



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/30985/2015

THE IMMIGRATION ACTS

Heard at Field House
On 13th July 2018

Decision & Reasons Promulgated
On 1st August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MR THABANI MICHAEL KAINGA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No Representative, Litigant in person

For the Respondent: Ms L Kenny, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Ross promulgated on 29th January 2018 dismissing his appeal against a further application for leave to remain on the basis of his partnership with a British citizen and his being a parent of a British child as well as a stepfather to other British children.
2. The Appellant appealed against this decision and was granted permission to appeal by First-tier Tribunal Judge Doyle in the following terms:

“The Grounds of Appeal argue that the judge failed to take account of relevant matters; that the proceedings were tainted by unfairness that the judge reached irrational conclusions.

It is arguable that the decision that the Appellant is not in a relationship with his partner and is not the father of his partner’s youngest child are crucial matters which were not put to the Appellant. It is arguable that the judge does not give adequate reasons for dismissing the evidence contained in the birth certificate of the Appellant’s partner’s youngest child.

If established, the Grounds of Appeal could undermine the judge’s finding that family life does not exist. The Grounds of Appeal raise arguable errors of law. Permission to appeal is granted.”

3. I was not provided with a Rule 24 reply from the Secretary of State however was given the indication that the appeal was resisted.

Error of Law

4. At the close of submissions I indicated that I did consider there was an error of law in the decision of the First-tier Tribunal but that my reasons would follow. My reasons for so finding are as follows.
5. In respect of the first ground (which I note was drafted by Counsel previously instructed in this matter, but whom was not instructed to attend this hearing due to the Appellant’s financial difficulties), the Appellant alleges that the Tribunal gave inadequate consideration to the allocation of his inability to meet the suitability criteria of Appendix FM in relation to his failure to mark on his current SET(O) application form that he had received a previous criminal conviction and a sentence of nine months.
6. The judge does consider the issue at paragraphs 30 to 31 and does discuss in part the Appellant’s case that his previous legal advisor was negligent in completing the application form on his behalf and did not complete the form in accordance with the instructions given by the Appellant. However, whilst the judge notes that the previous representatives were no longer able to work in immigration given that the OISC had cancelled the company’s registration with themselves since 6th December 2017, albeit the judge noted the Appellant’s case that he had merely signed the form and his advisor was left to complete it on instruction, the judge did not seemingly consider a great deal of the evidence provided by the Appellant, which was contained in the Appellant’s First-tier Tribunal bundle at pages 128 to 156 when reaching his decision. Specifically, the judge failed to consider or have regard to the article in the Law Gazette at page 182 which discussed the competency of the firm in question and also crucially failed to consider page 142 of the bundle which contains notes (purportedly) written in the handwriting of an employee of the firm which confirms that the firm’s ‘file note’ did in fact show that the Appellant had provided instructions in relation to his previous conviction and the fact that there was no

recommendation for deportation, etc. and thus the solicitors were apprised of this conviction and were under an obligation to disclose it to the Secretary of State.

7. Furthermore, the Appellant highlighted that his bundle before the First-tier Tribunal also contained a copy of the relevant pages of his previous FLR(O) application form of 4th November 2013 (see pages 79 to 80 of the Appellant's bundle) which showed that when he made his previous application himself he had disclosed his nine month conviction in that form. This also was omitted from consideration by the First-tier Tribunal.
8. Therefore in my view, the judge cannot have reached a full and informed decision as to whether it is likely on the balance of probabilities that the Appellant is of unsuitable character, unless the judge gave consideration to all of the evidence which told as to whether he had previously disclosed a conviction or not and as to whether he had provided instructions on the matter or not as to the competency of the firm and as to whether or not the Appellant stood to gain anything by failing to disclose that matter on this further application.
9. Consequently, I do find that the error alleged in Ground 1 has been made out.
10. Turning to Ground 2, the argument put in summary is that the judge made various findings on the Appellant's alleged partner's previous relationship and whether his relationship with his partner was genuine or not which were born of questions and unanswered questions that the judge had in his mind and which consequently should have been put to the Appellant one way or another in order that the Appellant or indeed his partner, had a fair opportunity to resolve any doubts that may have lingered in the judge's mind as to whether or not the relationship was genuine. This must follow as I am told that these matters were not relied upon by the Respondent in her closing submissions before the First-tier Tribunal.
11. In that respect by way of example I was told that there was various pieces of evidence that the Appellant and his partner would have given had the opportunity been provided. I will not rehearse all of these matters herein but suffice to say that these matters (such as whether the partner would have been able to stay with the Appellant following her flight from the domestic violence she was enduring and/or whether she would have been placed in a refuge by the police) may have had a material difference upon the judge's assessment of the relationship and whether it was genuine or not. Thus, I find that there is an error revealed in Ground 2 also.
12. Turning then to Ground 3 and the paternity of the Appellant and his partner's child, I was told that if the issue of the lack of DNA evidence had been put to them they both would have explained that they were (wrongly) advised by their previous legal representative that the burden of proving the child was not theirs fell upon the Home Office and not themselves at all. I was told by the couple that they would put forward DNA evidence in the future to establish that the child was indeed theirs as they were (ill)-advised by their former representative. I note this statement, but do

not take it into account as it is not a matter before me and thus cannot have, and has not had, any bearing upon my decision.

13. Thus, in summary, I do find that the judge's observations are points which should have been put to the Appellant so as to provide a fair opportunity for him to explain or resolve the doubts that may have lingered over the paternity of his (alleged) child.
14. Finally, turning to Ground 4 and the complaint that the judge erred in finding that the Appellant and his partner were able to dupe the registrar of births, the health visitor and the schools which their children and stepchildren attended, in order to fabricate the appearance of a paternal relationship which allegedly may not exist; I find looking at the health visitor's letter at B8 of the second bundle and looking at the letters from the school teachers at pages 10 and 11 of the second bundle that this finding is perverse. For example, I note the head teacher's letter reveals that she has talked to staff who have personally observed the Appellant dropping off and collecting the children from school which does give legitimacy to the basis of the letter and does not suggest that the school was 'duped' into writing a letter for which there was no factual basis.
15. Similarly the health visitor's letter appears to be born of her experience with the Appellant and his partner and child, and in my view there is nothing on the face of the letter which reveals that it was obtained by deception.
16. Consequently, given my findings above in relation to the other matters I do find that this ground is also made out.
17. In light of the above findings I set aside the decision of the First-tier Tribunal in its entirety.

Notice of Decision

18. The appeal to the Upper Tribunal is allowed.
19. The appeal is to be remitted to the First-tier Tribunal to be heard by a differently constituted bench.
20. No anonymity direction is made.

Directions

- (1) Standard directions are to be issued.
- (2) No interpreter is required.
- (3) The Appellant and his partner have indicated that they will try and obtain an independent social worker's report however I will not make any directions in respect of this potential report at this stage.

- (4) I have been told that the Appellant and his partner and the oldest stepchild who is an advanced teenager (albeit a child) will all give evidence at the further hearing before the First-tier Tribunal.
- (5) The appeal has been estimated to last four hours by the parties and will be remitted to be heard at Taylor House at the first available date *after* eight weeks.
- (6) The Appellant, or any legal representatives he may instruct in the future, are to file and serve a consolidated bundle which should *include* the previous two bundles before the First-tier Tribunal, as well as any further evidence the Appellant seeks to rely upon. That consolidated bundle is to be filed and served upon the Respondent and First-tier Tribunal no later than seven days before the remitted hearing.

Signed

Date: 27. 07. 2018

Deputy Upper Tribunal Judge Saini