistan without the

1<sup>st</sup> and 3<sup>rd</sup> appellants would be unduly harsh. The judge rejected this conclusion in respect of the second appellant. I have summarised her findings in the preceding paragraph and I see no basis on which the judge's conclusions can be criticised. Even if the result is disappointing for the second appellant no material error of law has been demonstrated in the determination in his case.

15. As to the 1<sup>st</sup> and 3<sup>rd</sup> appellants, the situation is more complicated. In essence their argument is that as females they will have their freedom severely curtailed by the strict interpretation of the law imposed on the population by the return to government of the Taliban. It does not appear that the judge in the First-tier was referred to any up to date country guidance on Afghanistan, previous country guidance might now be out of date because of the Taliban takeover. In essence the appeal of the 1<sup>st</sup> and 3<sup>rd</sup> appellants is more akin to an international protection claim than an article 8 claim. It is difficult to see how on the basis only of article 8 that the 1<sup>st</sup> and 3<sup>rd</sup> appellants right to respect for private and family life has been disproportionately interfered with by a decision of the respondent which itself merely maintains the status quo.
16. The economic circumstances in Afghanistan are no doubt difficult for most of the population although not for the appellants who are maintained by the support of the sponsor. The judge appears to have assumed that because the 1<sup>st</sup> and 3<sup>rd</sup> appellants were female and before the Taliban takeover had worked for the improvement of the lives of Afghan females that the imposition of Taliban rule of itself would so impact their article 8 lives they should be granted entry clearance to come to the United Kingdom. This point was not fully argued in the First-tier. I find that there was a material error of law in the judge's decision to allow the appeals of the 1<sup>st</sup> and 3<sup>rd</sup> appellants on the basis of conditions generally for females in Afghanistan.
17. Whilst there is existing authority that females in Afghanistan are a particular social group, that relates to international protection claims (usually made by persons already in the United Kingdom). That is not the case here. This is a claim under article 8. Having decided to overturn the decision of the First-tier I have decided not to proceed to remake the decision by dismissing the 1<sup>st</sup> and 3<sup>rd</sup> appellants appeals outright as I consider the first and third appellants should be given the opportunity to produce better evidence under article 8 to support their claims of undue harshness including any background material if necessary bearing in mind they are outside the United Kingdom. At [48] for example the judge highlighted the absence of medical evidence. Although a rehearing may involve some findings of fact, it will not be so extensive that it requires the case to be remitted back to the First-tier to be heard again. That might have been necessary if, as was submitted to me, all three appellants had their decisions set aside. I therefore set aside the decision of the First-tier Tribunal in relation to the 1<sup>st</sup> and 3<sup>rd</sup> appellants only and direct that their appeals be reheard in the Upper Tribunal on the first available date.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law in respect of the 1<sup>st</sup> and 3<sup>rd</sup> Appellants' appeals and I set the decisions aside. I dismiss the 2<sup>nd</sup> Appellant's appeal

Respondent's onward appeal in respect of the 1<sup>st</sup> and 3<sup>rd</sup> appellants allowed.

Their appeals will be heard on the first available date.

2<sup>nd</sup> Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 16<sup>th</sup> day of October 2023

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Judge Woodcraft  
Deputy Upper Tribunal Judge