IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003307

First-tier Tribunal Nos: HU/56381/2023
LH/04732/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 5th of November 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MS SHAIMA RAMISH
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Canlas, Legal Representative, instructed by Times PBS
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House on 1 October 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the Appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) 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 (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant is a national of Afghanistan born on 21 March 1962. She married and had children and subsequently her daughter, the Sponsor, married and left Afghanistan with her husband and came to the UK where ultimately they were granted refugee status. On 6 March 2023 the Appellant made an application for entry clearance for family reunion with her daughter and son-in-law. This application was refused in a decision dated 9 May 2023 and an appeal was lodged against that decision.

2. On 3 September 2023 the Appellant entered the UK illegally having travelled from France. Once she reached the United Kingdom she made an asylum application. Thereafter, due to the fact that there was both an outstanding asylum application and an appeal against the refusal of entry clearance, there was a case management hearing on 22 December 2022 where directions were issued requesting that the Respondent give consideration as to how to progress both matters.

3. In the event the appeal came before First tier Tribunal Judge Moffatt for hearing on 17 April 2024 without the Respondent having progressed the asylum application. The appeal against the refusal of entry clearance proceeded and in a decision and reasons dated 29 May 2024 the judge dismissed the appeal, having declined to deal with Articles 2 and 3 of ECHR on the basis there was no consent to do this on the part of the Respondent and that these matters could be considered as part of the protection claim.

4. An application for permission to appeal to the Upper Tribunal was made on 27 June 2024 on the following bases:

   (1) the judge failed to apply the relevant test when considering Article 8 of ECHR and that her findings on family life were misconceived and contradictory; and

   (2) the judge failed to apply the relevant test in considering exceptional circumstances and Article 8 and failed to engage with a material fact *cf* Agyarko [2017] UKSC 17 and further failed to consider the positive obligations as part of Article 8 *cf* MA v Denmark [2021] ECHR 628.

5. In a decision dated 16 July 2024, permission to appeal was granted by Designated Judge Shaerf in the following terms:

   > *"The second ground of appeal is of substance that the Judge arguably erred in law in not adequately considering whether there were any exceptional circumstances justifying a grant of leave outside the Immigration Rules as envisaged in R (Agyarko) v SSHD [2017] UKSC 17. Paragraph 72 of the Judge's decision is arguably an inadequate treatment of this issue since the Judge had earlier in her decision declined to look at the background to the Appellant's seeking to come to the UK. This does disclose an arguable error of law and so permission to appeal on this ground only is granted".*

6. Mr Canlas made submissions on behalf of the Appellant. He sought to re-raise issues in relation to Articles 2 and 3 of ECHR and the fact that the FtTJ had declined to consider these, however, this was not a matter before the Upper Tribunal given that permission had not been granted on that basis. Mr Canlas

also sought to rely on the judgment of the European Court of Human Rights in Bensaid v UK [2001] ECHR 82 and drew attention to the application letter in support of the application in particular at page 182 onwards and at page 190 to 192 where international protection issues were again raised. Mr Canlas submitted that the judge at [70] failed to make findings on the situation in Afghanistan and that this was relevant to family life. The Upper Tribunal pointed out that at [72] the judge found at the date of determination of the entry clearance application that there was no family life and at [73] that at the date of application there would be no unjustifiably harsh consequences because she found there was no family life and that this would clearly appear to be an error as the judge failed to consider the question of whether or not there was family life at the date of the hearing.

7. In her submissions, Ms Cunha accepted that the FtTJ had made an error of law in failing to determine the question of whether there was an extant family life at the date of hearing, but argued that it was not material. She submitted that the judge dealt with the issue of unjustifiably harsh consequences in the body of the decision and reasons and that this was based on contradictions within the medical evidence which the judge found was inconsistent. The judge also found that the Appellant was not dependent on the Sponsor given that the Sponsor was able to travel to Pakistan to obtain treatment and also travel to the United Kingdom and spend time in France. Therefore the judge was entitled to find that the Appellant had not shown there was a family relationship above and beyond normal emotional ties. Ms Cunha submitted that, on the evidence, the judge was entitled to find that there were no unjustifiably harsh consequences and that this would have been the outcome even if the judge had considered this at the date of hearing. Ms Cunha further submitted that the Appellant had not challenged the judge's findings regarding inconsistency in the evidence and so that these findings would be retained and even if the decision were to be re-made that any judge would be bound to reach the same conclusion. In relation to the interaction between Articles 2, 3 and 8 Ms Cunha drew attention to the judgment of the Court of Appeal in GS (India) [2015] EWCA Civ 40 at [85] and [86] but submitted there was no evidence that this was canvassed before the judge and that there was ultimately no error of law in the decision and reasons.

8. In response, Mr Canlas pointed out that the Respondent had failed to engage in relation to the interaction between the protection and Article 8 claims and that there had been multiple failures to comply with directions imposed by the Tribunal. He submitted this was pertinent to the Appellant's case regarding family life but stood by the argument that there was an error of law and that the judge had failed to consider exceptional circumstances in terms of the Sponsor's circumstances in Afghanistan. Mr Canlas drew attention to the fact that the moment the Sponsor was aware that her mother was in France she left her newborn baby and toddler in order to travel to France to assist her mother, which he submitted clearly demonstrated the closeness of the relationship. However, the judge had not considered this but rather had focused on the fact that mother and daughter had not lived together since 2016, failing to take account of the fact that their separation had been forced due to the fact the Sponsor and her husband had had to safeguard their lives and flee from Afghanistan and that the Sponsor was now living with her daughter and son-in-law in the UK.

Decision and Reasons

9. I find a material error of law in the decision and reasons of Judge Moffatt in that she failed to consider the issue of whether there was family life and consequently whether there would be unjustifiably harsh consequences in relation to a breach of that family life at the date of the hearing before her, which was 17 April 2024 by which time the Appellant had been living as part of a family unit with her daughter, her son-in-law and their children since her arrival in the United Kingdom on 3 September 2023.

10. Whilst I note Ms Cunha's submissions about materiality it is not, in my finding, possible to say that any judge would find that a family life was not engaged given the context of the case as a whole and the period of time spent living together in the United Kingdom. Whilst the FtTJ found that there were inconsistencies as to the Sponsor's medical conditions and did not overall accept her as a credible witness, I find that she failed to determine the key issue in the appeal at the relevant date ie the date of hearing. Given that this error may have infected the view of the FtTJ towards the evidence of the Appellant and the Sponsor as a whole, I set the decision and reasons aside and remit the appeal for a hearing *de novo* in relation to the Article 8 aspects of the claim.

Notice of Decision

11. The decision of the First tier Tribunal Judge is vitiated by error of law. I set that decision aside and remit the appeal for a hearing *de novo* in relation to article 8 of ECHR.

Rebecca Chapman

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 October 2024