



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/24525/2016

THE IMMIGRATION ACTS

Heard at Glasgow
on 25 October 2017

Decision & Reasons Promulgated
on 16 November 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

MRS NJAIMEH FAAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Y Darboe, Queen's Park Solicitors

For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by Judge of the First-tier Tribunal Cameron dismissing an appeal under the Immigration Rules and under Article 8. The appeal was decided by the First-tier Tribunal without a hearing.
2. The appellant is a national of Gambia. Her appeal was brought against a decision dated 12 October 2016 by the respondent refusing her leave to remain as the partner of a British citizen. The couple have a child who is a British citizen.
3. Permission to appeal was granted by the Upper Tribunal. This was principally on the basis that although the judge dismissed the appeal because the appellant had not provided all the specified documentary evidence under

Appendix FM, it was arguable the judge did not make a clear finding on whether the appellant met the substantive maintenance requirements of Appendix FM and then proceed to consider how such a finding would factor into the proportionality assessment. All the grounds were considered arguable.

Error of law

4. Before me Mr Darboe began by concentrating on the issue of whether the documentary evidence which was before the judge met the requirements of Appendix FM. He then turned to the significance of the appellant's daughter, who is a British citizen, having come from the Gambia to join her parents in the UK in the period between the refusal decision and the appeal to the First-tier Tribunal. He questioned whether the judge had proper regard to paragraph EX.1 of Appendix FM and to s 117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended). He contended that by refusing the appellant leave her daughter would be deprived of the benefits of her British and EU citizenship.
5. Addressing first the issues arising from the presence of the appellant's daughter in the UK, there seemed to be an implication in the respondent's case that the daughter was brought to the UK for the specific purpose of affecting the outcome of this appeal. In my view the evidence does not support this. The evidence is that the daughter was sent to live with her grandmother in the Gambia while her father was studying full time here. It was always the family's intention that when those studies were completed she would rejoin her parents in the UK. The timing of this during the appeal proceedings was largely coincidental. The daughter is now attending school in the UK.
6. Mr Govan submitted that the presence of the daughter was a "new matter" in terms of s 85 of the 2002 Act and as such the consent of the Secretary of State was required before the Tribunal might consider the matter. I do not agree. A "new matter" is defined in s 85(6), in terms of which a matter is a "new matter" if it constitutes a ground of appeal of a kind listed in s 84. Among the kinds of ground of appeal listed in s 84 is that the decision appealed against is unlawful under s 6 of the Human rights Act 1998. The sole ground in this appeal is that the respondent's decision is a breach of Article 8. Accordingly, no new ground of appeal has been invoked. The presence of the appellant's daughter in the UK is potentially a material factor in relation to the ground of appeal under Article 8 but it does not constitute in itself a different ground of appeal of a kind listed in s 84 - it is an aspect of the original ground of appeal arising from new evidence. Accordingly the daughter's presence is not a "new matter" under s 85(6).
7. In the grounds of appeal to the Upper Tribunal it was pointed out that at paragraph 39 the Judge of the First-tier Tribunal found on the basis of the

appellant's daughter having joined her in the UK that the appellant had a family life which would engage Article 8. Nevertheless, the judge did not consider the appeal under paragraph EX.1, seemingly because the respondent had not done so in the refusal decision. The respondent could not have done so, however, because at the time of the respondent's decision the daughter was in the Gambia. Under s 85(4) of the 2002 Act the Tribunal was empowered to consider any relevant matter, including a matter arising after the date of the respondent's decision. For reasons which I have already expressed, the daughter's arrival was not excluded from consideration as a "new matter" under sub-sections 85(5) and (6) but it was material. The judge ought therefore to have had regard to it under paragraph EX.1.(a)(i) and the failure to do so constitutes an error of law.

8. Similarly, although the judge found there was family life with the daughter in the UK, and referred to parts of s 117B, the judge did not refer specifically to s 117B(6) setting out the test of reasonableness in expecting the daughter to leave the UK. Instead the judge appears to have considered whether there were obstacles to the daughter's return to the Gambia and whether this would be against her best interests. The judge concluded, at paragraph 44, that it would not be unreasonable to expect the daughter and her father to accompany the appellant to the Gambia. This finding appears to be based almost entirely on the lack of obstacles to the daughter's return and makes no mention at all of the positive benefits to the daughter, as a British citizen, of remaining in the UK. By neglecting these positive factors, which might include, for example, the daughter's educational prospects, I consider that the judge disregarded relevant considerations and did not give adequate reasons for the conclusion reached. These are further errors of law.
9. Mr Darboe took me in great detail through the documentary evidence relating to the finances and employment of the appellant and her partner in relation to whether the specified documents required by Appendix FM-SE were provided. I am grateful to Mr Darboe, and also to Mr Govan, for the assistance they gave me in relation to this and for their attention to detail.
10. It is not disputed that the appellant did not initially provide all the specified documents with her application for leave to remain. Following receipt of the application the respondent wrote to the appellant asking for additional documents. In the appellant's bundle was a copy of a letter dated 20 August 2016 sent by the appellant to the respondent enclosing "requested documents". Regrettably the appellant did not provide a list of the documents enclosed with the letter. This omission has in part contributed to the length and complexity of these proceedings.
11. Nevertheless, Mr Darboe was able to demonstrate to my satisfaction that among the documents which accompanied the appellant's letter of 20 August 2016 was a significant quantity to which the respondent failed to have regard in the refusal decision of 12 October 2016. The refusal decision referred to

missing payslips and bank statements in respect of both the appellant and her partner. Mr Darboe pointed out that all of these documents, apart from a small number of payslips for the appellant, were provided with the letter of 20 August 2016, as was evidenced by the copies of them in the respondent's bundle. Some of the missing payslips had then been submitted with the appellants' appeal bundle but there were still a couple which had been mislaid by the appellant. Mr Darboe submitted that if the respondent had accepted that all the other documents had been provided, then a discretion could have been exercised to overlook the few missing payslips. The payslips which were still missing appeared to be those for week 52 of 2015-16 and week 4 of 2016-17. Mr Darboe further submitted that the respondent had not had regard to the correct period for payslips to be provided for the appellant's partner. The respondent had asked for payslips for 12 months when only 6 months' payslips should have been required as, unlike the appellant, the partner had been working for the same employer for at least 6 months.

12. The Judge of the First-tier Tribunal found at paragraph 25 that the appellant had not provided the specified documents requested by the respondent. I can understand why the judge made this finding. The judge heard no oral evidence or submissions and the appellant's letter of 20 August 2016, as already observed, did not list the documents provided. Accordingly the respondent's error in the refusal letter as to the documents provided was not corrected by the judge. In the circumstances this issue may not have been material to the outcome of the appeal, as the outcome hinged on reasonableness and proportionality. Nevertheless, the appellant's strenuous attempt to provide all the specified documents might have had some effect, first on showing the substantive maintenance requirements were met, and secondly on proportionality, in that the appellant not only met the substantive requirement but had done all that she could to provide the specified documents. I might add at this point that Mr Govan submitted that the respondent did not receive a copy of the appellant's appeal bundle but Mr Darboe contended this had been sent to Fleetbank House and proof of posting was available. I did not consider it necessary to pursue this point further.

Substantive issues

13. Having found errors of law in the decision of the First-tier Tribunal, I invited the parties to address me on the substantive issues. Not surprisingly, Mr Darboe's position was that not only were the substantive maintenance requirements met but it would not be reasonable to expect the appellant's child to leave the UK, in terms both of s 117B(6) and paragraph EX.1.(a)(i). The documentary evidence showed the appellant to be earning around £13,500 per annum and her partner around £14,000. I note that at paragraph 40 of the decision the Judge of the First-tier Tribunal appeared to accept that the maintenance requirements were met but did not proceed to factor this properly into the proportionality assessment.

14. It is difficult to envisage a successful counter-argument to the submission by Mr Darboe as to how the decision should be re-made. Satisfying the maintenance requirements of the Immigration Rules, albeit subject to two missing payslips, greatly reduces the weight to be given to any public interest in refusing the appellant leave to remain. Although the Judge of the First-tier Tribunal found it would not be unreasonable to expect the appellant's daughter to leave the UK, this finding was made, as I have already pointed out, without any apparent regard to the positive benefits to the daughter of remaining here. It was always the family's intention that the daughter would rejoin her parents in the UK after her father's studies were completed. The daughter is at school here. Her father is able to provide her with a settled family home here. Notwithstanding that the daughter has lived for several years in the Gambia, it is difficult to see how her best interests would not be adversely affected by uprooting her from her new life in the UK. On the contrary, this would be likely to have a deleterious effect on her education, her prospects and expectations, and on her emotional stability. For these reasons I am satisfied it would not be reasonable to expect the appellant's daughter to leave the UK.
15. The proper outcome for this appeal is that it is allowed under paragraph EX.1.(a)(i) of Appendix FM of the Immigration Rules and under Article 8.

Conclusions

16. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
17. The decision of the First-tier tribunal is set aside.
18. I re-make the decision by allowing the appeal.

Anonymity

I have not been asked to make an anonymity direction and I see no reason of substance for doing so.

Fee award (N.B. This is not part of the decision)

Although my attention was drawn to deficiencies in the refusal decision, the appellant made her application without all the specified documents. The additional documents she submitted on 20 August 2016 also contained omissions. The outcome of the appeal was affected by the arrival of the appellant's daughter in the UK. I have not been asked to make a fee award and in the circumstances I do not consider it appropriate to do so.

Deputy Upper Tribunal Judge Deans

15 November 2017