IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-000204, UI-2023-000205, UI-2023-000203, UI-2023-000202
First-tier Tribunal Nos: HU/53952/2022, HU/53957/2022, HU/53959/2022, HU/53960/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 5 June 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Entry Clearance Officer

Appellant

and

(1) CHB
(2) OB
(3) BCO
(4) BGB
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr C. Avery, Senior Home Office Presenting Officer
For the Respondent: Mr D. Lemer, Counsel, instructed by Duncan Lewis Solicitors

Heard at Field House on 25 May 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondents 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 them. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. By a decision dated 19 December 2022, First-tier Tribunal Judge Shore ("the judge") allowed an appeal against four linked decisions of the Entry Clearance Officer to refuse four linked human rights claims made in the form of applications for entry clearance. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. The Secretary of State now appeals against the decision of the judge with permission to appeal on a single ground, granted by Upper Tribunal Judge Keith.

3. For ease of reference, I will refer to the appellants before the First-tier Tribunal as "the appellants" or, for example, "the first appellant" (as the case may be), and to the respondent to the proceedings below simply as "the Entry Clearance Officer".

Factual background

4. The appellants are citizens of Afghanistan currently residing in Pakistan. The first appellant is a 65-year-old man. The second appellant is his 53-year-old wife. The third appellant and the fourth appellant are their sons, who were aged 20 and 13 at the time of the hearing before the judge, on 16 December 2022. The appellants have two additional sons, or (in the case of the third and fourth appellants) brothers, who are residing in the United Kingdom as refugees: A and B. I will refer to A and B as "the sponsors". At the time of the hearing below, they were aged 31 and 22 respectively.

5. The appellants applied for entry clearance on 10 and 13 December 2021. Their applications were refused by decisions dated 23 June 2022, which were upheld in supplementary decisions dated 12 December 2022.

6. Until 2015, the appellants and the sponsors lived in Afghanistan as a family unit. The first appellant worked in civil engineering for companies contracted to work for the Government of Afghanistan. On the judge's unchallenged findings of fact, in October 2015 B was kidnapped by the Taliban and later released for a sizeable ransom. The whole family unit fled Afghanistan in early 2016 and made their way to Turkey, where they were separated. The appellants were returned to Afghanistan by the Turkish authorities, while A and B were able to travel to the UK and were, following a successful appeal, recognised as refugees. In 2021, following the fall of the Afghanistan to the Taliban, the appellants fled to Pakistan, where they remain, with a precarious immigration status, at risk of removal to Afghanistan. The first appellant claims to have received a "night letter" from the Taliban which places him at a real risk of serious harm in Afghanistan, in the event he was to return.

7. The appellants' applications for entry clearance were on the basis that there were exceptional and compassionate circumstances justifying grants of leave outside the rules. They claimed to enjoy "family life" for the purposes of Article 8 of the European Convention on Human Rights ("the ECHR") with A and B, and that it would result in unjustifiably harsh consequences for their applications to be refused.

8. The applications were refused, and the appellants appealed to the First-tier Tribunal. The judge made a number of findings of fact concerning the family's

circumstances in Pakistan, and their prospective circumstances in the UK. At paragraph 18.12, the judge said:

> "I find that the sponsors have property and means to support the appellants in the United Kingdom without recourse to public funds because their evidence and documents were unchallenged by the respondent."

9. The judge stressed (paragraph 24) that he accepted the Entry Clearance Officer's submissions not to treat the appeal as a "back door" means to determine asylum claims.

10. The judge's operative reasoning commenced with the fourth appellant, who was and remains a child. The judge began by addressing his situation under paragraph 319X of the Immigration Rules. He found that there were "serious and compelling family or other considerations" that made the exclusion of the fourth appellant undesirable, bearing in mind his best interests, the precarious nature of the family's residence in Pakistan, the real possibility of his onward removal to Afghanistan, the absence of ongoing support in Pakistan, and his inability to access education in Pakistan (paragraph 29). He found that suitable arrangements had been made for the fourth appellant's care and, at paragraph 31, found that he was not leading an independent life, was not married, and had been in a family unit with the other appellants in the sponsors in Turkey until they were separated.

11. At paragraph 32, the judge found that the fourth appellant would be able adequately to be accommodated by the sponsors in the United Kingdom without recourse to public funds, in accommodation that the sponsors own or occupy exclusively. On the basis of those findings, the judge concluded that the fourth appellant met the requirements of paragraph 319X of the Immigration Rules. At paragraph 34, the judge expressly addressed a number of matters relevant to section 117B of the 2002 Act, including that there was no evidence that the fourth appellant could speak English, and he would not be dependent on state benefits.

12. From paragraphs 35 to 38, the judge analysed the position of the fourth appellant under Article 8 outside the Immigration Rules. He concluded in these terms:

> "I find that the decision appealed against by the fourth appellant would cause the United Kingdom to be in breach of its obligations under Article 8 ECHR because the fourth appellant has shown exceptional circumstances as set out in my findings above, and refusal would result in unjustifiably harsh consequences for the fourth appellant such that refusal of his application would not be proportionate."

13. The judge concluded that the first, second and third appellants could not meet the requirements of the Immigration Rules (paragraphs 39 and 40). Addressing Article 8 outside the rules in their cases, he found that the first three appellants had demonstrated "dependency" on the sponsors for Article 8 purposes, on account of their emotional dependency upon them. In the alternative, he found that if they did not engage Article 8 on that basis, it was engaged in relation to the sponsors through the fourth appellant who, the judge found, met the rules and does enjoy Article 8 family life with the sponsors.

14. The judge conducted a balance-sheet assessment in relation to the first, second and third appellants. He concluded that the public interest in the maintenance of effective immigration controls under section 117B(1) of the 2002 Act was outweighed by the family life "that would be established by the fourth appellant being with his parents and all his siblings in the United Kingdom". He added:

> "…the status quo position of the fourth appellant remaining in Pakistan, with the threat of removal to Afghanistan, constitutes a breach of his Article 8 rights to a private and family life. I also considered that the position of the fourth appellant being granted entry clearance while the other appellants were refused and remain in Pakistan or Afghanistan is disproportionate. There are insurmountable obstacles on my findings of fact." (Paragraph 49)

15. At paragraph 50, the judge concluded that the Entry Clearance Officer's decision in relation to the first to third appellants would cause the United Kingdom to be in breach of its obligations under the ECHR. There were exceptional circumstances. Refusal would result in unjustifiably harsh consequences for the first, second and third appellants, such that refusal of their applications would not be proportionate. The judge allowed the appeal.

Issues on appeal to the Upper Tribunal

16. The Secretary of State applied for permission to appeal on a number of grounds, including the judge's application of the Immigration Rules to the fourth appellant, and his findings of fact that Article 8 of the ECHR was engaged in relation to the appellants and sponsors. Permission to appeal was refused by a judge of the First-tier Tribunal.

17. Upper Tribunal Judge Keith granted permission to appeal on the sole basis that ground 1(c) was arguable. He expressly refused permission to appeal on the remaining grounds, and directed, in accordance with *EH (PTA: limited grounds; Cart JR) Bangladesh* [2021] UKUT 0117 (IAC), that the scope of the 'error of law' hearing in the Upper Tribunal was to be limited to ground 1(c). Ground 1(c) is as follows:

> "…it is submitted that the FTTJ has overlooked the requirement for the Appellant to satisfy the 'exceptional circumstances' as defined in paragraph 319XAA of the Immigration Rules for the minor appellant to have either no parent or no other family member than those present in the UK. It is submitted that those considerations are indicative of the intention of paragraph 319X for a minor appellant to have no parents of family currently residing with them. As the minor appellant currently resides with his parents, it is submitted that the FTTJ has materially erred in finding that the minor appellant satisfies the requirements of the Immigration Rules."

18. Judge Keith granted permission to appeal on that ground in these terms:

> "The FtT arguably failed to consider para 319XAA of the Immigration Rules. This because while the FtT had found at §32 that the fourth appellant can and will be accommodated adequately without recourse to public funds (para 319X(vi)(a)), he arguably failed to find that the fourth appellant could be maintained adequately without such recourse (para 319X(vii)(a)), which in turn means that para 319XAA is arguably

> relevant, by virtue of para 319X(vii)(b). I am conscious that there is a finding that the fourth appellant, a minor, has shown that he would not be dependent on state benefits (§34.2) but this is arguably not the same thing as maintenance without the sponsor needing to have recourse to public funds, to do so. ”

19. Pursuant to paragraph (3) of the headnote to *EH*, the Entry Clearance Officer, through Mr Avery, could have applied to vary Judge Keith's direction limiting the extent to which the remaining grounds of appeal, upon which permission to appeal was refused, could be pursued in any event. Mr Avery did not do so. He confirmed that there were no procedural issues arising from the terms of the grant of permission to appeal.

20. The hearing therefore proceeded on the narrow basis identified by Judge Keith.

21. I informed the parties at the hearing that the appeal would be dismissed, with reasons to follow, which I now give.

Judge considered all relevant factors under rule 319X

22. It is not necessary to set out paragraph 319X of the Immigration Rules in its entirety, in light of the narrow scope of the disputed issues. The relevant extracts are as follows:

> “(vi)(a) the applicant can, and will, be accommodated adequately by the relative the child is seeking to join in the UK without recourse to public funds and in accommodation which the relative in the UK owns or occupies exclusively; or
>
> (b) there are exceptional circumstances (as defined in paragraph 319XAA)…”

23. Mr Avery relied on ground 1(c) of the grounds of appeal. The submission is, essentially, that the judge failed to consider the broader financial position of the sponsors, and whether *they* would have to have recourse to public funds, in order adequately to accommodate and maintain the fourth appellant.

24. Mr Lemer submitted that the judge reached findings on expressly that issue, in particular paragraph 18.12, set out at paragraph 8, above.

25. I agree with Mr Lemer. The judge expressly addressed the broader financial position of the sponsors in terms that were open to him on the evidence he heard. If any further clarity be needed, one finds it at paragraph 32, which I also referred to above. It states:

> “I have found that the fourth appellant can, and will, be accommodated adequately by the sponsors and United Kingdom without recourse to public funds and in accommodation that the sponsors own or occupy exclusively.”

26. Turning to the substance of ground 1(c), it follows that the judge did not err by not expressly addressing whether there were “exceptional circumstances” for the purposes of paragraph 319XAA of the Immigration Rules. By definition, that paragraph is only engaged where adequate accommodation and maintenance

cannot be achieved without recourse to public funds. On the judge's findings, there would be no such recourse, it was not necessary to address it.

27. This ground of appeal therefore fails.

28. This appeal is dismissed.

Anonymity

29. The judge granted the appellants anonymity for two reasons. First, A and B are the beneficiaries of orders for anonymity made in their respective proceedings before the First-tier Tribunal and there was a risk of jigsaw identification. Secondly, the fourth appellant is a minor and should not be identified. For my own part, I observe that while the appellants remain in Pakistan, their need for anonymity remains strong. Once they are admitted to the UK, and with the passage of further time in relation to A and B, the reasons to maintain anonymity may well diminish. For the time being, however, there are good reasons to depart from the principle of open justice and I maintain the order made by the judge.

Notice of Decision

The decision of Judge Shore did not involve the making of an error of law such that it must be set aside.

This appeal is dismissed.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 May 2023