IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003524

First-tier Tribunal No:
HU/55255/2023
LH/06468/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 13 February 2025

Before

UPPER TRIBUNAL JUDGE GREY

Between

FAIZ MOHAMMAD ZELMAI

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr D. Bazini, Counsel instructed by AA Immigration Lawyers
For the Respondent: Ms S. Mckenzie, Senior Presenting Officer

Heard at Field House on 31 January 2025

DECISION AND REASONS

1. In a decision promulgated on 3 December 2024, an error of law was found in the decision of First-tier Tribunal Judge Wolfson promulgated on 22 January 2024 in which the appellant's appeal against the decision to refuse his application for entry clearance was dismissed. A copy of that decision is annexed below and the contents of which will not be repeated. This is the re-making of the appellant's appeal.

2. The following findings from [13] of the Judge Wolfson's decision were preserved:

a. The appellant is married to Mrs Khan and they have three adult children;
b. The appellant is also the father of child D and he has a parental relationship with her which has been maintained by phone and video calls and occasional visits, the last of which was in 2020;
c. The appellant worked for the National Directorate of Security in Afghanistan; and
d. The appellant's wife has mental health difficulties and poor English and would have consequently been less able to access help to apply for a visa for the appellant.

3. The finding that the appellant remained in Afghanistan was also preserved although evidence adduced in advance of this hearing indicates that he has escaped from Afghanistan and is now in Pakistan. Further, at the outset of the hearing I indicated to the representatives that in light of the preserved findings from [13] of the decision, the finding of Judge Wolfson that the appellant enjoyed family life with his wife and youngest child at [17] of the decision is also preserved. The only remaining issue to determine is the proportionality of the respondent's refusal under Article 8(2) ECHR; specifically whether the appellant is able to establish exceptional circumstances based upon unjustifiably harsh consequences for the appellant and his family in the United Kingdom.

The hearing and evidence

4. A supplementary bundle of documents was submitted in advance of this hearing containing: updated witness statements from the appellant, his wife and his adult children; medical evidence in relation to the appellant's wife; confirmation of a PIP award in favour of the appellant's wife for the enhanced rate in respect of daily living needs and the standard rate in respect of mobility needs; a letter from D's school confirming that she is on the waiting list with Hounslow Youth Counselling Services; employment and financial evidence in respect of the appellant's adult children; and country background evidence in relation to Afghanistan and Pakistan. At the hearing I heard oral evidence from the appellant's wife and his 12 year old daughter, D.

5. The witness statement of the appellant's wife dated 28 September 2023 indicates that she and her children visited the appellant in Afghanistan on a regular basis from 2017 until 2020. The visits varied in duration from four weeks to three months. In oral evidence the wife stated that D accompanied her on all visits to Afghanistan and that prior to the visits to Afghanistan the family had visited the appellant in Pakistan on one occasion when he was staying with his sister. In oral evidence the appellant's wife stated that the sister is now living back in Afghanistan and confirmed that she and her children have been unable to visit the appellant since the Taliban returned to power in 2021. The witness statements refer to the appellant living in hiding in Afghanistan since the Taliban came to power because he is at risk due to his former work for the National Directorate of Security ('NDS') in Afghanistan. There was no challenge at the hearing to the assertion that the appellant is at risk from the Taliban.

6. The most recent witness statements and the oral evidence of the appellant's wife confirm that the appellant managed to escape Afghanistan two months ago with the assistance of an agent and is currently in hiding in northern Pakistan. He is in Pakistan without leave and states that he is vulnerable to deportation back to Afghanistan if identified by the Pakistani authorities. The appellant states that he remains in fear of being discovered by Taliban sympathisers in Pakistan and states that they have a significant presence in his current area in Peshawar. He relies on financial support from his family in the UK.

7. The appellant's wife and D gave consistent evidence at the hearing regarding their contact with the appellant. They stated that they speak with the appellant by telephone or video call every day and they last spoke with him the evening before the hearing. D states that she will speak to her father every day and that she is unable to sleep until she has spoken with him and said good night, stating that she cannot sleep unless she knows that he is safe. D stated that she will speak with her father between 10 minutes to around one hour, depending on how much homework she has to do. She stated that she has a very close relationship with her father despite the physical distance between them.

8. D gave evidence that she is waiting to receive counselling support and that she is having problems sleeping because she is worried about her father and can get very anxious. She stated that she has nightmares about her father and wakes up at night when she does. She tries to provide her mother with emotional support but says that her mother's mental health has worsened since they last visited the appellant. She says she has to *"look after mum".* It was apparent during the hearing that D was providing her mother with physical comfort at times when her mother became distressed. D spoke about how upset she is not to have her father with her and how upsetting she finds it at events like parent-teacher evenings at school when she sees other children attending with their fathers.

9. Medical evidence in relation to the appellant's wife includes a letter dated 6 January 2025 from her GP and a printout summary of her GP notes which indicates entries dating back to February 2006. The GP's letter confirms that the appellant's wife has long-standing mental health issues. It states that her mental health has significantly declined over the past few years and that she suffers from depression, anxiety, regular panic attacks, paranoia and suicidal attempts which significantly impact on her daily functioning.

10. The evidence summarised above in relation to the visits to the appellant, the level of contact between him and his family in the UK, the appellant's wife's medical condition, the appellant's current circumstances in Pakistan and the risk to the appellant in Afghanistan were not challenged in submissions by Ms McKenzie at the hearing.

11. Ms McKenzie submitted that the appellant has failed to demonstrate that the refusal gives rise to unjustifiably harsh consequences for the appellant or his wife and daughter. She submitted that although the respondent has sympathy with the appellant and his predicament, she is not legally obliged to take steps to grant him entry clearance. She submitted that the appellant's wife

receives appropriate support for her medical conditions from the NHS and that she confirmed in oral evidence that she feels reassured after speaking with her husband on the phone. There is therefore no reason, in her submission, for the appellant to be in the UK to assist with his wife's mental health difficulties. In relation to the best interests of the appellant's minor daughter, Ms McKenzie submitted that a rational, objective approach should be adopted in the assessment of this issue. In her submission D has lived apart from her father for all of her life and the impact of her separation is minimised as she is part of a solid family unit with her mother and older siblings. D is able to maintain daily contact with her father using modern means of communication which can continue. She submitted that D does not appear to have suffered any hardship associated with arrangements until now and has been able to maintain her relationship with her father.

12. In Mr Bazini's submission family life between the appellant and his wife has been established and the decision gives rise to unjustifiably harsh consequences for all the appellant's family members. The appellant's family have been unable to visit him in Afghanistan since the Taliban returned to power and they are unable to visit him whilst he is hiding unlawfully in Pakistan. Family life can only be enjoyed in the UK; that is now their only option. The risk to the appellant as a former member of the Afghan security services is clear from the country evidence including the respondent's CPIN of August 2024 and was not challenged at the hearing. Further, the respondent has not challenged the evidence adduced regarding the deportation of Afghans by the Pakistani authorities (SB page 192-193). The appellant and his family have been forced apart by circumstances outside of their control.

13. In Mr Bazini's submission the medical evidence in respect of the appellant's wife shows that her mental health has declined since the time of the Taliban resurgence and return to power because she has been separated from the appellant since this time. He submitted that the impact of separation on D has been devastating for her and is now causing her mental health issues. D has the burden of caring for her mother who is in poor mental health as it is often just the two of them at home with the adult children at work. If it were not for the separation from her father, D would not need to have counselling. It is no answer to say that support is available for her here to help address her problems. In Mr Bazini's submission there are powerful indicators that the best interests of D are for her father to join the family in the UK. In his submission the refusal decision is plainly disproportionate and gives rise to unjustifiably harsh consequences.

14. At the end of the hearing I indicated that I would allow the appeal and I set out below the reasons for my decision.

Analysis and decision

15. It is accepted that the appellant does not meet the Immigration Rules. Where the Rules are not met, in order for an appellant to succeed in respect of Article 8 'outside of the Rules', it needs to be demonstrated that there are 'exceptional circumstances'; *"that is to say, unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate"* (R (on the application of Agyarko) v Secretary of State for the

Home Department [2017]UKSC 11 at [73]). Thus a high threshold needs to be met for the appellant to demonstrate that the respondent's refusal amounts to a disproportionate interference with their Article 8 rights, having regard to the weight to be attached to the public interest in effective immigration control.

16. At the outset it is important to note that the provisions of GEN.3.2.(2) of Appendix FM of the Immigration Rules refers to unjustifiably harsh consequences not only for an applicant but also *"their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application".* The appellant's family members are all settled in the UK. One son has indefinite leave to remain and the other family members are British citizens. Whilst approaching the assessment of the proportionality of the respondent's refusal I take into account the unitary nature of family life. Interference with the family life of one, is an interference with the rights of all those within the ambit of the family whose rights are engaged. It is a feature of family life recognised, for example, in Beoku-Betts v Secretary of State for the Home Department [2009] AC 115. In the words of Lady Hale at [4]:

" *... the central point about family life ... is that the whole is greater than the sum of its individual parts. The right to respect for family life of one necessarily encompasses the right to respect for family life of others, normally a spouse or minor children, with whom the family life in enjoyed.*"

17. Having regard to the Strasburg jurisprudence I find there is no doubt that it supports the proposition that a person outside the territory of an ECHR state may in certain circumstances rely upon the family life aspect of Article 8 to secure entry into an ECHR state. The principle was established firmly in Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 7 EHRR 471. I accept that Article 8 does not give a person a right to chose where to live together to enjoy family life. However, in determining this appeal in the appellant's favour I am satisfied that the appellant and his family have no choice. It is not an option for the appellant's family to join him in his country of origin in order to enjoy family life together.

18. In relation to the public interest Ms McKenzie did not rely on any factors beyond section 117B(1) in respect of effective immigration control. Although a neutral factor in the balancing exercise, I accept the evidence that the appellant would be financially independent of the state on account of receiving financial support from his adult sons.

19. In accordance with section 55 of Borders, Citizenship and Immigration Act 2009, I take into account the best interests of the appellant's 12 year old daughter as a primary consideration although recognise that it is not a paramount consideration.

20. I take as a starting point that in normal circumstances it is in the best interests of a child to be with both of their parents. Although I accept that D has not lived with her father throughout her life, I do not accept that she has been separate from him for all of this time. D has spent extended visits of up to 3 months living with her father over a four to five year period up until the

summer of 2020. She has some experience of living with her father and, I find, sufficient experience to know that she would like for him to with her and her family permanently, and that in doing so her concerns for his safety would be eliminated. However, an assessment of the best interests of a child is not the same as identifying their wishes, although I consider this to be a relevant factor in the analysis. Beyond D's wishes I also find that it is in her best interests to be with her father having regard to her emotional needs and welfare.

21. I accept the unchallenged medical evidence of the significant mental health difficulties experienced by the appellant's wife and that her condition has deteriorated in recent years since she has been unable to visit her husband. I find that her mental health condition impacts on her daily functioning, as evidenced by her PIP award at the enhanced rate for daily living, as well as her ability to care for D.

22. With her older siblings away from the home at work for much of the day, it is frequently D who is left to care for her mother and provide her with emotional support. D gave oral evidence of how she has to look after her mother and how she worries about her. She stated that her mother's mental health seems to be getting worse since they haven't been able to visit the appellant. As stated, I find that her mother's mental health condition will likely impact on her ability to care for D. It seems very likely that the appellant joining the family unit in the UK will have a positive impact on his wife's mental health and that the appellant can provide better and more effective support for his wife than he is able to do via phone and video calls, which will in turn reduce the burden on their 12 year old daughter. It is also reasonable to conclude that the support the appellant's wife receives from the NHS, to which Ms McKenzie refers, would not be required to the same degree or at all with the physical presence and support of the appellant in the UK. With her father in the UK I find there is every chance that D will receive the appropriate level of parental care and support from both her mother and father.

23. From the oral evidence of D it appears that her mother's declining mental health and her separation from and fear for her father's welfare, given his precarious circumstances, are causing or contributing to her own mental health difficulties for which she is now awaiting counselling support. The presence of her father in the UK and knowledge that he would be safe from the Taliban are likely to be significant factors in reducing the anxiety and sleep problems D is experiencing and return her to positive mental health. The continuation of a relationship with her father solely by means of modern technology and with no realistic prospect of being able to visit him in person, cannot sensibly be considered to be an adequate substitute for the day to day physical contact, love and support which D would enjoy if her father were able to join the family in the UK.

24. D and her mother are both British citizens. It is to her family's credit that D has been able to enjoy relative stability in a family unit with her mother and siblings. D has grown up in the cultural norms of a society to which she undoubtedly belongs, enjoying the educational provision available to her. It is no longer an option for D to visit the appellant for extended visits in Afghanistan during the school holidays as she did previously. There appears

to be no realistic prospect of this changing in the foreseeable future. The situation for women and girls in Afghanistan under Taliban rule is well documented. I find that the appellant is only able to enjoy family life with his family in the United Kingdom and the evidence points very clearly to a finding that it is in D's best interests that the appellant is permitted to do so, not only so that D can enjoy the benefit of a father's close, physical presence in her life whilst she continues her life here, but also to provide her with the reassurance that her father is now safe from the Taliban and to provide her mother with support.

25. In relation to D's best interests I find there is only room for one view in this appeal. The best interests of D are clearly to be physically reconciled with her father in the UK. There are no countervailing reasons which cause me to depart from this view.

26. In addition to considering the best interests of the appellant's minor child I also take into account the effect of the respondent's decision on all members of the appellant's family in accordance with Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 38. I do not have sufficient information to conclude that all of the appellant's children enjoy family life with him for the purposes of Article 8(1). The appellant's wife and D undoubtedly do. None of the appellant's family are realistically able to safely visit the appellant in either Afghanistan or Pakistan since the appellant is in hiding there. The appellant lives alone in isolated precarious conditions in Pakistan and is dependent upon his family for financial and emotional support. I accept the country evidence before me and have considered the respondent's CPIN in relation to Afghanistan. As a former member of the NDS the appellant is at risk of reprisal from the Taliban and their supporters. Whilst in Pakistan without leave he is liable to deportation back to Afghanistan where I find he would potentially be at grave risk.

27. I take into account the weight I must to attach to the public interest in effective immigration control. However, having carefully evaluated, and considered together and cumulatively, the considerations weighing against the appellant and in his favour and taking into account the best interests of the child, I reach the view that the factors in his favour are sufficiently compelling to outweigh the public interest in the maintenance of effective immigration control. I find that the circumstances of this case indicate that the refusal of the appellant's application gives rise to unjustifiably harsh consequences for the appellant, his wife and his daughter, D. I am satisfied that the refusal of entry clearance to the appellant is not proportionate under Article 8 ECHR and is thus unlawful under Section 6 of the Human Rights Act 1998.

Notice of Decision

The appellant's appeal is allowed on human rights grounds.

Sarah Grey

Judge of the Upper Tribunal

Immigration and Asylum Chamber

4 February 2024

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003524

First-tier Tribunal No:
HU/55255/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE GREY

Between

FAIZ MOHAMMAD ZELMAI

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr D. Bazini, Counsel
For the Respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 14 November 2024

DECISION AND REASONS

1. This is an appeal brought by the appellant against the decision of First-tier Tribunal Judge Wolfson ('the Judge') dated 22 January 2024, in which she dismissed the appellant's appeal in respect of the respondent's decision to refuse application for entry clearance.

Factual Background

2. The appellant is a national of Afghanistan. His wife and three children, two daughters and one son, came to the United Kingdom in 2004 and have remained living here since then. They are all now British citizens except for the adult son who has indefinite leave to remain. A further child, a daughter

D, was born in 2012 after the appellant and his wife had spent some time together in Pakistan in July 2011.

3. On 2 February 2023 the appellant made an entry clearance application under Appendix FM of the Immigration Rules based on his family life. The respondent refused the application on the basis that the appellant did not meet the Rules and there were no exceptional circumstances which merited a grant of entry clearance 'outside of the Rules'. The refusal decision states that the respondent was not satisfied that the appellant's youngest child, D, was his child as claimed or that he had family life in the United Kingdom.

4. The appellant's account is that he has been in hiding in Afghanistan since the Taliban took control of the country in August 2021 and his family have been unable to visit him since then. He fears the Taliban because he previously worked for the National Directorate of Security in Afghanistan (NDS) under the previous regime. He states that the NDS was mandated with investigating matters of national security and fighting terrorism. He claims that he would be unable to enjoy family life in Afghanistan with his wife and children. His wife is afraid to go Afghanistan because she is a British citizen and it is dangerous for women there under Taliban rule.

5. The appellant's appeal was heard at Hatton Cross on 9 January 2024 and was dismissed in a decision promulgated on 22 January

The decision under appeal

6. It was recorded in the decision that the appellant accepted that he did not meet the requirements of the Immigration Rules.

7. The Judge made the following findings of fact:

a. The appellant is married to Mrs Khan and they have three adult children;
b. The appellant is also the father of child D and he has a parental relationship with her which has been maintained by phone and video calls and occasional visits, the last of which was in 2020;
c. The appellant worked for the National Directorate of Security in Afghanistan; and
d. The appellant's wife has mental health difficulties and poor English and would have consequently been less able to access help to apply for a visa for the appellant.

8. The Judge accepted that the appellant has established family life in the UK based on his relationship with his wife and D. The Judge stated that she accepted that the appellant remains in Afghanistan and that *"circumstances there are difficult, particularly for people who have connections with the previous regime".* However, the Judge did not find there were exceptional circumstances nor unjustifiably harsh consequences for the appellant, Mrs Khan or D in the respondent refusing the appellant's application.

9. The Judge went on to assess the best interests of the child, D. The Judge referred to the fact that D did not meet her father until she was five years old and has never known a life in which she lives with him. The Judges states that

she recognises that D would like her father to live with them in UK to complete their family unit but finds that it is not *"necessary for her welfare".* The Judge also notes that it is open to the appellant to apply to come to the UK under the Afghan resettlement scheme.

10. Concluding in respect of the appellant's Article 8 claim and dismissing the appeal, the Judge states at [18] of the decision:

> "Taking into account my findings above:
>
> Although Article 8 (1) is engaged, the Immigration Rules are not met for the reasons given above. The public interest lies in the maintenance of effective immigration controls. To strike a fair balance between the competing public and individual interests involved, I adopt a balance sheet approach. I weigh in the appellant's favour the fact that he has a parental relationship with a British citizen child and that it would be in her best interests for him to come to live in the UK, in the sense that she would like him to be with her and her mother in the UK, but Child D's life will continue regardless of whether the appellant comes to the UK. She can maintain contact with her father via phone and video calls, and potentially via visits once those can recommence. I find that the factors raised by the appellant do not outweigh the public interest. The appellant does not speak English and would be financially dependent on the state. I have found that there are no exceptional circumstances in this case. Even recognising that the appellant worked for the previous regime in Afghanistan, I do not find that there are any unjustifiably harsh consequences such that it a refusal decision is disproportionate. "

The grounds of appeal

11. The grounds are lengthy and only need summarising. The appellant sought permission to appeal on the grounds that the Judge had failed to take account of various material circumstances and evidence in the Article 8 proportionality balancing exercise, including;

a. the danger to the appellant whilst he remains in Afghanistan;
b. the emotional harm to D caused by her separation from her father and from knowing that he was in danger;
c. the mental health condition of the appellant's wife and effect on her due to the continued separation from her husband, and the impact on her ability to care for D;
d. the fact that family life could only be enjoyed in the UK; and
e. the evidence of the appellant's son that he would financially support his father.

12. In addition, the grounds assert that the Judge erred in making a 'highly speculative' finding in stating that D *"can maintain contact with her father via phone and video calls, and potentially via visits* ***once those can recommence****".*

13. Permission to appeal was granted by Upper Tribunal Judge Landes on the basis that it was arguable that when assessing the proportionality balance, the Judge failed to take into account the effect on the emotional welfare of D in knowing that her father was in danger, which was relevant when assessing her best interests; the effect on the appellant's wife's mental health condition from the continued separation from her husband in circumstances where her husband was in danger; and, that family life could only be enjoyed in the UK and visits to the appellant were unlikely in the foreseeable future. Further, UTJ

Landes found that the Judge's findings that the appellant would be financially dependent on the state was inadequately reasoned given the witness evidence from the appellant's son that he would financially support the appellant.

Analysis and decision

14. I begin by reminding myself that this is an error of law hearing and the only basis for interfering with the decision of the Judge would be if she made an error of law.

15. A useful summary of the settled law in respect of the error of law jurisdiction is provided at [26] of Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 including the fact that (i) the First-tier Tribunal is a specialist fact-finding tribunal and the Upper Tribunal should not rush to find an error of law simply because it may have reached a different conclusion on the facts or expressed themselves differently; (ii) where a relevant point was not expressly mentioned by the First-tier Tribunal, the Upper Tribunal should be slow to infer it had not been taken into account; (iii) judicial restraint should be exercised by the Upper Tribunal when it comes to the reasons given by the First tier Tribunal and it should not be assumed the First-tier misdirected itself just because not every step in its reasoning was fully set out; (iv) the issues for decision and the basis upon which the First-tier Tribunal reaches its decision on those issues may be set out directly or by inference; (v) judges sitting in the First-tier Tribunal are to be taken to be aware of the relevant authorities and to be seeking to apply them; and (vi) it is the nature of assessment that different tribunals without illegality or irrationality may reach different conclusions on the same case.

16. I have carefully considered the decision and the evidence before the First-tier Tribunal, and in respect of the Article 8 balancing exercise I am persuaded that the Judge erred in a number of respects.

17. It is clear from [18] of the decision that the Judge weighed against the appellant in the balancing exercise that he would be financially dependent on the state. However, in making this finding the Judge has failed to take into account material evidence. As accepted by Ms Ahmed at the hearing, the witness statement of the appellant's son states that he is working and will financially support his father. There is no reference to this evidence in the decision at any point. In finding that the appellant would be financially dependent on the state, it can be concluded that the Judge weighed this matter against the appellant under section 117B(2) NIAA 2002. However, in light of the son's evidence, if accepted, this should have been a neutral factor in the balancing exercise. I find that this could have materially affected the outcome of the appeal when taken together with the matters below.

18. At [13] of the decision the Judge finds that the appellant worked for the NDS and at [14] she finds that he remains in Afghanistan and that circumstances are *"difficult".* It is unclear what the Judge means by "difficult" in this context. Although initially resisted by Ms Ahmed, on reading sections

from the witness statements during the hearing, she accepted that the appellant's account was that he was in hiding in Afghanistan due to his fear from the Taliban. It is clear that a key aspect of the appellant's case is that he is unable to live freely in Afghanistan or leave the country due to fear for his safety as a result of his previous position in the NDS. His wife and daughter, both British citizens, as females, understandably do not consider themselves safe to enter Afghanistan to be with the appellant in order to continue family life there. It is not clear from the decision whether the Judge accepted the appellant's circumstances. It may reasonably be inferred that she did accept these were his circumstances by referring to his situation as "difficult". It is not apparent what weight, if any, the Judge has attached to the appellant's circumstances in Afghanistan and the fact that family life can only continue in the UK. In this respect I find the judge erred in failing to provide sufficient reasoning and/or failing to take into account material evidence.

19. It would appear that the Judge accepts that it is not an option for the appellant's wife and daughter to join him in Afghanistan because she envisages them maintaining their relationship via phone and video calls. The Judge refers to visits to the appellant potentially recommencing. I accept the submission on behalf of the appellant that such a finding is highly speculative given the current political situation in Afghanistan and does not appear to be based on any evidence before the Judge. Any visits by his family to join the appellant in Afghanistan appear to be most unlikely for the foreseeable future.

20. In relation to the best interests of D the Judge refers to the fact that D has never lived in the same country as the appellant and did not meet him until she was five years old. The Judge goes on to state that D's

> "social and educational provision will continue regardless of whether the appellant comes to the UK and she will continue to have the benefit of growing up in the cultural norms of the society to which she belongs. Whilst I recognise she would like her father to live with her in the UK and that, for her, this would complete their family unit, I do not find this is necessary for her welfare. It may be in her best interests for her father to come to the UK, in the sense that she would like him to be with her and her mother in the UK, but that is not my only consideration."

21. The grounds assert that the Judge failed to consider the emotional harm being suffered by D in not only being separated from her father, but also in the knowledge that he was in hiding and at risk from the Taliban. Further, as part of the assessment of the best interests of D, the grounds assert that the Judge failed to factor in the effect on the mental health of her mother due to their circumstances, as referred to in the letter dated 7 August 2023 from Dr Chaudry, and how this may impact on her ability to care for D.

22. I am not persuaded that the Judge took full account of the emotional interests of the child, D, in her Article 8 assessment. In Ms Ahmed's submission, the Judge's reference to the child's welfare would have included an assessment of D's emotional well-being. I am unpersuaded by this submission. Although I accept that the term welfare can include a person's emotional well-being, I am unable to infer from the decision that this factor was specifically considered by the Judge. The Judge referred to what the child would like to happen and her social and educational provision, but makes no specific reference to having considered the emotional impact on D, in

particular from knowing that her father is at risk from the Taliban. I find that the Judge erred as asserted in failing to sufficiently factor in, or provide sufficient reasoning as to, the emotional and psychological impact on the child, not only from her continued separation from her father, but from knowing that her father was potentially in grave danger.

23. In addition, although the Judge made a finding that the appellant's wife suffers from ill mental health, there is no reasoning as to how, if at all, that has been factored into the balancing exercise. I also find that the Judge has erred in this regard. There appears to have been no consideration as to how D's mother's mental health may impact on her ability to care and provide for her which is relevant to the assessment of D's best interests.

24. Ultimately, taking into account the appellant's particular circumstances, and that the appellant's case was based upon a claim that there were exceptional circumstances, I find that the Judge fails to make sufficient findings in respect of what weight, if any, she attached to the factors asserted to weigh in his favour in the Article 8 balancing exercise. Although the Judge was not bound to accept these matters, there is no indication in the decision that she did not accept the appellant's circumstances were as claimed. I find that there has been insufficient reasoning in the proportionality exercise to enable the appellant to understand what the Judge made of the factors that he advanced in support of his case, and why he lost his appeal.

25. I find for these reasons that the decision involved the making of a material error of law. In view of the limited additional fact-finding required to re-determine this appeal, the decision will be re-made further to a resumed hearing in the Upper Tribunal.

26. The decision is set aside save for the findings recorded at [13 (a)] to [13(e)] of the decision, set out at [7] above, which are preserved together with the finding that the appellant remains in Afghanistan.

Directions

27. The decision will be remade in the Upper Tribunal with the findings referred to at [26] above preserved.

28. The appeal will be listed for hearing on the first available date after 21 days with a time estimate of 2 hours.

29. Any further evidence relied upon by the appellant or respondent is to be filed and served no less than 10 days before the hearing.

30. The appellant must inform the Tribunal no later than 10 days before the hearing of the appeal whether any interpreter is required, indicating the language and dialect required.

31. The appellant must provide a paginated and indexed consolidated bundle for the re-hearing no later than seven days before the hearing. The bundle should be organised in the manner required by the Upper Tribunal standard directions previously issued.

Notice of Decision

The appellant's appeal is allowed. The decision of Judge Wolfson involved the making of an error of law and is set aside. The decision will be re-made at a resumed hearing in the Upper Tribunal on a date to be notified to the parties.

Sarah Grey

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 November 2024