Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12977/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 November 2020	**On 24 February 2021**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

ENTRY CLEARANCE OFFICER

Appellant

and

ML
(Anonymity Direction Made)

Respondent

Representation:
For the Appellant: Mr Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr Chirico, Counsel

DECISION AND REASONS

1. The appellant has appealed against a decision of First-tier Tribunal Judge Abebrese sent on 24 March 2020, allowing ML's appeal on Article 8 ECHR grounds against a decision dated 16 July 2019, refusing to grant him leave to enter the UK as a child under paragraph 297 of the immigration rules. Upper Tribunal Judge Mandalia granted permission on 16 June 2020.

2. The hearing was held remotely. Both parties requested an oral hearing and did not object to the hearing being held remotely. Both parties participated by Skype for

Business. I am satisfied that a face-to-face hearing could not be held because it was not practicable and that all of the issues could be determined in a remote hearing. Both parties confirmed at the end of the hearing that it had been fair.

Background

3. ML is a citizen of Russia born on 28 May 2002. His father SG ('the sponsor') moved to the UK in 2007 under the self-employed lawyer concession. He was granted Indefinite Leave to Remain in the UK on 30 October 2014 and was granted British nationality on 7 November 2018. ML remained in Russia living with his mother OL but has retained a close relationship with his father. The appellant's brother IL was granted settlement under paragraph 298 of the immigration rules on 30 September 2016 and has also been granted British Citizenship. ML applied for entry clearance to join the sponsor in the UK pursuant to paragraph 297 of the immigration rules on the basis that he had a very close relationship with his father, had a very difficult relationship with his mother in Russia and that he would suffer emotional harm if he did not join his father and younger brother in the UK.

4. The application was refused on 16 July 2019 on the basis that ML did not meet the requirements of the 297 of the immigration rules because the sponsor in the UK did not have sole responsibility for ML and there were no 'serious family or compelling circumstances' that would make exclusion undesirable. The view of the ECO was also that ML did not have family life with the sponsor or alternatively if he did, the decision is proportionate.

5. In his grounds of appeal to the First Tier Tribunal, ML asserted that it would be a disproportionate breach of his Article 8 ECHR right to family life to deny him entry to the UK.

The decision of the First-tier Tribunal

6. At the hearing, the judge heard evidence from the sponsor and the sponsor's partner. The judge also had before him an expert report from an Independent Social Worker, Peter Horrocks as well as written evidence from ML and ML's mother.

7. At [13] the judge found that the high threshold of serious and compelling circumstances was not met. However, the judge went on to find that there were exceptional circumstances which would make the refusal of entry clearance disproportionate to the interference in ML's right to family life with his father. These included that it was in the best interests for ML to be granted entry clearance to the come to the UK [15]; ML is at a difficult age and needs the love and attention of his father [16] and ML has a difficult relationship with his mother [17]. The Independent Social Worker found that ML's emotional needs were for him to come to the UK and that ML would suffer harm to his emotional development if he were not granted entry clearance and would struggle to develop close and trusting attachments in future relationships.

8. In conclusion the judge found that although ML could not satisfy the requirements of paragraph 297 of the immigration rules, the decision to deny him entry was disproportionate because it would result in unjustifiably harsh consequences for ML, his father and older sibling.

Appeal to the Upper Tribunal ('UT')

9. At the hearing Mr Melvin for the appellant relied on the original grounds and the renewed grounds of challenge. He also sought to raise a new ground of challenge which he submitted was 'obvious'.

(1) *Misdirection in law*

Having found that there were no serious and compelling circumstances such that ML could meet paragraph 297(i)(f) of the immigration rules, the judge went on to use Article 8 ECHR as a 'general dispensing power' to circumvent the immigration rules. The judge failed to properly identify any exceptional circumstances over and above the requirements in the immigration rules such to make the refusal of entry disproportionate and gave no or inadequate reasons as to why the refusal of entry clearance would result in unjustifiably harsh consequences. Alternatively, the finding is irrational.

(2) *Failure to have regard to relevant caselaw*

The grounds of appeal to the Upper Tribunal do not particularise the caselaw which it is asserted that the judge failed to have regard to apart from an assertion that the judge "failed to adhere to the caselaw cited".

(3) *Inadequate reasons for finding a violation of Article 8 ECHR*

The judge failed to give adequate reasons as to why despite the fact that the appellant is cared for by his mother in Russia and received regular visits from his father, his Article 8 right to family life would be violated by the refusal of entry. There are no obstacles to family life continuing in its present form.

(4) *Irrationality/Inadequate reasons for factual findings (New ground – raised at hearing)*

It was irrational for the judge to find that ML would suffer emotional damage as a result of being denied entry to the UK in the absence of medical evidence. The judge's assessment of ML's best interests was brief and inadequate. There was no proper analysis. This appears to be a challenge to the judge's factual findings in respect of ML's best interests.

Permission to appeal

10. Permission was granted by Upper Tribunal Judge Mandalia in a decision dated 1 July 2020 which is worded as follows;

> "it is at least arguable that having found the requirements for indefinite leave to enter are not met by the appellant and that there are no serious and compelling family or other considerations which make exclusion of [ML] undesirable, the judge erroneously utilised Article 8 as a general dispensing power without identifying any compelling circumstances over and above the requirements set out in the rules, that make refusal disproportionate in all the circumstances".

11. The grant of permission does not refer to the other grounds of appeal. I will infer from this omission that all grounds are arguable.

Discussion

New Ground - Ground 4 - Challenge to factual findings

12. At the outset of the hearing before me, Mr Melvin sought permission to raise new grounds of appeal which he referred to as 'obvious'. He argued that the judge's findings on the effect on ML being denied entry clearance were irrational in the absence of medical evidence. He also sought to argue that the assessment of the best interests of the child was inadequate.

13. I note and take into account that in the original written grounds of appeal submitted on 2 April 2020 there was no reference to these asserted errors in the judge's approach, nor was there any reference to these asserted errors in the renewed application for permission on 30 June 2020. On 16 June 2020, the Secretary of State was provided with a further 14 days in which to provide written submissions. On 28 July 2020 the Secretary of State requested the Tribunal to extend the deadline for the filing of the further submissions to an unspecified date. On 31 July 2020 UTJ O'Connor refused to extend time. On 9 October 2020 further directions were sent out directing the Secretary of State to file a skeleton argument and any rule 15(2A) notice relied on within 21 days. The Secretary of State did not comply with the directions. The Secretary of State's written submissions were filed at 13.55 on 3 November 2020 on the day before the hearing. It was in these written submissions that the Secretary of State asserted for the first time that the judge's factual findings in respect of the emotional damage to ML were irrational and/or that the best interests assessment was inadequate.

14. When deciding whether to allow the Secretary of State to argue these grounds, I have had regard to the guidance of Lord Justice Jackson at [32] of Latayan v SSHD [2020] EWCA 191 where he states;

> "I would however comment on the additional submissions made by Mr Ó Ceallaigh as recorded at paragraph 28. Any counsel appearing for the first time on an appeal will seek to refresh the arguments so as to present them in the most persuasive way, and I do not criticise counsel for his efforts on behalf of this Appellant. Nor should a party be

> penalised for drafting grounds of appeal concisely. However, these arguments were not pleaded at all on this appeal and in my view they cannot be raised now. An appeal court can entertain a new argument of law where that is in the interests of justice (though it will be slow to do so) - Miscovic v Secretary of State for Work and Pensions [2011] EWCA Civ 16 per Elias LJ at [69], Sedley LJ at [109-112] and Moore-Bick LJ at [134] - but these arguments relate entirely to an assessment of the facts and they cannot fairly be raised on the hoof. They are not Robinson-obvious points that the tribunals or court could be expected to appreciate for themselves in a case where the Appellant was represented by counsel. As my lord, Lord Justice Singh, said in Talpada v The Secretary of State for the Home Department [2018] EWCA Civ 841 at [69]:
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> > "Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation."

15. In considering whether it is in the interests of justice to permit this amendment, I bear in mind the overriding objective, as set out in the procedural rules. As is apparent from [13] above, the Secretary of State has taken well over six months to raise a point without any proper explanation for the delay. If, as is averred, the point is obvious, it begs the question of why it was not raised until the day before the hearing. I do not find that it is in the interests of justice to permit the Secretary of State to raise these new grounds of appeal. When making this decision, I give weight to the fact that these are entirely new grounds which are not simply an enlargement of the previous grounds. Permission was not granted in respect of these grounds. I also give weight to the fact that the new grounds of appeal were raised very late in the day. The Secretary of State had ample opportunity to raise these grounds in the original grounds and in further submissions. The new grounds in essence amount to a challenge to the judge's factual findings and the judge's assessment of the evidence, rather than being concerned the with the interpretation of the law. They are not 'obvious' in the Robinson sense because they do not, for the reasons set out below, have strong prospects of success.

16. Even had I entertained the new grounds, I would have decided that they were not made out in any event. Mr Melvin accepts that the Secretary of State did not challenge the opinion or conclusions of Mr Horrocks the Independent Social Worker before the original judge. It was not submitted by the Presenting Officer at the appeal that the Independent Social Worker expert evidence was deficient or that the expert evidence could not be relied on, nor that it was necessary for there to be additional medical evidence. Mr Horrock's report appeared at page 158 to 177 of the original appellant's bundle. His expertise is set out in the introduction. I accept Mr Chirico's submission that Mr Horrocks is well known to the Tribunal and that he spoke to both ML and his father when preparing his report. Counsel for ML also drew the judge's attention to the fact that ML's mother confirmed in her statement that she had read the report and agreed with its contents. In the report Mr Horrocks went through the 'welfare checklist' considering the wishes and best interests of ML, his physical, emotional and educational needs, the effect on him of any change of circumstances,

his age, sex background and any other characteristics, any harm he had suffered and how capable each of his parents were of meeting his needs. Having taken all of these factors into account at 5.4 the Independent Social Worker stated that he strongly recommended that it would be in the best interest of ML for him to be granted leave to join his father and brother in the UK. The conclusions and opinions of the Independent Social Worker which the judge accepted in full were set out in detail at paragraphs 29 to 33 of ML's skeleton argument which was before the judge.

17. In was manifestly open to the judge to accept the unchallenged expert evidence before him in these circumstances. It was clearly rational for the judge to accept the expert Independent Social Worker's opinions and conclusions which he does at [18], [19] and [20].

18. The judge's factual findings from [16] onwards were based on the entirety of the evidence before him which the judge explicitly states at [13]. There was a large bundle of evidence before the judge including numerous detailed witness statements as well as the ISW report. The judge also heard oral evidence.

19. I have had regard to the various authorities in relation to the adequacy of reasons and interference with factual findings. I refer to the words of Dingemans LJ in Terghazi v SSHD [2019] EWCA Civ 2017 at [45];

> "A further principle which it is relevant to note is that, even if an appellate court is entitled to hear an appeal because of an error of fact (because the appeal court has jurisdiction to hear appeals on facts) appellate courts should be very cautious in overturning findings of fact made by a first instance judge. This is because first instance judges have seen witnesses and take into account the whole "sea" of the evidence, rather than indulged in impermissible "island hopping" to parts only of the evidence, and because duplication of effort on appeal is undesirable and increases costs and delay. Judges hearing appeals on facts should only interfere if a finding of fact was made which had no basis in the evidence, or where there was a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence so that the decision could not reasonably be explained or justified".

20. I am not satisfied that there was a demonstrable misunderstanding by the judge of the evidence nor that there was a failure to consider relevant evidence. The findings cannot be said to be either inadequately reasoned, nor can they be said to be "perverse" or "irrational" which is a a demanding concept with a high threshold.

21. I am satisfied that the judge was properly able to make the findings that ML had a difficult and fraught relationship with his mother, was close to his father and brother, that he suffered emotional development following the break-up of his parents relationship and these early emotional difficulties appear to have continued into his adolescence and impacted on his relationship with his mother, that he will "suffer harm to his emotional development" if he is not allowed to join his father and brother in the UK and that he will "struggle to develop close and trusting emotional attachments in his future relationships in those circumstances".

22. I am not satisfied that the judge's assessment of the best interests of ML was inadequate. The judge was entitled to give weight to the opinion of the expert who had taken into account a large range of factors prior to concluding that it was in ML's best interests to be granted entry clearance to join his father in the UK. I find that the new grounds of appeal raised by Mr Melvin were an attempt to re-argue the appeal.

Ground 1 – Misapplication of the law – general dispensing power

23. Mr Melvin's submission is that the judge has misapplied the law and used Article 8 ECHR as a 'general dispensing power'. The ground is poorly particularised and does not identify any specific error of law in line with R(Iran) [2015] EWCA Civ 982.

24. Firstly, I am in agreement with Mr Chirico that the Secretary of State has mischaracterised the judge's findings in respect of paragraph 297. The judge did not find that there were 'no' compelling or compassionate circumstances. The judge found that the 'high threshold of serious and compelling circumstances under the rules was not met' and gave brief reasons for this at [13] and [14].

25. I am not persuaded by Mr Melvin's argument that having found that ML could not meet the immigration rules, that it was irrational for the judge to find that a denial of ML's entry to the UK would be a disproportionate breach of Article 8 ECHR. It was incumbent on the judge to go onto decide, notwithstanding that ML did not meet paragraph 297 of the immigration rules, whether the denial of entry would amount to a disproportionate breach of Article 8 ECHR. In the skeleton argument the judge was referred to the tests set out in MM(Lebanon)[2010] UKSC 10 and Agyarko [2017] UKSC 11 and the need to strike a fair balance between the strength of the public interest and the impact on the individual's family or private life.

26. Having found at [13] that ML did not meet the immigration rules, the judge went onto carry out the Article 8 ECHR proportionality exercise at [15] where he states;

27. "I then went to consider whether there are any exceptional circumstances outside the Rules".

28. The judge then refers to s55 of the UK Borders Act 2009 and T(Jamaica) [2011] UKUT 483 (IAC). The judge refers to the child's best interests being a primary consideration. The judge accepts at [16] the evidence of ML in relation to his close relationship with his father and finds at [18] that the appellant has grown closer to his sponsor and his sibling. It is clear from these findings that the judge accepts that Article 8 (1) is engaged in respect of family life between ML and his father.

29. The judge finds at [15] that there are exceptional reasons in this appeal and sets them out from [16] to [20].

30. At [21] the judge states;

> "I am of the view that taking all of the evidence in the round that the decision of the respondent is not proportionate and that it would result in unjustifiably harsh consequences for the appellant and third parties such as the sponsor and his older sibling".

31. From this, I am satisfied that the judge was manifestly aware of the need to carry out a proportionality balancing exercise in respect of Article 8 ECHR and that the judge has referred to unjustifiably harsh consequences which is the wording found in GEN 3.2 of the immigration rules.

32. I am satisfied that the judge applied his mind to the correct legal test in respect of Article 8 ECHR. It is not incumbent on a judge to set out the test word by word, but to demonstrate in the decision that he has understood the test. I agree with Mr Chiraco the that the Secretary of State has failed to identify how the judge failed to adhere to the test. Although the judge's wording may not be perfect, it is inconceivable that an experienced judge would direct himself to the correct test and then fail to adhere to the self-direction. I remind myself of the principles set out by Lady Hale at [30] in AH (Sudan) v SSHD [2007] UKHL 49. A considerable degree of deference must be given to a specialist Tribunal which will be assumed to have directed itself appropriately even if the decision is not perfectly expressed or a judge has not expressly set out every step. Further the judge had a detailed skeleton argument before him which set out the relevant law in detail.

33. Mr Melvin's alternative submission is that it was irrational for the judge to conclude that there were exceptional circumstances in the case of ML or alternatively it was irrational to conclude that the exceptional circumstances would render the denial of entry unjustifiably harsh.

34. In deciding that there were exceptional circumstances the judge clearly had in mind the totality of the evidence before him and as explained above was properly entitled to rely on the expert report and detailed witness statements and oral evidence. This included evidence that ML had had a serious road traffic accident which had affected his mental and emotional health, the difficulties in his relationship with his mother and his close relationship with his father and brother in the UK as well as the difficulties of his father travelling to Russia in future because of his involvement with representing high profile Russian dissidents.

35. The judge was properly entitled to find that it was in the best interests of ML to live with his father and brother in the UK. The judge identified as exceptional circumstances the harm that would be suffered by ML in terms of his emotional development and future relationships if he were not granted entry clearance to the UK. He gave adequate and sustainable reasons for these findings based on the evidence. The judge's finding that there would be unjustifiably harsh consequences for ML because of these exceptional circumstances is adequately reasoned. The finding is perhaps generous but was firmly rooted in the evidence and does not reach the high threshold of perversity as alleged by the Secretary of State.

36. In this respect I take into account the words of Reed LJ in Henderson v Foxworth Investments Ltd [2014] UKSC 41 at [62];

> "It does not matter, with whatever degree of certainty, that the appellate 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."

37. I also remind myself of the comments of Carnworth LJ in Mukarkar approved by the Supreme Court in MM (Lebanon) 2017 SC10 that;

> "The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new… However on the facts of a particular case the decision of a specialist tribunal should be respected".

38. It may have been that another judge would have taken a less generous view in respect of the proportionality of the denial of entry, but the alleged generosity of this decision does not render the decision unlawful.

39. The grounds do not assert that the judge misdirected himself in law for instance by failing to make reference to section 117B of the Nationality, Immigration and Asylum Act 2002 when undertaking the proportionality balancing exercise. Although the judge appears to have failed to assess these statutory factors including ML's ability to speak English and his financial independence in accordance with the statutory scheme, the judge is only obliged to consider the relevant factors. The fact that ML speaks fluent English and can be supported by his father are neutral factors and s117(5) does not apply because ML's family life with his father was not formed at a time when his immigration status was precarious. I am satisfied that even if there were an error in this approach, the omission of considering these factors would not have made a material difference to the outcome of the appeal in these circumstances.

Ground 2 - Failure to have regard to relevant caselaw

40. This ground was not particularised in the original application for permission. In the renewal application it is said that the judge has "failed to adhere to the caselaw cited". This ground is not expanded on in the respondent's written submissions which were produced the day before the hearing and Mr Melvin did not expand on this ground of appeal in his oral submissions. The ground is lacking in specificity. Elsewhere in this decision, I have explained why the judge did not misapply the caselaw in respect of Article 8 ECHR. This ground is not made out.

Ground 3 - Inadequate reasons as to why ML's Article 8 ECHR rights would be violated

41. The Secretary of State asserts that Article 8 ECHR would not be violated because ML is cared for by his mother in Russia and can continue to receive regular visits from the sponsor.

42. The judge was manifestly aware that ML had grown up in Russia in the care of his mother after his parents separated when he was 8 years old. This is explicitly referred to at [13].

43. The judge turned to the relationship between ML and the sponsor at [16] and [18]. The judge had before him consistent evidence including witness statements, passport entries, course details and the Independent Social Worker report that the sponsor has visited ML in Russia on a regular basis, that ML has visited his father in the UK and undertaken courses in the UK and that there was regular contact between ML and his father by skype and email. The judge was manifestly entitled to find at [16] that regular visits have taken place and at [18] that ML has a close relationship with his father.

44. The judge accepted that ML had a fraught and difficult relationship with his mother at [16]. At [18] the judge accepted that his emotional needs were to live with his father and at [20] and that he would suffer emotional harm if that did not occur. The judge also had before him evidence that the sponsor was living with ML's older brother in the UK and that his visits to Russia were likely to become less frequent because of his work in the UK undertaking high profile human rights cases in relation to Russian nationals critical of the regime in Russia. The Secretary of State does not challenge these findings.

45. ML was at the date of the hearing a minor child of the sponsor. The judge was referred in the skeleton argument to the authorities for the proposition that family life is presumed to be engaged between a parent and a minor child.

46. The judge was manifestly entitled to find on the consistent evidence before him that Article 8 (1) is engaged in respect of family life.

47. The judge also had evidence before him that the sponsor had a partner in the UK, was responsible for ML's older sibling and was running a law firm employing 17 lawyers and that many of his clients actively criticise the Russian government.

48. It is not irrational in these circumstances for the judge to find that the exclusion of ML from the UK was an interference in his right to family life and that his task was to decide whether the refusal of admission of ML to the UK to join his father was a disproportionate breach of Article 8 ECHR. The judge was referred to the authorities of T(Jamaica) [supra] and Mundeba (s55 & paragraph 297(i)(f) [2013] UKUT 88 (IAC) in the skeleton argument and the judge refers to these authorities at [12] and [15].

49. I am satisfied that there was no error in the judge's approach to the engagement of Article 8 ECHR.

Alternative submission – Appeal upheld on alternative reasoning

50. ML also submits in the alterative, both in the rule 24 response and in the further note and oral submissions that, the judge erred in law by failing to allow ML's appeal under paragraph 297(i)(f) of the immigration rules on the basis that the judge has

construed the rules too constrictively, wrongly omitting from his consideration all of the best interests of the child evidence which the judge refers to in the analysis of exceptionality. Mundeba [supra] is proposition for the principle that consideration of paragraph 297(i)(f) should involve an analysis of the best interests of the child. I am invited to set aside the finding at [14] that there were no serious and compelling family and other circumstances which would make the exclusion of the child undesirable because had the judge taken a lawful approach to this issue and incorporated his analysis of the best interests of the child into his assessment, he would have, taking all the factors cumulatively into consideration, reached a different conclusion.

51. In accordance with Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 00216, I am satisfied that ML was not required to apply for permission to appeal to the Upper Tribunal because the determination of this ground in the appellant's favour does not confer on the appellant any material benefit compared with the benefit flowing from the ground or grounds on which the appellant was successful in the First-tier Tribunal. Either way the appeal is allowed on Article 8 ECHR grounds. Further I am satisfied that the rule 24 notice was filed and served in accordance with the procedural rules and the Upper Tribunal's directions.

52. I am satisfied that the judge's analysis of "serious and compelling family or other considerations" failed to address the best interests of the child and the findings of the Independent Social Worker report, thereby failing to take into account relevant material factors which should have been considered cumulatively when considering this issue. I have set out these findings and considerations at length above. I am accordingly satisfied that the judge erred in his approach to paragraph 297(i)(f) of the immigration rules and had he taken these factors into account may well have made a different decision in respect of whether ML met the immigration rules. The error however, it not material because it is corrected by the adequately reasoned decision on exceptional circumstances which I have upheld for the reasons set out above.w

Conclusion

53. It follows that none of the Secretary of State's grounds of appeal are made out and the Secretary of State's appeal is dismissed.

Decision

54. The decision of the First-tier Tribunal allowing the appeal is upheld.

Signed Date

UTJ Owens
Upper Tribunal Judge Owens **24 February 2021**