IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000065

First-tier Tribunal Nos: PA/54525/2022
IA/11201/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29th April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BEN KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR IBRAHIM KANDE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr K Mukherjee, Counsel

Heard at Field House on 27 February 2024

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Rae-Reeves ("the Judge") heard at Taylor House on 23 November 2023 and delivered on the following day, 24 November 2023.

2. The Secretary of State appeals against the Judge's decision to allow Mr Kande's Article 8 appeal under EX.1(a) and GEN.3.2 of the Immigration Rules. The First-tier Tribunal Judge refused Mr Kande's appeal in relation to his asylum and protection grounds but then went on to find that Article 8 was made out and allowed the appeal.

3. The Secretary of State's appeal pleads one ground. The ground is failure to provide reasons or adequate reasons for finding on material matters/making a misdirection of law on any material matter.

4. Permission was granted by Upper Tribunal Judge Kebede on 29 January 2024. In those reasons she said the following:

> "1. The appellant, a citizen of Guinea, appealed against the respondent's decision to refuse his asylum and human rights claim. First-tier Tribunal Judge Rae-Reeves found that the appellant would be at no risk on return Guinea but allowed his appeal on Article 8 human rights grounds. The Secretary of State seeks permission to appeal against the judge's decision.
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> 2. It was conceded before the judge that EX.1(b) did not apply because the appellant's girlfriend did not meet the definition of 'partner'. The judge went on to consider EX.1(a) in relation to his child, but misdirected himself on the correct test, which was whether it was reasonable to expect the child to leave the UK, a matter the judge did not go on to consider. Arguably that was a material error and was one which then arguably infected the judge's assessment of 'unjustifiably harsh consequences' in GEN.3.2 which in turn was arguably inadequately reasoned".

5. Before me today Ms Isherwood has argued that the First-tier Tribunal determination is so poor that it cannot stand and that the inadequate reasonings and misapplication of the test means that I should find an error of law.

6. The judgment has a number of difficulties. As Upper Tribunal Judge Kebede and the First-tier Tribunal Judge refusing permission stated, the judge has applied the wrong test in relation to EX.1(a). This is a case involving two children. The first child was born on 24 January 2022 and the second child born on 11 January 2023. EX.1(a) applies to this case and states:

> "EX.1. This paragraph applies if
>
> (a)
>
> (i) the applicant has a genuine and subsisting parental relationship with a child who –
>
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British Citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of application; and
>
> (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK".

7. The test therefore that should have been applied is that in EX.1(a)(ii), that is, taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the United Kingdom. Unfortunately the judge did not apply that test. The judge applied the higher test which is cited

in EX.1(b) in relation to the partner route in which an individual must show "there are insurmountable obstacles to family life with that partner continuing outside the UK".

8. At paragraph 51 the judge says:

> "51. Taking these points on board I find that paragraph EX1 applies and taking into account such best interests, that there would be insurmountable obstacles to the appellant continuing his family life with his child if he was to be denied leave".

9. That is the wrong test. The parties accept that. The question for me is whether or not that error of law is material to the findings that the judge then went on to make. The judge has as I have explained applied a higher test to EX.1(a) than was required. It has not been easy to discern exactly what the judge did because of this error. However, I have been referred by Mr Mukherjee in his skeleton argument to two cases, firstly **AA (Nigeria) [2020] EWCA Civ 1296** at paragraph 34, and the case of **Yalcin v Secretary of State for the Home Department [2024] EWCA Civ 74** where the Court of Appeal held at paragraph 67:

> "67. I am bound to say that I have not found this question entirely easy. The FtT's decision could certainly have been better expressed and structured. However, it is important to bear in mind the principles summarised at paras. 50-51 above: the focus should be on the way the judge performed the essence of the task required. As to that, he considered the factors that would have been relevant to an assessment of undue harshness under section 117C (5), and it is in my view obvious that he did regard the effect on D of the Appellant's deportation as unduly harsh, although he did not use that actual phrase. It is also, I think, adequately clear that he understood that the threshold required by subsection (6), whose terms he had correctly set out in para. 35 of the Reasons, was substantially higher than that required by subsection (5). As I have observed, that is in truth self-evident in the case of a serious offender, even apart from the language of the over-and-above requirement; and the height of the applicable threshold is repeatedly emphasised in the well-known authorities with which it should be assumed, in the absence of evidence to the contrary, that he was familiar (and to some of which he referred, albeit only by their names)".

10. I therefore bear those cases in mind when considering whether or not the error of law that I have identified is material to the overall outcome.

11. The second issue in relation to the judge's decision is the analysis of GEN.3.2 of the Immigration Rules which the judge was only required to go on and consider if the judge had decided that the case did not fall within EX.1(b). At paragraph 54 of the judgment the judge said the following:

> "54. Consideration of GEN 3.3. leads me to the same conclusion. I find that there would be unjustifiably harsh consequences for the appellant or his child for the reasons set out above. (Again. I'm not considering the position of Miss Harlow as they have not been in a relationship for two years). Whilst the test is a different one, removal of the appellant from his child's life would amount to the same thing, namely unjustifiably harsh consequences,

taking into account the best interest of the children. In reaching this conclusion, I acknowledge the high threshold that applies to such a test".

12. In my judgment the judge was clearly referring to GEN3.2, not 3.3 and applied the correct test in that respect, that test being a much higher test than that required under EX.1(a).

13. Mr Mukherjee has prayed in aid the expert report as providing support to the contention that individuals returned to Guinea particularly Mr Kande would face a poor human rights situation, low prospects of obtaining a job and potential difficulty in finding work. In response Ms Isherwood says that the expert report has been discredited by the First-tier Tribunal Judge who has not found that the expert was a proper expert or able to give proper evidence in relation to the asylum matters in this case. The judge gives some quite significant time to the expert report. From paragraph 18 through to paragraph 27 the judge sets out the problems and issues that the judge has with the expert report, in particular some of it becoming rambling and not proper citation of sources, and at 28 the judge says "For all of these reasons, I place limited weight on the experts report".

14. Although the judge dismisses a large part of the expert report in relation to the protection claim the judge says at paragraph 43:

> "43. The expert provides information as to the poor state of Guinea and its economy and the difficulty of finding work. I have no doubt that the situation is difficult in Guinea, but this would apply to many countries of the world and is not the test for the granting of asylum. However, as I note below, it may be relevant to the human rights claim".

Then at 44 the judge says:

> "44. In summary, I do not reject the experts report in its entirety as it does provide some helpful commentary on society in Guinea and the overall situation in that country. Have a, however, in terms of specifics I found it rambling, anecdotal, unfocused, irrelevant in parts and reliant on incorrect information. It also lacks academic rigour. As such, its conclusions relating to the appellant are less than helpful and I attach little weight to them".

As a result of that and the evidence provided to the judge, the judge went on to refuse the asylum and protection claim.

15. I therefore have before me a question as to whether the errors under Article 8 and EX.1(a), which is the lowest test that I must examine, are such that the judge's error of law was material to the overall outcome of the case. Bearing in mind the Court of Appeal authorities it is my judgment that the failure of the judge to apply the correct test and applying a higher test in my judgment to the question under EX.1(a), namely that of insurmountable obstacles rather than reasonableness, is not material to the overall outcome of the case. I bear in mind the Court of Appeal authorities about interfering with the decision of a fact-finding Tribunal. It would of course have been better if the First-tier Tribunal Judge had gone into a little more detail about the reasonings but brevity is to be applauded in these circumstances and the judge does, in my judgment, have the relevant facts before him and makes an analysis of the facts, in particular, the fact that there are two very young children and the removal of Mr Kande means

that he would not be able to properly continue a relationship with those two very young children should he be removed to Guinea. The reasonableness of that is, I agree with the First-tier Tribunal Judge, such that he should not be removed. The fact that the judge applied a higher test in my judgment means that there is no material error of law.

16. However, even if I am wrong about that the judge then went on to consider the GEN.3.2 issue. Whilst I might not necessarily agree with all the conclusions of the judge it was the judge that heard all the evidence and made a decision on the credibility of the witnesses and examined the witness statements in detail and in my judgment there is no basis to interfere with the decision in relation to GEN.3.2. The judge had found that it would be unjustifiably harsh for the appellant or his child to have to go to Guinea. Essentially, and this is my paraphrase, the separation of Mr Kande from his two very young children is such that it is both unreasonable to remove under EX.1(a) and unjustifiably harsh under GEN.3.2. The judge fully acknowledged the high threshold that applies in such a test and has given sufficient reasons to draw the conclusions that he did.

17. As a result whilst the judge did apply the wrong test in EX.1(a) in my judgment that is not a material error that impacts on the overall conclusion of the case and therefore I do not find that there was a material error of law made by the judge and I dismiss the appeal.

Ben Keith

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 February 2024