Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04238/2018

THE IMMIGRATION ACTS

Listed at Field House
On 4th September 2018

Decision & Reasons Promulgated
On 10th October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR C O
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the appellant: Mr E Tefan, Home Office Presenting Officer
For the respondent: Mr P Oyemike of Samuel and Co,Solicitors

DECISION AND REASONS

Introduction

1. Although it is a Secretary of State who is appealing for convenience I will hereinafter refer to the parties as in the First Tier Tribunal.

2. The appellant is a national of Nigeria who came to United Kingdom in 2005 on a visit Visa. Thereafter he overstayed. When his presence became known he made a claim for asylum. This was on 12 September 2017, the day after he had been served with notice as an overstayer. His claim was based upon his uncle's activities with the Biafran Zionist Party.

3. He had earlier made an unsuccessful application based upon Treaty rights. He stated he was cohabiting with a Bulgarian national since 2015 and they had a child, Benjamin, born on 21 October 2016.

4. His claim for protection was refused on 13 March 2018. The respondent did accept that the leader of the Biafran party was related to the appellant but concluded this would not place the appellant is any risk. He did not have any political views and had been away from Nigeria for many years. Regarding his article 8 rights his partner was not a British national. She had applied for a residency card on 6 October 2017 which was refused. She did not have indefinite leave to remain. It was not accepted that she was his partner within the meaning of the immigration rules. It was accepted that the appellant was the father of Benjamin who is a Bulgarian national who did not have indefinite leave to remain and had not lived here seven years.

The First tier Tribunal

5. His appeal was allowed by First-tier Tribunal Judge DP Herbert OBE following a hearing on 3 May 2018. The judge rejected his refugee claim and found no evidence of the appellant had been politically active. At paragraph 37 the judge concluded his claim to asylum had no merit.

6. The judge then found that he did not meet the requirements of the immigration rules because his partner was not a person present and settled in the United Kingdom and their child was not British. The judge did accept that they were in a genuine and subsisting relationship and considered whether removal would be proportionate bearing in mind his family life.

7. The judge made the point that the appellant's spouse was entitled to be here as an EEA national exercising Treaty rights. The judge referred to an unsuccessful application by the appellant to remain as her extended family member under European Treaty provisions. The judge recorded that the earlier refusal of a residence document was because he had failed to produce his Nigerian passport and so that refusal was not determinative of his status. The judge found that the appellant's partner was exercising Treaty rights. He found that the appellant was in a relationship with her for more than two years. At paragraph 45 the judge concluded that there was every likelihood if he made an application now he would obtain a residence permit. On this basis the judge allowed the appeal under article 8.

The Upper Tribunal

8. Permission to appeal was granted on the basis the judge's analysis was flawed because there was no regard to the public interest factors of section 117 B. Furthermore, it was suggested that the judge had confused European rights of movement with the right to family life. The appellant's child was not a qualifying child.

9. At hearing Mr Tefan made the point that the appellant could apply under European Treaty provisions for a residence permit. He argued that article 8 had not been adequately considered by the judge, who engaged in basic errors about the standard of proof. This was apparent at paragraph 32 when he equated it with the lower standard applicable to an asylum claim.

10. In response, the appellant representative argued that the situation was akin to that in Chickwamba. He accepted that the appellant's partner was not a qualified person and his child was not here seven years. He also acknowledges that the judge had not dealt with 117 B. He made the point that the appellant does speak English and is financially independent. The question of integration into the United Kingdom was a factual matter. He acknowledged that the judge had incorrectly stated the standard of proof but that the difference between the two standards made no practical difference. He did acknowledge that if the decision were remitted the asylum claim would not be pursued. There is no challenge to this aspect in the appellant's rule 24 response.

Consideration

11. At paragraph 32 the judge incorrectly sets out the standard of proof in relation to article 8, equating it to the lower standard in the appellant's asylum claim. If the judge in fact applied this lower standard in allowing the article 8 claim then this is a material error of law.

12. The judge found the appellant and his partner to be in a durable relationship. The judge referred to overwhelming evidence that they enjoyed a family life since they started living together in 2015. The judge referred to the evidence of the appellant and his partner as well as photographs. This was a factual finding open to the judge.

13. The judge accepted at paragraph 38 that there was no claim under the immigration rules because the requirements could not be met. This primarily related to his partner's immigration status. The judge then goes on to consider his partner's exercise of Treaty rights. The judge was satisfied that she was working and had been doing so for several months. The judge referred to remittances seen in her bank account. Again, this was a factual finding open to the judge.

14. I do not see anything to suggest that in accepting the relationship and the fact his partner was in employment the judge was influenced by the incorrect lower standard of proof referred to.

15. At paragraph 44 the judge refers to being satisfied the appellant was living in a family unit with his partner and their child. It was open to the judge to find as a fact that family life existed.

16. The judge also found that she was exercising Treaty rights and that she and her child had the right to remain in the United Kingdom on this basis. The judge found that at that stage they had been in a durable relationship for more than 2 years. The judge went on to say at paragraph 45 that in every likelihood he would be able to obtain confirmation of his right to reside under European Treaty provisions if he applied.

17. The judge however errs in conflating this with article 8. The immigration rules are intended to be article 8 compliant and have been passed through Parliament. The rules are not a complete code but the approach has been in appropriate circumstances to consider article 8 initially through the prism of the rules and then to see if there are particular circumstances which would render the decision in breach of article 8.

18. Into this must then be factored the public interest considerations set out in section 117 B. In any such consideration the judge is obliged to take these factors into account. It is in this context that the proportionality of the decision is to be evaluated.

19. The European Treaty provisions are distinct from the immigration rules and have not been supervised by Parliament. The criteria are completely different. For instance, the Treaty provisions do not have any minimum income concept akin to that in the rules. For this reason the situation is not akin to that in Chickwamba.

20. The judge found family life to exist. However the assessment of proportionality is fundamentally flawed. This is because the judge has sought to apply European Treaty provisions as if they were the same as the immigration rules and has failed to have regard to the public interest considerations in section 117 B. This is aside from potential errors in the fact-finding exercise because the wrong standard of proof was referred to. Consequently, the decision is not sustainable.

Decision

The decision of First-tier Tribunal Judge DP Herbert OBE materially errs in law in allowing the appeal under article 8 and this aspect of the decision is set aside. The matter is remitted to the First-tier Tribunal for a de novo hearing on the article 8 issue. The rejection of the other elements of the claim are maintained.

Francis J Farrelly

Deputy Upper Tribunal Date: 2 October 2018

Directions

1. Relist in the First-tier Tribunal at Taylor House excluding First-tier Tribunal Judge DP Herbert OBE.
2. This is to be a de novo hearing on the article 8 issue alone. The finding that the appellant is in a relationship with a Bulgarian national, Ms Gosheva and they have a child Benjamin, born on 25 October 2016, is maintained. The dismissal by the First-tier Tribunal of the appeal on the other grounds, including the underlying asylum claim are maintained.
3. It is anticipated the hearing should not last longer than 2 hours.
4. The appellant's representatives are to advise the tribunal if a Bulgarian interpreter is required.

Francis J Farrelly

Deputy Upper Tribunal Date: 2 October 2018