



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06573/2019

THE IMMIGRATION ACTS

Remote Hearing by Microsoft Teams
On 1st June 2021

Decision & Reasons Promulgated
On 5th August 2021

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MS THI TRANG VU
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Manh Cuong Le, Sponsor

For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

Remote Hearing

1. The hearing before me on 1st June 2021 was a remote video hearing held during the Covid-19 pandemic. Neither party objected to a remote hearing. The appellant did not join the hearing but her partner and sponsor, Mr Manh Cuong Le did join the hearing remotely. He informed me that the appellant no longer has any legal

representation. The sponsor was assisted throughout the hearing by a Vietnamese interpreter arranged by the Tribunal. The sponsor and interpreter introduced themselves and established that they were able to communicate with each other effectively, and they were able to hear and understand each other.

2. I sat at the Birmingham Civil Justice Centre. I was addressed by the parties in exactly the same way as I would have been if the parties had attended the hearing together. I was satisfied: that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it is in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing will ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. No technical problems were reported to me by the parties during the course of the hearing. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

Introduction

3. The appellant is a national of Vietnam. On 9th December 2018 she made an application for leave to enter the UK under Appendix FM of the Immigration Rules on the basis of her family life with her partner. The application was refused by the respondent for reasons set out in a decision dated 20th March 2019. The respondent accepted the application did not fall for refusal grounds of suitability. The respondent also accepted the appellant meets the eligibility relationship requirements and the eligibility English language requirement. The respondent concluded that the eligibility financial requirement is not met by the appellant. The respondent considered whether there are any exceptional circumstances for the purposes of paragraphs GEN.3.1 and GEN.3.2 which could render refusal of entry clearance a breach of Article 8 because the refusal could result in unjustifiably harsh

consequences for the appellant, her partner or relevant child. That included a consideration of whether the financial requirement is met through taking into account other sources of income, including any credible prospective earnings. The respondent concluded that there are no such exceptional circumstances, and the appellant cannot satisfy the minimum income requirement set out in the rules. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Housego for reasons set out in a decision promulgated on 13th January 2021.

The appeal before me

4. The appellant's grounds of appeal are dated 3rd February 2020 and were settled by Counsel that represented the appellant at the hearing before the First-tier Tribunal. The appellant advanced five grounds of appeal. First she claims Judge Housego misdirected himself in law, at paragraph [51], when requiring there to be 'exceptional circumstances' before reliance could be placed upon GEN.3.1(1) of Appendix FM. Second, it was *Wednesbury* unreasonable for the judge to find on the facts that GEN.3.1(2) was not satisfied particularly given the significant weight accorded by GEN.3.3(1) of Appendix FM to relevant children. Third, Judge Housego erred in law in his approach as to whether paragraph 21A(2)(b) of Appendix FM-Se was met on the evidence. It is said Judge Housego failed to take into account relevant evidence and gave inadequate reasons for finding that the letter from the perspective employer was not a genuine offer of employment. Fourth, Judge Housego failed to conduct a lawful best interests assessment of the relevant children pursuant to s55. Fifth, Judge Housego made perverse findings in relation to GEN.3.2(2) of Appendix FM and finally, Judge Housego made a *Wednesbury* unreasonable finding in paragraph [53.13] of his decision when stating that the sponsor was not integrated into UK society because he chose to use the services of a Vietnamese interpreter when giving his evidence.
5. Permission to appeal was granted by First-tier Tribunal Judge Loke on 23rd April 2020. She said:

“1. The judge did not misdirect himself regarding the application of GEN.3.1. Exceptionality is contained in the second limb of the test at GEN.3.1.(1)(b), in that the judge had to consider whether refusal would result in unjustifiably harsh consequences.

2. However, it is arguable that the judge did not conduct an adequate section 55 assessment as to the best interests of the appellant’s child.”

6. The respondent filed written submissions dated 23rd July 2020 in accordance with directions made by Upper Tribunal Judge Bruce on 1st July 2020. The respondent noted that despite the observations made by First-tier Tribunal Judge Loke on 23rd April 2020 which purported to exclude the grounds regarding the application of GEN.3.1, the states; "Permission to appeal is GRANTED". In light of Safi and others (permission to appeal decisions) [2018] UKUT 388 (IAC), the grant was therefore unrestricted. The respondent therefore responded to the claims made by the appellant in the grounds of appeal. The respondent opposes the appeal and submits that when read as a whole, the decision of Judge Housego demonstrates the Judge had proper regard to all relevant factors when reaching his decision. The respondent claims the grounds of appeal proceed on an erroneous understanding of the relevant terminology. The respondent submits GEN.3.2 of Appendix FM ensures any assessment of factors relating to the appellant’s family or private life that are not incorporated within other provisions of Appendix FM, are subsumed within the immigration rules by ensuring decision makers consider whether there are exceptional circumstances which would render refusal of entry clearance a breach of Article 8 because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights would be affected by the decision to refuse the application. The respondent submits Judge Housego had proper regard to the evidence relating to the three children, all of whom are British citizens, that live with the sponsor and the findings and conclusions reached by the judge were open to him, and are neither, *Wednesbury* unreasonable, irrational nor perverse. The respondent submits Judge Housego carefully considered the evidence before the Tribunal regarding the employment of the sponsor, and carefully considered whether there are credible prospective earnings that would be available to the appellant and should be taken into account. Furthermore, the respondent submits

Judge Housego considered the best interests of the appellant's child, noting the age of the child, and the fact that the appellant's child has lived with her father (*the sponsor*) for a number of years and the parties have never lived together as a family unit.

7. Although the appellant was unrepresented at the hearing before me, in response to previous directions made by the Tribunal, the appellant has filed a written reply dated 1st August 2020 and for the avoidance of any doubt, I have had regard to the matters set out in that reply when reaching my decision. The appellant refers to the explanatory note to the Statement of Changes HC 290 which confirms GEN.3.1 to 3.3 were provisions introduced into the rules to give effect to findings made by the Supreme Court in MM (Lebanon) -v- SSHD [2017] UKSC 10, which included a requirement for decision-makers to have regard, as a primary consideration, to the best interests of any child affected by the decision thereby giving explicit effect within Appendix FM to the respondent's duty under s55 of the Borders, Citizenship, and Immigration Act 2009. The appellant maintains Judge Housego misdirected himself by failing to ask, as he was required to by GEN.3.1(1)(b), whether, taking account of the best interests of the relevant children (and particularly the biological child of the appellant), it was evident *that there were exceptional circumstances which could (the appellant's emphasis) render refusal of entry clearance a breach of Article 8 because such refusal could result in unjustifiably harsh consequences for the appellant, the sponsor or the relevant children.* The appellant submits that instead, Judge Housego asked whether there were exceptional circumstances which would (*the appellant's emphasis*) render refusal a breach because such refusal would result in unjustifiably harsh consequences. The appellant maintains Judge Housego gave no adequate reasons for finding that GEN.3.3(1)(b) of Appendix FM was not met on the facts, and appellant's case that refusal of entry clearance could result in unjustifiably harsh consequences for either the appellant, child or sponsor, if the family is not reunited. The appellant also maintains Judge Housego erred in the assessment of the prospective earnings that would be available to the appellant from suitable employment. The appellant also maintains Judge Housego failed to carry out a lawful and adequate assessment of

the best interests of the children and erroneously gave undue weight to the decision by the sponsor to elect to use an interpreter when giving his evidence.

8. At the hearing before me, Mr Manh Cuong Le submitted that he is responsible for the care of three children and can only work part time. He said that 3 months ago, he had a stroke in a rest-room and he is afraid that if something happens to him, no-one will be able to take care of the children. He told me that he could not recall the date that he had a stroke, but it was after the decision of the First-tier Tribunal. He said that when he had the stroke the children were at school, and he fell when he went to the rest room. He accepts that he does not have sufficient income to satisfy the income requirements set out in the immigration rules but explained that that is because he is caring for three children, and he can only work at the weekend. He said that when he goes to work, he has to take the youngest child with him, whilst the two older ones look after themselves at home. He said that if the appellant cannot join him in the UK, he would be afraid to take the children to Vietnam because there are cases where the children have been taken to Vietnam and the children have been taken so that they cannot return to the UK.

Discussion

9. I deal first with the appellant's claim that Judge Housego misdirected himself as to the application of GEN.3.1 of Appendix FM and in reaching his conclusion that the appellant has failed to establish that there are credible prospective earnings available to the appellant. There is no doubt the appellant could not satisfy the minimum income requirement set out in paragraph E-ECP.3.1 of Appendix FM. That is a requirement that the applicant must provide specified evidence, from the sources listed in paragraph E-ECP.3.2. of a specified gross annual income of at least £18,600. It is uncontroversial that the sponsor's earnings relied upon by the appellant disclose an income of £6144 a year. That is not the end of the matter because the minimum income requirement is subject to what is said in paragraph GEN.3.1 of Appendix FM. It is useful to begin by referring to the relevant Immigration Rules:

Exceptional circumstances

GEN.3.1.(1) Where:

(a) the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1. or E-LTRC.2.1. applies, and is not met from the specified sources referred to in the relevant paragraph; and

(b) it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of entry clearance or leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal could result in unjustifiably harsh consequences for the applicant, their partner or a relevant child; then the decision-maker must consider whether such financial requirement is met through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE (subject to the considerations in sub-paragraphs (3) to (8) of that paragraph).

...

Other sources of income, financial support or funds in exceptional circumstances

21A(1). Where paragraph GEN.3.1.(1) of Appendix FM applies, the decision-maker is required to take into account the sources of income, financial support or funds specified in sub-paragraph (2).

(2) Subject to sub-paragraphs (3) to (8), the following sources of income, financial support or funds will be taken into account (in addition to those set out in, as appropriate, paragraph E-ECP.3.2., E-LTRP.3.2., E-ECC.2.2. or E-LTRC.2.2. of Appendix FM):

...

(b) credible prospective earnings from the sustainable employment or self-employment of the applicant or their partner; or

...

10. Judge Housego addressed the issue at paragraphs [48] to [51] of his decision. He noted the appellant's reliance upon a letter from the employer of the sponsor referring to prospective employment that will be available to the appellant. It is clear from the formulation of paragraph GEN.1.1.(b) that it is a pre-condition to any consideration of whether the eligibility financial requirement is met through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE, that there are exceptional circumstances which could (*my emphasis*) render refusal of entry clearance or leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal could (*my emphasis*) result in unjustifiably harsh consequences for the applicant, their partner or a relevant child. Judge Housego found that there were no such exceptional

circumstances for the reasons set out at paragraph [51] of his decision. The conclusion reached was one that in my judgment is neither *Wednesbury* unreasonable nor irrational and was open to the Judge. In any event, even if one were to accept that there are exceptional circumstances, that could render refusal a breach of Article 8, it is clear from what is said at paragraphs [48] to [50] that Judge Housego carefully considered the evidence before the Tribunal regarding the prospective employment that the appellant relied upon as being available to her upon her arrival in the UK. In reaching his decision Judge Housego referred to the evidence set out in the letter from the employer, and carefully considered the oral evidence given by the sponsor. He had regard to the claim made in the letter that the appellant would be engaged in cleaning and customer support, and the evidence of the sponsor that he did all the cleaning at the place of business, and the appellant would be a trainee nail technician. At paragraph [53.10] Judge Housego found the letter offering the appellant work at the nail bar where the sponsor works, is not a genuine offer. It was, on the evidence, open to Judge Housego to find there is no role for the appellant and the appellant has failed to establish credible prospective earnings from sustainable employment, which taken together with the earnings of the sponsor establish that the minimum income requirement is met.

11. I also reject the claim that Judge Housego erred in his assessment of the best interests of the children. The s55 duty to have regard to the best interests of a child applies when considering the proportionally assessment. The best interests of a child are usually best served by being with both or at least one of their parents.
12. The decision must be read as a whole. It is in my judgement clear that Judge Housego had in mind throughout, the best interests of the children and the circumstances in which the appellant and her child in particular, find themselves in. He noted, at [40], that the appellant lives with her parents in Vietnam and she has a daughter, who is a British citizen. He noted, at [42], that the appellant's daughter was about a year old when she came to the UK and where she has since remained. He noted she has always lived with her father and that the sponsor's child by his

former wife, and the child of his elder son, also live with them. At paragraph [53] he noted the appellant's child is now five of age and the situation now is as chosen by her parents, and that the child now attends primary school with no problems reported. He found the appellant's child is also a Vietnamese citizen. He noted that there has never been a family unit comprising of the appellant, the sponsor and their child so that the decision of the respondent to refuse the application for entry clearance does not interfere with any existing family life. He found, at [53.12], that it would not be unreasonable for the appellant's child to go to Vietnam with her father to join her mother and grandparents. He found that the sponsor has no other family in the UK and that if the parents decide they wish to be together in Vietnam, that is feasible on the evidence before the Tribunal.

13. At paragraph [53.13], Judge Housego also considered the care provided by the sponsor to his child from a previous relationship and his grandson. It is in my judgement clear that there was insufficient evidence before Judge Housego regarding the two other children (*i.e. the sponsor's child from his previous relationship and his grandson*) to establish that the two would be unable to live in Vietnam or of any adverse impact arising from the decision to refuse the appellant entry clearance, sufficient to warrant the appeal being allowed.
14. The assessment of what is in the best interests of a child is inherently fact sensitive and the First-tier Tribunal must carry out the assessment on the evidence before it. In reaching his decision Judge Housego plainly had regarded to the factors that weigh in favour of the appellant and those that way against her in his assessment of proportionality. Judge Housego considered all relevant matters holistically with the required degree of anxious scrutiny. It is clear that the intention of the sponsor and the appellant is to bring their family together in United Kingdom, but Article 8 does not give a person the right to choose where they wish to live. In this case the Judge gives adequate reasons to support the conclusions he reached, and in my judgment the decision reached was one that was open to the Judge. The Judge's reference to the sponsor requiring an interpreter must be read in context but even if it was erroneous, it was not material to the outcome of the appeal.

15. It follows that in my judgment, there is no material error of law in the decision of Judge Housego, and I dismiss the appeal.

Decision

16. The appeal is dismissed. The decision of First-tier Tribunal Judge Housego promulgated on 13th January 2020 shall stand.

Signed *V. Mandalia* Date: 20th July 2021

Upper Tribunal Judge Mandalia