



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00778/2014

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke
On 17th February 2015

Decision & Reasons Promulgated
On 3rd March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

D S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R O’Ryan of Counsel instructed by Paragon Law
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Before the Upper Tribunal the Secretary of State becomes the appellant. However, for the avoidance of confusion I shall continue to refer to the parties as they were before the First-tier Tribunal.

2. The first hearing of this appeal in the Upper Tribunal on 11th December 2014 (when the appellant was not represented) I heard submissions in relation to the claimed error of law in the decision of the First-tier Tribunal. I made the following decision setting out the background to the appeal:
 - “2. On 24th October 2014 Judge of the First-tier Tribunal Wellesley-Cole gave permission to the respondent to appeal against the decision of Judge of the First-tier Tribunal Juss in which he allowed the appeal against the decision of the respondent to refuse to vary the appellant’s leave to enter applying the provisions of paragraph 276ADE of the Immigration Rules and under Article 8 of the Human Rights Convention.
 3. Judge Wellesley-Cole noted that, in the grounds of application, it was claimed that the First-tier Judge had failed to give adequate reasons for findings on material matters having erred in his approach to Article 8 in particular. The grounds made reference to *MF (Nigeria)* [2013] EWCA Civ 1192 which, it was contended, had confirmed that the Immigration Rules were a complete code. Reference was also made to *Gulshan* [2013] UKUT 00640 (IAC) providing that an Article 8 assessment should only be carried out where there were compelling circumstances not recognised by the Rules and that the appeal should only be allowed where there were exceptional circumstances on the basis explained in *Nagre* [2013] EWHC 720p (Admin). The judge had also failed to take into consideration that the appellant had gained entry by deceit claiming that she was a tourist when in truth she had come to the United Kingdom to get married.
 4. Although Judge Wellesley-Cole note that the judge had found there were exceptional circumstances, citing *Huang* [2007] UKHL 11, she thought the judge had not elaborated the reasons for finding that to be the case.
 5. At the hearing before me the appellant was unrepresented (although correspondence from Paragon Law dated 18th December 2014 indicates that they are now representing her). In these circumstances I took steps to explain to the appellant the nature of the proceedings and, in particular, my initial task to investigate and decide whether or not the First-tier Judge had, actually, made an error on a point of law such that the determination should be re-made. It appeared that the appellant had received some legal assistance because she handed in a Rule 24 reply completed by Mr R O’Ryan, of Counsel, on 12th November 2014. I summarise this, below.
 6. The appellant argues that the decision of Judge Juss contained no material misdirection of law. It is submitted that the judge had given adequate reasons to support his conclusions. It is argued that, in *MF (Nigeria)*, the Court of Appeal had decided that the Rules were a complete code only in relation to deportation cases and the reference to ‘exceptional circumstances’ required a balancing exercise involving the application of a proportionality test. This view is supported by *Nagre* where the Court of Appeal noted that the respondent did not contend that the new Rules completely covered every conceivable case. The response also contends that the judge had properly considered Article 8 only after considering whether or not the appellant could succeed under the Immigration Rules.

The judge considered compelling features in the appeal including the fact that the appellant's husband was a refugee from Iran and had no connections with Tunisia and that the appellant was herself vulnerable as she was about to give birth.

7. Ms Johnstone submitted that the respondent continued to rely upon the grounds. She expressed the view that, from paragraph 12 onwards, the determination showed errors in failing to give reasons for the inability of the appellant's husband to go to Tunisia or to explain what made the case exceptional. The only reason given was that that the husband had indicated that he was not prepared to go to Tunisia.
 8. The appellant did not make any oral submissions although it was clear that she relied upon those set out in the response.
 9. After considering the matter for a few moments I indicated that I was satisfied that the determination showed a material error on a point of law in the judge's consideration of Article 8 issues such that it should be re-made. The reasons for that conclusion follow.
 10. Although the judge recounts the circumstances in which the appellant came to the United Kingdom as a visitor, he does not deal with the respondent's contention that she came by deception intending to marry which might have a bearing on the Article 8 decision. Further, the judge gives only one reason for the conclusion that the family life enjoyed by the parties cannot reasonably be expected to be enjoyed elsewhere which was simply the husband's unwillingness to go to Tunisia. Although the judge notes that the appellant was pregnant (she has now given birth to a daughter, S) the judge does not, in the Article 8 balancing exercise, give reasons for it not being reasonable to expect the young child, when born, to accompany her parents to Tunisia. Whilst the decision is otherwise comprehensive and cogently argued, the omissions to which I have referred give rise to material errors on points of law.
 11. Having decided that the determination showed errors I indicated my attention to proceed to re-make the decision. However, the appellant indicated to me that she would like to see representations and I also reminded myself that the Tribunal would need to consider the best interests of her child who, it was claimed, is a British citizen. On this basis I agreed that it would be in the interests of justice for the appellant to be represented at a resumed hearing before the Upper Tribunal before me.
 12. At the resumed hearing human rights issues incorporating the best interests of the appellant's child will be considered which may require a re-evaluation of the application of paragraph EX.1 of Appendix FM the Immigration Rules on that account."
3. At the first hearing I also made directions relating to the re-making of the First-tier decision which was then heard before me on 17th February 2015.

Re-making the Decision

4. The appellant gave brief oral evidence in which she adopted the content of her statement which commences on page 3 of the bundle of documents submitted by her representatives on 9th February 2015. In this she confirms that she lives with her husband and baby daughter in Nottingham. Her husband has indefinite leave to remain in the United Kingdom and so it was possible to obtain a British passport for her daughter. She states that, as her husband is a Christian, this would cause problems for her if she returned to Tunisia where her family are traditional and conservative Muslims. At present her family do not know that her husband is a Christian. During brief cross-examination she said that her parents would be angry and never forgive her for this and it would not be possible for them to become part of her family if returned to Tunisia.
5. The appellant's husband, Mr M H then gave evidence. His statement commences on page 1 of the bundle. He states that he works full-time as a taxi driver whilst his wife stays at home to care for their daughter. He said he would be unable to care for his daughter on his own if his wife were forced to return to Tunisia. During cross-examination he confirmed that he had never been to that country.

Submissions

6. Mr McVeety helpfully agreed that the only issue was whether, in terms of proportionality having regard to the provisions of Section 117B(6) was whether or not the appellant had a genuine and subsisting parental relationship with her British child and it would not be reasonable to expect the child to leave the United Kingdom. He made no further submissions on the point.
7. Mr O'Ryan relied upon the terms of his comprehensive skeleton argument which emphasises that the appellant's family life with her daughter and husband cannot reasonably be enjoyed in Tunisia. His argument also points out that there is no requirement, under Article 8 ECHR, for the existence of insurmountable obstacles to family life continuing abroad and there is no threshold test of "good arguable grounds" for consideration of Article 8 outside the Immigration Rules. The skeleton also concedes that, although the appellant's application might otherwise succeed under section EX.1 of Appendix FM of the Immigration Rules, that could not be applied in the circumstances of this case because, having arrived in UK as a visitor she cannot meet the immigration status requirements under section LTRP of Appendix FM. He asserted that it would not be reasonable to expect the British child to leave. He also reminded me that the appellant was still breastfeeding her baby who could not be left in the care of the father. The latter also speaks no Arabic and is a Christian in a mixed marriage which, if discovered in Tunisia, would make it unreasonable for him to go there. At this point Mr McVeety confirmed that the husband's faith was not an issue.
8. As to the situation in Tunisia Mr O'Ryan referred to an extract from the United States Department of State of 2013 in which he had marked passages concerning the difficulties experienced in the country by religious minorities and the inadequate steps taken by the Tunisian government to protect such communities from harassment, vandalism and intimidation. Societal abuses based on religious affiliation had also been reported on and there was significant societal pressure

against the conversion of Muslims to other religions. Particularly threats of violence from members of their families or others.

Conclusions

9. Where human rights issues arise it is for the appellant to show that the particular right will be infringed and for the respondent to show that the infringement of the right will not be proportionate. I take into consideration the evidence as at the date of hearing applying the standard of a balance of probabilities to any evidential issues.
10. Mr McVeety helpfully identified the issues in this appeal as those set out in Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended). I have little hesitation in concluding that the appellant has a genuine and subsisting parental relationship with her English national child. That is not a matter which has been contested by the respondent and I am satisfied, from the evidence I have heard, that the appellant is the main carer for her child who is being breastfed by her. In relation to the issue of whether or not it would be reasonable to expect the child to leave the United Kingdom I have to take into consideration the wider picture upon which I comment below.
11. I accept that the appellant is in a genuine relationship with her husband who has indefinite leave to remain in the United Kingdom following the successful asylum claim based upon his fear of persecution as a Christian convert in Iran. That situation was made quite clear to me from the evidence given by both husband and wife at the hearing, with their child present. As matters stand I also conclude that it would not be reasonable to expect the child to leave the United Kingdom with the appellant to go to live in Tunisia. Not only would this cause severe difficulties for the appellant with her family who would, I conclude, find out about the appellant's marriage to a Christian and thus give rise to some considerable friction within the family. Most importantly, however, family life could not reasonably be expected to continue by the appellant's husband going to Tunisia. That is because he is a Farsi speaker and not an Arabic speaker which will create difficulties for him in obtaining employment. I also conclude that the husband's faith, as a Christian, would inevitably give rise to other difficulties both with employment, family relationships and societal harassment which would make it unreasonable for him to go there. The background information provided to me by Mr O'Ryan has assisted me to make that conclusion as it shows the existence of religious discrimination with an absence of state protection. Such difficulties would be present throughout the country if the parties were forced to re-locate to avoid family friction.
12. Thus considering Article 8 issues outside the Immigration Rules, which cannot avail the appellant, I am satisfied that it has been shown that the respondent's decision would be a disproportionate exercise of legitimate immigration control. I have reached that conclusion applying the 5 stage approach recommended in *Razgar* [2004] UKHL 27. The public interest does not require the removal of a person who cannot reasonably be expected to leave the United Kingdom in the circumstances as I have found them to be.

Notice of Decision

I allow the appeal on human rights grounds.

Anonymity

As this appeal now involves the interests of a young child I make the following direction:

DIRECTION REGARDING ANONYMITY – RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Garratt

TO THE RESPONDENT
FEE AWARD

I do not make a fees order in this appeal. That is because the circumstances which now enable me to allow the appeal on human rights grounds were not all present at the time of the appellant's original application.

Signed

Date

Deputy Upper Tribunal Judge Garratt