IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002838

First-tier Tribunal No: HU/55184/2023
LH/05918/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

5th February 2025

UPPER TRIBUNAL JUDGE NEVILLE
DEPUTY UPPER TRIBUNAL JUDGE SEELHOFF

Between

ENTRY CLEARANCE OFFICER

Appellant

and

H B
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr L Youssefian, counsel instructed by NMH Solicitors
For the Respondent: Mr K Ojo, Senior Home Office Presenting Officer

Heard at Field House on 28 January 2025

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and her direct family members are 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 them. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. HB is a 27 year old national of Iran. When she was 10 years old, her father fled Iran and claimed asylum in the United Kingdom. He was initially unsuccessful but was ultimately recognised as a refugee by the Secretary of State on 8 November 2021. On 21 December 2022, HB and her mother made applications to join him in the UK.

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2. The provisions of the Immigration Rules applying to the application were then contained in Part 11, at paragraphs 352D and 352DB, as follows: (omitting text irrelevant to this appeal)

> 352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who has refugee leave or refugee permission to stay are that the applicant:
>
> (i) is the child of a parent who has refugee leave or permission to stay granted under the Immigration Rules in the United Kingdom; and
>
> (ii)
>
> (a) is under the age of 18; or
>
> (b) is over 18 and there are exceptional circumstances (within the meaning of paragraph 352DB);
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> […]
>
> 352DB. Where the requirements of paragraph 352D(ii)(b) apply, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which may justify a grant of leave to enter or remain, for the same duration as the sponsor (“leave in line”).
>
> In the case of an adult child seeking to join a parent with refugee leave, refugee permission to stay, temporary refugee permission to stay, or humanitarian protection in the UK, criteria which may amount to exceptional circumstances include:
>
> (i) they are dependent on the financial and emotional support of one or both or their parents in the country of origin or in the UK; and
>
> (ii) the parent or parents they depend on is either in the UK, or qualifies for family reunion or resettlement and intends to travel to the UK, or has already travelled to the UK; and
>
> (iii)
>
> (a) the applicant is not leading an independent life; and
>
> (b) they have no other relatives to provide means of support; and
>
> (c) they could not access support or employment in the country in which they are living and would therefore likely become destitute if left on their own.

> In the event of a refusal of leave to enter or remain on the basis the decision maker is not satisfied there are exceptional circumstances, consideration will also be given to whether refusal of the application would be a breach of Article 8 ECHR.

3. It is beyond doubt that HB's application was made expressly under those provisions (since relocated, in materially the same terms, to Appendix Family Reunion). The application type specified on the form refers to HB being an "other family member of someone in the UK with refugee leave", the corresponding fee was paid, and the correct "pre-flight family reunion" appendix was completed and attached, on which HB had written "I am [the] over 18 dependent child of a refugee".

4. Despite the existence of those rules, and the application having been made under them, the ECO instead considered the application against the requirements of paragraph EC-DR.1.1 of Appendix FM. This was plainly an error. While those requirements apply to adult dependent relatives of individuals settled in the UK, they do not apply anyone "who can seek leave" under Part 11: this is made clear at paragraph GEN.1.1. The ECO refused the application, deciding that the requirements of paragraph EC-DR.1.1 were not met and that there were no exceptional circumstances to render refusal a breach of Article 8 ECHR.

5. HB appealed to the First-tier Tribunal. The Appeal Skeleton Argument submitted on her behalf argued that the ECO had applied the wrong rules, on the basis that paragraph 352D is also engaged for an individual who is "over 18 and there are exceptional circumstances". The Respondent's Review submitted in response simply denied that the wrong rule had been applied because HB was over 18, entirely failing to engage with HB's argument.

6. The appeal was heard by Designated Judge Shaerf. The ECO did not send a representative to the hearing. In his decision of 28 February 2024, the Judge found that the ECO was wrong to have applied the rules applying to adult dependent relatives in Appendix FM, and should have applied paras 352D and 352DB. He then allowed the appeal on the following basis:

> 31. …the ECO's decision, at least in its present form, cannot stand if only because the ECO made the decision by reference to the wrong Immigration Rule. This with the other matters mentioned in this decision constitute good reason for allowing the appeal to enable the ECO to give the Appellant's application a thorough and holistic consideration by reference to the correct Immigration Rule, in force at the date of the decision under appeal, 9 March 2023, hopefully with the benefit of such further evidence as the Appellant may supply.

7. Dissatisfied with this outcome, the ECO applied for permission to appeal to the Upper Tribunal on two grounds: one, that the correct rules were indeed those in Appendix FM; and two, that the statutory appeals regime required the Judge to determine the substantive compliance of refusal with

Article 8 rather than require the ECO to take the decision again. Permission was granted on a renewed application to the Upper Tribunal.

Ground One

8. Ground One continues to assert that para 352D applies to “children who are under 18 years of age” so Appendix FM provides the applicable rule instead. The author of the grounds of appeal either cannot have read, or has chosen to ignore, multiple vital documents: the rule itself, the corresponding caseworker guidance, the ASA, Judge Shaerf’s decision and Judge Davidge’s permission decision. These set out the position beyond all doubt, as Mr Ojo quite sensibly conceded at the hearing before us. It is nonetheless a matter of concern that the Secretary of State’s grounds of appeal were so carelessly drafted.

9. Judge Shaerf was correct to identify paragraph 352D as the applicable rule, and Ground One is not established.

Ground Two

10. This ground is well founded, as conceded by HB in her rule 24 response. As held in Charles (human rights appeal: scope) Grenada [2018] UKUT 89 (IAC), for example at [46]-[49], and in other authorities, the task of the Tribunal in this appeal was to determine whether refusing HB entry to the United Kingdom would violate Article 8 of the European Convention on Human Rights. It was not open to the Judge to, in effect, remit the case back to the ECO to decide under the correct rule. The Judge appears to have considered that appeals against an entry clearance decision were to be distinguished in this respect from those against an “in-country” decision by the Secretary of State, but the relevant statutory provisions provide no support for such a distinction.

Disposal

11. Being satisfied that the decision of the First-tier Tribunal involved the making of an error of law as put forward in Ground 2, we set it aside. The Judge made no discrete findings of fact that ought to be preserved. The parties were agreed that the lack of any substantive determination of the relevant issues in the First-tier Tribunal, together with the fact-finding required when the matter is re-heard, mean that the appeal ought to be remitted to the First-tier Tribunal. We agree. The only countervailing factor is the importance of avoiding yet further delay, but it is a matter for the First-tier Tribunal whether it considers that the hearing of the appeal ought to be expedited.

12. Having identified the correct provisions of the Immigration Rules, at the hearing we proposed that the ECO be directed to provide a supplementary decision letter addressing them. This was supported by both representatives.

13. An anonymity order was made in the First-tier Tribunal, and we consider it appropriate to do likewise. HB and her family remain in Iran, and the possibility of risk arising from her or her father's identification, together with maintaining the integrity of the UK asylum system, justify derogation from the principle of open justice.

Notice of Decision

(i) The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

(ii) The case is remitted to the First-tier Tribunal for re-hearing with no facts preserved.

(iii) The Upper Tribunal directs the ECO to provide a supplementary decision letter assessing HB's circumstances against the correct provisions of the Immigration Rules as identified in this decision. This must be provided to the First-tier Tribunal and to HB **within 35 days** of the date on which this decision is sent to the parties.

(iv) All further directions are a matter for the First-tier Tribunal.

J Neville
Judge of the Upper Tribunal
Immigration and Asylum Chamber
30 January 2025