IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001978

First-tier Tribunal No: HU/56921/2022
LH/01211/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17th of November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR GHOLAM SAKHI MOHAMMADI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr P Lawson, Senior Home Office Presenting Officer
For the Respondent: Miss S Khan, counsel (instructed by Parker Rhodes Hickmotts solicitors)

Heard at Birmingham Civil Justice Centre on 7 November 2023

DECISION AND REASONS

Background

1. To avoid confusion and for ease of understanding, in this decision I shall refer to the parties as they were before the First-tier Tribunal i.e. to Mr Mohammadi as the Appellant and the Secretary of State as the Respondent.

2. This matter concerns an appeal against the Respondent's decision letter of 22 September 2022, refusing the Appellant's claim initially made by application dated 1 April 2022. The Appellant is a national of Afghanistan currently living in Iran. He has applied on the basis that he is a family member of someone in the

UK with refugee /humanitarian protection status, being his son Mr Ahmad Zia Mohammadi ("the Sponsor").

3. The Respondent refused the Appellant's claim on the basis that he had applied under the family reunion route, however since 09/07/2012, applications by family members other than children or partners to join a sponsor holding refugee status in the UK had been considered under the Adult Dependent Relative requirements of Appendix FM of the Immigration Rules, which the Appellant did not meet. This was because he had failed to provide any evidence to show that as a result of age, illness or disability, he required long-term personal care to perform everyday tasks. The Respondent considered that such support as was required could be provided to the Appellant remotely and that he was not under immediate threat nor were his circumstances any different to those of other Afghan nationals living in Iran.

4. The Appellant appealed the refusal decision on 3 October 2022. The Respondent undertook a review of the case on 16 February 2023 and maintained its refusal position.

5. The Appellant's appeal was considered by First-tier Tribunal Judge Thapar ("the Judge") at a hearing at Birmingham on 18 May 2023. The Judge later allowed the appeal in her decision promulgated on 19 May 2023.

6. The Respondent applied for permission to appeal to this Tribunal on the basis that the Judge has failed to provide adequate reasons, failed to make findings on the evidence and misdirected herself in law. Specifically the grounds submit that:

   (a) At [14] and [16] the Judge finds that family life can only be maintained in is the UK on the basis that the Appellant is likely to be returned to Afghanistan, there being nothing in the evidence to show that his temporary Iranian visa would 'certainly' be extended in the future. This finding is made without reference to any evidence and is mere speculation. It was for the Appellant to show that it was more than likely that his permit would not be extended. The Judge failed to engage with:

      (i) the fact that the Appellant is in a better position than most given he is not living in a refugee camp and not reliant on international aid

      (ii) country evidence which indicates that the Appellant is not likely to face refoulement.

   (b) It is evident from [16] that the only factors in favour of the Appellant in the proportionality assessment are that he is residing in Iran on a temporary basis and that his family members do not have long term residence permits for Iran. This reasoning is inadequate.

   (c) The Judge's article 8 assessment is infected by the Judge's failure to factor into the balancing exercise the Appellant's failure to meet the rules and the significant weight that deserves (Agyarko applied), or the context of the public interest.

7. Permission to appeal was refused by First-tier Tribunal Judge Thapar on 1 June 2023, stating:

   "1. The application is in time.

> 2. This application relates to an appeal heard as part of the pilot. I am reviewing this application for permission to appeal to the Upper Tribunal in accordance with the procedure applicable to the pilot.
>
> 3. It is unarguable adequate reasons are provided for finding the Appellant has established that the refusal of entry clearance would result in unjustifiably harsh consequences. Unarguably at paragraph 15 consideration has been given to the competing public and individual interests.
>
> 4. The grounds amount to no more than a disagreement with the findings and I discern no arguable error of law."

8. The Respondent applied to this Tribunal for permission to appeal on 5 June 2023, on the same grounds and stating:

> "In refusing permission and having reviewed her own decision, First-tier Tribunal Judge Thapar fails to engage with the entirety of the grounds and the substance argued. The challenge went beyond inadequate reasoning; it is submitted that the grounds identify several arguable material errors of law."

9. Permission to appeal was granted by Upper Tribunal Judge Pickup on 26 June 2023, stating that:

> "4. In summary, the grounds argue that the impugned decision failed to provide adequate reasons and in particular an inadequate proportionality balancing exercise.
>
> 5. It is at least arguable that the reasoning of the First-tier Tribunal was inadequate. Indeed, the decision appears to come to somewhat of an abrupt or sudden conclusion without an adequate discussion or appropriate weighing of the relevant factors. It is arguable that the conclusion that the only family life that could be pursued was in the UK and that the appellant was in danger of being repatriated to Afghanistan, even though he had a temporary residence permit in Iran, is insufficient and inadequate on the facts of the case to justify the allowing of the appeal.
>
> 6. For the reasons explained above, an arguable material error of law is disclosed by the grounds.
>
> Permission is, therefore, granted on all grounds."

10. The Appellant did not file a response to the appeal.

The Hearing

11. The hearing came before me on 7 November 2023.

12. Mr Lawson took me through the grounds of appeal, adding little more of substance. He submitted there were material errors with the Judge's decision such that it should not stand and should be remitted to the First-tier Tribunal for hearing afresh, although he was content that the finding that family life could not take place in Afghanistan due to the Sponsor's refugee status could be preserved.

13. Miss Khan submitted that there were no material errors in the Judge's decision, which was perfectly well-reasoned and sustainable. In summary her main arguments were:

(a) Relying on paragraph 29 of HS (Afghanistan) v. SSHD [2009] EWCA Civ 771:

> "A claim that the reasons are inadequate must be distinguished from a claim that the reasons are wrong. That is only permissible in this jurisdiction if it can be shown that the reasons are not merely wrong, in the sense that the

> conclusions are not ones with which the appellant or indeed the court might agree, but that they are irrational."

she submitted the Respondent is not saying the reasons are wrong but that they are insufficient. She said there was a significant amount of evidence before the Judge which was unchallenged, to the extent that there was no cross examination at the hearing. That evidence contained an account of the family's history, including the fact that the Appellant had been detained in Iran and deported back to Afghanistan in May 2014 which split the family. The evidence also discussed the Appellant's current circumstances in Iran in detail, such that it was sufficient for the Judge to make the findings she did.

(b) She said the country evidence cited in the grounds of appeal concerns individuals with different circumstances than the Appellant; he has not been recognised as a refugee by Iran such that the risk of refoulement is not the same; the Respondent did not challenge the Appellant's status being precarious and there was no evidence that his family can live with him in Iran.

(c) The Judge carried out a proper proportionality assessment rightly finding family life could not take place in Afghanistan and expressly taking account of the public interest. She said it was also in the public interest that people make applications lawfully, which the Appellant has done, rather than coming to the UK clandestinely.

14. I queried the basis on which the Sponsor's mother/appellant's wife had been granted leave to remain in the UK given her permit stated she is an adult dependant relative of the Sponsor. Miss Khan said her understanding was that the mother made an article 8 application which was initially refused, following which the Respondent conceded the appeal. Mr Lawson said he did not have any information but was content with this being the case.

15. I asked Miss Khan what the evidence was before the Judge concerning the Appellant's allegedly difficult circumstances in Iran and whether there was anything tying any of the country evidence to his specific living circumstances. Miss Khan referred to objective evidence including the Human Rights Watch Report in saying a large number of Afghans are being removed and there is an increased pressure on the Iranian authorities due to the number of refugees. I questioned whether this was not relying on the same evidence cited in the grounds of appeal which earlier she said did not apply to the Appellant? She said the increased number of people puts pressure on resources and one's ability to gain employment for example; the fact that Iran is subject to sanctions also has an impact on the economy which puts pressure on the government; in terms of the Appellant, this all goes to his ability to live there.

16. I questioned whether Miss Khan agreed with the grounds in saying that the only factor in the Appellant's favour in the Judge's balancing exercise was his situation in Iran? She said the Judge's reasoning is not based solely on this, but also the history of family separation and the fact that they did not separate out of choice but were forced to do so.

17. Miss Khan agreed that if any errors were found, remittal would be appropriate. She attempted to raise changes in the Appellant's circumstances in Iran, and his family's circumstances in the UK, which had taken place since the Judge's decision but I reminded her this was not appropriate given the nature of the

hearing as an error of law hearing and the fact that she herself could not give evidence on these matters. She took this no further.

18. Mr Lawson replied to say that the Appellant not being able to work in Iran puts him in the same position as asylum seekers in the UK such that he would be no different here than there aside from living with his family. Mr Lawson further submitted that the Appellant's family could join him in Iran, with support being sent to them from those who remain in the UK; there were therefore no exceptional circumstances.

19. At the end of the hearing, I reserved my decision.

Discussion and findings

20. I remind myself of the important guidance handed down by the Court of Appeal that an appellate court must not interfere in a decision of a judge below without good reason. The power of the Upper Tribunal to set aside a decision of the First-tier Tribunal and to proceed to remake the decision only arises in law if it is found that the tribunal below has made a genuine error of law that is material to the decision under challenge.

21. The Judge's decision amounts to 17 paragraphs.

22. At [3] the Judge states that the Appellant acknowledged he could not meet the requirements of the immigration rules such that the only issue in the appeal was an assessment pursuant to article 8 ECHR. This is in line with the Appellant's skeleton argument and Respondent's review.

23. At [4] and [5] the Judge confirms that the Sponsor, together with his mother and younger brother, attended to give oral evidence in which they confirmed the accuracy of their witness statements, and that the Respondent's representative was content not to undertake any cross examination. The Judge states that submissions were made, but does not describe what these were, and confirms the evidence that was before her. At [6] she confirms that she has considered all the documentary evidence even if she does not rehearse all of it in detail.

24. At [7] the Judge sets out correctly the legal framework which she must apply. She does not set out the burden and standard of proof but no clear challenge has been made to the effect that the correct burden and standard were not applied or heeded.

25. Paragraphs [8] – [17] fall under the heading "Findings" however [8]- [11] appear to focus rather on a description of the evidence, and the Judge's actual findings are to be found in [12]-[17].

26. In [8] the Judge refers to the Appellant having been "detained and deported to Afghanistan in May 2014 by the Iranian authorities because they were living in Iran unlawfully" and it can be seen from the rest of the account that the Appellant has not resided with his family again thereafter. The Judge also expressly notes that the Appellant's wife and children have previously been granted a temporary residence permit in Iran. In [10] the Judge recognises that the Appellant most recently travelled to Iran in March 2022 and has a temporary residence permit to reside there. In [11] the Judge notes the restrictions placed on the Appellant by that permit but notes that his family have been able to visit him in Iran, each for several weeks in 2022.

27. In [12] the Judge sets out some factors against the Appellant, finding that he has not been targeted and is not at risk in Iran, he receives financial support from

the Sponsor and so is not destitute, he has been visited in Iran by his family who are also not at risk there, and his leave has previously been extended.

28. In [12] and [13] the Judge discusses several factors in favour of the Appellant's claim, being that his leave is temporary and there is nothing to indicate it would 'certainly' be extended in the future, there is a real risk he could be returned to Afghanistan when it expires, there is nothing to indicate his family could reside with him in Iran on a long-term basis, his family have been granted leave to join the Sponsor in the UK, and the Appellant's wife and younger son are on a route to settlement.

29. It is well-established that sufficient reasons for a decision must be given (see headnote of MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC).

30. I consider the finding that "There is a real possibility that the Appellant could be returned to Afghanistan at the end of his leave in Iran" to be problematic as it is not clear what this finding is based on. Although the Appellant had previously been deported back to Afghanistan, this was in 2014, since which time the Taliban have taken over in 2021. The Judge does not refer to any country or other evidence indicating that the Iranian authorities would likely still adopt the same attitude to unlawful residence as they had nearly 10 years ago, especially given this change. In addition, [8] describes the Appellant's evidence that he was deported "because they were living in Iran unlawfully" whereas he is now living in Iran lawfully. There was also evidence before the Judge that the Appellant's residence permit has already been renewed (paragraph 22 Sponsor's witness statement) and this is recognised in [12]. It is therefore up to the Appellant to show, on the balance of probabilities, why his residence permit would not be renewed again. By saying "there is nothing before me to indicate that it would certainly be extended in the future" the Judge is approaching the issue from the wrong angle, and this finding required further explanation.

31. The same concern applies to the Judge's finding in [13] that "There is nothing before me to suggest that Appellant's wife and sons will be able to reside in Iran on a long-term basis". Again it was up to the Appellant to prove they would not be able to so reside, and I do not know what evidence the Judge had in mind when making this finding, especially since she says at [8] that:

> "The Appellant's wife and youngest son were caught by the Iranian authorities and were prevented from leaving Iran. They were then living in Iran having been granted a temporary residence permit."

32. If they were granted a temporary residence permit even after being caught living in Iran unlawfully, it is unclear why a permit would not be granted if they were to apply through the proper channels to join an existing, lawful, resident. They have also been able to visit the Appellant and stay with him for several weeks during 2022. This finding therefore also required further explanation.

33. Overall, I find there to be inadequate reasoning concerning the findings about a likely return of the Appellant to Afghanistan, and the inability of the family to reside with him in Iran, which I find to be an error.

34. In [14] the Judge states:

> "I accept the Sponsor would not be able to visit or live with the Appellant should the Appellant return to Afghanistan. I also accept the unchallenged evidence of Mrs Mohammadi and Mr Mohammadi that they were unsafe and therefore fled Afghanistan. I accept then that they would also not return to Afghanistan. I find it is

> likely if the Appellant is returned to Afghanistan this could severe his relationship with his wife and children. The Appellant's family do not have lawful status to live in Iran and therefore I find the only country in which the Appellant can continue his family life with his wife and sons is in the UK".

35. The Judge appears to be assessing whether family life could continue in Afghanistan, on the basis that the Appellant is likely to be forced to return there when his visa expired. As above, the Judge's finding that the Appellant would likely be returned to Afghanistan is inadequately reasoned and, I find, erroneous given the nature/lack of the evidence on this point before her.

36. Assessing whether family life could continue in Afghanistan was therefore based on a flawed finding but was also an irrelevant consideration given:

(a) the current (not future) circumstances were those which needed to be assessed, being that the Appellant lived in Iran; and

(b) the fact as stated in [13] that "The Respondent accepts the Sponsor cannot return to Afghanistan given his grant of refugee status".

37. It was not in dispute that family life could not continue in Afghanistan, and the Respondent's review clearly focused on the Appellant's position in Iran. Therefore, to the extent that an inability to continue family life in Afghanistan was a factor counted in the Appellant's favour in the proportionality exercise under article 8 (which it appears to have been given it is mentioned in [16]), this was an error. I now turn to that exercise.

38. As per paragraph 57 of R (on the application of Agyarko) v SSHD [2017] UKSC 11:

> "That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control".

39. The Respondent asserts that the only factor in favour of the Appellant in the proportionality assessment is that he is residing in Iran on a temporary basis and his family members do not have long-term residence permits for Iran. Miss Khan said this was incorrect and that the Judge also took into account the Appellant's living circumstances/restrictions in Iran and his history of separation from his family.

40. The factors taken into account in the proportionality exercise are discussed at [16] which states:

> "I accept that maintenance of effective immigration controls is in the public interest. There is nothing before me to indicate that the Appellant can speak English and this is a factor which counts against the Appellant. The Sponsor and Mr Mohammadi are working in the UK and the Sponsor presently provides the Appellant with financial support. I therefore find the Appellant would not be burden upon the public purse, however, this is a neutral factor. The Appellant is not in the UK unlawfully and his relationship with his wife was established in Afghanistan prior to his wife's arrival in the UK. The Appellant's children are now adults; however, I do accept that the Appellant's relationship with his children is continuing. I accept that the Appellant relies upon his sons for financial support. I bring forward my findings above and accept that the Appellants wife and sons do not have leave to remain in Iran on a long-term basis, the Appellant is also temporarily resident in Iran, there is a real possibility of the Appellant being returned to Afghanistan and should that occur the Appellant's wife and sons would be unable to return to or visit Afghanistan. Consequently, I find the Appellant's situation does amount to exceptional circumstances."

41. As recognised by the Judge, the Appellant's ability to speak English and his financial independence are at best neutral factors. The fact that the Appellant is not in the UK unlawfully would also at best have been a neutral factor, as compliance with the law is to be expected.

42. The factors found by the Judge to be positively in favour of the Appellant appear to be that:

(a) his relationship with his wife was established prior to her coming to the UK

(b) he has an ongoing relationship with his adult children who support him financially

(c) he is temporarily resident in Iran

(d) his wife and sons do not have leave to remain in Iran on a long-term basis

(e) there is a real possibility of him being returned to Afghanistan and if this occurs his family would be unable to return to or visit Afghanistan.

43. I cannot see that the Judge does take into account the Appellant's living circumstances in Iran beyond the fact that she finds them to be temporary, despite this forming one of the main tenets of his claim. I also cannot see that the historical family separation is given specific mention and actually, had it been properly considered, the fact that the Appellant has now been living separately from his family for nearly 10 years could have counted against him.

44. Pursuant to my above findings, (d) and (e) of the factors found in favour are erroneous. It is difficult to see how the remaining factors would have been sufficient for the Judge to have properly found the balance to have been tipped in the Appellant's favour. This means the errors found are material, as I find it cannot be said that without them, the Judge would still have allowed the appeal - as above, article 8 was the only issue in the appeal.

45. This is particularly the case when taking into account the Appellant's acknowledged inability to meet the immigration rules, as it is well-established that such an inability is a weighty factor to be taken negatively against an Appellant. The Judge does not mention having considered the Appellant's inability to meet the rules, despite acknowledging it at [3], or if she has, she does not state what weight she attributed to it as going against the Appellant. I find she

did not properly take it into account. The Judge also appears not to have regarded the factors she had already discussed as being against the Appellant in [12] i.e. that the Appellant and his family are not at risk in Iran, he is not destitute and his family have been able to visit him. I find that if she had properly taken into the account factors weighing against the Appellant then, when weighed against the remaining positive factors, I cannot see how she could have arrived at her finding in [17] that:

> "the balance weights in favour of the Appellant and his family for the reasons stated above. I find the public interest does not require the continued separation of this family".

46. Overall, I find the material errors found infect the decision as a whole such that it cannot stand.

47. Both parties agreed that the appropriate course of action in these circumstances was for the matter to be remitted to the First-tier Tribunal for hearing afresh.

Conclusion

48. I am satisfied the decision of the First-tier Tribunal did involve the making of errors of law.

49. Given that the material errors identified fatally undermine the findings of fact as a whole, I set aside the decision of the Judge and preserve no findings.

50. In the light of the need for extensive judicial fact-finding, I am satisfied that the appropriate course of action is to remit the appeal to the First-tier Tribunal to be heard afresh by a judge other than Judge Thapar. I see no need to preserve any findings concerning family life not being feasible in Afghanistan as I do not consider this was in issue in any case.

Notice of Decision

51. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

52. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues. No findings of fact are preserved.

L. Shepherd

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
9 November 2023