IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000842
First-tier Tribunal No:
HU/56628/2021
IA/15680/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 September 2023

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

The Secretary of State for the Home Department

Appellant

and

Owen Glen Barton
(no anonymity order made)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: The respondent appeared in person

Heard at Field House on 24 May 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against the decision of the Secretary of State on 18 October 2021 refusing him leave to remain on human rights grounds. Permission was granted by the First-tier Tribunal because the Secretary of State's grounds "clearly discloses arguable errors of law and the reasons so claimed are well-explained."

2. Whilst it would be undesirable if any judge granting permission to appeal routinely said no more than the grounds were arguable, there are occasions when it is appropriate and this is probably such a case because the grounds do set out with some care the Secretary of State's concerns. Essentially two faults are alleged, namely that there was material misdirection of law and or a failure to give adequate reasons, both generally and in relation to "EX.1 insurmountable obstacles/compelling circumstances".

3. In order to make sense of the criticisms I must look with some care at the First-tier Tribunal's Decision and Reasons.

4. The judge noted that the claimant entered the United Kingdom on 1 November 2020 with leave as a visitor valid until 1 May 2021. On 17 March 2021 he applied for leave to remain as a spouse. The application was refused on grounds of suitability because the claimant had been sentenced to three and a half years' imprisonment on 1 January 2011 in Australia. It was accepted that he met the eligibility requirements because he had entered into a genuine marriage with a British citizen and spoke the English language. He did not satisfy the requirements of S-LTR.1.4 of Appendix FM of the Immigration Rules. His presence in the United Kingdom is not conducive to the public good because the claimant was convicted of an offence for which they he had been sentenced to imprisonment for less than four years but at least twelve months and the period of ten years has not passed since the end of the sentence.

5. Neither did the claimant meet the eligibility immigration status requirements of paragraph E-LTRP.2.1 and 2.2. Essentially this is the provision intended to prevent "switching" and provides that an application for leave to remain as a partner must not be made by a visitor.

6. Paragraph EX.1 applies where the applicant has a genuine and subsisting parental relationship with a child. Here there was private and family life, not only with the claimant's wife but also with his children. The oldest child is now an adult but still lives in the family home and is about to go to university.

7. The judge was particularly concerned about the claimant's wife's child. He has been diagnosed with medical conditions and the judge accepted evidence that he was becoming difficult to control and that the claimant helped significantly. The judge accepted too the independent social worker assessment that the child's "education pathway would be significantly disrupted" by removal to Australia. It is important to emphasise that the finding was not that suitable care would not be available in Australia, but that the disruption inherent on removing may be harmful. The judge also gave some weight to the fact that the claimant's wife would not necessarily be able to get work but the judge was clearly impressed with the claimant's wife's evidence that her son's:

> "current education provision has an excellent understanding of [the child] and the challenges he faces. If he is moved to the school he would not have an understanding of his special needs and this will impact on [the child's] disorder and on his schooling."

8. The judge did have some concerns about the effect of COVID but it is impossible to say that these featured greatly in his reasoning. The clear finding of the judge was that refusing the claimant leave would cause disruption in a family where a young child with attention deficit hyperactive disorder was challenging but benefitting greatly from the claimant's presence.

9. The judge could have been more explicit in his application of Section 117B but it is perfectly obvious that the judge recognised the public interest in removal. He also found that the claimant was not a financial burden. The Act prescribes that little weight should be given to a private life or relationship formed with a qualifying partner established at a time when the person was in the United Kingdom unlawfully but that is not what this case is about. In fact the judge recognised that the relationship, although developed in the United Kingdom, started outside it. Further, this is not a deportation case. It is not about the private life end of the private and family life continuum. There was little in the section to guide the judge. The fundamental point here is that this appeal was allowed for the sake of the child. That is plain from reading the Decision and Reasons.

10. The grounds identify no misdirection of law. They are really concerned with weight and arguments based on weight rarely establish an error of law and they do not establish one here. There is no error or law on the part of the judge in evaluating the evidence in the way that he did and reaching the conclusion that he did.

11. At the start of the hearing the claimant confirmed that he was not expected to be represented but he handed me a summary of the First-tier Tribunal's decision that been provided for him by his former representative. It is, if I may so, an informed and helpful summary indicating that the claimant had been well-advised. The judge gave weight to the disruptive effect of removal and the extended private and family life, particular of the older child and pointed out how the children would no longer see their extended family. This is not a particularly weighty point and the judge had not given it excess weight. It is there and the judge was entitled to give it some weight.

12. It may be that the facts could have supported a different conclusion but I am not able to say there is any error of law in the decision that has been made. I dismiss the Secretary of State's appeal.

Notice of Decision

13. The Secretary of State's appeal is dismissed.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 August 2023