



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001334

First-tier Tribunal No: HU/53084/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14 July 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

EMITJAN BETOJA
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Slatter, Counsel instructed by Mayfairs Law Solicitors
For the Respondent: Mr. N. Wain, Senior Home Office Presenting Officer

Heard at Field House on 20 June 2023

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge Lea, (the "Judge"), promulgated on 10 March 2023, in which she dismissed the Appellant's appeal against the Respondent's decision to refuse leave to remain on human rights grounds. The Appellant is a national of Albania who applied on the basis of family life with the Sponsor, a national of Lithuania, and her son.
2. Permission to appeal was granted by First-tier Tribunal Judge Monaghan on 20 April 2023 as follows:

“The Judge has arguably made a material error of law in failing to make any or adequate findings in relation to the evidence he heard from the Appellant and the sponsor. The Judge has also arguably failed to consider the evidence appertaining to the child’s relationship with the sponsor’s family members and how removal from the United Kingdom would affect those relationships and his best interests. The Judge has also arguably failed to provide adequate reasons as to why the Appellant, his wife and step son would not face very serious hardship living in Albania or Lithuania.”

The hearing

3. The Appellant attended the hearing. I heard submissions from Mr. Slatter and Mr. Wain. I reserved my decision.

Error of law

4. It was submitted in the grounds of appeal that the Judge had failed to undertake a best interests assessment with reference to the case of MK (best interests of a child) India [2011] UKUT 00475 (IAC) [2]. It was submitted that she had failed to take into account the Sponsor’s child’s relationship with his grandparents and wider family in the UK, had failed to make a finding on where it was best for the child to live with the Appellant and Sponsor, and had incorrectly recorded the evidence.
5. Secondly the grounds asserted that the Judge had failed to make findings of fact on the evidence, significantly the oral evidence of the Appellant and Sponsor [3]. It is submitted that this evidence was relevant to her consideration of “insurmountable obstacles” under paragraph EX.1(b). It was also relevant to the consideration of GEN.3.2. The grounds state that the Appellant and Sponsor had explained in oral evidence the difficulties that they would have living in Albania and Lithuania. The Judge had failed to provide adequate reasons as to why the Appellant, Sponsor and her son would not face very serious hardship living in Albania or Lithuania. It was submitted that the Judge had failed to apply the test in EX.1(b) in a practical and realistic manner as required [4]. Further, she had taken into account irrelevant considerations when considering whether the insurmountable obstacles test had been met [8].
6. It was further submitted that the Judge had failed to consider the Sponsor’s settled status under the EUSS and the loss of her right of residence through permanent relocation abroad [5].
7. The Judge’s findings are set out from [11] to [13]. In relation to best interests, the Judge states at [11]:

“I must take in account the best interests of the sponsor’s son. However, the sponsor’s son is only three years old and at this age it would not be difficult to adapt to life elsewhere than in the UK. He will have little in the way of ties out with (sic) his immediate family. The sponsor advised that being with her parents had been a toxic environment for her son.”
8. This is the extent of the Judge’s consideration of the best interests of the Sponsor’s son. She does not make any findings as to where and with whom it would be in his best interests to live. She has found earlier in the paragraph that he only speaks English, but she makes no reference to this when considering his

circumstances. She has stated that he will have little in the way of ties outside the family, but she has failed to consider the relationships with his extended family.

9. In relation to extended family members, it was submitted that the Judge had incorrectly recorded the evidence in this paragraph when finding that “being with her parents had been a toxic environment for her son”. Mr. Slatter stated that the only toxic relationship referred to was that with the Sponsor’s son’s father. I was referred by Mr. Wain to the Sponsor’s statement at [10] and [11] where she stated that “My son witnessed my parents continuously arguing in the home where we used to live and this affected him for a while, he was scared to be around another person.” It was submitted that this finding was based on what was in the Sponsor’s statement.
10. It could be argued that this kind of environment was “toxic”, and that therefore the Judge was entitled to make this finding. However, it is not clear how this finding is relevant to the best interests assessment which the Judge is purporting to carry out. At the date of the hearing the Sponsor’s son was living with the Sponsor and Appellant. There are no findings as to the relationship that exists now between the Sponsor’s son and his grandparents.
11. MK states at headnote (i) that: “The best interests of the child is a broad notion and its assessment requires the taking into account and weighing up of diverse factors”. Further at headnote (iv) it states:

“What is required by consideration of the best interests of the child is an “overall assessment” and it follows that its nature and outcome must be reflected in the wider Article 8(2) proportionality assessment. Consideration of the best interests of the child cannot be reduced to a mere yes or no answer to the question of whether removal of the child and/or relevant parent is or is not in the child’s best interests. Factors pointing for and against the best interests of the child being to stay or go must not be overlooked.”
12. I find that the Judge has not conducted such an “overall assessment”. I find that this is an error of law. I find that this inevitably affects her consideration of both paragraph EX.1(b), given that the Sponsor’s circumstances fall to be considered under this paragraph, and also GEN.3.2. As MK acknowledges, the nature and outcome of the best interests assessment must be reflected in a wider consideration of Article 8. I therefore find that it is a material error.
13. The Judge’s consideration of paragraph EX.1(b) is also set out in paragraph [11]. She states:

“The appellant is in touch with his family in Albania and his family still provide him with some financial support. The sponsor is from Lithuania and has a grandmother there. Both the appellant and the sponsor worked prior to coming to the UK and they both adapted to life in the UK. Although it would be difficult for them to live in Albania or Lithuania this would not entail very serious hardship. The appellant and the sponsor developed their relationship in the full knowledge that the appellant did not have status in the UK. The appellant arrived in the UK in 2019 and only attempted to regularise his stay in 2021. I do not find that the appellant’s private and family life in this case has any special or compelling characteristics. The appellant’s representative states that it would be unreasonable for the sponsor to leave her career and life in the UK. The sponsor however advised in oral evidence that she was no longer working in the same career.”

14. The Judge finds that it would be difficult for them to live in Albania or Lithuania but that it would not entail very serious hardship. She gives no reasons for this. She considers the fact that the relationship was started when the Appellant did not have status, but this is not relevant to paragraph EX.1(b). She records the submission that it would be unreasonable for the Sponsor to leave her “career and life in the UK” but, apart from a comment that the Sponsor gave evidence she was not working in the same career, does not address the circumstances of her having to leave her life in the UK. There is no reference to her settled status under the EUSS. It was submitted that further evidence was given orally at the hearing in relation to the difficulties the Appellant and Sponsor would face moving either to Albania or Lithuania, but there are no findings regarding these difficulties. I find that the Judge’s consideration of paragraph EX.1(b) is inadequately reasoned.

15. In relation to GEN.3.2, the Judge states:

“I have gone on to consider whether under paragraph GEN 3.2 of appendix FM there are any exceptional circumstances which would render refusal a breach of Article 8 because it would result in unjustifiably harsh consequences for the appellant, the sponsor or the sponsor’s son. I have taken into account paragraph GEN 3.3 in respect of the best interests of any relevant child being a primary consideration. In terms of section 117B, the maintenance of effective immigration controls is in the public interest and little weight should be given to private life or a relationship established when an appellant is in the UK unlawfully. A very strong or compelling case is required to outweigh the public interest in immigration control and for the reasons as detailed above I do not find this to be the case in the appellant’s case. Article 8 is engaged but any interference with the appellant and the sponsor’s and sponsor’s son’s Article 8 rights would be proportionate to the legitimate aim of immigration control.”

16. While the Judge states that she has considered the best interests of “any relevant child” she has not set out what those best interests are, either here or in paragraph [11]. Given this failure to properly assess the Sponsor’s child’s best interests, I find that inadequate reasons are given for her finding that GEN.3.2 does not apply.

17. I find these errors of law are material as they go to the core of the Appellant’s appeal.

18. I have carefully considered whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade. I have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

“(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.

(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal.”

19. I have carefully considered the exceptions in 7(2)(a) and 7(2)(b). Given that the Judge has not carried out a best interests assessment, nor made adequate findings in relation to the circumstances of the Appellant and Sponsor, I consider that the extent of the fact-finding necessary means that it is appropriate to remit this appeal to be reheard in the First-tier Tribunal.

Notice of Decision

1. The decision of the First-tier Tribunal involves the making of material errors of law.
2. I set the decision aside. No findings are preserved.
3. The appeal is remitted to the First-tier Tribunal to be reheard de novo.
4. The appeal is not to be listed before Judge Lea.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
27 June 2023