

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/05730/2013

THE IMMIGRATION ACTS

Heard at North Shields
On 10 July 2013

Determination Promulgated
On 23 July 2013

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR OA
(Anonymity Order Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muquit of Counsel
For the Respondent: Mr P Mangion, Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Kempton dismissing this appeal under Article 8 of the Human Rights Convention.
- 2) The Judge of the First-tier Tribunal described the appellant's immigration history as "checkered". In August 2011 the appellant was successful in an appeal to the Upper Tribunal against a decision to deport him. His success was based on his relationship with his son, JK, now aged 4, together with his relationship with his wife, SB. Following this appeal the appellant was given discretionary leave to remain until 10 July 2012. On 4 July 2010 he applied for further leave but this was refused and reasons for the refusal were given in a letter dated 31 January 2013. The reasons for refusal letter was accompanied by a notice dated 30 January 2013 entitled "Notice of Refusal of Leave to Enter" purporting to contain a decision to remove the appellant. With some justification, perhaps, the Judge of the First-tier Tribunal did not seem clear about the nature of the decision under appeal. The judge pointed out that the refusal letter incorrectly referred to the appellant as still subject to a deportation order

(notwithstanding his previous successful appeal) and it may be this misapprehension which led the respondent to make a decision in the form in which it was made.

- 3) In the present appeal the Judge of the First-tier Tribunal recognised that family life had previously been found to exist between the appellant and his wife and children. The appellant now has a second son, JA, aged 22 months.
- 4) The Judge of the First-tier Tribunal noted that not only were the appellant and his wife no longer residing together but an order for protection from harassment was made at Newcastle Magistrates Court in August 2012 prohibiting the appellant from contacting his wife by any means whatsoever, with the exception of contact with the children arranged through his solicitors.
- 5) Both the appellant and his wife appeared before the First-tier Tribunal to give evidence. No witness statement was provided in respect of the appellant's wife. She explained the circumstances leading to the order for protection from harassment. This followed an argument between the appellant and his wife in a night club after they had both been drinking. Each thought the other was looking after the children at home. As a result of this argument the appellant was arrested. The court order against him was lifted 6-8 weeks prior to the hearing before the First-tier Tribunal. There were, however, photographs of the appellant with the children around Christmas 2012.
- 6) The Judge of the First-tier Tribunal inferred from the absence of a witness statement from the appellant's wife that there may have been some difficulty "either in contacting her or perhaps some reluctance on her part" in assisting the appellant. The judge noted that there was no evidence from Victim Support or any other official organisation, such as social services, in relation to the state of the relationship and the best interests of the children. The judge was not satisfied that the evidence of the appellant and his wife could be taken at face value and that their relationship was subsisting. Because of this it seems the judge was not satisfied that it was in the best interests of the children for the appellant to succeed. The judge further noted that the appellant was facing a trial on criminal charges and this weighed against the appellant under Article 8.

Submissions

- 7) When addressing me at the hearing, Mr Muquit acknowledged that the grounds of the application for permission to appeal were not as clearly drafted as they might have been. He said there were essentially three grounds. The first was that the judge erred in finding there was no family life. The judge's approach to the evidence was unfair especially in relation to the absence of a witness statement from the appellant's wife, on the basis of which the judge rejected her evidence as lacking in credibility.
- 8) The second ground related to the best interests of the children. There was a manifest error in the determination over what were the best interests of the children and the judge had not approached their best interests as a primary consideration.

- 9) Mr Muquit continued that, thirdly, the judge had taken into account irrelevant matters in relation to proportionality under Article 8, in particular outstanding charges against the appellant on which he had still to be tried.
- 10) Mr Muquit pointed out that when the appellant's previous appeal succeeded, his relationship with his wife was described as "volatile". He made his application for further leave to remain in time but it was refused. The refusal letter itself was confused and referred erroneously to a deportation order having been made. It also erroneously applied the new Immigration Rules. Nevertheless the refusal letter accepted that there was family life between the appellant and his children. The protection from harassment order did not address the appellant's relationship with his children. Although there was no statement before the First-tier Tribunal from the appellant's wife, she did attend to give evidence. Her evidence was that the couple were still living together. During a lengthy cross-examination there was no suggestion that the appellant's wife was coerced into giving evidence. Although the order made by the Magistrates Court prevented the appellant from coming within 100 yards of his wife, this only applied where he did not have the permission or acquiescence of his wife. It should be presumed that it was in the best interests of the children to have contact with both parents. The appellant continued to pay nursery fees in respect of the children.
- 11) Mr Muquit submitted that the judge gave inadequate reasons for finding there was no family life. The judge did not give adequate reasons for saying she was not satisfied by the evidence of the appellant and his wife that family life was continuing. In its decision the Upper Tribunal had applied ZH (Tanzania) [2011] UKSC 4. At that time the appellant had only one child but he had a strong bond with his son. Before the Upper Tribunal there was no evidence from social services and the Upper Tribunal Judge recognised that the absence of that evidence showed the relationship was continuing as social services would intervene only where there was a problem. The authorities showed that family life between parent and child was presumed, as in EB (Kosovo) [2008] UKHL 41. There was no suggestion that the appellant presented any risk to the children. He was paying £25 per week for the nursery and there was no evaluation of what would happen to this if the appellant was removed.
- 12) Mr Muquit submitted that the Judge of the First-tier Tribunal accepted that there was family life before 2011 but did not say why the relationship with the children had broken down. There was no justification for her finding that there was no family life between the appellant and his children. The appellant had given evidence on this himself and no corroboration was required. In her determination the judge confused the existence of family life with questions as to the quality of family life.
- 13) In relation to proportionality, Mr Muquit submitted that there was no deportation order and this affected the assessment of the public interest. The judge had not taken into account the interests of the children as a primary consideration in the balancing exercise.

- 14) For the respondent Mr Mangion submitted that the central issue was whether undue weight had been given to the restraining order. The order had been lifted and the judge had accepted this. The judge also accepted evidence of diminished cohabitation. The evidence of the appellant's wife was that the appellant spends a fifth of his time away from home. The quality of the appellant's relationship with his wife would have a knock-on effect on the best interests of the children. The judge was not satisfied as to the quality of the appellant's relationship with the children. There was a question as to whether the judge was entitled to draw an inference from the absence of a witness statement and the existence of the restraining order. In relation to proportionality the judge was entitled to take into account allegations against the appellant even though they were unproven.

Discussion

- 15) It is unfortunate that both in the determination by the Judge of the First-tier Tribunal and in the application for permission to appeal there is considerable discussion of the nature of the relationship between the appellant and his wife whereas the focus, certainly in the judge's determination, should have been on the relationship between the appellant and his children. The judge may have been entitled to draw the inference she did about the relationship between the appellant and his wife. She was not entitled, however, without more, to use her findings about the relationship between the appellant and his wife as the basis for a finding that it was not in the best interests of the children for the appellant to have continuing contact with them in this country. Given the ages of the children and the previous findings made in respect of the first child by the Upper Tribunal, a finding that it was not in their best interests for the appellant to continue to have direct contact with them would require strong and substantial reasoning. There is no such reasoning in this determination. The judge's reasoning in relation to the best interests of the children is weak almost to the point of non-existence. Furthermore, as Mr Muquit pointed out, she does not appear to have regarded the best interests of the children as a primary consideration. The inadequacy of reasoning in respect of the best interests of the children amounts to an error of law because of which the judge's decision must be set aside.
- 16) I have considered whether this decision should be remade within the Upper Tribunal. However, there is an almost complete absence of fact finding by the Judge of the First-tier Tribunal as to the best interests of the children and as to the evidence relating to their welfare. Accordingly, I consider the appropriate course is for the appeal to be remitted to the First-tier Tribunal to be reheard before a different judge in order, in particular, that facts may be found as to the children's relationship with their father and as to where the best interests of the children rely, as well as in relation to the other issues in dispute under Article 8. I make this decision in accordance with Practice Statement 7.2(b).
- 17) There is a further issue to be decided in relation to the scope for the application of the new Immigration Rules, which came into force on 9 July 2012. In the reasons for refusal letter the respondent considered that these rules applied to this application.

The judge decided otherwise but does not appear to have had any regard to the transitional provisions in paragraph 91 of HC194 or to the nature of the immigration decision against which the appeal was brought. Indeed, the form of the immigration decision itself presents something of a conundrum, which may even have implications for jurisdiction. As I have not heard submissions on these matters I do not intend to decide them at this stage but they are matters which will need to be considered when the appeal is reheard before the First-tier Tribunal.

Conclusions

- 18) The decision of the First-tier Tribunal discloses an error on a point of law such that it is set aside and will be remade at a hearing before the First-tier Tribunal.

Anonymity

- 19) Although the First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum & Immigration Tribunal (Procedure) Rules 2005, I consider that because the evidence concerns family life involving two young children such an order should be made in terms of Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The appellant is granted anonymity, unless and until a Tribunal or court directs otherwise. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 23rd July 2013

Judge of the Upper Tribunal