IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Extempore decision

Case No: UI-2022-003924

First-tier Tribunal Nos: HU/55097/2021
IA/12702/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 4 June 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

The Entry Clearance Officer

Appellant

and

Damitha Ishan Hewawickrama
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr E. Terrell, Senior Home Office Presenting Officer
For the Respondent: Ms S. Pinder, Counsel, instructed by York Solicitors

Heard at Field House on 16 May 2023

DECISION AND REASONS

1. By a decision dated 6 June 2022 First-tier Tribunal Judge Pears ("the judge") allowed an appeal brought by the respondent to these proceedings, a citizen of Sri Lanka, against a decision of the Entry Clearance Officer dated 5 August 2021 to refuse his human rights claim. He had applied entry clearance in respect of his family life with his British children who reside in this country with their mother, his wife ("the sponsor"), a citizen of Sri Lanka who holds limited leave to remain. The judge heard the appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The Entry Clearance Officer now appeals against the decision of the judge with the permission of Upper Tribunal Judge Macleman.

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2. For ease of reference, we refer to the appellant before the First-tier Tribunal as "the appellant", and to the respondent below as "the Entry Clearance Officer".

Factual background

3. The Entry Clearance Officer was not represented before the judge. At the hearing, the appellant accepted that he could not satisfy the requirements of the Immigration Rules, since the sponsor was not resident with indefinite leave to remain or as a refugee, and nor is she a British citizen. The appellant's case was advanced on the basis of Article 8 of the European Convention on Human Rights outside the Immigration Rules.

4. The judge set out the respondent's refusal decision and the procedural history to the case. At paragraphs 8 to 13 of his decision, he outlined the evidence from the respondent and from the appellant. One of the reasons the application for entry clearance had been refused was that the appellant failed to meet the financial eligibility requirement. The appellant had failed to satisfy paragraph E-ECPT.3.1. of Appendix FM. That rule provides that an applicant must demonstrate that they will be able adequately to maintain and accommodate themselves and any dependants in the UK without recourse to public funds. The appellant had provided evidence of a bank account in Sri Lanka which showed funds to the sterling equivalent of approximately £34,000. He had sought to rely on those funds to demonstrate that he would be able to meet the maintenance requirement. The Entry Clearance Officer rejected the significance of that account on the basis that the funds had not been shown to be readily accessible at the date of the application, and nor had he demonstrated that he had held the funds for the entire six months prior to the date of the application. Those requirements are found, as Mr Terrell emphasised, in Appendix FM-SE.

5. The judge addressed the financial evidence at paragraph 13 of his decision. He had before him a letter from the appellant's bank dated 5 May 2022 which confirmed that the balance of 8,250,000 Sri Lankan rupees was available to the appellant to withdraw at any time. The judge also noted that the sponsor was in part-time employment and had provided pay slips and a number of other financial documents demonstrating the extent of her financial means.

6. The judge summarised the submissions at paragraphs 19 to 21 of the decision. His operative analysis may be found at paragraphs 22 to 26. At paragraph 23 the judge said:

> "In relation to maintenance I find that on the evidence before me which includes the Appellant's savings and his wife's employment that they as a family of 4 will be able to maintain and accommodate themselves in the UK without recourse to public funds and paragraph E-ECPT.3.1 of Appendix FM are met."

The judge went on to direct himself in the course of his remaining analysis that the maintenance of effective immigration control was in the public interest and set out a range of additional considerations which in his ultimate conclusion militated in favour of the appeal being allowed. The appellant had been resident in the UK previously but had left voluntarily in order to make an application for entry clearance from outside the UK, which was a relevant factor. The judge stated at paragraph 26, "I conclude balancing the factors that I have set out above that the refusal would result in unjustifiably harsh consequences such that

the refusal of the application would not be proportionate." The judge allowed the appeal.

Issues on appeal to the Upper Tribunal

7. There are three grounds of appeal to the Upper Tribunal.

8. First, it is submitted in the written grounds of appeal that it was a misdirection of law for the judge to allow the appeal on the basis that the sponsor only held limited leave to remain, in light of the requirements of the rules that sponsors must hold indefinite leave to remain, hold leave to remain as a refugee, or be a British citizen.

9. Secondly, it is said that the judge failed to give adequate reasons for the findings he reached on a material matter. This ground challenges the judge's findings that the maintenance requirements were met. Mr Terrell submitted that the judge failed to engage with the requirements of Appendix FM-SE concerning the specified evidence required by the Secretary of State to demonstrate that an applicant meets the maintenance requirements. Although the requirement for adequate maintenance is not fixed, submitted Mr Terrell, it was nevertheless incumbent upon the judge expressly to address the relevant provisions of Appendix FM, and Appendix FM-SE, which set out the requirements to which all applicants are subject.

10. Thirdly, it was a misdirection of law for the judge to fail to consider whether it would be reasonable for the sponsor and their two British children to leave the United Kingdom.

11. Very fairly and realistically, Mr Terrell abandoned reliance on the third ground of appeal at the hearing before us. He was right to do so. As we have recorded, the Entry Clearance Officer was not represented at the proceedings below. As such, the approach of the judge was that governed by the *Surendran* guidelines set out in *MNM (Surendran guidelines for Adjudicator) Kenya** [2000] UKIAT 0005. Put simply, it was not the role of the judge to adopt points that would have been or could have been taken by the respondent had she attended at the hearing. Rather, the position of the the Entry Clearance Officer is that as set out in the refusal decision under consideration and any additional written materials in the proceedings below.

12. The suggestion that the children could be expected to leave the UK had not been a point that had been adopted by the Entry Clearance Officer in the refusal letter. Nor had it been addressed by the respondent's review. The closest the latter document got to that issue was to raise, in the most oblique terms at para. 17, whether the wife or children would be able to "travel", presumably to see the appellant in Sri Lanka. The possibility of relocation was not countenanced.

13. We also observe that respondent appears to have accepted that it would not be reasonable to expect the mother of the children or the children to leave the United Kingdom. The sponsor has been granted leave on account of it not being reasonable to expect her British daughters to leave the UK. It is hardly surprising that the judge did not address this matter of his own motion.

Article 8 ECHR outside the rules

14. We therefore turn to the substantive issues before this Tribunal. In relation to ground 1, Mr Terrell accepted that, as pleaded, it was narrow in focus. He adopted the observations of Judge Macleman in granting permission to appeal, namely that it was arguable that the judge erred by finding that the sponsor's previous observance of the Immigration Rules, that is his prior departure from the UK following an existing previous lawful stay, opened the way to a "freestanding Article 8 assessment".

15. Mr Terrell's submissions and the Entry Clearance Officer's skeleton argument sought to draw on Judge Macleman's observation. Mr Terrell argued that the approach of the judge failed adequately to engage with the importance of the maintenance of effective immigration controls, and that there was no self-direction concerning the importance of that principle.

16. We observe that there is a certain irony to the way Mr Terrell approached this ground of appeal, adopting Judge Macleman's observation that it was arguable that the judge had engaged in a "freestanding Article 8 assessment". Mr Terrell's submissions amounted to a freestanding challenge to the judge's decision, going significantly beyond the pleaded grounds of appeal, apparently unconstrained by the procedural rigour that is ordinarily expected of parties to litigation in this chamber.

17. We find that the judge was fully aware of the public interest in the maintenance of effective immigration controls. He had referred at paragraph 18 of the decision to section 117B of the 2002 Act. Section 117B(1) provides that the public interest is in favour of the maintenance of effective immigration controls. The judge also applied that principle at paragraph 24 of his analysis. We find that the Entry Clearance Officer's ground 1, as pleaded, is a simple disagreement with the judge's decision, and is premised on the footing that Article 8 may never necessitate a departure from the requirements of the Immigration Rules. Ground 1 as argued before us in its "freestanding" form, as it were, was similarly a further disagreement of weight and emphasis. We therefore find that ground 1 is without merit.

Adequate reasons for maintenance findings

18. The thrust of Mr Terrell's submissions before us was that the judge failed to give adequate reasons for his finding at [23] that the maintenance requirements were met. We accept that the judge did not in terms address the requirements of Appendix FM-SE. It may have been helpful for him to do so. However, the issue for our consideration is whether the judge made an error of law. We recall that it was common ground before the First-tier Tribunal that the appellant could not succeed under the Immigration Rules. We accept that that does not mean that the Immigration Rules themselves are of no relevance whatsoever.

19. As pleaded, this ground contends that the judge failed to give adequate reasons for concluding that the funds available to the appellant met the maintenance requirements. In our judgment, properly understood, the judge did give sufficient reasons. The law relating to the adequacy of reasons is now well established. A leading authority is *English v Emery Reimbold* [2002] EWCA Civ 605. At paragraph 118, the Court of Appeal concluded its guidance on the topic in these terms:

> "An unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with the knowledge of the evidence given and the submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision."

20. As we have already set out, the judge had before him evidence in the form of a letter from the appellant's bank confirming that the funds in the Sri Lankan account were available to the appellant. We observe that those were the same funds that had been available at the date of the application made to the Entry Clearance Officer on 5 May 2021. It followed that the evidence before the judge was that for the twelve months preceding the hearing there had been that substantial sum of money in the account that was available to the appellant. The evidence was also capable of demonstrating that it was available to the appellant, on demand. There was no challenge to that (or any other) part of appellant's evidence; the Entry Clearance Officer had chosen not to be represented at the hearing and had not applied for an adjournment.

21. The evidence before the judge as summarised at paragraph 13, taken along with the submissions advanced on behalf of the appellant from paragraphs 19 to 21, was capable of meriting the conclusion reached by the judge that the appellant's means were such that he would be able adequately to maintain himself. Against that background, it is possible to view paragraph 23 of the decision in only one way, namely that the judge accepted that evidence and found that it was available to the appellant.

22. Mr Terrell adopted a reformulated version of ground 2 in his submissions before us, continuing the freestanding approach he adopted in relation to ground 1. He submitted that it was insufficient for the judge simply to reach a conclusion on this basis without expressly considering the import of Appendix FM-SE. We put to one side the fact that this was not as pleaded, but conclude that it was entirely open to the judge to use his special expertise as a judge of a specialist tribunal to conclude, on the basis of the evidence that was before him, that the appellant would be able adequately to maintain himself without recourse to public funds. That approach was entirely consistent with the judgment of Lady Hale in *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10 at paragraph 76:

> "Rules as to the quality of evidence necessary to satisfy that test in a particular case [that is, the minimum income requirement, which was at issue in *MM*] are, as the committee acknowledged, matters of practicality rather than principle; and as such matters on which the tribunal may more readily draw on its own experience and expertise."

That was the approach adopted by the judge in these proceedings.

23. It follows, in our judgment, that the judge reached a conclusion on the basis of evidence and submissions he heard, taking into account all matters raised in the refusal letter. He dealt with all issues raised in a manner that was open to him, considering the correct matters, if briefly, reaching findings that he was entitled to reach. The Entry Clearance Officer's submissions in these proceedings amount to disagreements of weight, and do not disclose an error of law.

24. We therefore find that the decision of the judge did not involve the making of an error of law and dismiss this appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law such that it must be set aside.

This appeal is dismissed.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 May 2023