Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/07412/2013**

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 27 October 2015	**On 30 December 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR ABDUL KHALIQUE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms B Muldoon, Solicitor
For the Respondent: Mrs S Siddiq, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan, born on 15 February 1978. On 4 July 2012 he made an application for further leave to remain as a spouse. That application was refused in a decision dated 20 February 2013.

2. His appeal came before First-tier Tribunal Judge S. T. Fox at a hearing on 3 October 2013, whereby the appeal was dismissed. Permission to appeal having been granted by a Judge of the Upper Tribunal, the appeal came before me.

3. The appellant originally applied for further leave to remain on the basis of his relationship with his wife Nichola Gemma Johnston. However, she had signed a statement confirming that the relationship was no longer

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subsisting and that the appellant no longer resided in the family home. He was thus not able to meet the requirements of the Immigration Rules.

4. The respondent issued to the appellant a notice under Section 120 of the Nationality, Immigration and Asylum Act 2002 ("a s.120 notice"), thereby requiring him to state any additional grounds upon which he claimed to be entitled to remain in the UK. In response to the s.120 notice the appellant relied on a new relationship with a Ms Eireann Comhraidh, although her surname is spelt differently in the First-tier Judge's determination. They have a child, whom I shall identify as A, born on 29 June 2013.

5. The First-tier Judge concluded, in summary, that notwithstanding the appellant's partner's decision to elect to be an Irish citizen only, she still remains eligible to apply for a British passport. She had been born in the UK. He concluded that she is a person who is in addition to being an Irish citizen also a United Kingdom national. He concluded that she is not exercising Treaty rights.

6. That aside, the judge also concluded at [22] that he could not consider the 'new' circumstances of the appellant's new partner and child, those being circumstances which had changed since the application for further leave and the decision refusing it. Referring to the decision in *EA (Section 85(4) explained) Nigeria* [2007] UKAIT 00013, he concluded that it would not be permissible for him to act as the "primary decision maker" were he to determine the appeal on the changed circumstances.

7. For the same reasons, he concluded that the ground of appeal under Article 8 of the ECHR failed on the basis of the application as originally made and the decision in consequence of it.

The Grounds and Submissions

8. The grounds in summary contend that the judge's decision is contrary to the decision in *AS (Afghanistan) v Secretary of State for the Home Department* [2009] EWCA Civ 1076, and the decision of the Supreme Court in *Patel and others v Secretary of State for the Home Department* [2013] UKSC 72. The decision of the Upper Tribunal in *Jaff (s.120 notice; statement of "additional grounds")* [2012] UKUT 00396 (IAC) was also relied on. The appellant's skeleton argument that was before the First-tier Tribunal made reference to *AS (Afghanistan)* and *Jaff* but these are not referred to in the judge's determination.

9. In consequence of the judge's refusal to consider the circumstances as outlined in the Statement of Additional Grounds, it is contended that the judge erred in failing to consider Article 8 of the ECHR, including with reference to the best interests of the appellant's child, and had also erred in failing to give proper consideration to the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") in terms of the appellant's relationship with his Irish partner and their child.

10. The appellant's grounds refer to other suggested errors in the First-tier Judge's decision, although stating that those are not material. The first of

these concerns the constitutional issues arising out of nationality for those born in Northern Ireland with reference to what the judge described as the "*McCarthy* point". This appears to be a reference to the decision of the Court of Justice of the European Communities in *McCarthy* [2011] EUECJ C-434/09. At [13]-[15] of the grounds other issues are raised which it is asserted amount to further errors in the judge's decision.

11. Ms Muldoon in her submissions relied on the grounds. She said that the appellant's partner's position is that she could not renounce British citizenship because her contention is that she never had it in the first place. She accepted that under s.12 of the British Nationality Act 1981 a person can renounce British citizenship provided a declaration is included, but that declaration includes an acceptance that a person is a British citizen. The appellant's partner has manifested her Irish citizenship by applying for an Irish passport.

12. I raised with Ms Muldoon the question of whether it could be said that the appellant's partner was exercising Treaty rights since she had never exercised any free movement rights by moving anywhere between EEA states. Ms Muldoon submitted that this issue was dealt with in the case of *Chen (Chen and Zhu) v Secretary of State for the Home Department Case C-200/02* [2005] QB 325.

13. The judge, it was submitted, needed to consider the issue of a durable relationship and paragraph EX.1 of the Rules. Background evidence was referred to in general terms as set out in the appellant's bundle in relation to the situation for children in Pakistan.

14. Mrs Siddiq accepted that the authorities to which I had been referred indicated that the judge was wrong not to consider s.120 and the additional grounds.

15. Oblique reference on behalf of the respondent in submissions was made to the Secretary of State's appeals guidance in terms of s.120, although no copy of that guidance was put before me. It was suggested on behalf of the respondent that the circumstances of the new relationship are so contrasting with the original application that there needed to be investigation by the Secretary of State into the circumstances. It may be that a new application would have to be made.

16. In relation to the nationality point, it was accepted on behalf of the respondent that the Home Office position is that a person such as the appellant's partner has a constitutional right to choose Irish or British citizenship or both. On the other hand, in the light of the British Nationality Act, she had never renounced British nationality and therefore would be viewed as both British and Irish.

17. Furthermore, she had never exercised free movement rights.

My assessment

18. For all that the appeal raises a number of issues, the question of whether the First-tier Judge erred in law seems to me to be amenable to a simple resolution. The judge's ultimate refusal to consider, what could be described in general terms as the changed circumstances, is contrary to decisions in *AS (Afghanistan)* and *Patel and others*. *Patel and others* considered the Court of Appeal's decision in *AS (Afghanistan)*. At [35] the Supreme Court stated as follows:

> "Turning to the judgments in *AS* itself, it would be difficult to expand on or improve the depth of legal and contextual analysis to be found in the judgments of all three judges. The fact that the analysis led such experienced judges to opposite conclusions suggests that the path to enlightenment will not be found by attempting a similar exercise in this judgment. The problem lies in the drafting of the relevant provisions, which defies conventional analysis. It is not only obscure in places and lacking in detail, but contains pointers in both directions".

19. Further, at [44] it said this:

> "In the end, although the arguments are finely balanced, I prefer the approach of the majority in *AS*. Like Sullivan LJ, I find a broad approach more consistent with the "coherence" of this part of the Act. He noted that the standard form of appeal, echoing the effect of the section 120 notice, urged appellants to raise any additional ground at that stage, on pain of not being able to do so later, and observed:
>
>> '... it seems to me that appellants would have good reason to question the coherence of the statutory scheme if they were then to be told by the AIT that it had no jurisdiction to consider the additional ground that they had been ordered by both the Secretary of State and the AIT to put forward.'"

20. The decision in *EA* predates those authorities, and is in any event not on point so far as the circumstances of this appeal are concerned.

21. At the very least therefore, the judge's conclusions in relation to Article 8 of the ECHR cannot stand. There has been no consideration under Article 8 of the appellant's circumstances as disclosed in the s.120 notice and additional grounds. That is reason enough to set the decision aside to be re-made.

22. So far as the nationality point is concerned, the appellant's skeleton argument sets out a number of authorities on the issue in terms of the interrelationship between the Northern Ireland Act 1998 and the Belfast Agreement. It seems to me that those authorities which consider in various different respects the impact of the Belfast Agreement reveal that an individual does constitutionally have the right to identify themselves as either British or Irish or both, as set out in Article 1(vi) of the Belfast Agreement. Article 1(vi) provides that the two Governments:

> "recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish

citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland".

23. I need only refer to the decision in *Robinson v Secretary of State for Northern Ireland and Others (Northern Ireland)* [2002] UKHL 32 in support of the proposition that the Northern Ireland Act 1998 was passed to implement the Belfast Agreement which, amongst other things, recognises the right of the people of Northern Ireland to identify themselves as Irish or British, or both.

24. So much, it seems to me, was also conceded on behalf of the respondent at the hearing before me. Insofar as the First-tier Judge found otherwise, I am satisfied that he erred in law. Furthermore, insofar as the appellant's grounds appear to accept that the judge's finding on this issue is not material, I disagree.

25. As already indicated, it is clear that the decision will have to be re-made. My doubts expressed at the hearing in terms of the extent to which the appellant would be able to succeed under the EEA Regulations with reference to whether his partner was exercising Treaty rights because she had not in fact exercised any right of free movement, were not assuaged by Ms Muldoon's submissions. The issue in relation to *Chen*, which relates to the appellant's child, seems to me to be a separate issue entirely.

26. The parties agreed that it would be appropriate for the matter to be remitted to the First-tier Tribunal if I found that there was an error or errors of law requiring the decision to be set aside, and I provisionally agreed with that suggestion. I still consider that to be the appropriate course, having regard to paragraph 7.2 of the Senior President's Practice Statement of November 2014, given the nature and extent of the judicial fact finding necessary for the decision in the appeal to be re-made and having regard to the overriding objective in rule 2.

27. Accordingly, the appeal is remitted to the First-tier Tribunal to be heard by a judge other than First-tier Tribunal judge S.T. Fox.

28. The only finding of fact that is to be preserved is that found at [23] of the First-tier Tribunal's determination, namely that the appellant is the father of A. The parties are of course at liberty to come to agreement as to other facts.

29. In order to assist the First-tier Tribunal, I make the following direction. Further directions in relation to filing and service of witness statements and the like are of course to be left to the discretion of the First-tier Tribunal.

DIRECTIONS

No later than seven days before the hearing before the First-tier Tribunal, the appellant is to file and serve a skeleton argument:

(i) setting out the basis upon which it is contended that he meets the requirements of the Immigration Rules, the EEA Regulations (and on what basis), and setting out the appellant's case in relation to Article 8 of the ECHR.

(ii) explaining the basis upon which it is contended that the appellant is able to establish that he is an extended family member, being a person in a durable relationship, in circumstances where his partner has never apparently exercised any right of free moment.

(iii) explaining how it is contended that the appellant can legitimately rely on both the Article 8 Immigration Rules and the EEA Regulations.

Upper Tribunal Judge Kopieczek 17/12/15