Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08842/2019 (V)

THE IMMIGRATION ACTS

Heard by a remote hearing	**Decision & Reasons Promulgated**
On the 23 July 2021	**On the 11 August 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

R J
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms G. Kiai, Counsel, acting on behalf of the appellant.
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge Verghis (hereinafter referred to as the "FtTJ") promulgated on the 24 February 2020 , in which the appellant's appeal against the decision to refuse her application for entry clearance to settle in the UK to join her father and sponsor was dismissed.

2. The FtTJ did not make an anonymity order but having considered *Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008* I find that it is appropriate to make such an order as the proceedings refer to a previous protection claim, and the appellant is a minor. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or her family members. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The hearing took place on 23 July 2021, by means of *Microsoft teams* which has been consented to and not objected to by the parties. A face- to- face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the sponsor and his brother so that they were able to hear and see the proceedings being conducted. There were no issues regarding sound, and no problematic technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

4. The appellant is a national of Iran. In an application made on 18 December 2018 she applied for entry clearance by way of family reunion to enter the UK and settle with her father and sponsor. Her father left Iran in 2015 and entered the United Kingdom. He claimed asylum and his claim was allowed and he was granted refugee status.

5. On the 2 May 2019 the respondent refused the application. The Entry Clearance Officer (hereinafter referred to as the "ECO") considered the application under paragraph 352D but gave the following reasons for refusing the application:

   (1) Having considered the documentary evidence the ECO accepted that the sponsor had named the appellant as his child in his SEF but that the respondent must be satisfied that the appellant formed part of the family unit with the sponsor prior to his departure from Iran in 2015. Reference was made to the divorce certificate in 2010 and that the appellant's mother was awarded custody. It was stated that the appellant's father left Iran in 2015 and that she had not seen him since. The ECO considered that the appellant appeared to have lived for a significant part of her life separately from the sponsor. The ECO acknowledged that an affidavit of consent from her mother gave permission for her to join her father and also a letter from legal representatives stating that her mother had started a new life and that she had been residing with her grandmother who had since died but that the documents did not demonstrate that they had been the living arrangements .The ECO was therefore not satisfied that she was not leading an independent life from the sponsor (under paragraph 352D (iii).The ECO was also not satisfied that the appellant was part of the family unit of the sponsor at the time the sponsor left Iran (see paragraph 352D (iv)).

(2) The ECO considered whether the application raised any exceptional circumstances to warrant a grant of entry clearance outside the requirements of the Immigration Rules, but the ECO reached the conclusion that the appellant had not demonstrated that she was a member of the sponsor's pre-flight family and therefore the application was refused.

6. Following the refusal of the application, further documents were submitted with the appeal. On the 23 October 2019, the ECM considered the supporting documents submitted but, on his review, stated that he was satisfied that the original decision to refuse was correct and was not prepared to exercise discretion in the appellant's favour.

7. The appellant's appeal against the respondent's decision to refuse entry clearance came before the First-tier Tribunal on the 27 January 2020.

8. In a determination promulgated on the 24 February 2020 the FtTJ dismissed the appeal on human rights grounds, having considered that issue in the light of the appellant's compliance with the Immigration Rules in question and on Article 8 grounds.

9. At paragraphs [21]-[35] the FtTJ set out his findings of fact and conclusions on the appeal. The FtTJ that paragraph 352D (iii) was satisfied and that the appellant was a minor and was not leading an independent life nor had she formed any part of an independent family unit (at [27]). The issue centred upon paragraph 352D (iv) and whether the appellant "as part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum."

10. In summary, the First-tier Tribunal Judge considered the evidence relating to the separation and divorce of the adult parties concerned and the study from the Persia educational foundation published in 2017 which set out aspects of the Constitution of Iran, which the judge accepted "as presented, to be accurate" (at [30]-[31]). However having considered the evidence from the appellant's sponsor as to their circumstances after the divorce, the judge found at [32] that the appellant had not established to the required standard that the appellant was part of the sponsor's family unit and that the arrangements made between the parties was more "malleable and certainly not set in stone" and found that they were more akin to a "shared care" notwithstanding the legal effect of Article 1170. The judge found that the Article 1170 was not determinative of the situation and that the issue of whether paragraph 352D was engaged was "fact sensitive" and that on the available evidence the judge found that there was "not enough evidence to demonstrate to the required standard that the appellant was part of the sponsor's family unit within the meaning of paragraph 352D (iv) prior to his departure from Iran".

11. At paragraph [35] when considering Article 8, the FtTJ considered that there was no direct written evidence from the appellant herself nor from her mother

and that there was evidence that she continued to enjoy the time she spent with her extended family in Iran and her cousins, and the judge found that she had known no other life than that with her mother father and extended family in Iran. Thus taking the evidence in the round, the judge reached the conclusion that refusing the application would not have "unjustifiably harsh consequences for the appellant, sponsor or other family members" and that the decision was proportionate. He therefore dismissed the appeal.

12. Permission to appeal was issued on four grounds and permission to appeal was granted by FtTJ Bristow on 29 April 2020.

The hearing before the Upper Tribunal:

13. In the light of the COVID-19 pandemic the Upper Tribunal (Judge Sheridan) issued directions on 1 July 2020 that he had reached the provisional view that it would be appropriate to determine the issue of whether there was an error of law and if so whether the decision should be set aside without a hearing. Directions were given that the party who sought permission to appeal may submit further submissions in support of the assertion of an error of law and on the question of whether the FtTJ's decision should be set aside if error of law is to be found, to be filed and served on all of the parties. Directions were given for the other party to file and serve submissions in response. At paragraph 3 of the directions, it was set out that if any party considered that a hearing was necessary to consider the questions set out, they were required to submit reasons for that view within the timetable set out by UTJ Sheridan (within 21 days of the decision being sent out).

14. On th 5 November 2020, the respondent filed a Rule 24 response. No reply was received on behalf of the appellant.

15. Further directions were sent to the parties on 15 April 2021.

16. On behalf of the appellant a document was filed entitled "written submissions" on the 15 July 2021 and it is accepted that the directions issued on the 1 July 2020 had not been complied with (see paragraph 3).

17. The hearing was therefore listed as a remote hearing with both advocates providing their oral submissions. I am grateful to both advocates for their submissions.

18. The relevant Rule for this appeal is set out at part 11 of the Rules where the Secretary of State has made provision for close family members to seek family reunification with persons recognised as refugees in the United Kingdom.

19. Paragraph 352D states:

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 currently has refugee status are that the applicant:

(i) is the child of a parent who currently has refugee status granted under the Immigration Rules in the United Kingdom; and

(ii) is under the age of 18; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum; and

(v) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and

(vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

20. I therefore now turn to the grounds. Mr Diwnycz on behalf of the respondent relied upon the Rule 24 response where certain concessions were made as to Grounds 3 and 4. As to ground 3, it was submitted on behalf of the appellant that the FtTJ erred in law in finding that the appellant and the sponsor were not part of the same family unit by reference to the decision at paragraph [32] where it was stated that arrangements were more akin to "shared care". The grounds assert that it was unclear why this arrangement would mean that they were not part of the same family unit.

21. The respondent conceded that in light of that finding the judge erred in law failing to consider the decision of BM and AL (352D (iv): meaning of "family unit") Colombia [2007] UKIAT 00 55 and that the question that the judge needed to address, and answer was whether the appellant should properly be separated from the "family unit" that remained in the country of origin. On the basis of the suggestion of "shared care" the respondent considered the remaining family unit would be the maternal unit and that the fact that her mother may have consented to the appellant joining her father in the UK was no answer in light of the guidance given in BM and AL. Thus it was submitted that the judge had needed to make a clear, reasoned and unambiguous finding as to what was the "primary" family unit if more than one existed as this may then inform the merits of separation from a "secondary" family unit which is relevant to the article 8 proportionality assessment.

22. As to ground 4, the appellant submitted that there had been a failure to provide reasons/failure to consider material evidence when considering Article 8 and on the basis that the appellant was a minor with no home in Iran and that the judge had failed to engage with the factual account as to her circumstances in Iran relating to her family members and their inability to care for her as set out

in the statement of the sponsor and the supporting evidence set out in 2 witness statements. The judge also failed to consider the impact on the sponsor of separation and his inability to return to Iran to care for her as an accepted refugee.

23. The respondent also concedes that there is a material error in respect of ground 4 on the basis that as it is accepted on behalf of the respondent that there was an error in relation to ground 3, and that it would have material relevance to the proportionality assessment under Article 8.

24. In respect of ground 1, it is submitted on behalf of the appellant that there was an error of fact in the decision of the FtTJ at paragraph [32] which led to unfairness. Ground 2 is a failure to take into account material evidence or a failure to provide reasons. This is based on the failure of the FtTJ to consider or attach any weight to supporting evidence that had been provided at the hearing as set out at paragraph 7 – 8 of the grounds.

25. In the written response the respondent did not have access to the written statements and therefore could not reach any view on those earlier grounds but stated that it could be addressed at a further hearing.

26. In respect of Grounds 1 and 2 (which related to mistake of fact) and failure to take account of material evidence) and having had the opportunity to read the written submissions of Ms Kiai it is now also accepted on behalf of the respondent that those grounds were made out and that the decision should be set aside.

27. Having considered the grounds and having done so alongside the oral and written submissions made by the advocates and the decision of the FtTJ I am satisfied that the concession is properly made and that the decision of the FtTJ involved the making of an error on a point of law and that the decision should be set aside.

28. Given the nature of the concessions made it is only necessary to set out in brief terms why I am in agreement with the course adopted by both advocates' .

29. The grounds seek to challenge the FtTJ's conclusion reached on paragraph 352D (iv)). At paragraph [31-34] the judge then set out his reasons as to why he was not satisfied that the appellant was part of the pre-flight family unit. Whilst the respondent in the rule 24 response conceded an error based on ground 3 and as set out above, the respondent had based that concession on the factual finding that the judge had suggested a "shared care" arrangement and not on the factual basis that the appellant had advanced in his case. That is because the respondent had not seen at the time of the response the statements that related to grounds 1 and 2. Mr Diwnycz accepts now that ground 1 is made out and that there was a mistake of fact made at [32] which formed the basis of the eventual assessment under paragraph 352D (iv) and therefore the factual basis

as to the arrangements after the appellant's mother's engagement and remarriage was incorrectly considered.

30. As to ground 2, it is also conceded that the judge failed to take into account material evidence which related to the evidence of the sponsor's brother who attended the hearing and gave oral evidence. As the grounds set out the FtTJ at paragraph 10 stated that the appellant's case was articulated primarily through the sponsor but there was other evidence from the sponsor's brother and also the sponsor's partner, which was also relevant to the factual assessment.

31. In light of the errors set out in grounds 1 and 2, it also follows that ground 3 and 4 are made out. There is no dispute that any assessment of paragraph 352D (iv) is a factual assessment and therefore the failure to take into account material evidence and any mistake of fact made would necessarily have the impact that the factual assessment that was made was made on an incorrect basis. Whilst this is a human rights claim, the ability to meet the relevant Immigration Rules forms part of the Article 8 assessment. For the same reasons, it has also been accepted on behalf the respondent that the Article 8 assessment was in error by proceeding on the wrong factual premise and as ground 4 sets out, the failure to consider the evidence relating to the circumstances for the appellant in Iran and also the impact on other family members given the sponsor's status in the UK is an error that is material.

32. In the light of those issues taken together and in the light of the FtTJ's misunderstanding of the evidence I am satisfied that this may have impacted on his overall conclusions both under the rules and when considering Article 8 of the ECHR.

33. For those reasons, I am satisfied that it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law and that the decision should be set aside.

34. As to the remaking of the decision, Ms Kiai relied upon the written submissions at paragraph 25 and 36. At paragraph 25, she set out that the Upper Tribunal should preserve the finding at paragraph 27 and remit the appeal to the FtT for further fresh findings of fact to be made. In her oral submissions she sought to amend paragraph 25 to include paragraphs 22 – 25 of the FtTJ's decision. Ms Kiai then gave her reasons as to why she sought the preservation of those particular paragraphs.

35. Having heard her submissions on this issue and noting that there was no dispute between the advocates as to what findings should be preserved I have reached the following conclusion as to what paragraphs/findings should be preserved.

36. They are as follows:

(1) paragraph 22; that there is no dispute as to the immigration history of the sponsor and that a tribunal on 24 November 2015 found him to be a credible witness.

(2) Paragraph 23; there is no dispute that the sponsor and appellant are related is claimed and are father and daughter and that they have a close and loving parent/child relationship.

(3) Paragraph 24; whilst the respondent in the decision letter did not accept that they had met each other since the sponsor's departure, it was accepted at the hearing from the evidence that the sponsor and appellant had met in Turkey twice since the sponsor left Iran and on a third occasion the sponsor travelled to Turkey, but the appellant could not travel unaccompanied to meet her father.

(4) Paragraph 25; it was accepted that the paternal grandparents had died.

(5) Paragraph 27; there was no dispute that paragraph 352D (iii) was met.

37. Ms Kiai drew my attention to paragraphs 30-31 and the FtTJ's acceptance of the study from the Persia educational foundation published in 2017 which set out aspects of the Constitution of Iran with commentary and in particular Articles 1169 and 1170 as to the Constitution relating to custody after divorce. Ms Kiai sought for the finding to be preserved. Mr Diwnycz stated that there had been no issue before the FtT that the reference made to those 2 particular Articles of the Constitution was inaccurate and therefore he accepted what the judge had set out at [30] that the paper was helpful to the extent that it set out the Articles of the Constitution but that the tribunal made no further comments on the recommendations within the paper. As it appears there had been no challenge to those 2 Articles before the FtT as confirmed by Mr Diwnycz, that can be preserved to the limited extent accepted by the FtT as set out at paragraph [30]. If reliance is placed beyond that, it will be matter for the appellant's legal representatives as to whether expert evidence is required as to the operation of Iranian law.

38. Ms Kiai in her oral submissions stated that the appeal should be remitted to the First-tier Tribunal in light of the unfairness to the appellant (grounds 1 and 2) and that the necessity for factual findings to be made on all of the evidence. She also submitted that by not remitting the decision it would take from the appellant a subsequent right of appeal should it be necessary.

39. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

40. I have considered the further hearing of the appeal in the light of the practice statement recited above and by reference to the history of the appeal. The decision is a case management decision, and the Upper Tribunal has a broad discretion to remit or remake a decision which has been found to involve an error of law (see S12 of the Tribunal, Courts and Enforcement Act 2007). In applying that discretion, I have reached the conclusion that as a result of the nature of the errors of law set out above, and as Ms Kiai has submitted, it will be necessary for the sponsor and two other witnesses to give evidence and to deal with the evidential issues, and therefore further fact-finding will be necessary and in the light of the relevant documentary evidence which had not been considered by the FtTJ. I accept the submissions made by Ms Kiai for the appeal to be remitted to the First-tier Tribunal for a hearing. I find that the appeal falls into both categories (a) and (b) as set out in the practice statement above as Ms Kiai has submitted.

41. For the reasons given above, I am satisfied that the decision of the FtTJ did involve the making of an error on a point of law and the decision shall be set aside and will be remitted for a fresh hearing before the First-tier Tribunal with the preserved findings as set out above.

Notice of Decision.

42. The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision of the FtT shall be set aside. The decision shall be remitted to the First-tier Tribunal for a hearing with the preserved findings as set out above.

Signed *Upper Tribunal Judge Reeds*

Dated 26/7/2021