



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07991/2018

THE IMMIGRATION ACTS

Heard at Field House
On 30th October 2019

Decision & Reasons Promulgated
On 3rd March 2020

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE RIMINGTON
DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR ERDAL [C]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - UKVS SHEFFIELD

Respondent

Representation:

For the Appellant: Ms F Allen, instructed by Andrew Williams Solicitors (Roundhay Road)

For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, against the dismissal of his appeal by the First-tier Tribunal against a refusal decision of the Entry Clearance Officer dated 7th March 2018. The appellant applied for entry clearance to the United Kingdom as the spouse of Mrs [AC] ("the Sponsor") but the application was refused under ECP.3.1-

3.4 on the sole basis that the sponsor did not meet the financial requirements under Appendix FM.

2. The grounds of appeal were as follows:

- i. the judge failed to remind himself of the burden and standard of proof, there was no clear structure or findings and the judge had not referred to the submissions made by either the appellant's representatives or the respondent's representatives.
- ii. an inadequate assessment of section 55 of the Borders, Citizenship and Immigration Act 2009. Although the best interests of the child were addressed from paragraph 20 in the determination, they were not properly considered in the light of **Azimi-Moayed (decisions affecting children onward appeals)** [2013] UKUT 197 (IAC) and **Zoumbas v Secretary of State** [2013] UKSC 74. The judge had failed to apply the relevant test of whether it would be reasonable to expect the child to relocate to Turkey. There was a flawed assessment with regards the public interest whereby the judge stated at paragraph 22:

"There is a strong public interest in the maintenance of effective immigration control, there is a strong public interest in denying entry clearance to those who do not meet the Rules."

The judge had failed to recognise that the respondent in exercising the public interest in maintaining effective immigration control should strike a fair balance between the competing interests of the needs of the individual and the needs of the wider society. Further the judge failed to recognise that a child could not be punished for the conduct of their parents as per **KO (Nigeria)** [2018] UKSC 53.

- iii. the judge at paragraph 23 concluded he did not need to proceed outside the Rules but, even if he did, the decision did not take into account the child's best interests and all relevant factors and was thus flawed throughout.
- iv. a failure to give adequate reasons on material matters. The judge failed to identify and consider the evidence such that the sponsor, despite improvements in her mental health, remained on antidepressants and her difficulties were ongoing. The judge failed to provide adequate reasoning for his findings in relation to the evidence on health and his approach to the sponsor's letter from her GP dated 31st January 2019.
- v. a failure to assess all of the evidence. The appellant's representative's skeleton argument relied on **MM (Lebanon) v Secretary of State** [2017] UKSC 10 but this was not properly applied as the judge concluded that because exceptional circumstances were not in existence, he did not

proceed to consider relevant factors such as the ability of the sponsor to work in Turkey

- vi. failure to identify the full facts of the case and to engage with the facts of the case.
3. At the hearing before us, Mr Lindsay conceded that there was an error of law, particularly in the approach to the relevant child. Two rule 24 notices were submitted; one on 11th July 2019, which conceded that the judge failed to consider the reasonableness of the child leaving the UK but nonetheless the sponsor could not meet the financial requirements and a differently constituted tribunal would not come to a different conclusion.
 4. On 27th August 2019 the Secretary of State submitted a revised response to the grounds of appeal under rule 24 which agreed that the judge had not had proper regard to key parts of the evidence or that the analysis had been adequate.
 5. The revised rule 24 notice, however, identified that at the appeal it appeared to have been accepted that the appellant still could not meet the financial requirements of the Rules and the judge correctly identified the principal issue was whether there were exceptional circumstances leading to unjustifiably harsh consequences. Consideration of GEN.3.1 and GEN.3.2 of Appendix FM of the Immigration Rules was relevant.

"GEN.3.1.

(1) *Where:*

- (a) *the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1. or E-LTRC.2.1. applies, and is not met from the specified sources referred to in the relevant paragraph; and*
- (b) *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; then*

the decision-maker must consider whether such financial requirement is met through taking into account the sources of income, financial support or funds set out in paragraph 21A(2) of Appendix FM-SE (subject to the considerations in sub-paragraphs (3) to (8) of that paragraph).

- (2) *Where the financial requirement in paragraph E-ECP.3.1., E-LTRP.3.1. (in the context of an application for limited leave to remain as a partner), E-ECC.2.1. or E-LTRC.2.1. is met following consideration under sub-paragraph (1) (and provided that the other relevant requirements of the Immigration Rules are also met), the applicant will be granted entry clearance or leave to remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1. or D-LTRC.1.1. or paragraph 315 or 316B of the Immigration Rules.*

GEN.3.2.

- (1) *Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.*
- (2) *Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.*
- (3) *Where the exceptional circumstances referred to in sub-paragraph (2) above apply, the applicant will be granted entry clearance or leave to enter or remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2., D-LTRPT.1.2., D-ECDR.1.1. or D-ECDR.1.2.*
- (4) *This paragraph does not apply in the context of applications made under section BPILR or DVILR."*

6. The Secretary of State referred to an updated policy Family life (as a partner or parent), private life and exceptional circumstances Version 1 published on 25th July 2019, (helpfully provided by Mr Lindsay at the hearing) which confirmed at page 68:

"To reflect the findings in the Court of Appeal case of Secretary of State for the Home Department v AB (Jamaica) & Anor [2019] EWCA Civ 661, where the relevant child is a qualifying child (a British child or a child who has been continuously resident in the UK for at least seven years), it will be unjustifiably harsh to refuse if both of the following apply:

- *there is a genuine and subsisting parental relationship to the qualifying child*

- *it is unreasonable for the child to leave the UK.*”

The guidance continues:

“Where, under paragraph GEN.3.2. of Appendix FM, you consider that refusal would result in unjustifiably harsh consequences for the applicant or their family, they must grant entry clearance or limited leave to remain.”

7. As set out in the rule 24 notice, in this case the position of the British child was clearly a relevant factor and at page 50 of the guidance the reasonableness of a qualifying child leaving the UK is addressed. The Secretary of State’s position as outlined in the rule 24 notice was that *‘she would not normally expect a qualifying child to leave but this was in the context of the case where a family was being split. At page 51 guidance is given for consideration of those cases where it may be reasonable for a qualifying child to leave the UK’*.
8. The Secretary of State opined that in view of the accepted errors by the judge further fact-finding would be required to establish if there were exceptional circumstances leading to unjustifiably harsh consequences such as the requirements of GEN.3.1 or 3.2 and that the matter was best addressed in the First-tier Tribunal.
9. We note that Family Life policy guidance, has subsequently been revised in September and is now dated November 2019.
10. We agree the judge failed to apply the relevant test, which is whether it would be reasonable to expect the child to relocate to Turkey. That assessment should be made in the light of **Azimi-Moayed** and **Zoumbas** and of relevance is the British citizenship of the child.
11. A further point was explored at the hearing before us. The application was accompanied by financial evidence of third-party support. The judge proceeded on the basis at paragraph [22] that

“the sponsor does not meet the MIR [Minimum Income Requirement] which gives rise to the prospect that the couple will be reliant on benefits. The couple would not be financially independent because they would be reliant on Mrs [C]’s parents”.

The judge had failed to consider the dicta of the Supreme Court at paragraph 99 of **MM (Lebanon)**:

“Operation of the same restrictive approach outside the rules is a different matter, and in our view is much more difficult to justify under the HRA. This is not because ‘less intrusive’ methods might be devised (as Blake J attempted to do: para 147), but because it is inconsistent with the character of evaluation which article 8 requires. As has been seen, avoiding a financial burden on the state can be relevant to the fair balance required by the article. But that judgment cannot properly be constrained by a rigid restriction in the rules. Certainly, nothing that is said in the instructions to case officers can prevent the tribunal on appeal from looking at the matter more broadly. These are not matters of policy on which special weight has to be accorded to the judgment of the

*Secretary of State. In doing so, it will no doubt take account of such considerations as those discussed by Lord Brown and Lord Kerr in **Mahad**, including the difficulties of proof highlighted in the quotation from Collins J. That being the position before the tribunal, it would make little sense for decision-makers at the earlier stages to be forced to take a narrower approach which they might be unable to defend on appeal."*

12. In essence, the judge failed to address all relevant facts, failed to give adequate reasoning and failed effectively to address Article 8 at all. He proceeded on the basis of a previous flawed assessment with regards to the child and misapplied caselaw, not least **MM (Lebanon)**. The judge concluded that as the exceptional circumstances criteria did not apply the alternative source of income provided by her parents to make up the shortfall could not be used. It was, however, incumbent upon him to consider all of the circumstances in order to consider whether any unjustifiably harsh consequences were extant.
13. All grounds of challenge, which are intertwined, appear to us to be well-founded and disclose fundamental and material errors of law as explained. The First-tier Tribunal determination should be therefore set aside.
14. It was agreed at the hearing by both Ms Allen and Mr Lindsay that remittal was the appropriate course, given that notwithstanding the quality of the evidence before the First-tier Tribunal on the medical issues, there was significant change to the circumstances of the appellant because another child has been born.

Decision

The Judge erred materially for the reasons identified. We set aside the decision pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made, the matter is remitted *de novo* to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed *Helen Rimington*

Date 2.3.2020

Upper Tribunal Judge Rimington