



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08237/2016

THE IMMIGRATION ACTS

Heard at Bradford
On 15 June 2018

Decision & Reasons Promulgated
On 19 June 2018

Before

Deputy Upper Tribunal Judge Pickup

Between

MONDAY [E]
[No anonymity direction made]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr S Medley-Daley, instructed by ILAC

For the respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Monaghan promulgated 5.7.17, dismissing his appeal against the decision of the Secretary of State, dated 4.3.16, to refuse his application made on 30.9.15 for LTR on the basis of his relationship with his British citizen partner and child in the UK.
2. First-tier Tribunal Judge Martins refused permission to appeal on 14.12.17. However, when the application was renewed to the Upper Tribunal, Deputy Upper Tribunal Judge Saini granted permission to appeal on 26.2.18.

Error of Law

3. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such as to require it to be set aside and remade.
4. In granting permission to appeal, Judge Saini considered it arguable that the decision was in error of law in failing to take into account the Home Office Guidance concerning British Children, consistent with the case authority of SF and others (Guidance, post-2014 Act) [2017] UKUT 120 (IAC).
5. Because of the short period of time in which the appellant had been in a relationship with his partner at the date of application, and because he was in the UK in breach of immigration laws, he could not meet the requirements of Appendix FM for Leave to Remain as a partner. In the circumstances EX1(b) does not apply.
6. As the appellant does not have sole parental responsibility for his child, he cannot meet the eligibility requirements of Appendix FM as the parent of a child and thus EX1(a) does not apply.
7. The judge went on to find at [70] that the appellant had a genuine and subsisting parental relationship with his child, and took into account Section 55 of the Borders, Citizenship and Immigration Act 2009. However, at [75] the judge concluded that it would be in the child's best interests to accompany her parents if they choose to go to Nigeria and at [77] that it was reasonable for the child to leave the UK.
8. The issue is the proportionality of the decision in the article 8 ECHR assessment outside the Rules. At [84] the judge referred to section 117B(6) of the Nationality, Immigration and Asylum Act 2002, accepting that the daughter is a qualifying child and assessing whether it would be reasonable to expect the child to leave the UK, but concluding that it would.
9. The appellant relies on the Immigration Directorate Instructions of 2015, to the effect that a decision should not be taken in relation to the parent of a British citizen child where the effect of that decision would be to force the child to leave the EU, consistent with the Zambrano judgement. It is submitted that the judge in error considered that there were no insurmountable obstacles to family life being conducted from Nigeria instead of assessing the reasonableness of expecting a British citizen child to leave the UK and whether it was reasonable to split the family by requiring the appellant to return to Nigeria, leaving his wife and child in the UK. It is submitted that a decision maker should not usually make a decision that forces a family to be split in there are no factors to add weight to the public interest in removal.
10. Things have moved on since the promulgation of the decision of the First-tier Tribunal. First, MA (Pakistan) and Others v Upper Tribunal (IAC) and Anor [2016] EWCA Civ 705, held that in making the reasonableness assessment the wider public interest has to be taken into account.

11. Second, the 2015 instructions have been replaced in February 2018. These provide that the decision maker must consider whether the effect of refusal of the application would be, or would likely to be that the child would have to leave the UK. "This will not be the case where, in practice, the child will, or is likely to, continue to live in the UK with another parent or primary carer... If the departure of the non-EEA national parent or carer would not result in the child being required to leave the UK, because the child will (or is likely to) remain living here with another parent or primary carer, then the question of whether it is reasonable to expect the child to leave the UK will not arise. In these circumstances, paragraph EX1(a) does not apply."
12. The instructions also provide, in relation to the reasonableness of expecting a child to leave the UK, that where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. "Accordingly, where this means that the child would have to leave the UK because, in practice, the child will not, or is not likely to, continue to live in the UK with another parent or primary carer, EX1(a) is likely to apply." However, these considerations only apply where the effect of refusal of the application would be, or is likely to be, that the child would have to leave the UK. That is not the situation in this case, as the child will be able to and will likely remain with the appellant's partner in the UK. In evidence the partner made clear that she would not be prepared to join the appellant in Nigeria. In the circumstances, there is no question of the British citizen child being effectively forced to leave the UK. In the circumstances, even if EX1(a) was applicable, which for the reasons set out above it does not, it cannot apply to the appellant's situation. To that extent, I do not accept the argument in the grounds and the submissions of Mr Medley-Daley on this point. I do not accept his drawing of a distinction in the reasonableness assessment between s117B(6) and that under EX1(a), bearing in mind MA (Pakistan). Neither do I accept that the judge was necessarily wrong to find that there would be a choice of the other parent and therefore child as to whether they would accompany or follow the appellant to Nigeria.
13. However, the updated instructions also provide that, "where there is a genuine and subsisting parental relationship between the applicant and the child, the removal of the applicant may still disrupt their relationship with that child. For that reason, the decision maker will still need to consider whether, in the round, removal of the applicant is appropriate in light of all the circumstances of the case, taking into account the best interests of the child as a primary consideration and the impact on the child of the applicant's departure from the UK. If it is considered that refusal would lead to unjustifiably harsh consequences for the applicant, the child or their family, leave will fall to be granted on the basis of exceptional circumstances."
14. I find that this issue, a proportionality assessment outside of the Rules, relevant even under the previous case law and Home Office guidance, and in respect of which the wider public interests must be taken into account, has not been adequately addressed in the decision of the First-tier Tribunal. I am also satisfied that the judge was in error in finding that it would be reasonable for the child to leave the UK.

Remittal

15. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal. Further, the case cannot be fairly resolved immediately without evidence as to the current family circumstances.
16. In all the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal, on the basis that this is a case which falls squarely within the Senior President's Practice Statement (revised). The nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

17. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the directions below.



Signed
Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

18. The appeal is remitted to the First-tier Tribunal sitting at Bradford;

19. The appeal is to be decided afresh with no findings of fact preserved;
20. The ELH is 2 hours;
21. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Monaghan and Judge Martins;
22. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated, indexed and paginated bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming appeal hearing;
23. The First-tier Tribunal will give such further or alternative directions as are deemed appropriate.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.



Signed
Deputy Upper Tribunal Judge Pickup

Dated