IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006569

First-tier Tribunal No: HU/00806/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 18 August 2023

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

ENTRY CLEARANCE OFFICER

Appellant

and

AREZOU BARMAKI
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr A Pipe, instructed by IQ Legal Solicitors

Heard at Field House on 14 August 2023

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, I shall refer to the parties as they were in the First-tier Tribunal. The appellant is a citizen of Iran born on 13 September 1985. Her appeal against the refusal of entry clearance as an adult dependent relative was allowed on human rights grounds by First-tier Tribunal Judge Chamberlain ('the judge') on 21 December 2022.

2. The Secretary of State appealed, and permission was granted by First-tier Tribunal Judge Lester on 17 January 2023, on the grounds the judge erred in law at [36] in taking into account the appellant's son who was born after the application was made which therefore constituted a 'new matter'. It was submitted that the judge had not sought consent from the respondent regarding

the ‘new matter’ and therefore had no jurisdiction to include the appellant’s son, independent of the respondent’s consent.

3. The grounds rely on OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 00065 (IAC) in which it was stated:

> “8. Section 85(5) of the 2002 Act provides that the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.
>
> 9. Section 85(6) defines a "new matter" as follows:-
>
> (6) A matter is a "new matter" if –
>
> (a) it constitutes a ground of appeal of the kind listed in section 84, and
>
> (b) the Secretary of State has not previously considered the matter in the context of
>
> (i) the decision mentioned in section 82(1), or
>
> (ii) the statement made by the appellant under section 120.

Summary of the judge’s findings

4. The judge found the sponsor to be a credible witness and his evidence was consistent with the evidence of the appellant and with the documentary evidence provided. The judge relied on independent evidence which corroborated the appellant’s claim: [9]

5. The respondent accepted that the appellant required long-term personal care and the judge found that the appellant’s physical health had deteriorated since the application was made. In addition, the judge found the appellant suffered from depression as a result of her physical health problems and her situation in Iran. The respondent did not challenge the psychiatric report. The judge concluded the medication which the appellant needed was not available in Iran: [10]-[13].

6. The judge made the following findings at [16] to [18]:

> “16. I find that the Appellant lives with her aunt, uncle and their four adult children. Since the application was made, the Appellant has given birth to son (sic) following a brief relationship with her ex-husband. She has no contact with her ex-husband.
>
> 17. I find that the flat in which she lives is 75 metres square. It has two bedrooms. There are seven adults and a baby living there. I find that it is overcrowded and unsuitable for the Appellant and her baby. The Appellant’s aunt provided a letter dated 22 June 2022 (page 11 AB). She states that it has become impossible for them to continue to accommodate the Appellant and her son. ‘Unfortunately we do not have the means to provide her with the care that she requires due to her illness both from the financial perspective and from the medical perspective.’
>
> 18. I find that the Appellant’s aunt cannot provide the care that the Appellant needs. She is aging and has her own health problems. Her aunt’s husband is a pensioner, and her children are all employed. I find that they cannot provide the long-term personal care which the Appellant needs.”

7. The judge relied on the unchallenged independent medical evidence and concluded:

> “25. I find that the Appellant has shown that the long-term personal care that she needs is not available in Iran. The family with whom she is living, in an

overcrowded two bedroom apartment, cannot provide the care that she needs. The evidence of Dr. Mansouri is that they are not providing it. She has no other family in Iran. I accept the evidence of the Appellant and Sponsor, corroborated by the evidence of Dr. Mansouri, that there is no social care available in Iran for the Appellant.

26 I further find that the Appellant's emotional needs are not being met in Iran, and that it is her father who can provide her with the necessary emotional support. Although she is Iranian, she has lived outside of Iran for most of her life. Her ex-husband abandoned her when she became pregnant. She is a single mother living in Iran, in very difficult circumstances. She has always relied on her father who she describes as 'not just my father; he is my mother and best friend, and it has been so hard being away from him' (page 5 AB).

27 Taking all of the above into account, I find that the Appellant has shown that she meets the requirements of Appendix FM for entry clearance as an adult dependant relative."

8. The judge considered Article 8 and section 117B of the 2002 Act and found at [35]:

> "Taking all of the above into account, and placing weight on the fact that the Appellant meets the requirements of the immigration rules as an adult dependent relative, I find that the Appellant has shown that the decision is a breach of her rights, and those of the Sponsor, to a family and private life under Article 8."

Submissions

9. Ms Cunha submitted there was a procedural impropriety because the respondent did not give consent and the parties did not have the opportunity to address the 'new matter' which was unfair. This was a material error reflected in the reasons given for finding the relationship between the appellant and sponsor met the test in Kugathas. The judge considered the new born child in finding that the accommodation was overcrowded and in the conclusion that the appellant's aunt could no longer care for her. The judge considered the child as an additional factor impacting on the appellant's mental health and in finding there were more than normal emotional ties.

10. Mr Pipe relied on the rule 24 response and submitted the issue on appeal was whether the appellant had shown she was unable to obtain the required level of care in Iran. The judge found the requirements of the rules were met and there was no dispute that Article 8 was engaged. The judge's unchallenged findings that the adult dependent relative rules were met were dispositive of the appeal: TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109.

11. Mr Pipe submitted the appellant accepted the birth of her child was a 'new matter' and the child did not form any part of the judge's consideration of the relationship between the appellant and the sponsor. There was no challenge to the appellant's credibility or the judge's findings of fact. There was no challenge to the psychiatric evidence or the finding that the appellant's medication was not available in Iran. There was no procedural impropriety in this case.

Conclusions and reasons

12. The appellant's application was refused under the immigration rules because the respondent was not satisfied the appellant met the requirements of E-

ECDR.2.5, i.e. the respondent was not satisfied that the long-term personal care that the appellant requires was not available in Iran.

13. The respondent's sole ground of appeal relates to the reference to the appellant's son at [36]. The respondent did not challenge the credibility findings at [9] or any of the findings in relation to the immigration rules being met at [10]-[27].

14. I am persuaded by Mr Pipe's submission that the references to the appellant's child did not make any difference to the judge's findings. I find the judge focussed on the care the appellant needed. The accommodation was overcrowded notwithstanding the new born child which formed no part of the judge's finding that the appellant's aunt could no longer care for the appellant. The medical evidence pre-dated the birth of the child and was not challenged by the respondent on appeal. The judge's finding that long-term personal care was not available to the appellant in Iran was open to the judge on the evidence before her.

15. I am not persuaded by Ms Cunha's submission that the judge took into account the appellant's child in considering whether there were more than normal emotional ties. There was no reference to the appellant's child at paragraph [28] when the judge concluded that Article 8 was engaged. There was no challenge to this finding in the grounds of appeal.

16. The judge acknowledged the child was born after the application was made and was not included in the appeal. It is clear from reading the decision as a whole that the judge found the immigration rules were met and the refusal of entry clearance was disproportionate before considering the best interests of the child at [36].

17. Article 8 was engaged and the judge's finding at [27] was dispositive the appeal. The appellant satisfied the immigration rules and the refusal of entry clearance was disproportionate. The judge properly applied TZ (Pakistan) and her comments at [36] were not material to the decision to allow the appeal on human rights grounds.

18. Accordingly, I find there was no material error of law in the decision promulgated on 21 December 2022 and I dismiss the respondent's appeal.

19. The rule 24 response seeks a wasted costs order against the respondent. Mr Pipe did not renew that submission orally. Having considered all the circumstances, I am satisfied that a wasted costs order is not appropriate in this case. Given the appellant is chronically unwell, I urge the respondent to use best endeavours to avoid any further delay in implementing this decision.

Notice of Decision

The Secretary of State's appeal is dismissed

J Frances

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 August 2023