IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Extempore decision

Case No: UI-2023-001401
First-tier Tribunal No: HU/01662/2022
HU/54400/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 July 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

NINA CONADO COX
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: None

Heard at Field House on 19 June 2023

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer. However, for convenience I will refer to the parties as they were designated in the First-tier Tribunal.

2. The appellant is a citizen of the Philippines who, since 2017, has been married to a British citizen ("the sponsor"). The appellant and sponsor have two children, aged 3 and 7. Both are British citizens. The sponsor and the two children live in the UK. The appellant is in the Philippines.

3. The appellant applied to join her husband and children in the UK. The application was refused by the respondent for several reasons: failure to meet the financial eligibility requirements, a lack of evidence of adequate accommodation, and a failure to meet the English language requirements.

4. The appellant appealed to the First-tier Tribunal and her appeal came before Judge of the First-tier Tribunal Oxlade ("the judge"). In a decision promulgated on 29 December 2022 the judge allowed the appeal. The Entry Clearance Officer now appeals against this decision.

5. It was common ground before the First-tier Tribunal that the appellant did not meet the requirements of the Immigration Rules. This is set out in paragraph 5 of the decision, which was highlighted by Mr Lindsay during the hearing before me. Paragraph 5 states:

> "There is no dispute but that the Appellant did not at either the date of the application and the hearing meet three requirements under the Rules: income requirements, adequacy of accommodation, and English language test".

6. The judge stated that the appeal turned on the proportionality of refusing the appellant entry into the UK and that the best interests of the children are a - but not the - primary consideration. On the basis of evidence from the children's school the judge found that separation from their mother is having a negative impact on them.

7. The judge also found that although the requirements of the Immigration Rules were not met the intention behind them was. The key findings in this respect are at paragraphs 21 and 22. These state:

> "21. ... I find that the mother will live with the family in the grandparents house, the couple have savings of £21,000, the Sponsor now works, and the Appellant's English was sufficiently passable to work in Hong Kong for 8 or more years, which is a place which predominantly uses English.
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> 22. Accordingly, though the Appellant has not met the Rules, and I give this considerable weight, I find that the intention behind the Rules would be otherwise met. This finding, together with my finding as to the effect on the children (particularly [ ]) of the separation from the mother, leads me to conclude that the Appellant should be granted entry clearance for the family to be reunited. To do otherwise would be to afford the breach of the children's Article 8 ECHR rights too little weight".

8. The grounds are not divided into separate points but I understand them to be raising three distinct arguments. The first is that the judge failed to consider and attach appropriate adverse weight in the proportionality assessment to the fact that the appellant did not meet the requirements of the Rules and that there were multiple public interest factors weighing against her. The second argument is that it was unclear how it was found that the appellant's article 8 rights outweighed the public interest. The third submission is that the judge elevated the children's best interests to a paramount consideration rather than treating this as a primary consideration.

9. In his submissions Mr Lindsay accepted that the judge correctly directed herself regarding the children's best interests being a primary, rather than the paramount, consideration. He also acknowledged that the judge expressly stated that she gave weight to the appellant not meeting the Rules. He characterised this as a case where the judge, having directed herself correctly, proceeded to not follow her self-direction.

10. Mr Lindsay's central criticism of the decision concerns paragraph 22, where the judge found that although the Rules were not met the intention behind them was. Mr Lindsay submitted that the intention behind the Rules is that a person applying for entry clearance satisfies the Rules, which manifestly was not the case here. He argued that the judge had, in effect, allowed the appeal on the basis that there had been a "near miss".

11. I agree with Mr Lindsay that the judge's reference to the "intention behind the Rules" is misconceived. I also agree that the language used by the judge gives the impression that the appeal was allowed because the Rules were nearly met. However, stepping back and considering paragraphs 21 and 22 alongside the rest of the decision, I consider it to be tolerably clear that the judge did not allow the appeal because the appellant nearly met the Rules (or because she met the intentions underpinning the Rules) but rather allowed it because she was satisfied that the balance under article 8 fell in the appellant's favour.

12. Reading the decision as a whole, it is apparent that the judge undertook a balancing exercise. The judge placed on one side of the scales the factors identified in paragraph 21 (these are that there would be adequate living arrangements in the UK, the couple have savings, the sponsor is in employment, and the appellant speaks English) as well as the best interests of the children. The judge placed on the other side of the scales the public interest consideration that the Rules were not satisfied and gave "considerable weight" to this.

13. Having identified and set out the material considerations weighing on both sides of the scales in the article 8 proportionality assessment, it fell to the judge to determine the relative weight to attach to them and to decide where the balance fell. Other judges might have reached a different view but it was not irrational to find that the considerations weighing in the appellant's favour (which included not only the factors identified in paragraph 21 but also the best interests of the children) outweighed the public interest in the maintenance of effective immigration controls arising because the Rules were not met. I therefore uphold the decision and dismiss the appeal.

Notice of decision

14. The decision of the First-tier Tribunal did not involve the making of a material error of law and stands.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

14 July 2023