



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

**Appeal Numbers: UI-2022-001109  
UI-2022-001112, UI-2022-001108  
UI-2022-001110, UI-2022-001111**

On appeal from HU/03602/2021  
HU/03605/2021, HU/03601/2021  
HU/03603/2021, HU/03604/2021

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 7<sup>th</sup> November 2022**

**Decision & Reasons Promulgated  
On 8<sup>th</sup> January 2023**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON  
DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**G S  
S A  
B A  
K A (A MINOR)  
R A (A MINOR)  
(ANONYMITY DIRECTIONS MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Taimour Lay (Counsel), appearing by Direct Access  
For the Respondent: Mr Esen Tufan (Senior Home Office Presenting Officer)

**DECISION AND REASONS**

1. The Appellants appeal against the decision of First-tier Tribunal dismissing their appeals against the respondent's decision to refuse them entry clearance on human rights grounds pursuant to paragraph EC-DR 1.1. of Appendix FM to the Immigration Rules HC 395 (as amended). The appellants are all Afghan citizens, a mother, her three daughters and one son, all of whom have been living in Pakistan since 2018.
2. The respondent did not consider that the sponsor, who has a wife and two children of his own who have joined him in the UK, would also be able to meet the maintenance requirements of paragraph 319x(vii) of the Rules.
3. Nor did the respondent consider that the appellants were entitled to leave to enter outside the Rules on the basis of exceptional circumstances pursuant to Article 8 ECHR.
4. There is no application for international protection before the Tribunal, but the circumstances in which the appellants are living in Pakistan or would be living in Afghanistan if they returned there are relevant to the proportionality of the respondent's decision to refuse them entry clearance.
5. **Anonymity order.** Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellants have been granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. **Failure to comply with this order could amount to a contempt of court.**
6. This is the decision of us both. We apologise for the delay in promulgation of this decision. We have a clear recollection of the hearing, and a note of the evidence and submissions. Our decision was reached jointly immediately after the hearing, and the Tribunal's decision was dictated promptly, but due to typing difficulties consequent upon the postal strike, the draft decision was not available for fairing by the panel until the end of December 2022.

## **Background**

7. The appellants are a widowed mother, her three daughters aged 24, 15 and 13 and her son who is 19 years old. The sponsor is the principal appellant's son and has refugee status in the UK. All of the family are currently in Pakistan, having left Afghanistan in 2018 and not returned.
8. The appellants fear that if not admitted to the UK they would be refouled from Pakistan to Afghanistan, the government of which is now in the hands of the Taliban, and where the Appellants consider themselves to be at risk of ill-treatment amounting to persecution.
9. The sponsor arrived in the United Kingdom on 11<sup>th</sup> January 2010 with a student visa, following which he worked for the Ministry of Defence and

then claimed asylum. He was granted refugee status on 8<sup>th</sup> April 2015. The Sponsor returned to Afghanistan in order to marry his wife, which he did on 16<sup>th</sup> January 2011, following which he returned back to the United Kingdom. His wife, together with all of these five Appellants, then at the same time together applied to join the Sponsor, under the family reunion policy.

10. The sponsor's wife succeeded under paragraph 352 of the Immigration Rules. She succeeded together with the couple's two minor children who had by then been born to her. All three then entered the UK in 2021.

### **Refusal letter**

11. The Appellants were refused leave to enter. The reasons for the rejection of their applications for entry clearance are set out in the respondent's decision letters of 11<sup>th</sup> May 2021, served under cover of letters of 12<sup>th</sup> May 2021.
12. The respondent accepted neither the Sponsor's claimed relationship with them nor that a family life existed between the appellants and the sponsor. The applications were rejected under the adult dependent relative policy.
13. The respondent also did not accept that the sponsor had adequate financial resources to enable him to support the appellants in the UK or that they could be accommodated without requiring access to public funds.
14. The respondent was not satisfied that there were any exceptional circumstances for which leave to enter ought to be granted outside the Rules.
15. The appellants appealed to the First-tier Tribunal.

### **The decision of the First-Tier Tribunal**

16. The First-tier Tribunal considered that "[t]he determinative question in this case is whether or not in all the circumstances, their exclusion from this country is proportionate" (at paragraph 51). This is because the Sponsor's earnings had to provide for, not only the five Appellants, but for the Sponsor, his wife and his two children as well (paragraph 52). Neither the accommodation at hand nor the earnings of the Sponsor were sufficient in this regard (paragraph 52).
17. On the other hand, "the adverse consequences for the Appellants if they were not brought to the United Kingdom" (paragraph 54) ought to have been considered. That being so, the judge had regard to the fact that living in Pakistan, "after 20<sup>th</sup> December 2021, they would become unlawful there and therefore, exposed to being deported back to Afghanistan, which is under the control of the Taliban" (paragraph 55).

18. The First-tier Tribunal found as a fact that the appellants were related as claimed, and that there was family life between them and the sponsor, contrary to the respondent's conclusions in the refusal letters.
19. The judge then, however, made various speculative findings as to the risk on return to Afghanistan and the likelihood of the appellants being able to obtain an extension of their temporary leave in Pakistan.
20. On this basis, the First-tier Judge dismissed the appeals. The appellants appealed to the Upper Tribunal.

### **Error of law decision**

21. On 25<sup>th</sup> July 2022 Upper Tribunal Judge Gill determined that the First-tier Tribunal Judge made errors of law in making findings of fact that were not open to him and were speculative.
22. Judge Gill preserved the findings as to the family relationships and family life. These findings would be important in any subsequent hearing where the question of proportionality fell to be determined. This would be especially so given the 'best interests requirement' which applied to the minor Appellants - two of whom were female Appellants.
23. It is in these circumstances, accordingly, that this appeal comes before us.

### **The Upper Tribunal Hearing**

#### **Sponsor's oral evidence**

24. At the hearing on 7<sup>th</sup> November 2022, Mr Taimour Lay, for the Appellants, began by inviting the Sponsor, Mr Liaquat Ali, to adopt his original statement, as well as his additional witness statement (see, SB at pages 1 - 4). The November 2021 witness statement is set out in the First-tier Tribunal decision. The September 2022 witness statement brings the evidence up to date.
25. The appellants were living in three rooms at the top of their landlord's house, which they had been able to get because they had visit visas, now expired. His mother had one room, where they also cooked, and sisters shared the second room, and there was a small storeroom where his brother slept. The sponsor was sending £300 a month, £100 for rent and the rest for living expenses, via the landlord as the recipient had to have a bank account. The landlord's brother had more than once asked for a bribe not to tell local authorities in Pakistan that his family were there unlawfully. In July 2022, the sponsor paid him £150 to keep quiet.
26. The sponsor said that his mother had attempted to obtain a visa extension by making an application on 16 April 2022. It was now 5 months since her application, but she had not received a reply. Applications had been made subsequently for the four children. The family knew nobody who had

received an extension, although Pakistani law allowed for extension in exceptional circumstances.

27. The application was made because the family came under pressure from the landlord of the rooms in Pakistan where they were living, asking for proof of legal status in Pakistan. On 4 September 2022, the landlord gave the family 8 weeks to move out. He needed to move in his own family members who had lost their homes in the floods.
28. If the family were required to move out, alternative accommodation would be much more difficult as they no longer had visit visas or any legal status in Pakistan. The girls stayed indoors all the time, because his mother was scared for them, and even for his brother, who was still only 18. The two minor girls had been unable to register for schooling as they had no papers.
29. The family was in difficulty in Pakistan: there was no male elder. His mother was struggling as head of household and his sisters were vulnerable. Approaching the UNHCR in Pakistan would mean letting the authorities know that they were in Pakistan unlawfully, putting the family at increased risk with no certainty as to the outcome. The other schemes mentioned in the Home Office evidence were old schemes, now closed to new applicants.
30. The sponsor was very anxious about his family. He had done his best for them, but things were getting worse and worse. He feared for them in Pakistan, but they also could not return to Afghanistan. The family came from Nangahar Province, a Taliban stronghold even before the coup. The sponsor had been granted asylum due to his work for the Ministry of Defence. His sisters would have no future, no education and no employment opportunities in Afghanistan now, and were likely to be exploited.
31. The sponsor disputed the respondent's assessment that he would be unable to support his family members in the UK. He had been in full-time work since 2017 and had never claimed benefits. He concluded:

"18. I have been in full time work since 2017, I have never claimed benefits, I am fully integrated in the UK and I just want the opportunity to help resume family life with my loved ones and my wife, to see my brother work, my sisters educated, my mother secure in our family home. Afghanistan has been lost but there is one hope left and that is the UK, a country that gave me safety. ..."
32. He was then tendered for cross-examination.
33. In cross-examination, Mr Ali explained that his father had been killed in 2010 in Afghanistan and so the Appellants were not infrequently moving across the border between 2010 and 2011 as there were no other elder relatives upon whom they could rely after the death of the head of their family.

34. Mr Tufan then questioned him about the three million Afghans living in Pakistan, none of who had been deported, which if true meant that the Appellants would not be placed in any jeopardy themselves either. Mr Ali said that this was not true because the practice is to put Afghan nationals on the back of a van and then take them to the border to be left there. When asked whether he had any proof of this, Mr Ali said that “everyone knows this”. He said that his family from Pakistan speaks about this regularly with him in this country when they communicate.
35. He went on to explain how the Afghans in Pakistan have difficulty in approaching the UNHCR offices for status determination. This is why his own family had not approached the UNHCR. This is because many of the UNHCR officials are Pakistani and if they find out that someone approaching them is in the country illegally, they ask to be bribed by that person, otherwise they refuse to help. This is after a needy person first having to bribe the police guards outside the compound. The police guards will not give people permission for anyone to go inside and meet with the UNHCR officials unless they are first bribed themselves.
36. This was not the only problem that his family faced. They could not return to Afghanistan because they had been given notice by their Afghan landlords to leave their rented premises. For this reason, his mother was now very afraid for her only remaining son in Afghanistan, Mr Ali’s younger brother who she feels is at risk of being deported. The Appellant’s mother in Pakistan moreover lives precariously. She has to go out and buy food all by herself. She has to leave the three girls behind in the house as she is afraid for them. And, she is not able to take her son with her in case he is attacked.
37. In re-examination Mr Lay asked Mr Ali why he could not himself return to Pakistan. The Sponsor said that this was not practically possible for him because Pakistan was not issuing visas to anyone who had procured a refugee document abroad as he had done.

## **Submissions**

38. In submissions for the respondent, Mr Tufan acknowledged the preserved finding that family life exists between Mr Ali, the Sponsor, and the Appellants in Pakistan. Nevertheless, the fact that five people were now planning to come to the UK and depend on the public purse as Mr Ali was not in a position to either financially support them or to accommodate them, meant that the balance of probabilities fell in favour of the Secretary of State against the Appellants.
39. In any event, this was a “exceptional circumstances application” which did not fall under the relevant Home Office policy. It was not a claim for international protection, which the appellants could and should have made via the UNHCR in Pakistan or Afghanistan.

40. Dr Zadeh's expert report was not adequately sourced, and referred to matters not within the expert's personal knowledge (at paragraph 45). The expert had not referred to background information or source when giving his opinions. It was also not credible that UNHCR officials would want to be bribed given that the Appellant himself had been able to secure his own refugee status with the help of UNHCR.
41. Finally, there was no evidence that the Appellants' family in Pakistan would be forced to leave for Afghanistan. Mr Tufan asked that the appeal be dismissed.
42. For the appellants, Mr Lay submitted that even if the Appellants had applied to UNHCR for a refugee status determination card (see page 70 of SB) this would not have secured them a route to permanent residence in Pakistan because that country is not a signatory to the Refugee Convention 1951. In fact, 800,000 of the 3 million Afghans in Pakistan (comprising one third of the total number) have no status determined at present. This is why the sponsor was fearful that if his family went to the UNHCR officials they were not likely to be well-received.
43. Ultimately, however, Mr Lay submitted that what made the respondent's decision disproportionate was the position of the minor girls. This was so for three reasons. First, they could not go to Afghanistan, even if they were minded so to do, because they were under 18 years of age, without papers, and without a male elder to look after them, all of which would put them at risk.
44. Second, from December 2022 onwards they would be homeless because there was no accommodation available any longer to them given the documentary evidence that was before the Tribunal.
45. Third, it was true that given the Section 117B considerations, the Sponsor's ability to support his pre-flight family was a factor to be considered, but the plain fact remained that following the fall of Kabul it was disproportionate to expect these young girls to return to Afghanistan, without a male elder.
46. In fact, once the finding of the existence of family life was made by the judge below, this put the balance of considerations markedly in the Appellants' favour. That in turn, made the refusal decision of the Secretary of State one which was disproportionate.
47. In sum, this appeal should be allowed for the following three reasons:
  - (i) the Taliban takeover in Afghanistan, and in particular, its effect on women;
  - (ii) the existence of family life between the Sponsor in the UK and his pre-flight family in Pakistan; and
  - (iii) the pre-flight family's current circumstances in Pakistan.

## **Country evidence**

48. The appellants produced a 290 page supplementary bundle dated 26 September 2022, containing a witness statement from the sponsor dated 23 September 2022, the principal appellant's visa application dated 16 April 2022, and the following country materials:

- *Pakistan: Asylum Seekers from Afghanistan*, Asylos [1 September 2021] - highlighting how 117,547 individuals have arrived in Pakistan since January 2021...' (see SB at page 144) despite the fact that '[t]he Afghanistan / Pakistan border is formally closed to all except those with valid travel or work documents or travelling for medical reasons' with the Human Rights Commission of Pakistan calling on the Pakistani government 'to immediately address the situation of Afghan refugees in the country' who 'have been left to fend for themselves amid new and arbitrary restrictions on cross-border movement' (see SB at page 158). See further below.
- *Afghanistan: Country Policy Information Note, Fear of the Taliban*, Home Office [April 2022] - highlighting the plight of women as secondary schools 'remain closed to the vast majority of girls'; 'women are banned from most employment'; and how 'the Taliban have systematically closed down shelters for women and girls fleeing domestic violence' (see §6.5.2 of SB at page 251).
- *Pakistan: Situation of Afghan refugees*, European Union Agency for Asylum (EUAA) [May 2022] - highlighting how '[r]ecent sources confirm that there is still a widespread perception among Pakistani police and citizens that Afghan refugees are criminals and potential terrorists.' (see SB at page 51) See further below.
- *One Year On, few options for Afghans escaping hunger and Taliban persecution*, The New Humanitarian [10 August 2022] - highlighting how 'Pakistan's entry requirements for Afghans have been inconsistent since the Taliban retook control of Afghanistan' and 'Afghans are required to show authorities a valid passport and visa...' and Pakistani authorities 'frequently push people back across the border...' (see SB at page 258) so that '[b]etween January and July of this year, the UN's emergency and coordination body, OCHA, found that 46,300 Afghans were expelled or deported from Pakistan, which is 40,000 more than in the same period in 2021'(see SB at page 51). See further below.
- *Dr Jawed Hassan Zadeh report* [23 September 2022] - highlighting how 'Afghans residing in Pakistan, even those with refugee status papers live in legal limbo and risk being deported to Afghanistan' (see §17 of SB at page 269). See further below.

49. We have had regard to the contents of this bundle, and in particular to the documents to which the parties took us during the hearing.

## **Dr Zadeh's report [23 September 2022]**



50. Dr Jawad Hassan Zadeh BSc (Hons) BA LLM PhD describes himself as an expert witness for Afghanistan. He has academic connections with Birkbeck College, University of London, the University of Kent, Leeds Metropolitan University and Bradford College. His doctoral thesis was on the legal culture of Afghanistan from the 1950s to the 21<sup>st</sup> century. He also has a Masters' Degree from the University of Kent in International Law and International Relations. He has worked on matters concerning Afghanistan since 1994 and has 28 years' experience, including 11 years researching Afghanistan and 16 years as an expert witness internationally.
51. It is Dr Zadeh's expert opinion that these appellants would not be able to register as refugees with UNHCR while in Pakistan, and that they are at risk of ill treatment in Pakistan on suspicion of supporting the Taliban in Pakistan, or being themselves Taliban. He asserts that there is an 'underground mafia' in Pakistan whereby even the very trustworthy UNHCR officials are subject to bribery.
52. Undocumented Afghan nationals may not open a bank account in Pakistan, seek formal employment, receive medical services in government hospitals, study or rent a house there. They are not permitted to enter into contracts, or to buy, transfer or sell property. Identity documents are required for all of these. Internal free movement in Pakistan is available to registered refugees, but not to unregistered migrants. Those, like these appellants, who are of Pashtun ethnicity are easily distinguishable as such and suffer ill treatment on that basis.
53. All three girls are of an age to be married and are at risk in his opinion of forced marriage, even in Pakistan. Gynaecological check-ups are hard to get for undocumented migrants. There is a good deal more about the situation of Pashtun women in Pakistan.
54. Dr Zadeh from paragraph 42 onwards takes issue with the Home Office argument that Afghan nationals can apply within Pakistan to vary their visas, but until 1999, Dr Zadeh says he had personal knowledge of a notice at the British Embassy in Herat saying 'no visas until further notice' which was there until 1999.
55. Dr Zadeh says that hundreds of Afghans have given eye-witness accounts, between 2001 and 2022, that in order to reach an UNHCR appointment for refugee status, it is necessary to bribe at least 5 or 6 Pakistanis and the risk is that even then, local staff may not register your application in the system. There is no consistency or honesty or integrity in the UNHCR procedures. Most western countries, at least from 2021, require a UNHCR certificate before they will accept refugees from Afghanistan. In practice, the appellants, being women, would not be able to get an UNHCR appointment and a refugee status determination in their favour.
56. In his conclusions (which have no sources provided), Dr Zadeh said that no documentation, financial aid or any other services were available for Afghan documented refugees, and the position of undocumented refugees

such as these appellants was worse. Bribes would be expected, and they would be at risk of communal threats from the Taliban, and other Pashtun men.

57. The Pakistani state would regard them as unwanted burdens on society, while UNHCR 'does not have the power, funds or the capacity [to] support them in regards to documentation [or] living costs'.
58. The two youngest were both girls and were at risk of sexual molestation, harassment or forced marriage if they were seen outside the confinement of their home. The entire family would be 'deprived of security, dignity, safety and the right to change their accommodation, district or town and city should they wish. The risks to the family could be from the Taliban and Pakistani police and other officials'. Dr Zadeh considered that Pakistan would not be a safe place for any of the appellants.

### **EUAA report (19 May 2022)**

59. The European Union Agency for asylum (EUAA) in a report on *Pakistan: Situation of Afghan refugees*, dated May 2022, makes it clear (see SB at page 48 FF) that Pakistan has not registered any new refugees since 2007 (see here the US magazine *Foreign Policy* for November 2021) and this is despite the UNHCR being present in the country. In fact, 'Pakistan has shifted its policy' from what it was 'at the start of the influx of Afghans seeking refuge in Pakistan in 1979' because 'during the 1990s and especially in the year 2000 the international support for humanitarian relief declined' with the result that '[t]he Government of Pakistan urged for repatriation of the Afghan refugees (see SB at page 48). The UNHCR has not conducted group status determinations or granted prima facie status to Afghans in Pakistan (see the *Afghan Displacement Solution Platform ADSP* ['ADSP'] in its report of December 2018, *On the Margins: Afghans in Pakistan*<sup>1</sup> (at page 11), emphasizes how, '[t]he legal status of Afghans living in Pakistan determines their ability to access services such as legal aid, health and education.' In fact, '[a]n estimated 500,000 Afghans live in Pakistan with neither a PoR, an ACC card, nor a valid Pakistani visa' so that '[t]hese unregistered Afghans are considered to be illegal immigrants by the Government of Pakistan,' and as such '[t]hey can be apprehended and prosecuted under the relevant provisions of Pakistani law' (at page 14).
60. The report explains that until 2006 Afghan refugees in Pakistan did not have to be in possession of legal documents. It was only after that date that the Pakistan government introduced the registration requirement for Afghan refugees together with the UNHCR. The reason behind this was that PoR documents (Proof of Registration) could be issued such that the PoR cardholder is deemed to be a registered refugee. The result was that this 'gave Afghan refugees holding Proof of Registration (PoR) cards limited legal status and protection from deportation under the Foreigners Act 1946,' otherwise, 'Afghans without PoR cards are regarded as illegal aliens'

<sup>1</sup> Available at [https://adsp.ngo/wp-content/uploads/2019/06/ADSP\\_Report\\_AfghansinPakistan-1.pdf](https://adsp.ngo/wp-content/uploads/2019/06/ADSP_Report_AfghansinPakistan-1.pdf).

and the Pakistan Government of Pakistan needed to take this step because, '[i]n recent years, the refugee population has been linked by some to terrorism and security threats, which has further shaped public opinion' (at page 7).

61. Yet, ironically, as the EUAA report above makes clear, this has not led to new refugees being officially recognised. The Taliban takeover in Afghanistan in August 2021 has not led to the Pakistan government welcoming Afghan refugees either and 'Pakistan's interior minister stressed that these were not refugees, but rather "4,000 Afghans"' [see SB at page 50]. Indeed, there have been reports of deportations of newly arrived Afghans and 'the closure of makeshift camps' [see SB at page 51]. In fact, even PoR cardholders are not free of risk because from January to August 2020 the UNCHR documented 370 cases of arrested or detained PoR cardholders and in 2021 police harassment of Afghan refugees remained in issue [see SB at page 52].

### **Asylos report (31 August 2022)**

62. The Asylos and Clifford Chance Report of 31<sup>st</sup> August 2022, *Pakistan: COI Repository*, draws attention to the fact that '[a]round 54 per cent of registered Afghan refugees in Pakistan are children and 22 per cent are women. Violence against children and gender-based violence are largely under-reported and access to justice for refugee girls and women is often impeded by the lack of family/community support.' The Appellants are of course not registered as refugees and the Report goes on to explain how, '[A]fghan new arrivals faced multifaceted protection challenges. Most notably, access to registration and documentation which would enable them to enjoy basic rights, facilitate access to services, and mitigate the risk of arrest...Moreover, such access would protect against refoulement. Between September and November, 1,800 Afghans - predominantly undocumented Afghans, including some new arrivals - were reportedly deported...' (see SB at page 59)

### **Reasons & Decision**

63. We have given careful consideration to the preserved findings of the judge below, the evidence before us today, and the submissions that we have heard. We are allowing this appeal.
64. The only issue before us, now that family life and the family relationships are no longer in issue, is whether the continued exclusion of this family from the UK is proportionate, either within or without the Immigration Rules HC 395 (as amended). We do not find that it is.
65. First, the principal Appellant is a widow with four children, three of them daughters and two of those still minors. A family life exists between their UK Sponsor, Mr Liaqat Ali, and these appellants. We find the evidence of Mr Liaqat Ali to be broadly credible. The following points are therefore established:

- (1) That the rent agreement between the principal appellant and the family's Afghan landlords runs from 12 April 2018 and is valid for 5 years;
- (2) That the family has not been able to return to Kabul after 2018;
- (3) That the landlords have given notice of termination under clause 4 of the agreement, which stated that "either party shall have to serve one month prior Sponsor for termination of this contract";
- (4) That in July 2022, the landlord's brother threatened Mr Ali, demanding more money, which he did not pay; and that
- (5) On 4 September 2022, the appellants were notified of imminent eviction within 8 weeks and now probably have no home to which to return, even if they were able to go back to Afghanistan.

66. Significantly, the family life of the parties in this case was not established at a time when the status of either was precarious under United Kingdom Immigration Rules. That being so, this is a case where entry clearance is being sought for leave to enter in order to resume a pre-existing family life, which was originally established, quite legitimately at a point sometime in the past. In **Huang [2007] UKHL 11** the Supreme Court held that in a Article 8 case,

"the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8" (paragraph 20)."

Given the finding of the existence of family life between the Sponsor and his pre-flight family, in the form of the Appellants, it is clear that such a family life "cannot reasonably be expected to be enjoyed elsewhere," now that he is settled in the UK with his wife and two children. It is significant indeed that when the Sponsor, Liaqat Ali, applied for his own wife and two children to come to the UK, applications for entry clearance were made at the same time for his entire pre-flight family, namely, the Appellants. Whereas Mr Tufan has argued that the circumstances here are not an exception, in **SS (Congo) [2015] EWCA Civ 387**, the court, following on from what was said in **Huang** by the Supreme Court, stated that, "it cannot be maintained as a general proposition that LRT or LTE outside the Immigration Rules should only be granted in exceptional cases" (at paragraph 29).

67. Second, in **SS (Congo) [2015] EWCA Civ 387**, the court went on to note how "the general position outside the sorts of special contexts referred to

above is that compelling circumstances would need to be identified to support a claim for the grant of LTR outside the new Rules in Appendix FM", it was nevertheless the case that, "that is a formulation which is not as strict as a test of exceptionality or a requirement of 'very compelling reasons'" (at paragraph 33). This proposition had added force where the application by family members is "for LTE to come here to take up or resume their family life" (paragraph 34). For this reason, the court drew a distinction between "family life originally established in the ordinary and legitimate circumstances at some time in the past" and a family life that was "in the knowledge of his precariousness in terms of the United Kingdom controls" (paragraph 36). In fact, such an argument is stronger with respect of what is proportionate in refugee cases because "a person who is a refugee in the United Kingdom may have had a family life overseas which they had to abandon when they fled" (paragraph 36). We find that this is precisely the position here.

68. Third, and in such circumstances as the court explained, there is a positive duty on the State to promote the survival of already extant Article 8 right to family life:

"... an application for LTE is more in the nature of an appeal to the state's positive obligations under Article 8 referred to in **Huang** at paragraph [18] (a request that the state grant the Applicants something that they do not currently have - entry to the United Kingdom and the ability to take up family life there), rather than enforcement of its negative duty, which is at the fore in LTR cases (where family life already exists and is currently being carried on in the United Kingdom ...) this means that the requirements upon the state under Article 8 are less stringent in the LTE context than in the LTR context" (paragraph 38).

69. Against this background, the court concluded that "a person outside the United Kingdom may have a good claim under Article 8 to be allowed to enter the United Kingdom to join family members already here so as to continue to develop existing family life ...." (at paragraph 39(i))
70. As for their living conditions in Pakistan itself the girls in particular are living in a state of precariousness and isolation (see SB, 2 - 3). Given that the best interests of the girls are to be a primary consideration, the enjoyment of their family life in the UK with their older brother, the Sponsor, together with an opportunity to secure education whilst they still can, points to the fact the only proportionate decision in the circumstances would be to allow the appeal.
71. Fourth, Mr Ali in his oral evidence before us stated that potential Applicants trying to access the good offices of the UNHCR faced difficulty. Mr Esen challenged him on this maintaining that such a statement could not be credibly maintained. Mr Ali was therefore only reiterating what is already in the Expert Report.
72. Finally, the objective evidence before us is to the effect that Afghan nationals unlawfully present in Pakistan are in an invidious position. The

Appellants have been residing unlawfully in Peshawar, Pakistan since December 2021. Their status is unrecognised and unregulated. To regularise their status they will be competing with 3 million Afghan refugees living in Pakistan. That is the position as of January 2022. Of these 1.4 million Afghan refugees have no proof of registration. The Appellants have neither proof of registration and nor do they have an application pending before the UNHCR.

### **Notice of Decision**

73. Given the foregoing reasons, our decision is as follows:

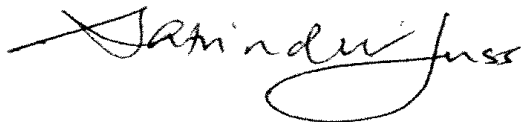
The making of the previous decision involved the making of an error of law on a point of law and has been set aside.

We remake these decisions by allowing the appeals of all the appellants.

Anonymity directions are made.

Signed

Date



Deputy Upper Tribunal Judge Juss

2<sup>nd</sup> January 2023