



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/28755/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 22 June 2018

Decision & Reasons Promulgated  
On 31 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

MR D A O  
(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Ms Z. Kiss, Senior Presenting Officer

For the Respondent: Mr R. Arkhurst, counsel instructed by Caulker & Co

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**DECISION & REASONS**

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1. The Respondent to this appeal, to whom I shall refer as the Claimant, is a national of Nigeria, born on 24.1.84. He claims to have been trafficked to the United Kingdom on 4 September 1999. The Claimant formed a relationship with a woman, KO, who gave birth to their daughter, AO on 18.7.10 and he then formed a different relationship with a British citizen who gave birth to two further daughters: OA, born

on 14.5.14 and MV, born on 2.7.17. The Claimant made an application for leave to remain on the basis of his private life in the UK on 26 November 2014. This application was refused in a decision dated 10 August 2015.

2. The Claimant has a number of convictions, culminating in a conviction for robbery at Isleworth Crown Court on 7 April 2017 in respect of which he was sentenced to 18 months imprisonment. The Secretary of State on a date unknown issued a decision to deport although it is unclear whether or not this has been served on the Claimant. However, given that the Claimant has appealed against his robbery conviction and the appeal was pending before the Court of Appeal, when the appeal came before the First tier Tribunal Judge for hearing he proceeded to determine the appeal on the basis of the Claimant's private life.

3. The appeal came before Judge Aujla of the First tier Tribunal for hearing on 7 March 2018. In a decision and reasons promulgated on 13 March 2018, the Judge allowed the appeal on human rights grounds with reference to Article 8.

4. The Secretary of State sought permission to appeal to the Upper Tribunal, in time. The grounds in support of the application for permission to appeal are not particularly clear but appear to be asserting that the on Judge erred:

(i) in finding that the suitability requirement of the Rules was met on the basis that the Claimant is a victim of trafficking and that the failure to deal adequately with the suitability finding is an error of law and impacts on the remaining findings;

(ii) in finding that the Claimant satisfies E-ECPT 2.4. the Judge failed to consider the guidance in GD (Ghana) [2017] EWCA Civ 1126 at [51];

(iii) in finding at [29] and [31] that the Claimant is in regular contact with his children and an integral part of their lives the Judge failed to give clear reasons in light of the fact that this was only for a short period of 9 weeks at the date of hearing given that the Applicant was detained from 23 January 2017 to 5 January 2018 [21]; and

(iv) the Judge failed to give clear reasons as to how the Claimant meets the high threshold set out at paragraph 276ADE(vi) of the Rules.

4. Permission to appeal was granted by First tier Tribunal Judge Parkes in a decision dated 30 April 2018 on the basis that:

*"4. It would help clarify matters if the Secretary of State were to make a decision on the Appellant's deportation and other outstanding matters. That said it is arguable that the Judge erred on the Appellant's status in the UK and overstated the Appellant's contact/role with his children in assessing their best interests or the effect of those on the public interest."*

*Hearing*

5. On behalf of the Secretary of State, Ms Kiss sought to rely on the grounds of appeal in their entirety. She submitted that the Presenting Office specifically raised the suitability requirements at [28]. Whilst prior to the hearing the claim to be a victim of trafficking was accepted, this does not mean the suitability requirements are to be set aside and they are compulsory. The criminal convictions are set out at [4] and the Claimant's PNC had been submitted at an earlier hearing. There are a number of outstanding issues which have yet to be resolved finally, including an asylum application and deportation. The parties were then informed by the Claimant that his appeal against his criminal conviction had been dismissed in April 2018. Ms Kiss submitted that there was cogent evidence before the Judge that the Claimant was unable to meet the suitability requirements. The fact that he had unfortunate teenage years from the age of 15 does not overcome the suitability requirements. The finding that the Claimant would be granted leave as a victim of trafficking is an error of fact given that the Claimant's representatives and the Claimant were aware that no leave had been granted, but this had not been disclosed to Tribunal.

6. At [28] the Judge found that there was no witness statement from either partner. Whilst there was a Child Arrangement Order, it is quite restrictive and was made before the Claimant was convicted of the robbery. At [27] the Judge found that the Claimant stated he was in regular contact with the children but he was living in Leeds and the children live in Truro. The Claimant was in prison from January 2017 to January 2018 and it was far from clear how he could he afford to get his daughter accompanied to visit him in HMP Wandsworth or Maidstone.

7. Ms Kiss submitted that paragraph 276ADE is stringent but had not been properly addressed by the Judge

8. Ms Kiss further submitted that if I were to find an error of law she would seek to make an application pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, given that a child protection issue was raised in the Judge's sentencing remarks, which does not appear to have been before the First tier Tribunal Judge and that these post date the Family Court Order.

9. In response, Mr Arkhurst submitted that he had been taken by surprise by the evidence intimated by the Presenting Officer. He submitted that the Claimant has been accepted as a victim of trafficking by the Secretary of State although it is accepted that leave does not automatically follow and that the Claimant has an asylum claim and deportation claim pending. He submitted that the Claimant has contact with two children on a weekly basis and contact on a monthly basis pursuant to a Child Arrangements order. Notwithstanding the stringent test under paragraph 276ADE(vi) there was a positive finding and also a positive finding the Claimant has a relationship with three children that required consideration, bearing in mind the jurisprudence and section 55 of the BCIA 2009. Mr Arkhurst further submitted that the Claimant had been put in a wholly unsatisfactory position. As nothing will be

progressed because the police cannot make any further investigations until there has been a decision on his asylum claim.

10. In her reply, Ms Kiss clarified that the Claimant had been released on 5 January 2018 after being in prison since August 2017.

11. I reserved my decision, which I now give with my reasons.

### *Findings*

12. I find material errors of law in the decision of the First tier Tribunal Judge. At the outset, it should have clear to both the parties and the Judge that an adjournment may have been appropriate in accordance with the overriding objective, given that the Claimant had both an outstanding asylum claim, based on his bisexuality and was awaiting the outcome of an appeal to the Criminal Court of Appeal in respect of his conviction for robbery. Moreover, whilst Ms Kiss asserted that leave had been refused in respect of the fact that the Claimant had been found to be a victim of trafficking on 11 December 2017 there was no evidence on this issue before the First tier Tribunal. Consequently, there were and remain a number of unresolved issues which are entirely pertinent to a fair and proper determination of the Claimant's immigration status. However, permission to appeal to the Upper Tribunal was neither sought nor granted on this basis.

13. Even if the Judge was correct to proceed with the appeal in respect of the Claimant's private life, I find that the Judge erred in finding at [30] that the Claimant satisfies the requirements of E-LTRPT 2.3.(b) of Appendix FM given that it was argued that he was unable to meet the suitability requirements due to his criminal convictions. Whilst the date of decision preceded the last two convictions, one of which was under appeal to the Court of Appeal, it was clearly argued by the Presenting Officer at [23] and addressed by the Respondent's representative in his submissions at [24] and so required determination in the form of a finding by the Judge.

14. Similarly, I find that the Judge erred at [35] in concluding that the Claimant satisfied the requirements in paragraphs 276ADE (vi) of the Rules and that in view of his particular circumstances and the decision that he is a victim of trafficking, the suitability requirement should not be considered as applicable. S-STR 1.1. to 1.8 are in mandatory terms and are expressly included at paragraph 276ADE(1)(i) and so cannot simply be disapplied.

15. As to the approach of the Judge to the Claimant's relationship with his children, the Judge was aware that the Claimant had been imprisoned but recorded his evidence at [21] that his children had been to see him in prison. The Judge further gave reasons at [28]-[32] for his findings that the Claimant was in regular contact with all three children [29]; that he found his evidence to be credible that he was taking and continued to take an active role in the children's upbringing [30] and at [31] that it was

in the children's best interests for the Claimant to be involved in their welfare and upbringing. The Judge further found at [32] for the same reasons that the Claimant had established family life with his children.

16. Given Ms Kiss' helpful clarification that, contrary to the assertion in the grounds of appeal, the Claimant spent up to 6 months in prison rather than 1 year and in light of the fact that the Judge had the opportunity to hear the Claimant give evidence and found him to be credible, for sustainable reasons, I find no error of law in this respect.

*Decision*

17. The Judge's decision and reasons contains material errors of law for the reasons set out at [12]-[14] above. The decision is set aside and remitted to the First tier Tribunal.

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DIRECTIONS

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1. The appeal is to be listed for a CMRH in order to determine:

- (i) whether there has been any progress by the Secretary of State in respect of a decision on the Claimant's asylum application;
- (ii) whether the Secretary of State intends to make and serve a deportation order;
- (iii) whether the Secretary of State intends to give the Claimant leave to remain on the basis that he is the victim of trafficking;
- (iv) the timeframe for the above decisions.

2. The findings of fact by First tier Tribunal Judge Aujla at [28]-[31] as to the Claimant's relationship with his children are preserved as a starting point, but can be built upon in light of further evidence. The issue of the proportionality of removal, or deportation, remains live.

*Rebecca Chapman*

Deputy Upper Tribunal Judge Chapman

10 July 2018