



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006319
First-tier Tribunal No:
HU/56116/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 September 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AN ENTRY CLEARANCE OFFICER

Appellant

and

MB
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Diwnycz, a Senior Home Office Presenting Officer
For the Respondent: Ms A Chaudhry instructed by Québec Law solicitors.

Heard at Phoenix House (Bradford) on 30 August 2023

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 Entry Clearance Officer ('ECO') appeals with permission a decision of First-tier Tribunal Judge Mensah ('the Judge'), promulgated following a hearing at Bradford on 12 December 2022, in which the Judge allowed MB's appeal against the refusal by the ECO of his application for leave to enter as an adult dependent relative of his parents, particularly his father.
2. MB, is a national of Iran born on 21 January 2001.

3. The application for leave to enter was made by MB under Appendix FM of the Immigration Rules but, as noted by the ECO, since 9 July 2012 applications by family members other than children or parents to join a sponsor holding refugee status in the UK are considered under the relative requirements of Appendix FM.
4. The ECO was satisfied MB did not fall for refusal on grounds of suitability.
5. The ECO was not satisfied MB met all the eligibility requirements under section E-ECDR of Appendix FM. In relation to E-ECDR.2.4 it is written:

You have failed to provide any evidence to show that as a result of age, illness or disability (you) require longtime personal care to perform everyday tasks.
6. In relation to E-ECDR.2.5, the ECO was not satisfied MB required assistance, was not satisfied he was in need of specific care, was not satisfied MB would be unable even with the practical and financial help of the sponsor, to obtain the required level of care in the country where he is living. The sponsor can provide financial support from the UK.
7. The ECO also had concerns about the eligibility financial requirement finding MB did not meet the requirements of E-ECDR.3.1 & 3.2 on the basis he had failed to provide any evidence to confirm his sponsor (his father) can and will adequately maintain him in the UK without recourse to public funds.
8. The ECO was not satisfied MB could meet the requirements of E-ECDR 3.2 which required the sponsor to be a British citizen or settled in the UK with the applicant providing an undertaking signed by the sponsor confirming the applicant will have no recourse to public funds, and that the sponsor will be responsible for their maintenance, accommodation and care, for a five year period from the date the applicant enters the UK if they are granted indefinite leave to enter. The ECO stated MB had failed to provide evidence showing the sponsor can meet those requirements.
9. The ECO went on to consider whether there are any exceptional circumstances, noting in support of the application MB raised a claim that he is facing a threat due to the sponsor fleeing Iran. It was not found, however, that MB had provided any evidence to confirm that he or his family are under immediate threat. It was noted MB is living and studying in Iran, is not dependent upon the sponsor as claimed, and that the exceptional circumstances requirement could not be met.
10. The Judge set out her findings from [6] of the decision under challenge. It is noted MB is 21 years of age and the son of his sponsor. The sponsor left Iran in 2020 and was recognised as a refugee and status granted in 2021. The Judge notes MB and his mother applied for family reunion which was granted to his mother who was granted entry clearance and who has entered the UK, but as MB was over 18 years of age he was considered under the adult dependent relative route and refused, as he does not have the required care needs. The Judge notes the sponsor claiming his son has never lived an independent life in Iran and was in the family home alone.
11. The Judge, having considered the evidence, wrote:
 16. The Appellant's situation is exasperated by the position of his father brought on by his own conversion which is already come to the attention of the Regime. Taking all matters together I am satisfied on the balance of probabilities the decision to refuse the Appellant entry has unjustifiably harsh consequences for him. I find there is a real risk he faces serious harm at the hands of the Iranian regime, both in future detention and prosecution of him. The same reasons, it would be disproportionate under Article 8 on the grounds of his private life to refuse to grant entry to join his parents here in the United Kingdom as he faces serious harm if he remains in Iran. I allow the human rights appeal.
12. The ECO sought permission to appeal asserting the Judge has materially erred in law by treating MB's appeal as an out of country asylum or protection based

claim when no such application had been made or accepted by the UK. It is also submitted the Judge erred in law in allowing the appeal on private life grounds despite MB not having established a private life in the UK. It is also asserted the Judge allowed the appeal on the basis the decision to refuse entry clearance is disproportionate despite failing to undertake an Article 8 proportionality balancing exercise, in that the Judge does not appear to have had regard to the public interest considerations set out in section 117 of the 2002 Act or state how the decision to refuse entry clearance interferes with MB's family or private life.

13. Permission to appeal was granted by another judge of the First-tier Tribunal on 23 January 2023, the operative part of the grant being in the following terms:
 2. The grounds assert that the Judge erred when allowing the appeal on the basis that the respondent's decision amounts to a disproportionate interference with the appellant's right to respect for his private life when the appellant has no established private life in the United Kingdom. This is at least arguable since it is common ground that the appellant is in Iran and has not been to the United Kingdom.
 3. The Judge clearly has concerns about the appellant's safety in Iran and clearly was not assisted by the respondent's failure to participate in the hearing. It may be that when read as a whole, the Judge's decision in fact entailed consideration of the appellant's family life with his United Kingdom based father and that any error referring to private life is immaterial in all the circumstances. For this reason it is in my judgment more appropriate to grant permission to appeal rather than exercise r35 Tribunal's Procedure Rules to set aside the decision.

Discussion and analysis

14. The Judge clearly erred in law when finding MB has a private life that was protected by Article 8 ECHR on the facts of this appeal. MB has never entered the United Kingdom, lives in Iran, there was no evidence the UK government exercises responsibility or control over his home area such that jurisdiction under the Human Rights Act or ECHR on an extraterritorial basis arose. The same issue arises in relation to any inference by the Judge that the appeal was allowed under Article 3 ECHR.
15. Article 1 ECHR states in relation to the obligation of a Contracting State to respect human rights:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.
16. MB is not within the jurisdiction of the UK government and there is no evidence of exceptional circumstances sufficient to enable a finding that the UK can exercise jurisdiction extra-territorially on the facts - *Smith & Ors v Ministry of Defence* [2013] UKSC 41 and *Al-Skeini v United Kingdom* (2011) 53 EHRR 589 considered.
17. In relation to family life, although the Judge seems to refer to it there are no findings made in relation to the existence of family life protected by Article 8 ECHR and the ECO's asserts the Judge, despite allowing the appeal on the basis the decision was not proportionate, fails to carry out the required statutory balancing exercise. That is correct.
18. I find the Judge has erred in relation to the human rights and protection aspects for the reason set out in the application for permission to appeal and grant of permission to appeal.
19. The appeal is against refusal of an application under the adult dependent relative rule decision on human rights grounds, yet there is no reference by the Judge to this factor or how the inability of the appellant to satisfy the same has been factored into the proportionality assessment.

20. Although it appears to be accepted MB cannot succeed under the adult dependant relative rule, reference is made by the Judge to paragraph GEN of Appendix FM.

21. The purpose of the General provision of the Rules is set out at GEN.1.1 as follows:

GEN.1.1. This route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British Citizen, is settled in the UK, is in the UK with protection status (and the applicant cannot seek entry clearance or permission as their family member under Appendix Family Reunion (Protection) of these rules), is in the UK with limited leave under Appendix EU, or is in the UK with limited leave as a worker or business person by virtue of either Appendix ECAA Extension of Stay or under the provisions of the relevant 1973 Immigration Rules (or Decision 1/80) that underpinned the European Community Association Agreement (ECAA) with Turkey prior to 1 January 2021. It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others (and in doing so also reflects the relevant public interest considerations as set out in Part 5A of the Nationality, Immigration and Asylum Act 2002). It also takes into account the need to safeguard and promote the welfare of children in the UK, in line with the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009.

22. The first thing to note is the requirement for there to be family life, but the Judge makes no specific finding on this issue. The Judge does not set out which aspect of GEN she is contemplating and applying or give any reason showing the relevant requirements of the same are met.

23. The ECO has also established material legal error in the Judge's treatment of what appears to have been treated as an out of country asylum/protection claim for the reasons set out in the application for permission to appeal.

24. I find the Judge has erred in law in a manner material to the decision to allow the appeal. There are a number of key issues the Judge appears to have failed to consider in relation to which protected right could be argued, finding for MB on the basis of his private life when that was not an option available for the reasons set out above, not making any clear findings in relation to whether family life recognised by Article 8 exists and, if so, the consequences of the impugned decision, and seeking to rely upon events in his own country as MB still remains in Iran, and the extraterritorial issues.

25. I find none of the findings of the Judge can be allowed to stand and must be set aside. The appeal requires comprehensive examination by another judge of the applicable law and relevant issues and extensive fact finding. I have considered the decision of the Upper Tribunal in Begum [2023] UKUT 00046, which set out guidance in relation to whether an appeal should be remitted or not, and have concluded that light of the unfairness that arises from MB not having had a fair hearing of his appeal in which all aspects are considered properly, and in light of the extensive fact finding that will be required on the next occasion, it is appropriate to remit the appeal to the First-tier Tribunal sitting at Bradford to be heard afresh by a judge other than Judge Mensah.

Notice of Decision

27. The First-tier Tribunal Judge materially erred in law. That decision is set aside. There shall be no preserved findings. The appeal shall be remitted to the First-tier Tribunal IAC sitting at Bradford to be heard *de novo* by a judge other than Judge Mensah.

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C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 August 2023