IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002259

First-Tier Tribunal No:
HU/59944/2022
LH/00561/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17th May 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

KJDR
(ANONYMITY ORDER MADE)

Appellant

and

Entry Clearance Officer (ECO)

Respondent

Representation:
For the Appellant: Mrs R Arif, Home Office Presenting Officer on behalf of the ECO
For the Respondent: Mr T Hussain, instructed by

Heard at Cardiff Civil Justice Centre on 2 May 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The application for permission to appeal was made by the ECO but for the purposes of this decision I shall refer to the parties as they were described before the First-tier Tribunal (FtT), that is KJDR as the appellant and the ECO as the respondent.

2. The ECO challenges the decision of FtT Judge Lloyd-Lawrie (the judge) who allowed the appeal of the appellant on article 8 grounds against the refusal of the ECO dated 8th November 2022 under paragraph EC-P of Appendix FM of the Immigration Rules. In particular, the ECO noted the appellant did not meet all the eligibility requirements because he did not meet the financial requirement under paragraphs E-ECP.3.1 to 3.4. The refusal letter identified that the sponsor had been in employment for less than six months and provided payslips showing she earned an annual salary of £10,296. She had only provided 1 month's payslip. The appellant was relying on self employed income but his HMRC tax return for 2022 showed he only earned £1042. It was confirmed that he met the English language requirement.

3. Under GEN.3.1 and GEN.3.2 of the Immigration Rules it was considered there were no exceptional circumstances resulting in unjustifiably harsh consequences on refusal. It was noted that the appellant was a Venezuelan national who was unable to return to Venezuela owing to political unrest.

4. The grounds for permission to appeal advanced that the judge had accepted that the appellant could not meet the immigration rules and the sponsor did not hold the £63,000 (transferred from the sponsor's father to the sponsor). The judge failed to factor in the failure to meet the rules and had used article 8 as a vehicle to circumvent the rules. The judge noted that the sponsor visited the appellant in Spain but failed to engage with the review which observed that family life could be maintained by the sponsor continuing to visit the appellant and the grounds asserted that the judge had used the child's best interests as a trump card. Article 8 did not impose on a State a 'general obligation to respect an immigrant's choice of the country of their matrimonial residence' and the appeal grounds referred to SD (British citizen children - entry clearance) Sri Lanka [2020] UKUT 43 (IAC).

5. The application for permission to appeal was refused by the FtT on the basis the judge was entitled to find that the sponsor's parents were willing to provide them with a place to live and financial support and referred to Mahad (Ethiopia) v ECO [2009} UKSC 16. Evidence was produced from the sponsor's father before the judge as to the transfer of substantial funds to his daughter. The judge, nevertheless, acknowledged that the appellant did not meet the rules but was entitled to take into account and found the appellant had the benefit of credible third party support, R (on the

application of MM (Lebanon) [2017] UKSC 10. The FtT went on to make further references to the requirements of the immigration rules and that the child (born 5th July 2022) was not treated as a trump card.

6. The grounds were renewed advancing that the FtT, when refusing permission, had erred when finding that the judge had been mistaken in finding the rules had not been met as this was incorrect in itself (see FM-SE 21 (3)-(8)) and this argument had not been raised before the FtT.

7. Permission was granted by the Upper Tribunal on the basis that the judge 'erred in his assessment of proportionality' as the judge arguably found the appellant could not meet the financial requirements of the rules and arguably failed to attach significant weight to the public interest.

8. A Rule 24 notice submitted that the challenge was misconceived and an attempt merely to reargue the points before the FtT. The assessment was open to the judge and reference was made to KB (Jamaica) [2020] EWCA Civ 1385 such that the Upper Tribunal should be reluctant to find an error simply because it did not agree with the decision.

9. The respondent's review of the appeal before the FtT noted that the sponsor and her child were not obliged to leave the UK but could maintain the relationship as they had done by visits and the appellant had failed to demonstrate that there were exceptional circumstances which would amount to unjustifiably harsh consequences. Little weight should be given to a relationship when the immigration status was precarious and they chose to enter a relationship when the appellant had not immigration status in the UK. The sponsor could continue to reside with her mother and the status quo maintained. The review noted that the appellant was a Venezuelan national who had claimed asylum in Spain.

10. In submissions, Mrs Arif contended that the judge had failed to import a consideration of the rules into the article 8 assessment and failed to engage with the respondent's review at 4 (iv) and (vi) (as above). The appellant could reapply for entry clearance and that had not been considered.

11. Mr Hussein submitted that Section 117 of the Nationality Immigration and Asylum Act 2002 had been considered by the judge when assessing article 8. The focus of the respondent was entirely on the rules. That did not necessarily justify refusal under Article 8. Further, Article 8 did not restrict consideration of the position of finance. The question of reapplication was not raised at the hearing. It was clear the appellant was not going to be a burden on the taxpayer. The respondent was attempting to elevate the public interest to being a trump card.

Conclusion

12. Agyarko [2017] UKSC 11 at [60] held this:

'*60. It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality.* ***On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate****". So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique": see para 19 above.'*

13. I have read the decision closely and set out the facts as found by the judge and which were unarguably in her mind when making the decision.

14. The judge was clearly aware of the facts, recorded at [2] of the decision such that the appellant was a Venezuelan national who had sought asylum in Spain, that there was relationship genuine relationship with his unmarried partner in the UK whom the appellant wished to join and who has since had his child (a British citizen). Implicit in the decision is that the sponsor is a British national (who evidently has no right to live in Spain). The respondent in the review clearly accepted that the sponsor and child would be remaining in the UK rather than relocating to Spain or Venezuela (which was characterised as unsafe in the evidence).

15. The judge set out the issues clearly at [4] not least whether there were exceptional circumstances. The judge also specifically set out Section 117B which identifies that the maintenance of immigration rules is in the public interests. I would note that section 117(4)(b) explains, contrary to the review, that little weight is to be afforded to a relationship formed in the UK; that is not the case here. The appellant and sponsor met in Montanita in Ecuador in 2019 and lived abroad together.

16. The judge recorded at [13] the sponsor's evidence on the very difficult economic and political conditions in Venezuela and that most of the appellant's family had left and claimed political asylum abroad. The reason for refusal of his application was specifically recorded that the appellant failed to meet the financial requirements of the immigration rules. That the judge was cognisant of that point was apparent from the FtT decision.

17. The judge found clearly at [14] that the appellant did not meet the immigration rules as he did not meet the financial requirements. At [15]

the judge realistically found the money transferred from the sponsor's father was not a gift but it was however open to the judge, to take into account that the sponsor had the benefit of credible and existing third party support in the form of support from the father who confirmed in oral evidence that 'he had always indicated he would help support his daughter and her partner financially'[13]. It was also evident (indeed as part of the review) that the sponsor lived with her family and the appellant could do so as well. The judge found at [14] that it was in the best interests of the infant child to have both parents living with her. Having taken those facts into account and made those findings the judge moved onto proportionality.

18. It was entirely open to the judge to reason at [16] that 'I will not discuss the merits of the appellant's asylum claim in this decision; the matter is not before me and I have not heard the evidence. However I find that at present the appellant and the sponsor do not appear to have the option to live together legally in any other country. I find that this makes the claim exceptional.'

19. The judge also cogently found the following that 'the sponsor's parents are willing to support the appellant and the sponsor and will provide them a place to live and financial support', 'the primary consideration of the British Citizen child is to be able to live in her country of origin with both parents where she has the benefit of relationships with her extended family' and the 'appellant will not be a burden on the taxpayer' and that 'the bests interest of the child, whilst not a 'trump card' when considering the other matters raised , outweighs the public interests in refusing the claim'.

20. Essentially the finding is that the family cannot live together elsewhere than the UK and that they should be able to do so legally. The continuation of visits was thus implicitly rejected. The sponsor is a British citizen, with no right to live in Spain, and the appellant, at the date of the hearing, had only an outstanding claim for asylum in Spain so the sponsor could not join him there. There was no contention by the respondent that the sponsor and child as British citizens would be expected to relocate. The judge specifically acknowledged that the best interests was not a trump card although the judge is obliged to treat the child's interests as primary. Nothing in the decision contradicted SD (British citizen children - entry clearance) Sri Lanka which held at paragraph 71 that

'*In relation to (ii), we cannot find any support in this jurisprudence for extending this to include a principle that having a British citizen child furnishes "powerful reasons" for granting admission or entry clearance or that "substantial weight" must be given to a child's nationality. What weight is to be given appears to be left as a matter for each Contracting State's "margin of appreciation". As regards (iii), we would observe that in this regard the Strasbourg jurisprudence reflects our own initial observations on the significance of nationality at the level of*

abstract principle, in particular that the rights and benefits that attach to nationality will depend heavily on the particular circumstances.'

21. It was also open to the judge to take into account the third party support available. The judge was clear that the rules had not been met and indeed these are not a trump card on behalf of the respondent either. Despite a reference to meeting the 'spirit of the immigration rules', the judge's approach to the finance was in accordance with MM (Lebanon).

22. I refer in particular to [93] and [99] of MM (Lebanon) of which states

*'...**The couple have no realistic prospect of living together in any other country**, and, although his earnings on their own are below the MIR, she is a pharmacist with good prospects of finding skilled employment here, and they have apparently credible promises of support from other family members. They are unlikely to be a burden on the state, or unable, due to lack of resources, to integrate. Yet the strict application of the rules will exclude them...'*

...

*'99. Operation of the same restrictive approach outside the rules is a different matter, and in our view is much more difficult to justify under the HRA. This is not because "less intrusive" methods might be devised (as Blake J attempted to do: para 147), but because it is inconsistent with the character of evaluation which article 8 requires. As has been seen, avoiding a financial burden on the state can be relevant to the fair balance required by the article. **But that judgment cannot properly be constrained by a rigid restriction in the rules. Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly.** These are not matters of policy on which special weight has to be accorded to the judgment of the Secretary of State. **There is nothing to prevent the tribunal, in the context of the HRA appeal, from judging for itself the reliability of any alternative sources of finance in the light of the evidence before it. In doing so, it will no doubt take account of such considerations** as those discussed by Lord Brown and Lord Kerr in Mahad, including the difficulties of proof highlighted in the quotation from Collins J. That being the position before the tribunal, it would make little sense for decision-makers at the earlier stages to be forced to take a narrower approach which they might be unable to defend on appeal.'*

23. In all, the judge heard oral evidence, of which I have not had the benefit, and weighed the relevant factors and although the decision is generous, the judge was manifestly aware the appellant did not meet the immigration rules. I am mindful of **Volpi v Volpi** [2022] EWCA Civ 464 which confirms at 2(i) that '*An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong'* and UT (Sri Lanka) [2019] EWCA Civ 1095 which held that

> *"judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it.*"

24. I am not persuaded that the judge failed to understand the test set out in Agyarko above. The term ‘exceptional circumstances’ was used seemingly in shorthand and I am not persuaded, on careful reading of the decision, that the judge was not familiar with the correct test of unjustifiably harsh consequences which imports a balancing exercise nonetheless. Additionally, judges are being encouraged to write succinct decisions as this was. Nor was I pointed to any indication that the respondent contested that the appellant should merely re-apply.

Notice of Decision

The ECO’s appeal is dismissed and the decision of the FtT will stand.

Helen Rimington

Judge of the Upper Tribunal Rimington
Immigration and Asylum Chamber

7th May 2024