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

Appeal Number: UI-2023-002517
UI-2023-002518, UI-2023-002519
UI-2023-002521, UI-2023-002522

First Tier Number:
HU/51819/2022; IA/04265/2022
HU/51817/2022; IA/04264/2022
HU/51814/2022; IA/04262/2022
HU/51718/2022; IA/04053/2022
HU/51816/2022; IA/04263/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued**
**On 10th November 2023**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BAGRAL**

**Between**

**(1) SAIMA YOUSSOUFZAI**
**(2) MORSAL YOUSSOUFZAI**
**(3) SOHA YOUSSOUFZAI**
**(4) SOMA YOUSSOUFZAI**
**(5) ROMA YOUSSOUFZAI**
**(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellants: Ms S. Lynes, Counsel instructed by Wilson Solicitors LLP
For the Respondent: Ms S. Lecointe, Senior Home Office Presenting Officer

**Heard at Field House on 11 September 2023**

## DECISION AND REASONS

## Background

1. The appellants are a family unit. The order in which they are listed above mirrors the decision of the First-tier Tribunal, but which does not reflect their ages in chronological order. The appellants are nationals of Afghanistan born in 1986, 2006, 2016, 2008 and 2014 respectively. The first appellant is the biological mother of the other appellants. Mr Shamshad Youssoufzai, ("the sponsor"), is claimed to be the spouse of the first appellant and is the biological father of the other appellants.

2. On 27 September 2021 the appellants made an application for entry clearance under paragraph 352A and 352D of the Immigration Rules ("the Rules") in order to join the sponsor. In other words, this was a refugee family reunion application.

3. The respondent refused the application in decisions dated 11 January 2022 and 11 February 2022. Essentially, the respondent was not satisfied that the appellants met the requirements of the Rules in terms of their relationship to the sponsor as spouse and children respectively, and further in terms of whether the first and second appellants were part of the sponsor's preflight family unit; the third, fourth and fifth appellants being born after the sponsor left Afghanistan.

4. The appellants appealed against that decision and their consolidated appeals came before First-tier Tribunal Judge Shakespeare ("the FtJ") at a hearing on 28 April 2023. I will come to the FTJ's reasons for dismissing the appeal below. Permission to appeal was granted by the First-tier Tribunal on 3 July 2023 on the basis of arguable errors in the FtJ's consideration of the evidence. The respondent did not file a Rule 24 response.

## Assessment and Conclusions

5. I do not recite all of the submissions except to explain why I have reached my decision. There are four grounds of appeal. For reasons that will become apparent, I consider them in reverse order.

6. I begin with a summary of the background to the appellants' application.

7. The sponsor and the first appellant claimed to have married in 2005. By the time the sponsor left Afghanistan in June 2008, the first appellant had

given birth to the second and fourth appellants. The sponsor arrived in the UK in 2009 and claimed asylum. During his asylum application he referred to having a "girlfriend" in Afghanistan and/or was single and had no children. It was the sponsor's evidence before the FtJ that he did not mention his wife and children during his asylum application because he was beaten by the police in France, and following his arrival in the UK he was "scared" and "unsettled" after escaping Afghanistan. The sponsor was recognised as a refugee in 2012. He first visited the first, second and fourth appellants in Pakistan in 2013. During subsequent visits the third and fifth appellants were conceived and born in 2016 and 2014 respectively. Before the FtJ, the respondent conceded, in view of DNA evidence, that the first appellant and sponsor are the mother and father of the other appellants.

8. The initial question for the FtJ, in his consideration of the Rules, was to determine either the date of marriage between the first appellant and sponsor, as the Rules specify that it must not have taken place after the sponsor left Afghanistan, or whether they were living together in a relationship akin to marriage which subsisted for two years or more before the sponsor left Afghanistan.

9. The primary source of the respondent's concerns in terms of the relationship between the first appellant and the sponsor, was, first, his evidence when he claimed asylum that he was single and, second, the marriage certificate issued in 2020 was dated fifteen years after the claimed date of marriage in 2005. The sponsor in evidence stated *inter alia* that they "had a nikah ceremony in 2005" when he was fourteen years old. He said the nikah was not legally registered. He also referred to another nikah ceremony taking place between them in 2013 in Pakistan.

10. The FtJ considered the evidence relating to the nikah ceremony in 2005 at [26] to [32]. Whilst the FtJ accepted the first appellant and sponsor had an intimate relationship between 2006 to 2008, and, had four children, he was not persuaded that a nikah ceremony took place in 2005, nor that they were living together in a relationship akin to a marriage that had subsisted for two years before the sponsor left Afghanistan in June 2008. The FtJ found the sponsor's evidence relating to the marriage was not credible, characterising his evidence as "inconsistent and confused". The FtJ reasoned at [26] that it was not clear why the marriage certificate was obtained in 2020 and identified various inconsistencies in the content of that certificate. Embedded within the FtJ's reasoning is the following:

> "The certificate does not give a date for the alleged ceremony. In particular, there is nothing to link it to a date in 2005…The lack of a date for the alleged ceremony and these inconsistencies mean it is impossible to ascertain when the alleged ceremony took place."

11. I agree with the substance of ground four, namely, that the FtJ's reasoning here is founded upon a clear mistake of fact. The translation of the

marriage certificate plainly states the marriage date of 31 July 2005, and it was this mistake, in particular, that led to a grant of permission to appeal. Ms Lecointe accepts there is an error, but nonetheless, submits it is not material in view of the FtJ's findings overall. I do not agree. The marriage certificate purporting to confirm a nikah ceremony taking place in 2005 is material evidence, and informed the FtJ's approach to the first appellant's case and in turn the position of the other appellants.

12. It is appreciably clear, that the FtJ drew a direct adverse inference from his mistaken view of the omission of a marriage date on the certificate, as this is referred to on three occasions at [26] when in fact he should not have done so. Whilst I acknowledge the FtJ identified other credibility issues, and in that sense the error is ever more unfortunate, I am not satisfied that this finding can be fairly severed from his overall view of the first appellant's claim, particularly when it featured significantly in the reasons at [26], [31], [36] and [50]. When the assessment of credibility has to be a global one, the FtJ's mistaken view of the facts gives rise to unfairness and a credibility assessment that is not safe. Given the nature of the error, I agree with Ms Lynes that that error alone is sufficient to undermine the FtJ's decision wholesale. I find ground four is made out.

13. Additionally, I am satisfied that the FtJ's s.55 BCIA 2009 assessment is incomplete at best in relation to the child appellants, in his consideration of Article 8 ECHR . This is the substance of ground three and relates to the FtJ's failure to consider whether it was in the best interests of the child appellants to join the sponsor in the UK along with the first appellant. The FtJ's consideration was confined to two alternatives, namely, whether it was in the best interests of the child appellants to remain in Pakistan with the first appellant, or, whether it was in their best interests to leave the first appellant to live with the sponsor in the UK. There are many authorities supporting the proposition that as a starting point it is in the best interests of children to be with both their parents (see: e.g. Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197(IAC)). This was not the FtJ's starting point and Ms Lecointe accepts the FtJ was in error in failing to consider this third alternative, she referred to it as an "incorrect assessment", but relied on the FtJ's "overall assessment". Without criticism, Ms Lecointe did not advance on this submission at the hearing, and I struggle to understand how the FtJ's, reasoning can with stand scrutiny in circumstances where the overall assessment is tainted by legal error and, particularly, when the FtJ accepted there was family life between the child appellants and the sponsor at [47[. I find ground three is made out.

14. Likewise, I agree with the grounds that the FtJ's findings at [49] in relation to the second and fourth appellants and whether they formed part of the sponsor's family unit before he left Afghanistan is in error. In finding that they were not, the FtJ factored into his assessment his earlier erroneous finding that the appellant and sponsor were not married (or living

together) at the time he left Afghanistan, and, gave inadequate reasons for that conclusion in view of his finding that there was some degree of relationship between the first appellant and sponsor before he left. The FtJ's reasoning was that he was not dealing with a temporary ruptured family unit and was reinforced in that conclusion by the sponsor's failure to mention the children during his asylum application. Ms Lecointe submits that whilst the FtJ's reasoning is not "lengthy" it is sufficient, but this submission fails to engage with the point made in the grounds.

15. I agree that the FtJ does not appear here to have factored into his assessment the evidence that the sponsor was receiving psychiatric care in 2011 at [40] (before he was granted asylum), and nor is it clear, that if this evidence was taken into account, why it did not reasonably explain the omitted reference to the children. Likewise, I agree the FtJ did not adequately, or at all, address the possibility that the children could have formed part of the sponsor's family unit whilst living with their mother, even if they were not married or living together, particularly in view of his finding that there was some degree of relationship between the first appellant and sponsor at the time he left Afghanistan. These matters are essentially the substance of grounds one and two, and whilst they are not as strong as the other grounds, I am satisfied on a holistic consideration of the decision that they are also made out.

16. I turn to the question of disposal. I remind myself of the decisions in AEB v SSHD [2022] EWCA Civ 1512 and Begum [2023] UKUT 00046 (IAC) and the nature and extent of the necessary fact-finding, (see §7.2(b) of the Senior President's Practice Statement). Both representatives agreed with me that this was an appropriate case that would need to be remitted back to the First-tier Tribunal.

**Notice of Decision**

The making of the decision of the First-tier Tribunal did involve the making of errors on a point of law.

I set aside the decision of the First-tier Tribunal with no preserved findings of fact.

I remit this appeal to the First-tier Tribunal for a complete rehearing by a judge other than Judge Shakespeare.

Signed

**R.Bagral**

Deputy Upper Tribunal Judge Bagral 31/10/2023