IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003157

First-tier Tribunal Nos: HU/52726/2023
LH/04539/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 4th of December 2024

Before

UPPER TRIBUNAL JUDGE LOUGHRAN

Between

IJ
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr A Arafin, Counsel
For the Respondent: Ms S Mackenzie, Senior Home Office Presenting Officer

Heard at Field House on 21 October 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals with the permission of Upper Tribunal Judge M Hoffman against the decision of First-tier Tribunal Judge Davey ('the judge'), dated 30 April 2024, dismissing the appellant's appeal against the refusal of her human rights claim.

2. The appellant's human rights claim arose out of an application for entry clearance dated 14 October 2022, in which the appellant sought to join her sister Ayesa Sultana and her brother in law Sarker Khatun Tauhid ('the sponsor').

Factual Background

3. The appellant is a national of Bangladesh born on 2 May 2002. She is 22 years old. The appellant has severe autism and multiple disabilities.

4. The appellant's sister Ayesa Sultana was born on 5 February 1991. On 12 July 2011 she married the sponsor who was born on 10 January 1973 and is a Spanish national.

5. The appellant's sister was granted pre-settled status in the UK on 14 November 2019. The sponsor was granted settled status in the UK on 17 February 2021. On 24 September 2021 the appellant's mother and father were granted pre-settled status in the UK as the dependants of the sponsor. They now all live in the UK.

The Respondent's decision

6. In a decision dated 20 February 2023 the respondent refused the appellant's application.

7. The respondent was not satisfied that the appellant met paragraph E-ECDR of Appendix FM of the Immigration Rules as an adult dependent relative, which is now Appendix ADR of the Immigration Rules.

8. The respondent considered that the appellant did not meet the eligibility relationship requirement at paragraph E-ECDR.2.1 because the sponsor was not the appellant's parent, grandparent, brother, sister or daughter and the appellant's parents were not able to sponsor the appellant because they only had pre-settled status in the UK.

9. The respondent was satisfied that the appellant met the requirements of paragraph E-ECDR.2.4 because as a result of age, illness or disability she required long-term personal care to perform everyday tasks.

10. The respondent noted that the appellant has a brother who lives in Bangladesh who has been providing her with financial assistance and that there was nothing to suggest the appellant's parents could not return to Bangladesh. The respondent therefore considered that the appellant did not meet the requirements of paragraph E-ECDR.2.5 that she was unable to obtain the required level of care in Bangladesh because (a) it is not available and there is no person in Bangladesh who can reasonably provide it or (b) it is not affordable.

11. The respondent was satisfied that the appellant met the eligibility financial requirements of paragraphs E-ECDR.3.1.

12. The respondent concluded that there were no exceptional circumstances in the appellant's case which would render refusal a breach of Article 8 ECHR because it would result in unjustifiably harsh consequences for the appellant, a relevant child or other family member.

13. The respondent considered the appellant did not fall for a grant of entry clearance outside the Immigration Rules because there were no compassionate factors in the appellant's case.

The appeal before the First-tier Tribunal

14. The appeal came before the judge on 18 October 2023. The appellant was represented by Mr Sayem. The respondent was not represented. The sponsor provided a witness statement but the judge does not record whether he was called to give evidence.

15. The judge outlined the evidence addressing the appellant's disabilities and care requirements at paragraphs 4-17 of the decision.

16. At paragraph 18, the judge considered that the feature that had not been addressed in the evidence, was the extent of the consequences on the appellant of her parents coming to live in the UK.

17. The judge made the following conclusions at paragraphs 19 to 20:

> 19. I concluded that the Appellant not only has significant disabilities but that at least prior to her parents coming to the United Kingdom that those had been managed and after their arrival in the United Kingdom the arrangements that have been put in place were not as good but there is no suggestion that they have sought any external provider, be that male or female, to assist the Appellant. That would appear to be a matter of choice and perhaps unsurprisingly those who have been involved in her general wellbeing have felt that the Appellant would be better off in the presence of her family and parents in the United Kingdom where the Appellant would achieve better treatment but that her circumstances could be managed in their absence
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> 20. In the circumstances I concluded that the unhappy situation that the Appellant finds herself in is not sufficiently supported to discharge the burden of proof upon a balance of probabilities that Article 8, whilst engaged in relation to her wellbeing and the family life that she had previously enjoyed, gives rise to a disproportionate decision by the Respondent. I concluded therefore under the provisions of Article 8 of the ECHR that the Appellant has failed to discharge the burden of proof that excluding the Appellant from the United Kingdom is a disproportionate breach of Article 8 rights in terms of both the Appellant and her parents and siblings.

The appeal to the Upper Tribunal

18. The appellant sought permission to appeal on five grounds. On 28 June 2024 First-tier Tribunal CJT Lester refused the appellant permission to appeal to the Upper Tribunal.

19. On 20 August 2024 Upper Tribunal Judge Hoffman granted permission on one ground only. Namely that it was arguable that the judge failed to give sufficient reasons in relation to his consideration of the appellant's and parents' Article 8 ECHR rights at paragraph 20 of the decision.

20. The respondent provided response pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 dated 4 September 2024 opposing the appellant's appeal. ('Rule 24 response') In summary, the respondent submitted that the judge directed himself appropriately. The Rule 24 response then read as follows:

> "It is trite that a decision should be read as a whole. The FTTJ's conclusion at **[20]** being premised upon the earlier considerations/findings. UTJ Hoffman in granting permission on ground 5 expressly rejected the challenges at grounds 1-4.
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> In short it was clear the FTTJ noted that the family split was a matter of 'choice' effected by the parents **[18]** who opted to reside in the UK leaving the Appellant in Bangladesh, notwithstanding her significant disabilities **[3].** The FTTJ observes care arrangements had been put in place **[19]** and it was open to the parents to explore 'external providers'. The FTTJ ultimately finding the evidence was insufficient to discharge the burden of proof i.e. that refusal would result in *'unjustifiably* harsh consequences' noting that the failure to satisfy the Immigration Rules **[2]** and that 'her circumstances could be managed in their (parents) absence' even if the presence of family may have been the optimal care outcome."

21. I heard submissions from Mr Arafin of Counsel for the appellant and Ms Mackenzie, a senior Home Office Presenting Officer for the respondent.

22. Mr Arafin served and filed a skeleton argument which Ms Mackenzie and I both read. Mr Arafin relied on his skeleton argument and submitted that the judge had not conducted a proportionality assessment. He argued that the judge had not considered at all whether the family life had been breached. Mr Arafin also submitted that the judge had erred in law by considering that the appellant's parents had chosen to come to the UK because they were exercising their rights under the Withdrawal Agreement.

23. Ms Mackenzie relied and expanded on the Rule 24 response. In response to a question from me Ms Mackenzie submitted that it could be inferred from the determination and in particular the judge's findings at paragraph 20 that the judge accepted that family life existed between the appellant, her parents and the appellant and her sister and the appellant and her brother-in-law. Ms Mackenzie submitted that the judge had not erred in law. He had considered all the evidence applying the appropriate case law. Mr Arafin provided brief response.

24. I reserved my decision which I now give.

Discussion

25. I am not persuaded by Mr Arafin's submission that the judge was not entitled to consider that the appellant's parents had chosen to come to the UK because they were exercising their rights under the Withdrawal Agreement. I also note that this aspect of Mr Arafin's case was not pleaded in the original grounds and he therefore did not have permission to argue it before me. The fact that the appellant's parents chose to exercise their right to come and live in the UK and the fact that they are able to return to Bangladesh is clearly relevant to the assessment of proportionality and whether there are exceptional circumstances in the case that would render a refusal a breach of Article 8 ECHR because it would result in unjustifiably harsh consequences for any of the family members. Accordingly, the judge was entitled to consider it.

26. I am however, persuaded that the judge limited his consideration of Article 8 ECHR to the appellant's parents' choice to come to the UK and the fact that the family had not sought an external provider to be determinative of the appeal.

27. The judge was required to determine, as the respondent had done so in the decision under the appeal, whether there were exceptional circumstances in the appellant's case that would render refusal of Article 8 disproportionate because it would result in unjustifiably harsh consequences for the appellant or another family member. I am satisfied that the judge materially erred by failing to do so.

28. There is no reference to exceptional circumstances or unjustifiably harsh consequences in the entirety of the determination. In addition, there is no reference to any case law in respect of Article 8 ECHR.

29. The judge did not list the factors that weighed in favour of the appellant in the proportionality assessment or indeed in the public interest of excluding her admittance from the UK. I therefore am satisfied that the judge failed to carry out a proportionality assessment as he was required to do.

Disposal

30. For the reasons given above the judge made material errors of law. Accordingly I set aside the determination.

31. The respondent accepts that the appellant has significant disabilities and because as a result of age, illness or disability she required long-term personal care to perform everyday tasks.

32. As detailed above, Ms Mackenzie accepted that the judge accepted family life exists with the appellant and her parents, the appellant and her sister and the appellant and her brother-in-law for the purposes of Article 8 ECHR. There has been no challenge to that finding. Accordingly, it is preserved.

33. There will need to be a fresh hearing. Mr Arafin informed me that the appellant would rely on oral evidence from both of her parents, her sister and brother-in-law if there was to be a fresh hearing. Applying the guidance in *AEB v the Secretary of State for the Home Department* [2022] EWCA Civ 1512 and taking into account the nature and extent of the fact-finding needed in this case I remit the matter to the First-tier Tribunal to be reheard by a different judge.

Notice of Decision

34. The First-tier Tribunal decision involved the making of an error of law.

35. I set aside the decision of the First-tier Tribunal and remit the case to the First-tier Tribunal to be heard by a different judge, with the following findings of fact preserved:

    (1) The appellant has significant disabilities and because as a result of age, illness or disability she requires long-term personal care to perform everyday tasks.

    (2) Family life exists with the appellant and her parents, the appellant and her sister and the appellant and her brother-in-law for the purposes of Article 8 ECHR.

G.Loughran
Judge of the Upper Tribunal

Immigration and Asylum Chamber

28 November 2024