



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003899

First-tier Tribunal No: HU/50212/2023
LH/01573/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12 December 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Shabana Kousar Malik
(NO ANONYMITY ORDER MADE)

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Ms G Patel of Counsel, instructed by Proctor & Hobbs Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard remotely at Field House on 21 November 2023

DECISION AND REASONS

1. To avoid confusion, the parties are referred to herein as they were at the First-tier Tribunal.
2. The appeal was anonymised at the First-tier Tribunal but pursuant to the directions issued by Upper Tribunal Judge Gill on 10.10.23, the appellant has confirmed that she does not seek continuation of the anonymity direction.
3. The respondent appeals against the decision of the First-tier Tribunal (Judge Monaghan) promulgated 8.8.23 allowing the appellant's appeal against the respondent's decision of 8.12.22 to refuse her human rights application made on 16.8.21 for Entry Clearance (EC) as the parent of her three minor British citizen children.
4. An issue arises on the face of the papers as to the purported grant of permission by the First-tier Tribunal which enables the appeal to come before the First-tier Tribunal. The decision of the First-tier Tribunal (Judge Galloway) dated

12.9.23 states at the head that “permission to appeal is refused.” However, it is clear from the body of the decision that it was intended that permission be granted. Ms Patel took no issue on the error on the face of the permission decision, noting that case authority was against her.

5. The application was considered by the respondent under E-ECPT.1.1 of Appendix FM of the Immigration Rules. It was refused on eligibility grounds (i) under E-ECPT.2.3(b)(ii), which excludes an application for EC as a parent of a child where the parent of the child with whom they normally live is the partner of the (appellant); (ii) under E-ECPT.2.4(b) as there was no evidence that the appellant was taking an active role in the child’s upbringing; (iii) under E-ECPT.3.1 there being no evidence that the appellant and her children could be maintained and accommodated without recourse to public funds; (iv) under E-ECPT.4.1 for failure to provide evidence that the English language requirement is met (where the IELTS test passed in January 2019 had expired by the date of application. Finally, the respondent considered that there were no exceptional circumstances under GEN.3.2 of Appendix FM where refusal would result in unjustifiably harsh consequences for the appellant or a relevant child and, therefore, a breach of article 8 ECHR.
6. Before the appeal, the respondent reviewed the refusal decision in the document dated 29.3.23, but maintained the decision. The review took into account that the appellant’s spouse and father to her three children passed away on 14.10.22 but considered that no further evidence had been produced to show that she had sole responsibility for the children, pursuant to E-ECPT.2.3(a). There was still no evidence that the financial requirements under E-ECPT.3.1 were met. However, it was accepted that a valid English language certificate had been produced.
7. Although the sponsor, the eldest of the three children, ZKM, was still a minor at the date of the First-tier Tribunal appeal hearing on 8.8.23, she is now an adult. The respondent conceded that the appellant had sole parental responsibility for the three children.
8. At [41] of the decision, the First-tier Tribunal found that an acquaintance of the sponsor, FH, was able to financially support the appellant so that she and her three children will be supported without recourse to public funds. Consequently, at [42] and [43] of the decision, the First-tier Tribunal found “all parts of the relevant Immigration Rules have been met. It is not necessary therefore for me to consider exceptional circumstances in this case.” In other words, the First-tier Tribunal considered that as the Rules were met there could be no public interest in refusal and allowed the appeal on article 8 ECHR grounds, without considering the proportionality balancing exercise in relation to private or family life.
9. In summary, the grounds assert a material error of law, finding that FH would be able to support the appellant and her children when such third-party support is not permitted under E-ECPT.3.2 of Appendix FM of the Immigration Rules. This provides that only income, savings or certain benefits or payments, relating to only the sponsor or the appellant may be taken into account. It is submitted that the judge erred in finding the financial requirements under the Rules to be met.
10. In purporting to grant permission, the First-tier Tribunal considered it arguable that in light of E-ECPT.3.2 (a) – (e) the support of a third party is not sufficient to meet the Rules.
11. The Upper Tribunal has received Ms Patel’s Rule 24 Reply, dated 26.9.23. This points out that in the pleaded grounds the respondent only sought to challenge the First-tier Tribunal decision under the financial requirement, the grounds citing

E-ECP.3.1 and 3.2. It is pointed out that the Rules relating to the financial requirements for EC of a parent of a child are not E-ECP which relates to EC of a partner, but under E-ECPT3.1 and 3.2, which do not exclude reliance on financial support of a third party. It is submitted that no error of law is disclosed in relation to the judge's findings that the financial requirements of the Rules were met. In the alternative, it is submitted that any error in relation to the Rules is not material as the First-tier Tribunal would have reached the same conclusion based on the exceptional and compelling circumstances of the case.

12. At the hearing before me, Ms Isherwood had not seen the Rule 24 reply, even though Ms Patel had sent it to her by email but was happy for me to summarise the arguments raised within the remote hearing.
13. In essence, the grounds fail at the first hurdle. The challenge is taken on the wrong provision of the Rules, E-ECP, when E-ECPT was applied in both the respondent's refusal decision and review. As the Rule 24 Reply explains, there is no prohibition on third-party support in E-ECPT.3.2. The grounds took issue not with the finding that financial support was available, only the narrow point that financial support from other than the appellant and the sponsor is prohibited. No other ground can be discerned from the grounds as drafted. The grounds are fundamentally flawed as E-ECP was never relied on. There was no application to amend the grounds and in the circumstances it is unlikely that any application at this stage would have been granted.
14. Ms Isherwood asserted that the Specified Evidence Rules required the evidence of financial support to be provided at the time of the application. However, Appendix FM-SE appears to make no direct reference to E-ECPT. The most that Ms Isherwood could point to was paragraph B, which provides that "where evidence is not specified by Appendix FM, but is of a type covered by this Appendix, the requirements of this Appendix shall apply." However, this was never a pleaded ground, and no challenge was raised to the nature or substance of the evidence, only as to permissible source of support.
15. In the circumstances, the grounds failed to identify any properly arguable error of law in the decision of the First-tier Tribunal. Permission should never have been granted as the grounds were flawed from the outset. It follows that the respondent's appeal must be dismissed.

Notice of Decision

The respondent's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal shall stand as made.

I make no order as to costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 November 2023