



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09789/2017

THE IMMIGRATION ACTS

Heard at Field House
On 5th September 2018

Decision & Reasons Promulgated
On 14th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

F A
(ANONYMITY DIRECTION MAINTAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Fripp, Counsel

For the Respondent: Ms J Isherwood, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Andrew promulgated on 26th April 2018 dismissing the Appellant's appeal on the basis of his human rights. The Appellant appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge Simpson in the following terms:

"2. Permission to appeal is granted because:

- (i) there was arguable as asserted that the Judge erred in the assessment of family life, specifically when finding that there had not been shown

genuine and subsisting relations with his wife and children, a matter of which did not appear to have been in contention with the respondent, arguably was inconsistent with the evidence, and there further appeared was not a matter of which the parties' representatives were put on notice at the hearing;

- (ii) the appellant's immigration history loomed large in the judicial evaluation combined with the appellant and his wife's evidence about their living arrangements of which there appeared there was not weighed in the evaluation may have been the function of challenging financial circumstances, which arguably altogether contributed to an arguably skewed assessment of the *bona fides* of the appellant's ties with his wife and children;
- (iii) there was further arguable that the Decision disclosed an inadequacy of regard to and application of **MA (Pakistan) & Ors v SSHD [2016] EWCA Civ 705**, more especially, that powerful reasons are required to be given when a parent faces separation from their children.

3. Arguable error(s) of law disclosed".

- 2. I was not provided with a Rule 24 response from the Respondent but was given the indication that the appeal was resisted.

Error of Law

- 3. At the close of the hearing I reserved my decision which I shall now give. I do find that there is a material error of law in the decision such that it should be set aside. My reasons for so finding are as follows.
- 4. In respect of the first Ground of Appeal, the complaint in essence is as follows. Firstly, that the Secretary of State in refusing the Appellant's application to remain on the basis of his partnership with a settled person did not at any stage indicate that there was a challenge to the genuine and subsisting nature of the relationship with that partner. Secondly, that position did not change at the substantive appeal before the First-tier Tribunal, notwithstanding that there was oral testimony in relation to the frequency of contact between the Appellant and his partner and the extent of their cohabitation in the same address. Having checked the Record of Proceedings, I also note that the Respondent's Presenting Officer did not seek to raise this as an issue before the First-tier Tribunal. Finally, the appeal was dismissed in part due to the Judge's view of the genuine and subsisting nature of the marriage which had not been raised earlier by the Respondent and appeared in the judgment for the first time. It was either for the Respondent to put the Appellant on notice that this had become an issue as a consequence of the oral testimony heard or at the very least it was incumbent upon the First-tier Tribunal to alert the Appellant to the fact that the Tribunal had concerns in relation to the evidence heard. Consequently, the complaint that the Appellant had not been put on notice that there was an issue in relation to the genuine and subsisting relationship between him and his partner is one that is made out, and one that is

material to the consideration of that relationship and represents a material error in the judgment.

5. Furthermore, it is implicit from that assessment that this affected the Judge's view as to whether there was a subsisting relationship between the Appellant and his children of that partnership also. In my view this is a further material error in the decision. However, notwithstanding this finding, I make it with extreme reluctance and with grave concerns in respect of the evidence that the judge heard and made findings upon, which, had the issue been properly raised, would have been plainly open to the Judge to make.
6. Having perused the Record of Proceedings and the Judge's accurate rehearsal of the evidence by Judge Andrew at paragraph 1 through to 26 of her decision (so far as relevant to these issues), I note that oral evidence was given by the Appellant and his partner – for example at paragraph 19 and 24 of the judgment – which one could only describe as 'poor' and somewhat 'dubious' which could understandably give rise to concerns as to whether the relationship was genuine and subsisting or not.
7. Thus, notwithstanding that the Appellant was not previously put on notice of this issue, he plainly has now by virtue of these proceedings, and upon any further hearing it would be for the Appellant and his partner to address the *previous* oral testimony heard by Judge Andrew in respect of whether the relationship is genuine and subsisting. As such, I am satisfied that by virtue of these proceedings and my decision, the Appellant has now been put on notice that the nature of his relationship is an issue of concern and one that will need addressing by him at a further appeal substantive appeal hearing before the First-tier Tribunal.
8. Turning to Ground 3 of the Grounds of Appeal, the Appellant's complaint may be summarised as arguing that, whilst the judge has made reference at paragraph 29 of her decision to there being "powerful reasons" why the Appellant should not be granted status in the United Kingdom having had regard to the Appellant's very poor immigration history which included deception, in my view, the reasoning given is insufficient in light of the decision of the Presidential panel of the Upper Tribunal in *MT and ET (child's best interests: ex tempore pilot) Nigeria* [2018] UKUT 88 (IAC) wherein the Appellant-mother of 'qualifying' children shared a similarly poor immigration history and had overstayed and had also been convicted of a criminal offence involving fraud, but in the panel's words, that immigration history was only described as "run of the mill" immigration offending. Thus given that the reason for the Judge finding at paragraph 29 there were strong reasons due to the Appellant's past deception in his immigration history, albeit that history is very poor, I am not satisfied that there is a sufficient analysis of whether that immigration history truly meets the threshold of 'powerful reasons' in order to defeat the Appellant's ability to rely upon his parental relationship with his children (if he is able to establish that relationship at a further hearing, having failed to do so before Judge Andrew).
9. In light of my finding material errors in respect of Grounds 1 and 3, turning to Ground 2, I am satisfied that the findings in respect of the parental relationship were infected

by not least the inability to address the Judge's concerns over the genuine and subsisting relationship between the Appellant and his partner and the extent to which that may have affected the First-tier Tribunal's view of the parental relationship between the Appellant and his children.

10. Notwithstanding that, I again emphasise that it would be for the Appellant to overcome the oral evidence he and his partner have previously given before Judge Andrew which is rehearsed in Judge Andrew's decision between paragraphs 19 and 25 as to (a) whether or not he is in a genuine and subsisting relationship with his partner and (b) whether or not he is in a genuine parental relationship with the children of he and his partner.
11. In light of the above findings, the appeal to the Upper Tribunal is allowed and I set aside the decision of the First-tier Tribunal in its entirety.

Notice of Decision

12. The appeal to the Upper Tribunal is allowed.
13. The appeal is to be remitted to be heard by a differently constituted bench.

Directions

14. Standard directions are to be given.
15. A Bengali interpreter is to be provided.
16. The time estimate for the remitted hearing is two hours.

No further directions are given.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 11 September 2018

Deputy Upper Tribunal Judge Saini