



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/12255/2017

THE IMMIGRATION ACTS

Heard at Liverpool
On July 3, 2018

Decision & Reasons Promulgated
On July 5, 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR S N
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hussain, Legal Representative
For the Respondent: Ms Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Procedure Rules) I make an order prohibiting the disclosure or publication of specified documents or information relating to the proceedings or of any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified. The effect of such an “anonymity order” may therefore be to prohibit anyone (not merely the parties in the case) from disclosing relevant information. Breach of the order may be punishable as a contempt of court.

2. The appellant claimed to be an Eritrean national. The appellant claimed to have arrived in the United Kingdom on May 17, 2009 and claimed asylum the same day. His appeal subsequently was heard by the First-tier Tribunal but was dismissed on July 6, 2010 and his appeal rights were deemed exhausted on September 13, 2010. He presented further submissions on April 30, 2015 but these were refused and on May 22, 2017 he lodged new submissions which the respondent accepted amounted to a fresh claim.
3. The respondent refused his protection and human rights claims on September 7, 2017 under paragraph 336 HC 395.
4. The appellant lodged grounds of appeal on November 23, 2017 under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. His appeal came before Judge of the First-tier Tribunal Shergill (hereinafter called "the Judge") on January 2, 2018 and in a decision promulgated on January 15, 2018 the Judge refused the appeal on all grounds.
5. The appellant appealed this decision on January 25, 2018. The appellant argued that the Judge's decision in respect of both the protection and human rights claims were flawed.
6. Permission to appeal was granted by Judge of the First-tier Tribunal Adio on February 6, 2018 on a limited basis, finding it arguable the Judge had arguably erred in her approach to article 8 ECHR in circumstances where it had been accepted the appellant and his partner were in a genuine and subsisting relationship and that they had a child together and his partner had been granted refugee status until February 15, 2018.

SUBMISSIONS

7. Mr Hussain submitted the Judge did not consider the partner's circumstances. The Judge erred when he said at para 61 that the partner would not have settled status for a few years because she was entitled to apply for settled status four weeks before the expiry of her leave (mid-January 2018) and he submitted her leave was likely to have been extended (in fact both she and her child have now been granted indefinite leave on April 16, 2018).
8. The Judge also erred by suggesting the family as a whole could go and live in Ethiopia but he failed to take into account she is a refugee and has now been settled in the United Kingdom for at least six years. At the date of the appeal hearing she was heavily pregnant with their second child (born April 2018) and there was no weight given to the fact the appellant provided support for his partner and child.
9. Ms Aboni submitted there was no error in law. The Judge had rejected the appellant's protection claim and found that his claim to come from Eritrea lacked credibility concluding the appellant was an Ethiopian national.
10. Having dismissed the appeal on protection and article 3 ECHR grounds the Judge concluded the appellant could not satisfy Appendix FM of the Immigration Rules but then considered the appeal outside of the Immigration Rules.

11. The Judge had regard to the best interests of the child and whilst the Judge may have erred regarding how long the partner would have to wait before she could apply for indefinite leave this was not material to the decision because instead of having to wait years for indefinite leave the period of separation would possibly be measured only in months. If it was not disproportionate to require the appellant to wait a few years then it would clearly not be disproportionate if the period was considerably less.
12. The Judge did consider the option of the whole family going to live in Ethiopia but made it clear this would be a matter of choice.
13. The appellant and partner had entered into a relationship in full knowledge that the appellant was here unlawfully and the Judge gave full consideration to section 117B of the 2002 Act and reached a conclusion that was open to him. The Judge had regard to the fact there was a genuine and subsisting relationship but ultimately concluded that the maintenance of immigration control where there were few, if any, positive factors under section 117B, outweighed the appellant's desire to remain here.
14. Having heard submissions from both parties I reserved my decision.

FINDINGS

15. The appellant had claimed to be an Eritrean national but in a detailed and well-reasoned decision the Judge rejected this claim and concluded that the appellant was an Ethiopian national who had spent most of his life living in that country.
16. Having dismissed this aspect of his appeal the Judge went on to consider whether the appellant came within Appendix FM of the Immigration Rules but it is common ground the appellant could not meet Appendix FM because neither the partner nor child had settled status at the date of hearing.
17. Mr Hussain submitted that the Judge had made three errors.
18. The first error was conceded by Ms Aboni but she submitted the error was not material. The finding by the Judge in paragraph 61 of her decision, that there could be a period of a few years until the partner became entitled to settled status, was incorrect but having found such a delay, against the background set out in the preceding paragraphs, the Judge found such a separation would not breach article 8 ECHR. I fail to see how a shorter separation would improve the appellant's situation in circumstances where the partner did not have settled status. The Judge factored in the possibility the appellant and partner/child would have to suffer a period of separation but concluded that was not disproportionate. There is no error in this approach.
19. The second point taken by Mr Hussain was that the Judge concluded it would be reasonable for the whole family to go and live in Ethiopia. This was not the primary finding of the Judge. It is clear from the Judge's assessment that the Judge concluded the child could remain with the appellant's partner in the United Kingdom for as long as she had leave to remain in the United Kingdom. The finding they could live together in Ethiopia was an alternative but not a requirement. The Judge did not state that was what the partner would have to do but she was obliged to consider it as an option in

light of the partner's limited status at the date of Hearing. Linked to this submission was the fact that she was a refugee but as Ms Aboni properly pointed out the partner had not fled from Ethiopia but was someone who had fled Eritrea. The fact she had been residing in this country for at least six years was a factor the Judge had regard to.

20. The final point raised by Mr Hussain was that the Judge failed to give weight to the support the appellant gave his partner especially bearing in mind she was heavily pregnant at the date of Hearing. The Judge's assessment under article 8 ECHR commenced at paragraph 46 and I am satisfied that the Judge did have regard to all factors. From paragraph 59 onwards the Judge considered section 117B of the 2002 Act. None of the findings under this section can be criticised.
21. Importantly, the Immigration Rules were not met and the relationship had been formed whilst the appellant was here unlawfully and given the status of the partner and child, at the date of the Hearing, I am satisfied that the Judge's conclusions were open to her.
22. In reaching this decision I have attached no weight to the fact that the appellant's partner now has indefinite leave to remain or that she has given birth to a second child is neither fact was before the original Judge. In the circumstances, I do not find there has been any error in law.

DECISION

23. There is no error in law and the original decision shall stand.

Signed

Date 03/07/2018



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I make no fee award as I have upheld the decision.

Signed

Date 03/07/2018



Deputy Upper Tribunal Judge Alis