



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-005615, UI-2023-
005616
First-tier Tribunal Nos:
HU/51562/2022, HU/51559/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 18th December 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

The Entry Clearance Officer

Appellant

and

(1) IB

(2) NB

(ANONYMITY DIRECTION IN FORCE)

Respondents

Representation:

For the Appellant: Mrs S. Simbi, Senior Home Office Presenting Officer
For the Respondent: Ms E. Daykin, Counsel, instructed by Stuart & Co. Solicitors

Heard at Birmingham Civil Justice Centre on 13 September 2024

DECISION AND REASONS

1. This is an appeal brought by the Entry Clearance Officer against a decision of First-tier Tribunal Judge Young-Harry ("the judge") dated 6 October 2022, in which she allowed two linked appeals against decisions dated 22 February 2022 to refuse the appellants' human rights claims, made in the form of applications for entry clearance.
2. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The Entry Clearance Officer appeals with the permission of First-tier Tribunal Judge Cox.
3. Although this is an appeal by the Entry Clearance Officer, I will refer to the parties as they were before the First-tier Tribunal.

4. This appeal concerns whether the judge erred in her approach to the appellants' father's conviction for a serious sexual offence and its impact on whether the appellants met the suitability requirements contained in para. S-EC.1.9.(a) of Appendix FM of the Immigration Rules.

Factual background

5. IB, a boy born in 2012, and his sister NB, born in 2002, are citizens of Turkey. On 3 February 2020, they and their mother, who is also Turkish, applied for entry clearance sponsored by their father, Mustafa Bolakar ("the sponsor"). The applications were refused on the basis that Mr Bolakar did not need the minimum income requirement. They appealed. The appeals were allowed by First-tier Tribunal Judge Knight by a decision promulgated on 10 August 2021. The Entry Clearance Officer implemented Judge Knight's decision by re-taking the decisions in relation to IB and NB, refusing the applications, and by granting their mother entry clearance.
6. The Entry Clearance Officer issued revised decisions in relation to IB and NB on 22 February 2022, which were the decisions under challenge before the judge.
7. The Entry Clearance Officer said that the best interests of the appellants had been taken into account as a primary consideration pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009. The decisions went on to refuse the appellants' applications on suitability grounds, under paragraph S-EC.1.9 of Appendix FM of the Immigration Rules. That paragraph provides:

"S-EC.1.9. The Secretary of State considers that the applicant's parent or parent's partner poses a risk to the applicant. That person may be considered to pose a risk to the applicant if, for example, they - -

 - (a) have a conviction as an adult, whether in the UK or overseas, for an offence against a child;
 - (b) are a registered sex offender and have failed to comply with any notification requirements; or
 - (c) are required to comply with a sexual risk order made under the Anti-Social Behaviour, Crime and Policing Act 2014 and have failed to do so."
8. The parallel refusal letters issued to IB and NB said that the Entry Clearance Officer had relied upon "information provided by West Midlands Police", without further elaboration.
9. Each refusal letter contained the following paragraphs:

"I note that you have applied with your mother to join your father in the UK and that your mother's application following your appeal has been issued. This is because S-EC. 1.9. of Appendix FM does not apply to adults."

"We are aware that this decision will potentially result in your mother travelling to the UK without you, however as stated above, we have a duty of care to you under S55 and are not satisfied that you would not be at risk should you come to the UK."
10. The appellants appealed and their appeals were linked. In the Respondent's Review before the First-tier Tribunal, the Entry Clearance Officer provided further reasons and evidence for relying on para. S-EC.1.9. The Review annexed a copy

of a Notification Order issued under the Sexual Offences Act 2003 issued by the Coventry Magistrates' Court for an indefinite period. Mr Bolakar had been convicted on 1 June 2011 before the Aksaray Heavy Penal Court (14th Criminal Chamber) in Turkey for the domestic equivalent offence of sexual activity with a child, an offence listed in Schedule 3 to the Act. The effect of the order was to subject Mr Bolakar to the notification requirements of the Sexual Offences Act 2003 indefinitely.

11. The Respondent's Review also said that para. S-EC.1.9(a) was a more appropriate ground for refusal in the appellants' cases.

Decision of the First-tier Tribunal

12. In her decision, the judge found that, since NB had attained the age of majority by the time the appeal before her was heard, para. S-EC.1.9. was incapable of being engaged. Since that was the only ground for refusal, she allowed NB's appeal.

13. In relation to IB, the judge accepted that para. S-EC.1.9. was engaged: see para. 14. That meant that the appeal could not be allowed on the basis that the Immigration Rules were met, necessitating a proportionality analysis outside the rules.

14. The judge found that IB's continued separation from his parents would not promote his well-being or development. He needed the care, guidance and support of his parents in the UK. She found that the notification order applicable to Mr Bolakar, in particular its monitoring requirements, were a protective factor. At para. 16 she held:

"There is no suggestion that the sponsor presents a risk to his children currently. Neither is it suggested that the sponsor has received any further convictions or committed any other offences of this nature. He has remained involved in the lives of the appellants since his conviction and there is no evidence that there have been any concerns in this regard."

15. The judge added, at para. 17:

"There is no suggestion that the sponsor presents a risk to his children currently. Neither is it suggested that the sponsor has received any further convictions or committed any other offences of this nature. He has remained involved in the lives of the appellants since his conviction and there is no evidence that there have been any concerns in this regard."

16. The judge found that IB had shown "compelling reasons" why the balance tipped in his favour. She found that the appellants' family life considerations outweighed the public interest in the case, and that the decisions amounted to a disproportionate interference with the appellants' Article 8 rights.

17. The judge allowed both appeals.

Issues on appeal to the Upper Tribunal

18. There are two grounds of appeal:

- a. Ground 1: the judge erred by failing to apply para. S-EC.1.9. correctly, by concluding that it did not apply in relation to an adult applicant, namely NB. It did apply to her, and the judge should have dismissed her appeal

on that basis. Also, having found that the paragraph was engaged in relation to IB, it was an error of law to allow his appeal; it is a mandatory ground for refusal, and should have overridden the judge's proportionality assessment.

- b. Ground 2: the judge's conclusion that the sponsor did not pose a risk to either appellant was irrational. The sponsor is subject to the notification requirements of the Sexual Offences Act 2003 indefinitely. There was no independent or other appropriate evidence before the judge which rationally permitted the conclusion reached by the judge that the sponsor did not pose a safety risk to the appellants.

19. Expanding on the grounds of appeal, Mrs Simbi submitted that, in relation to ground 1 concerning NB, it was inconsistent for the judge to allow the appeal under the rules applicable to children, on the one hand, while concluding that S-EC.1.9. was incapable of application in relation to her since she was an adult, on the other. NB should either have been treated as an adult for all purposes, or as a child for all purposes. The judge was wrong to adopt a hybrid approach.
20. In relation to ground 2, Mrs Simbi submitted that there was insufficient evidence before the judge to merit the conclusion that Mr Bolakar did not represent a risk to IB or NB. It was irrational to draw that conclusion solely from his evidence. He had not notified the authorities monitoring his compliance with the notification requirements or relied on any expert evidence of the sort that would ordinarily be expected when addressing the risk posed by a convicted child sex offender to another child. Moreover, it would not be disproportionate to maintain the status quo. The sponsor has made the choice to relocate to the United Kingdom; it was her actions in having done so that led to the prospect of her children, or just IB, living without parental support in Turkey.
21. On behalf of the appellants, Ms Daykin relied on her skeleton argument dated 12 September 2024. Addressing ground 1, Ms Daykin submitted, in summary, that the issue of suitability was not tied to the position at the date of the application. The judge was required to apply the suitability criteria as they applied at the date of the hearing, and did so in terms open to her, in relation to NB.
22. In relation to ground 2, Ms Daykin submitted that the Secretary of State's guidance concerning para. S-EC.1.9., *Family life (as a partner or parent) and exceptional circumstances*, version 18 ("the Guidance") implied that sub-paragraph (a) applies only to the commission of non-sexual offences against children. Sub-paragraphs (b) and (c) made provision for sex offenders and are restricted to a failure to comply with notification requirements under the Sexual Offences Act 2003, or the failure to comply with a sexual risk order.
23. Moreover, Ms Daykin submitted that the Entry Clearance Officer had not provided further evidence pertaining to the alleged risk posed by Mr Bolakar to his children. The guidance does not require applicants to submit a particular type of evidence to rebut the presumption under S-EC.1.9. It was not an error for the judge not to have regard to guidance or evidence which the Entry Clearance Officer's own operational guidance did not require. The guidance was based on the premise that an offender's risk profile and circumstances could change. The judge was accordingly entitled to find that there had been such a change in circumstances here.

Relevant legal principles

24. The appellants' applications for entry clearance amounted to human rights claims within the meaning of the term as defined in section 113(1) of the 2002 Act. The sole ground of appeal before the First-tier Tribunal was that the decision to refuse the appellants entry to the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998: see section 84(2).
25. For the decision to refuse to admit either appellant to be so unlawful, it would have to contravene the requirements of Article 8 of European Convention on Human Rights, the terms of which are well known.
26. As Baroness Hale explained in *R (oao Bibi) v Secretary of State for the Home Department* [2015] UKSC 68 at [25] to [29], and in *R (oao MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10 at [38] and [40] to [44], the European Court of Human Rights has distinguished between the negative and positive obligations imposed by Article 8 of the ECHR. Contracting parties to the ECHR are subject to negative obligations not to interfere with the private and family lives of settled migrants, other than as may be justified under the derogation contained in Article 8(2). By contrast, in cases concerning the admission of migrants with no such rights, the essential question is whether the host state is subject to a positive obligation to facilitate their entry. In positive obligation cases, the question is whether the host country has an obligation towards the migrant, rather than whether it can justify the interference under Article 8(2). But the principles concerning negative and positive obligations are similar. As the Strasbourg Court held in *Gül v Switzerland* (1996) 22 EHRR 93:

“In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation...” (paragraph 106)
27. The best interests of a child are a primary consideration when interpreting ECHR rights. The best interests of a child affect the balancing exercise in determining whether a decision involves an interference with a child's private life or family life interests which is proportionate to a legitimate aim identified in Article 8(2).

Ground 1: No error in the judge's finding that paragraph S-EC.1.9.(a) applies only to children

28. This ground of appeal is relevant only to NB's appeal since she had attained the age of majority by the time the decision was taken and the appeal before Judge Young-Harry was heard.
29. I consider that this ground is not made out because, in summary:
 - a. Properly understood, para. S-EC.1.9.(a) applies only to child applicants;
 - b. Where a child applicant has turned 18 by the date of a hearing before the First-tier Tribunal, para. S-EC.1.9. will no longer be capable of being engaged, since the mischief at which the provision is aimed (the risk posed by a known adult in the UK to a child applicant) will no longer be present in the same way;
 - c. The judge was entitled to find that, since para. S-EC.1.9.(a) was not engaged, the sole ground for refusal in NB's case had fallen away, and did not fall into error by allowing the appeal.

30. As mentioned above, the Respondent's Review refined the Entry Clearance Officer's reasoning in relation to para. S-EC.1.9., by relying expressly on subparagraph (a). The original decisions, somewhat confusingly, referred to subparagraphs (b) and (c), while adopting reasoning that fell squarely within subparagraph (a). Any ambiguity in that respect was clarified before the First-tier Tribunal, and it is now clear that the central issue under this ground is whether the judge was wrong to conclude that para. S-EC.1.9.(a) could not be engaged in relation to NB since she was no longer a child.
31. Mrs Simbi's submission that para. S-EC.1.9. is not restricted to children is superficially attractive. The paragraph does not, in terms, restrict its scope to child applicants. However, when the wording of the word is examined by reference to the broader context and the Secretary of State's use of the provision (including in the refusal letters under challenge in these proceedings), it is clear that para. S-EC.1.9.(a) applies only to child applicants.
32. In *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230 at para. 4, Lord Hoffman summarised the task of constructing a provision of the Immigration Rules in these terms:

"Like any other question of construction, this depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy."
33. In *Mahad* [2009] UKSC 16, Lord Brown said at para. 10:

"The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy."
34. Para. S-EC.1.9. stands apart from the other suitability requirements contained in paras S-EC.1.2. to 1.8. Those suitability requirements focus on the risk posed by an applicant, or suitability reasons arising from an applicant personally. By contrast, para. S-EC.1.9. looks to the broader circumstances of an applicant, and the context into which the applicant will be admitted, if entry clearance is granted. Para. S-EC.1.9. looks at a risk posed to an applicant if the applicant is granted entry clearance. It is a provision aimed at safeguarding an applicant.
35. The ordinary meaning of the wording of para. S-EC.1.9. invokes familial concerns of the sort likely to arise from a person in the household in which an applicant will reside if granted entry clearance. The reference to a parent of the applicant, or the partner of a parent, suggests that the focus of the risk is likely to be a person in a position of trust or authority within the household. In turn, that implies that the focus of the provision is a child or an otherwise vulnerable applicant.
36. Para. 1.9.(a)'s focus on children is confirmed by the terms of para. S-EC.1.9.(a) itself. It is engaged where the Secretary of State considered that the applicant's parent or parent's partner poses a risk to the applicant as a result of a conviction against a child. Offences committed by adults against children engage particular risk considerations, including the abuse of trust or power or another form of power imbalance, and, as children, the victims of such offences are particularly vulnerable. The general risk profile of offenders against children means that, in principle, the ordinary meaning of the rule, construed against the relevant

background and the Secretary of State's commitment to safeguarding children (primarily through the section 55 duty), should be read as focussing on the risk posed to a child applicant by a person who has previously committed an offence against a child.

37. This interpretation is consistent with the Guidance. At page 18 of the version in force at the date of the hearing before the judge, the guidance states:

“The purpose of paragraph S-EC.1.9. of Appendix FM is to enable Entry Clearance Officers to make decisions consistent with the need to safeguard children where entry clearance applications involving children raise child welfare or child protection issues.”
38. While the role of guidance in determining the meaning of a rule is limited (for example, see *R (Afzal) v Secretary of State for the Home Department* [2023] UKSC 46 at para. 80), my conclusion as to the meaning of the rules is fortified by the Secretary of State's guidance on the point.
39. This interpretation is also consistent with the approach of the Entry Clearance Officer in the decisions under challenge in these proceedings: see para. 9, above.
40. I therefore find that the judge was right to conclude that para. S-EC.1.9.(a) did not apply to adults. The focus of the provision is clearly on the risk posed by a child's parent, or their partner, to a child applicant, in light of the previous commission of offences by such an adult against a child, anywhere in the world. That is the approach the Secretary of State's guidance takes, and the explanation given by the decision letters in these proceedings for why the appellants' mother was granted entry clearance.
41. Since the mischief at which para. S-EC.1.9.(a) is aimed is to protect children, it follows that if a child has attained the age of 18 by the time the First-tier Tribunal decides for itself whether the decision of the Entry Clearance Officer was unlawful under section 6 of the Human Rights Act 1998, the provision will not be capable of being engaged. This conclusion is consistent with the risk-focussed nature of para. S-EC.1.9(a). Risk is, by its very nature, an inherently dynamic concept. The risk targeted by the provision will have subsided where an applicant is 18 or over at the date of assessment. The considerations which underpin the application of the subparagraph no longer apply in relation to an adult.
42. I do not consider that Mrs Simbi's submissions about NB benefiting from the rules relating to children, once she had turned 18, to detract from this conclusion. It is well established that a child applicant under Immigration Rules, such as those under consideration in these proceedings, who has turned 18 is entitled to have their application considered under the rules applicable at the date of the application. Since para. S-EC. 1. 9 (a) is based on a dynamic concept of risk, there would be an artificiality to applying the provision to an adult on the premise that she was still a child. The remaining provisions of the rules which are applicable in NB's case related to her position at the date of application. The judge's unchallenged findings in relation to the remaining provisions of the Immigration Rules were that the Entry Clearance Officer had not relied on any other reasons to refuse NB's application. Since the judge was right to conclude that para. S-EC.1.9.(a) could not be engaged in relation to an adult at the date of assessment, she was entitled to allow the NB's appeal for the reasons she gave.
43. For those reasons, the judge did not fall into error by allowing NB's appeal on this basis. This ground of appeal is dismissed, and the Entry Clearance Officer's appeal in NB's case is therefore dismissed.

Ground 2:

44. The appeal will succeed on this ground in relation to IB.
45. I conclude that the judge was right to accept that para. S-EC.1.9.(a) was engaged in relation to IB.
46. Contrary to Ms Daykin's submission, nothing in para. S-EC.1.9.(a) limits its scope to non-sexual offences. A sexual offence against a child is an offence against a child, within the meaning of sub-para. (a). It would be absurd if para. S-EC.1.9. was not engaged by substantive sexual offences against children but would be engaged in relation to breaches of ancillary and other orders relating to sexual offences, under sub-paras (b) and (c), as submitted by Ms Daykin. In any event, sub-paras (a) to (c) are non-exhaustive, indicative examples. There is no ambiguity in the rule such that it is necessary or permissible to look to the terms of the Secretary of State's guidance on the issue. The judge was therefore right to conclude that para. S-EC.1.9.(a) was engaged.
47. It may have been more accurate for the judge to have considered whether Mr Bolakar had rebutted any presumption applicable under para. S-EC.1.9.(a), since that is the approach the Secretary of State takes to deciding whether she "considers" that the relevant adult poses a risk to the applicant. In applying the provision as part of a full-merits appeal, the judge essentially (and rightly, in this context) stepped into the shoes of the Secretary of State, and decided for herself whether Mr Bolakar posed a risk to IB. She found that he did not. Although for the reasons set out below, I respectfully consider that the judge erred in her approach to the substantive question of risk, structurally the correct approach would have been to have determined whether the appellant had rebutted the S-EC.1.9.(a) presumption, rather than to conduct an "outside the rules" a risk assessment that should have been conducted under the auspices of para. S-EC.1.9.(a). Nothing turns on this, but it will be relevant to the approach I take to remaking the decision under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), pursuant to the directions I give below.
48. I respectfully conclude that there was insufficient evidence before the judge to merit the finding that admitting IB to live with a convicted child sex offender who was subject to the notification requirements of the Sexual Offences Act 2003 indefinitely ("the Notification Requirements") would not represent a risk to him. There was no evidence from a suitably qualified professional or the relevant local authority child protection team about any prospective risk posed by Mr Bolakar to IB. Taking the best interests of IB as a primary consideration, it is difficult to see how the United Kingdom could be said to owe a positive obligation under Article 8 ECHR to IB, and his family in the United Kingdom, to facilitate his admission in the absence of independent evidence demonstrating that his father, a convicted child sex offender, did not present a risk to him. While the judge was entitled to ascribe some weight to the repeated visits to Turkey that Mr Bolakar had made, that was not dispositive of the issue. There was no evidence before the judge as to whether the Turkish authorities had taken any protective steps in relation to Mr Bolakar during those visits, or any analysis from a suitably qualified professional with expertise in child protection and welfare matters. Of course, it may have been the case that, had the relevant local authority been provided with the opportunity to assess Mr Bolakar, the conclusions reached would have been favourable to him. The difficulty, however, is that there was no evidence of that sort before the judge.

49. There was, in fact, very little evidence before the judge pertaining to the circumstances of Mr Bolakar's offending. There was some evidence from Mr Bolakar himself (see para. 2 of his witness statement dated 22 April 2022), but he simply denied the offence and sought to blame the victim's family. It is difficult to see how Mr Bolakar's continued refusal to accept responsibility for committing an offence of this nature, coupled with his attempt to place the blame on others, could rationally have led to the conclusion that he no longer represents a risk of reoffending, in the absence of other evidence addressing his risk.
50. I also consider that the judge's approach to, and reliance upon, the protective framework provided by the Notification Requirements was flawed. The Notification Requirements enable the appropriate authorities to take steps after a change in a sex offender's living or other arrangements has occurred. They do not provide advance protection, or prior safeguarding or vetting ahead of a child residing with Mr Bolakar.
51. Finally, it was an abrogation of responsibility for the judge to conclude (at para. 17) that "any concerns can be addressed by the involvement of relevant and appropriate agencies, and if deemed necessary, safeguarding measures can be implemented". It was for the judge to be satisfied on the basis of appropriate evidence that no such risk existed before IB is admitted to the country. The potential availability of *ex-post facto* in-country oversight and supervision that would only be engaged after IB's arrival as a protective factor is not a factor that was rationally capable of tipping the balance in favour of admitting IB, in the circumstances of this case.
52. Ordinarily this appellate tribunal would be slow to find that an expert (and, in this case, experienced) judge of the First-tier Tribunal made an error of law in the course of conducting a multi-factorial evaluative assessment of the sort at play in these proceedings. However, drawing this analysis together, bearing in mind the primacy of the best interests of the child and the need to take a protective approach, I consider that the judge's analysis was flawed for the reasons set out above.
53. I therefore allow the appeal under ground 2 in relation to IB.

Setting aside the decision of the First-tier Tribunal

54. I set aside the decision of the First-tier Tribunal insofar as it relates to IB's appeal. I preserve the judge's findings and analysis in relation to NB's appeal.
55. I consider that it is appropriate to retain the proceedings in the Upper Tribunal. I have preserved part of the decision of the judge. I do not consider that it would be appropriate to remit IB's case to the First-tier Tribunal. The appeals should remain linked, with IB's case being reheard in this tribunal, under section 12(2)(b) (ii) of the 2007 Act.
56. I give directions below for the remaking of the appeal.

Anonymity

57. I do not consider that it is necessary to maintain the anonymity order in relation to the second appellant NB since she has now attained the age of majority. IB should remain anonymised, since he is a child. I am therefore minded to revoke the anonymity order that is in force in relation to NB, while maintaining the order in relation to IB. Since I have directed that this matter be reheard in the Upper Tribunal, any such revocation would take effect following the promulgation of that

decision. A party wishing to make submissions on this issue may do so at the resumed hearing.

58. It is not necessary to maintain the order to the extent it prohibits identification of the appellants' family. I vary the order that extent.

Notice of Decision

The Entry Clearance Officer's appeal in the case of NB is dismissed. The decision of the First-tier Tribunal in NB's case did not involve the making of an error of law such that it must be set aside.

The decision of First-tier Tribunal Judge Young-Harry in the matter of IB involved the making of an error of law and is set aside.

The decision in IB's appeal will be remade in the Upper Tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. I give the following directions in relation to IB's appeal:

1. The decision will be remade in the Upper Tribunal with a **time estimate of three hours** on a date to be notified.
2. If an interpreter will be required for the resumed hearing for the sponsor, **the appellant** (through his legal team) must inform the tribunal **as soon as possible, and in any event within 28 days of being sent this decision.**
3. If **the appellant** wishes to rely on any additional evidence, he must file and serve the evidence on which he wishes to rely, along with an application to rely on it under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to rely on it **within 28 days of being sent this decision.**
4. The **appellant** must file and serve a skeleton argument **within 28 days of being sent this decision.**
5. The **Entry Clearance Officer/Secretary of State** must file and serve a skeleton argument **within 42 days of being sent this decision.**

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 November 24