



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/23617/2015

THE IMMIGRATION ACTS

Heard at Field House
On 29 June 2018

Decision & Reasons Promulgated
On 17 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[J B]

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer

For the Respondent: Ms R Akther, Counsel

DECISION AND REASONS

1. I refer to the Appellant as the Secretary of State and the Respondent as the Claimant in this appeal. The Claimant is a national of Ghana born on 1 May 1965. He claims to have arrived in the United Kingdom on 17 May 1994 and claimed asylum on arrival. He did not pursue his asylum claim.
2. He applied for a residence card under the Immigration (European Economic Area) Regulations 2006. His application was refused on 2 September 2009 and he did not appeal against that refusal. He made a human rights application on Article 8 grounds

on 1 April 2015. The Secretary of State refused that application for the reasons set out in the refusal letter.

3. The basis of the Secretary of State's decision was that the Claimant did not satisfy the requirements of Appendix FM in respect of his family and his private life. The Claimant appealed against the Secretary of State's decision under Section 82(2) of the Nationality, Immigration and Asylum Act 2002 claiming that his removal would breach his rights under Article 8 of the 1950 Convention both due to his private life and his family life with his children.
4. His appeal was heard by Immigration Judge Majid and allowed in a decision and reasons promulgated on 16 September 2016. The Secretary of State was granted permission to appeal against that decision and the appeal was heard by the Upper Tribunal on 27 June 2017. In a Decision and Reasons promulgated on 30 August 2017 the Upper Tribunal found that Judge Majid had made a material error of law and remitted the matter to be heard afresh before the First-tier Tribunal.
5. The appeal came before Judge Aujla of the First-tier Tribunal on 7 March 2018 and in a Decision and Reasons promulgated on 12 March 2018 the Judge allowed the Claimant's appeal on the basis that the Secretary of State's decision was an unlawful interference with his human rights under Article 8 of the European Convention on Human Rights.
6. The Secretary of State sought permission to appeal the decision of the First-tier Tribunal. The grounds are set out in the application for permission to appeal dated 20 March 2018 and are as follows. It is asserted that the First-tier Tribunal made a material error of law in the decision because the First-tier Tribunal refused to allow the Secretary of State to make oral submissions. What is said is that the appeal proceeded with the Claimant unrepresented due to the fact that the Claimant's Counsel had fallen ill on the morning of the hearing. The Judge decided that the appeal could proceed without a representative but according to the Presenting Officer's notes after having cross-examined the Claimant and his witness the Judge said it would not be fair to the other side, namely to the Claimant, for the Secretary of State to make submissions because the Claimant was unrepresented. The Presenting Officer's note records that that the Presenting Officer disagreed but did as they were instructed.
7. It is alleged that in view of the fact that the Secretary of State was not given a proper opportunity to make the arguments she wished to make following the conclusion of the evidence there was a procedural irregularity amounting to a material error of law. It is said that the Presenting Officer wanted to challenge the credibility of the Claimant's evidence and of that of the witness.
8. The matter comes before the Upper Tribunal in order to determine whether or not there was a material error of law in the decision of the First-tier Tribunal and if so what to do about it. I heard representations from Mr Walker and from Ms Akther. Neither of the representatives had received a copy of the note from the Tribunal dated 21 June

2018. The Tribunal had received correspondence from Genga & Co Solicitors, the Appellant's representatives, sent on 20 June 2018 asking for a copy of the Record of Proceedings as a matter of urgency. The Upper Tribunal refused that application stating that whilst it was recognised that the Secretary of State's solicitor was unable to attend the First-tier hearing the Secretary of State's solicitor could take instructions from their client as to whether the matters raised by the Secretary of State in the grounds of appeal were accurate. The case referred to is **HD (Prison - Record of Proceedings) Iran [2004] UKIAT 00209** at paragraph 13. It is stated that the Tribunal will not disclose the note of the proceedings until all parties have sought to come to some agreement about what happened at the hearing. As stated neither party had received a copy of this and I asked at the outset of the hearing whether both representatives had had an opportunity to discuss what happened before the First-tier Tribunal.

9. Mr Walker helpfully conceded that there was no material error of law in the decision of the First-tier Tribunal. He accepted that the Secretary of State should have served a witness statement from the Presenting Officer in this case in accordance with **BW (Witness statements by advocates) [2014] UKUT 568** rather than simply relying on a note of the hearing made by that Presenting Officer. That had not been done. He also agreed that the First-tier Tribunal Judge should be allowed to comment on any witness statement by the Presenting Officer and that were these steps to be taken they would occasion an adjournment of today's hearing. He conceded that notwithstanding any alleged procedural irregularity, having considered the decision of the First-tier Tribunal as a whole, any procedural irregularity would not have been material in any event because the Secretary of State could not dispute the finding that the Claimant had three children in the United Kingdom born in March 2003 and 2009 and that he had a genuine and subsisting relationship with those children. Further the finding that the Claimant was no longer in a relationship with the children's mother was not in dispute and given that the Claimant did not have a relationship with their mother but saw the children regularly and had a genuine and subsisting relationship for the purpose of Section 117B(6) it would be unreasonable for the children to go to Ghana with the Claimant.
10. In those circumstances, notwithstanding any alleged procedural irregularity, the error of law could not be material and therefore he was not pursuing his grounds. I therefore find that there was no material error of law in the decision of the First-tier Tribunal and I dismiss the Secretary of State's appeal.

Notice of Decision

There was no error of law in the decision of the First-tier Tribunal and I do not set it aside.

I dismiss the Secretary of State's appeal.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

As the case concerns children I make an anonymity direction. Unless and until a Tribunal or court directs otherwise, the Claimant 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 Claimant and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 12 July 2018

A handwritten signature in black ink, appearing to be 'L J Murray', written in a cursive style.

Deputy Upper Tribunal Judge L J Murray