IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003246

First-tier Tribunal No: PA/62471/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 17th of October 2024

Before

UPPER TRIBUNAL JUDGE MEAH

Between

DD
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Acharya, Acharya Immigration Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

Heard at Field House on 10 October 2024

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Howard promulgated on 17 June 2024 ("the decision"). I shall refer to the parties as they were in the First-tier Tribunal for ease of understanding and to avoid confusion.

2. By the decision, the First-tier Tribunal allowed the appellant's human rights appeal under Article 8 ECHR, against the respondent's decision dated 16 November 2023, to refuse the appellant's asylum/protection and human rights claims. There was no cross appeal by the appellant against Judge Howard's decision to dismiss her appeal against the decision to refuse her asylum/protection claim.

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3. The appellant, an Albanian national, entered the UK with her son, ED who is also an Albanian national, (date of birth 11th November 2012), on the 17th June 2018. The appellant claimed asylum on 21 January 2019.

The Grounds

4. The respondent's grounds of appeal to the First-tier Tribunal were as follows:

> "Making a Material misdirection in law/Lack of adequate reasons
>
> Ground One
>
> It is respectfully submitted that FTTJ Howard errs in allowing the appeal on
> human rights grounds. It is asserted, that they have failed to show any reasoning for how the appellants case is sufficiently exceptional to warrant such a finding, they have failed to carry out an adequate balancing exercise, nor any considerations of the public interest under section 117 [79], and as such the simply utilise article 8 as a general dispensing power. The appellant advances her case on a private life basis (not a family life one which seems to have been erroneously considered with reference to the extended family) however no evidence has been provided to demonstrate any substantial private life which could not be replicated in Albania. It is respectfully asserted that no consideration has been given to what about the appellants private life in the UK, other than duration[67] which would cause return to result in unjustifiably harsh consequences.
>
> Ground Two
>
> It is additionally submitted that the FTTJ has treated the relationship between
> the appellant and her child and any associated best interests as a "trump card". In doing so, it is asserted that they have elevated the consideration of the child's "best interests" above that required, namely, "a" primary consideration, in making it "the" primary consideration above that of the Public Interest. In doing so any balancing exercise is flawed and therefore unreliable.
>
> Interplay of section 117B(6) and the best interests analysis
>
> The assessment of whether it is reasonable to remove a child must encompass all of the relevant public interest factors, including those set out in section 117B(1)-(5).
>
> The assessment of whether it is reasonable to expect a child to leave the UK in
> order to maintain his relationship with a parent, under section 117B(6)(b) is not a proxy for compliance with the duty to have regard to the best interests of a child under section 55 of the 2009 Act.
>
> As a general rule, the consideration of what is in a child's best interests is an
> exercise to be conducted separately within the proportionality analysis to the

assessment of what is in the public interest. That the 'best interests' analysis is free-standing is made plain by both section 55 of the 2009 Act and section 71 of the 2014 Act.

Secondly, if Parliament had intended a child's best interests to be the sole relevant consideration under section 117B(6)(b), it would have used express
words to that effect. It did not do so.
Accordingly, for the avoidance of doubt, it may be reasonable to remove a child, notwithstanding that it is not in the child's best interests to do so.

It is respectfully submitted that the FTTJ has erred in their approach to the children's best interest and his subsequent approach to the required balancing
act. The approach they have taken does not accord with long established article 8 jurisprudence on the importance of considering all relevant factors in the round, and the impossibility of defining such factors exhaustively, eg Huang v SSHD [2007].

In the case of AM (Malawi) 2015 UKUT 260 Mr Ockelton stated (at paragraph 13) that: "The mere presence of the children in the UK, and their academic success was not a 'trump card' which their parents can deploy to demand immigration status for the whole family";

Accordingly, it may be reasonable to remove a child, notwithstanding that it is not in the child's best interests to do so. The appellants stay in the UK has at all times been on a temporary basis and therefore her position has been precarious and arguably unlawful given the rejection of her account in the asylum claim. It is respectfully submitted that this has not been applied to the balancing exercise and as such the resulting conclusion is flawed.

The FTTJ finds the rules are not met and that there are no significant obstacles to integration under 276ADE [74], as such, it is unclear why, without more, it is said that return of the appellant and her son to their own country, despite any closeness between them and her extended family in the UK would be unreasonable. The appellants child has not reached the 7 year point which would provide him with the status of a "qualifying child", nothing has been advanced that would suggest he would be unable to re-integrate into Albanian society with his mother and extended family there, whilst maintaining any relationship with the family in the UK, and as such any conclusion that return is unreasonable is flawed to the extent that it is unreliable, and has resulted in material misdirection in law.

Permission to appeal on the above grounds is respectfully sought.
n oral hearing is requested."

5. Permission to appeal was granted by First-tier Tribunal Judge Dainty in the following terms:

"1. The application was made in time.

2. It is averred that the judge has failed to give reasons as how there are sufficiently exceptional circumstances/failed to carry put and adequate balancing exercise, has treated the s55 interests as

> a “trump card”/the primary consideration and the decision is out of line with Huang v SSHD [2007] and AM (Malawi) 2015 UKUT 260.
>
> 3. It is arguable in particular by reference to paragraph 89 and the reference to reasonableness that the judge applied the wrong test when carrying out the balancing exercise.

6. A detailed Rule 24 response was filed by the appellant’s representatives drafted by Mr Acharya.

7. That is the basis on which this appeal came before the Upper Tribunal.

Documents

8. I had before me a composite bundle containing all necessary documents. This also included the bundles relied upon by the parties in the First-tier Tribunal. A further skeleton argument was received from Mr Acharya.

Hearing and Submissions

9. Both representatives proceeded to make their submissions which I have taken into account and these are set out in the Record of Proceedings. Mr McVeety relied on the respondent’s original grounds upon which he expanded. Mr Acharya relied on the Rule 24 response and then expanded on this and that which he had stated in the skeleton argument. The oral and written submissions at the hearing are a matter of record and need not be set out in full here.

Discussion and Analysis

10. Turning to the grounds pleaded by the respondent, I am unpersuaded that there was any error of law in the First-tier Tribunal’s decision in the assessment of the appellant’s claim under Article 8 ECHR, for the following reasons.

Ground 1

11. The Judge self-directed at [37]-[38] as follows:

> “37. On a consideration of Article 8 of the ECHR outside the Rules, the question is whether the refusal breaches the appellant’s right to respect for private life under Article 8 ECHR. That right is qualified.
>
> 38. The appellant must establish on a balance of probabilities the factual circumstances on which she relies, and that Article 8 (1) is engaged. If it is, then I have to decide whether the interference with the appellant’s right is justified under Article 8 (2). If an appellant does not meet the Rules, the public interest is normally in refusing leave to enter or remain. The exception is where refusal results in ‘unjustifiably harsh’ consequences for the appellant or a family member such that refusal is not proportionate. I take into account the factors set out in section 117B Nationality Immigration and Asylum Act 2002 (NIAA 2002) and balance the public interest considerations against the factors relied upon by the appellant.”

12. The Judge then at [67] accepted that Article 8 ECHR was engaged and at [68] stated the best interests of the appellant's child was a primary consideration. The Judge then considered (the now defunct) Rule 276ADE(1) from [69]-[74] finding that there would not be any very significant obstacles to reintegration in Albania.

13. Then from [75]-[92] the Judge considers the appellant's claim under a separate heading 'Article 8 ECHR outside the Rules' to which there is a further subheading under [75] where he states 'balance sheet approach', and I find that this is exactly what the Judge has done in his assessment of the appellant's and her child's claims under Article 8 ECHR.

14. It is clear to me that having found that the appellant could not satisfy the Immigration Rules, in his assessment of Article 8 ECHR, the Judge went on to conduct a balance sheet approach, as commended by the Supreme Court in **Hesham Ali [2016] UKSC 60; [2017] Imm AR 484** and more recently in **Kaur v Secretary of State [2023] EWCA Civ 1353**. In so doing, the Judge was considering the factors weighing for and against the appellant and noted factors in the appellant's favour included that the appellant had been in the UK since June 2018, that her child was settled into school where he considered the child's school reports and certificates, and that the child had fully integrated into the educational system and lifestyle here, and he had a significant private life having spent formative years here during childhood. The Judge further considered the appellant's two siblings in the UK were British citizens, the close bond both she and her child had with them where one of the siblings was also providing the appellant and her child with accommodation, financial support, food, clothing and emotional support. The Judge found this sibling, who gave live evidence before him, to have given 'a truthful, consistent and plausible account in his oral evidence'. The Judge further noted that the appellant's child had a close bond with one of his first cousins (sibling's child). Factors against the appellant were also noted. These were that the appellant's child had not lived in the UK for a seven years, and that little weight was to therefore be afforded to the appellant's private life in considering section 117B, including considering her precarious immigration status. The Judge concluded ultimately at [92] that;

> "Striking a fair balance between the competing public and individual interests involved, I find that the factors raised by the appellant outweigh the public interest. I find that the refusal of the appellant's Human Rights claims does give rise to unjustifiably harsh consequences."

15. I find the Judge plainly took proper account of the public interest in this case which is demonstrated by the way he approached the evidence and the specific facts. The Judge was also entitled to take account of the sponsor's sibling's evidence which he found to be truthful, and to attach weight to the relationships established between the appellant and her child, the siblings families, and especially the sibling with whom she and her child reside (see **Beoku-Betts v SSHD [2008] UKHL 9**). The Judge concluded ultimately that the factors in the appellant's favour simply in terms of numbers, outweighed those falling in favour of the public interest. Otherwise, the decision is well structured and the Judge's self-directions are all lawful and correct in terms of the approach he adopted in dealing with the issues identified by the parties, and in applying the law correctly to the facts as they were presented to him.

16. In terms of the Judge finding ‘unjustifiably harsh consequences’ at [92] and [95], I accept that that what the Judge did in substance was to properly conduct a proportionality assessment and having weighed the factors for and against the appellant, against relevant public interest considerations, he ultimately found that refusal of the claim under Article 8 ECHR would constitute a disproportionate interference with the family life in existence between the appellant and her child and the siblings families’.

Ground 2

17. There is no indication that the Judge deemed the appellant’s child’s best interests to be a decisive element of the appellant's case, or that he viewed this be a trump card that singularly availed the appellant. The Judge was aware that the child was not a qualifying child for the purposes of section 117B having been in the UK for less than seven years. Contrary to what is averred, it is clear that the Judge assessed the best interests of the child as a factor falling within the wider proportionality assessment he conducted under the ‘outside the rules’ heading in his consideration of Article 8 ECHR, and there is no error in the Judge’s approach on this.

18. On the issue of the Judge’s comment at [89] where he states ‘I do not find that it would be reasonable to expect the appellant and ED to have to leave the United Kingdom’ I do not accept that the Judge applied the wrong test of reasonableness in reaching his decision on the Article 8 ECHR claim. Reading the decision holistically and in context, it is clear to see that the Judge undertook a full and careful assessment of all the evidence making findings in the appellant’s favour as well as against her in his consideration of Article 8 ECHR outside the Immigration Rules, thus demonstrating the correct approach. He had already set out at [37]-[39], [92] and [95] the correct test and threshold he was required to apply, and I find that this is what he did based on the entirety of the evidence placed before him. It is important to distinguish between what may appear or be perceived to be a generous decision which may well have been decided differently by another judge, and one which is legally flawed. I find that there were no material errors of law in the decision, despite the respondent attempting to argue that it was legally flawed. The Judge took into account a variety of factors which led him to conclude that the appellant’s Article 8 ECHR claim succeeded for what were sustainable reasons set out by the Judge in his decision.

Conclusions

19. The grounds are therefore not made out. The Judge’s decision is comprehensive, with consideration being given to all relevant issues. The Judge undertook a careful analysis of the evidence and applied the relevant legal provisions (including on the asylum/protection claim which he dismissed). He provided full and cogent reasons for the findings made and he reached a decision which was properly open to him on the basis of the evidence before him, albeit one that may have been made differently by another judge on the Article 8 ECHR claim. I remind myself that reasons have to be adequate and not perfect. The grounds do not identify any material error/s of law in the Judge’s decision. Therefore, in summary, I find the Judge did not err in his approach to Article 8 ECHR, he did not fail to have regard to any other relevant matters, he rationally attributed weight to particular factors, he provided adequate reasons,

and he ultimately reached a conclusion which was open to him. There are no errors of law and thus no basis for me to interfere with his decision.

20. In **Volpi & Anor v Volpi [2022] EWCA Civ 464**, Lewison LJ at [2] emphasised the importance of an appellate tribunal exercising judicial restraint when reviewing findings of fact reached by first instance judges:

> *"i). An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.*
>
> *ii). The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.*
>
> *iii). An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.*
>
> *iv). The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.*
>
> *v). An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.*
>
> *v). Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."*

21. Accordingly, the Upper Tribunal interferes only with caution in the findings of fact by a First-tier Tribunal which has heard and seen the parties give their evidence and made proper findings of fact. An appellate Court or Tribunal may not interfere with findings unless they are 'plainly wrong' or 'rationally insupportable' as per **Volpi & Anor v Volpi** . That high standard is not reached here. The respondent's appeal must therefore fail.

Notice of Decision

22. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside.

23. The respondent's appeal is dismissed and Judge Howard's decision to allow the appellant's appeal on Article 8 ECHR human rights grounds stands.

S Meah
Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 October 2024