



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/04664/2014

THE IMMIGRATION ACTS

Heard at Field House
On 28th April 2016

Decision & Reasons Promulgated
On 3rd June 2016

Before

Mr H J E LATTER
DEPUTY UPPER TRIBUNAL JUDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A C
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr A Chonan of Immigration Advice Service

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Devittie) allowing an appeal by the applicant on human rights grounds against the respondent's decision made on 25 June 2014 refusing to grant her asylum. The appeal was dismissed on asylum and immigration grounds. In this decision I

will refer to the parties as they were before the First-tier Tribunal, the applicant as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of Malawi born on [] 1996. She arrived in the UK on 25 September 2010 on a domestic worker visa valid until 17 September 2011. She was arrested on 3 May 2013, detained and served with notice of removal as an overstayer. On 22 May 2013 she claimed asylum on the basis that she was a victim of trafficking. She attended the screening interview on 29 May 2013 and her full interview on 3 October 2013. In the light of her claim that she had been trafficked she was referred to the competent authority and on 24 October 2013 it was held that there were reasonable grounds to believe that this was the case and she was granted a period of discretionary leave. In the respondent's decision letter of 25 June 2014 it was noted that the appellant had been receiving support from the Poppy Project and accepted that she was a victim of trafficking as claimed.
3. However, the respondent was not satisfied that the appellant was entitled to asylum as she was not a member of a particular social group within the Refugee Convention, and she had failed to demonstrate that the authorities in Malawi would be unable or unwilling to offer her protection or that it would be unreasonable to expect her to relocate in Somalia. The respondent found the appellant would not qualify for humanitarian protection or fall within articles 2 or 3 of the Human Rights Convention. She went on to consider article 8 but found that the appellant could not meet the requirements of the Rules and that there were no exceptional circumstances which might warrant consideration outside the Rules.

The Hearing Before the First-tier Tribunal

4. At the hearing of the appeal before the First-tier Tribunal the appellant submitted further evidence about the change in her family circumstances since arriving in the UK. She met her partner in February 2013, a citizen of Malawi, who came to the UK in 2002 as a student. He was subsequently granted indefinite leave in 2014. He is in full-time employment. They started living together in June 2014 and their child, a son, was born on [] 2015.
5. The judge accepted the appellant's evidence that this was a genuine relationship. The child's birth certificate was produced which confirmed that her partner was the father of the child. He attended the hearing and presented a witness statement confirming the relationship and saying that he had adequate means to maintain and accommodate the appellant and their child. He has obtained a degree in the UK and is employed as a software engineer. However, the judge found that he had not advanced any credible evidence to show that he would not be able to obtain employment in Malawi were he to accompany the appellant and their child upon their return. He found that even if her partner was minded not to abandon his life in the UK to join the appellant in Malawi, he would be able to provide effective

assistance for them whether financial assistance or in facilitating her contact with the members of his family network there. Both the appellant and her partner would have been well aware that her immigration status had yet to be resolved and there could be no certainty that they would be able to continue family life in the UK. For the reasons set out at [14], the judge found that it would be reasonable to expect the appellant's child to leave the UK.

6. The judge then went on to consider article 8. He accepted that the interests of the child were best served by both parents continuing to live as a family unit and he repeated that there were no obstacles to the appellant's partner returning to Malawi with his wife and child and that if his evidence that he held a degree in software engineering was true this would stand him in good stead in the employment market there. He accepted that the appellant's partner had completed his tertiary education in the UK and was in full-time employment and that his clear inclination would therefore be not to abandon the life he had built up in the UK in order to join his partner and child but, on the other hand, his parental instinct would dictate that he follow them to Malawi [17].
7. The judge said that he did not consider that the maintenance of effective immigration control was a compelling factor weighing in the public interest because the appellant had been found to be a genuine victim of trafficking. Further the relationship between them had developed in part at a time when the appellant had been granted discretionary leave outside the Rules.
8. It was argued on the appellant's behalf that her mental health and the implications of this were she compelled to return were factors to be taken into account in the assessment of proportionality. The appellant had been referred by her GP for psychological services to address her fear of returning to Malawi and the statements she had made that she would kill herself on return. It was further argued that consideration should therefore be given to the impact on her son in the event of them returning together which might result in the appellant being unable to care for him or have a detrimental impact on her ability to do so given that she had repeatedly set out she had no family and it had been accepted by the competent authority that she had been trafficked [19].
9. The judge commented that the appellant's partner had not produced any documentary evidence to support his contention that his income was well above the threshold of £22,000 per annum and that, consequently he was able to provide maintenance and accommodation for his wife and child without the need for recourse to public funds. He was not therefore satisfied that the financial requirements of the Rules could be met. The judge said that in the light of the lack of evidence to demonstrate the financial means of her partner the economic wellbeing of the UK was a factor that weighed heavily against the appellant in the assessment of proportionality.

10. He found that the appellant was a genuine victim of trafficking and that he was bound using the lower standard of proof to accord some weight to the medical report which raised the risk of the appellant not being able properly to care for her son because of her mental frailty. It did not seem to the judge that the fact that she would have the financial support of her partner would mitigate the risk and it might be that her mental state would be more stable if her partner were to return with her, noting that this was an agonising decision which as parents they had to make. The judge said that it was this consideration touching on the best interests of the child that was decisive in reaching his conclusion that, notwithstanding the considerable weight he attached the economic wellbeing of the UK, the potentially serious consequences to the child must outweigh the public interest in the economic wellbeing of the UK. For these reasons the appeal was allowed under article 8.

The Grounds and Submissions

11. In the grounds it is argued that the judge materially erred in law by allowing the appeal outside the Immigration Rules while dismissing the appeal on the same issue within the Rules. The grounds refer to the decision in AM (s117B) Malawi [2015] UKUT 260. They argue that the issues in para EX1 are mirrored in s117B(6) of the Nationality, Immigration and Asylum Act 2002 and that the judge has answered the same question with contradictory answers. In [14] of the decision the judge had found that it would be reasonable to expect the appellant's child to leave the UK but in [21] that it would be unreasonable and contrary to the best interests of their child to accompany them to Malawi.

12. Permission to appeal was granted by the First-tier Tribunal for the following reasons:

“The grounds complain that having found that it was reasonable to expect a child to relocate in Malawi in respect of the Immigration Rules 276ADE(1)(iv) no different result should have obtained re s117(B)(6) of the 2002 Act, so that the reasoning of the decision lacks coherence.”

13. Mr Tufan adopted these grounds arguing that the judge had erred in law by making contradictory findings on whether it was reasonable for the child to return to Malawi. He had considered article 8 outside the Rules without considering whether there were any compelling circumstances justifying such consideration when he had found that the appellant had been unable to meet the requirements of the Rules. Mr Chonan accepted that he was in some difficulties in trying to support the decision. It was, however, his submission that there were compelling circumstances which would justify the judge's decision and that if the First-tier Tribunal was set aside, it should be remitted for a fresh hearing before that Tribunal.

Consideration of whether the First-tier Tribunal erred in Law

14. I am satisfied that the First-tier Tribunal did err in law such that its decision should be set aside. When considering para EX1 the judge found for the reasons set out in [14] that it would be reasonable to expect the appellant's child to leave the UK but

when considering article 8 outside the Rules found that there were potentially serious consequences to the child leaving the UK outweighing the public interest in the economic wellbeing of the UK. These findings contradict each other. If there were such potentially serious consequences in the appellant returning to Malawi, it is hard to see how it could be reasonable to expect the child to return with her. The judge has therefore failed to give adequate reasons making it clear why he reached his decision.

15. Further, in the light of the judgment of the Court of Appeal in Secretary of State v SS (Congo) [2015] EWCA Civ 387 the judge erred by carrying out a freestanding article 8 exercise without properly considering whether there was a reasonably arguable case which had not been sufficiently dealt with under the substantive provisions of the Rules. In this context when considering the position outside the Rules the judge clearly failed to take into account his finding that it would be reasonable to expect the appellant's child to leave the UK.
16. For these reasons the judge erred in law and the decision must be set aside. Both Mr Tufan and Mr Chonan agreed that the decision should be remitted to the First-tier Tribunal for a full re-hearing. At the hearing Mr Tufan raised the issue of whether in fact there had been a right to appeal on human rights grounds in the light of the fact that the appellant had been granted discretionary leave. Mr Chonan indicated there was further evidence that he would wish to adduce in support of the appeal. I am satisfied the remittal of the First-tier Tribunal is the proper course to take. It will be for that Tribunal to consider what directions need to be issued. Any issues of jurisdiction can be raised before the First-tier Tribunal.

Decision

17. The First-tier Tribunal erred in law and its decision is set aside. The appeal is remitted to the First-tier Tribunal for reconsideration, by way of and a full re-hearing. No application has been made to vary or discharge the anonymity order made by the First-tier Tribunal and that order therefore remains in force.

Signed HJ E Latter

Date: 1 June 2016

Deputy Upper Tribunal Judge Latter