IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006666
First-tier Tribunal No: HU/52474/2021
IA/07466/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 13 September 2024

Before

UPPER TRIBUNAL JUDGE OWENS

Between

Mr Ritvan Ramaj
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms Knight, Legal Representative, Fountain Solicitors
For the Respondent: Mr C Bates , Senior Presenting Officer

Heard at Cardiff Civil Justice Centre on 11 July 2024

DECISION AND REASONS

1. The appellant seeks to appeal against a decision of First-tier Tribunal Judge Khurram, sent on the 17 October 2022, dismissing his appeal against the decision dated 6 December 2022 by the respondent to refuse his human rights claim. Permission was granted by First-tier Tribunal Judge Hatton on 21 November 2022.

The Background

2. The applicant is an Albanian national who entered the United Kingdom illegally in 2018. Thereafter he entered into a relationship with a British national, Ms Hewins, a divorcee with three British citizen children. Ms Hewins has shared custody of the children with her ex-husband.

3. The Secretary of State refused the application because at the date of the application the appellant could not meet the requirements of Appendix FM. He did not meet the definition of partner under GEN 1.2 because he had not been

cohabiting with his partner for a period of two years. This was the version of the rules in force both at the date of the decision and the date of the appeal. As a result the Secretary of State did not go onto consider EX1. The view of the Secretary of State was that there were no unjustifiably harsh circumstances which would outweigh the public interest in maintaining immigration control. The best interests of the children were to remain in the UK with their mother and biological father. The appellant could maintain contact by modern means of communication.

The Decision

4. At [21] the judge noted that the parties agreed that the definition of partner was not met by the appellant at the date of the application, so the rules under Appendix FM and EX1 did not apply. The judge also noted that the appellant's representatives argued that these issues would still be relevant in the proportionality assessment outside the rules at the date of the hearing.

5. The judge found that by the date of the hearing the appellant and sponsor had been cohabiting for two years, that they were in a genuine and subsisting relationship, that the appellant did not have parental responsibility with the three British children although he has formed a bond with them and that he had been a source of emotional support during his partner's divorce, but he did not accept that the sponsor was struggling with her mental health.

6. The judge found that the appellant cannot meet the eligibility immigration status of the rules because he did not enter the UK legally and he does not meet the definition of partner under GEN 1.2. The judge found that EX1 did not apply. The judge found that there are no very significant obstacles to the appellant returning to Albania. Family life was engaged with respect of Article 8 ECHR. The children's best interests are to remain in the UK with their parents. The arguments pursuant to Chikwamba v SSHD [2008] UKHL 40 was not relevant. The judge found that an in-country application would not inevitably succeed because numerous elements of the rules had not been considered. The judge found that the public interest in maintaining immigration control and the fact that the appellant's relationship was formed with the sponsor when he was in the UK illegally outweighed the positive factors in the balancing exercise which included his relationship with his partner. The judge considered that this relationship could be continued through visits and that the sponsor could return to Albania to reapply for entry clearance. The sponsor could increase her earnings to meet the income threshold.

Grounds of Appeal

7. The original grounds of appeal as drafted state that the First-tier Tribunal "erred in its consideration of proportionality under Article 8 ECHR particularly with regard to the best interests of the children".

(1) Ground 1- It was not sufficient for the judge to say that because the daughter with mental health problems has support from both biological parents, it does not matter whether her stepfather is in the country or not.

(2) Ground 2- The judge took "too narrow" a view of parental relationships. The fact that the children have a relationship with their biological father does not preclude it being in their best interests to have

contact with another person such as their stepfather. The judge failed to take into account that the appellant has contributed to the family's stability and it would not be in their best interests for there to be further instability if the appellant left the family home.

(3) Ground 3- The judge did not take into account the likely length of separation between the applicant and sponsor were the appellant to return to Albania to apply for entry clearance. The sponsor cannot meet the financial requirements of the rules and would not be able to do so in the near future. She earns £10,000 and is in receipt of Universal Credit.

8. Permission to appeal was granted on the basis that the judge did not in accordance with EA (section 85(4) explained) Nigeria [2007] UKAIT 00013, consider whether in light of the evidence available to the judge at the date of the hearing the applicant would be granted leave if he made the same application. At the date of the hearing the partner definition was met, it was therefore an error of the judge to fail to consider whether the appellant satisfied EX1 of the immigration rules. At [21] the judge's starting point was that EX1 did not apply. The judge did not engage with the question of "insurmountable obstacles". The grant of permission was not limited.

9. I pause here to note that this ground of appeal was raised by the judge granting permission and did not feature in the original grounds of appeal. In accordance with AZ (error of law; jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC) permission to appeal should only be granted on a ground that was not advanced by an applicant for permission if the ground is "Robinson obvious" and has a strong prospect of success for the original applicant. I am not persuaded that the ground was either, nevertheless since permission has been granted, I will deal with this ground below.

Submissions

10. Ms Knight submitted that the grounds are wide enough to encompass the error found by the permission judge because the grounds refer to an overall error in the proportionality exercise and the judge's failure to consider whether there were insurmountable obstacles to family life taking place abroad should have formed part of this exercise. was argued before the judge at the hearing.

11. The judge's finding on best interests is inadequately reasoned and did not take into account the stability that the presence of the appellant had provided to the family. The judge took too narrow a view on the appellant's contribution to the family because he concentrated on the fact that the appellant did not have parental responsibility. The family had been through a tumultuous time and the eldest child was having issues. The judge failed to have regard to the evidence in respect of this.

12. It was irrational for the judge to find that an individual earning £10,000 could increase her earnings to £18,500. The witness was not cross examined on this point and was not asked about it. The proportionality assessment should be set aside.

13. Mr Bates argued that the grant of permission was misconceived. At the date of the hearing the applicant met the relationship requirements but the point was that he had not made the necessary application. There was no requirement for the judge to consider EX1. There was no error in the judge's approach to

Chikwamba. The applicant has new evidence. This is a change of circumstances which could form the basis of a new application. There would be no disruption to the family in an in-country application. He relied on Younis (s117B(6)(b); Chikwamba; Zimbrano) [2020] UKUT 00129 and Ortega (remittal; bias; parental relationship) UKUT [2018] 298. The judge correctly found that the appellant had not taken on the role of parent when the children had their own biological father in their life. The children lived with their father during the week where they attended school. The judge gave cogent and adequate reasons for finding that the appellant did not have parental responsibility or caring responsibilities for the children. The judge was entitled to find that the appellant had a limited role in the children's lives. The judge's decision was not irrational in this respect.

14. When carrying out the best interests assessment, the judge took into account the mental health difficulties of the oldest child. There was nothing perverse or irrational in the balancing exercise.

15. The fact that the family could not meet the income threshold strengthens the public interest. The sponsor did not need to be cross examined for the judge to make a finding that the appellant could not meet the income threshold. The grounds amount to a disagreement. The decision was lawful and sustainable. The judge was entitled to state that he could not state with certainty whether a fresh application would succeed.

16. In response Ms Knight submitted that the sponsor had not had an opportunity to address whether she could increase her earnings.

Discussion and Analysis

17. I deal firstly with the basis on which permission was granted. The grant of permission refers to EA (section 85(4) explained) Nigeria [2007] UKAIT 00013. First-tier Tribunal Judge Hatton found that it was arguable that it was incumbent on the judge to decide whether the appellant satisfied paragraph EX1 of the immigration rules, and his failure to do so at [21] where he found that EX1 did not apply was an error of law.

18. I am satisfied that the grant of permission on this basis is entirely misconceived. EA is an old decision and was made under a different statutory regime with different available grounds of appeal. At [7] it says:

> "It is therefore not open to an appellant to argue simply that, on the date of the hearing, he meets the immigration rules. He can succeed only if he shows that the decision that was made was one which was not in accordance with the immigration rules. Section 85(4) allows him to show that be reference to evidence of matters postdating the decision itself…. . The correct interpretation of s85(4)is perhaps best indicated by saying that the appellant cannot succeed by showing that he would be granted leave if he made an application on the date of the hearing".
>
> (My emphasis).

19. The grant of permission erroneously suggests that the application would succeed if it was now made on this date. This is an entirely different question. As Mr Bates submitted no application has been made and it is open to the appellant to make an application.

20. The issue in front of the judge as agreed by both parties in accordance with TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109, was whether the at the

date of the hearing the appellant met the requirements of the immigration rules. In the appeal the parties discussed the issues. At [21] the judge recorded that the parties agreed that definition of 'partner' was not met by the appellant at the date of the application so the rules under Appendix FM and EX1 did not apply.

21. I am satisfied that this was the correct and lawful approach. As conceded by the applicant's representative the appellant could not meet the immigration rules because on the date of the original application on 15 January 2021 he had not been living with his partner in a relationship akin to marriage for two years (they started living together in June 2020) and therefore did not meet the eligibility criteria in respect of relationships under GEN 1.2 of Appendix FM. In these circumstances it was not necessary for either the decision maker nor the judge to go on to consider EX1. The judge as agreed by the parties was confined to considering the appeal under paragraph 276ADE(1)(vi) and GEN 3.2 that is whether the refusal would result in unjustifiably harsh consequences. This involves carrying out the Article 8 ECHR balancing exercise weighing up the rights of the individual against the public interest in maintaining immigration control.

22. The judge was manifestly aware that the decision to refuse the appellant's human rights claim would involve separating the appellant from his partner because he acknowledged at [45] that when the appellant returned to Albania, the sponsor and her children would continue to live in the UK and that this was in the children's best interests.

23. The ground on which the judge granted permission is not made out. There is no error of law in the judge's approach.

24. I turn to the remaining grounds as originally pleaded. Grounds 1 and 2 take issue with the judge's findings on the best interests of the children. I state firstly that Grounds 1 and 2 are poorly pleaded. Both grounds read as a disagreement with the judge's findings on the best interests of the children.

25. It is trite law that a Tribunal should be slow to interfere with findings of fact. In this appeal the judge found that the appellant had been cohabiting with his partner since June 2020. (The appeal hearing took place on 3 September 2022). The sponsor's children lived with their father in the week in Gloucester. The children visited their mother at weekends and in holidays in Rotherham. The judge found that one daughter had developed mental health concerns which resulted in self-harm and that her biological parents and supported her tremendously. The grounds do not challenge the judge's finding that the appellant does not have parental responsibility for the sponsor's children.

26. At [35] the judge stated:

> "All the evidence points to active co-parenting by the sponsor and her ex-partner . There is very limited evidence of the appellant's role and responsibilities pertaining to the children. No doubt the children have formed a bond with the appellant during the time spent together on weekends and holidays. However, it is clear that the appellant is not involved in E's care plan or responsible in any significant other way for the welfare of the children. At most E is said to refer to the appellant's stepfather at times and he spends time with them in the way described at 5 to 7 of the sponsor's witness statement".

27. These findings are sustainable and grounded in the "sea" of evidence before the judge and it is not argued that they were irrational or not adequately reasoned.

28. The judge went on to consider the best interests of the children at [44] and [45]. The judge accepted that it was in the best interests of the children to remain in the UK with both of their parents. The judge was manifestly aware at [33] and [34] of the evidence in relation to the child and the difficulties she had faced and also that the appellant had contributed to the stability of the family [36]. A judge is not obliged to refer to all the evidence in the decision.

29. The judge was entitled to point to the lack of evidence that the appellant's absence would significantly impact on the child's mental health and also that the appellant was not involved in the child's care plan. There was no supporting evidence such as a report from an independent social worker. The judge found that the appellant's role or responsibilities towards the children had not been sufficiently evidenced. The judge did not, as asserted in the grounds say that it did not matter whether her stepfather was in the country or not. The judge did not, as asserted in the grounds, find that the children's relationship with their biological father precluded him having a parental relationship with the children. The judge assessed the strength of the relationship on the evidence before him and then assessed the children's best interests accordingly.

30. I am satisfied that the judge has carried out a lawful and balanced exercise in relation to the best interests of the children based on the evidence before him. His findings are rational, reasonable and grounded in the evidence.

31. I turn to ground 3. Firstly I note that the submission in respect of Chikwamba made by the appellant's representative at the appeal set out at [29] was rather confused. Her submission was that if the appellant made the same application from within the UK he would succeed. She further submitted that the appellant would not inevitably succeed in an application for entry clearance.

32. At [46] the judge stated:

> "I do not consider the Chikwamba submission raised by Ms Anzani to be materially relevant to this appeal. It was submitted that Chikwamba applied because it was inevitable that the appellant would succeed in an in-country application under EX1 having now cohabited for the requisite 2-year period required in the definition of partner.... Firstly I am not convinced that an in-country application would inevitably succeed, numerous elements of the rules have yet to be considered by the respondent or the tribunal as the appellant has not met the definition of 'partner'. Secondly, there is no comparable disruption to family life in an in- country application as that considered in Chikwamba".

33. I find the judge's approach to be lawful. Chikwamba manifestly does not apply to in-country applications because there is no interference in family life. If the appellant thought he could succeed on an in-country application, it was and is still is open to him to make the necessary application and he could have chosen to do this rather than pursuing his appeal.

34. To the extent, that it was unlawful for the judge to comment on the fact that the sponsor could increase her earnings at [49](iv) without this matter being put to the sponsor, this would have made no material difference to the outcome of the appeal following Alam and Anor v SSHD [2020] EWCA Civ 30. In this appeal the application for entry clearance was far from being certain to succeed because

the sponsor could not meet the financial requirements of the immigration rules. Chikwamba is only now relevant when an application for leave is refused on the narrow procedural ground that the applicant must leave and apply for entry clearance and that even then, a full analysis of the Article 8 claim is necessary.

35. I can see no error in the proportionality exercise. The judge was entitled to give significant weight to the fact that the appellant entered the UK illegally, formed his relationship with his British partner when his immigration status was unlawful and did not meet the immigration rules. The judge's ultimate finding in respect of Article 8 is rational, reasonable and lawful.

36. I am not satisfied that any of the grounds are made out. The decision of the First-tier Tribunal dismissing the appeal did not involve the making of an error of law.

37. The appellant provided a rule 15(2)(a) notice in respect of fresh evidence. This includes the fact that the sponsor and the appellant have had a baby who is a British citizen. I do not admit this evidence because I have dismissed the appeal and there is no re-making appeal. The evidence was not relevant to whether the judge had made a material error of law because it postdated the appeal. There have been numerous unfortunate delays in this appeal. It seems to me that if the appellant were to submit a new application it would be likely to succeed and I would hope that the application could be dealt with expeditiously by the Secretary of State.

Notice of decision

38. The appellant's appeal is dismissed.

39. The original decision of First-tier Tribunal Judge Khurram dismissing the human rights appeal stands.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 September 2024