IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-006560
UI-2022-006561

First-tier Tribunal Nos:
HU/57983/2021 HU/57982/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
13 August 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

ZEBA KHUSHBEN HAKIMI (FIRST APPELLANT)
ARZOO HAKIMI (SECOND APPELLANT)
(NO ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Pipe, Counsel, instructed by Bushra Ali Solicitors
For the Respondent: Mr T Melvin, Senior Presenting Officer

Heard at Field House on 26 July 2023

DECISION AND REASONS

Introduction

1. The Appellants appeal with permission against the decision of First-tier Tribunal Judge A Davies ("the Judge"), promulgated on 28 July 2022 following a hearing which took place on 18 July of that year. By that

decision, the Judge dismissed the Appellants' appeals against the Respondent's refusals of their human rights claims.

2. The Appellants are both Afghan citizens. The first Appellant is the mother of the second. The United Kingdom-based Sponsor is the son of the first Appellant and the brother of the second. He is a British citizen.

3. By way of background, the family had at various times fled Afghanistan, ending up in various countries around the world. The Sponsor had assisted the coalition forces in Afghanistan for a significant period of time before coming to the United Kingdom in 2012. Other siblings had gone to Germany, Australia and Greece. The Appellants had relocated to Turkey and have resided there since approximately 2018. Their residence has been on the basis of temporary visas which have been renewed over the course of time.

4. By applications made on 10 August 2021 the Appellants sought entry clearance to join the Sponsor as adult dependent relatives, pursuant to the relevant provisions under Appendix FM (now contained within Appendix ADR to the Immigration Rules). The applications asserted that both Appellants suffered from mental health problems and, in particular the first Appellant, required help with personal care needs. In addition, both Appellants, again in particular the first, were suffering emotionally from continuing to being separated from the Sponsor.

5. The applications were treated as human rights claims and were refused by the Respondent by decisions dated 16 November 2021. In essence, the Respondent concluded that neither Appellant required long term care with personal needs or that any such care, if needed, would not be available in Turkey. Beyond that the Respondent was not satisfied that there were any exceptional circumstances.

The Judge's decision

6. Having set out the relevant background, the Judge considered the evidence and dealt with the Appellants' cases in the context of the Immigration Rules and then on a wider Article 8 basis. He accepted that the Appellants could not return to Afghanistan: [18]. He found that the Appellants were currently living in a flat in Turkey owned by one of the first Appellant's sons, albeit that he had plans to sell that property: [23]. The Judge was satisfied that there was no imminent prospect of the Appellants having to leave Turkey, given the renewal of their temporary visas in the past: [26]. Financial support has been provided through rental income from property owned in Afghanistan and the Sponsor: [27], [31]. The Sponsor had a close relationship with the first Appellant and had visited the Appellants regularly: [30], [32]. The Judge found that the second Appellant had provided care for the first, but it was emotional support and encouragement from the Sponsor which the first Appellant really sought and such emotional support could not, it was claimed, be provided by anyone else: [29]. The Judge accepted that there was a "close filial relationship" between the Sponsor and the first Appellant. The Judge elsewhere described the relationship as being a "close emotional attachment" and that there were "strong emotional ties": [30], [61].

7. Various medical reports were discussed. The Judge accepted that both Appellants were receiving medication for depression and that the medical reports reflected a strong wish of the first Appellant in particular to be reunited with the Sponsor. The Judge had certain concerns relating to the methodology, objectivity, and the apparent lack of a thorough psychiatric examination conducted by the relevant professionals, which led him to place only "some limited weight" on the reports: [42].

8. In terms of the Immigration Rules, the Judge recorded the Respondent's concession that E-ECDR.2.4. had been satisfied and that it was only E-ECDR.2.5. which was in play: [45]. That provision required that relevant care was either not available in the country of residence (here, Turkey), or

that, whilst available, it was prohibitively expensive. The Judge found the first Appellant was able to obtain relevant medication in Turkey and that support was being provided by the second Appellant: [35], [46], [61]. The medical evidence did not suggest "significant physical incapacity": [46]. The Judge found that the second Appellant could not come within the Immigration Rules because she was not a parent or grandparent of the Sponsor: [47]. It is clear enough that the Judge concluded that E-ECDR.2.5. had not been satisfied. He doubted the existence of family life within the section of his decision addressing the Immigration Rules: [50]-[52].

9. On a wider Article 8 assessment, the Judge again indicated that he did not accept the existence of family life: [58], [61]. He used the term "exceptional" in relation to the consideration of family life: [61]. The Judge noted that the "personal interests" featured on the positive side of the balancing exercise, but went on to say that the "decisive element" in that exercise was a combination of the public interest in immigration control and the failure of the Appellants to meet the relevant Immigration Rules: [62].

10. The appeals were accordingly dismissed.

The grounds of appeal

11. Six grounds of appeal were put forward and permission was granted in respect of them all. Rather than setting them out here we will address them when setting out our conclusions, below.

Withdrawal of the second Appellant's appeal

12. Prior to the hearing, the second Appellant sent a signed letter to the Upper Tribunal, dated 17 July 2023, confirming that she wished to withdraw her appeal. When this issue was raised at the hearing, Mr Pipe confirmed that the second Appellant had obtained a visa to go to Australia to work. That visa had been issued in September 2022 (after

the hearing in the First-tier Tribunal) and that she had in fact left Turkey for Australia later that month, or in early October. This change in her circumstances had prompted the request to withdraw the appeal.

13. We were satisfied that the request to withdraw had been made on an informed basis and that it was appropriate for us to give consent to that request. Accordingly, we treat the second Appellant's appeal as having been withdrawn. For administrative purposes, a separate notice of withdrawal pursuant to Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008 will be sent out together with this error of law decision.

The hearing

14. Mr Pipe relied on five of the six grounds of appeal originally drafted, with what was the first ground falling away in light of the withdrawal of the second Appellant's appeal.

15. In summary, he submitted that the Judge had misdirected himself as to the test for family life between adult members of a family. Whilst the Judge had found that there were strong ties between the Sponsor and the first Appellant, he had gone on to seemingly apply an exceptionality threshold at [62]. This was contrary to the binding guidance set out in cases such as Kugathas [2003] EWCA Civ 31 and Mobeen [2021] EWCA Civ 886. Mr Pipe submitted that this error was material because it could have led to the Judge failing to give proper recognition to any protected rights when carrying out any proportionality exercise. Secondly, Mr Pipe submitted that the Judge had engaged in double-counting in [62], where it was said that the decisive factor against the first Appellant was the public interest in immigration control combined with the inability to meet the Immigration Rules. He submitted that that inability was in effect part and parcel of the public interest and should not have been counted twice over. Thirdly, Mr Pipe submitted that the Sponsor's rights had not been considered adequately, or indeed at all. Fourthly, the Judge had failed to

make clear or adequate findings in respect of E-ECDR.2.5. Fifthly, it was submitted that the Judge had made a mistake of fact in respect of the medical reports. Diagnostic criteria had been stated in those reports, contrary to what the Judge said at [40]. This error had led to the Judge wrongly limiting the weight he attributed to the medical evidence.

16. In response, Mr Melvin submitted that there were not material errors of law. The adult dependent relative Immigration Rules set a very high threshold and the Judge had been entitled to find that those Rules had not been met. In terms of Article 8 outside of the Immigration Rules, the Judge had provided a careful and considered decision and all the findings had been open to him. We were urged to read the decision holistically and to accept that none of the findings were irrational.

17. In response to Mr Melvin's submissions, Mr Pipe confirmed that his challenge did not necessarily depend on the Tribunal findings errors in respect of E-ECDR.2.5. The wider Article 8 issue could be separated from the Immigration Rules issue.

18. At the end of the hearing we reserved our decision.

Conclusions

19. We have reminded ourselves of the need for appropriate judicial restraint before interfering with a decision of the First-tier Tribunal. This is particularly so where a Judge has read and heard a variety of sources of evidence and has reached conclusions involving an evaluative assessment of the evidence as a whole.

20. Having read the Judge's decision sensibly and holistically, we conclude that he has not materially erred in law. Our reasons for this are as follows, addressing first the two challenges to the Judge's consideration of the evidence relating to the Immigration Rules.

21. In our view, the Judge did deal adequately with the issue under E-ECDR.2.5 of Appendix FM. It is right that [46] is in fairly brief terms. However, what is said there must be viewed in the context of everything which preceded it, including the consideration of the evidence from the Appellants, the Sponsor, and the medical professionals.

22. It is important to emphasise that the focus of E-ECDR.2.5 is on care needs, not simply an understandle desire for emotional support and/or family reunification. We acknowledge that such needs can encompass more than physical assistance and can involve appropriate psychological care. Having said that, on any view, the test imposed by E-ECDR.2.5 is "rigorous and demanding": Ribeli [2018] EWCA Civ 611, at [56]. We have no reason to think that the Judge was unaware of the appropriate threshold.

23. The Judge was rationally entitled to find that: both the Appellants been able to access relevant medication in Turkey; that there was no significant physical incapacity; that the precise level of mental health difficulties had not been made clear by the evidence; that the second Appellant was able to provide appropriate care for the first; and that they were both living in suitable accommodation and had meaningful financial support. As far as we can see, there was no evidence before the Judge as to any investigation into additional/alternative care provision in Turkey for one or both of the Appellants.

24. The Judge was entitled to, at least implicitly, recognise the difference between, on the one hand, the Appellants' desire for direct emotional support from the Sponsor and, on the other, their care needs.

25. Turning to the medical reports, we accept that the Judge was wrong to have stated that no diagnostic criteria had been cited. In fact they had been. We conclude, however, that this error was, in the circumstances of this case, immaterial. It is clear from the Judge's consideration of the medical evidence at [35]-[41] that he had relatively significant concerns

about the reports. These were not confined to the absence of diagnostic criteria, but included the "objectivity and the apparent lack of a thorough psychiatric examination". The Judge was entitled to hold those concerns and we are not satisfied that the factual error might have made a difference to the overall outcome.

26. It follows from the above that there are no material errors of law in relation to the Judge's assessment of the Appellants' cases under the Immigration Rules.

27. We turn to Article 8 in its wider context. We recognise that at certain points in his decision the Judge stated findings which pointed towards the existence of family life, whilst in other passages he indicated that family life was absent: [30], [39], [52], [58], and [61]. There is, on the face of it, something of a tension here.

28. The difficulty in the Appellants' path as regards the family life issue is what the Judge said at [58] and [61]. On a fair reading of [58], we conclude that whilst the Judge had (at least) doubts as to the existence of family life, he nonetheless went on to consider the question of proportionality. This is demonstrated in the final sentence of that paragraph:

> "However, looking at the duty to promote family life, I have considered whether the failure to do so would be disproportionate and a breach of Article 8(2) balancing the personal interests of the appellant's with the public interest in immigration control."

29. In essence, what followed constituted an "in any event" assessment; in other words, on the premise that family life did exist, was the Respondent's disproportionate?

30. In respect of [61], we agree that there is no exceptionality requirement in order to show the existence of family life under Article 8(1). However, the passage in question is part and parcel of the Judge's

proportionality assessment, not that of whether family life itself existed. At that stage of the process and in light of the conclusion that the Immigration Rules had not been satisfied, he was entitled to consider whether there were exceptional (or, to put in other terms, particularly strong) aspects of the relationships between the Appellant's and the Sponsor.

31. We conclude that the judge did not err in respect of the family life issue.

32. On initial consideration, we saw some merit in Mr Pipe's submission that the judge might have double-counted at [62]. On further reflection, we reject that aspect of the challenge. The first of the two factors taken into account by the judge was the public interest in immigration control. That is a mandatory consideration, pursuant to section 117B(1) of the NIAA 2002, as amended. At the hearing, Mr Pipe fairly accepted that this general consideration was not confined to whether an individual could or could not satisfy any specific provisions of the Immigration Rules. We agree. The second consideration taken into account was the specific inability of the Appellant's to satisfy the Immigration Rules. In truth, this was not double-counting, but rather a legitimate conclusion that the second consideration enhanced the first.

33. There is no error in respect of the double-counting issue.

34. In respect of the Sponsor's own rights, we acknowledge that the judge did not refer to these in terms. It would have been better if he had. Having said that, we are satisfied that the Judge was aware of the Sponsor's perfectly genuine feelings towards the Appellants and his understandable desire to be reunited with them: this much was clear from the Sponsor's own evidence. Beyond that, the Judge was entitled to take account of the fact that all the protagonists were adults and that the Sponsor had been separated from the Appellant's for many years. It was

open to the Judge to conclude that the ties between three were not exceptional (insofar as the proportionality assessment was concerned).

35. On the facts of this case, the failure of the Judge to have specifically referred to the Sponsor's rights did not constitute a material error of law.

36. Overall, there is in our judgment no proper basis on which to interfere with the Judge's decision.

Postscript

37. As mentioned earlier in our decision, the second Appellant is no longer residing with her mother in Turkey. This change in circumstances *may* have had a material impact on the first Appellant's health and well-being. Any further steps in that regard are of course a matter for her, no doubt with advice from her legal representatives.

Anonymity

38. The Judge made no anonymity direction and we see no reason to do so.

Notice of Decision

39. The decision of the First-tier Tribunal did not involve the making of errors of law. That decision stands.

40. The appeals to the Upper Tribunal are accordingly dismissed.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 1 August 2023