IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004316
UI-2024-004317
First-tier Tribunal No: HU/59451/2024
HU/58935/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 28th of November 2024

Before

UPPER TRIBUNAL JUDGE MEAH

Between

1. BAS NOORIA MIAH KHAIL
2. MARWA KHAN
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Hodson, Elder Rahimi Solicitors
For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

Heard at Field House on 19 November 2024

DECISION AND REASONS

Introduction and Background

1. The appellants are citizens of Afghanistan who were born, respectively, on 11 September 1968 and 16 September 2006. They are mother and daughter who appeal against the decision of First-tier Tribunal Judge Hussain (FtTJ) promulgated on 15 July 2024 ("the decision"). The appellants had applied for entry to the UK for family re-union purposes to join the adult son of the first appellant/brother of the second appellant. His name is Mr Qudrat Khan (Sponsor) and he is a recognised refugee in the UK.

2. By the decision, the First-tier Tribunal dismissed the appellants' appeals against the respondent's decisions dated 21 June 2023, in the case of the first appellant, and on 24 July 2023, in the case of the second appellant, refusing

their applications for entry clearance. The application by the first appellant was considered under the Adult Dependent Relative provisions of the Immigration Rules in force at the time under Rule E-ECDR of Appendix FM. The second appellant's application was considered under Appendix 'Child Staying with or Joining a Non-Parent Relative (Appendix CNP) of the Immigration Rules. In the case of the first appellant she was unable to meet the requirements of E-ECDR.2.4. and E-ECDR.2.5. It was stated that she had failed to evidence that as a result of age, illness or disability, she required long term personal care to perform everyday tasks. She therefore did not meet the requirements of paragraph E-ECDR.2.4. The requirement in E-ECDR.2.5 was not met as she had not established that she required assistance with everyday tasks and therefore the respondent was not satisfied that she was in need of specific care, and the respondent was satisfied that any support she required could be provided remotely by her sponsor. The respondent was therefore not satisfied that this appellant would be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where she was/is living. It was stated that her sponsor could provide financial support from the UK. The Eligibility Financial Requirement in paragraph E-ECDR.3.1-3.2. was also not met as there was no evidence to show that there would be adequate maintenance for this appellant, the sponsor and any dependents without recourse to public funds.

3. The second appellant's application was refused as the respondent was not satisfied this appellant had demonstrated that she had an existing genuine family relationship with the sponsor. The relationship between her and the sponsor was disputed. Her application was therefore refused under paragraph CNP3.1(b) of the Immigration Rules. This aspect of the refusal was conceded by the respondent in her later review of the original decision prior to the First-tier Tribunal hearing on the basis that DNA evidence had been provided to prove the relationship between the second appellant and the sponsor as biological siblings. However, the respondent was also not satisfied that this appellant would be adequately maintained and accommodated without recourse to public funds in accommodation which would be occupied exclusively, or that her exclusion from the UK would be undesirable. It was decided that it was in her best interests to remain in Afghanistan with the first appellant and for the status quo to be maintained. Both applications were considered under the banner of exceptionality under Article 8 ECHR, although it was decided that there would be no breaches resulting from the refusal of the applications.

4. It was not disputed before the FtTJ that the Immigration Rules under which the applications were considered could not be met, and that the appellants relied upon Article 8 ECHR under the family life heading, and this was the way in which their cases were put before the First-tier Tribunal. They were seeking to be reunited with the sponsor.

The Grounds

5. In summary, the grounds averred that the FtTJ had failed to consider the consequences of the refusal decisions on the vulnerable sponsor in this case. There was a failure to take into account as a primary consideration the best interests of the second appellant and there was a failure to make findings on, and take properly into account the evidence of witnesses, and there was a failure to take into account properly or at all, relevant background evidence.

6. Permission to appeal was granted by FtTJ Dhanji on 17 September 2024, in the following terms:

> "Permission to Appeal is Granted on Grounds 1 and 3.
>
> Permission to Appeal is Refused on Grounds 2 and 4.
>
> REASONS FOR DECISION (including any decision on extending time)
>
> 1. The application is in time and discloses no basis for reviewing the Judge's decision in accordance with rule 35 First-tier Tribunal (Immigration and Asylum) Procedure Rules.
>
> 2. The Appellants have advanced four grounds of appeal:
>
> i. Ground 1 asserts that FTTJ Hussain ("the Judge") failed to address the likely consequences of the Respondent's decision refusing the Appellants entry clearance on the Sponsor when determining the proportionality of the interference caused by the decision.
>
> ii. Ground 2 asserts that, despite making an appropriate self-direction, the Judge failed to take the minor Appellant's ("A2") best interests into account as a primary consideration when deciding the proportionality issue.
>
> iii. Ground 3 asserts that the Judge failed to making findings or take into account, the evidence of the three witnesses that gave live evidence at the hearing.
>
> iv. Ground 4 (misnumbered as a second Ground 3) asserts that the Judge failed to take into account the country background evidence adduced by the Appellant when deciding the issue of proportionality.
>
> 3. In my judgment, Grounds 1 and 3 disclose arguable material errors of law in the Judge's decision. My reasons are as follows:
>
> i. Ground 1: Although it is apparent from paragraphs 19-27 of the determination that the Judge had in mind the Sponsor's evidence on his mental health difficulties and vulnerabilities, I find it arguable, from a review of the Judge's analysis of the proportionality issue at paragraphs 53 to 58, that the Judge failed to resolve or make any findings on the material matter of the impact of the Respondent's refusal decision on the Sponsor and, in particular, on the Sponsor's mental health.
>
> ii. Ground 3: I find it arguable, as the Appellants argue in their grounds, that the Judge materially erred in law by failing to include in his analysis, at paragraph 54 of his decision, the evidence he had read and heard from witnesses at the hearing which the Judge did not reject. For example, there is an arguable disconnect between the Judge's observations at paragraph 54 that "no evidence was given as to why [A2] does not go out" and the evidence the Judge records as having been given by the witnesses, such as that from Malalai Khan that A2

> is “terrified to go out” and “talks about her brothers who have been killed” (see paragraph 32 of the determination).
>
> 4. However, in my judgment, Grounds 2 and 4 disclose no arguable errors of law in the Judge’s decision. My reasons are as follows:
>
> i. Ground 2: As the Appellants accept in their grounds, the Judge directed himself, at paragraph 47 of the determination, to the need to take A2’s best interests into account as a primary consideration. Although it is perhaps unfortunate that the Judge did not refer to A2 as a child in his analysis at paragraph 54 of A2’s circumstances, paragraphs 47 and 54 must be read together. To my mind, it is clear that the Judge was aware of A2’s age and the need to consider A2’s best interests. Although the Judge’s analysis at paragraph 54 is arguably erroneous for the reasons given in Grounds 1 and 3, in my judgment it is not arguable that the Judge failed to take account of A2’s best interests as a primary consideration and did not take account of A2’s age when reaching his decision.
>
> ii. Ground 4: At paragraph 54 of the determination, the Judge made explicit reference to the country background evidence the Appellants relied on in support of their appeals. The Judge was not required to set out and address each and every piece of evidence. In my judgment, it is not arguable that the Judge failed to take the country background evidence into account when reaching his decision.
>
> 5. For these reasons, permission to appeal is granted on Grounds 1 and 3 and refused on Grounds 2 and 4. .”

7. There was a Rule 24 response from the respondent in the appeal of the second appellant only. This stated as follows:

> “Secretary of State’s response to the grounds of appeal under Rule 24. Marwa Khan Afghanistan 16 Sep 2006
>
> 1. The respondent to this appeal is the Secretary of State for the Home Department. Documents relating to this appeal should be sent to the Secretary of State for the Home Department, at the above address.
>
> 2. The respondent opposes the appellant’s appeal. In summary, the respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately.
>
> 3. The sponsor has lived separately from the appellants since 2017. There was little, if any, communication between them until 2023. There is no dependency between appellants, who do not meet the financial requirements of the immigration rules. The appellants cannot speak English.
>
> 4. Section 117 B of the Nationality, Immigration and Asylum Act 2002 sets out the factors which judges must consider when deciding appeals under Article 8 of the ECHR.

> 5. The appellant's representative accepted on her behalf that she could not meet the requirements of the immigration rules and if the appellant were admitted, there would be further recourse to public funds. There was no evidence that the ties between appellant and sponsor were stronger than normal emotional ties between a child and her adult sibling.
>
> 6. The judge did not deal with the effect on the sponsor, but there was no independent evidence before the judge of this appellant's claimed mental health difficulties.
>
> 7. The appellant did not demonstrate to the required standard that she would suffer unduly harsh consequences because of the decision to refuse her entry clearance.
>
> 8. It was open to the judge to find that where there was no financial dependency and the sponsor is unable to financially support the appellant, the UK authorities struck an appropriate balance between the competing interests in this case.
>
> 9. The respondent requests an oral hearing…"

8. That is the basis on which this appeal came before the Upper Tribunal.

Documents

9. I had before me a composite bundle which included the salient documents, including the bundles relied upon by the parties in the First-tier Tribunal. A further supplementary bundle was provided containing various documents to support the appellants' appeals.

Preliminary Issue

10. Mr Hodson had made a renewed application for permission to argue the original grounds two and four where FtTJ Dhanji had refused permission in his limited grant on grounds one and three. This was contained in a document entitled 'Application for permission to renew grounds of appeal to the Upper Tribunal' contained within the supplementary bundle lodged with the Upper Tribunal on 13 November 2024, by those acting for the appellants with a covering letter in the following terms:

> "I write in relation to the above matter. I have uploaded a supplementary bundle which includes the grounds for our application for permission to renew the grounds of appeal upon which permission was not granted by the FtTJ.
>
> I write to confirm that we hereby apply to the Upper Tribunal under r. 21(2)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) for permission to appeal on Grounds 2 and 4 and for the merits of these grounds to be considered, alongside those of Grounds 1 and 3, at the upcoming hearing.
>
> We also apply for an extension of time to make this application. Please refer to the enclosed grounds in that respect. As stated in my letter of 07.11.2024, we were unable to make this application earlier because legal aid was not granted until

> 06.11.2024. Subsequently we have endeavoured to make this application as soon as possible, although unfortunately our advocate has been unwell since this weekend.
>
> In all the circumstances I respectfully request that an extension of time and permission to appeal on all grounds are granted. Please note that in the supplementary bundle are also included the Respondent's Review and Rule 24 Reply which I omitted to include in the Composite Bundle.
>
> A copy of this letter and the bundle have been sent to the Respondent by email…"

11. Mr Hodson renewed the application at the hearing before me stating that it would be difficult to argue the grounds upon which permission had originally been granted without venturing into points that were interlinked and in essence indivisible from the arguments raised in the grounds upon which permission had been refused. Mr Parvar opposed the application. I decided to grant permission on the previously refused grounds by FtTJ Dhanji, as I accept Mr Hodson's contention that all four grounds were intertwined and went ultimately to the same question as to the FtTJ's consideration of the claims made under Article 8 ECHR.

12. In fairness to the respondent, having admitted the additional grounds, I asked Mr Parvar whether he was seeking an adjournment in order to prepare the respondent's case in the light of the additional grounds. Mr Parvar stated that he was not seeking an adjournment despite my indication to him that I would be prepared to accede to such a request in the circumstances. He stated he did not need an adjournment as he had in fact come prepared to argue all four grounds in any event. He was therefore ready to proceed.

Hearing and Submissions

13. Both representatives made submissions which I have taken into account. These are set out in the Record of Proceedings and need not be repeated here.

Discussion and Analysis

Ground 1 - failure to consider consequences of decision on sponsor

14. In **Al Hassan & Ors. (Article 8; entry clearance; KF (Syria)) [2024] UKUT 234 (IAC)**, the Upper Tribunal said in the headnotes:

> "*2. Properly interpreted, **KF and others (entry clearance, relatives of refugees) Syria** [2019] UKUT 413 is not authority for the proposition that it is only a UK based sponsor whose rights are engaged. while the rights of the person or persons in the United Kingdom may well be a starting point, and that there must be an intensive fact-sensitive exercise to decide whether there would be disproportionate interference, it is not correct law to focus exclusively on the sponsor's rights; to do so risks a failure properly to focus on the family unit as a whole and the rights of all of those concerned, contrary to SSHD v Abbas*"

15. I do not accept that this ground is made out. The FtTJ at [47] self-directs on the test of 'unjustifiably harsh consequences'. Whilst this is stated in relation to the

second appellant, the FtTJ has considered the sponsor's position in his overall findings and in particular from [45]-[53] where he mentions the sponsor numerously in the context of his findings on whether there would be unjustifiably harsh consequences for the second appellant. He acknowledged specifically at the end of [45] '*the submission was that the appellant's appeals cannot succeed other than on whether the refusals breached their right to family life with the sponsor under Article 8 of the Human Rights Convention, in that, the decision will result in unjustifiably harsh consequences for one or both of them and/or their sponsor*'(my emphasis).

16. I find that this shows the FtTJ was aware of the applicable test and that this necessarily included assessment of the sponsor's position and whether there might be unjustifiably harsh consequences for him resulting from the refusals of the appellants' applications. The FtTJ was not required to state in terms whether or not there would be unjustifiably harsh consequences on the sponsor, and to my mind he has adequately addressed this issue in noting that though the sponsor was accepted as being vulnerable, he was himself dependent upon other relatives here for various means of support. In other words, though the decisions would likely be difficult for the sponsor, these difficulties were unlikely to reach the high 'unjustifiably harsh' threshold given that the sponsor is being supported by the relatives here who would also undoubtedly include assisting him in dealing with the emotional upset caused to him as a result of the refusal of the appellants' applications.

17. Furthermore, even if I were to accept that the FtTJ had erred by not including the sponsor in his assessment on whether there would be unjustifiably harsh consequences, this would not be material in any event, as the overall evidence presented to the FtTJ was not capable of supporting any proposition that refusal of the appellants' applications would result in such consequences for the sponsor given the FtTJ's findings on the limited extent of the family life in existence between the appellants and the sponsor where at [51] he stated '*the sponsor Qudrat had very little knowledge of the appellant's lives in Afghanistan other than clearly a natural concern he would have about wishing to be reunited with his mother and sister*', and it can reasonably be inferred from the FtTJ's remarks at [52] that he was only just persuaded of the existence of family between the appellants and the sponsor given the low threshold for engagement, which must be read in conjunction with his earlier comments in this regard at [51] as cited here above.

18. In reaching his decision, it is clear from the overall contents that the FtTJ had in mind whether there were exceptional circumstances which would render refusals of entry clearance a breach of Article 8 ECHR because the refusals would result in unjustifiably harsh consequences for not only the appellants but the sponsor also. I find that the FtTJ clearly adopted the correct approach.

Ground Two – Failure to take into account as a primary consideration the best interests of the second appellant as a child

19. The leading authority on this is to be found in the Upper Tribunal decision in **Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 88(IAC)**. The headnote to this case states:

i) The exercise of the duty by the Entry Clearance Officer to assess an application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require.

ii) Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is "an action concerning children...undertaken by...administrative authorities" and so by Article 3 "the best interests of the child shall be a primary consideration".

iii) Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55.

iv) Family considerations require an evaluation of the child's welfare including emotional needs. 'Other considerations' come in to play where there are other aspects of a child's life that are serious and compelling for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social backgrounds and developmental history and will involve inquiry as to whether:-

a there is evidence of neglect or abuse;
b. there are unmet needs that should be catered for;
c. there are stable arrangements for the child's physical care;
The assessment involves consideration as to whether the combination of circumstances are sufficiently serious and compelling to require admission.

v) As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important: see also SG (child of a polygamous marriage) Nepal [2012] UKUT 265 (IAC) [2012] Imm AR 939 .

20. The grounds acknowledge the FtTJ's self-direction at [47] regarding consideration of the best interests of the second appellant who was aged 17 years when the matter was heard before the FtTJ on 30 May 2024 (she is now aged 18 years). In fact the FtTJ noted at [18] that the respondent had also considered the best interests of this appellant. On the question as to whether the FtTJ considered the best interests in substance, in my judgement it is clear that he was alive to all the arguments advanced on behalf this appellant which is demonstrated from his findings at [50]–[51] and [54] where he dealt with this.

21. The FtTJ also acknowledged the way in which the appeals were presented before the First-tier Tribunal in that the central focus was on the case of the second appellant and its various facets, which I find, therefore included, certainly by implication, a best interests consideration that formed part of his overall assessment of this appellant's case. The FtTJ was cognisant of the arguments pertaining to the current circumstances in Afghanistan. He further noted in this regard that the country background situation in Afghanistan was relied upon '*very heavily*' to support the appellants' cases, although he

concluded also at [54] that '*in my judgement, the appellants are in no worse position than women generally in Afghanistan by assumption of control by the Taliban of the government of Afghanistan. No doubt generally women there may feel discriminated, however, the second appellant nor her mother have had any personal experience of being harmed by the Taliban*'. This was a finding that was open to the FtTJ and I find that his assessment here effectively encompassed a best interests consideration.

Ground Three – failure to make findings on and take properly into account, the evidence of witnesses

22. The FtTJ noted the evidence of all the witnesses, both written and then the oral evidence they gave at the First-tier Tribunal hearing. This is carefully set out at [19]-[39]. The complaint here that the FtTJ erred by not making sustainable findings on why the second appellant did not go out due to being terrified and fearing the Taliban, and that simply citing this was not sufficient in the absence of findings, I find this ground is not made out. Whilst I accept that the FtTJ appears to say at [54] that no evidence was given as to why the second appellant did not go out, I find he addressed his mind to the circumstances of the second appellant at [55] where he set out that he had nonetheless considered the plight of both appellants, and the second appellant in particular, upon whom there was central focus in the way the cases were put to him. Put another way, it is unfortunate that the FtTJ said there was no evidence when he had earlier recited the evidence extensively, and I find that his rehearsal of the evidence demonstrably shows that he was aware of the evidence relied upon in relation to why the second appellant claimed not to go outside, alongside all of the other arguments advanced on her behalf. The error therefore in stating that there was no evidence was not material and importantly, it did not either taint or infect the substantive findings made by the FtTJ where he did in fact consider the evidence relied upon.

Ground Four – failure to take into account properly or at all, relevant background evidence

23. It was averred that the FtTJ recorded that the appellants' skeleton argument relied heavily on the background situation in Afghanistan and in particular the plight of women in light of the Taliban takeover, although the FtTJ failed to mention or make any findings on the background evidence in issue despite all of this being argued and put forward in the skeleton argument. In particular, the skeleton argument included detailed references to background evidence relating specifically to the mental health crisis faced by women and girls in Afghanistan under the Taliban rule, and references were made also to the Overseas Development Institute (ODI) report entitled '*The mental health crisis among Afghan women and girls*' which was contained in the appellants' Country Material Bundle placed before the FtTJ.

24. This ground is not made out as the FtTJ at [42] noted clearly that he had been '*admirably and ably assisted*' by the very same skeleton argument to which Mr Hodson referred (and had prepared himself to assist the First-tier Tribunal at the hearing before the FtTJ). I do not find with this backdrop in mind that the FtTJ either missed anything in the country specific background material relied upon or that he had either forgotten or misremembered the evidence he had recited earlier in the same decision at [34]. I therefore find his comments that there

was no evidence, though unfortunate, was not a material error, and again, importantly, it does not support the wider contention that he did not consider in substance the country background evidence relied upon in this regard. This is aptly demonstrated by his comments at the beginning of [54] where he acknowledged that there had been heavy reliance upon the background situation in Afghanistan at the time and on the date he heard the appeals.

Conclusions

25. An appellate Court or Tribunal may not interfere with findings unless they are ‘plainly wrong’ or 'rationally insupportable’ as per **Volpi & Anor v Volpi** . That high standard is not reached here. The appellant's appeal must therefore fail.

26. It is now well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding Tribunal. An appeal before the Upper Tribunal is not an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting or even surprising, on their merits. Here, the decision of the FtTJ must be read as a whole. He gave adequate reasons for his findings and his conclusion followed the fact-sensitive analysis that was required. The findings and conclusions reached by the FtTJ were neither irrational nor unreasonable in the Wednesbury sense. Where a judge applies the correct test, and that results in an arguably harsh conclusion, it does not mean that it was erroneous in law.

27. I should say in this regard that during the discussions at the outset of the hearing I raised with the parties a preliminary observation that the FtTJ’s finding on the best interests consideration of the second appellant may have, at first blush, been inadequate. This was on an initial view on the basis that this appellant is a young female living in Afghanistan and given the difficult country background situation in that country at the present time under the Taliban rule. However, having considered all the points and arguments I heard from both parties during the course of the substantive hearing, and after careful assessment of all of the evidence that I have before me, I reached the conclusion that there was in fact no legal error in the FtTJ’s consideration on the best interests of the second appellant for the reasons set out above at [19]-[21]. In other words, my observations at the outset of the hearing were strictly within the confines of the preliminary discussions, and it was not an actual finding that there had been a error of law on this issue by the FtTJ, and I have since found that there was no such material error either on this or indeed on any of the other points raised. See on this, for example, Singh v SSHD [2016] EWCA Civ 492 at [31] and [34]-[35].

28. In all, I do not find when reading the FtTJ’s decision as a whole, that he failed to consider any of the evidence with the required degree of scrutiny. The decision is structured and a contextual reading of the decision shows that the FtTJ, having analysed all the evidence alongside all the arguments and submissions put to him, including all that was argued in the skeleton argument which he stated he had followed, gave sustainable reasons, concluding ultimately as stated in the decision. This included weighing up and finding in favour of the public interest after cogent considerations which he set out at [56] and [58].

29. I am satisfied that there were no identifiable material errors of law in the decision by the FtTJ, and the law was applied correctly, with sufficiently clear

findings and reasons provided. I am satisfied that the FtTJ correctly identified the correct tests and legal thresholds which it was required to apply in considering these appeals.

Notice of Decision

30. The appeals are dismissed.

31. The decision by FtTJ Hussain dismissing the appellants appeals shall stand.

S Meah
Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 November 2024