IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-004857
UI-2023-004858
UI-2023-004859

First-tier Tribunal Nos:
HU/60132/2022; LH/04087/2023
HU/60134/2022; LH/04088/2023
HU/60135/2022; LH/04089/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24 January 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

(1) MK
(2) SAS
(3) SHS
(ANONYMITY ORDER MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr Mansoor Fazli, Counsel instructed by S.A.J Legal Solicitors
For the Respondent: Mr David Clarke, Senior Home Office Presenting Officer

Heard at Field House on 10 January 2024

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 appellants. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellants have been granted permission to appeal from the decision of First-tier Tribunal Judge Moon promulgated on 12 October 2023 ("the Decision"). By the Decision, Judge Moon dismissed the appellants' appeals against separate decisions by the respondent made on 22 November 2022 to refuse them entry clearance to the United Kingdom on human rights grounds.

Relevant Background

2. The appellants are all nationals of Afghanistan. The first appellant, MK, was born on 7 August 1968. She is the mother of the second appellant, SAS (Samira, d.o.b. 23.06.2000) and the third appellant (Shahinshah, d.o.b. 24.05.2001). Their sponsor is RS (Rohina d.o.b. 27.09.1992) who is a daughter of the first appellant and a sister of the other two appellants.

3. In May 2022, the appellants applied from Pakistan for entry clearance to join the sponsor in the UK. While these applications were pending, their solicitors sent a covering letter dated 26 June 2022 to the UK Visa Application Centre in Islamabad

4. They said that on 20 August 2021 the British family members of the appellants had sent an email to the FCDO requesting urgent assistance for the sponsor and the three appellants. In the cut and pasted email extract, an unnamed British citizen brother of the appellants reported that his sisters (Rohina and Samira) had run a boutique and beauty salon for many years. The Taliban had shut it down and they had been threatening to punish anyone they found who had worked in a beauty salon. His brother (Shahinshah) was being forced to join the Taliban army even though he was underage.

5. The solicitors said that, on 22 August 2021 during the day, the British family members had spoken to a FCDO representative on the telephone about these applicants and about the wife of one of the British family members and their British child who were also stranded. Around midnight, a named representative of the Home Office informed them on the telephone that unfortunately the UK authorities were only able to rescue Rohina (as well as the wife and British child). Rohina had been evacuated to the UK during the evacuation period, and she was now settled in the UK

under the Afghan Citizen Resettlement Scheme. ("ACRS"). The appellants had gone into hiding and had then managed to flee Afghanistan. They were now in Pakistan in the hope that they could join their sponsor and British family members in the UK.

6. On 22 November 2022 an Entry Clearance Officer refused the applications on identical grounds. The first was that they did not meet the eligibility requirements for entry clearance as adult dependant relatives under Appendix FM. Secondly, the respondent was not satisfied that they could meet the exceptional circumstance requirements. They had raised a claim that they were at threat from the Taliban in Afghanistan. But they had not provided any evidence to confirm that they were under immediate threat. They were currently in Pakistan and there was nothing to suggest that they could not remain there. The first appellant continued to reside with her adult children, and the sponsor could support them financially from the UK.

The Appellants' Case on Appeal to the First-tier Tribunal

7. The appellants' case on appeal to the First-tier Tribunal was set out in an ASA settled by Mr Jegede of SAJ Legal Solicitors that was uploaded to the CCD file in May 2023. He submitted that before the Taliban came to power in Afghanistan, the appellants and the sponsor were all living together. In addition, the second appellant and the sponsor had been running a beauty salon. After the Taliban seized power, the Taliban assaulted both the sponsor and the second appellant, and destroyed their beauty salon. While the sponsor had been able to escape from Afghanistan, the appellants were not so fortunate and had instead escaped to Pakistan where they have been residing illegally.

8. On the issue of whether there are exceptional circumstances in the appellants' case which warranted a grant of leave to enter outside the Rules, he submitted that the position adopted by the respondent was irrational, as the respondent had accepted that the sponsor's circumstances had warranted a grant of settlement under the ACRS on account of her exceptional circumstances, so it was difficult to comprehend why they refused to permit the appellants to join the sponsor on the ground that there were not exceptional circumstances in their case.

The Hearing Before, and the Decision of, the First-Tier Tribunal

9. The appellants' appeals came before Judge Moon sitting at Hatton Cross on 4 October 2023. Mr Jegede appeared on behalf of the appellants, and the respondent was represented by Counsel.

10. As is recorded by her at para [6] of the Decision, the Judge received oral evidence from the sponsor, from AS (Abdul) and MS (Mustafa), who are male siblings of the second and third appellants; and from their spouses, JS (Jamila) and NS (Neelam).

11. The Judge's discussion of the evidence and her findings began at para [12]. At paras [12] to [24], the Judge analysed the evidence that was relied on as establishing that the appellants qualified for entry clearance as ADRs under the Rules, and concluded at [24] that none of the appellants met the requirements of the Rules.

12. At para [26], the Judge turned to consider the appellants' Article 8 claim outside the Rules. She had no hesitation in finding that the appellants could not return to Afghanistan. The issue was whether they were at risk of being deported back to Afghanistan, and whether the conditions they faced in Pakistan were such that refusing their appeals would breach the obligations that the UK had under Article 8 ECHR.

13. At para [27], the Judge said she disagreed with the respondent's position that there was no protected family life between the three adult appellants and their relations here in the UK. She accepted that the separation of the family had impacted upon the mental health of the family members. In her assessment there were clearly elements of emotional and financial dependency that went beyond normal emotional ties.

14. The Judge moved on to consider the status of the appellants in Pakistan, initially by reference to the witness statement evidence of the appellants and the oral evidence of the witnesses, and then, from para [40] onwards, by reference to the country background information contained in the appeal bundle.

15. The Judge concluded her discussion of the subjective evidence with an observation at para [39] that it was entirely plausible that the appellants had been granted permission to live in Pakistan, which was time-limited, and therefore that applications had to be made to renew their leave. Most of the witnesses accepted that permission had been given, and that the next application was refused. The Tribunal had not been provided with any evidence of the refused applications. The Judge observed that it would be a simple matter to produce a copy of a letter, email, or even a screen-shot of the refused online application. If it was the case that the latest application had been refused, it was difficult to understand why evidence of this was not simply presented. Instead, the witnesses presented their documents to the Tribunal on the basis that they never had permission to be in Pakistan - a claim that she had rejected:

> "On the basis of the evidence that has been presented to the Tribunal, I find that the appellants have not established that they are currently in Pakistan without any legal status."

16. After considering the background evidence in the appellants' bundle, the Judge concluded at para [50] that given her earlier finding that the appellants had not established that they were in Pakistan illegally, and given that they had had access to healthcare - including a referral to a specialist - and that they had been able to rent two separate properties, she found it more likely than not that they were either PoR or ACC cardholders, or that they had valid visas. As such, the evidence discussed

above indicated that they were protected from being returned to Afghanistan.

17. At para [52], the Judge said that when considering their situation in Pakistan, she had found that the appellants had access to services and accommodation, and the evidence was that they received financial support to meet their needs. They also received practical support from neighbours, and she did not accept that they had experienced harassment by neighbours, as this aspect was raised very late and the evidence was inconsistent in relation to when they suffered harassment and whether it had continued in the second rented property. The appellants had also not established that there were no relations or support within a reasonable distance. Even if they did live far away from their relations in Pakistan, there was no convincing evidence that there was any restriction on freedom of movement for them, so no reason had been given as to why they could not move to another rented property to be closer to family.

18. At para [54] the Judge said that a material factor in her decision was whether the appellants should have received assistance from the FCDO along with Rohina. If that had been established, that factor would weigh heavily in favour of allowing the appeals.

19. She noted that the respondent submitted that it was not a factor in the assessment, because there was no evidence that an application was made in the first place. Alternatively, if there had been no decision in relation to the three appellants, that could be challenged by judicial review.

20. After considering the evidence pertaining to the issue, the Judge held at [57] that it was insufficient to establish that the appellants had been wrongly left behind.

21. At [58] the Judge concluded as follows:

> "The situation for these appellants is not easy. I found that they would have been traumatised, have had to move away from their home into a foreign country, and they are separated from the rest of their family … I have also found that Pakistan is not a completely unfamiliar country, they have family there, they are able to access services and that they are able to maintain contact with their family in the United Kingdom. In these circumstances, I do not consider the strength of the Article 8 claim is sufficient to outweigh the public interest in maintaining effective immigration controls given my finding that they do not meet the requirements of the Immigration Rules. Had I been satisfied that the appellants should have received assistance to come to the United Kingdom because their circumstances were the same as those of Rohina, my decision would have been different but I was not satisfied that this was established on the evidence before me."

The Reasons for the Grant of Permission to Appeal

22. Grounds of appeal were settled by Mr Fazli of Counsel, and on 15 November 2023 First-tier Tribunal Judge Boyes granted permission to appeal for the following reasons:

1. The application is in time.
2. The grounds assert that the Judge erred in numerous regards. The grounds are extraordinarily lengthy.
3. That said, the grounds are all arguable. I have not chosen to separate out which ones are stronger than others given the cumulative effect of the grounds is that it is arguable that the judgment is unsafe. The first ground, as argued, may be the start and conclusion of this appeal, however, that is a matter for the UT, not me.

23. In a Rule 24 response dated 29 November 2023, Mahdi Parvar of the Specialist Appeals Team, gave extensive reasons for opposing the appeal. In summary, he submitted that the Judge of the First-tier Tribunal had directed herself appropriately.

The Hearing in the Upper Tribunal

24. At the hearing before us to determine whether an error of law was made out, Mr Fazli developed the grounds of appeal that he had settled. He also addressed us on an application to admit further evidence pursuant to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The additional evidence comprised email correspondence between the appellants' British family members, Mr Jegede and the FCDO from 20 August 2021 to 30 November 2021 relating to requests for assistance; copies of 30-day medical visas that had been issued to the appellants by the Pakistani authorities on 3 March 2022; and correspondence between the FCDO and Mr Jegede following the appeal hearing in the First-tier Tribunal.

25. On behalf of the respondent, Mr Clarke dealt first with the application under Rule 15(2A). He submitted that the application was misconceived for the reasons given in *Akter (Appellate jurisdiction, E and R challenges)* [2021] UKUT 272, a decision by a Presidential Panel which affirmed that for a decision of the First-tier Tribunal to be disturbed on the grounds of the new evidence sought to be admitted, all four limbs of the test set out in *E and R* had to be satisfied. Firstly, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence be established in the sense that it is uncontentious and objectively verifiable. Thirdly, the appellants or their advisers must not have been responsible for the mistake. Fourthly, the mistake must have played a material part in the Tribunal's reasoning. Mr Clarke submitted that none of these requirements was met in the present case.

26. Mr Clarke also referred us to *Lata (Ft T: Principal controversial issues)* [2023] UKUT 00163 (IAC) in which paragraph 3 of the Headnote states that the reformed appeal procedures are specifically designed to ensure that the parties identify the issues for resolution by the First-tier Tribunal, not

that proceedings before the IAC are *"some form of rolling reconsideration by either party of its position*". Mr Clarke submitted that the appellants had not identified for the First-tier Tribunal that the question of whether they had been wrongly refused admission by the FCDO was a principal controversial issue to be resolved by the Judge. In any event, the new evidence that was now sought to be introduced relating to the FCDO process was evidence that was available in advance of the hearing in the First-tier Tribunal, and there was no reasonable excuse for it not being deployed at the hearing if the appellants had wished to run a case that they were aggrieved by the FDCO process.

27. Mr Clarke then addressed us on the seven grounds of appeal advanced by Mr Fazli. He took a similar line to that taken in the Rule 24 response, except that, in relation to Ground A, he did not adopt the concession made by his colleague that the Judge had erred as alleged in Ground A - albeit not materially. Mr Clarke cited a passage in *AA (Nigeria)* [2020] EWCA Civ 1296 at [34], where Popplewell LJ said that experienced judges in a Specialist Tribunal are to be taken to be aware of the relevant authorities and to be seeking to apply them, without needing to refer to them specifically, unless it is clear from their language that they failed to do so. There was nothing to suggest that the First-tier Tribunal Judge was unaware that she had to consider whether there were exceptional circumstances which would render refusal of entry clearance a breach of Article 8 of the ECHR because such a refusal would result in unjustifiably harsh consequences for the appellants or the sponsor or any of the other family members who gave evidence at the hearing.

28. After briefly hearing from Mr Fazli in reply, we reserved our decision.

Discussion and Conclusions

29. In light of the way that the appellants' case has been presented, we consider that it is helpful to set out the guidance given by the Court of Appeal in *T Fact-finding Second Appeal* [2023] EWCA Civ 475 as to the proper approach which we should adopt to the impugned findings of fact made by Judge Moon:

> 56. The most-frequently cited exposition of the proper approach of an appellate court to a decision of fact by a court of first instance is in the judgment of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5:
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> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the

House of Lords or of the Supreme Court. The reasons for this approach are many.

(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
(ii) The trial is not a dress rehearsal. It is the first and last night of the show.
(iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to the evidence (the transcripts of the evidence),
(vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2022] EWCA Civ 1039 [2003] Fam 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] UKCLR 1135."

57. More recently, Lewison LJ summarised the principles again in *Volpi and another v Volpi* [2022] EWCA Civ 464 at paragraph 2:

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

Ground A

30. Ground A is that, against a background of a series of positive findings, there was a complete failure on the Judge's part to determine whether there were exceptional circumstances that would create unjustifiably harsh consequences for the appellants or the sponsor or any of the other family members who gave evidence at the appeal hearing.

31. In the Rule 24 response, it is accepted that the Judge ought to have carried out an assessment of whether there were exceptional circumstances with reference to GEN 3.2 of Appendix FM. It is argued that the error is not material, given the Judge's very detailed findings on Article 8 ECHR from paras [27] onwards.

32. Insofar as the Rule 24 response can be read as a concession, we consider that Mr Clarke was right to withdraw it. Although the Judge did not expressly direct herself that the purpose of the proportionality exercise that she was conducting was to establish whether there were exceptional circumstances justifying the appellants being accorded relief on Article 8 ECHR grounds outside the Rules, it is clear from para [2] of the Decision that this was the case that the Judge was addressing. The Judge characterised the appellants' case outside the Rule as being that the refusal amounted to a disproportionate interference with their rights_to a family and private life under Article 8 of the ECHR. It was not in dispute that, for there to be a disproportionate interference, there needed to be exceptional circumstances.

33. The Judge made express reference to this at para [8], where she said that the policy adopted by the respondent is that where an application does not meet the requirements of the Rules, leave should only be granted in exceptional circumstances, when a refusal would amount to unjustifiably harsh consequences for the person or their family.

34. The Judge rightly directed herself at para [10] that if the appellants did not meet the requirements of the Rules, the issue would be whether the public interest factors were outweighed by the strength of their Article 8 claim.

35. The Judge's line of reasoning in the proportionality assessment is clear, and the reasonable reader is left in no doubt that the outcome of the assessment is that there were not exceptional circumstances which rendered the refusal of entry clearance disproportionate, as the Judge is

not persuaded that the strength of the Article 8 claim is sufficient to outweigh the public interest in maintaining effective immigration controls.

Ground B

36. Although the appellants do not in terms mount an error of law challenge to the Judge's finding that none of them met the requirements for entry clearance as an ADR, Ground B is that the Judge at para [15] made an insufficiently clear adverse finding in respect of the help that the first appellant requires.

37. In para [15], the Judge said that each of the witnesses was asked about the specific personal care that their mother required. She held that their evidence was not consistent. The sponsor said that she needed help going to the toilet and taking her medication and food. Abdul did not mention that she needed help going to the toilet, and said that her issues were mainly related to her mental health, which meant that she needed to reminded to take her medication, and she could not wash herself - something that the sponsor had not mentioned. The Judge said that the evidence of Jamila was vague and evasive. Firstly, she said that she did not understand the question, and then she said that her mother-in-law needed help taking medication and dressing herself - although dressing had not been mentioned by the previous two witnesses. Neelam said that she needed help dressing, but she did not appear to have much knowledge about the day-to-day lives of the appellants. When asked who did the cooking, she said that she did not know, and she did not know how the care was managed in Pakistan. The evidence of Mustafa was that his mother relied on his brother and sister, but he did not give any examples of any particular care that his mother required.

38. The Judge went on to find at para [22] that, having heard evidence of the five witnesses, she found Mustafa to be the most plausible and sincere witness. But she did not accept all of his oral evidence. She also found his wife Neelam to be an honest witness in relation to not having an in-depth knowledge of the appellants' circumstances, but she did not consider that she was telling the truth in relation to other aspects.

39. At para [23], the Judge said that, with the exception of Mustafa and Neelam, she found that the witnesses had exaggerated the extent of any difficulties that the appellants had. It was completely implausible that individuals such as Samira, who cooked for the family, would require help to eat. She could not accept that the two adult children, who their mother was said to rely on for support, would be unable to assist their mother with every-day tasks if they themselves were unable to do such things. She preferred the evidence of Mustafa, who confirmed that the appellants were getting by, but that life was difficult for them.

40. Given that there is no error of law challenge to these paragraphs, and there is also no error of law challenge to the conclusion at para [24], it is difficult to see how the asserted errors in para [15] can be material.

41. Mr Fazli's first objection is that there are respects in which the evidence of the witnesses on the first appellant's needs was consistent. His second objection is that the asserted respects in which their evidence was inconsistent it simply reflective of the extent of each witness's knowledge of the facts, and so no adverse inference should have been drawn.

42. The weight which the Judge chose to give to the respects in which the evidence of the witnesses was inconsistent was pre-eminently a matter for her, and there is no tenable basis for asserting that the Judge was clearly wrong in her analysis. Moreover, as previously highlighted, it is not suggested that the Judge was wrong to reach the conclusion which she did on the primary facts, which was that the medical evidence did not support the claim that any of the appellants needed help to perform every-day tasks, and that the relevant requirements for admission as ADRs were not met.

Grounds C and E

43. We consider that it is convenient to deal with Grounds C and E together, as they both relate to the issue of the appellants' status in Pakistan.

44. Ground C relates to paras [29] and [30] of the Decision. In these paragraphs, the Judge identified various inconsistencies in the oral evidence as to the appellants' current status in Pakistan. For example, Abdul's clear evidence was that the appellants had not made any application to regularise their stay in Pakistan, because it was a well-known fact that the authorities in Pakistan were not issuing any documents to refugees. The Judge observed that this was not consistent with the oral evidence of Neelam, who said that the family in the UK applied for visas for the appellants online which were granted, but when the applications were made again, they were refused. The Judge went on to say, at [31], that Mustafa was also asked whether the appellants had ever held legal status in Pakistan, to which he said 'no'. His reply to the same question was then put to him, and he explained the discrepancy by saying that he thought he was being asked if the appellants had been granted indefinite leave to remain in Pakistan, which they had not. He said that the initial visa had expired after one month. They had applied after one month online, but the application was refused and no reasons for refusal were given.

45. At [38] the Judge said that that in cross-examination most of the witnesses confirmed that in fact the appellants had been granted entry clearance to Pakistan. She did not accept that this was only for one month, as stated by Mustafa, because the majority of the witnesses confirmed that the appellants had managed to rent two different houses, which she considered would be very difficult if their status in Pakistan was illegal. Another reason for her disbelief was that the appellants had been receiving medical treatment. She rejected the claim that treatment was only given on one or two occasions for compassionate reasons, because the letters from the hospital had stated that all three appellants had been under the care of the hospital since August 2022 until - in the case of the

third appellant - May 2023. According to the letter from the hospital, the third appellant had also been referred to a specialist in order to obtain a diagnosis. This evidence of ongoing care and referral to a specialist indicated that the appellants had had permission to be in Pakistan for a period of time, or at least until May 2023.

46. Ground C is that the Judge's findings at paras [29] and [30] are inadequately reasoned. Ground E is that the Judge's findings at paras [38] and [39] are speculative, factually inaccurate and without a sufficient evidential foundation.

47. Mr Fazli's detailed submission on Ground C is that the Judge plainly failed to appreciate that there were about 1.7 million Afghans who were staying in Pakistan illegally, all of whom were ordered to leave Pakistan by the time of the hearing, or else they would be forcibly removed from 1 November 2023. Secondly, he submits that the Judge was not clear in these paragraphs as to whether the witnesses were each asked about the first time the appellants applied to get visas to Pakistan, or whether each one was asked about subsequent visa applications that may or may not have been made to the Pakistani authorities when they were living in Pakistan.

48. We consider there is no merit in these submissions. Firstly, at this stage of the discussion, the Judge was addressing the subjective evidence as to the appellants' visa status in Pakistan. She was not purporting to assess their status by reference to the background evidence. This assessment came later. Secondly, the background evidence upon which reliance is placed by Mr Fazli was not before the Judge. Thirdly, what the Judge said in paras {29] and [30] was only part of a very extensive discussion by her of the subjective evidence, and on a holistic assessment there is no proper basis for the assertion that the evidence of the witnesses on the visa issue was rehearsed by the Judge with insufficient clarity.

49. Mr Fazli's detailed submissions with regard to paras [38] & [39] are that the Judge had no basis to find that the appellants had permission to remain in Pakistan beyond the initial grants of a short stay of a month or so; and no sufficient basis to find that Afghan refugees without visas cannot rent properties in Pakistan or get private treatment. He submits that, contrary to the finding at [39], permission to enter as a visitor is wholly different from permission to reside with any sense of reasonable permanence or longevity. Mr Fazli further submits that the Judge was wrong to say in para [39] that the witnesses presented their documents to the Tribunal on the basis that they had never had any permission to be in Pakistan, because the appellants stated in their application forms that they had leave to enter until 9 June 2022.

50. As the Judge refers to the witnesses, rather than to the appellants, it is to be inferred that the Judge was referring back to the oral evidence given by the witnesses at the hearing to the effect that the appellants had never had any permission to reside in Pakistan, albeit that the Judge went on to

find that the consensus was that the appellants had been granted time-limited leave, and so the issue was whether they had applied to extend their leave.

51. Mr Fazli impugns the Judge's line of reasoning in para [38] on the ground that the Judge had no proper evidential basis for linking the appellants' ability to rent two different houses and to receive medical treatment, with the legality of the appellants' residence in Pakistan. His submission in this regard overlooks the fact that it was the appellants themselves who provided the link. The Judge is not said to have misdirected herself in stating, at the beginning of para [32], that the case put forward on behalf of the appellants was that they could not access medical care in Pakistan because they had no legal status. Given that this was the appellants' case, it was entirely open to the Judge to find that the appellants' continuing access to medical care showed that the appellants did in fact have legal status. It was also reasonably open to the Judge to find that the appellants' ability to rent two properties was more consistent with the appellants having legal status than it was with them being present in Pakistan illegally.

52. On the question of whether the appellants had tried unsuccessfully to renew their permission to live in Pakistan, it was clearly open to the Judge to attach significant weight to the fact that no documentary evidence had been provided to show this.

53. Mr Fazli also reiterates that there are 1.7 million undocumented Afghan refugees in Pakistan whom the Government have recently ordered to be deported. But as is highlighted in the Rule 24 response, one of the reports cited by him, which is a BBC News report headed "*Afghan Refugees Forced to leave Pakistan so they have nothing"*, also states that 1.3 million Afghans have been registered as refugees in Pakistan, and 880,000 have received the legal status to remain.

54. Thus, not only is no error of law disclosed by the Judge not addressing background evidence that was not put before her, but objectively the background evidence cited by Mr Fazli is not such as to invalidate the Judge's line of reasoning up to and including para [39].

Ground D

55. In Ground D Mr Fazli challenges the findings made by the Judge on the appellants' ability to access support from family members in Pakistan.

56. At para [35], the Judge said that the case put forward was that the appellants had never been to Pakistan and had no family there. However, the oral evidence of Rohina was that there was family in Pakistan. She said that they did not live close by, and she said that she did not know their location. When other witnesses were asked about family in Pakistan, initially they said that there was none. But when Rohina's reply was put to them, the witnesses then said that there might be extended family but not close family.

57. At [36], the Judge did not accept that none of the appellants had ever been to Pakistan, because the respondent's bundle contained a copy of a visa confirming that the first appellant was granted entry clearance to Pakistan for a 30-day visit for her and her children on 1 November 2018, which was valid until 30 April 2019.

58. At para [37], the Judge found that the witnesses had not been honest in relation to connections or prior visits to Pakistan. On this basis, she was not satisfied that the extended family in Pakistan lived far away. If the distance was great, there would be no reason to lie.

59. Mr Fazli submits that the Judge has made an improper finding of deception, and that her finding in relation to distance is without an evidential basis.

60. He submits that the finding of deception is improper because the Judge has not given adequate reasons as to why such a serious finding of deception had been reached, and because the finding is inconsistent with the fact that the sponsor volunteered in oral evidence that there were other family members in Pakistan. He submits the fact that other witnesses initially stated that there were no family members in Pakistan, but later qualified that there might be, did not mean that a lie had been told.

61. We consider that the impugned findings of fact made by the Judge were reasonably open to her on the evidence, for the reasons which she gave. It is clear that her line of reasoning was that the other witnesses had suppressed the truth about there being other family members in Pakistan to whom the appellants could potentially turn to for support, because they deemed that it would be unhelpful to the appellants' case to acknowledge this fact. The Judge also reasoned that, if the other family members resided far away so as not to be able to offer support to the appellants, the witnesses would not have had reason to lie about their existence, rather than acknowledging at the outset that there were extended family members in Pakistan, but that they lived far away.

Ground F

62. Ground F consists of a disparate group of asserted errors lumped together under the heading of "*Unreasonable Findings and Failure to Consider Material Evidence (or to do so adequately)".* We deal with the asserted errors in the order in which they arise in the Decision.

63. The first asserted error relates to the finding on alleged harassment by neighbours at [34]. The Judge did not accept that the appellants have been harassed by neighbours, as this was not mentioned in any of the witness statements. It was only raised in the most recent statement provided by the sponsor in August 2023. The Judge found that if the appellants were being harassed, at least one of the witness statements

prepared in April 2023 would have mentioned this. In addition, she held that the evidence was inconsistent about when the appellants had had to move house, and, on Rohina's oral evidence, they had not moved at all. Another inconsistency was that there was other evidence that the neighbours helped with the care of the appellants.

64. Mr Fazli's objection to this finding is that just because something may not have been mentioned in previous evidence does not make it untrue or unfounded. Mr Fazli also submits that just because some neighbours may have been helpful to the appellants, it does not follow that they have not experienced harassment from other neighbours, given the widespread mistreatment and discrimination experienced by Afghans in Pakistan.

65. Although Mr Fazli considers that he is raising a point of principle which he derives from the case of *Maheshwaran* [2002] EWCA Civ 173, he is mistaken. The principle which he derives from *Maheshwaran* is that an adjudicator is not compelled (our emphasis) to radically discount the evidence of the claimant simply because there are inconsistencies between what the claimant says in interview and what he says in his oral evidence. This does not mean that the reverse is true. It does not mean that the Judge was compelled not to reject the evidence of harassment by neighbours due to the inconsistencies she identified.

66. The second asserted error relates to the Judge's findings at [48], [50] and [52]. We note that there is no error of law challenge to the extensive discussion which proceeds these impugned paragraphs.

67. Beginning at para [41], the Judge undertook a detailed assessment of the background evidence in the appellant's bundle relied upon by the appellants to show the position of Afghan nationals in Pakistan. This included a Country Information report by the EUAA which was dated May 2022. At para [42], the Judge noted that the EUAA report stated that in addition to Afghan nationals with a formal status known as 'proof of registration card holders' (PoR card holders, or RIC holders), the Afghan population in Pakistan can be divided into the following three categories: Afghan citizen card (ACC) holders, undocumented Afghans (who are considered illegal), and visa holders. At [43], the Judge noted that the report stated that PoR cardholders represent almost half of Afghanistan nationals living in Pakistan, and approximately one quarter are ACC cardholders. Undocumented Afghans make up just over one quarter.

68. At [48], the Judge said that the broad submission in relation to Article 8 was that whilst the Pakistani authorities may have in the past tolerated the presence of refugees from Afghanistan, the situation now was that the authorities wished refugees from Afghanistan to leave or they would deport them. Reliance was placed on an article in the appellants' bundle entitled "*Afghan refugees fear return as Pakistan cracks down on migrants*". This article was posted on the internet on 1 February 2023.

69. The Judge discussed and made findings on the implication of this article. In [49], she concluded that the article did not support the claim that the authorities in Pakistan were refusing to grant extensions to visas.

70. At para [50], the Judge found that the appellants had not established that they were in Pakistan illegally. Given that they had access to healthcare, including a referral to a specialist and they had been able to rent two separate properties, she found that it was more likely than not that they were either PoR or ACC card holders, or that they had a valid visa. As such, the evidence discussed above indicated that they were protected from being returned to Afghanistan.

71. Mr Fazli's submission on para [48] is that the Judge should have accepted that, in order to renew their visas, the appellants had to re-enter Afghanistan, as indicated by the article, rather than accepting the oral evidence of the witnesses who admitted that the appellants had obtained their visas by making an online application from within Pakistan. We consider that his submission is misconceived. It would have been an error of law on the part of the Judge to ignore the specific evidence given by the witnesses as to how the appellants had obtained their visas simply because one article in the bundle indicated that this was not possible.

72. Mr Fazli submits that the Judge's finding at para [50] that the appellants are either PoR or ACC cardholders is without foundation and is based on pure speculation. But this criticism ignores the fact that the Judge stated in the further alternative that the appellants had valid visas. Moreover, the Judge carefully laid the ground for the alternative possibilities in her earlier discussion, and so there is clearly an evidential foundation for the impugned findings of fact made by the Judge at para [50].

73. At para [52], the Judge gave a summary of her findings on the appellants' current circumstances in Pakistan. She found *inter alia* that there was no convincing evidence that there was any restriction on freedom of movement for the appellants, so no reason had been given as to why they cannot move to another rented property to be closer to other family members in Pakistan.

74. Mr Fazli repeats the objection raised in Grounds C and E. He submits that the finding in [52] is inconsistent with the objective evidence that Pakistan had ordered all undocumented Afghans to leave, as they would face forced removal from 1 November 2023. While acknowledging that the articles cited by him in his grounds of appeal had not been placed before the First-tier Tribunal, Mr Fazli submitted in oral argument that, as the October 2023 crackdown was in the public domain, the Judge should have factored this into her analysis.

75. But it would clearly have been an error of law for the Judge to have conducted research on recent developments in Pakistan after the hearing, even if, as Mr Fazli understands, Mr Jegede made some passing reference to a new crackdown in his submissions. The Judge rightly confined her

analysis to the background evidence that had been placed before her and the respondent for the purposes of the appeal hearing.

76. The third and fourth asserted errors under Ground F are a failure to take into account, in the assessment of exceptional circumstances, the ill-health of the appellants, and the adverse impact upon the sponsor's mental health of the ongoing separation.

77. Although there is no overt consideration of these matters in the balancing exercise, we do not consider that an error of law is thereby disclosed. The Judge clearly had in mind the medical conditions of all three appellants, as they are extensively discussed in the earlier part of her Decision when she is addressing the issue of whether they qualify for entry clearance as ADRs. It is also clear that the Judge had in mind the impact on the sponsor, because at para [57] she said that the experience at the airport in August 2021 would have strengthened emotional bonds, and she accepted that the separation of the family had impacted upon the mental health of "*these family members.*"

Ground G

78. Ground G contains two separate error of law challenges. The first is that the Judge made erroneous findings on "*the important issue*" of assistance from FCDO. In the alternative, if there was no error in the Judge's finding that there was insufficient evidence to show that the appellants had been wrongly left behind when Rohina was evacuated, it was the fault of the Judge and/or the respondent that there was a deficiency of evidence on this issue, and so her conclusion is vitiated by procedural unfairness.

79. We consider that the necessary starting point is a recognition that, going into the appeal hearing, the appellants had not identified as a principal controversial issue to be resolved by the Tribunal a claim that in August 2021 they had had a legitimate expectation of being evacuated with Rohina, and that their exclusion from a visa waiver had been irrational and/or contrary to the ACRS policy set out in the covering letter of June 2022. Although irrationality was raised in the ASA, this was in the context of the refusal of admission by an Entry Clearance Officer in November 2022, and the continuing refusal of admission inherent in the Entry Clearance Officer opposing the appeals. Mr Jedege did not purport to advance a case that the appellants had been a victim of an historic injustice in August 2021.

80. Consistent with the line taken in the ASA, the witness statement evidence for the hearing was bereft of any detail relating to the request for assistance from the FCDO in August 2021. We consider that by far the most detailed account of the chain of events in August 2021 was given in the covering letter, and that the witness statement evidence for the appeal did not provide an evidential springboard for the case that was apparently raised for the first time by Mr Jegede during the hearing, to the effect that the FCDO had unreasonably failed to assist the appellants in

August 2021 by granting them a visa waiver, as they did for Rohina. For the remainder of this discussion, we will refer to this as “the new issue”.

81. Given the background that we have set out above, the submission that the Judge made erroneous findings on the new issue is wholly without merit. The Judge fairly and accurately summarised the factual position at [56]: there was no documentary evidence in support of the appellants’ case; and no details had been given in the witness statements as to how the FCDO decision was communicated and what the procedure was leading to Rohina being allowed on a flight and the appellants being refused.

82. The Judge went on to say that she could only attach limited weight to the reproduction of the email which had been cut and pasted onto the solicitors’ letter. The Judge was not thereby making an adverse credibility finding against the appellants, contrary to what is said in the grounds of appeal.

83. Mr Fazli appears to suggest in the grounds of appeal that the Judge should have resolved the new issue in favour of the appellants, simply on the basis that (a) the solicitors’ covering letter evidenced an application being made on behalf of the appellants to the FCDO at the same time as an application was made for Rohina; and (b) that Rohina’s circumstances in August 2021 were the same as Samira’s. But it was clearly open to the Judge to find that there was insufficient evidence to enable her to resolve the new issue in favour of the appellants, for the reasons she gave at [56] and [57].

84. We consider that Mr Fazli’s alternative case is misconceived. It was incumbent upon the appellants to bring forward any relevant documentary evidence in their control which was believed by their legal representatives to advance their case. The Judge did not have a duty to ask questions of the witnesses in order to elicit evidence which might assist the appellants on the new issue.

85. In oral argument, Mr Fazli took a different line, which is that the respondent should have provided evidence to show why Rohina had been evacuated but not the appellants. But this line of argument is equally untenable. The respondent did not have advance notice of the new issue. The respondent reasonably prepared for the hearing on the basis that the only question to be resolved by the Tribunal with regard to exceptional circumstances was whether there were currently exceptional circumstances, not whether the appellants had been the victims of an historic injustice in August 2021.

86. Under Rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Upper Tribunal has the power to admit evidence that was not before the First-tier Tribunal. But where, as here, the purpose of the application is to establish that the First-tier Tribunal Judge made a material mistake of fact leading to procedural unfairness, we accept Mr Clarke’s submission that the appellants must satisfy the test in *E and R* which was recently

restated by the Presidential Panel in *Akter.* We also accept his submission that none of the four requirements of the test is met. The only further observation we make is that, far from raising a doubt as to whether the Judge was materially mistaken in her assessment, the new material is confirmatory of it.

Summary

87. The Judge conducted a comprehensive and well-reasoned analysis of the evidence before her, and she gave clear and cogent reasons for resolving the appellants' appeals in favour of the respondent.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. These appeals to the Upper Tribunal are dismissed.

Anonymity

The First-tier Tribunal made an anonymity order in favour of the appellants, and we consider that it is appropriate that the appellants continue to be protected by anonymity for the purposes of these proceedings in the Upper Tribunal.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
22 January 2023