



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004155
UI-2023-004162

First-tier Tribunal No: HU/50302/2023
HU/50303/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

8th November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

ENTRY CLEARANCE OFFICER

Appellant

and

(1) MANDEEP KUMAR
(2) ANEETA RANI
(NO ANONYMITY ORDER MADE)

Respondents

Representation:

For the Appellant: Mr N. Wayne, Senior Home Office Presenting Officer
For the Respondent: Ms E. Harris, counsel, instructed by ATM Law Solicitors

Heard at Field House on 1 November 2023

DECISION AND REASONS

Introduction

1. This is an appeal by the Entry Clearance Officer. However, for ease, I shall refer in this decision to the parties as Appellants and Respondent as they were before the First-tier Tribunal.
2. The Appellants are citizens of India. Their children, also Indian nationals, born in 2012 and 2016, have lived in the UK with their Portuguese national grandparents since 2021. The children have leave under the EU Settlement Scheme. The Appellants applied to leave to enter at the same time as their children, but this

was refused. A number of further applications have been made by the Appellants, but these too were refused.

3. Most recently, by a decision dated 15 December 2022, the Respondent refused the Appellants' human rights application for leave to enter so as to be able to live in the UK with their children. The Appellants appealed that decision on the basis of their Article 8 family life with their children and, by a decision promulgated on 10 September 2023, First-tier Tribunal Judge Sweet ("the Judge") allowed their appeal ("the FTT Decision"). The Respondent now appeals with permission against the FTT Decision.
4. Before turning to the FTT Decision, there are three preliminary matters worth mentioning.
5. First, I am aware that the Appellants' solicitors received at least one email from the Tribunal chasing them for an electronic bundle purportedly in accordance with the new standard directions that apply in this Tribunal. However, the requirement to produce a bundle is imposed by those directions on the party who obtained permission to appeal - here the Entry Clearance Officer - and so the Appellant's solicitors were not in fact in breach of those directions as was suggested. In light of the fact that the Respondent took no steps to comply with the direction, I am nonetheless grateful for the Appellants' solicitors for then having prepared the bundle.
6. Second, at the outset of the hearing and out of an abundance of caution I raised with the parties whether they had any objection to me hearing this appeal on the basis that, when not sitting as a Deputy Judge of this Tribunal, I am regularly instructed as a barrister by ATM Law, who are the solicitors for the Appellants in this case. It did not seem to me, subject to hearing any objections, that this gave rise to a risk of apparent bias, given that the relationship is a professional one, and solicitors can be expected to understand that a Judge must adhere to his or her oath of office. Neither party raised any objection to me hearing the appeal, and I therefore did so.
7. Third, I was not asked to make any anonymity order and I do not consider that it would be appropriate to do so of my own motion in light of the issues in this case and the importance of the open justice principle. I have not referred to the identities of the children involved.

The FTT Decision

8. Having set out the background and procedure, the relevant burden and standard of proof, a summary of the evidence given by those who gave oral evidence and of the submissions, the Judge expressed his operative reasoning in a single paragraph. This read as follows:

"11. It was accepted on behalf of the appellants that they cannot meet the Immigration Rules, and therefore the only issue is under Article 8 ECHR. The situation is that their children have obtained pre-settled status on 14 February and 21 February 2022 respectively, and therefore having entered the UK in 2021 would be entitled to settled status in 2026. It was the family's decision to send their children to the UK in 2021 after their successful applications, where they have been living with their grandfather, supported also by their uncle. It is accepted that it is in the best interests of

the children to be with their parents, but the Presenting Officer submitted that this would be with their parents in India. However, I have reached a different conclusion, because the appellants' children have the right to be in the UK with their pre-settled EUSS status, and therefore I conclude that these are exceptional circumstances where there would be a breach of Article 8 ECHR under GEN.3.2 and 3.3, if their parents were not permitted to join them in the UK.”

Appeal to the Upper Tribunal

9. The Respondent appealed on the following grounds (which I have paraphrased and numbered):
 - a. Ground 1: The conclusion that the children would suffer unjustifiably harsh consequences by virtue of the refusal of entry clearance was irrational in light of the finding that it was the Appellants’ decision to send their children to the UK without them.
 - b. Ground 2: The Judge failed to take into account the fact that it was the Appellant’s choice to send their children to the UK without them and not the refusal of entry clearance that has led to the interference with family life.
 - c. Ground 3: The Judge failed to have regard to the provisions of s.117B of the Nationality, Immigration and Asylum Act 2002 and to weigh the Appellants’ failure to meet the requirements of the Immigration Rules;
 - d. Ground 4: The Judge has failed to give adequate reasons for concluding that there were exceptional circumstances in this case.
10. Permission to appeal was granted by First-tier Tribunal Judge Saffer on 27 September 2023, on the basis that “It is arguable that the Judge materially for the reasons set out in the grounds.” Presumably there is meant to be an “erred” after “materially”.
11. No rule 24 response was filed by the Appellants.

Discussion

Ground 4

12. I start with Ground 4 because it seems to me the most obviously meritorious.
13. Brevity can be a virtue in judicial decision writing. However a short judgment must still provide adequate reasons for the decision reached. Reasons need not be lengthy but they must enable the parties, and in particular the losing party, to understand why it is that a Judge decided the case in the way that he or she did. In cases involving human rights, this duty is elevated by the requirements of anxious scrutiny - the decision must show by its reasoning that every factor which might tell in favour of an applicant has been properly taken into account: R (YH) v Secretary of State for the Home Department [2010] EWCA Civ 116; [2010] 4 All ER 448 at [24] (Carnwarth LJ).
14. In determining whether the public interest in the maintenance of effective immigration control outweighs family life rights and best interests of any relevant

children, it is well established (see e.g. EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874 at [34]-[35] (Christopher Clarke LJ)) that it is necessary to make a fact-specific evaluative assessment determining the relative strength of the factors which make it in their best interests to remain in the UK and of any factors that point the other way. Those factors may, depending on the case, include (a) the child's age, (b) the length of time that they have been here; (c) how long they have been in education; (d) what stage their education has reached; (e) the extent to which they have become distanced from their country of nationality; (f) the extent to which they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens).

15. Notwithstanding the decision of the Supreme Court in Agyarko v Secretary of State for the Home Department [2017] UKSC 11 and the approval in that case of unjustifiably harsh consequences as an appropriately high benchmark for showing that Article 8 rights outweigh the public interest where the requirements of the Immigration Rules are not met, the ultimate test remains whether a "fair balance" has been struck. See GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630; [2020] INLR 32 at [29]. While the tipping point of that balance will be further along the scales in light of the considerable weight to be given to the Secretary of State's view, as expressed in the Immigration Rules, of how that balance is to be struck at a general level, it is still necessary to consider and weigh the relevant factors.
16. Turning back to the FTT Decision, it seems to me that the Judge has not provided sufficient reasons for his conclusion that Article 8 required the Appellants' admission to the UK. First, he has not engaged in any real evaluative exercise in relation to the children's best interests. He appears to have simply assumed that their best interests were in being with their parents (despite the fact that, notwithstanding that they had hoped to come with them, it was the Appellants' own decision that they should be separated in order to further the children's education and other life chances) and to have decided that those best interests were to be with the parents in the UK rather than India simply because the children have leave to remain. That fails to explain what it is about the children required them to be in the UK and failed adequately to explain why their having leave to remain (which would not, unlike British citizenship, normally be an important factor) tipped the balance.
17. In those circumstances, it seems to me that the FTT Decision did involve making an error of law. In my judgment it is also not possible to conclude that the error is immaterial. I do not consider that it is possible to say with any confidence that had the Judge imposed on himself the discipline of giving proper reasons for where the children's best interests lay or which side of the tipping point the Article 8 case ended up, he would necessarily have come to the same answer. That is not to say that he would have been bound to dismiss the appeal, as the Entry Clearance Officer submits under Ground 1, to which I now turn,

Ground 1

18. Mr Wayne submitted that the conclusion that the Appellants' children would suffer unjustifiably harsh consequences was irrational. As Ms Harris rightly pointed out, the effect of this submission was that on the facts of this case, no Judge could accept that the Appellants' Article 8 claim was made out, and yet the

decision had not been certified as clearly unfounded (and, given that India is on the list of countries in s.94(4) of the 2002 Act which require certification, unless the decision-maker is satisfied that the claim is not clearly unfounded, it follows that the Entry Clearance Officer was so satisfied in this case). Mr Wayne relied on the statements by Lord Hodge in R (Bibi) v Secretary of State for the Home Department [2015] UKSC 68 at [66] that “there is no general obligation on a state to facilitate or allow a couple who are married to live within it” and “Mixed nationality couples have no right to set up home in whichever country they choose”. Nor, it follows, do couples with the same non-British nationality, whose children however reside here.

19.

20. That is all uncontroversial so far as it goes. But it does not show that the only outcome that could rationally result on the facts of this case is a dismissal of the Appellants’ Article 8 claims. This is a case involving young children, who if required to return to India would themselves be separated from their grandparents with whom they will also enjoy family life within the meaning of Article 8. They had, by the time of the hearing before the FTT, been in the UK for two years – over a quarter of the youngest child’s life. They are at school here. This is not a case, as Ms Harris pointed out, of parents simply sending their children off to be educated elsewhere without them and later deciding that they would prefer to join them in the UK rather than remaining in India. This is a family who applied to come to the UK together and who have been applying ever since for the Appellants to join their children here. It is also said to be the case that the children will be entitled to indefinite leave to remain in 2026 at which point the Appellant would be able to join them in any event, such that granting them leave is simply bringing forward the inevitable. On those facts, it would not in my judgment be perverse or irrational for a decision-maker to find that the Appellants succeed in showing that the refusal of entry clearance breaches their Article 8 rights.

21. That is not to say that the result of this case is by any means a foregone conclusion in the Appellants’ favour. Plainly weight must be given to the fact that the separation of the Appellants and their children is the result of their decision to send their children to the UK when they were themselves refused leave to enter. But I am satisfied that it provides a complete answer to Ground 1 on this appeal.

Ground 2

22. I do not accept that the Judge left out of account the fact that it was the Appellant’s choice to send their children to the UK without them. It was referred to expressly by him in his operative reasoning in para.11 (“It was the family’s decision to send their children to the UK in 2021 after their successful applications...”). Ground 2 is therefore rejected.

Ground 3

23. There is more merit in the argument that the Judge has failed to apply the statutory public interest factors in section 117B. The factors said to be of relevance in this case are those in s.117B(1)-(3).

24. A Judge that applies the factors set out in section 117B without mentioning those provisions does not commit an error of law, *a fortiori* a material one. Given that the test that the Judge was applying (unjustifiably harsh circumstances) itself reflects the public interest in the maintenance of proper immigration control, as

Ms Harris submitted, the Judge did in my view give proper weight to the maintenance of effective immigration control as required by s.117B(1).

25. As to the question of the Appellants' ability to speak English and to be financially independent from the state contained in s.117B(2)-(3), these are only neutral factors when they are decided in an individual's favour so in many cases it may well be that a failure to consider these can be said to be immaterial. However as Mr Wayne submitted there was a dispute as to whether the Appellants were financially independent, which, if they were not, would tell against them and the Judge failed to resolve that. That does seem to me to be a material error of law. Ms Harris drew my attention to the fact that the First Appellant's brother earned some £8500 per month and would be housing and maintaining the Appellants here. Given however that they are also planning to accommodate the Appellants' children and the First Appellant's this fact alone does not in my judgment lead to the conclusion that it is inevitable that the question of financial independence would be answered in the Appellants' favour. It might well be, but that will be for the Tribunal that re-makes the decision..

Remittal or retain?

26. Having concluded that the FTT Decision involved the making of an error of law, I have a discretion whether this appeal should be redetermined in the Upper Tribunal or the First-tier Tribunal.
27. Having regard to Part 3 of the Tribunal's Practice Direction and paragraph 7 of the Practice Statement, as well as the guidance given in the reported decision of Begum (Remaking or remittal) Bangladesh [2023] UKUT 46 (IAC), I consider it appropriate to remit this appeal to the First-tier Tribunal, although by a narrow margin. While the scope of the fact-finding required in this case is narrower than in others, I am setting aside the FTT Decision without preserving any findings and the Tribunal will have to undertake a full fact-finding exercise as to the children's best interests and other relevant issues that arise in the assessment of Article 8. On balance, remittal therefore seems to me more appropriate.

Notice of Decision

The decision of the First-tier Tribunal involved the making of a material error of law and is set aside. The appeal is remitted to the First-tier Tribunal for redetermination by a Judge other than the First-tier Tribunal Judge Sweet.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 November 2023