



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/26948/2015

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke-on-Trent
On 19 July 2016

Decision Promulgated
On 20 July 2016

Before

Deputy Upper Tribunal Judge Pickup

Between

Hyatt Kimanie Anthony
[No Anonymity Direction Made]

Appellant

And

Secretary Of State for the Home Department

Respondent

Representation:

For the Appellant: Ms N Nelson-Cofie, instructed by Calices Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Coates promulgated 6.1.16, dismissing the appellant's appeal against the decision of the Secretary of State, dated 14.7.15, to refuse his application for leave to remain in the United Kingdom on the basis of private and family life. The Judge heard the appeal on 16.2.15.
2. First-tier Tribunal Judge Keane granted permission to appeal on 7.6.16.
3. Thus the matter came before me on 19.7.16 as an appeal in the Upper Tribunal.

Error of Law

4. After hearing submissions on error of law, I reserved my decision, which I now give.

5. For the reasons briefly set out below, I find no material error of law in the making of the decision of the First-tier Tribunal such as to require the decision of Judge Coates to be set aside.
6. The grounds contend that the judge erred by having regard under section 55 of the Borders, Citizenship and Immigration Act 2009, of the best interests of the appellant's child living in Jamaica, when section 55 is limited to children who are in the UK and does not apply to children overseas. The judge did not assess the best interests of that child but stated at §21, "...it would be in his (the appellant's) best interests if the appellant were to return to Jamaica to live with and resume responsibility for his child."
7. In granting permission to appeal, Judge Keane found it arguable that the First-tier Tribunal Judge made an error of law in not applying the relevant statutory provisions and in embarking on a consideration of the best interests of the child in Jamaica, a child who at all material times resided overseas. "The judge made an arguable material error of law but for which the outcome of the appeal might have been different. The application for permission is granted."
8. One of the difficulties for the appellant pursuing this ground of appeal is that at §17 of the decision the judge noted that section 55 'technically' only applies to children in the UK, "it is generally accepted that the principle should be applied to all children who are likely to be affected by the decision under appeal. Counsel agreed with me in submissions that this principle would include consideration of (the child's) best interest."
9. In effect, the appellant is complaining that the judge took into account the best interests of one of his biological children when considering the best interests of another. Apart from the fact that the argument is unattractive, on the facts of this case I am not satisfied that there is any error of law in this regard, the appellant's representative agreeing that the judge should have regard for the best interests of that other child. No complaint is made that the judge omitted to have regard to the best interests of the appellant's biological child in the UK.
10. Reliance was placed by Ms Nelson-Cofie on T (s55 BCIA 2009 - entry clearance) Jamaica [2011] UKUT 00483 (IAC), where it was held that the statutory guidance of section 55 does not apply to children who are outside the UK. However, in that case the child was in Jamaica seeking to join her parent in the UK. Whilst it was accepted that the duty under section 55 did not apply, reference was made to the Secretary of State's guidance that overseas UKBA staff "must adhere to the spirit of the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding or present welfare that requires attention." ZH (Tanzania) [2011] UKSC 4, and other similar case law, places emphasis on the welfare of children as a primary consideration in all immigration decision-making. In T the Upper Tribunal rejected the suggestion that there was a "spirit of section 55" general duty under common law, it being too vague, but agreed that there was a duty to have regard to the best interests of T as a primary consideration. The case is certainly not authority for the proposition that to have regard for the welfare or best interests of a child who is outside the UK amounts to an error of law.

11. In the circumstances, I find no error of law in the judge having regard in general terms to the best interests of the appellant's child in Jamaica.
12. Another difficulty for the appellant is that it was also conceded by appellant's representative that the appellant could not meet the requirements of the Immigration Rules for leave to remain on the basis of private and family life, as noted by the judge at §19 of the decision. His representative solely addressed article 8 outside the Rules, without any apparent consideration as to whether there was any justification for doing so.
13. It is clear that at §21 the judge found no exceptional or compelling circumstances to justify a separate consideration of article 8 outside the Rules. It follows that the appeal would have to be dismissed. Any consideration in the decision of article 8 ECHR could only have been entirely in the alternative. The grounds of appeal make no complaint about and do not address this finding. No permission to appeal has been sought or given in respect of the judge's finding that there there is no basis for considering article 8 ECHR outside the Rules and so that part of the decision must stand as made.
14. It further follows from the above that any comments about taking into account the best interests of the child in Jamaica or the best interests of the appellant in returning to look after that child were not in fact material to the decision in the appeal. Inclusion of such considerations, whilst not within the scope of the statutory provision under section 55, do not bear on the finding that the appellant did not meet the requirements of the Rules and that there were no exceptional or compelling circumstances to justify consideration of family and/or private outside the Rules pursuant to article 8 ECHR.
15. In the circumstances, there is no merit in the sole ground of appeal and the appeal must fail.

Conclusions:

16. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.



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.

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.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed.



Signed

Deputy Upper Tribunal Judge Pickup