IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005982
First-tier Tribunal No: HU/00282/2022

THE IMMIGRATION ACTS

Before

DEPUTY UPPER TRIBUNAL JUDGE STOUT

Between

[U F]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Roberts, Counsel, instructed by Cromwell Wilkes
For the respondent: Mr Clarke, Senior Home Office Presenting Officer

Anonymity Order (Rule 14): No-one shall publish or reveal any information likely to lead members of the public to identify the children referred to in this judgment. Failure to comply with this order could amount to a contempt of court.

Heard at Field House on 26 May 2023

DECISION AND REASONS

Decision and reasons

1. The appellant is a male citizen of Pakistan who is sponsored by his wife, Mrs Bibi, who is a British National. He appeals against the decision of the

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First-Tier Tribunal (the FtT), Judge John Hillis (the FtTJ) sent to the parties on 17 August 2022 following a hearing on 28 July 2022 dismissing his appeal against the respondent's decision of 24 January 2022 refusing him leave to enter and remain in the UK on the basis of family life with his partner under Appendix FM of the Immigration Rules and/or under Article 8 of the European Convention on Human Rights (ECHR) outside the Rules. Permission was granted on all grounds by First-tier Tribunal Judge Adio on 4 November 2022.

Anonymity

2. The parties were in agreement that there was no need for an anonymity order in respect of the appellant in this case, but that the identities of the children should not be made public. It was agreed that that was sufficiently achieved in this case by using initials and that there was no need to anonymise the appellant in order to safeguard the interests of the children. I also considered that this approach struck the appropriate balance in this case between the privacy rights of the children and the principles of public justice and freedom of expression. I made an order under Rule 14 accordingly.

Background

3. The non-contentious facts as they appear from the FtT decision and the parties' evidence and submissions are as follows:-

4. The appellant was born in Pakistan on 8 July 1997, but moved with his family to Kuwait as a young child and remains resident in Kuwait. The sponsor, Mrs Bibi, was born in Pakistan, but moved with her family to the UK when she was two and was granted British citizenship on 17 May 2011.

5. They met online in 2016 and married in 2017 in Kuwait, the sponsor having fled there in fear that her family might kill her because of her relationship with the appellant.

6. They have five children: twin boys born in April 2018, one of whom (UBU) is deaf and has special needs; a girl born in October 2019; and twin girls born in February 2021. All five children are British citizens. As a result of UBU's profound deafness and other needs (the evidence in the bundle shows his school has raised concerns about his educational progress and has applied for an assessment of his Education, Health and Care needs from the local authority), the sponsor is entitled to Disability Living Allowance (carers).

7. The sponsor has lived for periods with the appellant in Kuwait, initially on three-month visas, before the appellant obtained Kuwaiti residency cards for her and the twin boys. She has also returned to and lived in the UK for periods. In 2019 she was accommodated by the local authority as being homeless. She moved into temporary accommodation in Birmingham on 25 March 2021 and continues to live there with the children. Towards the end of her pregnancy with the twin girls in January 2021 she developed

pre-eclampsia and was admitted to hospital. As there was no one in the UK to look after the three older children while she was in hospital, the three older children were taken into local authority care for four months.

8. The appellant sought to obtain a visit visa to come to the UK, making an application on 15 February 2021. The sponsor's evidence in her witness statement was that what was 'behind' this application was that they wanted the appellant to come and look after the children. His application was refused on 24 February 2021. The reasons for refusal state (p 205) that the appellant applied for entry clearance for 15 days *"to visit wife and new born children"* but this was refused because the respondent was not satisfied with the appellant's financial evidence and was not satisfied that he genuinely intended only a short visit.

9. The appellant then applied for leave to enter under Appendix FM and/or on Article 8 grounds. That application was refused by letter dated 24 January 2022 for a number of reasons, including that the respondent did not accept the sponsor and the appellant were in a genuine relationship (only the marriage certificate having been submitted with the application and no other supporting evidence); the sponsor did not meet the financial eligibility requirement in paragraph E-ECP.3.1-3.4 as her income that is counted for the Rules is solely from benefits and was not equal to the amount of Income Support that a UK resident family of equivalent size would be entitled to (other income from family members did not count); and there were no exceptional circumstances under paragraph GEN 3.2 of Appendix FM that would render refusal a breach of Article 8 of the ECHR because it would result in unjustifiably harsh consequences for any member of the family. The respondent also refused the appellant's claim under Article 8 outside of the Rules.

First-tier Tribunal decision

10. The appellant appealed to the FtT under s 82(1) of the Nationality Immigration and Asylum Act 2002 (NIAA 2002) on the ground that refusal of entry clearance would breach the rights of him and his family under Article 8 and thus breach the respondent's obligations under s 6 of the Human Rights Act 1998 (HRA 1998). The FtTJ dismissed the appellant's appeal against the respondent's decision.

11. Before the FtTJ the respondent accepted that the sponsor and appellant were in a genuine relationship (further information having been provided since the original decision).

12. The FtTJ received statements and documentary evidence from the sponsor, and heard oral evidence from the sponsor. There was no statement (and no oral evidence) from the appellant. (It was an out-of-country appeal, but that does not explain the absence of written evidence from the appellant.)

13. The FtTJ considered the financial eligibility requirement, but concluded at [31]-[32] that on the appellant's own evidence the sponsor's income did not meet the requirements of the Immigration Rules. Mr Roberts for the appellant accepted this at the hearing. The FtTJ noted that £544.88 was the weekly income required by the Immigration Rules (the equivalent to the Income Support that a family of that size, including the appellant, would receive). The sponsor's evidence was that she received £389.29 in benefits, plus £63.11 per week in family support, giving a total of £452.40.

14. As to the appellant's Article 8 claim outside the Rules, the FtTJ directed himself at [33] by reference to the test in Appendix FM, GEN.3.1 and GEN.3.2 of whether there were exceptional circumstances which meant refusal would result in unjustifiably harsh consequences for the applicant or their family, and to the best interests of the child as a primary consideration (as required by GEN.3.3 s 55 of the Borders, Citizenship and Immigration Act 2009 (BCIA 2009)).

15. The FtTJ also cited at [34] from the Introduction to the Family Policy and thus directed himself to *Agyarko* [2017] UKSC 11 and also to the respondent's statement of policy intent that Entry Clearance Officers will when considering GEN.3.1.-3.3 *"reflect the findings in the Court of Appeal case of SSHD v AB (Jamaica) and anor* [2019] EWCA Civ 661".

16. At [40], the FtTJ quotes from the sponsor's witness statement that she had been planning to stay in Kuwait with the children until they were about four years old, but she got pregnant again with her daughter who was born in 2019 and so had to return to the UK because of the financial cost of healthcare in Kuwait (for her as a non-national).

17. At [41], the FtTJ refers to the sponsor's account of being accepted as homeless in the UK from 2019, but states: *"She gives no explanation in her WS as to why she became homeless when she clearly has financial support from the Appellant and his family in Kuwait."*

18. At [42], the FtTJ refers to the appellant's children being taken into care when she was pregnant with the twins in 2021, but states *"she gives no explanation as to why her children were temporarily taken into care when she was pregnant with their twins, Nida and Nadia, rather than being taken to stay in Kuwait with their father and his family as they had been from 2018 to 2020 when the appellant's application to come to the UK to care for them was refused"*.

19. At [43], the FtTJ quotes what the appellant states in her witness statement about the respondent not having taken into account their five children's best interests and how the refusal is *"definitely not helpful for them. They need their father , and the best place for us all to be together is in the United Kingdom, where [UBU] can get the specialist support that he needs"*.

20. At [44]-[47] the FtTJ analyses the appellant's Article 8 claim as follows:

44. There is no evidence before me that [UBU's] medical needs cannot be adequately treated and cared for in Kuwait. The Sponsor has travelled back and forth to Kuwait ever since she left her home to avoid being forced into a marriage she did not consent to. The Appellant has cared for at least two of their children between 2018 and 2020 when the Sponsor, on her own account, returned to the UK to have a further child due to the expense involved in having a child in Kuwait. She was clearly quite happy for her and her children to live in Kuwait as she intended to stay here until her two oldest children reached four-years-of-age. She was also content for her children to spend a significant length of time in Kuwait living with their father and her in-laws.

45. The test to be applied is whether refusal of the Appellant's application would result in "unjustifiably harsh consequences" for the Applicant, their partner or a relevant child. under paragraphs GEN .3.1 and GEN .3.2 of Appendix FM.

46. I conclude, on the evidence before me taken as a whole, that it would not be unduly harsh for the present family life that the Appellant, his Sponsor and the children enjoy to continue in the future without them suffering undue hardship. I accept that the Sponsor and her children are all British citizens who are entitled to receive medical treatment and a State education in the UK and conclude they can maintain the current family life together through the frequent visits they enjoy with the Appellant in Kuwait and by using modern methods of communication. Further to this, there is no evidence before me that the Sponsor and her children could not relocate to Kuwait to live together if they chose to do so.

47. I find the Appellant has failed to show, on the balance of probabilities, the refusal of his application will result in undue hardship. His current family life with his Sponsor and children can be maintained despite the refusal of his claim. The Respondent's interference with his family life is proportionate and in the maintenance of the UK Government's proper immigration controls and the economic well-being of the country.

Permission to appeal

21. The appellant appealed against the FtTJ's decision on his Article 8 claim (only) under s 84(1)(c) of the NIAA 2002. FtTJ Adio granted permission to appeal on all grounds by order of 4 November 2022, observing as follows:-

> **It is not disputed that the Applicant has five young British children all under the age of 5 (comprising two sets of twins amongst them). One child is disabled suffering from auditory neuropathy spectrum disorder (profound deafness). It is arguable that the children and their mother are entitled to enjoy the rights that such status confers upon them as British citizens and that the judge has conflated the issue as to whether family life could be transferred to Kuwait, and not properly analysed whether there are unjustifiably harsh consequences in view of the background of the Applicant's and Sponsor's marriage and their family life as it is at present. The grounds give rise to an arguable error of law. It is also arguable that the judge failed to make findings on certain aspects of the evidence as stated in the grounds for permission to appeal. All grounds are arguable.**

22. The Respondent by a Rule 24 response dated 15 November 2022 seeks to uphold the FtT's decision.

The parties submissions

23. Mr Roberts for the appellant relied on his appeal skeleton argument. This includes a preamble at [11]-[17] that asserts that the decision of the FtTJ was 'manifestly unsound', misapplied factual evidence and legal principle and failed to take proper account of the best interests of the children. The specific grounds of appeal are then identified as: 1) "possibility of family life in Kuwait", in which it is argued that the FtTJ erred in concluding that the family life could be transferred to Kuwait and gave insufficient weight to the British citizenship of the sponsor and children; 2) "the availability of future foster care", in which it is argued that the FtTJ wrongly adopted the respondent's submission that the family could if need be make use of foster care in the UK if needed in the future in the absence of the appellant and/or that the FtTJ was perverse in observing at [42] that foster care had been unnecessary because the children could have gone to their father in Kuwait when the appellant was taken into hospital with pre-eclampsia; and 3) "failure to include favourable evidence in the public interest balance", in which it is argued that the FtTJ wrongly failed to take into account the family contributions to the sponsor's finances, which would take her over the financial threshold and thus mean that a grant of entry clearance to the appellant would not be economically detrimental to the nation.

24. Mr Roberts made supplementary oral submissions, which I summarise as follows:- Mr Roberts submitted that FtTJ Adio had got it right in the grant of permission. He confirmed that it was still accepted that the financial threshold was not met, but submitted that there had been a failure to take into account the best interests of the children, and a failure to recognise

what the case was factually about. Mr Roberts said that what the FtTJ had recorded as having been his submission about the case at [23] of the judgment (i.e. that *"the exceptional circumstances in this appeal are that the Sponsor … and the Appellant have faced down many challenges in the past having left their countries of origin"*) was not a submission that he had made. He submitted that the determination on exceptional circumstances was perverse. He submitted that it was impossible for the sponsor's family to relocate. He submitted that the judge should not even have been considering whether the family could relocate to Kuwait. He invited me to re-make the decision today.

25. Mr Clarke for the respondent relied on the Rule 24 notice and submitted that there were no material errors of law in the judgment. The judge appropriately directed himself to the law, appropriately considered the circumstances of the family. The conclusions are not irrational. He pointed out that the grounds of appeal were based on Article 8 and not on the Immigration Rules, but that under Article 8 appropriate weight needs to be given to the respondent's policy and the appellant's case did not satisfy the requirements of the Immigration Rules. There is no 'near miss' principle.

26. In answer to my question as to where the FtTJ had dealt with the best interests of the children, Mr Clarke submitted that the grounds of appeal do not raise the best interests of the children and I would be enlarging on the grounds if I found there to be an error on that basis. However, when pressed, he accepted that compliance with s 55 BCIA 2009 was a necessary step in relation to the assessment of undue harshness that is challenged by the appellant under Ground 1. He submitted that it was implicit that the FtTJ had properly directed himself and was mindful of the law. He submitted that paragraph [43] shows that the judge was alive to best interests. He submitted that the evidence in the bundle that suggests that medical care would not be available to the children in Kuwait (the letter of 1 February 2022 from The Midlands Hearing Implant Programme - Children' Services and 20 April 2021 letter from Sandwell and West Birmingham NHS Trust) is just opinion evidence from individuals and not sufficient to show that the children would not get the necessary care available. The burden is on the appellant to produce such evidence and there was none.

27. He submitted that the FtTJ's main finding was that the status quo would continue at [46] and there was nothing unlawful about that. In *Huang* the Supreme Court at [20] held that in an Article 8 case the ultimate question is whether the life of the family cannot reasonably be expected to continue elsewhere. If the answer is affirmative then the question is whether there is undue harshness. *Huang* recognises that there is a consideration that is looked at in terms of the family split. They are relevant considerations. There is no authority to say that on an entry clearance case you do not consider whether family life can be enjoyed elsewhere. Personal choice does not trump the right of the UK to control its borders – see *Agyarko* at [48] and [63]. Nor is British Citizenship a trump card.

28. As to Ground (2), Mr Clarke submitted that the foster care point was just the respondent's submission that was not adopted by the judge. In any event, he submitted that it is baffling why the father did not apply immediately to come to the UK when the children were taken into care. There was a two-week delay before the visit visa application was made and the refusal letter suggests that no reference was made in the application to the children being taken into foster care. In the circumstances, the FtTJ's finding at [42] was a sustainable finding. There *was* no (reasonable) explanation as to why the children were taken into care rather than the appellant taking responsibility for them.

29. As to Ground (3), Mr Clarke submitted that the financial evidence is not such that granting the entry clearance application will be financially positive for the country. The appellant does not meet the Immigration Rules and that is a significant public interest point. He does not have a job lined up. There is no witness statement from the appellant so we do not know what he will do if he comes to the UK.

30. Mr Roberts in reply submitted that this was an overwhelming case, the financial requirements of the Immigration Rules were only narrowly missed, social services have had to intervene with this family because of the absence of the appellant and those are costs that would be saved if entry clearance was granted. The visit visa decision does not tell you the reasons why the application was made. The medical letters reflected the genuine beliefs of the authors. It should be assumed that the appellant would get a job if he came here. The appellant and sponsor have made poor decisions. The status quo is unsupportable. The sponsor is too poor to meet the financial rules. The status quo is the children sometimes needing foster case. The judge should have found that the status quo is dangerous to the welfare of these children.

31. As to disposal, the parties submitted that I could if I found an error of law either remit or remake the decision on the current evidence.

Analysis

32. The grounds of appeal are not a model of legal precision, but the essence of Ground 1 is that the FtTJ erred in law in concluding that the family could be expected to continue family life in Kuwait. Both under the Rules and under Article 8 that required the FtTJ to consider the legal tests that are now captured in GEN.3.1, 3.2 and 3.3 of Appendix FM, specifically whether there were exceptional circumstances which meant refusal would result in unjustifiably harsh consequences for the appellant or their family, taking into account (as required also by s 55 of the BCIA 2009) the best interests of any relevant child as the primary consideration.

33. The Supreme Court has given further guidance as to the approach to be taken to cases involving children. In *Zoumbas v. Secretary of State for the Home Department* [2013] UKSC 74. Lord Hodge, at [10] held:

(1) The best interests of a child are an integral part of the proportionality
assessment under article 8 ECHR;
(2) In making that assessment, the best interests of a child must be a primary
consideration, although not always the only primary consideration; and the
child's best interests do not of themselves have the status of the paramount
consideration;
(3) Although the best interests of a child can be outweighed by the cumulative
effect of other considerations, no other consideration can be treated as
inherently more significant;
(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
(5) It is important to have a clear idea of a child's circumstances and of what is
in a child's best interests before one asks oneself whether those interests are
outweighed by the force of other considerations;
(6) To that end there is no substitute for a careful examination of all relevant
factors when the interests of a child are involved in an article 8 assessment; and
(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

34. Where the children concerned are British Citizens, the fact and benefits of that citizenship must be taken into account in assessing their best interests. *ZH (Tanzania)* [2011] UKSC 4 remains the leading authority in which Baroness Hale (giving the judgment of the majority) held at [30]-[33]:

30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (article 7) and to preserve her identity, including her nationality: article 8. In *Wan* 107 FCR 133, para 30 the Federal Court of Australia pointed out that, when considering the possibility of the children accompanying their father to China, the tribunal had not considered any of the following matters, which the court clearly regarded as important:

> **“(a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, ‘and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle’ (*Vaitaiki v Minister for Immigration and Ethnic Affairs* [1998] FCA 5; 150 ALR 608 , 614); (b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland; (c) the loss of educational opportunities available to the children in Australia; and (d) their resultant isolation from the normal contacts of children with their mother and their mother's family.”**

31. Substituting “father” for “mother”, all of these considerations apply to the children in this case. They are British children; they are British, not just through the “accident” of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily reintegrate in their own community (as might have been the case, for example, in Poku 22 EHRR CD 94 : para 20, above). But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well.

32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. As Jacqueline Bhaba (in “The ‘Mere Fortuity of Birth’? Children, Mothers, Borders and the Meaning of Citizenship”, in Migrations and Mobilities: Citizenship, Borders and Gender (2009), edited by Seyla Benhabib and Judith Resnik), has put it, at p 193:

> **“In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.”**

> **33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8 , the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as *Edore v Secretary of State for the Home Department* [2003] 1 WLR 2979 , where Simon Brown LJ held that "there really is only room for one view": para 26. In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer.**

35. In this case, the FtTJ did not refer either to *Zoumbas* or *ZH (Tanzania).* He did direct himself to the basic elements of the legal test now contained in GEN.3.1, 3.2 and 3.3 at [33], and in that same paragraph he made clear that he had taken particular account of the reports relating to UBU. However, when he re-stated the test he was applying at [45] he omitted the reference to the best interests of the children and nowhere in the decision does he make any finding as to what the best interests of each of the five children involved were. Nor, it follows, is it apparent on the face of the decision that he has taken those best interests (whatever they are) into account as the primary consideration.

36. Mr Clarke objects that this question of whether the FtTJ erred in law by failing to deal expressly with the best interests of the children is an issue not raised by Mr Roberts or the grounds of appeal. However, in my judgment it is raised in the grounds of appeal – expressly in the preamble, and implicitly in Ground 1 since the essence of the appellant's argument under Ground 1 is that the FtTJ erred in law in his Article 8 assessment in concluding that family life could reasonably be expected to be enjoyed by the family in Kuwait because he failed to accord appropriate weight to the interests of the children and the sponsor as British Citizens and/or reached a perverse conclusion. So far as the children are concerned, the points raised by the appellant under Ground 1 are all points that are properly captured by considering whether the FtTJ erred in law in failing specifically to address the best interests of each of the children as a primary consideration as *Zoumbas* and *ZH (Tanzania)* make clear. In any event, I am satisfied that this point is a *Robinson* obvious point (*R v Secretary of State for the Home Department, ex p Robinson* [1997] 3 WLR 1162) that the interests of justice require me to consider. Parliament prescribed in s 55 of the BCIA 2009 that the bests interests of any relevant child must be

the primary consideration in such decisions. That is because of the inherent importance of the rights of children. If it is arguable – as it is here – that this did not happen in a case, the interests of justice require me to consider the merits of that argument regardless of whether it is raised in the grounds of appeal.

37. Mr Clarke urges me to conclude that the missing steps in the FtTJ's reasoning in this case as to the best interests of the children are not material and/or do not indicate an error of law. I accept that I should be slow to infer from the omission of reference to the best interests of the children at [45] that the FtTJ failed properly to direct himself as to the applicable legal principles – particularly given that he did at [33] refer to the best interests principle and mentioned having taken into account the reports relating to UBU. Likewise, the fact that the FtTJ did not refer to the case law does not mean there has been any legal error. However, in this case I consider that the failure specifically to identify the best interests of the children and expressly to put those best interests at the forefront of the decision as the primary consideration constituted an error of law. As the Supreme Court put it in *Zoumbas, "it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued … It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations … there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment"*.

38. That process did not happen in this case. So far as UBU is concerned, the FtTJ states at [33] that he has taken account of the reports, and at [44] that there is 'no evidence' that UBU's medical needs cannot be met in Kuwait, but it is impossible to know what he concluded were UBU's best interests. The FtTJ apparently rejected the opinion of the Midlands Hearing Implant Programme – Children's Service (based on their understanding of working with other families from Kuwait) that the intensive on-going rehabilitation and access to medical care that UBU requires was unlikely to be available to him in Kuwait, but the FtTJ gives no reason for that conclusion, and by holding that there was 'no evidence' that UBU's medical needs could not be met in Kuwait, the impression is that the FtTJ had in fact failed to take account of the content of the letter of 1 February 2022. It is also unclear what the FtTJ made of the professional opinion of the Children's Service that in order for the sponsor to provide UBU in the UK with the support that he requires (both attending therapy appointments and undertaking therapy with him at home), the appellant's presence is required in the UK. Even if the FtTJ was right to conclude that the appellant had failed to prove that UBU's medical needs could not in principle be met in Kuwait, it is hard to see how any judge could properly have concluded on the evidence that UBU's <u>best</u> interests would be served by anything other than staying in the UK with both his mother and the appellant and continuing to receive the medical care that he is currently receiving as well as the other benefits of British Citizenship including

education. UBU's best interests, as thus specifically identified, needed to be taken into account by the FtTJ as a primary consideration, and then weighed against the other factors that the FtTJ considered. On the face of the decision, that did not happen and I am satisfied that in this case that was a substantive material error of law and not merely a case of there being a missing step in the written reasons.

39. Although there was much less evidence about the other four children, the decision is in my judgment also vitiated by the failure to carry out that same process of identifying their best interests and then weighing those best interests against the countervailing factors. Section 55 BCIA 2009 requires the best interests of each relevant child to be taken into account and I am not satisfied that the FtTJ did so in this case.

40. It follows from the foregoing that the first ground of appeal succeeds in part.

41. For completeness, I record that I do not accept the appellant's further submission under Ground 1 that the FtTJ should not even have considered whether family life could be enjoyed in Kuwait. That submission is unsupported by authority and, in my judgment, plainly incorrect. The fact that this is an application for entry clearance rather than an appeal against a removal decision makes no difference to the legal test in an Article 8 case, which requires consideration of whether refusal will result in unjustifiably harsh consequences for the appellant or their family, and that is a question that must be answered by reference to both a 'stay' and a 'go' scenario: see *HA (Iraq)* [2022] UKSC 22 at [17] *per* Lord Hamblen. (Although that case concerned a deportation and the provisions of Part 5A of the NIAA 2002, the general principles for considering Article 8 cases are the same in both contexts.) In cases such as this, it is always necessary to consider both what will happen if the family remains in the UK without the appellant, and what will happen if the family relocates to the appellant's country of origin. It is only if both options will result in unjustifiably harsh consequences for one or more members of the family that the refusal of entry clearance will breach Article 8.

42. Nor do I accept the appellant's submission that this is a case which admits of only one possible answer such that it was perverse for the FtTJ to conclude that the consequences for the family of either maintaining the status quo of living in the UK and visiting the appellant in Kuwait or moving to Kuwait would not be unjustifiably harsh. However, those scenarios did need to be considered on a proper legal and factual basis and when that is done, the outcome may well be different.

43. In that respect, I should also deal with the appellant's complaint about the FtTJ's findings at [44] that: "*She was clearly quite happy for her and her children to live in Kuwait as she intended to stay there until her two oldest children reached four-years-of-age. She was also content for her children to spend a significant length of time in Kuwait living with their father and her in-laws.*" While using the term *"quite happy"* purportedly describing the sponsor's feelings about the situation was insensitive, there is no error

of law in the FtTJ recording by way of summary of the sponsor's evidence that she had chosen to live in Kuwait for much of the time while the children were young rather than (for example) remaining in the UK and making a much earlier application for the appellant to join her. What is more troubling about this paragraph is that it reads as if the FtTJ has failed to understand the significance of the children reaching four years of age, which is obviously that it is compulsory school age in the UK, and the implications of that both for the children themselves and also for the sponsor in terms of the reasons why she might have been prepared to live in Kuwait up to that point but not afterwards. These are all relevant factors that will need to be taken into account when the case is remade.

44. As to Ground 2, the appellant's complaint that the FtTJ has wrongly taken into account or adopted the submission made by the respondent as to the possibility of the family making further use of foster care in future if they remain in the UK does not constitute an error of law because there is nothing on the face of the decision to suggest that the FtTJ did accept or adopt that submission by the respondent. However, it is right to note that it will be necessary on remaking or remittal for the tribunal to address, as part of considering whether the consequences of the 'stay' or 'go' scenarios would be unduly harsh, whether there is any likelihood of foster care being required for the children again if they remain in the UK and whether that in itself constitutes an 'unduly harsh' consequence.

45. As to the appellant's complaint under Ground 2 that the FtTJ's conclusion at [42] that foster care had been unnecessary because the children could have gone to their father in Kuwait when the appellant was taken into hospital with pre-eclampsia, I agree that this factual conclusion is perverse. The FtTJ states that the Claimant has given: *"no explanation as to why her children were temporarily taken into care when she was pregnant with their twins,… rather than being taken to stay in Kuwait with their father and his family … when the Appellant's application to come to the UK to care for them was refused"*. There are two problems with this: first, it ignores the explanation in the sponsor's witness statement that she had pre-eclampsia and had been taken into hospital, which provides an obvious and complete explanation for why the children were taken into care. She could not possibly care for three children under five while in hospital herself. Secondly, the suggestion that the children could have been taken to stay in Kuwait with their father at that point is baffling. The sponsor was in hospital and obviously in no fit state to travel with her children to Kuwait, and the appellant needed to make an application for a visit visa so could never have come straight away (even if a visa would have been granted for the purposes of allowing him to collect the children – a point on which there is no evidence) and, in the event, of course, the appellant's application was refused so he could not come to get the children. If the FtTJ was thinking that the local authority could have arranged for three children under the age of five to be transported to Kuwait accompanied by a foster carer, then that needed to be spelt out and the basis for the conclusion that this was possible identified. Mr Clarke at this hearing sought to argue in defence of [42] that it was unclear why

the appellant had apparently delayed two weeks in applying for a visa at this point, and had apparently not mentioned the fact of the children being taken into care in the application, but those points go to the appellant's motivations. They may well be relevant points to consider on remaking (and will need to be addressed by the appellant in a witness statement if he serves one), but they do not save that paragraph of the judgment from perversity.

46. As to Ground 3, although the appellant is right in principle that the economic impact of granting the appellant's application (in terms of whether the appellant was likely to present an additional burden on the public purse or to reduce the overall burden that the family would have on the public purse) was a relevant consideration, I am not persuaded that it was a material error of law for the FtTJ not expressly to address it in this particular case. The tribunal is only required to deal with the case that is put before it. Here, the financial evidence was that the sponsor did not meet the Appendix FM threshold and the respondent's policy in that regard was a weighty consideration to be borne in mind. The evidence of additional family contributions took her just over that threshold but indicates nothing about the likely burden that the appellant would place on the state, which would depend on what he does if he comes here, his prospects of employment and whether he would become an additional benefit claimant. There was not even a witness statement from the appellant dealing with these issues. Given the limited evidence, it was not in my judgment a material error for the FtTJ not to give express consideration to the economic impact of granting the appellant's application. I cannot see how doing so could possibly have made any difference to the conclusion on the facts of this case.

Disposal

47. For all these reasons, I find that the FtT erred in law and the decision on the appellant's Article 8 claim must be set aside.

48. Paragraphs 7.2 to 7.3 of the Senior President's Practice Statement 2012 provide:

> 7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make
> the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier
> Tribunal; or
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.
>
> 7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.

49. In this case, the fact-finding necessary to remake the appeal is likely to be significant as the evidence of the family's situation will need to be updated, specific consideration will need to be given to the circumstances of each child and the appellant is likely in the light of the observations in this judgment to wish to submit a witness statement. The appeal will therefore be remitted to the First-tier Tribunal for fresh consideration by a different judge.

Notice of Decision

The decision of the First-tier Tribunal on the appellant's Article 8 claim contains material errors of law and I set it aside.

The appeal is remitted to the First-tier Tribunal (not before FtTJ John Hillis).

Signed H Stout Date: 13 June 2023

Deputy Upper Tribunal Judge Stout