



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/24771/2018 (V)

**THE IMMIGRATION ACTS**

Heard by Skype for business  
On the 19 May 2021

Decision & Reasons Promulgated  
On the 16<sup>th</sup> June 2021

Before

UPPER TRIBUNAL JUDGE REEDS

Between

R A  
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE ENTRY CLEARANCE OFFICER

Respondent

**Representation:**

For the Appellant: Mr Mahmood, Nationwide Law Solicitors acting on behalf of the appellant.  
For the Respondent: Mr Diwnycz , Senior Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Clarke (hereinafter referred to as the "FtTJ") promulgated on the 14 October 2019, in which the appellant's appeal against the decision to refuse his application for entry clearance to settle in the UK to join his mother and sponsor was dismissed.

2. The FtIJ made an anonymity order, and no application was made for the order to be discharged before the Upper Tribunal.
3. The hearing took place on 19 May 2021, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face- to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the sponsor so that she was able to hear and see the proceedings being conducted. There were no issues regarding sound, and no problematic technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.
4. The appellant is a national of Iran. In an application made on 25 September 2018 he applied for entry clearance by way of family reunion to enter the UK and settle with his mother and sponsor. His mother and 2 sisters left Iran in August 2017 and entered the United Kingdom. They claimed asylum on 6 September 2017 and their claims were allowed by the respondent and they were granted refugee status on 5 March 2018.
5. On the 4 December 2018 the respondent refused the application. The Entry Clearance Officer (hereinafter referred to as the "ECO") considered the application under paragraph 352D but gave the following reasons for refusing the application:
  - (1) Having considered the documentary evidence including the birth certificate, the date of birth is different to the date on the passport. No other evidence was submitted to confirm or demonstrate the relationship and therefore the ECO was not satisfied that the appellant and the sponsor were related as claimed (paragraph 352D(i)).
  - (2) The ECO took into account the appellant's age but at the date of the application he was 31 years old and was therefore not under the age of 18 and thus could not meet paragraph 352D (ii).
  - (3) The appellant had provided no evidence of any relationship with the sponsor before she came to United Kingdom in September 2017. Nor was there any evidence of contact or communication with the sponsor since September 2017. The ECO was therefore not satisfied that the appellant was part of the family unit of the sponsor at the time the sponsor left her home (see paragraph 352D (iv)).
  - (4) The ECO considered whether the application raised any exceptional circumstances to warrant a grant of entry clearance outside the requirements of the Immigration Rules, but the ECO reached the conclusion that the appellant had not demonstrated that he was a member of the sponsor's pre-flight family and therefore the application was refused.

6. Following the refusal of the application, documents were submitted with the appeal including photographs, passport copies, BRP copies, TB certificate, ID booklet, interview record, determination letters and chat records (see ECM review date stamped 14 March 2019). The ECM considered the supporting documents submitted but, on his review, stated that he was satisfied that the original decision to refuse was correct and was not prepared to exercise discretion in the appellant's favour.
7. The appellant's appeal against the respondent's decision to refuse entry clearance came before the First-tier Tribunal on the 2 October 2019.
8. In a determination promulgated on the 14 October 2019, the FtTJ dismissed the appeal on human rights grounds, having considered that issue in the light of the appellant's compliance with the Immigration Rules in question and on Article 8 grounds. The judge heard evidence from the appellant's sponsor as recorded at paragraph [5].
9. At paragraphs [6]-[11] the FtTJ set out his findings of fact and conclusions on the appeal.
10. In summary, the First-tier Tribunal Judge considered that there were a "number of evidential difficulties with the claim" and that the "appellant bears the burden of proof on a standard of probabilities." At paragraph [6] the FtTJ set out that in the asylum interview undertaken 8 February 2018 the sponsor said that she had 4 children but, on the screening interview only showed 3. At [8] the FtTJ set out the inconsistency in the documentary evidence noting that the birth certificate gave a different date of birth to that of the passport issued to the appellant. The judge noted that they both had the same place of birth but that there had been "no objective evidence to show that the change of year from the Persian calendar to the Gregorian calendar would account for the error".
11. At [9] the FtTJ stated that even if the sponsor was the mother of the appellant, he did not accept that the appellant was living in the family unit in Iran when she departed but was based in Malaysia. The FtTJ noted that there was a copy of his multiple entry visa (although this was a poor copy) but that it stated the appellant was studying and was valid until July 2019. In this respect, the judge stated "there is no updated witness statement by the appellant to show what his status is now. There is no evidence from the appellant to show how his fees are being paid over the years, and how he has maintained himself. Given that he is aged 31 years and left the family home, I do not find he has discharged the burden of proof that he was part of the pre-flight family unit, and dependent upon the sponsor. I have taken into account the x bank statements and remittances, but they only go back to October 2018, and whilst they may be to date, they do not show what was happening in the years before. There are notable gaps in the evidence which I find is readily available, or at least, no explanation has been provided as to why the appellant could not provide it."

12. At [10] the FtTJ made reference to the appellant's father who was last seen by the sponsor in 2014 that found "there is no evidence the father has not been assisting the appellant in some form or other."
13. At [11] the FtTJ concluded that he did not find that the appellant had discharged the burden of proof and dismissed the appeal finding that he had not shown the necessary family life as being established but even if he had, he is not shown that there was any interference with it because they are living in different countries and is not shown that it is disproportionate for entry clearance not to be granted. "The appellant has not shown what his current status is in Malaysia and the siblings live in the UK have not attended to give evidence or prepared any witness statements either to support what the appellant and the sponsor say."
14. He therefore dismissed the appeal.
15. Permission to appeal was issued and permission to appeal was granted by FtTJ Bristow on 26 February 2020.

The hearing before the Upper Tribunal:

16. In the light of the COVID-19 pandemic the Upper Tribunal (Judge Gill) issued directions on 20 April 2020 that she had reached the provisional view that it would be appropriate to determine the issue of whether there was an error of law and if so whether the decision should be set aside without a hearing. Directions were given that the party who sought permission to appeal may submit further submissions in support of the assertion of an error of law and on the question of whether the FtTJ's decision should be set aside if error of law is to be found, to be filed and served on all of the parties. Directions were given for the other party to file and serve submissions in response. At paragraph 5 of the directions, it was set out that if any party considered that a hearing was necessary to consider the questions set out, they were required to submit reasons for that view within the timetable set out by UTJ Gill.
17. On behalf of the appellant a document was filed entitled "further submissions in support of assertion error of law". This document set out the following:

"it is submitted to the honourable Tribunal that there is clearly an error of law made by the learned judge in his determination. The 1<sup>st</sup> question that needs to be considered by the tribunal is whether the appellant is the son of the sponsor. We submit that enough evidence has been provided to the tribunal to suffice them that the appellant is the son of the sponsor and a member of their family. 2<sup>nd</sup> question was the tribunal needs to consider is if the Tribunal finds that the appellant is the son of the sponsor, whether his life is in danger if he returns to Iran. We submit that the answer to this question has already been determined by the respondent in the case of the sponsor that the life of the sponsor and the sponsor's family members are in danger if they return to Iran as they have already been granted asylum

in the UK. For these reasons and those asserted in the grounds for permission to appeal; it is contended that the learned judge has made an error of law and his determination is to be set aside and a fresh determination needs to be determined.”

18. On 18 May 2020 the respondent submitted a response to the appellant’s grounds and in response to UTJ Gill’s directions. It does not appear that the author of the grounds had seen the further submissions from the appellant set out in the preceding paragraph.
19. The response is short, and states as follows:

“The SSHD asserts that the A has failed to identify any material errors in law in the FtT determination. The grounds just stand a disagreement with the findings, the conclusion in respect of article 8 is sustainable in law.

The A, in effect seeks to argue private life rights when no such rights exist in an extraterritorial appeal of this kind, see Secretary of State for the Home Department v Abbas [2017] EWCA Civ 1393.”
20. Upper Tribunal Judge Mandalia reviewed the file and in directions issued on 8 March 2021 indicating that the appeal should be determined without a face- to-face hearing and directions were given for a remote hearing to take place and that this could take place via Skype. He recorded at paragraph 2 that neither party had expressed a view as to whether it be appropriate to determine whether the making of the FtTJ’s decision involved the making of an error on a point of law without a hearing. He considered the issues in the appeal and reached the conclusion that the Upper Tribunal would benefit from oral submissions made by the parties (see paragraph 3).
21. The hearing was therefore listed as a remote hearing with both advocates providing their oral submissions.
22. Mr Mahmood on behalf of the appellant relied upon the written grounds of appeal and the further submissions summarised above.
23. In his oral submissions he submitted that there were 2 issues in relation to the decision firstly the relationship and the date of birth of the applicant. It had not been accepted that the appellant was related as claimed and the other issue was whether he was part of the family in Iran and would be at risk.
24. With regard to the error, he submitted there was evidence which covered the date of birth and that the judge appeared to be taking information to justify his decision to refuse. Mr Mahmood referred to the screening interview where she said she had 4 children and there were 4 names that was given. The passport was before the judge and also a certificate. These are referred to in the skeleton argument. There was one document which was a translation which had the wrong translation of the date of birth and that there were other documents which gave the date of birth. He submitted that the explanation was because

there had been a confusion with the Georgian calendar being different. This was explained to the judge but that the judge disregarded the evidence. Mr Mahmood submitted that the translation was “not a very authentic document from a third party” and there was a possibility of an error.

25. As to the issue of family reunion, he submitted that this was “not about collecting documents”. He referred to the sponsor providing photographs and list of communications showing daily calls to her son and money receipts. This was before the judge.
26. He further submitted there was nothing to make an any assumption concerning the appellant’s father and the judge could not justify the conclusion at paragraph [10].
27. He further submitted that the sponsor had been in contact and communication with her child, and he was part of the family unit. Mr Mahmood submitted that apart from that the other issue was whether the appellant’s life was in danger. He was clearly in danger as his family had claimed asylum.
28. In his closing submission Mr Mahmood submitted that once it was accepted that he was part of the family, his life was in danger in Iran.
29. I then heard from Mr Diwnycz on behalf of the respondent. There was a written response filed on behalf of the respondent dated 18 May 2020 which I have summarised above.
30. He submitted that the grounds stand as a disagreement to the decision of the FtTJ and that the appellant is an adult who could not claim asylum vicariously and may not be part of the family unit.
31. After that short submission, Mr Mahmood stated that he had not received the rule 24 response (the written submissions) and arrangements were made for this to be sent to him by the email he had provided.
32. Following this Mr Mahmood submitted that the rule 24 response/document should not be admitted because it was not before the FtTJ. He stated that to allow the document to be admitted would be unfair to the appellant.
33. When asked if he could indicate which part of the rule 24 response or written submissions he disagreed with, Mr Mahmood stated that the application made was not an asylum application but that the sponsor was asking for a child to join her for family reunion and that “he was not making an asylum application”. He stated that the written submissions were a new issue and that the Upper Tribunal was limited to matters before the judge and nothing else. He stated that this would be introducing a new ground and that it is not possible to show a new ground of refusal. He stated that if the tribunal admitted the written submissions, it would be a new ground.

34. Following those submissions, Mr Mahmood indicated that had not seen or read the rule 24 (written submissions) and I stated that we would not finish the hearing until he had seen the document. Mr Diwnycz confirmed that he had sent it to him. Having then read the document Mr Mahmood stated that there was nothing in the rule 24 written submissions that Mr Diwnycz had stated in his oral submissions. He further stated that it had not been argued or raised on the basis of private life. He further submitted that the matter should go back to the tribunal.
35. At the conclusion of the hearing, I reserved my decision which I now give.

Decision on error of law:

36. Dealing with the issue of admissibility, the rule 24/written submission dated 18 May 2020 is an admissible document. It was provided in response to the directions an order made by UTJ Gill and is therefore an admissible document.
37. As to its contents, the written submissions are very short and state that the grounds are no more than a disagreement with the decision of the FtTJ and also raise a point that the appellant had argued private life rights when no such right exists in an extra territorial appeal of this kind relying on the decision in SSHD v Abbas [2017] EWCA Civ 1393.
38. Again, reference to a legal argument does not make a document inadmissible and the document sets out an issue of law relevant to Article 8 of the ECHR. I do not accept the submission made that this was a new issue. In reaching his decision the ECO applied the relevant Immigration Rule which is paragraph 352D and also considered it outside the rules on human rights grounds (Article 8). Since April 2015 there has been no right of appeal to the tribunal on the ground that the Secretary of State's decision was not in accordance with the Immigration Rules. The only relevant right of appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) and that decision would be unlawful under section 6 of the Human Rights Act 1998 in the context of Article 8 of the ECHR. Nevertheless, the Immigration Rules and associated guidance are highly relevant to the tribunal's task because they reflect the responsible Minister's general assessment of when interference with the right to respect for private and family life is justified under article 8(2) on the basis of legitimate public interests.
39. However, I have not heard any legal argument on behalf of the respondent in respect of the cited decision in Abbas and there was little set out in the written submission in respect of this. On the facts of that case, the Court of Appeal found that the UK had no obligation on private life grounds to grant entry clearance to the applicant to visit an elderly relative in the UK in the circumstances where there was no family life (article 8). The issue here is not in relation to private life but whether or not there is family life between the

appellant and the sponsor sufficient to engage article 8 and whether refusing entry clearance amounts to a disproportionate interference with the sponsor's right to respect for family life taking into account the particular factual matrix.

40. Mr Mahmood objected to the oral submissions of Mr Diwnycz and the reference to the appellant being an adult. This was also not a new issue. The decision letter expressly referred to the Immigration Rules and that the appellant could not meet paragraph 352D on the basis of the appellant being over the age of 18 as he was an adult. Furthermore, the circumstances of the appellant's age were directly relevant to the issue of family life and the related issue of whether the appellant formed part of the sponsor's pre-flight family which again was an issue plainly relevant to the decision and as set out in the decision letter.
41. The relevant Rule being set out at part 11 of the Rules where the Secretary of State has made provision for close family members to seek family reunification with persons recognised as refugees in the United Kingdom.
42. Paragraph 352D states:

352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who currently has refugee status are that the applicant:

  - (i) is the child of a parent who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
  - (ii) is under the age of 18; and
  - (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
  - (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum; and
  - (v) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and
  - (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.
43. I therefore now turn to the grounds. Having considered the grounds and having done so alongside the oral submissions made by the advocates and the decision of the FtTJ I am satisfied that the decision of the FtTJ involved the making of an error on a point of law and that the decision should be set aside in its entirety.
44. I will set out my reasons for reaching that view.



45. The grounds seek to challenge the FtTJ's conclusion reached on the relationship between the sponsor and the appellant. As set out in the decision letter the ECO was not satisfied that they were related as claimed (see paragraph 352D (i)) due to the differing dates of the sponsor's birth certificate and the date of birth on the appellant's passport. Reference is made in the grounds to other documents that were before the FtTJ which supported the nature of the relationship between the appellant and the sponsor.
46. At paragraphs [6] and [8] the FtTJ considered this issue. He noted at [6] that the asylum interview referred to 4 children and the screening interview only showed 3. At [8] the judge referred to the sponsor's birth certificate and the passport providing 2 different dates and that there was "no objective evidence" to show the change of the year from the Persian to the Gregorian calendar. The reference to there being "no objective evidence" must refer to the explanation given during the evidence as to why the dates were in error/inconsistent and as reflected at paragraph 5 that there was an error in the document.
47. Looking at the documents before the tribunal, the translation of the sponsor's birth certificate (page 15) gives the appellant's date of birth as 26/3/1986. The passport set out at page 12 gives the date of birth of 26 Jan 1987 and therefore there was an inconsistency as to the date from those documents.
48. Whilst the judge referred to there being "no objective evidence", I note that in the bundle of documents there was reference to the Iranian calendar (at pages 35 - 37AB).
49. However, the grounds make the point that there was other evidence available which gave the birth date as 26 January 1987 and against that background the judge was in error in not assessing this issue in the light of all of the documents that was before the Tribunal and in the light of the evidence of the sponsor that there had been a mistake.
50. A further point relevant to the relationship between the parties concerns the earlier provision of evidence which appeared to be inconsistent evidence as to the number of children the sponsor had. The FtTJ highlighted that there were "evidential difficulties" at [6] noting that the sponsor stated in the asylum interview that she had 4 children but that the screening interview had only referred to 3.
51. The grounds set out that the person carrying out the screening interview had made an error and had written 3 and that there was no contradiction between the AI and the SI.
52. I have looked at the documents before the judge. The asylum interview question 1 sets out that the sponsor was asked questions as to whether she agreed with the contents of the screening interview. Her response was that it "needed to be amended" because of mistakes. The mistake was that the appellant had stated she had 4 children, but the screening interview showed 3.

At question 9 the interviewer asks, "you have four children is that correct?" The sponsor stated "yes". Then at question 10 she was asked to provide details of where they are. The sponsor's reply made reference to her 2 daughters living with her in the UK, 1 of her sons lived in London and her other son lived in Malaysia and he is a student (see page 52AB). At question 77 of the interview four children again are referred to (see p 63AB).

53. Whilst the judge set out the differences in the evidence by reference to the asylum interview at paragraph [6] he did not make any further reference to the other evidence available before him before reaching his overall conclusions set out at [8]. It is also unclear when reading paragraph [8] whether the judge is relying on the differences as to the number of children he identified at [6] or the differences as to the date of birth at [8] in reaching a conclusion that the appellant and the sponsor were not related as claimed.
54. I am therefore satisfied that the FtTJ did not carry out an assessment of all of the evidence that was before the tribunal before reaching his conclusions.
55. The issue of whether it was a material error or not arises because at paragraph [9] the judge considered the issue in the alternative by stating "even if the sponsor is his mother, the appellant, it is clear from the evidence that he was not living in the family unit in Iran when she departed but he was based in Malaysia."
56. At paragraph [9] the judge then set out his reasons as to why he was not satisfied that the appellant was part of the pre-flight family unit. The grounds refer to paragraph [9] and that the judge stated that there was no witness evidence provided by the appellant and no evidence as to his status at the time of the hearing but that this was incorrect as the sponsor set out his status and was still a student on a Visa.
57. I have carefully considered the evidence before the FtTJ. The sponsor's evidence in the witness statement (see pages 6 - 7 of the bundle) gave no details of the appellant's circumstances or any narrative of the circumstances of when they left Iran. In the oral evidence recorded in the decision at [6] the judge recorded that she said her son was a student in Malaysia and at [7] that her son lives in Malaysia. I have not been referred to any other evidence that was before the judge concerning the appellant's circumstances and the judge was not incorrect when he said there was no witness statement from the appellant himself. Therefore, other than the student Visa which had run out by the date of the hearing, the only evidence came from the sponsor.
58. As to how his fees had been paid, the judge appeared to conclude that there was no evidence as to how the fees had been paid over the years or how he maintained himself. The judge considered this in the context of the appellant's age and also, he considered the bank statements but stated they were only available from October 2018.

59. The grounds do not appear to challenge that factual point made by the judge that the bank statements/remittances only went back as far as October 2018. The grounds make the point that the appellant was under no obligation to provide the evidence from more than one year. However, the burden of proof is upon the appellant to prove on the balance of probabilities the factual elements of his claim.
60. That said, it is unclear to me whether the judge considered the issue of whether the appellant was part of the pre-flight family by taking into account the sponsor's evidence as recorded at [7]. There are no factual findings made as to the history of events given by the sponsor. Nor is there any assessment of the photographs or the communication/chat evidence.
61. In the light of those issues taken together and in the light of the FtTJ's misunderstanding of the evidence I am satisfied that this may have impacted on his overall conclusions as to whether family life continued between the appellant and his family members and on the issue of whether the appellant formed part of the pre-flight family, along with whether they were related as claimed.
62. For those reasons, I am satisfied that it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law and that the decision should be set aside in its entirety with no factual findings preserved.
63. I observe that the respondent has published Family Reunion Guidance which addresses "exceptional circumstances" for those who are aged over 18 which may have relevance at any future hearing.
64. Mr Mahmood stated that it could be re-heard by the Upper Tribunal I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.
 

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

  - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
  - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."
65. I have considered the further hearing of the appeal in the light of the practice statement recited above and by reference to the history of the appeal. The

decision is a case management decision, and the Upper Tribunal has a broad discretion to remit or remake a decision which has been found to involve an error of law (see S12 of the Tribunal, Courts and Enforcement Act 2007). In applying that discretion, I have reached the conclusion that as a result of the nature of the errors of law set out above, it will be necessary for the sponsor to give evidence and to deal with the evidential issues, and therefore further fact-finding will be necessary and in the light of the relevant documentary evidence which had not been considered by the FtTJ. I also observe that there has been further new documentary evidence provided on behalf of the appellant upon which factual findings will need to be made. In my judgement the best course and consistent with the overriding objective is for it to be remitted to the First-tier Tribunal for a hearing. I find that the appeal falls into both categories (a) and (b) as set out in the practice statement above.

66. For the reasons given above, I am satisfied that the decision of the FtTJ did involve the making of an error on a point of law and the decision shall be set aside and will be remitted for a fresh hearing before the First-tier Tribunal.

**Notice of Decision.**

67. The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision of the FtT shall be set aside. No findings are preserved. The decision shall be remitted to the First-tier Tribunal.

Signed *Upper Tribunal Judge Reeds*

Dated 03 June 2021.