Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2023-001989**
First-tier Tribunal No: HU/51275/2022
IA/02004/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 10 July 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

ISHAQ BENBADI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Solomon of counsel
For the Respondent: Mr Wain, a Home Office presenting officer

Heard at Field House on 7 July 2023

DECISION AND REASONS

Introduction

1. The appellant appeals against the decision of First-tier Tribunal (FTT) Judge Ian Howard (the judge) to dismiss his appeal against the respondent's decision to refuse entry clearance. The application was

made on the basis that he was the spouse of a British citizen, namely Mrs Gulnaz Begum Khan (the sponsor).

2. FTT Judge Hollings-Tennant decided that the application for permission to appeal enjoys a real prospects of success as arguably the judge had failed to consider relevant factors in assessing proportionality. Those factors may way in favour of the appellant.

Background

3. The appellant and the sponsor married in Morocco on 25 February 2014. He applied for entry clearance on 27th of October 2021 but the application was refused on 9 February 2022 on the grounds that the appellant did not meet the requirements of E – ECP 4.1 – i.e. he did not meet the English language requirement of the Immigration Rules.

4. On 14 April 2023 the appellant appealed the respondent's decision stating that unjustifiably harsh consequences may follow from the refusal to allow him entry clearance and that the respondent would as a consequence be in breach of article 8 of the European Convention on Human Rights (ECHR) by reference to GEN 3.1 (1) of the Immigration Rules.

5. The judge heard the appeal on 20 January 2023 and his decision was promulgated on 17 March 2023. In summary, the judge was not satisfied that the appellant met the requirements of Appendix FM of the Immigration Rules since he could not meet the English language requirement in E-ECP.4.1 and the evidence did not demonstrate that he was entitled to benefit from the relevant medical exemption. The judge also considered the case outside the rules, found article 8 to be engaged and for the interference with article 8 rights of sufficient gravity to engage that article. The judge found that the appellant and the sponsor were in a genuine and subsisting marriage. However, he went on to have regard to the insertions into the Nationality, Immigration and Asylum Act 2002 (2002 Act) now found in Part 5A thereof, and in particular to section 117B which provides that the maintenance of effective immigration control is in the public interest. The judge considered that the public interest in effective immigration control is such that the interference with the appellant's human rights was proportionate to the legitimate public end, namely the enforcement of effective immigration control. In a single paragraph at the conclusion of numbered paragraph 27 the judge stated:

> "Given that the public interest is, for the time being and on the evidence before (sic), in favour of his non-admittance by virtue of the fact he has failed to establish that he cannot meet the

requirements of the Immigration Rules, the decision of the respondent is proportionate."

The judge went on to conclude that the appeal should be dismissed on human rights grounds (that being the only appeal before him by virtue of section 82 (1) the 2002 Act).

6. In granting permission Judge Hollings-Tennant thought the judge's decision in relation to medical evidence (that the evidence produced was insufficient to discharge the burden of proving that the appellant did speak English or there was an exemption to that requirement on medical grounds) was open to him on the evidence. But, Judge Hollings-Tennant thought, the judge had failed to carry out a proper balancing exercise taking into account those factors in section 117B of the 2002 Act.

The hearing

7. At the hearing Mr Wain accepted there was a material error in relation to the article 8 assessment outside the Immigration Rules. In the respondent's view, the decision under the Immigration Rules could be maintained. However, he took the "pragmatic view" that all matters needed to be reconsidered by another judge, there being clear errors in the judge's approach. He would not therefore oppose a remittal of the case to the FTT for a *de novo* hearing.

8. Mr Solomon concurred with Mr Wain's view.

9. The decision was reserved.

Discussion

10. Although permission was only expressly granted on one ground (lack of reasoning in relation to article 8 outside the rules) we think it right to consider all the grounds below.

11. The grounds state that:

    (i) The judge failed to engage with E-ECP. 4.2 which provides an exception to the requirement of a minimum level of competence at English in the case of a person with a disability and, having regard to the requirements of the exception discussed in the case of **Alvi, R (on the application of) v Secretary of State for the Home Department [2012] UKSC 33**, the appellant fell within this exception;

(ii) Adequate evidence was presented as to the appellant's medical condition, namely the report by Dr Essaidi Chafik, who was a specialist in neuro psychiatry;

(iii) The passage quoted at paragraph 5 above, when compared with the following passage from the decision, is described as "unclear and contradictory". In particular, the passage above which is taken from paragraph 27 (5) of the decision appears to contradict the previous sub- paragraph of the same paragraph where it states:

> "The difficulty in this case is that the evidence the appellant relies upon does not demonstrate that, notwithstanding the terms of the rules applicable to him, for reasons not catered for by the rules he cannot succeed in an application for entry clearance."

12. Reference may also be made to Appendix FM. No evidence of any particular quality is specified under Appendix FM and in particular under Appendix FM, paragraph EX 1 (b), which allows an exception where there are "insurmountable obstacles" to family life continuing outside the UK".

13. The decision contains a number of typing errors, such as the reference to the appellant's name in paragraph 1 and the reference to his representative in paragraph 5. These are not significant and do not infect the decision but they may be symptomatic of a lack of attention to detail.

14. We would be sceptical as to the possibility that the appellant was medically unfit to undertake an English language exam but it is relevant that he tried to take such an exam (in 2018). We note that the evidence in this regard was hearsay since the appellant did not give oral evidence. We would also observe that the judge did consider the disability exception within paragraph E – ECP.4.2 (b) of Appendix FM but found it not to be satisfied on the medical evidence presented before him. He describes the medical evidence as "scant" and it may be there was insufficient evidence to justify a finding that the appellant fell within the disability exemption. However, since we have found other errors in the judge's decision it appears unnecessary to consider this aspect of the appellant's case any further.

15. The more significant omission relates to the assessment under article 8. The judge makes reference to the case of **Sunassee** and points out correctly that a failure to satisfy the requirements of the Rules tends to suggest that the public interest requires refusal of leave to (in this case) enter. Compelling circumstances would be needed to support a claim outside the Rules.

16. The judge went on to ask himself five questions. He answered questions (1), (2) and (3) in the affirmative. Having referred to section 117B of the 2002 Act, the judge went on to answer questions (4) and 5) in the negative. It is not clear entirely what his answer to question (4) means and the answer to question (5) has already been the subject of some discussion above. It seems that ultimately the judge decided that the respondent's decision was proportionate without making clear findings as to the extent of the appellant's family life in the UK or the extent to which it would be interfered with by the respondent's decision. It would be necessary to make appropriate findings as to those factors before turning to consider whether the respondent had discharged the burden on her under article 8 (2) of the ECHR.

17. Whilst the fact that the appellant may well not have satisfied the requirements of Appendix FM or the other rules quoted is a matter to which great weight could be attached, it is not necessarily decisive. Proper consideration needs to be given to the weight to be attached to each factor. All the evidence needs to be considered before reaching a conclusion on the issue of proportionality. The judge found in favour of the appellant in relation to the fact that the marriage was genuine and subsisting. As the Supreme Court said (in the case of **Agyarco v Secretary of State [2017] UKSC 11**) once a finding is made that parties have formed a family life together and that family life could not reasonably be expected to be conducted elsewhere, albeit one of those parties is living abroad, refusal of an application for leave to enter amounts to a *prima facie* breach of article 8. It is necessary to go on to make an assessment as to whether the interference was justified under article 8 (2) of the ECHR. If taking all matters into consideration the decision was justified in the public interest of enforcing effective immigration control, for example, that decision would be lawful.

18. We are not persuaded that the judge went through this process and accordingly he fell into error.

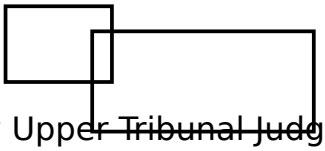
Conclusion

19. We have concluded that the decision is insufficiently reasoned and clear for us to be satisfied that a proper proportionality assessment was conducted. In the absence of this, and having regard to the concession made by Mr Wain, the decision cannot be allowed to stand.

Notice of Decision

The appeal is allowed. We find a material error of law in the decision of the FTT. That decision is set aside in its entirety and the matter is remitted to be heard de novo by a judge other than FTT Judge Ian Howard.

No anonymity direction is made.

Signed  Dated 7 July 2023

Deputy Upper Tribunal Judge Hanbury