



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/26242/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11 May 2018

Decision & Reasons Promulgated
On 22 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

RAPHAEL OLUFUNSHO OLANREWaju
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Noor (counsel) instructed by IRAS & Co
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Parkes promulgated on 21 September 2017, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 04/10/1985 and is a national of Nigeria. On 29 November 2016 the Secretary of State refused the Appellant's application for leave to remain in the UK.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Parkes ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 22 March 2018, sitting as a Judge of the First-tier Tribunal, I gave permission to appeal stating

1. The Appellant seeks permission to appeal, (in time), against a Decision of the First-tier Tribunal (Judge Parkes) who, in a Decision and Reasons promulgated on 21 September 2017 dismissed his appeal against the Secretary of State's decision to refuse his application for leave to remain in the UK.

2. The grounds assert that the Judge failed to give adequate reasons for his decision; that the Judge does not correctly apply section 117B of the 2002 Act; that the Judge's article 8 proportionality assessment is flawed; that the Judge has failed to take proper account of the best interests of the appellant's child.

3. The Judge's findings of fact are set out between [11] & [19] the decision. It is arguable that the Judge does not carry a clear analysis of the immigration rules nor does the Judge clearly set out the factors considered in the proportionality assessment of the article 8 ECHR grounds of appeal. Between [16] and [19] the Judge assesses the best interests of the appellant's child. It is arguable that his assessment is inadequately reasoned.

4. The grounds of appeal identify an arguable error of law. Permission to appeal is granted.

The Hearing

5.(a) For the appellant, Mr Noor moved the grounds of appeal. He told me that it is conceded that the appellant cannot meet the eligibility criteria for leave to remain under appendix FM, but this case turns entirely on section 117B(6) of the 2002 Act because the appellant has a genuine and subsisting relationship with a British citizen child. He told me that if it is not reasonable for the child to leave the UK then there is no public interest in the appellant's removal.

(b) He told me that the material error of law in this decision is that the Judge failed to consider whether it is reasonable for the British citizen child to leave the UK. Instead the Judge proceeded solely on the basis that the appellant will leave, and the child will stay. He told me that the Judge placed undue emphasis on the appellant's poor immigration history and was wrong to find, at [18] of the decision, that the appellant's decision to remain in the UK without leave is a crime.

(c) Mr Noor reminded me of the respondents Immigration Directorate Instructions on family migration. He told me that the Judge failed to carry out a proper proportionality assessment. He urged me to set the decision aside and to remit the case to the First-tier so that a decision can be made focusing on section 117B(6) of the 2002 Act

6. (a) For the respondent, Ms Everett told me that the decision does not contain errors. She told me that the Judge placed weight on the conduct of the appellant, but his findings about the appellant's conduct does not infected his findings in relation to the best interests of the child. She told me that he approached the case on the correct basis, which is that the child will not be compelled to UK.

(b) Ms Everett told me that there was no evidence that the child's welfare will be compromised if the appellant leaves the UK. She told me that it is open to the appellant to regularise his stay. She told me that the Judge applied the correct test. She urged me to allow the decision to stand and to dismiss this appeal.

Analysis

7. s.117B(6) of the Nationality, Immigration and Asylum Act 2002 says

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

8. The guidance given by the respondent in the IDIs on Family Migration (February 2018) is that the questions a decision maker should pose are:

(i) is there a genuine and subsisting parental relationship?

(ii) is the child a British citizen or have they lived in the UK for a continuous period of at least 7 years?

(iii) will the consequence of the refusal of the application be that the child is required to leave the UK?

(iv) would it be reasonable to expect the child to leave the UK. In many cases where one parent has a right to remain in the UK, the child would not leave?

9. The respondent's guidance suggests that the test is whether the child would be likely to leave rather than actually be required to leave. The Home Office now say in those circumstances EX.1 (a) would not apply but the impact on the child of the appellant's departure from the UK should be considered taking into account the best interests of the child as a primary consideration and if refusal would lead to unjustifiably harsh consequences, then leave can be granted on the basis of exceptional circumstances.

10. It does not follow that section 117(6) should be interpreted in the same way as the SSHD interprets his immigration rules. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was held (see [19]) that when applying section 117B(6) only three questions needed to be asked as long as the applicant was not liable to deportation, and those questions are

- (i) is there a genuine and subsisting parental relationship?
- (ii) is the child a British citizen or have they lived in the UK for a continuous period of at least 7 years?
- (iv) would it be reasonable to expect the child to leave the UK?

11. The Judge's findings of fact start at [11] of the decision. Between [11] and [15] the Judge dwells on the appellant's immigration history. At [16] the Judge mentions the best interests of the child for the first time. Although it is not disputed that the appellant's child is a British citizen, there is no clear finding that the appellant's child is British. There is at least a suggestion that the appellant now has two British citizen children.

12. At [19] the Judge applied the wrong test. In the first sentence of [19] the Judge says that there is no expectation that the appellant's child has to leave the UK. That is a reversal of the test in section 117B(6). Following the wording of section 117B(6) the appellant has to establish that he has a genuine and subsisting relationship with a British citizen child. Once that is established the test is whether or not it is reasonable for the child to leave the UK. Those are not the questions that the Judge addresses in the decision.

13. The decision therefore contains a material error of law. I set it aside.

14. I consider whether I can substitute my own decision, but find that none of the Judge's findings of fact stand because they dwell on the appellant's immigration history rather than on the correct test.

Remittal to First-tier Tribunal

15. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

16. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re-hearing is necessary.

17. I remit this case to the First-tier Tribunal sitting at Birmingham to be heard before any First-tier Judge other than Judge Parkes.

Decision

The decision of the First-tier Tribunal is tainted by material errors of law.

I set aside the Judge's decision promulgated on 21 September 2017. The appeal is remitted to the First-tier Tribunal to be determined afresh.

Signed *Paul Doyle*

Date 17 May 2018

Deputy Upper Tribunal Judge Doyle