IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001878

First-tier Tribunal No: HU/54099/2021
IA/10568/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

13th November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

The Secretary of State for the Home Department

Appellant

and

Fitim Potera
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr R Halim, Counsel; instructed by Waterstone Legal

Heard at Field House on 30 October 2023

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Kudhail ("the Judge") dated 27th March 2023 allowing the Appellant's appeal on Article 8 grounds outside the Immigration Rules. For ease of comprehension, I shall refer to the parties as they were constituted before the First-tier Tribunal.

2. The Secretary of State applied for permission to appeal on the following grounds:

   "The Judge of the First-tier Tribunal has made a material error of law in the Determination.

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Making a material misdirection in law

Ground One

It is respectfully submitted, that FTTJ Kudhail errs in allowing the appeal under the article 8 provisions. Having found, under the Immigration Rules, that maintenance of the refusal, on the facts of the case, would not result in any unjustifiably harsh consequences for the appellant or the sponsor [29-30], it is unclear on what basis they are able to then find a breach of article 8,

Agyarko & Ors, R (on the application of) v the Secretary of State for the Home Department [2015] EWCA Civ 440

21. 'The phrase 'insurmountable obstacles' as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.'

in doing so it is asserted that they utilise the provision as a general dispensing power. The FTTJ records:

'29. Mr Brown argued the appellant was working in the UK and that she was not undertaking any current treatment. I agree the fact she is able to work in the UK also means she can work in Kosovo. I also accept that she is not receiving treatment in the UK so it would be no different in Kosovo. I note she has visited Kosovo regularly since marrying her husband and so would have some familiarity with the culture. I accept the language barrier may be an issue but as IJH's states she has her husband to assist her. Additionally, she has managed to navigate this in her visits.

30. Considering all the evidence cumulatively in the round, I do not find the sponsors mental health is an exceptional circumstance. Whilst I sympathise with her and accept she has mental health issues, the evidence before me is that she has continued to visit the appellant since being diagnosed [22-23/AB], she is still working and is not under any treatment. Thus, her mental health as not impacted her life to make it unjustifiably harsh.'

It is respectfully submitted, that given the above, the only remaining issue appears to be simply, the desire of the Sponsor to live in the UK rather than Kosovo, which is insufficient to defeat the public interest, particularly given the minimal weight to be afforded to the relationship, which was formed in the full knowledge that the appellant had no legal right of stay in the UK. Article 8 is a qualified right, and does not oblige the UK to accept the choice of a couple as to which country they prefer to reside in, as such, given the appellant and sponsor have a remedy to their separation as held above, it is unclear how the maintenance of the status quo (given the prior serious and repeated breaches of the Immigration laws) in refusing can be held to be a breach of any article 8 right.

Ground Two

It is further submitted, that FTTJ Kudhail is misdirected in their approach to the balancing exercise under section 117 Ain their inappropriate application of weight afforded to the appellant [41d, e and f].

41. Factors in favour of the appellant being granted entry clearance include:

....

d) The appellant has been financially independent whilst in the United Kingdom (Section 117B (3) of the Nationality, Immigration and Asylum Act 2002)

e) The appellant has never accessed any public funds during his residence in the UK and so has not been a burden on taxpayers (see section 117B(2) of the Nationality, Immigration and Asylum Act 2002);

f) The appellant has no criminal convictions

Whilst the appellant may have maintained financial independence in the UK, he did so by virtue of illegally working, therefore avoiding the payment of any required taxes, and contributing to the network of underground activity that allows illegal immigration to prosper, thus, to afford weight to this illegality against the public interest is bordering on the perverse.

Furthermore, whilst the appellant may not have been prosecuted, and as such does not have any criminal convictions against his name, it is submitted, that the activity he was involved in, his repeated use of different identities, working illegally, entering the UK illegally and providing false documentation are all criminal offences, which could attract prosecution, as such whilst in the strictest sense of the term, it is accepted that the appellant does not have any criminal convictions, as prosecution was not pursued in light of the appellants voluntary return, it is asserted, that again, this should not have been afforded any weight against the public interest in any balancing exercise.

It is therefore submitted, that the above misdirection’s have caused the balancing exercise to be flawed to the extent that it is unreliable.

Permission to appeal on the above grounds is respectfully sought.

An oral hearing is requested.”

3. Permission to appeal was granted by Upper Tribunal Judge Blundell on 23rd June 2023 in following the terms:

“1. The respondent seeks permission to appeal against Judge Kudhail’s decision to allow the appellant’s appeal against the refusal of entry clearance as a spouse. The appellant left the United Kingdom in 2017 and has been trying since then to return to be with his British wife. His first appeal was dismissed by Judge Housego. Judge Kudhail was persuaded – by reference primarily to the passage of time and the worsening mental health of the sponsor – that the point had been

reached at which the appellant's continued exclusion was contrary to Article 8 ECHR.

2. Whilst the first ground is poorly expressed, there is some merit in the contention that the judge's approach to Article 8 ECHR was flawed. She seems arguably to have taken the appellant's ability to meet the Immigration Rules as a matter in his favour, despite her conclusion that he was unable to meet the Immigration Rules on grounds of suitability. That said, I am not at all sure that the judge's consideration of suitability - at [21] - is itself legally sustainable or reconcilable with her later findings. Given the discretion in the rule, it was arguably for the judge to consider for herself whether the passage of time, the sponsor's ill health and the Article 8 ECHR rights of the appellant and the sponsor justified that discretion being exercised in the appellant's favour.

3. The second ground is certainly arguable, however, in asserting that the judge erred in her consideration of Part 5A of the Nationality, Immigration and Asylum Act 2002. The question posed by s117B(3) was arguably not whether the appellant was financially independent in the past but whether he would be financially independent upon arrival. I also note that the judge 2 considered s117B(4) to militate in favour of entry clearance being granted - at [41](a) - but it is arguable (i) that it was of no application in an entry clearance case and (ii) that the judge erred in her recollection of that subsection in any event.

4. This is certainly a case in which the Tribunal would be assisted by a response to the grounds under rule 24."

4. After hearing submissions, I reserved my decision which I now give. I do find that the judge materially erred in law for the following reasons.

5. In respect of the judge's decision, as observed during the hearing, at first blush the decision appears to be extremely well-drafted and comprehensive; however, there are flaws pointed to in the decision which I find require it to be set aside, given the far-reaching implications of those errors.

6. In respect of the first ground the Respondent's chief complaint is that the appeal has been dismissed under the Immigration Rules whilst the judge also finds that the appeal should succeed under Article 8 ECHR on the basis that the rules *could* somehow be met notwithstanding that she previously found that they could *not* be met. In short, as put by Upper Tribunal Judge Blundell, the judge appears to have taken the ability to meet the Rules in favour of the Appellant despite the finding that he was unable to meet them. There is therefore a tension between these two positions which is irreconcilable.

7. As noted by Judge Blundell in granting permission, the judge's findings at paragraph 21, that the Appellant fails to meet the suitability criteria, does not appear to be legally sustainable or reconcilable with the judge's later findings that the rules can be met. I note the judge correctly observes at paragraph 21 of the decision in the final conclusive sentence that the rule in question is one to which discretion *can* be applied. The passage in question reads as follows: "*I accept that part 9 does state 'may' and so it is discretionary. As the rules stand the Respondent can refuse to exercise discretion and has done so. Thus the Appellant is unable to satisfy this rule*". Given that the judge acknowledged at

paragraph 21 that this was a discretionary general Ground for Refusal under part 9 that required consideration and given that it was brought to her attention by Counsel in submissions, which she notes at paragraph 19(b) that this was not a mandatory Ground for Refusal and discretion existed, it appears that the judge has failed to perform a consideration of whether or not the discretion ought to have been exercised in favour of or against the Appellant for herself. It appears to me that the judge's failure to consider the exercise of discretion for herself has led to the decision containing material errors as the judge does appear to investigate the matter under Article 8 ECHR but appears to attempt to qualify the weight to be given to the public interest at that stage rather than considering whether or not discretion should have been exercised to refuse entry in the first place. This omission is a glaring one as, based on the judge's findings, it is quite likely that the judge may have found that discretion should not have been exercised against the Appellant to refuse entry to him on suitability criteria, tantamount to a lifetime ban. In that scenario the public interest would have been nominal as the only basis for refusing the application would have fallen away and the decision would have been disproportionate for quite different reasons, namely that the judge had formed the view that the Appellant qualified for entry clearance. However, that is not what the judge does.

8. Whilst Mr Halim valiantly sought to persuade me that the judge consideration of the exercise of discretion occurs later at paragraphs 33 to 37, I do not find this argument to be correct. For instance, paragraph 31 which precedes these passages falls under the heading "Article 8 –Outside The Rules" and the title itself makes plain that the assessment that follows is consistent with the Razgar questions (see R, (on the application of Razgar) v. Secretary of State for the Home Department [2004] UKHL 27) and pursuant to the approach of the Court of Appeal in TZ (Pakistan) and PG (India) v. Secretary of State for the Home Department [2018] EWCA Civ 1109, as the judge has quite rightly considered the appeal under the rules, from paragraphs 20 to 30 (as indicated by their content and the subheading above those paragraphs) and given that she was *first* bound to calibrate the public interest in refusing the Appellant entry clearance by his ability to meet or not meet the Immigration Rules and the extent to which he is able to do so.

9. The judge's later assessment of the public interest under paragraphs 33 to 38, cannot save the decision from material error given that this consideration takes place outside the rules whereas the consideration should have taken place under the rules in terms of whether or not, in the judge's view, the Secretary of State should or should not have exercised discretion to refuse under the suitability criteria, and given that this is what should have provided the judge with the weight to be placed on the public interest in refusing entry clearance, which could then have been placed on the weighing scales in the Article 8 public interest assessment under Razgar, as that this was the sole basis upon which the Appellant's application for entry clearance had been refused and given that this is an Article 8 human rights appeal.

10. Consequently, in light of Ground 1 and the judge's inconsistent approach to the weight to be given to the public interest, I find that there is a material error of law in this respect.

11. Turning to Ground 2 and the argument that the judge has not performed a correct assessment of the public interest factors under section 117B of the Nationality, Immigration and Asylum Act 2002, as observed by Judge Blundell,

those public interest considerations are not concerned with an appellant's previous abilities to meet those sub-sections but with the Appellant's *present* abilities to meet them. For example, in respect of section 117B(3), the statute asks whether it is in the public interest and in particular in the interests of the economic wellbeing of the United Kingdom that persons who seek to enter or remain in the United Kingdom "are" financially independent, not whether they "were" financially independent. With that in mind, I find that the judge has failed to assess whether the Appellant is presently financially independent (although I pause to note that no issue was taken by the Secretary of State with his ability to meet the eligibility criteria under Appendix FM in respect of finance and accommodation) but nonetheless this mandatory assessment needs to be performed, as does the assessment of sections 117B(1) and (2). In respect of section 117B(4), as noted by Judge Blundell, it is doubtful that this provision is engaged in an entry clearance application given that the Appellant is not in the UK to trigger whether little weight should be given to their relationship where the person concerned is "in the United Kingdom unlawfully" (whereas this Appellant is applying from Albania and making an entry clearance application). In respect of paragraph 41(f) of the judge's decision, I do not find that there is an error in these grounds notwithstanding the Grounds of Appeal attempting to persuade the Upper Tribunal that the Appellant should somehow take the Appellant's previous actions into account against him under section 117B, despite there being no specific subsection under which one would consider those actions. The Secretary of State rightly acknowledges that the Appellant indeed has no criminal convictions. In respect of the previous immigration history and whether there are any aggravating features that consideration would have already been given under S-EC.1.5, and therefore that history and the public interest in respect of it would have already been considered under the Immigration Rules and factored into the public interest by that same consideration.

12. In summary, despite the otherwise comprehensive nature of the judge's decision, as discussed above, I find that there are material errors in law in the decision, such that it must be set aside.

<u>Notice of Decision</u>

13. The Appellant's appeal is allowed.

14. The decision of the First-tier Tribunal involved the making of material errors of law.

15. The appeal is hereby remitted to IAC Taylor House to be heard *de novo* by any judge other than First-tier Tribunal Judge Kudhail.

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber