Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/27771/2016

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 29 November 2018	**On 22 January 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

SIDALI [O]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Dougan, Solicitor
For the Respondent: Mr Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge S T Fox, promulgated on 26 April 2018, dismissing his human rights claim on 20 September 2016.

2. The appellant arrived in the United Kingdom on 16 November 2009 and claimed asylum. That claim was refused and his appeal dismissed. He did not, however, leave the United Kingdom and in 2012 met his partner at a mosque in London. They were married there in an Islamic ceremony on 23 September 2013; they then moved to Belfast. The couple attempted to

legalise their marriage in a civil ceremony but it did not take place on the date scheduled, 10 December 2014, on the basis that there was an accusation that there was a sham marriage. The appellant was detained and then eventually removed to Algeria on 15 April 2015. The couple's first child was born in April 2015 shortly before the appellant was removed. In September 2015 the appellant was smuggled back into the United Kingdom with the assistance of an agent and has remained here since.

3. The appellant's partner is a citizen of Somalia. She has indefinite leave to remain in the United Kingdom having previously been recognised as a refugee. She is in receipt of Disability Living Allowance on account of the gunshot injuries she sustained whilst in Somalia.

4. As the couple's second child was born after his mother had acquired indefinite leave to remain, he is a British citizen from birth.

5. The respondent refused the application on the basis that the appellant:-

   (i) not meet the requirements under Appendix FM as his partner was not a British citizen nor was she present and settled in the United Kingdom and so did not meet E-LTRP.1.2 although it was accepted that this might change in the future;

   (ii) did not meet paragraph EX.1 as no evidence has been produced there were insurmountable obstacles which would mean there would be very significant difficulties in the appellant or his partner continuing their family life together outside the UK in Algeria and that the child did not meet the requirement of paragraph EX.1(a) as he was not a British citizen and had not lived continuously in the United Kingdom for seven years and in any event it would be reasonable to expect the child to leave the United Kingdom;

   (iii) did not meet the requirements of paragraph 276ADE(1) of the Immigration Rules as he had not shown that there were very significant obstacles to his integration into life in Algeria;

   (iv) had not shown that there were exceptional circumstances, it being noted that he had commenced a relationship in the knowledge he had no immigration status in the United Kingdom, no legitimate expectation to remain here indefinitely, and that all parties should have been aware from the beginning that family life might not be able to continue in the United Kingdom; and, that the best interests of a child and his parents facing removal were best served by that child remaining with the parents and being removed with them and that it was reasonable to expect the child to return to Algeria with him.

6. It is of note that by the time of the appeal the factual situation had changed. The appellant's partner had by then acquired indefinite leave to remain and a younger child had since been born who was a British citizen by birth.

7. The judge found that:-

   (i) the appellant had a very poor immigration history, was likely to become a drain on the public purse owing to his inability to secure employment and had sought to ignore and navigate the laws and Immigration Rules of the United Kingdom to his own advantage [13];

   (ii) there were grounds for considering that the purpose of the relationship with his partner was a device and/or vehicle employed by him to enhance his claim to remain in the United Kingdom at all costs [14];

   (iii) appellant's previous asylum claim had been fabricated indicating that his credibility was in issue [15];

   (iv) what the appellant and his partner considered to be exceptional circumstances or insurmountable obstacles to living in Algeria amounted to an unsupported assertion that the wife and children could not gain Algerian nationality, the evidence consisting solely of the appellant stating that he telephoned the Algerian Embassy and had received a negative response [19]; accordingly in the absence of evidence, was not satisfied that paragraph EX.1 was met [20];

   (v) the children were in good health [27]; that it was incumbent on the parents to identify something that amounts to an insurmountable obstacle to exceptional circumstances so as to engage their Article 8 rights [27]; a simple assertion by the parents that they could not go to Algeria without proper explanation or evidence being insufficient [27];

   (vi) the eldest child had experience of living life without his father and the youngest child was too young to enjoy this experience to any meaningful degree [28] and that the father could maintain contact with the wife and family by "modern means of communication" [29];

   (vii) there was nothing to suggest the appellant's wife was in anything other than robust good health [30] and the help he gives round the house with housework and looking after the children did not amount to exceptional circumstances or an insurmountable obstacle. The children could remain with the mother in the United Kingdom whilst the appellant returns to Algeria. The appellant's behaviour "clearly demonstrates that his sole and exclusive agenda is to remain in the United Kingdom at all costs";

   (viii) removal is proportionate.

8. The appellant sought permission to appeal on the grounds that the judge had erred:-

   (i) in not considering whether paragraph EX.1 applied, it not being reasonable to expect the child who is a British citizen to leave the United Kingdom and reside in Algeria and whilst the wife might be able to renew her travel document, this would not permit her to reside in Algeria not least as she has no passport and, she was in receipt of Disability Living Allowance, a fact which had not been in

dispute nor indeed had the fact that she had received gunshot wounds in Somalia;

(ii) in failing properly to apply Article 8 Section 117 Nationality, Immigration and Asylum Act 2002 in concluding that the appellant did not speak English; and, whilst accepting the family should not be separated, fails to note that the wife should be allowed to continue to enjoy the grant of refugee status and indefinite leave to remain as she could not reside in Nigeria, not having a Somali passport and not yet qualifying for British citizenship;

(iii) in concluding that the eldest child had lived apart from his father when this was not the case; the father had returned when the child was 5 days old.

9. There are, as Mr Dougan submitted and Mr Duffy accepted, a number of problems with the judge's analysis of paragraph EX.1. The assessment of issues does not follow any logical order and it is somewhat surprising that the judge should commence with an analysis of Section 117 as though it was somehow an analogy to Section 8 of the 2004 Act.

10. Further, the birth of the second child, acquisition of indefinite leave to remain by the appellant's wife and the British citizenship of the children all arose after the date of decision. It does not, however, appear to have occurred to the judge or indeed either representative before him, that any of these three events might amount to a new matter for the purposes of section 85 of the 2002 Act.

11. In assessing whether the requirements of paragraph EX.1 were met the judge did not take into account the position of the children which is covered by paragraph EX.1(a). He addressed himself only to the matters raised in the refusal letter, there being at that time only one child who was not at that point a British citizen. That was undoubtedly the correct position at the date of decision and would have been the correct approach if the Secretary of State had concluded that a new matter had arisen and had refused to allow this to be considered. But the judge did not do so; he clearly elsewhere in the decision takes into account the citizenship of the children yet did not take this into account in his assessment at EX.1. There is an inconsistency here.

12. Whilst, as Mr Duffy submitted, had the findings been only that there would be no insurmountable obstacles in respect of the wife, that is entirely sustainable given the lack of evidence to support the assertions that the wife and children could not go to live in Algeria.

13. The judge did, however, go on to consider the position of children but not through the lens of EX.1. The judge did not address whether it would be reasonable to expect the children to go to live in Algeria. But, the sole basis on which it is said it would not be reasonable for the children to go and live in Algeria is the difficulty of going to live there in terms of practicalities, that is passports and entry clearance. No evidence was

provided to show that there would be any difficulty of the family going to live in Algeria. Indeed, the witness statements from the appellant and his wife make no mention of difficulties in relocating, or about the children's best interests. Nothing is said about the children or why it would not be reasonable to expect the family unit to go to live in Algeria.

14. It was for the appellant to make out his case. He did not do so and so far as the judge erred in his approach to assessing the children's best interests, as noted above there was little or no evidence put to him about any difficulties they would face if they left the United Kingdom or in living in Algeria. The simple fact that they are British citizens is not determinative; it is frequently the case that parents take their British children to live overseas.

15. Similarly, there was no reliable evidence that the appellant's wife could not, in the near future, obtain a travel document so that she and the children could go to live in Algeria. That she has a disability which entitles her to benefits in the United Kingdom is not sufficient evidence that there would be insurmountable obstacles to her living in Algeria.

16. Viewing the decision and the evidence as a whole, the assessment that there are no insurmountable obstacles was one manifestly open to the judge, given the lack of evidence and there is nothing to show that the passports could not have been obtained for the wife and children. It cannot therefore be said that any error in his approach was material.

17. Having properly concluded that EX.1 was not met, and there not being any errors with respect to there being immaterial given the lack of evidence, it cannot be said that the higher test applicable where the Rules are not met, would be applicable in this case. Again, although Section 117B would apply, and the judge did err with regard to the application of whether or not the appellant spoke English, this is of little weight. At best it would have been neutral that the appellant spoke English but there are a considerable number of other factors which would militate against him, not least of which is his immigration history and the fact that he is dependent on public funds and that his family life with his partner arose at a time in his life whilst to say the least precarious.

18. Insofar as that the judge erred in suggesting that the family could be separated, this was clearly based on erroneous findings of fact as to the length of time that the appellant had spent with the child, this is of no assistance to the appellant. This was a finding reached in the alternative. The fact remains that there is simply no evidential basis on which it could have been concluded that requiring the family to go to live in Algeria was unreasonable and still less that there were very compelling circumstances such that, despite the requirements of the Immigration Rules not being met, removal would still be disproportionate. There is simply no evidential basis for such an assertion.

19. Accordingly, for these reasons, I conclude that the decision of the First-tier Tribunal did not involve the making of an error of law capable of affecting the outcome.

Summary of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

2. No anonymity direction is made.

Signed Date: 14 January 2019

Upper Tribunal Judge Rintoul