



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01647/2019 (P)

THE IMMIGRATION ACTS

Decided under Rule 34 without a hearing
On 14 July 2020

Decision & Reasons Promulgated
On 23 July 2020

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MRS ANJULINE KEMESHA GREEN

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge P-J White promulgated on 15 October 2019 (“the Decision”). The Judge dismissed the Appellant’s appeal against the Respondent’s decision dated 16 November 2018 refusing her human rights claim in the context of the refusal of entry clearance to enable the Appellant to join her British citizen spouse in the UK.
2. The Appellant is a national of Jamaica where she currently lives. She married her husband there in 2018. The Appellant was removed to Jamaica in 2016, following about fourteen years in the UK, the majority of which period was with unlawful status. The Appellant had originally entered as a visitor and then had a short period of further leave as a student. Thereafter, however, she was an overstayer. She was able to remain with the benefit of a fraudulently obtained stamp purporting to give her indefinite leave to remain in the UK.

3. The Respondent accepts that the Appellant's relationship with her husband is genuine. She also meets all the substantive requirements of the Immigration Rules ("the Rules") under Appendix FM save that the Respondent has refused her application on suitability grounds. If that conclusion is upheld, the Appellant cannot succeed within the Rules and must rely entirely on Article 8 ECHR outside the Rules based on her family life.
4. The Appellant's husband, Mr Gary Ellis, has three children from previous relationships. The eldest is an adult, now living in Jamaica. The two younger children were born in 2002 and 2008 and are currently aged seventeen and eleven years respectively. Both live with their mother in the UK.
5. Judge White upheld the Respondent's refusal on general grounds (paragraph 320(11) of the Rules) for reasons given at [9] to [21] of the Decision. For those reasons, the Judge concluded that the Appellant cannot succeed under the Rules as she fails on suitability grounds. He went on to consider the Appellant's case outside the Rules based on Article 8 ECHR but concluded that the Respondent's decision was proportionate and therefore dismissed the appeal.
6. The Appellant challenges the Decision on one ground only, namely that the Judge has failed to give "appropriate weight" to the Appellant's and Mr Ellis' private and family life in the UK and has failed to assess in particular the impact on Mr Ellis' children if he were to relocate to Jamaica. The Appellant expressly acknowledges "the careful consideration given by the FTTJ to the application of HC395 paragraph 320(11)". The Judge's conclusion as to the general ground of refusal and suitability is therefore expressly accepted. It is however asserted that the Judge failed to consider the evidence about the best interests of Mr Ellis' children and therefore materially erred when considering whether it was proportionate to refuse the Appellant entry to the UK.
7. Permission to appeal was granted by First-tier Tribunal Judge Gumsley on 3 March 2020 in the following terms so far as relevant:
 2. Having considered the 'Grounds Seeking Permission to Appeal' as submitted, I am satisfied that it is arguable that the judge did make a material error of law.
 3. The judge clearly considers the position under the Immigration Rules and makes findings in relation to that issue which were legitimately open to him on the evidence. However, it is arguable that in considering the position under Article 8 outside the Rules, and in concluding that 'I do not have detailed evidence about the level of contact..' he fails to have any or any adequate account of the evidence on this point provided in the supplementary witness statements of the Appellant and her Sponsor or the evidence given at the hearing and/or fails to give reasons as to why he does not accept such evidence.
 4. Permission to appeal is therefore granted on the grounds as pleaded."
8. By a Note and Directions dated 23 April 2020 and sent on 6 May 2020, having reviewed the file, I reached the provisional view that it would be appropriate to

determine without a hearing (pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 – “the Procedure Rules”) the following questions:

- (a) whether the making of the First-tier Tribunal’s decision involved the making of an error of law and, if so
- (b) whether that decision should be set aside.

Directions were given for the parties to make submissions in writing on the appropriateness of that course and further submissions in relation to the error of law. The reasons for the Note and Directions was the “present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules”.

9. Written submissions were filed by the Appellant on 15 May 2020. There has been no response from the Respondent. The Appellant’s submissions repeat and amplify to a minor extent the grounds as pleaded. The submissions make no mention of the forum for a decision as to the error of law and do not suggest that the Appellant wishes to have an oral hearing on that issue.
10. The Tribunal has the power to make a decision without a hearing under rule 34 of the Procedure Rules. Rule 34(2) requires me to have regard to the views of the parties. In this case, neither party objects to this course. The exercise of my discretion is subject to the overriding objective in rule 2 to enable the Tribunal to deal with cases fairly and justly.
11. The Appellant is of course in Jamaica and, although she gave evidence by video-link at the hearing before Judge White, it is not suggested that she wishes to participate in an oral hearing which would be concerned only with the legal question whether there is an error of law in the Decision. The Appellant has had two opportunities, via the initial grounds and the further submissions, to set out her case as to the error of law asserted in the Decision. Whilst I recognise that the outcome of the error of law stage is of importance to the Appellant and Mr Ellis, as failure at this stage will mean that the Appellant’s appeal is dismissed finally, I do not consider that fairness requires an oral hearing of this issue. The evidence on which reliance is placed in the grounds is contained in witness statements which I can (and have) read for myself and in what is said about the oral evidence in the Decision. Even if an oral hearing were convened at the error of law stage, I would not be hearing any further oral evidence to determine the error of law issue.
12. It is difficult to see what more could be said orally in support of the grounds if a hearing were to be convened. Although it is possible for the Tribunal to hold remote hearings and even limited face-to-face hearings at the present time, its capacity to do so is reduced from what would normally be available. The convening of an oral hearing is accordingly likely to lead to some delay in the determination of this appeal. I have therefore reached the view that it is appropriate to deal with the error of law issue on the papers and without an oral hearing.

13. At this stage, the issue for me is whether the Decision contains an error of law. If I conclude it does, I need to consider whether I should set aside the Decision based on that error. If I decide to do so, I would either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

14. The passage of the Decision which lies at the heart of the Appellant's challenge is at [22] to [24] as follows:

"22. It follows that the appellant, failing on general and suitability grounds, cannot succeed under the immigration rules. That an applicant fails under the rules is important but not necessarily the end of the matter, because the ground of appeal is breach of human rights. In this case it is accepted that the relationship is genuine, so there is clearly family life between husband and wife and the decision interferes with that by continuing their separation. The decision is lawful and for a legitimate purpose and the issue therefore is proportionality. In assessing that I must have regard to the matters set out in section 117B of the 2002 Act. That tells me that immigration control is in the public interest. This appellant does not meet the rules, and she fails because of general and suitability grounds. If her admission is, on such grounds, undesirable, that adds weight to the public interest in generally excluding those who do not meet the rules. It is in the public interest that applicants should speak English and be financially self-sufficient. Both are true for this appellant, but neither is a positive reason to grant leave. The section further tells me that little weight is to be given to family life established while here unlawfully, or to private life established while stay is precarious. The appellant's position has never been better than precarious, and since September 2003 it has been unlawful. Mr Ellis knew at some stage that her ILR stamp was under investigation, because she told him. Whether or when he realized that her position was unlawful was not explored in the evidence, and I have no basis for assuming that he knew from the outset of the relationship that she had no leave, but clearly once she was detained he was aware that she might be here unlawfully.

23. Mr Ellis told me, and was not challenged on this, that he has a son from a previous relationship in Jamaica, who is now an adult, and two children from his first marriage in the United Kingdom. He has regular contact with them, and clearly it would be more difficult for him to move to Jamaica. Their mother, with whom I infer they live, is in the United Kingdom and it seems clear that they will stay here. I do not have detailed evidence about the level of contact or the possible impact if Mr Ellis did choose to move to Jamaica. As a general point, if they have regular contact and a good relationship with their father it is likely to be in their interests not to disrupt it, but how strong that consideration may be in this case I cannot say.

24. Taking all these matters into account and bearing in mind the reasons why this appellant cannot succeed under the rules, I am in no doubt that the interference occasioned by the decision is proportionate, and accordingly that the appeal in reliance on human rights fails."

15. As I have already indicated, the focus of the Appellant's grounds is on Mr Ellis' two minor children who live in the UK with their mother. It is therefore appropriate to

turn to the evidence which was before the Judge about those children and the relationship between Mr Ellis (and to some extent the Appellant) and those children.

16. I begin with the grounds of appeal. That states that “[t]he Appellant has a close relationship with her stepchildren who are aware of the genuineness of the relationship and are also supporting the application”. The Appellant has of course been outside the UK since 2016, at which date the children would have been aged about thirteen and seven respectively. There is no evidence that the children have been taken to Jamaica to visit the Appellant in the period since her return although the Appellant says that she has maintained contact by telephone, in particular with the younger child. The grounds go on to say that it would be “unreasonable to expect the Appellant to establish family life with her husband and stepchildren outside the UK”. It is also said that “[t]he sponsor’s children were born in the UK and have close relationship with their biological mother and other family members and friends who would be adversely affected if they were separated”. The Judge’s conclusion is, of course and unsurprisingly, that there would be no question of the children going with their father to Jamaica since they live with their biological mother. The issue is therefore one of separation of the children from their father if he chooses to go to Jamaica or separation of the Appellant and her husband if he chooses to remain in the UK without her.
17. Turning then to the initial evidence, the Appellant says in her first statement for this appeal that she has “a close relationship with [Mr Ellis’] children, particularly with his youngest child...with whom I speak regularly”. She does not say what is meant by “regularly” and, as I have already observed, such contact is necessarily by telephone or video call rather than face to face. As to Mr Ellis’ relationship with his children, the Appellant says that “[h]e has three children from a previous relationship. The children are either British citizens or settled in the UK.” There is further evidence (see below) which confirms that the two younger children at least are British.
18. Mr Ellis in his first statement says this about his children:

“...9. I have family, employment and other ties in the UK, and it would be extremely difficult for my children and I to move permanently to Jamaica. My children from my previous relationship also have a close bond with their mother and she is residing in the UK. I do not believe that their mother would agree to them residing permanently in Jamaica as we both have shared parental responsibility for the children. In any case the children are currently in fulltime education. They have established close relationship with their family members and friends at their schools and within their local community.”

As I have already observed, and as Judge White, concluded, the more likely scenario is that the children would remain in the UK with their mother and would be separated from their father. Mr Ellis’ first statement does not contemplate nor provide any evidence as to what that scenario would mean for the children.

19. There is no evidence in the Appellant's initial bundle other than what is said in those two statements about the circumstances of the children, their ages, where they live and the regularity and extent of contact they have with their father. The statements do not even provide the names or ages of the children. There is no statement from their mother regarding contact nor any documentary evidence about their schooling or even where they live. As Judge Gumsley pointed out, though, there is evidence in the form of supplementary statements from the Appellant and Mr Ellis. These are the high point of the Appellant's evidence on this subject and it is therefore appropriate that I set out what is there said in full.

20. The Appellant's statement reads as follows:

"11. I confirm that I have a close relationship with my husband and our relationship is genuine and subsisting. We speak to each other on a regular basis and are both looking forward to spending the rest of our lives together as husband and wife. Gary has three children from previous relationships. His eldest child, Jardane Ellis is 25 years old and currently residing in Jamaica. He has two children from a previous relationship with [SG]. The children, [S] [16 years] and [S] [10 years] were born in the United Kingdom and are British citizens. They are currently residing with their mother. My husband has close relationship with all his children. He speaks to the children on a regular basis and is actively involved in all aspects of their upbringing and overall development. [S] and [S] are in fulltime education and attending schools in the United Kingdom. Gary sees the children twice weekly and every other weekends and they are often with him during the school holidays. I am aware that [S] has been diagnosed with ADHD and relies heavily on his father's support particularly when his symptoms become worse. I have a close relationship with [S] because he is a very sensitive child and he has known me most of his life. I do not have any children of my own and I treat Gary's children as my own. I am aware that it would be difficult for my husband to be separated from his children because of his close involvement in their upbringing. He provides them with emotional and financial support and has genuine parental responsibility for both children."

I repeat as I have already observed that the Appellant's own contact with the children is necessarily via remote means and yet she says that she manages to maintain a close relationship with the younger child in particular.

21. Mr Ellis' supplementary statement contains the following information:

"2. I confirm that I have three children. My eldest son, Jardane Ellis [25 years] is an adult and is currently residing in Jamaica. I have two children, [S] [16 years] and [S] [10 years] who were born in the United Kingdom and are British citizens. [S] and [S] are currently residing with their mother, [SG] at [address given in Manchester]. They have both been residing in the United Kingdom continuously since birth. I currently have joint custody of both children and have regular and continuous contact with them. I have regular contact with the children and I see them at least twice weekly. They reside with me during the school holidays. I have close relationship with the children and I am actively involved in all aspects of their upbringing and overall welfare. A close parental bond with my children [sic]. My children's mother is a British citizen residing in the UK. I believe that any

separation between my children and I will have an adverse effect on our relationship.

3. [S] has been diagnosed with ADHD and relies heavily on my support. I am known to the school and health care professionals involved in his care and support. Anjuline has close relationship with all three children and she speak to them on a regular basis. She is particularly close with [S] because he is a very sensitive child and he has known her most of his life. Anjuline does not have any children of her own and she treat the children as if they were our own.

4. I confirm that I have children, employment and other commitments in the UK, and it would be extremely difficult for my children and I to move permanently to Jamaica. My children in the UK have a close relationship with their mother, family members and friends in the United Kingdom. I do not believe that their mother would agree to them residing permanently in Jamaica as we both have shared responsibility for the children. The children are currently in fulltime education in the UK and consider the UK as their home. They have established close relationship with their family members and friends at their schools and within their local community."

22. Whilst that evidence does at least have the benefit of providing some very general particulars as to the children and the contact which Mr Ellis has with them, there is still a lack of detail or other supporting evidence. There is still no statement from the children's mother as to contact. Although Mr Ellis says that he is "known" to those teaching and treating the younger child with his ADHD, there is no evidence from those professionals. More importantly, all that Mr Ellis says about the consequences of separation from his children is that this would have "an adverse effect on" the relationship between them. He does not elaborate on any particular effects which he says that separation would have on the children's own wellbeing.
23. Turning finally to the Appellant's grounds and submissions challenging the Decision, the initial grounds accept that what is said at [23] of the Decision "goes some way" to acknowledging that it would not be in the children's best interests to be separated from their father. However, the grounds then jump from that conclusion to the assertions that, if the Decision is upheld "it would lead to unjustifiably harsh consequences for Mr Ellis and his children on the basis [of] their particular circumstances. He would not be able to continue these relationships to the same level through modern means of communication, and his children's wellbeing and development would be detrimentally impacted if they were separated from their father. [S] has been diagnosed with ADHD and relies heavily on his father for support". The grounds point to no evidence which underpins those assertions. Although I accept that Mr Ellis says that [S] relies heavily on his support because of his ADHD, he does not say in what way that materialises and nor does his evidence go so far as to say that the children's "wellbeing and development would be detrimentally impacted"; the impact in his statement is said to be on the relationship rather than directly on the children's wellbeing. Moreover, there is no additional or detailed evidence which supports such assertions. It is the case that the Appellant says that she has managed to maintain a close relationship with the children notwithstanding her physical separation from them, although I accept that as their stepmother rather than a biological parent, her position is more removed.

24. That brings me on to a point which is made in the further submissions which suggests that the Appellant might herself have been able to rely on her relationship with the children if she had been in the UK (based, I assume, on section 117B(6) Nationality, Immigration and Asylum Act 2002). Whilst I do not reject that as a proposition, if the Appellant were able to show that she has a genuine, subsisting parental relationship with the children (notwithstanding that they live with their biological mother), that submission goes to the heart of the problem in this case and that is the lack of any detailed evidence about the relationships between the Appellant and Mr Ellis on the one hand and the children on the other.
25. True it is that Mr Ellis has now given more particulars of the contact he has with the children and made various assertions about the level of that contact and the closeness of the relationship, he has provided no detailed information about that contact or relationship. Whilst he does not necessarily need to provide independent or other supporting evidence, such as from teachers, the children's mother and the like, the issue for the Judge was the impact of separation of the children from their father on the children's wellbeing. As the Judge said, the difficulty in this case was the lack of "detailed evidence" about that. The Judge was prepared to assume that the best interests of the children were not to be separated from their father, given the evidence that he retains contact and a relationship with them, he did not, as he says, have any "detailed evidence" about the impact of separation on the children. It is for that reason that the Judge concluded that he was unable to say "how strong" the best interests demands were in this case. I do not therefore consider that the Judge's conclusion in this regard can be said to be in error. The Judge did not say there was no evidence; simply no "detailed evidence" as to the impact of separation on the children. As can be seen from the evidence which I have set out above, that is a not unreasonable assessment and there is no error in this regard.
26. Moreover, the Judge's finding that the children's best interests would be to some extent impacted by separation would not lead inevitably to success in this appeal. Contrary to what is suggested at [9] of the submissions, the duty to assess best interests was not "pivotal" to the outcome. The Judge did of course conduct that assessment in any event as I have shown. However, that is not the end of the matter. It is trite law, stemming back to ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 that a child's best interests are a primary consideration but not the primary or the paramount one.
27. In relation to best interests, I do not understand the suggestion made at [9] of the submissions that these were not considered separately from public interest as they should be. It is abundantly clear from what is said at [23] of the Decision that the Judge considered the impact on the children entirely separately from the public interest. However, having done so and having concluded that the children's best interests were to be separated from their father, the Judge had to then balance the Article 8 rights of those affected against the public interest which applies. In this case, that was particularly strong, not simply because the Appellant could not meet the Rules but because she could not do so for reasons of her immigration history

and past conduct which led to her failing on suitability grounds within the Rules. That is the analysis conducted at [24] of the Decision. There is no error in the Judge's approach.

28. Finally, I come back to the point about the maintenance of relationships by remote means. I accept the point made in the submissions that such contact is not as good as face to face contact. However, what must be remembered in this case is that the children have maintained what is said to be a close relationship with their stepmother (the Appellant) by such means over a period of over four years since her removal to Jamaica. Although the relationship between the children and their father is, I would accept, of a different nature, on the facts of this case, the children have managed to adapt to such means of contact and have maintained a relationship of sorts. I do not rely on that point in relation to the error of law as it is not one which was taken by Judge White. It does though reinforce the need for an appellant to provide evidence, targeted at the particular case, in order to establish the interference which is said to arise from a refusal of leave to enter or entry clearance. The burden of establishing the interference, level and consequences is on the Appellant. In this case, for the reasons the Judge gave, she failed to provide sufficient evidence to show that the interference outweighs the public interest.
29. For those reasons, the grounds do not establish that the Decision contains any error of law and I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

DECISION

The Decision of First-tier Tribunal Judge P-J White promulgated on 15 October 2019 does not involve the making of an error on a point of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

Signed *L K Smith*
Upper Tribunal Judge Smith

Dated: 14 July 2020

