Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08009/2020

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Wednesday 27 April 2022	**On Thursday 7 July 2022**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MRS PARVIN AKTER

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr J Martin, Counsel instructed by Hubers Law
For the Respondent: Ms H Gilmour, Senior Home Office Presenting Officer

DECISION

BACKGROUND

1. By a decision dated 2 February 2022, the Tribunal (myself and Deputy Upper Tribunal Judge Juss) found there to be an error of law in the decision of First-tier Tribunal Judge I Ross promulgated on 15 July 2021. We therefore set aside that decision and gave directions for a resumed hearing before this Tribunal. Our error of law decision is annexed to this decision for ease of reference.

2. The factual background to this claim is briefly set out at [1] and [2] of the error of law decision and I do not need to repeat it. Due to the way in which the hearing proceeded before me on this occasion, I do not need to deal with the facts of this case in any detail. The facts are broadly agreed. The appeal turns on assessment based on the facts.

3. Having taken evidence from the Appellant's husband ("the Sponsor"), Ms Gilmour very fairly conceded that the Appellant is able to meet the Immigration Rules ("the Rules") as at date of hearing. Accordingly, she agreed that the appeal should now be allowed. I therefore indicated that I would allow the appeal and would set out my reasons for so doing in writing which I now turn to do.

DISCUSSION

4. As Ms Gilmour accepted at the outset of the hearing, the Respondent has only ever taken issue with one aspect of the Appellant's claim within the Rules, namely the financial eligibility criteria. The Sponsor is a state pensioner and does not have sufficient income to meet the income eligibility requirements. As such, it has also always been accepted by the Appellant (until this hearing) that she cannot succeed within the Rules for that reason. The appeal has therefore proceeded on an assessment of the Appellant's claim outside the Rules.

5. However, in January 2022, the Appellant filed further evidence relating to the Sponsor's finances. That included evidence that he had applied for attendance allowance due to his disability. Although not apparently filed with the Tribunal, the evidence was put in the form of a supplementary bundle which Mr Martin was able to provide to me at the outset of the hearing. Ms Gilmour confirmed that the Respondent had seen that evidence.

6. The supplementary evidence now includes bank statements which show that, since October 2021, the Sponsor has been in receipt of attendance allowance in the sum of £358.40 per month. He is also in receipt of state pension in the sum of £359.20 fortnightly. As Mr Martin set out in his skeleton argument, that gives an annual figure of £13,665.66.

7. The Sponsor's earnings still fall short of the income eligibility thresholds set out in E-ECP.3.1. of the Rules. However, the Appellant can still meet that paragraph if she can show that "(c) the requirements in paragraph E-ECP.3.3. [are] being met".

8. Paragraph E-ECP.3.3 reads as follows (so far as relevant):

> "E-ECP.3.3. The requirements to be met under this paragraph are-
>
> (a) the applicant's partner must be receiving one or more of the following -
>
> …
>
> (iv) attendance allowance;

> …
>
> (b) the applicant must provide evidence that their partner is able to maintain and accommodate themselves, the applicant and any dependants adequately in the UK without recourse to public funds."

9. Ms Gilmour cross-examined the Sponsor in relation to his finances, asking him questions about the withdrawal of funds from his bank account and the use to which those funds were put. He said that he withdraws some of his income each month in cash which he uses to buy his food, clothes and other incidentals. He does not pay rent as he lives with his adult son. It is not disputed that the Appellant and their child will also be accommodated rent-free by this son. The Sponsor also says that he sends between £100 and £300 each month to his family in Bangladesh for food etc for his child.

10. The Appellant also provided evidence from Mr Saleh Ahmed (the Sponsor's adult son) who, in a letter dated 28 February 2022, confirms that he continues to be able to provide accommodation for the Appellant and her child. He has a four-bedroomed house where he lives with his wife and the Sponsor. He also says that he is "financially solvent", has "nearly four thousand pounds" in savings (confirmed broadly by his bank statement appended to the letter) and that he will be "financially responsible" for the Appellant and her child.

11. A further letter from Md Azizur Rahman also provides evidence of further financial support should that be needed. Mr Rahman is the Sponsor's cousin. He earns in the region of £18,000 per annum as a taxi driver. His bank statements appended to the letter show him to have considerable funds available (in the region of £100,000). Mr Rahman says he will be "partially financially responsible for [the Appellant] if [the Sponsor] requires any help". Although I would accept that this is not the sort of promise of regular funding which would satisfy the evidential requirements in relation to the income threshold, it is nonetheless relevant to the Sponsor's ability to maintain himself, the Appellant and their child adequately without recourse to public funds.

12. As it is, in any event, Ms Gilmour did not seek to argue that the Sponsor's income was not sufficient adequately to maintain the Appellant and their child. I was not taken to any authority on the relevant tests or threshold. However, given Ms Gilmour's indication that the Appellant has provided evidence which shows that the Sponsor can maintain her and their child, I did not need to consider this aspect in any detail.

13. The Appellant has therefore provided evidence that the Sponsor is in receipt of attendance allowance and that he can maintain and accommodate her and their child adequately in the UK. As at the date of hearing, therefore, the Appellant can meet paragraph E-ECP.3.3. of the Rules. It follows that she can also meet paragraph E-ECP.3.1. of the Rules. That was the only basis for the refusal of her application for entry clearance under E-ECP.1.1.(d) of the Rules.

14. As I have already indicated and Ms Gilmour reconfirmed, the Respondent does not dispute that the Appellant meets the other Rules for entry clearance as a partner. As I have already indicated, and as Ms Gilmour fairly accepted, the Appellant can therefore show that she meets the Rules as at date of hearing. It is not suggested that there is any public interest in the refusal of entry clearance once the Appellant's entitlement under the Rules is established. Ms Gilmour did not suggest to the contrary.

15. Whilst the outcome of this appeal might not have been the same if the claim had fallen to be considered entirely outside the Rules, since it is accepted that the Appellant can now satisfy the Rules and that there is no other public interest at play, the continuing refusal of entry clearance would be disproportionate. It follows that refusal of entry clearance would breach the Appellant's Article 8 ECHR rights and would for that reason be unlawful under section 6 Human Rights Act 1998. I therefore allow the appeal.

DECISION

Refusal of the Appellant's human rights claim is unlawful under section 6 Human Rights

Act 1998. The Appellant's appeal is therefore allowed on human rights grounds (Article 8 ECHR).

Signed: L K Smith Dated: 6 May 2022
Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08009/2020

THE IMMIGRATION ACTS

Heard at Field House, London
On Wednesday 2 February 2022

Determination promulgated
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Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MRS PARVIN AKTER

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr J Martin, Counsel instructed by Hubers Law
For the Respondent: Ms H Gilmour, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge I Ross promulgated on 15 July 2021 ("the Decision"). By the Decision, Judge Ross dismissed the Appellant's appeal against the Respondent's decision dated 6 October 2020 refusing her human rights claim. The decision is made in the context of a decision by the Respondent refusing

the Appellant entry clearance as the spouse of her husband ("the Sponsor") who is a British citizen living in the UK. The Appellant is of Bangladeshi nationality and lives there. The couple have a child who is also a British citizen due to the Sponsor's status and who lives with the Appellant in Bangladesh.

2. The Sponsor lives on a state pension and it is common ground cannot meet the financial requirements under the Immigration Rules ("the Rules") although the Sponsor has an adult son with whom he lives rent-free who would also allow the Appellant and their child to live with him at no cost to them. The Sponsor has various medical ailments and it is said wishes to have the care of his wife. It is common ground that the claim and the appeal could only succeed outside the Rules. The relevant test in that regard is whether there are unjustifiably harsh consequences for the Appellant and other parties affected by the decision refusing entry clearance.

3. The Judge set out the relevant test at [7] of the Decision. Thereafter, in three short paragraphs he set out the facts as he considered relevant to that test and dismissed the appeal.

4. The Appellant appeals the Decision on three grounds as follows:

Ground 1: the Judge erred by not conducting a balancing exercise.

Ground 2: the Judge erred by not taking into account material evidence and submissions made on behalf of the Appellant.

Ground 3: the Judge erred by not conducting a "correct" best interests' assessment.

5. Permission to appeal was granted by First-tier Tribunal Judge Handler on 12 October 2021 in the following terms so far as relevant:

> "… 2. ...All three grounds are arguable. There is no reference to s117 of the Nationality, Immigration and Asylum Act 2002 in the decision and reasons. It is arguable that the Judge's reasoning does not adequately engage with the evidence that was before him in the conduct of the balancing exercise. It is arguable that the Judge has not made a reasoned assessment of the child's best interests, the significance of the child's British citizenship and arguable that he has not treated the child's best interests as a primary consideration."

6. The Respondent filed a Rule 24 reply on 17 November 2021 seeking to uphold the Decision. In short summary, the Respondent contends that the Judge has (albeit briefly) considered the relevant factors in this case, has identified the issue of best interests and made a finding in that regard. The medical evidence in relation to that child (which we will come to) is a short letter from a doctor in Bangladesh showing that the child has been treated in that country for his medical conditions. It is pointed out that there is no challenge to the Judge's apparent finding that family life could be continued in Bangladesh.

7. The appeal comes before us to decide whether there is an error of law in the Decision and if we so conclude to either re-make the decision or remit the appeal to the First-tier Tribunal for it to do so. Having heard from the parties, we indicated that our preliminary view was that there was an error of law in the Decision. However, in deference to Ms Gilmour's reliance on the decision of this Tribunal in SD (British citizen children – entry clearance) Sri Lanka [2020] UKUT 43 (IAC). ("SD (Sri Lanka)"), we indicated that we would reserve our decision to consider carefully her submissions about this case before reaching a concluded view. Having done so, for reasons set out below, we have reached the conclusion that this case does not alter our view that there is an error of law in the Decision.

8. We had before us a core bundle of documents including the Respondent's bundle. We also had a bundle prepared by the Appellant for the hearing before us running to 258 pages which also includes the evidence before the First-tier Tribunal and to which we refer below as [AB/xx]. The Appellant has also made an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce further evidence but, as Mr Martin correctly submitted, that is not relevant to the issue before us at this stage.

DISCUSSION AND CONCLUSIONS

9. Brevity of a decision is not of itself a reason not to uphold it. However, given that the Decision in this case is so brief (less than 3 pages), it is possible for us to cite in full the relevant part of it as follows:

> "**My findings**
>
> 7. It is not disputed and I so find, that the appellant's relationship with her husband (sponsor) is genuine and subsisting. I also accept that Article 8 is engaged in this case. However, the financial eligibility requirement has been found to be Article 8 compliant by the courts. The essential question is whether the refusal of the appellant's application will lead to unjustifiably harsh consequences for her, her husband or their child, whose best interests need to be considered.
>
> 8. I take into account that the appellant and her husband must have been aware, or should have made themselves aware of the eligibility requirements prior to making this application. I have carefully considered the contents of a letter from the appellant's husband's GP dated 8 February 2021, which states that Mr Miah has had multiple medical problems. Mr Miah has also told his GP that he has poor mobility and could use a level of care that his wife is happy to provide.
>
> 9. However, I find that there is no medical evidence that Mr Miah is unable to travel to Bangladesh, to visit his wife and son if needs be for prolonged periods of time. Indeed, after the death of his first wife, Mr Miah did travel to Bangladesh and stayed there for a period of time during which he met the appellant and was subsequently married to her.

> 10. I accept that the appellant's son with Mr Miah is a British citizen by virtue of his father's nationality. However that fact alone does not render the decision disproportionate and contrary to Article 8. I find that the 3 year old son's best interests are to remain with his mother and for his status quo not to be disturbed."

The Judge thereafter stated simply that the appeal on human rights grounds was dismissed.

10. Since the focus of Ms Gilmour's and much of Mr Martin's submissions was on the best interests of the child, we begin with the third ground. We accept as Ms Gilmour submitted that the Judge was aware that the child was a British citizen. There is a reference to the need to consider the child's best interests and a brief finding in that regard. We accept also that the Judge does say that the fact of citizenship "does not render the decision disproportionate".

11. We have already referred to Ms Gilmour's reliance on SD (Sri Lanka). She referred us to [1], [4] and [5] of the headnote. We consider that [2] and [3] of the headnote are also material and we therefore set the headnote out in full:

> "1. British citizenship is a relevant factor when assessing the best interests of the child.
>
> 2. British citizenship includes the opportunities for children to live in the UK, receive free education, have full access to healthcare and welfare provision and participate in the life of their local community as they grow up.
>
> 3. There is no equivalent to s.117B(6) of the Nationality, Immigration and Asylum Act 2002 in any provision of law or policy relating to entry clearance applicants.
>
> 4. In assessing whether refusal to grant a parent entry clearance to join a partner has unjustifiably harsh consequences, the fact that such a parent has a child living with him or her who has British citizenship is a relevant factor. However, the weight to be accorded to such a factor will depend heavily on the particular circumstances and is not necessarily a powerful factor.
>
> 5. When assessing the significance to be attached to a parent's child having British citizenship, it will also be relevant to consider whether that child possesses dual nationality and what rights and benefits attach to that other nationality."

12. Ms Gilmour submitted that the case is on all fours with the present one. It does have the similar factors of British children living abroad and a finding that the sponsor could be expected to go to live in Sri Lanka with them and their mother (although we are not convinced that the Judge's finding in this case goes that far). It is though rare that a case is so similar on its facts, in the human rights context, that the conclusion reached can merely be read over into another case. As is evident from the close and careful reasoning of the Tribunal in SD (Sri Lanka), the outcome was not a foregone conclusion even on those facts.

13. We accept that the relevance of British citizenship in the best interests analysis is not determinative as was found by the Tribunal in SD (Sri Lanka) when dismissing the appeal. Although Mr Martin referred to the importance of British citizenship as set out in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, as he fairly conceded, that was a case concerned with removal of the mother of a British citizen child who would be obliged to accompany her because she was a single parent. Here, the child has never lived in the UK. He has therefore not known the benefits which come with British citizenship. However, although we accept that this is not a determinative factor, his citizenship is nonetheless a relevant factor, the weight of which is a matter for a Judge to determine (as is evident from the decision in SD (Sri Lanka)).

14. In this case, although we accept that the Judge does refer to the child's British citizenship, he makes no reference to the reasons why that might be relevant to the balancing exercise which he had to conduct. There is no reference to the importance of citizenship and the benefits derived from it. In this case, the child has medical conditions (cerebral palsy and asthma). We were shown in that regard the letter from the paediatric doctor at [AB/168]. That refers to the child needing "better treatment" but does not identify what treatment is not available in Bangladesh but would be in the UK. The onus is on the Appellant to provide such evidence. We agree with the Respondent also that this letter does at least indicate that the child is being treated by a suitable doctor in Bangladesh. The extent and detail of his treatment is not set out.

15. We accept however that there is an error of law disclosed by the Appellant's ground 3. Whilst the Judge was of course entitled to conclude that the child's best interests are served by remaining with his mother, there is no consideration whether those interests are best served by that being in the UK or in Bangladesh. The child's citizenship was not, as we have said, determinative, but nonetheless it was a factor which had to be weighed up and it was not.

16. We would in any event have found an error to be made out on the first two grounds for the following reasons.

17. There are six issues identified in the second ground on which it is said that the Judge failed to make a finding. We agree with the Respondent that many of these are not issues at all and therefore did not require any finding to be made. It is not disputed that the Appellant and Sponsor are in a genuine relationship. Indeed the Judge refers to that as being accepted at [7] of the Decision. The issues regarding contact and financial support by the Sponsor to the Appellant are similarly irrelevant for the same reason as those would only go to the question whether the relationship is subsisting.

18. The Judge does refer to the care which the Appellant would be able to provide to the Sponsor at [8] of the grounds. It is true that the Judge does not go into much detail about the level of care which the Sponsor

needs. Nor is this very obviously considered in relation to the question whether the Sponsor could obtain that care from the Appellant and medical services in Bangladesh. As we have pointed out, although the Judge does say at [9] of the Decision that the Sponsor could travel to Bangladesh to visit the Appellant and potentially do so "for prolonged periods of time", that does not go so far as to consider whether he could remain living there permanently in the context of the medical care available and indeed his family circumstances here. That is therefore no answer to the Appellant's challenge on the reasoning as it stands.

19. We have already accepted that there are deficiencies in the Judge's best interests assessment when looking at the third ground.

20. Mr Martin drew our attention to the fact that the Sponsor lives rent-free with his adult son and that the son has agreed that the Appellant and their child will be able to live with them without cost. There is reference to that fact at [6] of the Decision and that appears to have been accepted by the Judge. This does not feature however in the Judge's findings.

21. That leads us on to the more important error in the Decision and that is the failure to conduct a balancing exercise as identified in the first ground.

22. We accept that the Judge set out at [7] of the Decision the correct test. He was right to point out the financial eligibility requirement. As we say, the fact that accommodation would be available to the Appellant and her son at no cost was relevant but it remains the case that the Appellant and Sponsor cannot meet the financial eligibility requirement under the Rules.

23. That the Appellant could not meet the Rules was relevant to the public interest assessment. However, as Ms Gilmour very fairly accepted, there is no reference to the weight to be given to the public interest or reasons given as to why that outweighs the interference with the Appellant's and Sponsor's Article 8 rights. As Judge Handler pointed out when granting permission, there is no reference to section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B"). Whilst, as the Tribunal made clear in SD (Sri Lanka), Section 117B(6) is not applicable to an entry clearance case, other subsections of Section 117B are. It may be that, in circumstances where an appellant is unable to meet the financial requirements in an entry clearance case, that appellant will face an uphill struggle to succeed outside the Rules. However, as the Supreme Court made clear in R (oao MM (Lebanon) and others) v Secretary of State for the Home Department [2017] UKSC 10, there are some cases which can succeed if the interference with the Article 8 rights of partners and children is sufficient to outweigh the public interest.

24. In an appeal being decided outside the Rules, it is necessary for there to be a balanced assessment setting out the weight being given to the

various factors which make up the interference with the Article 8 rights of those involved against the strength of the public interest. In this case, that is absent. It may well be that one further paragraph would have been quite sufficient. If the Judge had made slightly fuller findings and set out the weight which he gave to the factors as well as referring to the public interest and the weight which he gave to that, it may well be that no error of law would be disclosed. We do not criticise the brevity of the Decision. However, given the lack of the balancing assessment and for the other reasons set out above, we are satisfied that the Decision contains an error of law.

25. We are also persuaded for the reasons we have set out that the error is a material one. We therefore set aside the Decision. We do not preserve any of the findings which were made. The appeal will need to be reconsidered afresh. However, there are few facts in dispute in this case and for that reason the parties agreed that we could retain the appeal in this Tribunal.

26. In addition to the application to adduce documents to which we refer at [8] above, Mr Martin indicated that the Appellant would wish to provide further evidence as the Sponsor's financial circumstances may have changed. We also draw the Appellant's attention to what we say about the paucity of the medical evidence relating to the Appellant's child. We therefore agreed to adjourn the hearing and to list a resumed hearing giving time for the filing and service of further evidence by the Appellant. We have given directions below in that regard.

DECISION

The Decision of First-tier Tribunal Judge I Ross promulgated on 15 July 2021 involves the making of an error on a point of law. We therefore set aside the Decision. We make the following directions for the remaking of the decision by this Tribunal.

DIRECTIONS

1. Within 28 days from the date when this decision is sent, the Appellant shall file with the Tribunal and serve on the Respondent, any further evidence on which she seeks to rely.

2. The appeal will be relisted for a re-making hearing with a time estimate of ½ day on the first available date after six weeks from the sending of this decision on a face-to-face basis. If either party seeks a remote hearing, application should be made to the Tribunal within 14 days from the sending of this decision with reasons.

3. If the Appellant requires an interpreter for the hearing, application should similarly be made to the Tribunal within 14 days from the sending of this decision. If the Appellant intends to give oral evidence from Bangladesh, her attention is drawn to the guidance in Agbabiaka (evidence from abroad, Nare guidance) Nigeria [2021] UKUT 286 (IAC) in relation to the procedure which must be followed.

Signed: L K Smith Dated: 2 February 2022
Upper Tribunal Judge Smith