



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/20326/2016

THE IMMIGRATION ACTS

Heard at Field House
On 27 June 2018

Decision & Reasons Promulgated
On 10 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOVON JANELL BOYD
(ANONYMITY DIRECTION NOT MADE)

Claimant

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Claimant: In person

DECISION AND REASONS

1. The Secretary of State appeals from the decision of the First-tier Tribunal (Judge Norton-Taylor sitting at Taylor House on 17 January 2018) allowing on human rights (Article 8 ECHR) grounds the claimant's appeal against the decision of the Secretary of State to refuse to grant him leave to remain as the spouse of a British national, in circumstances where the claimant had entered the United Kingdom as a visitor on 20 November 2015, and the minimum income requirement was not met. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the claimant requires anonymity for these proceedings in the Upper Tribunal.

Relevant Background Facts

2. The claimant is a citizen of the USA, whose date of birth is 22 March 1987. In 2013, he met online 'LN', a British national with four minor children by a previous relationship. Their relationship developed to a point where LN flew to the United States without her children to visit him in March 2014, and they got married during her visit. The couple went on to have two children of their own. The first child was born in the UK in December 2015, and the second child was born in the UK in January 2017. Prior to the birth of their first child, LN made four visits altogether to the USA on her own, leaving her children in the care of her mother and sister. The claimant also visited LN in the UK when he had time off from his full-time employment. He is recorded as having entered the UK on a visit visa valid from 6 August 2015 until 6 February 2016, and as having last entered the UK on 26 November 2015 on a visit visa valid until 26 May 2016.
3. As found by the First-tier Tribunal Judge, the claimant entered the UK in November 2015 as a genuine visitor, intending to return to the USA to resume his full-time employment after the birth of his first child with LN. However, he changed his mind after the birth of the child, and decided that he wished to remain here after all. He sought legal advice and decided to apply for leave to remain. At around the same time, he resigned from his full-time employment in the USA in which he was receiving an annual salary of US\$70,000.
4. The application for leave to remain was made in February 2016, and the refusal decision was issued on 8 August 2016. The Home Office said he did not qualify for leave to remain under Appendix FM because, among other things, he had entered the UK as a visitor. While it was acknowledged that his British family member was living in the UK, having entered the UK as a visitor, he had no legitimate expectation of being able remain in the UK for his family and private life to continue once his visit visa had expired. Accordingly, from the outset, all parties should have been aware of the possibility that family life might not be able to continue in the UK. It was open to his wife to return with him to the USA whilst he applied for entry clearance to return to the UK on the basis of their relationship. Alternatively, she could remain in the UK, with their son and her children from the previous relationship, to support any application that he made from abroad for entry clearance to return with a view to settlement. While he remained in the USA, he would be able to maintain their relationship through modern means of communication.

The Hearing Before, and the Decision of, the First-tier Tribunal

5. Judge Norton-Taylor received oral evidence from the claimant and LN. In his subsequent decision, he held that the evidence that he had received had been broadly consistent, plausible, and reliable. The Judge's findings of fact are set out at paragraphs [27]-[50]. He found that the father of the four step-children had refused to give consent for his children to leave the UK in the past; but that on the basis of LN's oral evidence, he had changed his view on this. However, he had not in fact provided written consent for such a course of action. The Judge inferred that his agreement was

in principle only, and that whether in fact he would give permission was to an extent still speculative.

6. He found that LN was in receipt of benefits, namely Child Tax Credit, Child Benefit and minimal Housing Benefit. She had no savings or other assets. As regards the claimant, he had family members in the USA, including two daughters who lived with their mother in that country. He accepted that the claimant had been employed in a highly skilled position as a Structural Designer in the Nuclear Power Industry, and he had been employed in this field for some 10 years before coming to the UK; and that he resigned from this job in late February 2016 when he decided that he wished to remain in the UK.
7. The Judge went on to hold that the claimant did not have a viable Article 8 claim under the Rules. At paragraphs [62] and following, the Judge set out his conclusions on an Article 8 claim outside the context of the Rules.
8. At paragraphs [69]-[72], the Judge addressed the best interests of the children. He said that of particular significance was the age of the two eldest step-children, who were now into their teenage years. Both had lived in the UK all their lives. The eldest was quite clearly at a critical stage of her educational career. The other child was only just over a school term away from embarking on her GCSE course, which would start in year 10, and he regarded her educational stage as being very important. Both girls would have very significant ties to this country, both educational and social/cultural.
9. The Judge continued, in paragraph [72]: *“Although the precise nature of the direct contact that the stepchildren have with their father is not entirely clear, and it is now less regular than it was in the past, it is nonetheless in their best interests to be able to actually see him whenever that might be possible. Even on the assumption that he would actually give consent for them to go and live in the USA, it is extremely unlikely that he would go and visit them there. Visits by them back to the United Kingdom would clearly be problematic as regards issues of funding and such like.”*
10. At paragraphs [81]-[103], the Judge addressed section 117B(6) of the 2002 Act and the Secretary of State’s Guidance published in August 2015 on the circumstances in which it would be unreasonable to expect a British citizen child to leave the UK. In the course of an extensive discussion, the Judge made reference to **MA (Pakistan) [2016] EWCA Civ 705** and **SF & Others (Guidance, post-2014 at) Albanian 2017 UKUT 00120 (IAC)**.
11. The Judge concluded, at paragraph [95], that it was not reasonable to expect the British children in this case to leave the UK, with particular emphasis being placed on the two eldest step-children and the SSHD’s Guidance. He held, at paragraph [96], that in this way, the claimant himself satisfied section 117B(6). As this was a free-standing provision, the claimant succeeded in his Article 8 case outside the context of the Rules.
12. At paragraph [97], he said that if it was said that this Guidance would not apply to the claimant’s case because LN could remain in the UK and care for the children while he left (even temporarily) in order to make an entry clearance application, *“I make an alternative conclusion on section 117B(6).”* At paragraph [103], the Judge held as follows: *“On this alternative basis, the [claimant] still succeeds in his case. Once the requirements of*

section 117B(6) are met, the possibility of the [claimant] making an entry clearance application does not arise, because satisfaction of the statutory provision is sufficient, in light of MA (Pakistan)."

The Application for Permission to Appeal

13. A member of the Specialist Appeals Team settled an application for permission to appeal on behalf of the SSHD. She pleaded that the Judge had erred in finding that the removal of the claimant to seek the appropriate entry clearance would involve a disproportionate interference in his family life. Clearly, the effect on the stepchildren of the claimant returning to seek entry clearance would be minimal as he had only been in the UK since the end of 2015. With regard to the two children born to the claimant and his wife since 2015, it was accepted that they were British, but again there is no requirement for them to leave the UK while the claimant made the appropriate application. The Judge had unduly speculated about the success or otherwise of a future entry clearance application by the claimant, and this was a material error affecting the proportionality assessment.

The Grant of Permission to Appeal

14. On 24 April 2018, First-tier Tribunal Judge Parkes granted permission to appeal as in his view the grounds were arguable. He observed that the first question to be addressed was whether the children would have to leave the UK. If not, the question of reasonableness did not arise. He continued: *"If not, the issues under Chen may arise and need to be addressed but were not. The financial requirements under Appendix FM and FM-SE have been upheld and are a powerful factor in the proportionality exercise."*

The Hearing in the Upper Tribunal

15. The hearing before me consisted of two stages. The first was to determine whether an error of law was made out. I ruled in the Secretary of State's favour on this issue, and my written reasons for so finding are set out below. I then moved on to the second stage, which was to hear further evidence and submissions with a view to remaking the decision.

The Reasons for Finding an Error of Law

16. I am persuaded that the Judge erred in law in the respects identified by Judge Parkes when granting permission. I consider that the Judge misdirected himself in law in stating that the satisfaction of the requirements in s117B(6) was sufficient to preclude the possibility of the claimant returning on his own to the USA to make an application for entry clearance. The case advanced in the refusal decision was that it was reasonable and proportionate for the claimant to adopt this course in circumstances where he had entered the UK as a visitor and - as both he and his wife were well aware - there was therefore no legitimate expectation of being able to carry on family and private life after the expiry of his visit visa. Since the spouse and the children were not expected to leave the country, and they would not in practice be forced to do so by the claimant going back to the USA to seek the correct entry clearance, s117B(6) did not,

and does not, operate so as to nullify the public interest in requiring this course of action to be followed.

The Remaking of the Decision

17. There was no challenge to Judge Norton-Taylor's primary findings of fact, and so the further evidence which I sought to elicit from the claimant with Mr Walker's assistance was directed at teasing out the related questions of (a) whether there were insurmountable obstacles to the whole family relocating to the USA; and (b) the potential difficulties which the claimant would face in seeking to rejoin his family in the UK.
18. The claimant explained that he knew from an early stage that a barrier to him carrying on married life in the UK was an inability on the part of his wife to meet the minimum income requirement. Accordingly, their initial plan was for the family to relocate to the USA, where he was earning US\$70,000 a year. But this plan was thwarted by the natural father of the four stepchildren refusing to give his written consent to them leaving the UK. It was a requirement of the US authorities that the stepchildren should have written consent from their natural father to settle in the USA.
19. Another obstacle now was that the two oldest stepchildren had reached a critical stage in their education. The oldest child had just completed her GCSEs, and had been accepted on a place at a sixth-form college, and the next oldest child was going to be taking her GCSEs in two years' time.
20. The claimant told me that he had graduated with a degree in Computer-Aided Drafting & Design. He had 10 years' experience working in the power generating industry in the USA. He had lived with his parents at Alabama at weekends, and he had an apartment in Kansas where he worked during the week. His job was doing structural design for a nuclear power company. After his appeal was allowed by the First-tier Tribunal, he had secured a number of job offers. In order to take things further he needed a national insurance number, and a document from the Home Office to say that he had a right to work. But, he did not have these because of the Home Office appealing to the Upper Tribunal. The potential job offers were in the field of Computer-Aided design, and the salary levels were between £30-40,000 per annum.
21. In his closing submissions on behalf of the Secretary of State, Mr Walker acknowledged that LN faced a great deal of difficulty in proceeding down the route suggested in the refusal decision, and he said it was open to me to find that requiring the claimant to return to the USA to seek entry clearance would be disproportionate.
22. I ruled that the claimant's appeal should be allowed on remaking, with written reasons to follow.

Reasons for Allowing the Appeal on Remaking

23. No issue was taken by the Secretary of State with regard to Judge Norton-Taylor's analysis of the claimant's Article 8 claim outside the Rules, with the exception of the

discrete issue of whether it was reasonable and proportionate to require the claimant to return to the USA to seek entry clearance as a spouse.

24. Ordinarily, it is reasonable to require someone in the claimant's position to return to their country of origin to obtain the correct entry clearance.
25. However, as matters stood at the date of the hearing in the First-tier Tribunal, the only basis on which the claimant could apply for entry clearance to the UK was that there were insurmountable obstacles to family life being carried on in the USA, since there was no foreseeable prospect of the minimum income requirement being met.
26. But no useful purpose from an immigration control prospective was or is served in requiring the claimant to return to the USA to make an application for entry clearance on this particular basis. It is rarely going to be proportionate to require a family member to return to his or her country of origin to make an EX.1-type application, and it is not proportionate in this case, as Mr Walker accepts. The proportionate response is to grasp the nettle now. I find that there are very significant difficulties which would be faced by the claimant and his spouse in continuing their family life together outside the UK. The first is that they do not have written consent from the natural father of the stepchildren for these children to accompany him to the USA, and it is clearly unpalatable that the family should be split up, with the four stepchildren having to remain in the UK. Secondly, in the event that the first obstacle could be surmounted (which, as Mr Walker agreed, might involve a contested application to the Family Court for a Court Order permitting the couple to take the four stepchildren to the USA against the wishes of their natural father) very serious hardship for the couple would be entailed by them having in effect to drag their two eldest children to the USA against their wishes and contrary to their best interests.
27. The unchallenged evidence of the claimant before me also illuminates another reason why it is disproportionate to require him to return to the USA to seek entry clearance. At the time of the hearing before the First-tier Tribunal, LN had applied for a Carer's Allowance for the care which she provides to her mother. The claimant's evidence is that she has been successful in this application, and is now receiving a Carer's Allowance. Accordingly, the claimant no longer has to demonstrate compliance with the financial requirement set out in E-ECP.3.1, namely that his spouse has a specified gross annual income of at least £18,600 per annum.
28. Although the claimant is not currently financially independent because he does not have permission to work, he is a highly skilled migrant who is likely to be able to secure an offer of permanent and full-time employment at an annual salary well in excess of £18,600 per annum.
29. In conclusion, for the reasons given above, I allow the claimant's human rights claim outside the Rules. The decision appealed against does not strike a fair balance between the rights and interests of the claimant and affected family members in the UK, and, on the other hand, the wider interests of society. It is not proportionate to the legitimate end sought to be achieved, namely the protection of the country's economic well-being and the maintenance of firm and effective immigration controls.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

The claimant's appeal is allowed on human rights (Article 8) grounds.

I make no anonymity direction.

Signed

Date 2 July 2018

Judge Monson

Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal on re-making, and because a fee has been paid or is payable, I have considered making a fee award and I have decided to maintain the reduced fee award of £40 which was awarded by Judge Norton-Taylor as this appeal has ultimately succeeded on a different basis than the basis upon which the original application to the Secretary of State was made.

Signed

Date 2 July 2018

Judge Monson

Deputy Upper Tribunal Judge

Date: 2 July 2018