



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15805/2016

THE IMMIGRATION ACTS

Heard at Bradford
On 29 June 2018

Decision & Reasons Promulgated
On 2 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE PICKUP

Between

NNAEMEK ECHEZON EZEUGO
[NO ANONYMITY DIRECTION MADE]

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the appellant: Mr S Medley-Daley, instructed by Immigration Legal Centre
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 Bradshaw promulgated 31.5.17, dismissing his appeal against the decision of the Secretary of State, dated 9.6.16, to refuse his application for LTR on grounds of private and family life outside the Rules pursuant to article 8 ECHR.
2. First-tier Tribunal Judge Pedro granted permission to appeal on 8.12.17.

Error of Law

3. For the reasons summarised below, I find that there was an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside and remade. For the same reasons, I also find that the appeal should be allowed.
4. The appellant last came to the UK on a family visit visa in 2015. Within the duration of his visa, in March 2016 he sought Leave to Remain on the basis of his relationship with a British citizen partner and their British citizen child.
5. The respondent conceded that the relationship requirements of the Rules were met and that the family relationship is genuine and subsisting. The appellant's representative conceded that the Rules could not be met, because he made his application as a visitor and not overstayer. The only ground of appeal was on human rights outside the Rules.
6. At [10] of the decision Judge Bradshaw purported to take account of section 117B of the Nationality, Immigration and Asylum Act 2002 and Section 55 of the Borders, Citizenship and Immigration Act 2009. However, the grounds assert that the decision fails to engage properly with the best interests of the appellant's child as a British citizen as a primary consideration and that s117B(6) was not address at all, despite there being a qualifying child. It was on that basis that Judge Pedro considered that there was an arguable error of law.
7. Having read the decision, it does appear that whilst best interests were assessed at [35] as being for children to be raised with both parents, the judge did not take account of s117B(6) and did not specifically address the test of whether it was reasonable to expect the qualifying child, with whom the appellant had a genuine and subsisting relationship, to leave the UK. No reference was made to the Home Office's policy from 2015 on separating parents of British children.
8. In the circumstances, I am satisfied that the decision was in error of law and cannot stand and I consider it appropriate to remake the appeal on the factual findings of the First-tier Tribunal.
9. Whilst Mr Medley-Daley accepts that MA (Pakistan) and Others v Upper Tribunal (IAC) and Anor [2016] EWCA Civ 705 held that the assessment of reasonableness requires a consideration of the wider public interest, including immigration control, his primary submission is that the refusal decision made a specific concession at p3 in relation to EX1 under Appendix FM: "It is accepted that you have a qualifying relationship contained within EX1, and therefore meet the requirements of R-LTRP 1.1 (d)(iii)." Whilst EX1 does not in fact apply because of the appellant's immigration status, the concession, it is submitted, amounts to acceptance that it is not reasonable to expect the child to leave the UK.
10. Mr Medley-Daley's point is that having made that concession it is not now open to the Secretary of State to suggest that it is reasonable for the child to leave the UK and that would in any event, be contrary to the respondent's own policy. He suggests

that the time for considering the public interest had been and gone before the making of the concession that it would not be reasonable to expect the child to leave the UK.

11. Mr Diwnycz conceded the point and accepted that the Secretary of State was bound by the concession made in the refusal decision, so that it was now not open to the respondent to suggest anything other than s117B(6) is made out so that the public interest does not require the appellant's removal. He also recognised that there is now a second British citizen child born to the appellant and his partner. The 2015 policy has been refreshed in February 2018 but amounts to the same or similar guidance.
12. In the circumstances, I am driven to accept that the appeal has to be allowed outside the Rules on the basis of the concession made that it would not be reasonable to expect the child(ren) to leave the UK. If by statute the public interest does not require the appellant's removal and no other relevant features or factors of the wider public interest have been drawn to the tribunal's attention, I can only conclude that the decision interfering with the family life rights of the appellant and his family members engages article 8 ECHR and the respondent has failed to justify the decision as proportionate to those rights. It follows that the appeal has to be allowed on human rights grounds.

Decision

13. 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 re-make the decision in the appeal by allowing it on human rights grounds.



Signed

Deputy Upper Tribunal Judge Pickup

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 a whole fee award.

Reasons: The appeal has been allowed.



Signed

Deputy Upper Tribunal Judge Pickup