



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal No: UI-2022-001851
(FtT ref HU/54310/2021); IA/11077/2021

THE IMMIGRATION ACTS

**Heard at George House, Decision & Reasons Promulgated
Edinburgh on 12 October 2022 on 24 November 2022**

Before

**UPPER TRIBUNAL JUDGE MACLEMAN
& DEPUTY UPPER TRIBUNAL JUDGE FARRELLY**

Between

RUDELIZA MENDOZA MILNE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr V Sharma, of the Chamber Practice, Aberdeen
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. FtT Judge Doyle dismissed the appellant's appeal by a decision dated 23 March 2022.
2. The appellant has permission to appeal to the UT on 3 grounds, set out in his application as follows:

It is respectfully submitted that the First-tier Tribunal made the following errors of law:

1. Incorrect assumption that the appellant's husband will continue his overseas oil engineer life.

While assessing the best interest and unjustifiably harsh consequences in relation to the British children of the appellant's husband, the FtT made the above erroneous assumption in paragraph 26 of its decision. The FtT had sufficient evidence before it that the appellant was made redundant from this position. The appellant's husband had also made a clear statement that he cannot move to the Philippines because he would not be able to financially support his children (see the second last paragraph of his statement). In the last paragraph of the first page of his statement, the appellant's husband says that he was working and taking up jobs outside the UK to financially support his children.

Hence, it is respectfully submitted that the First-tier Tribunal erred in concluding that the best interest of the children will not be affected and there will not be unjustifiably harsh consequences for them if the appellant's husband is to leave the UK.

2. Active role in the upbringing of the British children and exceptional circumstances

In its decision, the FtT in paragraphs 11 and 23 accepts the regular contact with the children but finds that playing board games and eating food together don't amount to an active role in upbringing.

The FtT has accepted in Paragraph 26 of its decision there is no suggestion that the appellant's husband did not meet his parental rights and duties when he was away from the UK. However, the FtT finds in its decision that he is not playing an active role in his children's lives even when they are in regular contact with him, he helps his son deal with the covid anxieties and spend weekends with them. There is no challenge to the financial support provided by him to his children as evident from the separation agreement between him and his wife and his undisputed statement on pages 2 and 3 of the appeal bundle.

It is pertinent to mention that the Home Office guidance 'Family life (as a partner or parent), private life and exceptional circumstances' was brought to the attention of the FtT at the hearing. Please see the attached email. However, the FtT appears to have missed to consider it as evident from its decision. The said guidance is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1039000/Family_life_as_a_partner_or_parent_private_life_and_exceptional_circumstances.pdf.

The following part of the said guidance see page 77 was brought to the attention of the FtT at the time of the hearing. It confirms that the subsisting and genuine relationship between the applicant's husband and his British children and his playing an active role in their lives will mean that it would be unjustifiably harsh for the applicant's partner to relocate overseas without his children,

"Examples of circumstances in which the refusal of the application might result in 'unjustifiably harsh consequences' might include:

...

The applicant's partner has a genuine and subsisting parental relationship with a child in the UK of a former relationship, is taking an active role in the child's upbringing, and the particular circumstances of the case mean that (taking into account the child's best interests as a primary consideration) it would be unjustifiably harsh to expect the child to relocate overseas with the applicant's partner, or for the applicant's partner to do so without the child."

The FtT has not addressed the above important ground raised by the appellant as to how the appellant's case is covered by the Exceptional circumstances. It is in itself is an error of law.

At page 80, the guidance also discusses 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 requirements of the Rules are otherwise not met (in part or at all), there is a genuine and subsisting parental relationship to a qualifying child and if there is and it is unreasonable for that child to leave the UK, the exceptional circumstances test will be met. It is accepted that the British children in the present appeal are not qualifying children and they are not of the appellant but her husband. However, in view of the above guidance and the Supreme Court's decision in ZH (Tanzania) [2011] UKSC 4, the above court of Appeal decision should be interpreted in favour of the appellant placing them in the same position as the qualifying children.

3. Best Interests of British children, Exceptional Circumstances and Article 8 Assessment

In the above discussed Home Office guidance 'Family life (as a partner or parent), private life and exceptional circumstances, it is stated on page 80 that the child's best interests, taking into account as a primary consideration, must constitute substantive and compelling factors for entry clearance to be granted following consideration under paragraphs GEN.3.2. and GEN.3.3. of Appendix FM, where the requirements of the Immigration Rules are not otherwise met. At page 78, the said guidance discusses the decisions of the Supreme Court in ZH (Tanzania) [2011] UKSC 4 and FZ (Congo) [2013] UKSC 74 with regards to the best interest of the children, article 8 and the exceptional circumstances.

It is respectfully submitted that the relocation of the appellant's husband to the Philippines will not be in the best interest of his children as he will not be able to financially support them and will not be physically available to them to perform his day to day fatherly responsibilities which he is doing now such as supporting his youngest child to deal with covid related anxieties. The best interest of the British children is a primary consideration and a relevant factor in meeting the exceptional circumstance test as discussed above. The FtT in its decision has repeatedly referred to the period when the appellant's husband was working outside the UK in concluding that his children will not be adversely affected he leaves the UK gain. The FtT was required to consider the best interest of the children in the present circumstances when he was in the UK playing an active role in their upbringing and the children don't want him to leave the UK. Please see the undisputed statements of the appellant's husband and his son on pages 2, 3 and 4 of the appeal bundle.

3. On 28 April 2022 FtT Judge Lodato granted permission:

... all grounds of appeal are arguable. There was an emphasis in the decision on a return to the circumstances that pertained between 2015 and 2020. This was a period when the appellant's husband lived and worked abroad and maintained his parental relationship from a distance. He had engaged in weekly, face-to-face contact with the children since 2020. There is very little to indicate that meaningful consideration was given to the change that the children would experience if their father left the UK to continue living with his wife and, importantly, whether this

would be in their best interests. Even if there were gaps in the evidential picture about the best interests of the children, this was an obvious possibility that merited full and careful consideration. I also note that there is no reference to the applicable standard of proof, the balance of probabilities. Paragraph 7 arguably misstates the burden and standard of proof.

4. Mr Sharma told us that the SSHD's guidance has been updated since the above citation, but remains to the same effect.
5. The grounds overlap and contain some mere insistence and disagreement, but as clarified in the oral submissions of Mr Sharma, they amount to two propositions of error:
 - (i) the FtT failed to see that the facts of the case fell clearly within the scope of the guidance on "exceptional circumstances" in terms of GEN.3.2 of appendix FM of the immigration rules and was bound to succeed because refusal resulted in "unjustifiably harsh consequences" for the children of the appellant's husband; and
 - (ii) the Judge erred by deciding the case on the facts from 2015 - 2020, when the appellant's husband lived abroad, seeing his children only intermittently, not at the date of decision, when he lived in the same city and saw them regularly.
6. Mr Mullen submitted that the Judge adequately explained his finding that removal of the appellant would result in no unjustifiably harsh consequences for the children, either if their father remained here, or if he moved to the Philippines. If he did move abroad, reciprocal visits could take place. Satisfactory family life had been carried on in that way over several years previously, when his sons were younger, of an age when they were likely to spend a higher proportion of time directly with a parent. He did not accept that the respondent's guidance amounted to a policy to grant leave to anyone whose partner had a relationship with children in the UK of a previous relationship. That was a question of circumstances which the FtT was entitled to resolve as it did. The appellant's challenge did not amount to more than disagreement.
7. We reserved our decision.
8. Mr Sharma did not take up the remark in the grant of permission about the burden and standard of proof; rightly so, because the decision did not turn on burden or standard, and even if there was a misstatement at [7], it was one which tended in the appellant's favour.
9. The guidance was the most hopeful source for the appellant to pray in aid, but the submission that it was bound to produce a result in her favour goes too far. It does not provide for a grant of leave in all cases where a partner of an appellant has a parental relationship. It raises a question of fact and degree, to be resolved on the evidence in the particular case.

10. The FtT did not adopt an approach narrower than the scope of the guidance. It noted at [16 and 28] that the case was pitched on the relationship between the appellant's husband and the children. The substance of the decision, [16 - 32], is all about whether there was evidence of unduly harsh consequences in that respect.
11. It is not a fair representation to suggest that the decision is based on comparing the facts from 2015 - 2020 rather than in 2022 with the effects of removal. It is based very much on the current state of the evidence.
12. When looking at the likely effect of removal, there is no error in looking at the quality of contact when the appellant's husband lived abroad, as one indication that any further change would not be significant - see [26 & 31].
13. The case for the appellant has been pressed as strongly as it could be, both in the FtT and in the UT, but her complaints about the FtT's resolution of her case do not survive reference to the decision itself, in which no error on a point of law is disclosed.
14. The decision of the FtT shall stand.
15. No anonymity direction has been requested or made.

H Macleman

17 October 2022
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.