



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06554/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3rd May 2018

Decision & Reasons Promulgated
On 23rd May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

SIMON [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Pinder (Counsel)
For the Respondent: Ms K Pal (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Watson promulgated on 19th April 2017, following a hearing at Birmingham on 6th April 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon

the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Kenya, and was born on 27th October 1975. He appealed against the decision of the Respondent dated 28th February 2016 refusing his application for leave to remain in the United Kingdom on the basis of his family life.

The Appellant's Claim

3. The Appellant states that he came to the UK on a temporary visa in 2000 and has stayed here ever since. He has been living with his partner for fifteen years and married her in 2014. He has two children born to a UK citizen. The children and partner are all British citizens. They cannot be expected to leave the UK to go to Kenya. He was given leave to remain in the UK in 2013 and has worked and has shown that he is able to support his family. He is fully involved in family life and lives with his family. His partner is studying to become a mental health nurse and she would not be able to continue this if she had to leave the UK and go to Kenya with him. It would be wholly disproportionate to refuse his application because it interferes with his family life and it is not in the interests of his children.
4. The Respondent, however, rejected the Appellant's application in the letter of 28th February 2016 on the basis that he failed the suitability requirements as he has a conviction for drink driving in 2005 and did not disclose this on his application form. Furthermore, he did not satisfy the requirements for leave as a partner as he had not been able to show that he has been living with his partner for two years prior to the application. The Respondent did not accept that the relationship was genuine and subsisting. The Appellant also could not satisfy the parent Rule.

The Judge's Findings

5. The judge held that the Appellant's partner, Ms [M], has known throughout what the Appellant's immigration status was, knew him to be of Kenyan origin, and she had herself visited Kenya and it was reasonable to expect her to visit him there again, in a way that would not harm her interests, and the upbringing of the children. The judge held that, "they can remain in touch through modern media and can visit the country where both the Appellants were born to stay in touch with their father" (paragraph 45). With respect to the Appellant's private life, the judge held that the Appellant had only been in the UK since 2000, and there were no "very significant obstacles" to his integration in Kenya, were he to return there. It was accepted that he had British children born in the UK but there were no other obstacles. Moreover, "he and Ms [M] visited Kenya with the children in 2013 and the Appellant has returned for a visit in 2015. He has shown no personal difficulties in any return" (paragraph 44).
6. The appeal was dismissed.

Grounds of Application

7. The grounds of application state that the Tribunal failed to make clear findings on Section 117B(6) of the NIAA 2002, and in particular whether or why it would be in the circumstances reasonable for British children to leave the UK in this case.
8. On 10th January 2018 permission to appeal was granted by the Upper Tribunal.

Submissions

9. At the hearing before me on 3rd April 2018, Ms Pinder, appearing on behalf of the Appellant, submitted that the judge did not accept that the relationship between the Appellant and Ms [M] was continuing, such that the Appellant could not succeed under the partner route. However, if one looks at paragraph R-LTRPT of Appendix FM, it is clear that, when dealing with the “requirement for limited leave to remain as a parent, this provision also refers to “parent or partner” such that the appellant’s ‘partner’ role should also have been considered. Second, apart from this error in the construction of the applicable Rule, the judge also erred in concluding that, given that he had found that the Appellant “has a genuine relationship with his children and is involved and intends to continue to be involved in the upbringing,” that, “in these circumstances I find it is not reasonable for them to leave the UK with their father” (paragraph 47). The question is not whether it is “reasonable for them to leave the UK” but whether it is “unreasonable” for them to leave the UK. In any event, the conclusion that it was “reasonable” was not borne out by the fact that EX.1(a) refers to a “genuine and subsisting relationship”, and if this was found by the judge to have been in existence, it was not in the children’s “best interests” that he, the Appellant, as their father, leave the UK.
10. For her part, Ms Pal accepted that the judge had made a positive finding that the Appellant, as the father of the children, had a relationship with them. However, he had then gone on to say that “the children can remain in touch through social media and would be able to visit Kenya as they have done previously” (paragraph 51). That finding was open to the judge.
11. In reply, Ms Pinder submitted that, in the face of the glaring omission to recognise the significance of a “genuine and subsisting relationship” as stipulated at Section 117(vi), the judge had failed to carry out a balancing exercise to show why the Appellant’s immigration history was such that the “best interests” of the children could be overridden.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007), such that I should set aside the decision and remake the decision. My reasons are that on the basis of what the judge has stated at paragraph 47, namely, that the Appellant “has a genuine

relationship with his children and is involved and intends to continue to be involved in their upbringing”, the fact that these British children also have “a relationship with their mother” does not mean, that as a matter of law, “it is not unreasonable for them to leave the UK with their father”.

Remaking the Decision

13. I remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. This is a case where the judge found as a fact that there was a genuine relationship between the Appellant and his children. He was involved in their lives. He intended to be involved in the future also. The children themselves were British citizens.
14. In **MA (Pakistan) [2016] EWCA Civ 705**, the Court concluded that it was inherent in the reasonableness test in section 117B(6) that the court should have regard to wider public interest considerations and in particular the need for effective immigration control. The Court felt obliged to follow another decision of the Court of Appeal in **MM (Uganda) v Secretary of State for the Home Department [2016] EWCA 617**. That was a case concerning foreign criminals which engaged section 117C rather than 117B, and in particular to the need in section 117C(5) to show that it would be "unduly harsh" rather than simply not unreasonable, to require the qualifying child to leave the UK. However the court in **MA (Pakistan)** considered that the structure of the relevant provisions was sufficiently similar to require a common approach.
15. Accordingly, since the Court in **MM (Uganda)** had held that wider public interest considerations relating to effective immigration control could be taken into account when deciding whether or not it was unduly harsh to send an applicant back to the country of origin, so likewise should they be taken into account when considering under section 117B whether it is not unreasonable to do so.
16. But the court also held that section 117B(6) was a self-contained provision in the sense that where the conditions specified in the subsection are satisfied, the public interest will not justify removal. The wider public interests considerations can only come into play via the concept of reasonableness in section 117B(6) itself.
17. I find both that it is not reasonable to for a “qualifying child” to leave the United Kingdom and that the public interest does not justify the Appellant’s removal because the children’s key welfare needs are to remain in the care of both parents, which includes the British citizen mother as well, and to have both their parents continue to look after them. The mother cannot leave the UK and go to Kenya. She is studying to become a mental health nurse. It has been the Appellant’s case that the children’s mother would not be able to continue her studies if she had to leave the UK. The children have a genuine and subsisting relationship with both parents. In these circumstances the public interest in the maintenance of immigration control is not an overriding factor and it would not be reasonable for the children to relocate outside the United Kingdom, or feasible to continue, through modern means of communication. This is because of the level of continuing interests and support to which they are used to from their father, whilst he has been physically present in the

UK. Taking into account all the relevant factors, I find that the appeal must be allowed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity direction is made.

Signed

Dated

Deputy Upper Tribunal Judge Juss

18th May 2018

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable.

Signed

Dated

Deputy Upper Tribunal Judge Juss

18th May 2018