IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16688/2019**

THE IMMIGRATION ACTS

Heard at Field House
By Microsoft Teams
On the 23rd June 2021

Decision & Reasons Promulgated
On the 5th July 2021

Before

UPPER TRIBUNAL JUDGE OWENS

Between

ENTRY CLEARANCE OFFICER

Appellant

and

Mr Mohamed Jwel
(Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr Walker, Senior Home Office Presenting Officer
For the Respondent: Mr Karim, Counsel instructed by Chancery Solicitors

DECISION AND REASONS

1. The Secretary of State has appealed against a decision of First-tier Tribunal Judge Wood sent on 17 February 2021, allowing Mr Jwels's appeal on Article 8 ECHR grounds against a decision dated 9 August 2019, refusing to grant him leave to enter the UK as a spouse pursuant to Appendix FM of the immigration rules. First-tier Tribunal Judge Parkes granted permission on 16 March 2021.

2. The hearing was held remotely. Both parties requested an oral hearing and did not object to the hearing being held in this manner. Both parties participated by Microsoft Teams. I am satisfied that a face-to-face hearing could not be held because it was not practicable and that all of the issues could be determined in a remote hearing. Both parties confirmed at the end of the hearing that it had been fair.

Background

3. Mr Jwel is a citizen of Bangladesh born on 1 July 1960. He is currently 60 years old. He married his British citizen spouse in 1996 and she relocated to Bangladesh where the family had three children who were all born British citizens. In 2010 the family decided that the sponsor and her three children would relocate to the UK in order for the British children to access the British education system. Mr Jwel continued to live and work in Bangladesh. In 2011 he applied for a visit visa which was refused. On 15 May 2019 he applied for entry clearance under Appendix FM of the rules. The three children are now aged 22, 17 and 12.

4. The application was refused on 9 August 2019 on the basis that Mr Jwel did not meet the requirements of Appendix FM because he could not meet the minimum income requirements or the English language requirements. The Secretary of State was of the view that there were no exceptional circumstances which would warrant a grant of leave outside of the immigration rules.

5. In his grounds of appeal to the First Tier Tribunal, Mr Jwel asserted that it would be a disproportionate breach of his Article 8 ECHR right to family life to deny him entry to the UK.

The decision of the First-tier Tribunal

6. At the hearing, the judge heard evidence from the sponsor and Mr jwel's eldest son.

7. It was conceded by Mr Jwel's representative that he could not succeed under Appendix FM because the sponsor had part time work and is in receipt of Universal Credit and because Mr Jwel cannot speak English. There was some discussion about whether Mr Jwel met the parent route of the rules, but the judge found that he did not and that the appeal related to the Article 8 ECHR proportionality exercise only. The judge found that family life existed between Mr Jwel and the sponsor and Mr Jwel and his 3 children.

8. The judge turned to whether the exclusion of Mr Jwel was necessary, justified or proportionate. The judge took into consideration the factors at 117A and 117B of the Nationality, Immigration and Asylum Act 2002. He considered the best interests of the children and having carried out the proportionality balancing exercise decided that the strong family life between Mr Jwel and the sponsor and children outweighed the public interest and that to deny him entry was a disproportionate breach of Article 8 ECHR.

Grounds of Appeal ('UT')

Flawed proportionality Exercise

9. It is asserted that the judge made the following errors when carrying out the proportionality balancing exercise.
   i. failing to give sufficient weight to the public interest,
   ii. failing to give sufficient weight to the fact that the Mr Jwel did not meet the requirements of the immigration rules including the minimum income threshold,
   iii. failing to identify any exceptional circumstances;
   iv. irrationally finding that the fact that the family had been separated for ten years was capable of amounting to undue harshness,
   v. speculating as to the earning power of the sponsor if Mr Jwel were to join her in the UK with no evidential basis,
   vi. failing to take into account Mr Jwel's lack of English and lack of earning potential in the proportionality balance
   vii. carrying out a flawed balancing exercise

10. Mr Walker made very brief oral submissions and did not attempt to vigorously pursue the grounds of appeal.

11. Mr Karim relied on the rule 24 response and took me through the decision in detail. His oral submissions are recorded in the record of proceedings. Essentially, he submits that the judge took into account the public interest, gave it due deference and took into account those factors that weighed against Mr Jwel in the balancing exercise, the judge found that there was a strong bond between Mr Jwel and his British citizen children and that a continued separation was not in the children's best interests. The judge identified factors such as the hardship suffered by the children and the sponsor and the length of the separation as well as the age of Mr Jwel.

Permission to appeal

12. Permission was granted by First-tier Tribunal Judge Parkes in a decision dated 16 March 2021

Discussion and Analysis

13. I first take into account importantly that the Secretary of State does not challenge any of the judge's factual findings or the credibility of the witnesses. This means that the judge's proportionality exercise was undertaken against the facts as found by the judge.

14. The main thrust of the challenge is that the judge has given insufficient weight to the public interest and has not given sufficient weight to those factors which weighed against Mr Jwel in the proportionality exercise.

15. I am in agreement with Mr Karim that in general matters of weight are for the judge and a challenge will only succeed where it can be demonstrated that the judge's decision was perverse, inadequately reasoned or that the judge took into account an immaterial factor or failed to consider a material factor which would have altered the outcome of the appeal.

16. It is not submitted that the judge misdirected himself in law in relation to the Article 8 ECHR proportionality exercise. Indeed, the judge sets out the relevant authorities at [33], [34] and [35]. At [36] the judge finds that Article 8 ECHR is engaged and later the judge finds that there is a strong bond between Mr Jwel and his children which is valuable and cherished.

17. It is clear from the structure of the decision that the consideration of proportionality then encompasses paragraphs [37] to [47] with a concluding paragraph at [48]. From [37] to [47] the judge takes into account the best interests of the affected children, those factors which weigh against Mr Jwel and those factors which support him.

18. The first ground asserts that the judge "has given incorrect weight to the public interest". The Secretary of State does not particularise where the judge has given the public interest incorrect weight.

19. The judge takes into account at [26] that Mr Jwel does not meet the requirements of the immigration rules. At [32] the judge states;

> "In this regard I have regard to the public interest element of these types of appeals and the effect of sections 117A and 117B which are placed in Part 5A of the Nationality, Immigration and 2002 (sic) Act, which is headed Article 8 ECHR :'Public interest Considerations'. They apply in all cases where a Tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's rights under article 8".

20. At [33] the judge notes that the Tribunal is required to have due regard to the respondent's policy and parliament's assessment of the public interest. At [43] the judge states;

> "Looking at the other side of the coin, I accept that there is a strong public interest in excluding applicants who do not satisfy the certain aspects of the immigration rules".

21. On this basis, I do not accept the Secretary of State's submission that the judge did not give weight to the public interest in denying entry to those who do not meet the requirements of the immigration rules. The judge manifestly demonstrated his understanding that there is a strong public interest in excluding those who do not meet the rules and this was clearly at the forefront of the judge's mind.

22. Tied in closely with this submission, is the submission that the judge failed to give appropriate weight to Mr Jwel's inability to meet the minimum income threshold in the proportionality assessment.

23. The judge was manifestly aware that Mr Jwel did not meet the minimum income threshold. This is acknowledged at [26]. At [43] the judge acknowledges that the sponsor works part time and earns significantly less than the £18,600 limit. Indeed, the judge goes onto state;

> "In fact the figures for her earnings in 2018/2019 at page 191 suggest that although there are some months when she is paid around £1,000 per month, that her yearly wage is much less than £12,000".

24. From this I am satisfied that the judge took into account that the family did not come near to meeting the minimum income threshold and afforded appropriate weight to this factor.

25. The judge however then went onto consider that the situation is more "nuanced" because if Mr Jwel were permitted to come to the UK, the sponsor would be able to work longer hours and increase her income. The Secretary of State's argument is that this was "speculation" on the part of the judge. However, I am in agreement with Mr Karim that the sponsor's evidence in her witness statement at paragraph 7 was that she was prevented from working longer hours because of her status of a single mother and that the judge accepted her evidence. Her evidence was not challenged by the Secretary of State and there was no challenge to the judge's findings. The judge's finding in this respect was in these circumstances neither irrational nor perverse and the judge when carrying out the proportionality exercise was entitled to take into account the effect on the household income were Mr Jwel permitted to enter the UK.

26. Mr Jwel's older son gave oral evidence that he was worried that he would not find employment in Bangladesh, from which it can be inferred that he intends to find employment in the UK. It seems to me that since he was studying a Masters at SOAS and attended court to support his father's appeal, that the judge's finding that he would also be able to work to contribute to the household income was neither irrational nor inadequately reasoned. In any event even if this were speculation, it is not material because he is an adult now in any event and the judge's finding that the sponsor could work more hours was sustainable.

27. It is then stated that the judge failed to take into account the lack of Mr Jwel's financial independence as stipulated by section 117B(3) of the Nationality, Immigration and Asylum Act 2002.

28. The judge expressly deals with this factor at [45]. The judge finds that Mr Jwel is unlikely to be able to work in the UK because of his age, health, lack of education, skills and English language. However, the judge finds that the family as a whole has an adequate income to avoid him becoming a burden on the state should he come to the UK. The judge's finding that Mr Jwel would not be a burden on the state because

he will be financially dependent on his family has not been challenged. The judge has manifestly taken into account section 117B(3) of the Nationality, Immigration and Asylum Act 2002.

29. Similarly, I am satisfied that the judge has given weight to Mr Jwel's lack of ability to speak English. At [26] the judge acknowledged that he was refused on this basis under the immigration rules and considers this issue at [46]. The judge finds against Mr Jwel. His view is that it is more likely that Mr Jwel is unwilling to learn English rather than being unable to do so. The judge expressly acknowledges that there is clearly a public interest in not allowing applicants into the UK who do not have a command of English. The judge was entitled to take into account that this shortcoming is less conspicuous because he is coming to provide childcare rather than to work.

30. In summary, I am not persuaded by the Secretary of State's submission that the judge has failed to give weight to the public interest, nor that the judge has failed to take into account or give weight to Mr Jwel's inability to meet the minimum income threshold, his inability to speak English or his lack of earning potential. I am also not satisfied that the judge erred by finding that the sponsor would be able to work more hours if Mr Jwel comes to the United Kingdom and that the judge was properly entitled to take this factor into account.

31. The remaining grounds assert that the judge failed to identify any exceptional circumstance which would render the denial of entry unjustifiably harsh.

32. The judge gave careful consideration to the family's circumstances. The context was of a British woman who had married a Bangladeshi national in 1996 and relocated to Bangladesh to be with her husband who at that time had a business in Bangladesh. All three of the couple's sons were born in Bangladesh. The judge acknowledged that in 2010 the couple took the difficult decision to separate the family with the sponsor and the three British children relocating to the UK in order for the children to access a British education. The judge took into account at [36] that the family had separated themselves out of choice and that it was their decision to deprive the children of paternal influence.

33. The judge also however at [37] acknowledged that the family quite understandably wanted to take advantage of the superior education in the UK for the British citizen children.

34. The judge gave weight to the best interests of the two younger children, finding that this was an important but not determinative issue. The judge found that there was a strong bond between the children and their father with regular communication between them. He found that the bond between Mr Jwel and his children is "valuable and cherished" and that the children had missed having their father in their lives on a day-to-day basis. The judge found that it is in the children's best interest to live with their father.

35. The judge noted that the youngest child is 12 and the next child 17 and that they are British citizens and have the rights that that status brings. He noted that both were in important stages in their lives in terms of development and education and that it would be untenable for them to move to Bangladesh when they do not speak, read or write Bengali. He also noted that this was not suggested by the Secretary of State. The judge found that expecting the family to continue to have family life through phone calls and social media is substandard and also pointed to the fact that it was not the fault of the children that they were separated from their father.

36. The judge took into account that this was not a marriage of convenience but a longstanding marriage and that Mr Jwel and the sponsor have been separated for over ten years. He pointed to the fact that the sponsor could not have reasonably been expected to envisage how matters would develop 14 years later having been married when she was 21 years old.

37. The judge pointed to the burden that the sponsor has faced in bringing up her family on her own in financial and emotional terms. The judge also noted that Mr Jwel is now getting older and has health problems. In the skeleton argument Mr Karim also referred the judge to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 which he submitted was analogous.

38. The judge has manifestly weighed up all of the relevant factors in the balance in a well-structured and detailed decision. I am not in agreement that in the absence of criminality, where this was a genuine long-standing marriage, there is no adverse immigration history as found by the judge and there are three British children, that it was perverse for the judge to consider that a ten-year separation should be given considerable weight as well as the likelihood of a further long-term separation. I am not persuaded by the Secretary of State's submission that such a separation could not rationally be categorised as unjustifiably harsh.

39. At 48 the judge stated;

> "This is a finely balanced decision under article 8 outside of the immigration rules. However, in my judgement the balance lands in favour of the appellant. Whilst there remain some public interest in the refusal of leave to the appellant; it is my view that interest of the children and the sponsor all being British citizens, in having the appellant permitted to live in the UK and therefore reunite the family, are marginally stronger. Therefore I find that the respondent has failed to demonstrate to me that the exclusion of the appellant is justified or proportionate in the circumstances".

40. In summary, I am not satisfied that the grounds amount to more than a disagreement with the weight that the judge has given to various factors in the decision. The judge has noted that the decision was finely balanced but has taken into account all of the relevant factors and weighed them in the balance.

41. The judge's finding is perhaps generous but was firmly rooted in the evidence and does not reach the high threshold of perversity.

42. In this respect I take into account the words of Reed LJ in Henderson v Foxworth Investments Ltd [2014] UKSC 41 at [62];

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

43. I also remind myself of the comments of Carnworth LJ in Mukarkar v SSHD [2006] EWCA Civ 1045 approved by the Supreme Court in MM (Lebanon) 2017 SC10 that;

> "The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new… However on the facts of a particular case the decision of a specialist tribunal should be respected".

44. It may have been that another judge would have taken a less generous view in respect of the proportionality of the denial of entry, but the alleged generosity of this decision does not render the decision unlawful.

Conclusion

45. It follows that none of the Secretary of State's grounds of appeal are made out and the Secretary of State's appeal is dismissed.

Decision

46. The decision of the First-tier Tribunal allowing the appeal is upheld.

Signed Date

UTJ Owens
Upper Tribunal Judge Owens **28 June 2021**