Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04812/2020

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 19 January 2022 **On 14 February 2022**
Extempore decision

Before

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

ENTRY CLEARANCE OFFICER

Appellant

and

AMITKUMAR JAYANTILAL MAHETA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Ms C Warren, Counsel instructed by JML Solicitors

DECISION AND REASONS

1. This is an appeal of the Secretary of State but for convenience we will refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of India born in June 1981. In April 2008 he married his wife, who is also a citizen of India. She resides in this country pursuant to a grant of limited leave to remain. The couple have two children. One is a British citizen and lives here with the appellant's wife; the other is a citizen of India and lives with the appellant in India.

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3. On 31 January 2020 the appellant made a human rights claim in the form of an application for entry clearance to join his wife and child. That application was refused on 10 March 2020. The appellant appealed to the First-tier Tribunal. A hearing took place on 2 June 2021, and on 17 June 2021 First-tier Tribunal Judge S Knight allowed the appellant's appeal. The Secretary of State now appeals to this Tribunal against the decision of Judge Knight.

Factual background

4. Before the First-tier Tribunal, it was the appellant's case that he should be granted entry clearance as it would be in the best interests of both of his children, in particular his British son, for him to reside in this country with his wife, and both children, as a family unit. He accepted that he was unable to meet the provisions of the Immigration Rules concerning a grant of entry clearance, and so advanced his case on the base of Article 8 of the European Convention on Human Rights ("the ECHR"). That was because the only possible avenue available to him under the Immigration Rules was on the basis that he bore "sole responsibility" for the upbringing of his British child and plainly, as he accepted below, that was not the case.

5. Turning to the judge's decision, at [5] and [6] he outlined the relevant provisions of the Immigration Rules. At [7] he set out the approach that the court or Tribunal must take to an appeal brought on the basis of Article 8 "outside" the Rules.

6. At [9] the judge directed himself concerning section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") concerning the public interest considerations inherent to any assessment of Article 8 in this context. The judge quoted from the relevant policy of the respondent at [11], and then at [12] and [13] directed himself concerning the approach that should be taken when determining the best interests of a child, drawing on the lead authority on the issue, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

7. Having summarised the competing submissions advanced on behalf of the Entry Clearance Officer and the appellant, the judge reached the operative reasoning in his decision at [43] and following. At [45], the judge conducted the following analysis of the best interests of the appellant's British son, who lives in this country. We observe at this point that his son was seven years old at the time of the hearing below. At [45] he said this:

> "45. I have considered the best interests of the Appellant's son. His son is British and is residing in the United Kingdom. His future is best served by him being raised in the United Kingdom. The Appellant has loving and nurturing relationships with both of his children. The Appellant's daughter is currently well cared-for, by him. The Appellant's son is currently well cared-for, by his wife. However, the son does not receive from the Appellant the emotional support that he should have, and which he would receive if the Appellant was in the United Kingdom. I find that the best interests of the Appellant's son (and also his daughter) are to grow up in the United Kingdom with both parents available in person. In particular, the continuation of parenting

> by videocall is damaging to the children's emotional development."

8. At [46], the judge concluded that the appellant enjoys family life within the meaning of Article 8 of the ECHR with his son. He gave reasons for concluding that the refusal of entry clearance by the Entry Clearance Officer to the appellant would be sufficient to interfere with the Article 8 rights enjoyed by the appellant and his son, but found that, in principle, such an interference would be in accordance with the law in the sense that it would be in pursuit of "immigration control in the interests of the economic wellbeing of the country".

9. The judge then identified what he considered to be the central issue in the appeal in these terms: "The main question for me to consider is therefore whether the interference is proportionate to the pursuit of a legitimate aim. This requires a balancing exercise." Having set out reasons for why he considered the appellant to be financially independent, satisfying the requirement that he would not be a burden on public funds, the judge then stated that the appellant speaks English and that he would meet the relevant English language requirement under the Rules. The judge identified those as neutral factors. Against the appellant, at [49], was the maintenance of effective immigration controls.

10. At [50], the judge stated that in the appellant's favour is the family life that he had developed with his son. At [51], the judge stated that the appellant would not be required to be removed from the United Kingdom if he were already present in the territory. He said:

    > "It would be perverse to hold against the appellant the fact that he has not unlawfully entered the United Kingdom. The respondent's guidance plainly anticipates this."

    The judge concluded the operative reasoning of his decision in these terms at [52]:

    > "I conclude that the balance falls very clearly in favour of the appellant's family life and that of his son. I find that the refusal of entry clearance to the appellant would breach both of their rights under Article 8 of the ECHR and would not be justified. The same also applies to the rights of the appellant's daughter, who cannot be separated from the appellant."

Grounds of appeal

11. The Secretary of State advances a number of grounds of appeal based on what she considers to be the judge's failure to make relevant findings of fact, to give weight to material matters or to give adequate reasons for the findings that were made by the judge. Although the judge noted that the appellant has separated from his wife and son, that has been the situation for a number of years, and other than a reference to the appellant's son crying in the appellant's absence, the judge failed to identify other features which would militate in favour of a grant of entry clearance.

12. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Woodcraft.

Submissions

13. The case as it was advanced before us by Ms Everett departed somewhat from the way in which the grounds of appeal set out the case for the Entry Clearance Officer.

14. First, we deal with a concession which the Entry Clearance Officer initially stated in a skeleton argument prepared for these proceedings had been made by the appellant. At [7] of the skeleton argument, drafted by Ms Willocks-Briscoe, who did not appear before us, it is stated that:

> "Although the judge in assessing the appeal notes that the appellant concedes he cannot meet the Immigration Rules – the judge fails to address the question of exceptional circumstances to identify any relevant factors that would be carried into the wider Article 8 assessment. **In light of the concession made by the appellant it has to be taken that it is conceded that no exceptional circumstances exist for the family that would make the refusal of entry clearance disproportionate**" (emphasis added).

15. Before us Ms Everett withdrew this submission. She accepted that the appellant had not made such a concession. She was right to withdraw that submission, in our judgment. Had she not done so, we would have found that the appellant had not conceded anything.

16. The Secretary of State's submission at [7] of her skeleton argument is misconceived. By definition, where an appellant is unable to demonstrate that his appeal should be allowed on the basis of Article 8 as articulated by the Immigration Rules, an assessment should take place of the proportionality of the appellant's proposed removal, or continued non-admission, by reference to Article 8 "outside" the Rules. So much is clear from *TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department* [2018] EWCA Civ 1109 where the former Senior President of Tribunals said:

> "The structure of decision-making in appeals of the instant type would usually involve the application being considered under the relevant provisions of the Rules and, if the appellant did not qualify under the Rules, outside the Rules to determine whether removal would amount to a breach of Article 8."

That is precisely the approach the judge below adopted on this occasion and there was no merit to the criticism advanced against that approach by the Secretary of State in her skeleton argument. It appears that [7] of the Secretary of State's skeleton argument conflated the fact that it was accepted on the part of the appellant that his appeal could not succeed *inside* the Rules with a concession that the case could not succeed *outside* the Rules.

17. The focus of the appeal before us lay in the judge's approach to assessing the best interests of the appellant's British son. Ms Everett contends that the conclusion that the judge reached, namely that it would be in the best interests of the child for the appellant to reside with him in this country, was not supported by any evidence meriting that conclusion. She submits that the judge speculated concerning the continued impact of the appellant's non-admission, in light of the fact the *status quo* had been for the appellant to be living in India apart from his

son for most of his son's life. It is in this respect that the Secretary of State's grounds of appeal should be viewed, submits Ms Everett. The judge failed to make findings of fact that were necessitated by the conclusion that he had reached, and failed to give sufficient reasons for reaching that conclusion in light of the absence of the necessary findings of fact.

Discussion

18. In our judgment, the judge did give sufficient reasons for reaching the conclusion that he did at [45] and made all the findings of fact necessary to justify the conclusion that he reached.

19. By way of a preliminary observation on this point, we note that even in Ms Everett's submission by which she contended that it was not open to the judge to find that it was in the best interests of the son for the father to live in this country, the terminology that she used before us was that it was "a not unreasonable speculation". In our judgment, it is highly relevant that in articulating her submission in that way, Ms Everett accepted that it was not unreasonable to assume that it would be in the best interests of a child for both the child's parents to reside with them in the same country.

20. Moreover, in our judgment, it is possible to go further in rejecting the submissions advanced by Ms Everett. The judge had heard evidence from the appellant's wife concerning the impact of the appellant's absence on their son. According to the judge's unchallenged summary of her evidence at [21], the appellant is very attached to his son and misses him every day. The family keep in contact through WhatsApp and the appellant's son cries extensively because of their separation. The judge also summarised the appellant's wife's evidence that it was the best moments of the appellant's life when the family met up in Poland and in Paris for short periods in the recent past.

21. In our judgment, it is axiomatic that a child's best interests are served by the physical presence of both parents in the same country unless there are any safeguarding or other similar concerns raised which, we stress, have not been raised in this case. The judge heard evidence concerning the impact of the appellant's continued non-admission on the child, and reached findings that were entirely consistent with that settled, accepted approach to determining the best interests of a child.

22. Although Ms Everett stated that she was not advancing a rationality challenge against the judge's reasoning concerning the best interests of the appellant's British son, in our view, her submissions are most appropriately categorised in that way. In Ms Everett's submission, the judge reached findings which were not open to him on the evidence that he heard. We reject that submission; Ms Everett's submissions concerning the judge's assessment of the best interests of the appellant's British son amount to no more than a disagreement with legitimate findings that were open to the judge on the evidence that he heard.

23. We also observe that it had been no part of the Secretary of State's case before the First-tier Tribunal that the family should relocate to India. At [37(iv)] of the judge's decision the submissions of the presenting officer before the First-tier Tribunal were set out; it had been assumed by the presenting officer that the British son would not be required to leave the United Kingdom, and rather that family life would be able to continue, with the family split up in the way that they

had been thus far. It was no part of the Secretary of State's case that the appellant's British son should be expected to relocate to India, and against that background the judge was entitled to conclude as he did concerning the child's best interests.

24. Based on the submissions as focussed by Ms Everett, those findings are sufficient to dispose of the Entry Clearance Officer's appeal in this case. For completeness, however, we address the other grounds of appeal that featured in the Secretary of State's written case. At the heart of the Secretary of State's remaining grounds of appeal lies a challenge to the proportionality assessment conducted by the judge. As we have already set out, at [7] the judge set out the now well-established series of questions that should be asked by a court or Tribunal when determining the proportionality of an interference with Article 8 in this context. Those questions are taken from *R (on the Application of Razgar) v Sectretary of State for the Home Department* [2004] UKHL 27. The fifth *Razgar* question concerns whether the interference is proportionate to the legitimate aim pursued. As we have already set out, that was identified at [46] by the judge as being the crucial issue at the heart of his analysis.

25. Broadly speaking, the Entry Clearance Officer's challenge to the judge's proportionality analysis has two limbs. First, she challenges the judge's adoption of the so-called "balance sheet" approach to conducting the proportionality analysis. Secondly, she challenges the judge's substantive application of the "balance sheet" approach.

26. We deal first with the judge's adoption of the "balance sheet" approach. Pursuant to [2], [4] and [5] of the grounds of appeal, the Entry Clearance Officer challenges what is said to be the judge's failure to articulate and apply the test for an appeal succeeding on the basis of Article 8 outside the Rules. In this respect, the Entry Clearance Officer states that, despite having quoted the Secretary of State's guidance on what amounts to exceptional circumstances at [11] of his decision, the judge then failed to follow that guidance.

27. It is correct to observe that the judge did not state, in terms, that the refusal of entry clearance would be a breach of Article 8 because it would "result in unjustifiably harsh consequences to the appellant or their family". However, in our view, that is a criticism of form over substance.

28. The unduly harsh test is often used as shorthand to summarise the circumstances when a grant of leave outside the Rules is required. It is important to recall, in our judgment, that the term "unduly harsh" is not the operative wording of Article 8(2) of the Convention and nor does it necessarily feature in the established jurisprudence concerning interferences with Article 8 of the Convention as the *only* method or manner of articulating the test. For example, it does not feature in the key questions set out in *Razgar*, to which we have already referred, and nor is it a feature of Part 5A of the 2002 Act, see Section 117A(3), which states as follows: "In sub-Section (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

29. The so-called unduly harsh test says nothing of the operative reasoning process by which a judge arrives at an assessment as to whether something is disproportionate or not. Little authority is needed to endorse the judge's identification of the question of proportionality being the central issue that lay at

the heart of the case, see for example *Huang v Secretary of State for the Home Department* [2007] UKHL 11 at [18]. The judge stated that the assessment that lay before him required a balancing exercise, and, properly understood, it is in relation to that balancing exercise that the Entry Clearance Officer targeted her grounds of appeal. In our judgment, the judge reflected an orthodox approach to balancing the competing interests at play when engaged with an assessment of the proportionality of a refusal of entry clearance.

30. The grounds of appeal refer at [5] to *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 and the need for a full assessment to be conducted when assessing the proportionality of a refusal of entry clearance or leave to remain under Article 8. However, at [41], the Supreme Court's judgment in that case says:

> "Ultimately, whether the case is considered to concern a positive or a negative obligation, the question for the European Court is whether a fair balance was struck. As was explained in *Hesham Ali* at [47] to [49], that question is determined under our domestic law by applying the structured approach to proportionality which has been followed since *Huang*."

31. We pause here to note that since this is an entry clearance case, the question of positive obligations is appropriate but, ultimately, the underlying question is the same: does the decision in question strike a fair balance? To assess that issue, the judge applied what is known as the balance sheet approach. This was endorsed by the former Lord Chief Justice, Lord Thomas, at [83] of *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, where he said this:

> "One way of structuring such a judgment would be to follow what has become known as the 'balance sheet' approach. After the judge has found the facts, the judge would set out each of the 'pros' and 'cons' in what has been described as a 'balance sheet' and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders."

If any further authority is needed we refer to the judgment of the former Senior President of Tribunals in *TZ (Pakistan)* at [35].

32. It follows that the judge adopted an approach that has been endorsed at the highest levels of the judiciary. The use of the term "unjustifiably harsh" is not an essential prerequisite to an appropriately conducted Article 8 proportionality assessment. What matters is the substance of the analysis. In our judgment, the judge adopted the correct approach to the principles that underlay the proportionality assessment he conducted.

33. The remaining question is therefore whether he reached a conclusion that was rationally open to him. We have already set out why the judge reached a conclusion concerning the best interests of the appellant's British child that was open to him and then at [51] the judge applied Section 117B(6) of the 2002 Act by analogy. That provision states as follows:

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

34. As a matter of statutory construction, that provision does not apply in an entry clearance context, but addresses the situation that would obtain in the event that the appellant were in the UK. As we have set out, the judge applied that provision by analogy in this entry clearance context. That was not an approach of the judge's reasoning that was challenged by the Secretary of State, either in the grounds of appeal upon which she obtained permission to appeal, in the skeleton argument drafted by Ms Willocks-Briscoe, or by Ms Everett in her oral submissions before us. Accordingly, we do not examine whether the judge was rationally entitled to apply section 117B(6) by analogy, and proceed on the basis that, pursuant to his unchallenged reasoning, he was. In any event, in our judgment, the judge was entitled to ascribe significance to the fact that it would not be reasonable for the British child of the appellant to leave the UK in order to reside with him in India. As we have already noted, that was not a suggestion that was made by the Secretary of State before the First-tier Tribunal.

35. Drawing this analysis together, therefore, while the Secretary of State may well contend that many children live in separate countries to their parents and that the *status quo* for this family has been for the appellant to live in India apart from his British son and Indian wife for some time, those concerns are no more than disagreements of fact and weight. As Ms Warren put it at [9] of her skeleton argument:

> "The respondent's grounds are no more than an attempt to re-argue an appeal that they have lost at the FtT."

36. For these reasons, we find that the decision of Judge Knight did not involve the making of an error of law and this appeal is dismissed.

Notice of Decision

The appeal is dismissed.

The decision of Judge Knight did not involve the making of an error of law such that it must be set aside.

No anonymity direction is made.

Signed Stephen H Smith Date 26 January 2022

Upper Tribunal Judge Stephen Smith