IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002719
UI-2024-002720

FTT No. HU/61839/2023 LH/01707/2024
HU/61841/2023 LH/01711/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 January 2025

Before

UPPER TRIBUNAL JUDGE LANE

Between

AHMAD JAMIL ZAKHIL
PIGHLA SURAYA FAZLI
(NO ANONYMITY ORDER MADE)

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Mr Bazini
For the Respondent: Mr Terrall, Senior Presenting Officer

Heard at Field House on 3 September 2024

DECISION AND REASONS

1. The appellants are citizens of Afghanistan, born on 2 September 1957 and 11 December 1960 respectively, who applied, on 2 September 2023 and 1 September 2023 respectively for entry clearance as the adult dependent relatives of Mr Hamid Jamil, their son, a British citizen living in the United Kingdom (the sponsor). The Entry Clearance Officer refused their applications on 25 September 2023 and the appellants appealed to the First-tier Tribunal, which dismissed their appeals. The appellants now appeal to the Upper Tribunal.

2. The First-tier Tribunal was concerned with the application of ADR 5.2 of the Immigration Rules:

ADR 5.2. Where the application is for entry clearance, the applicant, or if the applicant is applying as a parent or grandparent, the applicant's partner, must be unable to obtain the required level of care in the country where they are living, even with the financial help of the sponsor because either:

(a) the care is not available and there is no person in that country who can reasonably provide it: or

(b) the care is not affordable

3. Mr Bazini, who appeared for the appellants and who also drafted the grounds of appeal, submitted that the judge had fallen into error primarily by failing to make adequate findings of fact on the evidence, failing to make any proper assessment of the care needs of the appellants in the future and failing properly to assess the particular care needs of the second appellant in the context of the evidence regarding Afghanistan. He submitted that the 'crucial issue' in the appeal lay in the findings (and lack of findings) of the judge at [24-27]:

24. Mr Nasrat Jamil Zahkil, another son of the Appellants also living in the UK, also states in his witness statement that there are no facilities such as care homes in Afghanistan. He further states that, "There are a very few male workers who can assist for a few hours a day" and continues by stating that his mother is a very traditional and religious woman who will not have a man coming to the house to wash, bathe or give her medication. The Sponsor, in contradiction to Mr Nasrat Zahkil's written statement dated 12 December 2023, stated in oral evidence that male carers stopped being available approximately 4 months ago in November 2023.

25. It is unfortunate that Mr Nasrat Zahkil was not able to attend the hearing to give evidence on this point in particular; the Sponsor explained that he needed to leave the hearing centre to be at a parents' evening; the hearing did not start until 2pm so he was not able to stay. I note that no application was made to hold the hearing at an earlier time and it is not apparent why a meeting in the evening would prevent Mr Nasrat Zahkil from staying for a hearing starting at 2pm. When presented with this inconsistency the Sponsor repeated that care workers had been banned by the Taliban. In the absence of any supporting evidence for this I find that no good reason has been given for this inconsistency and that it casts some doubt on the credibility of the account.

26. Ms Haider referred me to country background evidence relating to lack of care facilities for elderly people in Afghanistan, the most recent dating from March 2023. I also have regard to CPIN Afghanistan humanitarian situation which states that as at April 2022 "Economic instability and the international freeze on funding has put the healthcare system on the brink of collapse" [2.4.8]. However, taking all the evidence before me into account (and not exclusively that indicated in the Respondent's guidance), I have not seen any up to date country background evidence or expert evidence specific to the circumstances of the Appellants which contradicts the hospital medical reports which themselves indicate that medical care is being provided, nor any up to

date country background evidence or expert evidence specific to the Appellants which indicates that they are not able to obtain the required level of care because it is not available in Afghanistan or there is no one in Afghanistan who can reasonably provide it.

27. I have regard to the finding of the Court of Appeal in *Ribeli v ECO* that the test imposed for entry clearance as an adult dependent relative is a rigorous and demanding one and it is for the Appellants to show that the test has been met. Whilst the Sponsor stated that the support from neighbours was a temporary arrangement I have not seen any evidence that the care which the Appellants are currently receiving, whether from the hospitals or from male care workers or from neighbours (or by the First Appellant on behalf of the Second Appellant), could not continue in its current form and that the Appellants' needs cannot be reasonably and adequately met in Afghanistan. With regard to all the evidence and circumstances, I find on balance that then requirements of ADR 5.2. of the Immigration Rules are not met.

4. Mr Bazini submitted that (i) the judge's finding at [24-25] as regards the inconsistency in the evidence was immaterial; whether the male carers could assist for a few hours or day or whether they had been banned by the Taliban from caring for females made no difference given that the medical evidence indicated that the appellants need 'continuous and long-term support.' (ii) although she accepted that the second appellant could not 'cook, take a bath, walk or achieve anything which involves physical movement' , the judge had failed to understand that the second appellant would not permit herself to be cared for by a male (ii) the judge's reference to a lack of evidence of care available from the hospital [26] showed that she had failed understand that it was daily care at home rather than occasional medical treatment in hospital which the appellants could not access (iii) it was unclear why the judge did not accept the oral evidence of the sponsor regarding the current situation, but, more importantly, the judge had no assessed the care needs of the appellants going forward in the context of a shortage of female carers and the first appellant's inability to meet his own care needs, let alone those of his wife.

5. Mr Terrall, for the respondent, submitted that the judge's analysis at [26[was accurate and in line with case law (in particular, *Ribeli [2018] EWCA Civ 611*). The appellants had failed to show that their current care needs could not be met in Afghanistan. The burden of proof was on the appellants and they had failed to discharge it.

6. I have considered the central issues in the appeal as submitted at the initial hearing by both representatives. I heard submissions also regarding the alleged failure of the judge to consider ADR 7.1 (which applies in respect of Article 8 ECHR in circumstances where an appellant cannot meet the rules but he or his family will suffer unjustifiably harsh consequences if leave is not granted). Arguments in respect ADR 7 may be relevant on the remaking of the decision but, for the purposes of my decision in this appeal, I make no finding beyond observing that Mr Bazini

is correct to say that, whilst arguably not a live issue before the First-tier Tribunal, ADR 7 was raised in the respondent's refusal letter.

7. This is a finely balanced appeal but, in my opinion, the reasons given by the judge for dismissing the appeal are, in part, unclear and problematic. I agree with Mr Bazini that the judge fails to explain why the discrepancy in the evidence regarding the care provided to the appellants currently makes any material difference to the outcome of the appeal (which leaves begging the question as to why the oral evidence, notwithstanding the discrepancy identified by the judge, was inadequate) and, whilst I acknowledge that the burden of proof was on the appellants, I find also that the judge has not clearly distinguished between the medical care which may be available and the day to day personal care required by both appellants. I find that the judge was required to assess the likelihood of that current care continuing in the future; put another way, the fragility of the current arrangements was a factor which the judge should have considered. In my opinion, these errors in the decision vitiate the First-tier Tribunal's decision and I set it aside. None of the findings of fact shall stand, including the findings as regards the engagement of Article 8 ECHR. There will need to be a fresh fact-finding exercise which is better conducted by the First-tier Tribunal to which this appeal is returned for that Tribunal to remake the decision following a hearing *de novo.*

Notice of Decision

The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand. the appeal is returned to the First-tier Tribunal for that Tribunal to remake the decision following a hearing de novo.

C. N. Lane

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 8 January 2025