IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002994
First-tier Tribunal Nos:
HU/55354/2021
LP/00047/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 July 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

[S S]
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Shay (Solicitor)
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 24 May 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Jepson, promulgated on 25th March 2022, following a hearing in Manchester on 16th March 2022. In the determination, the judge dismissed the appeal of the Appellant,

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following which the Appellant applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Pakistan, and was born on 17th August 1975. She appeals against the decision of the Respondent dated 31st July 2021 refusing her application to join her sponsoring husband, [MA], on the basis of her family life.

The Appellant's Claim

3. The essence of the Appellant's claim is that she married her sponsoring husband, [MA], on 20th December 2012, after which she then applied on 2nd February 2021 for entry clearance to come to the UK as a spouse of a settled person. She has two children aged 5 and 7 years who are living in the United Kingdom. Her husband, the Sponsor, is a pensioner, and is not working. He does, however, have a state pension of £9,110.40 per annum and has also secured an employment that would be available on offer, which in the circumstances of the pandemic at the time, he was unable to utilise, given that he had to stay at home and look after the children. The Appellant claims that once she is allowed entry into the UK she would have a firm employment offer providing her with £9,620 per annum. In addition, the Sponsor himself would be entitled to pension credit of £6,118.84 per annum and child benefit of £1,620 per annum. In the light of this, the refusal of the application by the Respondent on 25th August 2021, was unfair and unlawful.

The Judge's Findings

4. The judge was not persuaded by the offer of employment to the Sponsor. This was dated January 2021. However, the position was due to start in April, almost a year before the appeal was heard and, and nothing more recent was presented (at paragraph 23). There was no witness statement from the owner of the company and nothing in the letter supplied indicated that the job was open ended (paragraph 24). The judge was not persuaded that the Sponsor had considered the possibility of childcare for the two children when maintaining that he was unable to work during the pandemic and observed that, "there seems to be a reluctance to place the children with anyone else", and that "no particular reason is given for this" (paragraph 27). Taking everything into account, the judge was not persuaded that there were any exceptional circumstances arising from this case (paragraph 30). The judge did go on to consider the COVID related school closures as well (paragraph 32) and also had regard to the leading jurisprudence in this field (at paragraph 37) and the requirement to bare in mind "the best interests of the children" (paragraph 44). However, the judge was not persuaded that the refusal of entry clearance would be disproportionate in relation to the Appellant's Article 8 rights (paragraph 47). The appeal was dismissed.

The Grant of Permission

5. The Appellant appealed on the basis that the judge had erred in (a) failing to consider proportionality in relation to the best interests of the children; and (b) errors of fact made that led to irrelevant findings. By a decision dated 29th June 2022, the First-tier Tribunal granted permission, whilst observing that "the structure of the judge's decision is challenging" (see paragraph 3). In granting

permission, the Tribunal also stated that, “The judge suggests that the because separation of the appellant and the child was by choice, it is not in the best interests of the children to live with both parents” (paragraph 5). In the circumstances, the balance of considerations in relation to “disproportionate breach”, “unjustifiably harsh” and “compassionate grounds outside the Rules”, had not been properly undertaken. The recent decision of **KB (Article 8: points-based proportionality assessment) Albania [2022] UKUT 00161** appears not to have been followed that judges should adopt the balance sheet approach to proportionality assessments.

Submissions

6. At the hearing before me on 24th May 2023, Mr Shay, appearing on behalf of the Appellant began by drawing attention to the way in which permission to appeal had been granted by the First-tier Tribunal. He then took the Tribunal to the refusal letter before returning to the Grounds of Appeal. He submitted that there had not been a fair assessment of proportionality under the “**Razgar**” principles even though the judge found that Article 8 had been engaged. Mr Shay submitted that the Sponsor’s family had been living in the UK before he took the two children to Pakistan, and then later decided to bring them with him to the UK, leaving the mother behind in Pakistan. The logic of the judge below was that because they had made a decision to leave Pakistan in this way they could not complain about the children being separated from their mother. However, the children are also British citizens together with the Sponsor. In the circumstances, the decision that had to be made could not simply be reduced down to the adults having decided to separate with one of them deciding to take the children to the United Kingdom.

7. For his part, Mr McVeety submitted that the grant of permission was effectively a trap. It is well-established that parties asserting Article 8 rights cannot chose the country to which they will go. The starting point is that the Appellant in this case does not meet the requirement of the Rules. The judge did look at the extent to which Article 8 applied and found that for a considerable while the children were living with the mother in Pakistan, before the decision was made to remove them to the United Kingdom, where they had only been now for two years. This meant that for most of their lives they had lived in Pakistan. The judge was not wrong to say that, “If the children went back to Pakistan but the Sponsor remained then things would revert to how they were two years ago” (paragraph 45). He could not be wrong in this given that the Appellant did not meet the legal requirements. The judge was equally entitled to take into account as a consideration that, “I remain unclear exactly why the Sponsor chose to bring his children to the UK beyond personal choice” because “there is no suggestion of a significant event requiring that” (paragraph 42). It could not be said that he had overlooked the application of Article 8 because he had begun his analysis by observing that “refusal of entry does amount to a breach of Article 8 – that is both in terms of the rights of the Appellant but also the sponsor and their children” (paragraph 41). However, after his analysis, he had made a finding that the Appellant’s Article 8 rights were not breached. There were no factual errors in his assessment.

8. In reply, Mr Shay submitted that Appendix FM makes it perfectly clear that one can look at a job offer, and yet in this case the judge had taken the view that a open ended job offer in the future, could not be taken into account. The judge is unnecessarily sceptical about the job offer going to extreme lengths (at

paragraphs 24 to 28) in deciding that the employment letter was out of date by the time of the hearing and therefore could not be relied upon. The plain fact was, as known to the judge, that the job offer came from a family business, and as such the job offer was left open for the Appellant, so that it was deliberately not advertised again. Mr McVeety pointed out that Mr Shay, who had represented the Appellant in the Tribunal below, had, "in court conceded that absent exceptional circumstances the Rules have not been met" (paragraph 25).

Error of Law

9. I have considered this appeal on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I find that the judge below erred as a matter of law. The recent decision of the Upper Tribunal in **KB [2022] UKUT 00161** states that judges should adopt a balance sheet approach when they come to making proportionality assessments. However, in this appeal, the analysis of the judge below is fundamentally predicated on whether the Appellant herself met the Immigration Rules. Yet, the Appellant had conceded that she did not meet the Immigration Rules (see paragraphs 13 and 47). Given that this was the case, the judge had to consider, by way of a balance sheet approach, the other factors that could be put in the balance. It is not clear what these factors are. To suggest that the parental choice of bringing the children, who in this case happen to be British citizen children, to the United Kingdom has the effect of subverting a child focused assessment of what are the best interests of two very young children, is to fall into error in precisely the way in which the Upper Tribunal suggested should be avoided in **KB [2022] UKUT 00161**.

Notice of Decision

10. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. This appeal is allowed and remitted back to the First-tier Tribunal for a *de novo* hearing because the nature or extent of any judicial fact-finding, which is necessary, in order for the decision and the appeal to be remade is such that it is appropriate to remit the case to the First-tier Tribunal, to be heard by a judge other than Judge Jepson (see paragraph 7.2 of the Practice Statement).

Satvinder S. Juss

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21st July 2023