



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08300/2017

THE IMMIGRATION ACTS

Heard at Field House
On 14 August 2018

Decision & Reasons Promulgated
On 23 August 2018

Before

LORD BECKETT
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE CANAVAN

Between

R D
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was granted at an earlier stage of the proceedings because the case involves child welfare issues. I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. 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.

Representation:

For the appellant: Ms S. Pinder, instructed by Breytenbachs Immigration Consultants

For the respondent: Mr P. Deller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 18 July 2017 to refuse a human rights claim in the context of deportation proceedings.
2. First – tier Tribunal Judge Mitchell (“the judge”) dismissed the appeal in a decision promulgated on 03 May 2018.
3. Designated First-tier Tribunal Judge McCarthy granted permission to appeal in the following terms:

“2. The first ground argues that the judge erred by failing to have regard to EU law matters. I find there is no merit in this ground because irrespective of the findings made that the appellant is the spouse of an EEA national qualifying person (albeit separated from her), the judge had no jurisdiction to consider EU law matter. The appeal was against the judge had no jurisdiction to consider EU law matters. The appeal was against the refusal of a human rights claim and was brought under s.82(1)(b) of the 2002 Act. The only ground of appeal available was that in s.84(2). In addition, the judge had no jurisdiction to consider whether the decision was in accordance with the law (see *Charles (human rights appeal: scope)* [2018] UKUT 89. I do not grant permission on this ground.

3. The second ground argues that the judge erred in his approach to the balancing exercise. I find there is some merit in this ground. For example, at [44] Judge Mitchell found that the appellant has a genuine and subsisting relationship with a child resident in the UK for over seven years, but then states, “There is no evidence that it would be unduly harsh for [the child] to remain in the United Kingdom without the appellant”. A similar comment can be found at [50]. Both findings fail to have regard to the assessments carried out by the Family Court that indicated it was in the child's best interests to have contact with the appellant or to the evidence that the appellant's son was doing better at school now that he had contact with the appellant.

4. The third ground argues that the judge erred in his proportionality assessment because he failed to weigh the above factor with the public interest in expelling a foreign criminal. Because I have found that the second ground is arguable, the third ground must also be arguable.

5. The fourth ground argues that the hearing was procedurally unfair because the appellant was legally unrepresented and Judge Mitchell failed to explore several potentially material issues. This ground also alleges Judge Mitchell acted unfairly by drawing adverse findings from a lack of evidence even though the appellant was not given an opportunity to address. I do not find merit in this ground because the judge dealt with the case presented to him. He can only do so much for an unrepresented appellant. There is no explanation why the appellant was legally unrepresented. The appellant did not seek time to instruct a lawyer. I do not grant permission on this ground.”

Decision and reasons

4. It is not necessary to set out detailed reasons why we have concluded that the First-tier Tribunal decision involved the making of an error on a point of law because Mr

Deller accepted that insufficient findings were made in relation to the best interests of the child.

5. In summary, the decision lacked any coherent structure, failed to engage with undisputed facts, failed to take into account relevant evidence, and in places, made apparently contradictory findings.
6. It was not disputed that the appellant had two children from his marriage to a Slovakian citizen. The judge noted the fact that the eldest child passed away only months before the hearing [5-6], but the likely effect of this event on the appellant and his remaining son, who suffers from severe autism, was not mentioned again and was notably absent from any assessment of whether deportation was 'unduly harsh' on the remaining child. The effect of such a recent bereavement on a child with special needs, who was facing long term separation from his father, as well as the effect on the appellant of being separated from his remaining child in such circumstances, was a relevant consideration that should have formed an important part of the assessment.
7. No clear findings were made as to whether it was in the best interests of the child for his father to remain in the United Kingdom. The first mention of the child's best interests was at the end of the decision after the judge had already concluded that deportation was proportionate. Even then, it was limited to a bare statement that the child's interests had been considered at as 'primary consideration' without any meaningful findings. It is trite law, repeatedly emphasised by the Supreme Court, Court of Appeal and the Upper Tribunal that clear findings should be made in relation to the best interests of children. The judge failed to make any findings as to where the best interests of the child lay and failed to give any indication that he placed proper weight on the interests of the child. This alone justifies setting aside the decision.
8. Although we note that Designated First-tier Tribunal Judge McCarthy did not grant permission on the first and fourth grounds, we have some observations to make on those points having set aside the decision on the other grounds.
9. First, it is at least arguable that rights of residence under EU law are relevant to the assessment under Article 8. It is difficult to see how the terms of the immigration rules are relevant to a holistic assessment of the circumstances, but rights of residence under EU law would not be relevant. The appeal might not be an appeal under The Immigration (European Economic Area) Regulations 2006 (or 2016), but to exclude potential EU rights of residence from an Article 8 assessment would lead to an incomplete assessment of all the relevant circumstances.
10. We flag this issue up because it might be relevant given that the appellant says that he is married to a European citizen. Although they are separated, they have not divorced. Any assessment would have to consider whether the appellant's estranged wife is likely to be exercising rights of free movement. Ms Pinder indicated that it might be difficult to obtain such evidence, in which case those representing the appellant need to give immediate thought to whether it is appropriate to make an application to the

First-tier Tribunal for a direction: see *Amos v SSHD* [2011] EWCA Civ 552. If the applicant is advised that this might be a relevant argument, any further evidence and submissions on the point should be made well in advance of the next hearing to allow time for the respondent to consider his position on the issue. The respondent will need to consider whether it is a 'new matter' for the purpose of section 85 of the Nationality, Immigration and Asylum Act 2002. We note that the facts were known to the respondent and form part of an ongoing 'matter' i.e. an Article 8 human rights claim. However, it is likely to be of assistance to the First-tier Tribunal that hears the appeal to be informed of the respondent's position on this issue.

11. Second, the judge noted that there was evidence to show that the appellant had been referred to the adult mental health team to assess him for a formal diagnosis of Asperger's Syndrome. Despite the indication that the appellant might have special needs, and the fact that the appellant was unrepresented, there is nothing to indicate that the judge treated the appellant as a vulnerable witness and applied the relevant guidance. The appellant is now represented and is likely to be in a better position than he was at the previous hearing. However, it may be necessary for the First-tier Tribunal that rehears the case to consider the most up to date evidence before deciding whether the appellant should be treated as a vulnerable witness.
12. We conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside. The nature and extent of the judicial fact finding which is necessary for the decision to be remade is such that, having regard to the overriding objective, it is appropriate to remit the case to the First-tier Tribunal (paragraph 7.2(b) Practice Statement - 25 September 2012).

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The appeal is remitted to the First-tier Tribunal for a fresh hearing

Signed  Date 15 August 2018
Upper Tribunal Judge Canavan