IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001889

First-tier Tribunal No: HU/56176/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 July 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Thakshayini Suresh Kumar
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms J Heybrook, Counsel, instructed by David Benson Solicitors Ltd
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 17 July 2023

DECISION AND REASONS

1. The appellant is a national of Sri Lanka. Her application for entry clearance to the UK under Appendix FM to the Immigration Rules on the basis of her family life with her partner, Mr Suresh Kumar Velayoutham was refused by the respondent for reasons set out in a decision dated 12 August 2022.

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2. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Cotton for reasons set out in a decision dated 27 February 2023.

3. The appellant claims Judge Cotton (i) failed properly apply the Immigration Rules and the respondent's policy regarding the minimum income requirement, (ii) failed to consider the documents as at the date of the hearing, and (iii) erred in her approach as to the appellant's human rights claim. In particular, Judge Cotton failed to have any or any adequate regard to the nationality of the appellant's child. The child is a British citizen.

4. Permission to appeal was granted by First-tier Tribunal Judge Landes on 5 April 2023. She said:

> "2. I do not consider the judge applied the wrong policy so far as the immigration rules were concerned. He correctly said that for the 12 months before the application date, £18,600 was the relevant amount. That is both the relevant amount and the relevant time. The grounds refer to the sponsor's income at the date of hearing, but whilst that is relevant for proportionality, it is not relevant for the satisfaction of immigration rules. The judge explained clearly why he found the relevant immigration rules were not satisfied.
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> 3. I do however consider that ground 3 is arguable, specifically paragraph 24 in the light of the facts earlier set out. There was no apparent challenge to the child being of British nationality indeed her passport number was given in the application form. If the judge was concerned that her nationality needed to be proved, this could have been done very easily. That the child is of British nationality is relevant for the proportionality balance, as is the sponsor's current income, on which the judge made no findings. As it is arguable the judge approached the proportionality balance in the wrong way, I consider it arguable that he did make a material error in his approach to Article 8 ECHR on these particular facts."

<u>The decision of Judge Cotton</u>

5. At paragraph [1] of his decision Judge Cotton noted appellant was married to Mr Velayoutham ("the sponsor") on 1 February 2020 and that there is a child of the marriage born on 10 November 2020. The evidence before the Tribunal is set out in paragraph [4] of the decision. The sponsor attended the hearing and gave oral evidence. The Judge's findings and conclusions are set out at paragraphs [12] to [30] of the decision. At paragraph [14], Judge Cotton said that the nationality of the child is not in evidence, albeit the appellant's skeleton argument claims the child is a British citizen.

6. At paragraphs [16] to [22] of his decision, Judge Cotton addresses the eligibility financial requirement that must be met by the appellant and the evidence before the Tribunal regarding the sponsor's income. At paragraph [17] Judge Cotton said the appellant must prove a gross annual income of £22,400 *(i.e £18,660 plus £3,800 for the child)*. Judge Cotton commented upon the unsatisfactory way in which the evidence was presented to the Tribunal and it is clear that he was not assisted in his

task. He considered whether the appellant can show the eligibility income requirement was met during the 12 months to 22 February 2022 *(i.e the 12 months before the application)*. At paragraphs [21] to [23] of his decision, Judge Cotton said:

> "21. The Uber weekly summary of earnings show gross payments into the sponsor's bank account. Those summaries do not cover the relevant period but the gross sums do match the inward payments on his bank statements. I therefore find that the income from Uber stated in the sponsor's bank statements represent his gross income from Uber. The total payments from Uber into his bank account for the period of 12 months to 22 February 2022 total £7,327.91. There is no obvious way to reconcile this sum with the self-assessment or accountant's documents.
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> 22. There are other income sources evident on the sponsor's bank statements. Notably there are numerous payments from "stitching custodia". The sponsor does not give evidence about what these payments are and so has not proved that they are from one of the sources listed in E-ECP.3.2 (which details the acceptable sources of income for the Immigration Rules to be satisfied).
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> 23. The appellant has not proved that she meets the income requirement of the Immigration Rules."

7. Having found the requirements of the immigration rules are not met, Judge Cotton went on to address the Article 8 claim outside the rules. The issue was whether the decision to refuse leave to enter is proportionate to the legitimate aim of immigration control. At paragraphs [27] to [30], Judge Cotton said:

> "27. Given my finding above about the nationality of the child, I cannot find that the refusal of leave to the appellant impacts on the child's ability to exercise rights relating to nationality.
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> 28. Weighing in favour of the appellant's position is that the family life in this case would be stunted if the appellant were not allowed to enter the UK. Denial of leave means that a family would not be able to live together. However, whilst family life must include the ability to deepen and grow those rights it does not go so far as to provide an appellant with an automatic choice to choose where they live.
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> 29. In all of the analysis above, I consider that the best interests of the child weigh equally in favour and against the appeal being allowed.
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> 30. There would undoubtedly be hardship for the appellant if leave were refused. However taking all the evidence into account, and keeping the interests of the child as a primary consideration, I conclude that the appellant's circumstances are not exceptional and that the consequences of refusal would not be unjustifiably harsh. For the same reasons, I find that the decision not to grant leave is proportionate."

<u>The hearing of the appeal before me</u>

8. Before me, Ms Heybrook submits that in her decision dated 12 August 2021, the respondent accepted the application does not fall for refusal on grounds of suitability. The respondent also accepted the eligibility relationship requirement is met by the appellant. The respondent did not however accept that the eligibility financial requirement is met. Ms

Heywood conceded from the outset that the appellant could not have succeeded under the Immigration Rules because as at the date of the application, the eligibility financial requirement was not met. However, she submits Judge Cotton made two fundamental errors that are material to the outcome of the appeal. First, although Judge Cotton said that the nationality of the child is not in evidence, the respondent did not take issue with the fact that the child is a British Citizen. Second, in her decision the respondent had said; *"In order to meet the financial requirements of Appendix FM your sponsor needs a gross income of at least £18,600 per annum.".* However at paragraph 17] of his decision, Judge Cotton states:

> "The appellant must therefore prove a gross annual income of £22,400 (£18,600 plus £3,800 for the first child) if considering the 12 months before the hearing date or £18,600 if considering the 12 months before the application date...."

9. Ms Heybrook submits it is not clear why Judge Cotton took the view the appellant must establish a gross annual income of £22,400 if viewed on the basis of income during the 12 months before the date of the hearing, but the lower figure of £18,600 if considering the 12 months before the date of the application. The appellant's daughter was born before the application was made. She was a British citizen throughout, and as the respondent set out in her decision, in order to meet the financial requirements of Appendix FM a gross income of at least £18,600 per annum was required. In any event, Ms Heybrook submits there was evidence before the First-tier Tribunal that the eligibility financial requirement was met at the date of the hearing of the appeal before Judge Cotton, albeit the judge received little assistance from the way in which the evidence was presented. In the appellant's supplementary bundle, the appellant had provided unaudited accounts relating to her partner's income for the tax year ending 21st March 2022 *(i.e. the last full tax year before the hearing of the appeal)*. The appellant's partner had a total income (profit) of £25,374 from self employment. That was supported by the 'Self Assessment Tax Calculation' issued by HMRC *(page 7 of the appellant's supplementary bundle)*, which confirms the profit from self-employment declared to HMRC for the tax year ending 5 April 2022 to be £25,374. Therefore although the eligibility financial requirement was not met at the date of application, it was met at the date of the hearing of the appeal and so it should have featured in the judge's assessment as to whether the decision to refuse entry clearance is in all the circumstances proportionate.

10. In reply, Ms Nolan, quite properly in my judgment, accepts the appellant had confirmed her daughter is a British citizen and had provided her passport number. The respondent did not challenge the child's nationality in her decision and proceeded on the premise that the sponsor needs a gross income of at least £18,600 per annum in order for the appellant to establish that the financial requirements of Appendix FM are met. She quite properly accepts that the decision of Judge Cotton is therefore vitiated by a material error of law. Judge Cotton had said at paragraph [14] of his decision that the nationality of the child is not in evidence. At

paragraph [27], it is clear that the judge's misunderstanding as to the nationality of the child was a factor the judge had in mind when considering the Article 8 claim outside the immigration rules. Ms Nolan, having had the opportunity of considering the evidence that was before the First-tier Tribunal regarding the sponsor's earnings, accepted there was evidence before the First-tier Tribunal that the eligibility financial requirement was met at the date of the hearing.

Decision

11. It is uncontroversial that the only reason given by the respondent for refusing the appellant's application was that the eligibility financial requirement was not met. The appellant claimed in her application form that her daughter, who I refer to as [MSK] is a British Citizen and the appellant had provided her 'passport number'. The nationality of the appellant's daughter has never been disputed and Ms Nolan properly accepts Judge Cotton proceeds upon a mistake of fact when he states the nationality of the child is not in evidence. As MSK is a British citizen, Judge Cotton erroneously directed himself, at [17], that during the 12 months before the date of the hearing the appellant must prove a gross annual income of £22,400 *(£18,600 plus £3,800 for the first child)*. In any event, there was clearly evidence before Judge Cotton that the sponsor's earnings during the twelve months preceding the hearing were in excess of £22,400. Judge Cotton cannot be criticised for his understanding of the evidence before him because it is clear the evidence was poorly presented and the Tribunal gained little assistance from the appellant's representatives. Judge Cotton quite properly noted that the evidence was not presented in a way that makes it easy for the Tribunal to assess whether the appellant meets the income requirement. The appellant's representatives are under a duty to assist the Tribunal, but failed to do so. Judge Cotton was right to have concerns about what appeared to be unexplained payments from "stitching custodia", but I accept he appears to have overlooked the material documents submitted in support of the income requirement for the period in between 1 April 2021 to 31 March 2022, that Ms Heybrook took me through.

12. It follows that I accept the decision of First-tier Tribunal Judge Cotton must be set aside. As to disposal, there is in my judgment no reason why the decision cannot be remade in the Upper Tribunal.

Remaking the decision

13. There is no doubt the appellant has established a family life with her partner and child. There is no dispute between the parties that the decision to refuse entry clearance has consequences of such gravity as to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of immigration control and the economic well-being of the country. The issue in this appeal is whether the decision to refuse entry clearance is proportionate.

14. Ms Heybrook accepts the appellant cannot satisfy the requirements of Appendix FM because at the date of the appellant’s application, the eligibility financial requirement was not met .

15. In Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60, Lord Reed emphasised that the failure to meet the requirements of the Immigration Rules is a relevant and important consideration in an Article 8 assessment because the Immigration Rules reflect the assessment of the general public interest made by the responsible minister and endorsed by Parliament. As set out by the Court of Appeal in TZ (Pakistan) [2018] EWCA Civ 1109, compliance with the immigration rules would usually mean that there is nothing on the respondent’s side of the scales to show that the refusal of the claim could be justified. At paragraphs [32] to [34], the Senior President of Tribunals confirmed that where a person meets the rules, the human rights appeal must succeed because ‘considerable weight’ must be given to the respondent’s policy as set out in the rules. Conversely, if the rules are not met, although not determinative, that is a factor which strengthens the weight to be attached to the public interest in maintaining immigration control.

16. In reaching my decision, I must also have regard to the best interests of the appellant’s child who is a British citizen. Her best interests are plainly served by being able to grow up in a stable environment where she can live with both her parents.

17. As at the date of the hearing before me, I am satisfied that the evidence establishes the appellant’s sponsor has an income from his self employment as an Uber driver that exceeds £18,600, and that the eligibility financial requirement is therefore met. In my judgement, compliance with the immigration rules now, taken together with the best interests of the child are factors that weigh heavily in favour of the appellant. Although the appellant did not meet the requirements of the rules when she made her application the requirements are now met. There is therefore nothing on the respondent’s side of the scales to show that the refusal of entry clearance remains proportionate. I find the refusal is disproportionate.

18. It follows that I allow the appeal on Article 8 grounds.

Notice of Decision

19. The decision of First-tier Tribunal Judge Cotton is set aside.

20. I remake the decision and I allow the appellant’s appeal on Article 8 grounds.

V. Mandalia

Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 July 2023