IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001629

First-tier Tribunal No:
HU/51632/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

22nd February 2024

Before

THE HONOURABLE MRS JUSTICE THORNTON
UPPER TRIBUNAL JUDGE MANDALIA

Between

Ehan Raheel
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

REPRESENTATION

For the Appellant: Mr J Dhanji, instructed by ATM Law Solicitors
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 28 November 2023

DECISION AND REASONS

INTRODUCTION

1. The appellant is a citizen of Pakistan and was born on 18 February 2021. On 9 February 2022 the respondent refused his application for entry clearance to the UK under Appendix FM to the Immigration Rules and on Article 8 grounds. The appellant's appeal against that decision was dismissed by First-tier Tribunal ("FtT") Judge Nightingale ("the judge") for reasons set out in a decision dated 24 February 2023.

2. It was common ground between the parties at the hearing before the FtT that the appellant cannot satisfy the eligibility requirements for entry clearance as a child set out in paragraph EC-C of Appendix FM. It was accepted on behalf of the appellant that at the date of her application, her mother, Kubra Ashra ("the sponsor") had discretionary leave to remain in the United Kingdom (as opposed to leave to remain as a partner or parent). However, the sponsor had since been granted indefinite leave to remain ("ILR"). The appellant's primary case before the FtT was that she meets the requirements for ILR as the child of a settled person in paragraph 297 of the Immigration Rules. It was accepted that the issues in dispute between the parties are the same whether one looks at the "child" route in Appendix FM or paragraph 297. In the alternative, the appellant claimed the respondent's decision amounts to a disproportionate interference with her and the sponsor's right to family life, pursuant to Article 8 ECHR, when her case is considered outside the Rules.

3. The issues in the appeal are set out in paragraph [5] of the decision:

> "Subsequent to the decision, the sponsor had been granted indefinite leave to remain in the United Kingdom. Mr Dhanji conceded that this was a "new matter" and given that the respondent's review refused consent to consideration of paragraph 297, the case was to be argued on the basis of serious and compelling circumstances outside of the Immigration Rules."

4. The sponsor attended the hearing of the appeal and her evidence is set out at paragraphs [6] to [9] of the decision. The judge's findings and conclusions are set out at paragraphs [17] to [21] of the decision. The judge accepted the sponsor had lived in the United Kingdom from the age of 11 and appears, at some point, to have been granted discretionary leave to remain. The judge noted the sponsor has subsequently been granted indefinite leave to remain, although she could not take that into account.

5. At paragraph [19] of her decision the judge said:

> "There is, I accept, family life between the appellant and his mother who would remain in Pakistan to care for him in the event that this appeal is unsuccessful. The appellant also presently has access to his father, with whom he also lives, and I bear in mind case law with regard to the interests of a child being best served by living with, and being raised by, both parents. I consider it to be in the best interests of the appellant to remain in the care of his mother and his father which would continue in the event that

> his appeal is unsuccessful. I find nothing which indicates that this appellant's best interests will be in any way adversely affected or his welfare impacted by remaining in Pakistan."

6. Having accepted there is family life between the appellant and sponsor, the judge went on to consider whether the refusal of entry clearance will be an interference by the respondent with the exercise of the appellant's right to respect for his family life. At paragraphs [20] and [21] of her decision the judge said:

> "20. The test, as Mr Dhanji correctly submitted, of establishing interference is not an especially high one. However, it is long established that where family life can reasonably be expected to be enjoyed elsewhere, there will be no interference caused. Whilst I accept that the sponsor may have lived in the United Kingdom from the age of 11, she has now formed her own family unit with her husband and child in Pakistan. She has been living in Pakistan for over three years; spending just sixteen days in the United Kingdom during this time. Save for missing her mother and brother, which I accept she may well do, she has made no assertion that she is unable to remain in Pakistan with her husband and child. She has submitted no evidence which I find establishes that it is in any way unreasonable to expect her to enjoy her family life with the appellant in Pakistan notwithstanding the grant of indefinite leave made by the respondent with regard to her private life. Even considering that the test is not an especially high one, I find that it has not been satisfied on the evidence before me. *(our emphasis)*
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> 21. Even if, which I do not accept, there would be interference with the family life of the appellant by refusing him entry to the United Kingdom with his mother, the decision to admit him would also cause an interference with his family life by way of his daily contact with his other parent; namely his father. Whilst I accept his father may travel for the purposes of running the family business in Pakistan, there is nothing on the evidence before me which indicates that he does not have some responsibility for the upbringing of the appellant. The presumption of shared responsibility for upbringing applies on the facts of this appeal *(TD (Yemen))*. The Immigration Rules would require sole responsibility to be established in order to meet the requirements for entry. I cannot find in these circumstances that those Rules would be met. The appellant does not meet the requirements of the Immigration Rules for entry and would not, I find, suffer any hardship as a result of this refusal. Further, whilst it may be the sponsor's preference to live in the United Kingdom with her son and her parents, I have found nothing unreasonable in expecting her to remain in Pakistan in her new family home with her husband and child. The appellant does not meet the requirements of the Immigration Rules and I find nothing on the evidence which leads me to conclude that any interference which might be caused with family life here would be disproportionate to the respondent's lawful aim. It follows that the appeal must be dismissed."

THE GROUNDS OF APPEAL

7. The appellant advances three grounds of appeal. In summary, it is said:

   i. The judge misapplied the law when she concluded that she could not take the fact that the sponsor had been granted indefinite

leave to remain between the date of application and date of hearing into account as part of the proportionality assessment outside the Immigration Rules because it was a new matter ("Ground 1");

ii. The FTTJ misapplied the law when she found that the respondent's decision did not interfere with the appellant's and sponsor's Article 8 ECHR rights ("Ground 2");

iii. The FTTJ erred when considering whether the appellant met the requirements of the Immigration Rules as part of her determination of the issue of the proportionality of the Respondent's decision ("Ground 3").

8. Permission to appeal was granted by Upper Tribunal Judge Owens on 10 October 2023.

THE PARTIES SUBMISSIONS

9. Mr Dhanji submits the judge misunderstood the concession being made by the appellant as set out in paragraph [5] of her decision. The appellant conceded that she could not claim that she met the requirements of paragraph 297 of the Immigration Rules. That was a 'new matter' and the respondent had refused the consent required in accordance with s85(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). However, that is not to say that the fact that the sponsor now has indefinite leave to remain, is altogether irrelevant. It remained a relevant factor when considering whether the decision to refuse entry clearance is proportionate to the legitimate aim.

10. Mr Dhanji refers to the decision of the Upper Tribunal in *Mahmud (S. 85 NIAA 2002 - 'new matters')* [2017] UKUT 488 (IAC). A 'new matter' is a claim that is factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive. Here, Mr Dhanji submits the fact that the sponsor now has ILR in the context of an Article 8 claim outside the rules, is further and better evidence of the sponsor's immigration status. He submits the position here can be distinguished from that in *OA and Others (human rights; 'new matter'; s.120) Nigeria* [2019] UKUT 00065 (IAC) ("*OA and Others")*, because there, the appellant relied upon a fundamental change in the factual matrix (*the appellant had completed ten years' continuous lawful residence during the course of the human rights appeal and could meet paragraph 276B of the immigration rules)* that had a material bearing on the sole ground of appeal.

11. Mr Dhanji submits the judge erred in finding that the respondent's decision did not interfere with the appellant and sponsor's Article 8 rights. The sponsor has had to remain in Pakistan to be with her son and the decision to refuse entry clearance impacts upon her ability to return to the UK. The sponsor has been forced to make a choice between returning to the UK without the appellant or to remain in Pakistan with the appellant. The decision to refuse entry clearance prevents the sponsor from resuming

her life in the United Kingdom where she had lived from the age of 11, and which could, eventually lead to the sponsor's indefinite leave to remain lapsing. The decision is therefore an interference with the exercise of the appellant's right to respect for his family life that is sufficient to result in the Article 8 rights being engaged.

12. Finally, Mr Dhanji submits that at paragraph [21] of her decision, the judge, in effect, considered the requirement in paragraph 297 of the immigration rules, notwithstanding that earlier in her decision she had noted that the respondent's review refused consent to consideration of paragraph 297. The appellant had not made an application under paragraph 297 of the rules and the respondent had not made a decision as to whether the requirements of paragraph 297 are met. The judge considered whether the sponsor has 'sole responsibility' for the appellant but failed to consider whether there are serious and compelling family or other considerations which make exclusion of the appellant undesirable. The assessment of paragraph 297 of the rules was therefore incomplete.

13. In reply, Mr Wain submits the judge was right to note at paragraph [5] of her decision that since the respondent's decision to refuse the application, the sponsor has been granted indefinite leave to remain in the UK and the respondent had refused consent for the consideration of whether the requirements for ILR as the child of a parent settled in the UK are met. He submits the position here is akin to that in *OA and Others.* There, the appellant had completed ten years continuous lawful residence during the course of the human rights appeal and paragraph 276B provides that a person with such a period of residence is entitled to indefinite leave to remain in the United Kingdom, so long as the other requirements of that paragraph are met. Here, the appellant has been granted ILR during the course of the human rights appeal and paragraph 297 makes provision for leave to enter as the child or a parent present and settled in the UK. The sponsor is now 'settled' in the UK but was not, when the application was made and refused.

14. Mr Wain submits that although the judge found there will be no interference with the exercise of the appellant's right to respect for his family life, any error is immaterial because the judge went on to consider whether the decision to refuse entry clearance is in any event disproportionate. Mr Wain submits the judge was not considering the requirements of paragraph 297 of the immigration rules in paragraph [21] of the decision. He submits the relevant requirements in paragraphs 297 and E-EEC of Appendix FM are for all intents and purposes, the same. In the decision refusing the application, the respondent did not accept the eligibility relationship requirement is met by the appellant. He submits that when the decision of the FtT is read as a whole it is clear that the judge considered whether there are serious and compelling family or other considerations which make exclusion of the appellant undesirable, and suitable arrangements have been made for the child's care.

DECISION

15. It is helpful to recite from the outset what was said by Lord Hamblen in *HA (Iraq) v SSHD* [2022] UKSC 22.

> "72. It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:
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> (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirection simply because they might have reached a different conclusion on the facts or expressed themselves differently - see *AH (Sudan) v Secretary of State for the Home Department [2007] UKHL 49; [2008] AC 678* per Baroness Hale of Richmond at para 30.
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> (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account - see *MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49; [2011] 2 All ER 65 at para 45* per Sir John Dyson.
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> (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out - see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber) [2013] UKSC 19; [2013] 2 AC 48 at para 25* per Lord Hope."

16. We note from the outset, as Mr Wain submits, that the requirements set out in paragraph 297(i)(e) and (f) of the immigration rules are broadly the same as the relationship requirements set out in E-ECC.1.6.(b) and (c) of Appendix FM. They both require consideration of whether the parent has had and continues to have sole responsibility for the child's upbringing; or alternatively, whether there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care. The judge did not and was not required to consider whether the rules are met because it was accepted the requirements are not met. The appeal before the FtT was advanced on the basis that the decision to refuse entry clearance, outside the rules, is in breach of Article 8.

GROUND 1

17. Mr Dhanji accepts that whether the appellant is able to meet the requirements of paragraph 297 of the immigration rules whilst the appeal was pending before the FtT, constitutes a "new matter" for the purposes of section 85 of the 2002 Act. He was right to do so. At paragraph [17], the judge said:

> "…I accept that the sponsor lived in the United Kingdom from the age of 11 and appears, at some point, to have been granted discretionary leave to

> remain. She has subsequently been granted indefinite leave to remain, although I may not take that matter into consideration in these appeal proceedings. Certainly, at the time that she left the United Kingdom, got married in Pakistan and, indeed, began a family of her own there, she did not have permanent stay in the United Kingdom and her situation was, by virtue of Section 117B, "precarious" for the purposes of private life."

18. We do not accept the submission made by Mr Dhanji that the fact that the sponsor now has ILR, is simply further and better evidence of the sponsor's immigration status. In Mahmud (S. 85 NIAA 2002 - 'new matters') [2017] UKUT 488 (IAC) the Upper Tribunal confirmed that in practice, a 'new matter' is a factual matrix which has not previously been considered by the SSHD in the context of the decision in section 82(1) or a statement made by the appellant under section 120. Here, the fact that the sponsor had acquired ILR represented a significant new factual matter which was capable of having a direct bearing on a ground of appeal relied on by the appellant; namely, whether the decision of the respondent to refuse a human rights claim is unlawful under section 6 of the 1998 Act. It was a significant new factual matter that was capable of bringing the appellant within the ambit of paragraph 297 of the immigration rules because by the acquisition of ILR, the sponsor was a parent present and settled in the UK giving rise to an entitlement to the appellant to indefinite leave to enter, so long as the other requirements of that paragraph are met.

19. Mr Dhanji accepts the appellant is unable to meet the requirements for entry clearance as a child set out in paragraph EC-C of Appendix FM. The real issue at the heart of the appeal before us concerns the judge's assessment of 'proportionality' and whether the judge should have had regard to the fact that since the application made by the appellant, the sponsor has been granted ILR. Having accepted the grant of ILR to the sponsor was a 'new matter', the judge was, in our judgement, right not to have had regard to that as a relevant factor in her assessment of proportionality.

20. In *Mahud* the appellant relied on a different, new relationship, and in his bundle in support of his appeal provided evidence of that relationship. The Tribunal said that a new relationship with a different partner coupled with an entirely new type of parent/child relationship is factually distinct from the claim made by the appellant originally. The Tribunal held there had been no express consent by the respondent for this to be considered such that the First-tier Tribunal had no jurisdiction to consider it pursuant to section 85(5). It would be contrary to the statutory regime, if a 'new matter' could not be considered by the Tribunal, but remained a relevant factor when considering proportionality. The question whether a decision to refuse leave to enter or remain is disproportionate to the legitimate aim is often critical in determining whether the decision of the SSHD to refuse the human rights claim is unlawful under section 6 of the Human Rights Act 1998. The approach contended for by Mr Dhanji is one which, taken at its highest, would lead to the absurd result that the 'new matter' would in

fact have to be considered by the Tribunal and could not be left out of account in a human rights appeal within the current statutory framework.

GROUND 2

21. We do not propose to address ground 2 since it is in our judgement immaterial to the outcome of the appeal. In *AG (Eritrea) v SSHD* Lord Justice Sedley said, at [28], that while an interference with private or family life must be real if it is to engage Article 8(1), the threshold of engagement (the "minimum level") is not a specially high one. At paragraph [20] of the decision here, the judge accepted the threshold test is not an especially high one, but found, on the facts, that the respondent's decision did not interfere with the appellant's and sponsor's Article 8 ECHR rights. We can see the force in the claim made by Mr Dhanji that the appellant was born in Pakistan and the sponsor has had to make the difficult choice to remain in Pakistan to be with her son. The decision to refuse entry clearance prevents the sponsor from resuming her life in the United Kingdom. However, any error in the judge's approach is immaterial to the outcome of the appeal because the judge went on to consider whether the decision is proportionate to the legitimate aim.

GROUND 3

22. We reject the claim that the judge erred in her assessment of 'proportionality' by considering whether the sponsor has 'sole responsibility' for the child's upbringing, but failing to consider whether there are serious and compelling family or other considerations which make exclusion of the child undesirable. When paragraph [21] of the decision is read as a whole, it is clear that the judge referred to the decision of the Upper Tribunal in *TD (Paragraph 297(i)(e): "sole responsibility") Yemen* [2006] UKAIT 00049 and the presumption of shared responsibility for the upbringing of the appellant, in the context of the interference that would be caused to the appellant's family life with his father in the event that the appellant joins the sponsor in the UK.

23. It was common ground between the parties that the immigration rules could not be met. As set out by the Court of Appeal in *TZ (Pakistan)* [2018] EWCA Civ 1109, compliance with the immigration rules would usually mean that there is nothing on the respondent's side of the scales to show that the refusal of the claim could be justified. At paragraphs [32] to [34], the Senior President of Tribunals confirmed that where a person meets the rules, the human rights appeal must succeed because 'considerable weight' must be given to the respondent's policy as set out in the rules. The corollary of that is that if the rules are not met, although not determinative, that is a factor which strengthens the weight to be attached to the public interest in maintaining immigration control. The judge had proper regard to the appellant's circumstances in Pakistan and found that the appellant would not suffer any hardship as a result of the refusal and that although the sponsor may prefer to live in the UK with her son and her parents it would not be unreasonable to expect her to remain in Pakistan with her husband and child.

Conclusion

24. We accept the decision of the judge could have been better expressed but the focus should be on the way the judge performed the essence of her task. On appeal, the Upper Tribunal should not overturn a judgment at first instance, unless it really cannot understand the original judge's thought process when the judge was making material findings. In our judgement, the judge identified the issues and gave a proper and adequate explanation for her conclusions. The findings made by the judge were findings that were properly open to the judge on the evidence before the FtT. The findings cannot be said to be perverse, irrational or findings that were not supported by the evidence. Having carefully considered the decision of the FtT we are satisfied that the appeal was dismissed after the judge had carefully considered the facts and circumstances of the appellant and his mother in particular.

25. In our judgment, the appellant is unable to establish that there was a material error of law in the decision of the FtT, and it follows that the appeal is dismissed.

Notice of Decision

26. The appeal is dismissed and the decision of FtT Judge Nightingale stands.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber
15 February 2024