



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/12470/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8 January 2020**

**Decision & Reasons Promulgated  
On 15 January 2020**

**Before**

**UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**M S  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: No attendance

For the Respondent: No attendance

**DECISION AND REASONS**

**Introduction**

1. This is an appeal against the decision of Designated Judge of the First-tier Tribunal McCarthy ('the Judge') issued on 30 June 2017 by which the appellant's appeal against the decision of the respondent to refuse to grant him leave to remain on human rights (article 8) grounds was dismissed.

2. By means of an order dated 3 September 2019 the High Court quashed a decision of the Upper Tribunal to refuse permission to appeal. This order was issued consequent to the appellant having been granted permission to apply for judicial review on 19 July 2019 following a Cart application.
3. In granting permission to appeal to this Tribunal the Vice-President of the Upper Tribunal granted permission on all grounds.

### **Anonymity**

4. An anonymity direction was previously made in this matter and the parties did not request it to be set aside. I therefore direct:-

Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any formal publication thereof shall directly or indirectly identify the appellant or members of his family. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

### **Background**

5. The appellant is a national of Syria. He entered this country in 2013 and claimed asylum. He was fingerprinted by the Italian authorities as he travelled through that country on his way to the United Kingdom and following a request made under the mechanics of the Dublin III Regulation, the Italian authorities accepted responsibility for his application for international protection. The appellant was returned to Italy in January 2015 but proceeded to return to this country six weeks later. The respondent's effort to return him to Italy for a second time was challenged by means of judicial review proceedings and the challenge was subsequently settled by consent. The respondent accepted that she would consider the appellant's human rights application based on family life consequent to the birth of his British citizen son in January 2016. The respondent refused the human rights application by way of a decision dated 27 April 2016.
6. The Judge heard the appeal on 21 June 2017 and made the following findings of fact:-

"29. Because the situation was unclear, I have considered the situation for myself. I recognise that paragraph EX.1(a) has three components, each of which must be satisfied. The first is that an applicant is the father of a British citizen child or a child who has lived in the UK for more than seven years continuously. Both children are British citizens. The second is that there is a genuine and subsisting parental relationship between the appellant and his children. The evidence I have discussed confirms that to be the case.

...

33. It is obvious that if the appellant goes to Italy, his wife would not be able to join him because it would be unreasonable to expect their children to leave the UK. She would be required to remain in the UK to care for them. This means they would be expected to maintain their family life at a distance. There is no evidence the appellant's wife would not be able to visit the appellant in Italy. As a British citizen, she has a right under European Union free movement laws to be admitted and stay in Italy for up to three months if she can support herself during that time. The same applies to her children."

7. The Judge dismissed the appeal concluding, inter alia:-

40. Section 117B(6) makes provision to reduce any public interest in expulsion where it would be unreasonable to expect a qualifying child to leave the UK. This provision mirrors paragraph EX.1(a) of Appendix FM. I must apply the same reasoning as I have already set out and can only find that the appellant does not benefit from s. 117B(6). This is consistent with the Court of Appeal's guidance in *R (MA (Pakistan) & Ors) v SSHD and another* [2016] EWCA Civ 705.

...

49. Ms Radford suggested that I should bear in mind the fact that there was no provision in law for the appellant to return to the UK. I acknowledge the appellant is unlikely to ever derive a benefit from the free movement laws of the European Union because it is very unlikely his wife could ever be a worker or self-employed in Italy. Not only would she be prevented from leaving the UK because of her childcare commitments, she would be unlikely to find work because she does not speak Italian, has no qualifications and has no work experience.
50. But it is open to the appellant to apply for entry clearance as the partner of a British citizen under the Immigration Rules. I have made clear findings of their period of cohabitation and it would appear he satisfies the provisions of paragraph GEN.1.2 and the relationship requirements. Of course, it is not for me to consider the likely outcome of such an application, but it is trite law that an Entry Clearance Officer would have to respect the right to family life if there are exceptional and/or compelling factors."

## **Decision**

8. The respondent wrote to the Tribunal on 3 January 2020 conceding that in light of the Supreme Court judgment of *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53; [2018] 1 WLR 5273 and the unchallenged findings of fact made by the First-tier Tribunal at paragraphs 29 and 33 of its decision that the appellant's children are British, that there exists a genuine and subsisting parental relationship and it would be unreasonable to expect the children to leave this country, the subsequent findings as to the application of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 at paragraph 40 of the decision

discloses a material error of law and so it was not open to the First-tier Tribunal to dismiss the appellant's appeal. She invited the Tribunal to find a material error of law, set aside the decision of the First-tier Tribunal and allow the appellant's appeal on the basis of article 8 without the necessity of an oral hearing.

9. On 7 January 2020 the appellant confirmed in writing through his solicitors, Duncan Lewis Solicitors, that he was in agreement with the proposed course of action. I directed that in such circumstances neither party was required to attend the oral hearing.
10. Having carefully considered the findings of fact made at paragraphs 29 and 33 the respondent's concession is wholly appropriate as to the judge having materially erred in law at paragraph 40 of his decision and reasons. It was not lawfully open to him to determine that in light of his findings of fact section 117B(6) could not benefit the appellant, without giving adequate reasons.
11. Upon remaking the decision I observe that the appellant has been found to enjoy a genuine and subsisting parental relationship with a qualifying child and I am satisfied to the requisite standard that it would be unreasonable to expect the child to leave the United Kingdom: Section 117B(6) of the 2002 Act. In such circumstances the proposed removal of the appellant from this country would be a disproportionate interference in his family life rights and so the appeal is allowed on article 8 grounds.

### **Notice of Decision**

12. The Judge materially erred in law for the reasons identified. I set aside the Judge's decision promulgated on 30 June 2017 pursuant to Section 12(2) (a) of the Tribunal Courts and Enforcement Act 2007.
13. The decision in the appeal is remade. The appeal is allowed on human rights (article 8) grounds.
14. The anonymity direction is confirmed.

Signed: **D O'Callaghan**  
**Upper Tribunal Judge O'Callaghan**

Date: 13 January 2020

**TO THE RESPONDENT**  
**FEE AWARD**

As no fee was paid I make no fee award.

Signed: D O'Callaghan  
**Upper Tribunal Judge O'Callaghan**

Date: 13 January 2020