



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17796/2019**

THE IMMIGRATION ACTS

**Heard at Bradford
On the 15 August 2022**

**Decision & Reasons Promulgated
On the 14 November 2022**

Before

UPPER TRIBUNAL JUDGE LANE

Between

**ROYA HASHEMI
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The sponsor appeared in person

For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

1. Following the making of a transfer order, I heard the resumed hearing in this appeal in a face to face hearing at Bradford on 15 August 2021. Error of law in the decision of the First-tier Tribunal had been found by Upper Tribunal Judge Plimmer following a remote hearing on 27 May 2021. Her decision is as follows:

1. The appellant is a citizen of Iran who was born in July 2001. That makes her nearly 20 years old. She has appealed against a decision of First-tier Tribunal ('FtT') Judge Kelly that was promulgated on 26 October 2020 in which he dismissed her appeal on human rights grounds.

2. The appellant's father arrived in the United Kingdom ('UK') in January 2019 and was granted asylum in August of that year. The respondent accepted that he was at risk of persecution in Iran for reasons relating to his conversion to Christianity.

3. The appellant, her mother and younger brother applied to join the father in the UK in an application dated 11 September 2019 (when the appellant was 18). The applications relating to the mother and the younger brother were successful and they joined the father in the UK on 14 December 2020. The appellant's application was unsuccessful and refused in a decision dated 18 October 2019. In that decision the respondent noted that as the appellant was over the age of 18 she could not succeed under the Rules relevant to family reunion. She was therefore required to meet the Rules for an adult dependent relative. These Rules are very onerous and she was unable to meet them. The respondent considered whether there were any exceptional circumstances that would result in unjustifiably harsh consequences for the appellant or her family and decided that there were none.

4. The appellant appealed against the respondent's decision to the FtT, and the FtT hearing took place on 13 October 2020. The appellant's mother and father attended and confirmed their witness statements. I have considered the record of proceedings that was prepared by the FtT and that records a very brief series of questions of the father and no questions of the mother. The FtT noted in its decision that it considered the various witness statements, a bundle of documents together with a translation of a report by a psychiatrist following his examination of the appellant.

5. The FtT accepted much of the evidence submitted on behalf of the appellant. In particular, the FtT accepted:

(i) The father entered the UK as a refugee and has been recognised as such. His family, that is his wife and his younger son, left Iran for that reason.

(ii) The appellant was the elder of the two children of her parents. All four of them lived together in the same household until her father fled to the UK in order to avoid being arrested by the Iranian police.

(iii) Just days after her father's departure the police attended the family home and interrogated the appellant regarding her father's whereabouts and associates. They attended the family home a few days later and she was again interrogated. The effect of this interrogation upon the appellant was significant and has left her suffering from severe anxiety and depression for which she is prescribed medication by her doctor in Iran. This separation has also had an adverse emotional impact upon the appellant's younger brother.

(iv) Following the father's departure from Iran and the subsequent departure of the mother and brother, the appellant has resided with her maternal grandmother in Iran. She is not in employment but is not financially dependent upon her father.

(v) The general position in Iran is of some concern and there continue to be discriminatory practices against women in Iran.

(vi) Although the FtT considered there was some force in the respondent's submission that there was no family life bearing in mind the appellant's age and that she no longer lives in the same household

as her parents, it accepted that there was an emotional bond between her and her parents that significantly exceeded the norm and proceeded on the premise that the appellant has continued to have family life with her parents and brother for the purposes of Article 8.

(vii) The consequences of refusing the appellant's application for leave to enter could appropriately be characterised as harsh both for the appellant and for the members of her family, particularly her brother, who is only 6 years of age. The FtT said this at [32]:

“Moreover, the knowledge that they would not be dealing with the emotional trauma of separation had either the appellant been born a few months later or the decision to grant the sponsor asylum been made a few months earlier is bound to make those consequences all the harder to bear. The remaining question is therefore whether those harsh consequences are justifiable on public interest grounds.”

6. On the other hand, the FtT considered whether the appellant's circumstances were such that she could meet the guidance contained in the respondent's family reunion for refugees and those with humanitarian protections guidance and concluded that she could not. The FtT also concluded that the appellant was unable to meet the English language requirement and would almost certainly be dependent upon public funds until such time as she was able to establish an independent life for herself in the UK.

7. As part of its assessment of whether or not the harsh consequences could be described as justifiable or not on public interest grounds, the FtT turned to the public interest considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). The FtT found that two of the statutory factors were relevant in the appeal and could not be said to be assessed to be in this appellant's favour, that is her (a) inability to speak the English language and (b) likely financial dependence on the state.

8. Thus far, it can be seen that I have carefully considered the FtT's decision with a view to summarising the pros and cons it considered when undertaking the Article 8 balancing exercise. On the one hand, the FtT identified a number of pros: the family's background; the repercussions of the separation upon the appellant and her mental health; the position of women generally; the impact upon the appellant's brother in particular given his age; the particular harsh consequences being all the more harder to bear because of the timing of the application, that is the appellant had just turned 18 and therefore narrowly missed being considered favourably under the family reunion Rules (as her brother was).

9. The FtT then identified two cons, that is the two statutory factors that I have identified already, inability to speak English language and financial dependence on the state. Having done so, the FtT said this at [35]:

“Having considered what I believe to be all the relevant factors in the balance, I have reluctantly concluded that whilst the consequences of the decision for the appellant and affected members of her family are harsh, those consequences are nevertheless justified by and are proportionate to the public interest in maintaining the economic wellbeing of the country through the consistent application of immigration controls. It follows that the decision is not unlawful under Section 6 of the Human Rights Act 1998.”

10. The appellant appealed against that decision in grounds drafted by Mr Maddah, who has appeared on behalf of the appellant before me. Those grounds can be summarised as follows.

- (1) The FtT was wrong to apply public interest considerations when the family reunion Rules did not contain anything similar to those.
- (2) The FtT was not entitled to conclude that the appellant would almost certainly be reliant on public funds, bearing in mind the evidence available to it.
- (3) The FtT provided inadequate reasons as to why the public interest outweighed the lack of respect for family life in this case.

11. Permission to appeal was granted by Upper Tribunal Judge ('UT') Kebede in a decision dated 25 February 2021. She observed that there was some merit in the assertion in the grounds that the judge erred by giving the weight that he did in the proportionality assessment to the questions of English language proficiency and dependency upon public funds, where such matters were not required under the Home Office family reunion policy, albeit being relevant considerations in section 117B of the 2002 Act.

12. The respondent relied upon a Rule 24 notice dated 7 May 2021 in which attention was drawn to the requirement on the part of the FtT to apply the public interest considerations. At the hearing before me Mr Maddah relied upon his grounds of appeal and a skeleton argument that expanded upon those grounds of appeal. Mr Tan relied upon the Rule 24 notice.

13. I am entirely satisfied that the FtT was obliged to apply the public interest considerations contained in section 117B of the 2002 Act. It is to be noted that section 117A(2) makes it clear that the Tribunal must have regard to public interest considerations in all cases. It therefore matters not that this was a claim that was originally made pursuant to family reunion as the child of a refugee. This Tribunal was addressing whether or not the failure to grant entry clearance breached Article 8 and was therefore required to apply the public interest considerations.

14. However, I am not satisfied that the FtT's finding that the appellant would almost certainly be dependent on public funds upon her arrival is adequately reasoned or supported by the evidence available to it. The evidence available to the FtT and accepted by it was that the appellant was likely to be able to get employment in Iran given that she had finished her High School diploma - see [23]. The FtT has not engaged with the natural extension of that i.e. if she could get employment there, why could she not get employment in the UK?

15. In any event, the FtT has not addressed the submission that for the duration of the limited time that she might need to establish herself, she could be supported by her father. It is clear from the father's witness statement which Mr Maddah read out to me that he was saying that he had always financially supported his daughter and continued to do so. He emphasised that he continued to do so even though for the first time in his working life he was unemployed as a result of the pandemic. Notwithstanding this he was able to find £150 to send to his daughter out of universal credit. It follows that it is also very difficult to see on what basis and by reference to which evidence the FtT concluded at [21] that the appellant was not financially dependent upon her father. The FtT noted that the father was unemployed but a person can be financially dependent on

someone who is unemployed and in receipt of benefits. The real issue is whether there was going to be additional recourse to public funds and the FtT has not addressed that issue.

16. In any event, in my judgment the FtT has not adequately reasoned why in this case the public interest outweighed the interference with family life. The FtT states a conclusion at [35] without providing even brief reasons for that conclusion. On any view of the FtT's findings, the factors in support of the appellant's family life and the significant impact of the interference with that family life upon her, her parents and her younger brother were prima facie significant and compelling. The FtT's findings as to the consequences of refusing the appellant's application with the result that the family life would be interfered with, are stark. The FtT was prepared to describe the impact as harsh. This demanded a careful enquiry as to why the public interest in this case was capable of outweighing the interference with family life, and clear reasons for the conclusion reached.

17. Mr Tan reminded me that this is a case where the Immigration Rules could not be met. The FtT did not remind itself of that although I am prepared to find that when the decision is read as a whole that must be a factor that the FtT bore in mind together with the public interest considerations [34]. Although the FTT identified matters relevant to the public interest (English ability and financial independence), it failed to identify the weight it attached to the public interest in this case. The public interest is not a fixed entity. Whilst the FTT referred to the additional harshness caused by the knowledge that the appellant, due to no fault of her own or her family members only narrowly missed meeting the requirements of the Rules, the FTT has not addressed the role this played on the public interest in this case. Had the appellant been born a couple of months later or the decision to grant the father asylum been made a couple of months earlier, she would have met the Rules. Although Article 8 is not to be used as a general dispensing power, the FTT was nevertheless obliged to determine the weight to be attached to the public interest in these particular circumstances, and failed to do so.

18. The FtT's reference to the need for the application of immigration controls to be consistent at [35] is difficult to follow. The application of immigration controls can be consistently applied by treating different cases differently, provided a structured approach is undertaken in every case. This is a case which had unique individual factors including the significant impact that the interference with the family life had on all family members in the light of the circumstances that led to the family's departure from Iran (and the consequences of that upon the appellant, who at all material times continued to be a part of the family unit for the purposes of Article 8).

19. I have already, however, found that the FtT was not entitled to make the finding it did regarding financial dependence upon the state but even if I am wrong as to that, this is a case, in my judgment, which required careful reasoning as to why the public interest and the 'cons' outweighed the 'pros'. The relevant factors involved were clearly not equally weighted and in such circumstances one expects some kind of explanation as to what weight was attached to each factor. The authorities make it clear that although reasoning can be brief a Tribunal must articulate the weight attached to the relevant factors and why certain factors outweigh others. That has not been done.

20. I note that the FtT “reluctantly” reached the conclusion that it did. This makes it all the more important for the conclusion to be adequately explained so that the appellant knows why in her particular case, with all the factors the FtT regarded to be harsh, the public interest outweighed those matters.

21. For those reasons, the decision contains a material error of law and needs to be remade. The representatives agreed that there needs to be very little fact-finding and this can be done in the UT. Indeed, many of the facts have already been accepted and the UT will simply need to apply those factual findings to the relevant legal framework and undertake the balancing exercise again. Bearing in mind the relevant practice statement, I am of the view that this is a matter that should be remade in the UT.

22. It would be helpful for the appellant and her representatives to ensure that there is detailed evidence that updates the Tribunal on the appellant’s circumstances together with any financial support that the parents have been providing to the appellant as well as any indication as to how it is envisaged the appellant would be able to enter the UK without additional recourse to public funds.

Directions

(1) The appellant shall file and serve a consolidated that contains only evidence that is relied upon within 28 days of the date this decision is sent.

(2) The respondent shall file and serve an updated position statement seven days before the appeal is listed before the UT.

Notice of decision

23. The decision of the FtT contains an error of law and is set aside. It shall be remade in the UT.

2. At the resumed hearing, the Secretary of State was represented by Mr Diwnycz, Senior Presenting Officer. The sponsor appeared in person. Immediately before the hearing, Mr Diwnycz send to the Tribunal two emails. Attached to the first was a tenancy agreement for the flat that the appellant currently rents. Attached to the second is a wage slip of the sponsor, the appellant’s father, for the month of June 2022 issued by Esifood Limited. It shows that the sponsor earned net of tax £658.64 that month. Mr Diwnycz told me that these documents had been sent to the Secretary of State by the sponsor. In addition, Mr Diwnycz acknowledged there is now documentary evidence that the appellant had passed an English language test on 2 June 2022.
3. Having considered this additional evidence, Mr Diwnycz told me that the Secretary of State now accepts (i) that the sponsor regularly send money from the United Kingdom to support the appellant; (ii) the appellant is able to prove that she speaks English, albeit to a limited extent; (iii) the appellant should be able to find work in the United Kingdom and would consequently not be a burden on the state.
4. The appeal is brought on Article 8 ECHR grounds only. It has been accepted that the appellant cannot satisfy the Immigration Rules. In

addition to the facts as found by the First-tier Tribunal (and preserved in Judge Plimmer's decision). I have considered the application of section 117B of the Nationality, Immigration and Asylum Act 2002:

117B Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.

5. I have regard to the application of section 117B to the facts of this appeal, including those facts as found by the First-tier Tribunal and as established by the recent documentary evidence and accepted by the Secretary of State. I have considered also those matters identified by Judge Plimmer at [17] of her error of law decision. I have to determine whether the interference caused to the appellant as a consequence of the decision to refuse her leave to enter the United Kingdom is outweighed by the public interest concerned with her exclusion. I find as a fact that the appellant would not be dependent on public funds on her arrival in the United Kingdom and would be supported, at least in the immediate and medium term, by her father and not by the state. I note and agree with the comments of both the First-tier Tribunal and Judge Plimmer as to harsh consequences of the failure of the appellant of the continuing separation from her family. I find that the decision is not proportionate in all the circumstances. The public interest is, on the particular facts, outweighed by the extend of interference with the appellant's family life.
6. I allow on Article 8 ECHR grounds the appellant's appeal against the decision of the Secretary of State dated 18 October 2019.

Notice of Decision

Appeal Number: HU/17796/2019

The appellant's appeal against the decision of the Secretary of State dated 18 October 2019 is allowed on human rights grounds.

Signed

Dated 1 November 2022
Upper Tribunal Judge Lane