Asylum and Immigration Tribunal

SM and others (Entry Clearance – proportionality) Afghanistan CG [2007] UKAIT 00010

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 August & 10 November 2006	**On 02 January 2007**

Before

Senior Immigration Judge Drabu
Senior Immigration Judge Waumsley
Mrs M L Roe (Non Legal Member)

Between

SM
AS
MS

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr G Hodgetts of Counsel for SM and AS;
Mr M Saleem of Malik & Malik, solicitors for MS

For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

There are no facilities for Afghan nationals to obtain entry clearances from Afghanistan or elsewhere. Where an appellant meets all the relevant requirements under the immigration rule and but for the absence of entry clearance he would qualify and the respondent cannot show that it is practicable for him to obtain entry clearance, the claim may succeed under Article 8 if the appellant shows, or (as in this case) the respondent conceded, that entry clearance cannot in practice be obtained because of the lack of accessible facilities.

DETERMINATION AND REASONS

Background:

1. The appeals of the three appellants, all males, were heard together with their consent. All the appellants are nationals of Afghanistan and have appealed against the decisions of the respondent to refuse to grant asylum and to give directions for removal to Afghanistan. The cases raise important issues of law related to proportionality in respect of Article 8 of the ECHR.

Relevant Facts in SM:

2. SM had arrived in the United Kingdom clandestinely on or about 20 August 2001. He applied for asylum on 24 August 2001. On 21 June 2005 the respondent made the decision to refuse asylum and on 27 June 2005 he decided to remove the appellant as an illegal entrant by way of directions under paragraphs 8-10 of Schedule 2 to the Immigration Act 1971.

3. His appeal against the respondent's decision was dismissed by Immigration Judge North following a hearing on 9 August 2005. The Immigration Judge concluded that the appellant is not a refugee. In respect of the appellant's claim that his removal from the United Kingdom would be a disproportionate interference with his right to family life as protected by Article 8 of the ECHR, the Immigration Judge held that it would not be disproportionate.

4. On the evidence that he heard and saw, Immigration Judge North found that the appellant's marriage to a British citizen in February 2003 is genuine and subsisting.

5. The Immigration Judge whilst accepting that there had been a long delay in the decision making process found that neither the appellant nor anyone on his behalf had chased the respondent for a decision. The Immigration Judge held that the appellant's removal would not be harsh on account of the delay alone.

6. Based on the evidence of the appellant's wife the Immigration Judge found that she "cannot reasonably be expected to relocate to Afghanistan with the Appellant even for a short period. It follows that the Appellant's return to Afghanistan will interfere with his right to enjoy family life in that he will be separated from his wife."

7. He went on to say, "The letters of support for the Appellant also show that he has many social contacts and is valued as a volunteer advice worker with a Citizen's Advice Bureau and from those I find that he has established a significant private life in the UK. It follows that the Appellant's return to Afghanistan will interfere with his right to enjoy his private life."

8. As to how the appellant's wife would cope in the Appellant's absence from the UK, the Immigration Judge further said, "I am satisfied that she entered her relationship with the Appellant knowing there was a possibility of a separation. Her parents attended court to

show support for the Appellant and I am satisfied that she will have their support in the Appellant's temporary absence."

9. With regard to the Appellant's private life in the UK the Immigration Judge said, "he has been occupied in voluntary work and has made friends in the UK, there is no reason to suppose that he will not be able to do the same on his return to Afghanistan."

10. Immigration Judge North concluded, "I find therefore that there is nothing exceptional about the Appellant's family or private circumstances which would make his return to Afghanistan disproportionate.

11. In response to the argument made on the Appellant's behalf that there are no facilities for making an application for entry clearance as a spouse in Kabul and that his application will therefore need to be made from another country, the Immigration Judge noted that the Presenting Officer had been unable to give him any information as to the length of time it would take to make a decision on an entry clearance application of the Appellant. He was informed by the Presenting Officer that the Appellant could make the application through either the embassy in Dubai or the High Commission in New Delhi. The Immigration Judge held, "The Appellant has not shown why he should not be expected to do so. He has not shown that there is any reason why he would not be able to travel to either, or that it would be unreasonable to expect him to do so. He has not demonstrated that there will be a significant delay in processing his application for entry clearance as a spouse." He dismissed the appeal on human rights grounds too.

12. The Appellant sought and was granted an order of reconsideration on the sole ground that the Immigration Judge had erred in law in concluding that it would not be a disproportionate interference to his right to respect for private and family life under Article 8 to require him to go back to Afghanistan and apply from there or from a designated third country (in this case Dubai or India) for entry clearance as spouse, there being no facilities for issue of entry clearances in Afghanistan and the appellant needing to have a visa to enter the designated third countries.

13. The case was listed to be heard together with that of AS as the issue raised was common.

Relevant Facts in AS

14. The Appellant arrived in the United Kingdom on 9 July 2001 and sought asylum the same day. He was refused asylum on 31 July 2001. The Appellant appealed the decision on 20 August 2001. The decision was withdrawn as being fatally flawed and the appellant was granted exceptional leave to remain until 2 July 2003. He sought further leave to remain on 6 May 2003.

15. The respondent decided on 15 March 2005 to refuse to grant further leave and to refuse to vary his leave to remain the United Kingdom. An appeal against the decision was heard by Immigration Judge Shanahan on 23 June and 4 July 2005 at Stoke. She dismissed his claim for asylum.

16. With regard to the Appellant's claim under Article 8, the Immigration Judge said, "In addition to his claim to private life the Appellant has now developed a relationship with Ms A. They first met in March 2004 and commenced their relationship in May 2004.

They have chosen not to cohabit because Ms A is currently still married to her husband. She wishes to divorce him but has encountered difficulties because her husband destroyed their marriage documents from Pakistan. She is therefore unable to commence divorce proceedings in the United Kingdom until she is either able to provide the marriage certificate or other proof of the marriage. She has three children aged 14, 12 and 8 years. Form the evidence I am satisfied that the Appellant and Ms A are involved in a relationship and I respect their decision, in accordance with their beliefs, not to cohabit. I do not hold this against them in determining the issue of family life."

17. She went on to find that the Appellant has "a private life and something approaching a family life." The Immigration Judge concluded, "While acknowledging that until Ms A is able to obtain a divorce the Appellant cannot apply under the immigration rules for entry clearance as a spouse, fiancé or unmarried partner I find on balance that there is nothing truly exceptional as set out in Huang, about this case to override the legitimate aim of controlling immigration." She dismissed the appeal on Article 8 human rights grounds.

18. The appellant was granted an order for reconsideration only on his Article 8 claim.

Relevant Facts in MS:

19. The Appellant arrived in the United Kingdom on 28 June 2000 and applied for asylum. Asylum was refused on 29 May 2003 and his appeal against the decision was dismissed on 21 November 2003. Permission to appeal to the Immigration Appeal Tribunal was refused. The appellant then applied for leave to remain on the basis of his marriage on 23 February 2003.

20. On 26 July 2005 the respondent made the decision to refuse the application for leave to enter on the grounds that removal would not place the United Kingdom in breach of its obligations under the Human Rights Act 1998 and to give directions under paragraph 10A of Schedule 2 to the Immigration Act 1971 for removal from the United Kingdom. His appeal against this decision was heard by Immigration Judge R Walters on 3 October 2005. He dismissed the appeal.

21. The Immigration Judge found that "the proposed removal of the Appellant would amount to an interference with the right to respect for family life" and that the interference was "sufficiently serious to engage Article 8." He went on to find that "the interference was in accordance with immigration law and had the legitimate aim of immigration control."

22. The representatives of the parties before him agreed that there are no facilities for entry clearances in Kabul but the closest embassy which provides such a service is in Pakistan. The Appellant's representative argued that the overland journey between Afghanistan and Pakistan is extremely hazardous and dangerous but the Immigration Judge said, "there was no objective evidence that travel by public transport from Kabul to the Pakistani border is not possible. I therefore found that the Appellant could make a journey to Pakistan and there apply at a British Embassy for entry clearance to the UK as his wife's spouse." He held " I therefore did not find that this case is so truly exceptional on its particular facts that the imperative of proportionality demands an outcome in the

Appellant's favour, not withstanding that he cannot succeed under the Rules following Huang's Case."

23. The Appellant succeeded in obtaining an order for reconsideration of the decision of the Immigration Judge essentially on the grounds that the Immigration Judge had failed to take account of the determination of the Tribunal in *MS* (inability to make entry clearance application) Somalia UKAIT 00003 and that in dismissing the Article 8 claim the Immigration Judge had not taken any account of the general security situation in Afghanistan in requiring the Appellant to travel to Pakistan to seek entry clearance.

24. On 11 August 2006 when the AIT met to consider whether the determination of the Immigration Judge in this case was indeed in material error of law, the AIT included the two legal members of the present panel. The AIT, after hearing arguments from Mr Saleem and Mr Deller, decided to adjourn the hearing for the parties to have the opportunity to adduce evidence on facilities available, if any, for nationals of Afghanistan to obtain entry clearances as appeared to be required of the appellant in this case.

25. Mr Deller admitted that there was no such facility in Kabul but he suggested that the appellant could obtain an entry clearance from the offices of the British Missions in Pakistan, India or Dubai.

26. Mr Deller contested the proposition that the burden of proof in respect of appropriateness of removal was upon the Secretary of State. The AIT indicated to Mr Deller that as the decision in this case was likely to be of some importance, he should consider calling the Head of UK Visas to give evidence at the resumed hearing, if it were the case of the respondent that the appellant and other Afghan nationals in circumstances similar to the appellant could obtain entry clearances from offices of other British Missions.

27. The case was listed to be heard together with SM and AS.

The Hearing:

28. We had before us bundles of documents filed by Mr Hodgetts for SM and AS and by Mr Saleem for MS. Included in the bundles were skeleton arguments. Most importantly in the bundle filed by Mr Saleem there were copies of the correspondence between UK Visas, London and the British Missions in Afghanistan, India, Pakistan and Dubai.

29. Mr Deller quite properly and correctly conceded that the Immigration Judge North had, for the reasons advanced by the appellant in his written grounds of appeal, made a material error of law. We need say no more on this matter.

30. Mr Hodgetts, addressing us on the facts of SM drew our attention to his written skeleton argument. He said said that the Immigration Judge having found the existence of family life in this case should have found on the facts before him that the Secretary of State had not discharged the burden of proof that it was appropriate to remove the appellant from the United Kingdom. He said to the extent that the Immigration Judge had placed such burden on the appellant and concluded that the burden had not been discharged, the Immigration Judge had made a material error if law.

31. Mr Hodgetts relied on paragraphs 12 and 13 of the judgment of the Court of Appeal in Miao v SSHD [2006] EWCA Civ 75. He said that all the relevant requirements of the immigration rules were met by the appellant, in that the marriage is genuine and subsisting, the parties intend to live together permanently and there is no issue on maintenance and accommodation.

32. He argued that the respondent had produced no evidence to establish that the appellant could obtain entry clearance from any of its designated Missions abroad, reminding us that the designated posts listed on the Foreign and Commonwealth Office Website are shown to be Dubai, India (New Delhi) and Islamabad.

33. To require the appellant to leave the United Kingdom in order to obtain an entry clearance was in the circumstances disproportionate and impractical. He relied on the decisions of the IAT in EH [2005] UKIAT 00062 and AM [2004] UKIAT 00276 as well as the decisions of the European Commission of Human Rights in Sahra Said Botan v Netherlands (Application no. 1869/04, 12 May 2005) and Abdullahi Ibrahim Mohamed v Netherlands (Application no. 1872/04, 12 May 2005). In the cases of Sahra and Abdullahi the Commission had found the applications admissible but the cases had not yet been decided by the Court. In both the issue is whether it is disproportionate to require applicants to obtain entry clearances from diplomatic posts in other countries.

34. Again, Mr Deller quite properly and correctly conceded that the Immigration Judge had made a material error of law in his decision for the reasons set out in the written grounds of appeal. In this case too therefore we need say no more on this aspect.

35. In relation to AS, Mr Hodgetts accepted that there is no immigration rule under which the appellant could apply for re-entry. However, said Mr Hodgetts, the appellant's application for an entry clearance would not be doomed to failure. He drew our attention to the concession made by the respondent that the appellant's partner cannot go to Afghanistan.

36. Mr Hodgetts said that the appellant's partner is committed to marry the appellant but can only do so once she gets divorce from her husband whose whereabouts she does not know. He said that she has moved an application before the Court and the divorce process has begun. He was not able to explain though why there had been such delay in approaching a court and when the court was expected to make an order.

37. Mr Hodgetts said that in this case the Immigration Judge had made a number of errors in law. First his finding "approaching a family life" was so unclear as to be perverse. Second, the Immigration Judge had failed to understand that the couple come within the spirit if not the letter of the relevant Rules in that their relationship is akin to marriage. Third, said Mr Hodgetts, the Immigration Judge wrongly placed the burden of proof on the issue of proportionality on the appellant.

38. Mr Hodgetts argued additionally that as there was no rule under which the appellant could qualify to reenter to continue his genuine relationship with his partner, the Immigration Judge had erred in law in upholding the respondent's decision requiring him to leave to seek permission to re-enter. Mr Hodgetts asked that the decision of the

Immigration Judge be substituted by a decision to allow the appeal against the respondent's decision.

39. Mr Deller argued that in this case there was no error in the Immigrationn Judge's decision. The findings made by the Immigration Judge are supported by evidence and are by no means perverse. The parties are in some kind of relationship but the relationship is not such as to come within the accepted definition of "family life".

40. Mr Deller said that even if it had been found that the appellant has a family or private life in the United Kingdom, it would still have been open to the Immigration Judge, on the relevant facts of this case, to find that the case was not truly exceptional to engage Article 8 of the ECHR to the extent of making the interference to his Article 8 (1) rights disproportionate.

41. Mr Deller pointed our that at the date of the decision made by the Immigration Judge the relationship had not existed for two years and in any event the couple were not co-habiting. He said that the appellant's inability to qualify under any immigration rule is determinative or at the very least of great weight in this case in the context of the balancing exercise required under Article 8(2) even assuming that the relationship relied upon falls within Article 8(1) of the ECHR. Mr Deller asked that the decision of the Immigration Judge to dismiss this appeal be upheld.

42. We agree with Mr Deller that the decision of Immigration Judge Shahanan discloses no error in law. On the findings of facts made by her she was entitled to, given the current case law on the matter, conclude that the decision of the respondent was in accordance with the law and the Rules and that the appellant's removal from the United Kingdom would not infringe his rights under Article 8 of the ECHR.

43. Having found material errors of law in the cases of SM and MS, we considered the cases afresh ourselves, proceeding on the basis of findings of facts made by the respective Immigration Judges as agreed to be correct by the parties.

The Law:

44. Article 8(1) of the ECHR states:

> *"Everyone has the right to respect for his private and family life, his home and his correspondence."*

45. It is agreed by Mr Deller for the respondent and Mr Hodgetts and Mr Saleem for the appellants that the facts of the two cases (SM and MS) engage Article 8(1) of the ECHR in that the appellants have an established family life in the United Kingdom.

46. Article 8(2) of the ECHR states:

> *"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and feeedoms of others."*

47. Mr Hodgetts and Mr Saleem argue that in the cases of SM and MS it is for the Secretary of State to show that the interference in the exercise of the right to family life is in accordance with the law and is necessary for all or one of the reasons specified in Article 8(2) of the ECHR. Mr Dellor argued, rather faintly, that the burden of proof remains with the appellant throughout and that it is for the appellant to prove that the interference is disproportionate.

48. In this context we are assisted by two decisions which were cited to us. First, the decision of the IAT in EH [2005] UKIAT 00062. The Tribunal chaired by Mr Justice Ouseley said in paragraph 20 of the determination:

> *"Ms Sigley endeavoured to deal with the second point as to the ability of the Appellant to travel to Amman by reference to the burden of proof which she said lay upon him to make out his case. We do not accept the way she put it. We accept that it is for the Appellant to show that Article 8 is engaged and that the action of the Secretary of State would interfere with it. The Secretary of state then shows that the interference is lawful and is in pursuance of the interests of immigration control. It is then for the Appellant to show that the interference is disproportionate to that interest."*

Mr Deller confirmed that the decision of the IAT in EH had not been appealed and represented good law.

In Chengjie Miao v SSHD [2006] EWCA Civ 75, Lord Justice Sedley after citing Article 8 (1) and (2) of the ECHR said in Paragraph 9 of his decision:

> *"The Immigration judge, having found that the first paragraph of the article was engaged, set out a series of consequential questions. Uncontentiously, he found that removal would interfere with the appellant's family life to an extent which would necessarily engage article 8. He held, again, uncontentiously, that any such removal would be in accordance with the law. He then posed the following two questions:*
>
> - *Is the interference necessary in a democratic society for the prevention of disorder or crime?*
> - *If so, is the interference with the right of the appellant to respect for family life and private life posed by the decision under appeal proportionate to the legitimate end sought to be achieved?.*

In Paragraph 10, Lord Justice Sedley said, "This approach over-elaborates the issue arising under art. 8(2). Once the article is engaged by a substantial but lawful derogation from the respect due to family life, the remaining question is whether the impugned act is necessary in a democratic society for one of the purposes specified in the Convention. The specified purposes relevant to immigration control are ordinarily the economic well-being of the country and the protection of the rights and freedoms of others. (Disorder and crime are more likely to matter in deportation cases). But the Strasbourg court has wisely avoided the making of political judgments about what democratic societies should and should not be doing by using the concept of proportionality as a surrogate: a democratic society does not use its lawful powers so as to interfere disproportionately with individuals' human rights. It is by this means that proportionality enters art 8 (2)."

In Paragraph 11 he said, "It follows that the first of the immigration judge's two final questions was unnecessary, partly because it postulated the wrong Convention purposes but mainly because it raised no issue that was not raised in the final question."
Paragraph 12 of the decision states, "The latter question was described by immigration judge as involving 'the balancing exercise which is the essence of proportionality' requiring him to 'accord due weight to competing interests'. This may be right as far as it goes, but it is not all. The assessment of proportionality is not a simple weighing of two cases against each other. It arises only when the claimant has established that he enjoys a protected right which is threatened with violation: at that point the burden shifts to the state not only to show that the step is lawful but that its objective is sufficiently important to justify limiting a basic right; that it is sensibly directed to that objective, and that it does not impair the right more than is necessary. The last of these criteria commonly requires an appraisal of the relative importance of the state's objective and the impact of the measure on the individual. When you have answered such questions you have struck the balance."

49. In the determination of the two cases (SM and MS) we respectfully follow the principles set out by the Court of Appeal in its decision in Miao v SSHD as quoted above.

50. For the appellants it is argued that the burden of proof, on a point of practicality relating to the making of an entry clearance application in circumstances where there is no visa post in the country of return, lies on the Secretary of State. It is submitted that the Secretary of State (the respondent) has failed to establish that making an application for entry clearance in one of the designated posts outside of Aghanistan is a practicable proposition. Drawing attention to the evidence before us Mr Saleem and Mr Hodgetts said that no such facilities exist anywhere for Afghan nationals – not in India, not in Pakistan and not in Dubai.

51. We were taken through letters that had been sent by Malik & Malik, solicitors for MS to: 1) UK Visas, FCO, London on 30 August 2006 (Pages 27, 28 and 29 of the bundle); 2) British Embassy, Kabul on 4 October 2006 (Pages 40 to 42 of the bundle); 3) British Embassy Dubai dated 4 October 2006 (pages 43 to 45 of the bundle) and 4) British High Commission, New Delhi, India dated 4 October 2006 (Pages 47 to 49 of the bundle).

52. We were impressed by the care taken by Malik and Malik in the letters referred to in presenting full facts neutrally and in the use of appropriate language to assist in facilitating a prompt and considered response. By the date of the hearing the only responses received had been from the UK Visas and the British Embassy in Dubai. The absence of responses from India and Pakistan were not material in the light of the information set out in the letter from UK Visas.

53. In his letter of 10 October 2006, Chris Stimpson, the Deputy Head, Visa Customer Services states as follows:

i. Entry Clearance must always be obtained prior to travel to the UK. Applications for entry clearance from individuals of any nationality cannot be submitted while the applicant is in the United Kingdom.
ii. Even where applications can be made online or via a courier, the applicant should be in the country where the application is lodged, as they may be called for an interview at the Visa Section at short notice.

iii. Entry Clearance applications (including those for settlement) are currently not accepted by the British Embassy in Kabul.
iv. Islamabad has been designated the relevant visa section for applications from Afghanistan. There are no specific Entry Clearance Officers designated to assess applications made by Afghan nationals.
v. The Governments of Pakistan and Afghanistan do not allow passports to be sent across international borders.
vi. Applications from Afghanistan should be submitted through Gerry's FedEx office in Peshawar.
vii. Applicants do not have to submit the application form themselves, but unless there are compelling circumstances that dictate otherwise, applicants should collect their passports in person.
viii. Afghan Express Ltd represents FedEx in Afghanistan but due to constraints on sending passports across the border they do not accept applications for visas for the UK.
ix. If an Afghan national is normally and legally resident outside of Afghanistan, they can apply for entry clearance in their country of residence.

No assertion is made in this letter that Afghan nationals seeking entry clearance for settlement in the United Kingdom who are returned to Afghanistan can apply in Dubai or New Delhi, India. The only designated post according to the letter is Islamabad in Pakistan.

54. Mr Deller raised no issues on the contents of this letter nor did he raise any points on the correspondence which brought about this evidence. We make no criticism of Mr Deller but we feel disappointed that the respondent appeared not to be fully engaged in adducing relevant evidence which by its nature and its origin, it was reasonable to expect the respondent to adduce.

55. We rely on the contents of the letter from the UK Visas and from it we find as follows:
(i) There are no facilities for issue of entry clearances in Afghanistan.
(ii) Afghan nationals resident in Afghanistan who wish to apply for entry clearances will have to travel to Peshawar, Pakistan to make the application and deposit the same with FedEx.
(iii) The applicants will have to remain in Pakistan until such time as their applications are considered.
(iv) The applicants may be called for interview in which case they will need to present themselves before the entry clearance staff in Islamabad.
(v) No indication is given as to the length of time it may take for applications for entry clearances for settlement by Afghan nationals is given.
(vi) With regard to the safety of travel between the two countries the letter states, "We cannot comment on whether it is safe for an applicant to travel to the British High Commission in Islamabad from Afghanistan and how much it would cost."

56. It is reasonable to assume that Afghan nationals require visas to enter Pakistan and that they have no unfettered right to enter or leave Pakistan. The respondent has produced no evidence to show that the nationals of Afghanistan can safely and/or lawfully travel to Pakistan without having obtained visas to enter Pakistan.

57. We also bear in mind the current Travel Advice on Afghanistan issued by the FCO. Whilst accepting that the Advice is meant for British nationals and not persons of other nationalities, we see force in the argument advanced by Mr Saleem that all human life is precious and that the Advice is also based on assessment of danger faced by all and not just by those with British nationality. We note though that the appellants are spouses of British citizens and they are being expected to travel to Afghanistan. However we accept that in assessing the practicability and reasonableness of travel from Kabul to Peshawar or Islamabad, the FCO Travel Advice is not determinative. A more complete and reliable picture is set out in the CIOS report. Also the report of the Secretary General to the United Nations dated 11 September 2006 which is on pages 77 to 85 of the appellant's bundle (MS) paints a picture of great insecurity and turmoil in most of Afghanistan with the Taliban in resurgence.

58. We remind ourselves of Paragraphs 21 to 23 of the determination in EH (Palestinian – entry clearance- proportionality) Iraq [2005] UKIAT 00062.

59. Mr Justice Ouseley said in paragraph 21 *" But where the point at issue is one which goes to the extent and nature of the public interest involved in immigration control, it is for the Secretary of State to make out this point. It is the Secretary of State's contention that the interests of the system of immigration control require this man to make an application for entry clearance in his country of habitual residence and to return there for that purpose. It is implicit at least in that contention that the Secretary of State contends that the FCO provides the facility and that the Appellant would not be prevented by the authorities of Iraq or Jordan from applying. It is for him to make out his implicit contention rather than for the appellant to show the contrary….."*

60. In paragraph 22 of the decision in EH it is said, *"It does not inevitably follow from the fact that the making of an entry clearance application may well not be a practicable proposition, that it is disproportionate to return someone. It is a factor which goes into the balance. But the force of the relevant interest of immigration control in an orderly system of entry clearance is weakened where no application for entry clearance can practicably be made, in a category of those contemplated by the Immigration Rules. Its effect depends on the interests which are interfered with by removal."*

61. We have taken due account of the decisions of the IAT in MS (inability to make entry clearance application) Somalia [2005] UKIAT 00003 and KJ (Entry Clearance – Proportionality) Iraq CG [2005] UKIAT 00066.

Findings & Conclusions:

62. We find as a fact that the appellants in MS and SM, nationals of Afghhanistan, cannot safely and lawfully travel to Pakistan without getting visas from Pakistan authorities to obtain Entry Clearances as spouses from Islamabad to continue their well established family lives in the United Kingdom.

63. In the circumstances we find that in these cases there are no queues for entry clearances that the appellants can join. Therefore the argument that by allowing them to remain in the United Kingdom would be seen as legitimising queue jumping is misconceived.

64. We also find as a fact common to both cases (MS and SM) that but for the requirement to have entry clearances, the appellants qualify to remain in the United Kingdom as spouses of persons present and settled in the United Kingdom. In other words if required to make applications for entry clearances they would in all probability be successful.

65. We respectfully agree with Mr Justice Ouseley as he said in Paragraph 24 of his determnination in EH , *"If an entry clearance was not likely to succeed on its merits, we would regard any impracticability in the making of such an application in a very different light. It would be perverse in general to regard that as a reason for not insisting on the maintenance of the substance of immigration control."*

66. Having taken account of the submissions made by Mr Deller who conceded the merits of the appeal in SM and mounted no serious argument in respect of the merits of the appeal in MS and those of Mr Saleem and Mr Hodgetts, we have concluded that the removal of the appellants would be disproportionate for the reasons we have given.

67. In the circumstances we find that the decisions made by the respondent in respect of SM and MS would violate their Article 8 rights protected by ECHR and are not in accordance with the Law and the Rules. Their appeals are allowed.

68. With regard to the case of AS we have concluded for reasons given earlier that the decision of the Immigration Judge was not in material error of law and must therefore stand.

69. As Lord Justice Sedley said in paragraph 13 of his judgment in Chengjie Miao v SSHD [2006] EWCA Civ 75, *"In the field of immigration, the removal of someone who has no right to be here is generally self-justifying: it requires no additional reasoning to establish that their removal is both lawful and necessary for the purposes recognised by the Convention……It is only in cases where the Rules operate entirely against him – that a freestanding proportionality case may occasionally arise under art.8, requiring independent proof of circumstances sufficient to outweigh the policy imperatives: see Huang v Home Secretary [2005] 3 WLR 488 Para56, per Laws LJ."*

70. The appellant in AS on the facts found by the Immigration Judge Shanahan did not establish on the required standard of proof the existence of family life in the United Kingdom and therefore his claim failed on the first hurdle. Assuming that he has a kind of family life that engages Article 8(1), he is not likely to succeed in getting an entry clearance as there is no rule under which he can qualify to enter. The impracticability of being able to seek an entry clearance does not assist him. Further we do not find the case to have any truly exceptional features.

71. On the evidence before us we have found that there are at the present time no accessible facilities for Afghan nationals to obtain entry clearances from Afghanistan or elsewhere. In the circumstances it cannot be right for the respondent to assert that they must obtain entry clearances when in fact it is impossible for them to do so.

72. In view of what we have said in paragraphs 64 and what was said by Mr Justice Ouseley in EH which we respectfully follow, where it emerges on the facts that it is not practicable for an appellant to obtain entry clearance and the appellant otherwise meets

all the relevant requirements of the immigration rules, the claim under Article 8 succeeds. The respondent cannot be found to discharge the burden of proof if he does not provide an otherwise meritorious appellant the facility to apply for an entry clearance.

73. In cases where practicability of obtaining entry clearance is a serious issue, it is strongly recommended that the AIT make clear and reasoned findings on the merits of the claim under the Rules before determining the practicability issue. For the avoidance of doubt we repeat it is for the respondent to prove that accessible facilities for obtaining entry clearance are in place.

Senior Immigration Judge Drabu

APPENDIX

SM, AS, MS and Secretary of State for the Home Department

1. United Nations, The Situation in Afghanistan and its implications for peace and security dated 11/09/2006

2. Five Years after their removal from power: Taliban are back – Senlis Council News Release 5 September 2006.

3. Afghanistan: Five years later by Stephen Zunes, 13 October 2006. FPIF Policy Report

4. British High Commission, Islamabad Travel Advice of Afghanistan – 30 October 2006

5. UK Visas – British Embassy P O Box 65, Dubai, United Arab Emirates – 10 October 2006

6. UK Visas, King Charles Street, London – Letter from Deputy Head Customer Services of 10 October 2006.