IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001605
First-tier Tribunal No: HU/54292/2021
IA/10962/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 March 2023

Before

UPPER TRIBUNAL JUDGE REEDS
DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

SHIKHA MALHOTRA

Respondent

Representation:
For the Appellant: Ms Z. Young, Senior Presenting Officer
For the Respondent: Mr Bukhari, Solicitor Advocate

Heard at Phoenix House (Bradford) on 9 January 2023

DECISION AND REASONS

1. The Entry Clearance Officer appeals, with permission, against the decision of the First-tier Tribunal (Judge Nazir – the FtTJ) who, in a determination promulgated on the 22 March 2022 allowed the appeal of the Respondent on human rights grounds. The appeal was allowed on the basis that the appellant's ongoing exclusion from the United Kingdom was in breach of Article 8 based on her family life with her partner resident in the United Kingdom.

2. Whilst the appellant in these proceedings is the Entry Clearance Officer, for the sake of convenience we intend to refer to the parties as they were before the First-tier Tribunal. The FtTJ did not make an anonymity order and no grounds were submitted during the hearing for such an order to be made.

3. The factual background to the appeal is set out in the decision of the FtTJ, the decision letter and the papers in the parties' respective bundles. We summarise the salient facts as follows. The appellant is a national of India. Her immigration history is not straightforward, but it is stated that in September 2006 she applied for a spouse Visa which was refused, and a further application made was unsuccessful. However she was granted entry clearance in October 2007. The relationship with her spouse ended in or about 2010. She applied for leave outside the rules but was refused and later returned voluntarily to India in December 2010.

4. The relationship with the sponsor and her spouse began in or about October 2017. They were married on 21 September 2018. The appellant's spouse travel to India once a year and they lived together for a short time. It was said that he had maintained to sources of employment and United Kingdom and was not able to live in India due to his employment but also his commitment to his daughter. The sponsor had been granted limited leave to remain on the basis of his relationship with his UK British citizen child.

5. On 29 April 2021, the appellant made an application for entry clearance as a partner setting out the nature of her relationship with her partner and his circumstances in the UK. The application was refused.

6. The respondent's reasons for refusal are set out in the decision letter dated 28 July 2021, summarised as follows:-

> It is accepted that the appellant meets the suitability and financial requirements of Appendix FM, Immigration Rules.
>
> However, it is argued that the appellant fails to meet other requirements, as follows:
>
> (i) The appellant failed to provide a valid TB test certificate, as required by paragraph A39 of the Immigration Rules;
>
> (ii) The appellant fails to meet the relationship requirement, because her husband does not hold the required immigration status in the UK, as set out in Appendix FM. He has limited leave to remain;
>
> (iii) The appellant does not meet the English language requirement, as she failed to provide the appropriate certificate to demonstrate that she had taken and passed the required test.

The respondent also argues that the appellant's case does not disclose any exceptional circumstances, and that the refusal does not constitute a breach of Article 8 rights.

7. At the outset of the hearing the issues in relation to the TB test requirement and English language requirement were conceded by the Presenting Officer (see paragraph [18] of the FtTJ's decision). As a result, the only remaining issue of contention between the parties related to the 'relationship requirement,' in light of the sponsor's immigration status. The FtTJ set out his finding on this at paragraphs [20-22].

8. The FtTJ found that the sponsor did not meet the definition as he had limited leave to remain in the UK and therefore the application did not meet the Rules at the time of the decision and at the time of the hearing before the FtT.

9. As to the circumstances of the sponsor, the FtTJ found that the sponsor currently had limited leave to remain, which had been granted on the basis of his relationship with his child from a previous relationship. The FtTJ found:

"I am satisfied, based on the evidence before me that the sponsor has regular contact, including overnight contact with his child on a weekly basis. I am also satisfied, in light of the sponsor's oral evidence, that his current status is that of limited leave to remain and that this will remain the case for a further 2.5 years."

10. As to his assessment of Article 8, the FtTJ set out his assessment at paragraphs [23]-[31] as follows:

(1) He accepted that the appellant and sponsor had a genuine and subsisting relationship.

(2) The appellant and sponsor have a child together, M born on 14 July 2021 and accepted for the purposes of GEN 3.2 of the Rules that M is a 'relevant child' and therefore his bests interests should be a primary consideration.

(3) The FtTJ accepted the sponsor's evidence that his child has been impacted by the refusal of the decision stating "This is to be expected, given that the child is separated from his father."

(4) In considering the application of Article 8 to the facts of this case, the FtTJ adopted the structured approach suggested by Lord Bingham of Cornhill in R v SSHD ex parte Razgar [2004] UKHL 27.

(5) When addressing those questions, the FtTJ was satisfied that it was appropriate to characterise the appellant's relationship with her husband as 'family life.' The respondent's decision was taken in accordance with immigration rules and was thus in accordance with the law. The FtTJ also found that the respondent's decision was also taken in pursuance of the legitimate aim of maintaining the economic wellbeing of the country through the consistent application of immigration controls.

(6) The remaining question was whether the decision to refuse is proportionate to that end.

(7) When assessing proportionality, the FtTJ found that that the following factors were relevant:

(i) The fact that the sponsor has a child in the UK, with whom he has had, for a number of years, a relationship of overnight contact. The child lives with her mother from Monday to Friday and with the sponsor from Friday to Sunday;

(ii) Inevitably, the sponsor relationship with his UK based daughter will be significantly impacted should he travel to India;

(iii) Although argued by the respondent, it is not feasible for the sponsor to travel to India and live with the appellant and their child, as doing so

would prevent him from his ongoing and meaningful contact with his daughter from the previous relationship. The FtTJ stated that "To that end, I accept the Sponsors evidence that every time he has gone to India, this has interfered with his relationship with the child in the UK.

(iv) This is not a case where the appellant can simply make a fresh application. The sponsor's immigration status will not change for at least for a further 2.5 years, and if this appeal were to be dismissed, this would result in a significant delay in re-unification of the family;

(v) The appellant meets all other requirements of the Rules, and this is a necessary consideration to add to the balance. The single issue of contention between the parties is a narrow one;

(vi) The appellant previously applied for a visit visa, but this was rejected.

11. The FtTJ concluded at paragraphs [29-31] as follows:

> "Whilst the factors in this appeal are finely balanced, I find that GEN 3.2 of the Rules is met. There are exceptional circumstances in this case. I find that it is in the best interests of the child to be brought up together by the appellant and sponsor as a family unit.
>
> I find that, on balance, the refusal of entry clearance to the appellant would result in unjustifiably harsh consequences for the appellant and her child.
>
> Consequently, I find the appellant's and her child and the sponsor's family life, taken individually or cumulatively, and having had regard to the wider section 117 considerations, does render the respondent's decision disproportionate and outweighs the legitimate purpose of immigration control."

12. The FtTJ therefore allowed the appeal. Permission to appeal was sought on behalf of the respondent which was refused by FtTJ Hatton but was granted by UTJ Lane when renewed.

13. At the hearing, Ms Young, Senior Presenting Officer appeared on behalf of the ECO and Mr Bukhari, Solicitor Advocate appeared on behalf of the appellant. Ms Young relied upon the written grounds of challenge which were supplemented by her oral submissions.

14. As to the first ground, she submitted that at paragraph [23] the FtTJ found that the appellant's child M was a "relevant child" as per GEN.3.2. and so his best interests should be a primary consideration as the child is separated from his father. The FtTJ stated that he accepted the sponsor's evidence that the child was 'impacted by the refusal of the decision'(sic). However she submitted that no application for entry clearance was made by the child and the child was not an appellant and so it remains unclear how he might have been affected by the decision to refuse his mother entry clearance to the UK. The refusal simply meant that he would likely remain in the care of his mother in India. She submitted that the child could reside with the appellant in India and there will be no disruption to family life. She further submitted that the FtTJ had not engaged with those circumstances, it undermined the article 8 consideration.

15. The written grounds also submitted that it was an error to consider the best interests of the child in India as the FtTJ has and at paragraph [29] the FtTJ treated the child's best interests as determinative without any adequate explanation beyond an acceptance he would be 'impacted'. Ms Young submitted that the FtTJ failed to adequately explain why it is unreasonable to expect the relationships to continue as they have done.

16. Ms Young acknowledged that the FtTJ stated at paragraph [28] that the sponsor's travel to India has 'interfered' with his relationship with his daughter in the UK but submitted that it was a conclusion without explanation, and nothing was revealed about the appellant's daughter or her circumstances. In the absence of any adequate consideration of this the FtTJ was wrong to hold that the decision was an interference of Article 8.

17. She referred to reference made by the FtTJ to 're-unification' of the family but there is no suggestion that the family was ever 'unified', and the family life was a consequence of choices made. Ms Young in her submission pointed to the letter page 246 that the father had the permission to take his UK daughter out of the country. She submitted that the FtTJ failed to engage with this needed to explain a more adequate detail.

18. As to the proportionality assessment, Ms Young submitted that it was inadequate and that he had not set out what the unjustifiably harsh consequences were and thus it was not sufficiently reasoned. At paragraph [31] the FtTJ did not state what section 117 considerations had applied, and the FtTJ did not attach significant weight to the immigration rules. The written grounds also assert that the FtTJ was in error by failing to adequately consider any countervailing circumstances. or attach any significant weight to the Immigration Rules that reflect a consistent policy of the Government that requires the sponsor to have a particular category of leave in the UK before he can bring a range of relatives to the UK to settle here.

19. Mr Bukhari in behalf of the appellant confirmed that there was no rule 24 response but made oral submissions. He began by setting out the background to the application and the FtTJ's decision and that the child M had not been born at the time of the application. He stated that the FtTJ accepted the witness statement that the sponsor had sought legal advice previously which confirmed that in the event of his marriage he would be able to make an application for entry clearance for his spouse, but this had been erroneous. He said it was relevant because the respondent's grounds asserted that the circumstances were a consequence of their own actions and knowledge.

20. By reference to the decision, Mr Bukhari submitted that the FtTJ had considered all the evidence including the immigration rules and had undertaken an assessment applying the 5 stage test in Razgar. He pointed to paragraph [8] of the FtTJ's decision and that it was the appellant's case that there were exceptional circumstances on the facts and as a result of which the sponsor could not meet the immigration status requirement for the foreseeable future.

21. As to the factual assessment, he submitted that the FtTJ had found the facts to be proved on the balance of probabilities (at paragraph [17]), that he had considered all the evidence (paragraph [14]) and that at paragraph [16] the FtTJ stated that he was "bound to be selective in my references to the evidence when giving reasons my decision. I nevertheless wish to emphasise that I have considered all the evidence in the round in arriving at my conclusions".

22. Mr Bukhari further submitted that the FtTJ considered the circumstances of the appellant's child in the UK noting that he had regular contact with her, and he could not leave the UK living India. He submitted that the FtTJ had to take into account that he had 2 children living in 2 different countries and how it was possible to be part of their lives. The "best interests" were relevant to consider.

23. Mr Bukhari submitted that the FtTJ stated why he found family life to exist and that the issue was proportionality which the FtTJ addressed at paragraph [28] and properly considered the factual circumstances. He submitted that whilst reference was made to the letter saying the child could go to India, that was not a relevant consideration as the child lived with her mother in United Kingdom and at weekends with her father. He submitted that it would have an impact on the child.

24. As to the issue of whether the relationship with M would be "impacted", he submitted that the FtTJ did not need a document to state that the relationship would be impacted and was entitled to rely upon the oral evidence that he had heard from the sponsor. The FtTJ had used the word "significantly" impacted and the FtTJ was entitled to find that it was not feasible for the sponsor to travel to India and live with the appellant and the child and this will prevent the ongoing meaningful contact. Mr Bukhari referred to the assessment at paragraph [28] and that it was not a case where the appellant could make a fresh application because the sponsors' immigration status would not change for at least 2 ½ years and that would result in significant delay in the family "unifying". He accepted that the FtTJ had used the word "reunification" but that he clearly meant "unification".

25. Mr Bukhari referred to paragraph [29] and that the FtTJ found that the appeal was "finely balanced", and he set out the factors relevant to the proportionality assessment. The section 117 considerations were dealt with by the FtTJ.

26. In his submissions Mr Bukhari referred to the medical condition of the child in India as being relevant. However he accepted that there was no reference to this in the evidence before the FtTJ and that this was new evidence. At the end of his submissions, Mr Bukhari asked to file further evidence on this. He accepted that it had not been sent to the court, and it had not been referred to in any rule 24 response or disclosed to the respondent. We did not consider the evidence should be admitted at this late stage at the end of the submissions and in the light of the lack of disclosure. However in any event, Mr Bukhari submitted that new evidence had no bearing on the points made relation to whether the FtTJ erred in law.

27. By way of reply Ms Young submitted that she acknowledged the decision was short, but the submissions were not based on that, but that the FtTJ failed to give adequate reasons for the conclusions reached and how they had been reached.

Discussion:

28. The first ground challenges paragraph [23] of the FtTJ's decision and the assessment that M (his child in India) was a "relevant child" under GEN 3.2 and the FtTJ's acceptance of the sponsor's evidence that M was "impacted by the refusal of the decision."

29. Ms Young on behalf of the respondent submits that there has been no entry clearance application made on behalf of the child and therefore it is unclear how

he might have been affected by the decision and the refusal must mean that he would likely remain in the care of his mother.

30. Ms Young further submits that there was no interference with their family life as the parties could live together in India and consequently the Article 8 assessment was flawed as the FtTJ did not consider the material circumstances.

31. We have carefully considered the submissions in the light of the material before the FtTJ and his decision. In doing so we observe that it does not appear to have been argued on behalf of the respondent before the FtTJ that there would be no interference or impact on the child on the basis that there had been no entry clearance application made.

32. The respondent's review sets out the matters in issue and the document records that the first issue was whether the appellant and sponsor had a "strong family life" and that "little weight should be given to family life" as the appellant's life was precarious as she entered into the relationship when she had no immigration status. The second issue identified relates to the issue of proportionality.

33. The argument now advanced in the grounds is not one that appears to have been argued by the respondent before the FtTJ and therefore is not surprising in those circumstances that the FtTJ did not deal with it directly. However even if it were, the original application that had been made by the applicant was prior to the birth of M and therefore the child would not be a dependent on her claim. Furthermore, as far as we can see from the material, it had not been suggested that if the appellant were successful in her appeal or application that she would leave the child in India. As Mr Bukhari submitted if the application or appeal succeeded, any application made thereafter for M would be bound to succeed on the basis that it was accepted that M was a child of the parties and was a dependent of the appellant and the sponsor.

34. Contrary to the grounds, we consider that the FtTJ made a clear finding at paragraph [23] in relation to the child M which was reasonably open to him on the evidence. Firstly, we do not consider that the FtTJ was in error in reaching the conclusion that M was a "relevant child" under GEN 3.2.

35. "Relevant child" means a person (a) is under the age of 18 years at the date of the application; and (b) it is evident from the information provided by the applicant would be affected by a decision to refuse the application.

36. When looking at the circumstances of M, the FtTJ was entitled to find that he met the definition of a "relevant child" given his age and the evidence that the FtTJ plainly accepted about his circumstances as given by the sponsor in his evidence and as set out at paragraph [23]. The FtTJ set out in that paragraph that he accepted that M had been "impacted" by the refusal of the decision. The use of the word "impacted," we think simply refers to the effect or adverse effect on the child. As the FtTJ later set out, such an impact on a child separated from his father is to be expected.

37. Similarly, we find no error in considering the best interests of M or the sponsor's child, who is a British citizen and living in the UK. Given that there were 2 "relevant children" who met the definition under GEN 3.2, the FtTJ was required to consider their best interests when making his decision.

38. Whilst it is suggested that the FtTJ treated those interests as determinative that is not borne out by his assessment. The FtTJ referred to the best interests of M as a "primary consideration" (at [23]) and considered those interests in the proportionality balance.

39. It is further submitted on behalf of the respondent that the FtTJ did not properly consider the circumstances of the sponsor's daughter in the UK when reaching his finding at [28]. The grounds assert that nothing is revealed about the appellant's daughter or her circumstances.

40. We are satisfied that this submission is nothing more than a disagreement with the factual findings made by the FtTJ on the evidence. Contrary to the grounds, the FtTJ made clear findings about the circumstances of the appellant's daughter in the UK. At paragraph [22] the FtTJ set out the basis upon which the sponsor had been granted limited leave to remain; based on his genuine and subsisting parental relationship with his child from a previous relationship. The FtTJ stated at paragraph [22] "I am satisfied based on the evidence before me that the sponsor has regular contact including overnight contact with the child on a weekly basis."

41. On the evidence the sponsor's daughter in the UK was also a "relevant child" and the FtTJ addressed the circumstances of this family life and the adverse impact upon his daughter in the UK at paragraph [28] when undertaking the proportionality assessment. The FtTJ's reasoning on this issue is not only set out at paragraph [28 (ii)] but also should be read alongside paragraph [28 (iii)] where the FtTJ found, "although argued by the respondent it is not feasible for the sponsor to travel to India and live with the appellant and his child and doing so would prevent him from ongoing and meaningful contact with his daughter from his previous relationship. To that end, I accept the sponsors evidence that every time he has gone to India, this has interfered with his relationship with the child in the UK."

42. It was against this evidential background that the FtTJ set out his findings of fact and his clear acceptance of the sponsor's evidence that every time he had gone to India, this interfered with his relationship with his child in the UK. Therefore when that finding is properly read with the finding set out at paragraph [28(ii)]the FtTJ gave adequate and sustainable reasons on this issue.

43. The respondent had accepted the strength and importance of the family life the sponsor had with his UK-based daughter by the grant of limited leave on the 5 year route to settlement as a parent. To satisfy the requirements, he would need to demonstrate that there was a genuine subsisting parental relationship which the sponsor plainly had done by the nature, duration of contact and the parental responsibility he had for his daughter in the UK. We also observe that it was open to the FtTJ to make the finding at paragraph [28] (ii) based on the evidence that he had heard from the sponsor and the written evidence. In the witness statement (paragraph [7] page 12) the evidence attests to the problems of sponsor had leaving his daughter given that he played an active role in her upbringing.

44. We do not consider it is any answer to the FtTJ's finding at paragraph 28 (ii) as Ms Young submits, that the sponsor could take his daughter with him (based on the mother's letter). There is a world of difference between the possibility of a short visit and the sponsor leaving the UK to live in India and severing the family life that he has built up with his daughter in the UK over a period of years.

45. In essence, the FtTJ's assessment of the sponsor's parental relationship with his daughter which included him having staying contact and daily contact was such that it amounted to an "insurmountable obstacle" to family life with his partner in India. The importance of the relationship had been recognised by the respondent by the successive grants of leave.

46. Whilst Ms Young argued that the FtTJ did not consider whether family life could continue as it had with the parties living separately, this again is not borne out by the decision. The FtTJ found on the evidence that the child M in India had been affected adversely (or "impacted" as the FtTJ described it) by living apart (see paragraph [23] given that since the child's birth he had been separated from his father (also see paragraph [23]). The FtTJ addressed the issue at paragraph [28 (iv] stating that this is not a case where the appellant could simply make a fresh application as the sponsor's immigration status would not change for at least another 2 ½ years and that the effect of the refusal of entry clearance would result in significant delay in the family living together (see findings made at paragraph [22] as to the sponsor's status and at [28 iv]).

47. Whilst the FtTJ used the word "reunification" it is plain what he means and that as the sponsor has an established family life in the UK with his daughter based on his genuine and subsisting parental relationship stretching over a number of years, that this is an insurmountable obstacle to establishing family life in India, and that as his status would not change for 2½ years it would mean that there would be a separation for a significant period of time from his child and partner.

48. We see no error of law in the FtTJ's assessment of the competing issues of family life that the sponsor had in the UK and in India.

49. The last point made on behalf of the respondent is that the FtTJ failed to adequately consider any countervailing circumstances or attach weight to the Immigration Rules. We do not consider that this criticism is justified when reading the decision as a whole. Between paragraphs [18]-[22] the FtTJ expressly addressed the Immigration Rules and whether the appellant could meet them. At paragraph [21] he found that "it was clear" that the appellant could not meet the rules. We would accept that the appellant's inability to meet the Immigration Rules is a legitimate and weighty factor as part of the maintenance of effective immigration control. However that was plainly factored into the FtTJ's assessment at paragraph [31] in his reference to the legitimate purposes of immigration control and the section 117 considerations. We observe that no countervailing circumstances were outlined by Ms Young or in the respondent's written grounds.

50. As regards the section 117 considerations they were addressed briefly at paragraph [31]. There was no dispute on the evidence that the appellant could speak English (s117(2)), nor that the appellant would be financially independent based on the sponsor's income which had been accepted as meeting the requirements of Appendix FM (S117(3)). The issue, we think, is that family life had been entered into at a time when the appellant did not have status in the UK and was precarious. However having considered the decision, and in light of the assessment made as to proportionality, the conclusions reached between paragraphs [29] – [31] were ones reasonably open to the FtTJ on the evidence. The FtTJ recorded that the factors were "finely balanced" but that having considered the relevant factors, that the family life of the appellant and the sponsor's family life were of sufficient weight to make the respondent's decision disproportionate or lead to unjustifiably harsh consequences, and that the refusal

of entry clearance breached the appellant's right to respect for family life under Article 8.

51. The grounds were based on the adequacy of the reasoning of the FtTJ. We acknowledge the need for appropriate restraint before interfering with a decision of the First-tier Tribunal, bearing in mind its task as primary fact-finder on the evidence before it, allocator of weight to relevant factors, and overall evaluator within the applicable legal framework. Decisions are to be read sensibly and holistically, perfection might be an aspiration, but is clearly not a necessity, and there is no requirement for reasons for reasons. In MD (Turkey) v SSHD [2017] EWCA Civ 1958 the Court of Appeal confirmed that adequacy meant no more nor less than that. It was not a counsel of perfection. Still less should it provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits. The purpose of the duty to give reasons, is in part, to enable the losing party to know why he or she has lost, and it is also to enable an appellate court or tribunal to see what the reasons for the decision are so that they can be examined in case there has been an error of approach. The FtTJ was required to consider the evidence that was before the First-tier Tribunal as a whole, and he plainly did so, giving adequate reasons for his decision. The findings and conclusions reached by the FtTJ are neither irrational nor unreasonable. The decision was one that was open to the FtTJ on the evidence before him and the findings made having heard the oral evidence and considered the written evidence.

Notice of Decision:

52. The decision of the First-tier Tribunal did not involve the making of an error on a point of law; the decision shall stand.

Upper Tribunal Judge Reeds

Upper Tribunal Judge Reeds

19 January 2023