Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
UI-2021-001833 [HU/01129/2021]
UI-2021-001834 [HU/01130/2021]
UI-2021-001835 [HU/01131/2021]
UI-2021-001836 [HU/01132/2021]
UI-2021-001837 [HU/01418/2021]

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 21 September 2022	**On 6 November 2022**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

(1) HADIL DAHDAL
(2) HODA DAHDAL
(3) A. AL JOHMANI
(4) Q. AL JOHMANI
(5) M. AL JOHMANI

Respondents

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr D Lemer, Counsel instructed by Kidd Rapinet LLP

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Smeaton promulgated on 25 November 2021 ("the Decision"). By the Decision, the Judge allowed the Appellants' appeals against the Respondent's decisions dated 21 January 2021, refusing their human rights claims (Article 8 ECHR). The claims were made in the context of applications to enter the UK as the relatives of persons settled in the UK (for family reunification). The First and Second Appellants are the daughters of parents living in the UK. Their siblings are also living lawfully in the UK. The remaining Appellants are the children of the Second Appellant.

2. The Appellants are all nationals of Syria. The Second Appellant and her children are living in Saudi Arabia. They lived there previously with their husband/father, but he has since died (in Syria having returned there for his brother's funeral). The First Appellant lives in Jordan. The Appellants' other family members were accepted for resettlement in the UK under the Syrian resettlement scheme. This did not include the First Appellant because she was not registered with the family at the time. Nor did it include the Second to Fifth Appellants who were at the time part of a separate family unit with their husband/father.

3. The Respondent refused the Appellants' applications under paragraph 352D of the Immigration Rules ("the Rules") on the basis that the First and Second Appellants were over the age of eighteen and the remaining Appellants were the grandchildren and not children of their sponsor. The applications were also rejected for lack of evidence of the claimed relationship and of continuing contact with the family in the UK. The Respondent did not rely on the lack of evidence of claimed relationship in her review but maintained her decisions on the basis that the Appellants could continue to live as they do presently and that separation from the family in the UK was not a disproportionate interference with family and/or private life.

4. It was accepted on the Appellants' behalf that they could not meet the Rules. The only issue therefore is whether the Respondents' decisions breach the Appellants' human rights based on interference with their family and/or private lives.

5. The Judge concluded that refusal of entry is indeed a disproportionate interference with the Appellants' Article 8 rights and allowed the appeals outside the Rules based on exceptional circumstances.

6. The Respondent appeals on one ground only. She submits that the Judge has materially misdirected herself in law on a material matter. It is said that the Judge has failed to have regard to section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B") and has given "no real weight" to the public interest.

7. Permission to appeal was granted by First-tier Tribunal Judge I D Boyes on 11 January 2022 on the basis that the grounds were "clearly arguable".

8. The matter came before me to determine whether the Decision contains an error of law. If I were to conclude that it does, I must then decide whether the error should lead to a setting aside of the Decision and, if I set it aside, I must either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

9. I had before me a core bundle of documents relevant to this appeal, the Respondent's bundle before the First-tier Tribunal and the Appellant's bundle before the First-tier Tribunal. I do not need to refer to the documents before the First-tier Tribunal as the issue is one of law.

10. After hearing oral submissions from Mr Whitwell and Mr Lemer, I concluded that the Respondent had not established that the Decision contains an error of law. I indicated that I would provide my decision in writing which I now turn to do.

DISCUSSION

11. As Mr Whitwell pointed out, the Respondent's decisions under appeal were predicated on a lack of evidence provided by the Appellants. That evidence had since been produced. Judge Smeaton was therefore in the position of being the primary finder of fact.

12. The Respondent's first complaint was that the Judge failed to make express findings. Mr Whitwell asserted that the Judge failed to determine whether family life exists between the Appellants and their family in the UK. He said that was left to inference from what is said at [40] to [43] of the Decision.

13. The Judge properly directed herself at [23] to [25] of the Decision as to the law which applies in entry clearance cases. That includes whether Article 8 is engaged at all in circumstances where family members are already living apart. As the Judge pointed out at [24] of the Decision, determination of that question is highly fact sensitive. The factors which form part of that determination are the same whether considered under the heading of engagement or as part of the proportionality assessment. The Judge then reached a conclusion at [25] of the Decision that Article 8 was engaged. Thereafter, the issue became one of proportionality. Whether the factors were considered as part of the private lives of the Appellants or as part of their family lives did not matter.

14. The crux of the Respondent's pleaded grounds is that the Judge has failed to have regard to Section 117B and has failed therefore to give appropriate weight to the public interest.

15. The Judge recognised at [25] of the Decision that, having concluded that Article 8 was engaged, the first question was whether the Appellants could meet the Rules. Having recorded that the Appellants did not claim to be able to meet the Rules, the Judge properly directed herself at [27] of the Decision as to approach. She recognised that she needed to conduct a balance sheet assessment in relation to proportionality. She said this:

> "27. If the Appellants do not meet the rules (as here), I must move on to consider proportionality using the 'balance sheet' approach. After finding the facts, I set out those factors that weigh in favour of immigration control – the "cons" – against those factors that weigh in favour of family and private life – "the pros" – giving reasoned weight to each before giving a reasoned conclusion as to whether the "pros" have outweighed the "cons" such that the Refusal Decisions are disproportionate. If they are, the appeals succeed. If they are not, the appeals must be dismissed."

16. Whilst I accept that no express mention of Section 117B is there made, that is a clear recognition of Section 117B (1) and a correct statement of the exercise which the Judge was required to conduct.

17. As Mr Lemer pointed out, there is in fact express mention of Section 117B at [65] of the Decision. As he also pointed out, the Judge has set out what she viewed as "the cons" at [44] to [46] of the Decision as follows:

> "44. The Appellants do not meet the requirements of the Immigration Rules and this is clearly an important factor that weighs against the Appellants in the proportionality assessment (KF and others). A1 does not meet the requirements of the rules on the sole ground that she was over 18 at the point she applied. A2 does not meet the requirements of the rules on the basis that she was over 18 at the point she applied and, further, was not part of Mr Dahdal's family unit at the time that he left Jordan and came to the UK. A3-A5 do not meet the requirements of the rules because they are the grandchildren, not the children, of Mr Dahdal.
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> 45.Considering the factors in Part 5A of the 2002 Act, there is nothing before me to indicate the level of English spoken by the Appellants. A1 has an undergraduate degree in Engineering but it is not clear in which language that course was taught.
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> 46.It is also unclear whether A2 has any qualifications which would assist her in obtaining employment in the UK. At present, the Appellants are all reliant on money sent from the UK."

18. Although I accept that the Judge does not there make express mention of Section 117B, it is clear from those findings that the Judge had well in mind Section 117B(1), (2) and (3) in terms of the importance of the maintenance of effective immigration control, and the importance to the public interest of being able to speak English and be financially self-sufficient in order to integrate. Those were the only provisions which apply. That the Judge was there referring to what she described at [27] of the Decision as "the cons", in other words, the factors weighing against the Appellants is clear when

one reads [47] of the Decision which begins with the words "[s]et against those 'cons'".

19. For the foregoing reasons, it cannot therefore be said that the Judge failed to have regard to Section 117B.

20. Mr Whitwell went on to argue that, in light of the adverse factors identified, the Judge failed to give proper weight to the public interest. He described the Judge's reasoning and findings as "questionable" as to weight.

21. In particular, he submitted that, although the Judge said that she gave weight to the public interest in the Appellants' failure to meet the Rules, describing it as an "important" factor at [44] of the Decision, by the time that one reached the assessment at [55] of the Decision, that factor had been "whittled down" to a failure to meet one element of the Rules.

22. As Mr Lemer pointed out, a description of reasoning as "questionable" does not identify any public law error. Either the Respondent has to say that the findings are perverse (which she has not pleaded and was not Mr Whitwell's submission) or that the reasoning is inadequate.

23. At [55] the Judge said this:

> "I accept that A1 is not living apart from her family by choice. She was living with them, as part of the family unit, before they left Jordan for the UK and but for the fact that she had no right to travel to the UK, she would have travelled with them to the UK. She is a young woman who is not leading an independent life, is unmarried and has not formed an independent family unit. The only reason she does not meet the Immigration Rules is because of her age, yet she remains a young woman reliant on her family."

24. I do not accept that this analysis is irrelevant, unreasoned or even questionable. The fact that the Appellants do not meet the Rules is, as the Judge recognised, an important factor. However, given that the underlying public interest is in the maintenance of effective immigration control, the reason why an individual cannot meet the Rules is relevant as is the extent to which the individual does not do so. The Judge's finding is not that this is a "near miss". That would be impermissible. However, the public interest is not fixed. It is flexible and the issue for the Judge is what weight to give it on the facts. The Judge was entitled to take account of the reasons why the Appellants could not meet the Rules and has provided adequate reasons for finding as she did.

25. Mr Whitwell finally submitted that the Judge must have been aware of the economic cost of the Appellants joining their family in the UK. However, the only mention of this is the cost of education. He pointed out that the family has been separated for many years, that the Appellants have status where they are living currently, could travel in order to maintain contact and were in receipt of financial remittances. The family has even travelled back to

Syria where circumstances require. He asserted that the Judge has treated Article 8 as a general dispensing power and has simply acceded to the wish of the Appellants and their family to continue family life in the UK when that family life could be continued elsewhere.

26. I have no doubt that other Judges could have reached the opposite conclusion on the facts of these cases. However, Judge Smeaton carried out a careful analysis of the factors for and against the Appellants at [44] to [65] of the Decision. As I have indicated above, the Judge recognised the exercise she had to conduct. She balanced the "pros" against the "cons" as she was required to do. There is no inadequacy of reasons. The Respondent's grounds are merely a disagreement with the outcome and the relative weight given to the factors at play.

CONCLUSION

27. As I indicated above and at the hearing, the Respondent's grounds do not identify any error of law in the Decision. Accordingly, I uphold the Decision with the consequence that the appeals remain allowed.

DECISION

The Decision of First-tier Tribunal Judge Smeaton promulgated on 25 November 2021 does not involve the making of an error on a point of law. I therefore uphold the Decision with the consequence that the Appellants' appeals remain allowed.

Signed: L K Smith

Upper Tribunal Judge Smith Dated: 27 September 2022