IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005448
First-tier Tribunal No: HU/59225/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 03 April 2024

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Nabeela Kausar
(NO ANONYMITY ORDER MADE)

Appellant

and

Entry Clearance Officer

Respondent

Representation:
For the Appellant: Mr J Greer of Counsel, instructed by MY UK Visas
For the Respondent: Ms T Rixom, Senior Home Office Presenting Officer

Heard remotely at Field House on 26 March 2024

DECISION AND REASONS

1. To avoid confusion, the parties are referred to herein as they were before the First-tier Tribunal.

2. By the decision of the First-tier Tribunal (Judge Lester) issued on 15.12.23, the respondent has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Trevaskis) dated 16.11.23 allowing the appellant's appeal against the respondent's decision of 20.7.23 refusing her application made on 23.5.23 for Leave to Enter or Remain in the UK as the fiancée of the sponsor MS, a British citizen in the UK, and to live with him permanently.

3. Following the helpful submissions of the legal representatives, I reserved my decision to be provided in writing, which I now do. The Upper Tribunal has received and taken into account Mr Greer's Rule 24 reply and skeleton argument, filed on 21.3.24, together with the oral submissions and all documents in the case.

4. The relevant background can be summarised as follows. The appellant claims to have met the sponsor in the UK in 2010, at which time he was married to another

woman, FB, from whom he was divorced in 2018. It is asserted that they continued their relationship until 2013, when she was removed to Pakistan. It is said that he has visited her in Pakistan, that they communicated via Whatsapp and Messenger, and that they became engaged on his visit to Pakistan in 2016.

5. In June 2017, the sponsor was sentenced to 12 years' imprisonment for murder and subsequently released on licence in December 2022. He remains on licence with a condition prohibiting leaving the UK without the consent of his supervisor. It is asserted that the couple have resumed contact through electronic means.

6. It is common ground that the appellant cannot meet the financial eligibility requirements of Appendix FM of the Immigration Rules without third-party support. The sponsor's only income was carer's allowance of £69.70 per week. However, the First-tier Tribunal found that the Rules were met and therefore allowed the appeal on article 8 ECHR grounds.

7. The First-tier Tribunal found at [10] that there was a genuine and subsisting relationship and at [11] that the couple intend to live together permanently in the UK. At [12], the judge found 'exceptional circumstances' and was satisfied that in those circumstances the genuine and subsisting relationship could only continue in the UK and, therefore, allowed the appeal on family life grounds pursuant to article 8 ECHR.

8. In summary, the grounds argue that the First-tier Tribunal made a material misdirection in law in finding exceptional circumstances without providing adequate reasons. In particular, it is submitted that the First-tier Tribunal failed to consider how the sponsor's mother was cared for during the period of his incarceration and what alternative care arrangements there might be for her care in the sponsor's absence. Further, there is no evidence that the sponsor has in fact sought the permission of his supervisor to leave the UK so that the finding that he cannot leave is necessarily flawed. No details were provided for the supposed third-party support of the sponsor's mother and sister, or whether this would be adequate to maintain the appellant without additional recourse to public funds. Finally, it is argued that the First-tier Tribunal failed to have any regard to s117B of the 2002 Act the public interest in maintaining effective immigration control.

9. In granting permission, Judge Lester considered that "*The respondent argues that the judge appears to have accepted much of the appellant case assertions without any evidence to support or substantiate them. When comparing the grounds with the decision it would appear that the respondent presents an arguable case*."

10. I bear in mind the guidance of the Court of Appeal in Volpi & Anor v Volpi [2022] EWCA Civ 464 (05 April 2022) at [65]-[66], where the judgment of Lord Justice Lewison, with whom Lord Justice Males and Lord Justice Snowden agreed, set out the following guidance:

> *"(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.*
>
> *(ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.*

(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

11. The Rule 24 Reply and Skeleton argument submits that the First-tier Tribunal directed itself correctly in law and provided sufficient reasoning. Regarding how the sponsor's mother was cared for whilst he was in prison, it is asserted that as this argument was not advanced before the First-tier Tribunal, there was no obligation on the Tribunal to address it. It is submitted that whether the sponsor could leave the UK or not is immaterial given that the requirement for him to remain in the UK to care for his mother was identified as exceptional circumstances. It is also pointed out that at [6] of the decision the judge expressly took the s117B public interest considerations into account.

12. At [4] of the decision, the judge sets out the three issues to be resolved in the appeal: whether there was a genuine and subsisting relationship; whether they can meet the financial requirements; and whether there are exceptional circumstances on which refusal of EC would produce unjustifiably harsh consequences and therefore be disproportionate.

13. Whilst brief, I am satisfied that the reasoning at [10] of the decision is sufficient to explain why the judge concluded that the relationship was genuine and subsisting. It is a balanced assessment, for example giving limited weight to the 'superficial' evidence of contact by telephone and social media. It cannot be said that the finding is 'plainly wrong' or one that no reasonable judge could reach. In any event, it does not appear that the respondent challenges this finding.

14. At [12] the judge found that the appellant could not meet the financial eligibility requirements and that the third-party support only become relevant if there are exceptional circumstances rendering the refusal of EC unlawful. Again this is not challenged. It is not entirely clear from the way in which [12] is expressed but Ms Rixom accepted that the judge must have been referring to GEN.3.1, and the circumstances where the financial requirements of the Rules are not met but it is "*evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of entry clearance or leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal could result in unjustifiably harsh consequences for the applicant, their partner or a relevant child*".

15. I accept that at [6] of the decision the judge stated that s117B public interest considerations had been taken into account. However, the reasoning that follows makes no mention of the any such considerations. On the other hand, it is not

clear from the evidence that the 'little weight' to be given to a relationship applies as the appellant's immigration status would have to have been unlawful when the relationship was established. In any event, as Mr Greer pointed out, the public interest considerations cannot logically apply to exclude a person where the Tribunal has found that the Immigration Rules are met. It follows that there is no merit in this ground.

16. The difficulty with the decision is the reasoning provided at [13] for finding exceptional circumstances. The three brief reasons for that finding were (i) that the sponsor is a British citizen who is the sole carer for his elderly mother; (ii) is unable to leave the UK because of his licence condition; and (iii) unlikely to be admitted to Pakistan because of his conviction.

17. As Mr Rixom submitted, the reasoning simply accepts the assertions made by the appellant and sponsor without any critical assessment of the evidence in support. I note that there is no reference in the decision to considering any evidence except the oral evidence mentioned at [5] of the decision. There is no exploration in the decision of what the third-party support would consist of and whether it would be sufficient. Ms Rixom pointed to the mother's letter at [234] of the bundle saying that she has "savings". Whilst there is a DWP letter stating that the sponsor is in receipt of Carer's Allowance, there is nothing to demonstrate that the sponsor's care is essential to his mother or that she could not cope without him. Similarly, there is no clear evidence that the sponsor has requested and been refused permission to leave the UK, or that such a request would be refused. The information merely states the condition that permission is required.

18. Whilst accepting that a decision and reasons can be brief, and an appellant court should not lightly interfere with the findings of fact of a Tribunal that has heard oral evidence, I am satisfied that it was necessary for the First-tier Tribunal to demonstrate that all material evidence has been considered. The way in which the findings are drafted at [13] and [14] of the decision do not demonstrate that the judge has grappled with the evidence, rather than simply accepted the assertions made on behalf of the appellant. It does not even suggest that those assertions or submissions were found to be supported by the documentary or other evidence. As Ms Rixom asserted, the reader is left unclear what the judge made of the evidence and in reality, what the reasons are for finding that there are exceptional circumstances. There is certainly no indication that a balanced or objective assessment was made of the evidence.

19. In all the circumstances, I am satisfied that there is a material error of inadequate reasoning for findings made and that this requires the decision to be set aside and remade afresh.

20. It would not have been possible to remake the decision as part of the error of law hearing and I anticipate that the appellant may seek the opportunity to present further evidence as to the finances and care requirements of the sponsor's mother. In the circumstances, I am satisfied that this case falls squarely within paragraph 7.2 of the Practice Statement and should be remitted to the First-tier Tribunal to be remade afresh with no findings preserved.

Notice of Decision

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

The decision of the First-tier Tribunal is set aside in its entirety with no findings preserved.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal to be remade de novo.

I make no order as to costs.

DMW Pickup

DMW Pickup
Judge of the Upper Tribunal
Immigration and Asylum Chamber
26 March 2024