



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

Appeal Number: HU/08461/2016

THE IMMIGRATION ACTS

**Heard at Bradford
On 25 October 2018**

**Decision & Reasons promulgated
On 11 January 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**CFNCK
(anonymity direction made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Medley-Davey Immigration Advice Centre

For the Respondent: Mr Diwnycz - Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Casswell who, in a decision promulgated on 18 August 2017, dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant is a national of Cameroon who arrived in the United Kingdom with a false passport in 2002. The appellant was arrested in November 2015 and served with a removal notice. On 5 January 2016

the respondent sent a letter requesting proof of the appellants paternal relationship with a child in the United Kingdom and, on 9 January 2016, a letter was received from the appellant's representatives setting out additional grounds. On 9 March 2016 the respondent refused the application for leave to remain in the United Kingdom or exceptional grounds outside the Immigration Rules.

3. The Judge records at [15] that the appellant could not succeed under the Immigration Rules. The Judge noted the appeal rested very largely on the relationship the appellant has with his son J born on 12 May 2014. J's mother [C] is a Portuguese national, as is J. The appellant and J's mother are not in a relationship.
4. The Judge, at [16], finds the appellant has a strong and close relationship with J and that family life is being exercised between them. The Judge considered section 55 and the best interests of the child. When considering the proportionality of the respondent's decision the Judge finds at [18]:

"18. Under *Razgar*, I then have to go on to consider whether the family life would be interfered with if the Appellant were removed to Cameroon. Initially, it would appear that it would, but there is an absence of evidence to demonstrate that that situation would continue given the lack of information about [C] plans for the future (and indeed her ability to remain in the UK). If she does return to Portugal, Mr Medley-Daly asks me to find the Appellant could not go and visit his son there or live in that country. However, I have no evidence before me to show that that is correct. Even if there were substantial interference with family life, which I do not find proved, the decision to remove the Appellant is clearly lawful and serves the legitimate aim of the protection of the social and economic interests of the UK through the maintenance of fair and effective immigration control. When considering whether the Respondent has shown it to be proportionate, I have to consider a number of matters. The Appellant speaks English and has not been an obvious burden on public funds, but he has been working illegally in the UK for 15 years, has lived here illegally all the time, and only sought to regularise his status once he had been apprehended. He has an HIV condition, but there is treatment available in Cameroon for this, and his only significant relationship in the UK is with his son J. J is a Portuguese national who on the evidence before me has no right to remain in the UK on a long-term basis and who may not remain here."

5. The Judge found any interference proportionate [19].
6. The appellant sought permission to appeal which was granted by another judge of the First-Tier Tribunal on 1 February 2018. The operative part of the grant being in the following terms:

"2. The grounds alleged that the Judge erred in failing to consider that the best interest of the child generally involved having a relationship with both parents. She further erred in suggesting that there was an absence of clear evidence that

the Appellant's removal would have major consequences for his son. Given that his son resides in the UK, the suggestion that the relationship could continue in Portugal was unlawful. She had further erred in failing to consider that the Appellant's son was an EEA citizen.

3. I have carefully considered the decision. While the evidence before the Judge regarding the Appellant's son's circumstances was not completely clear, nevertheless she found that there was family life between the Appellant and his son. The evidence before her was that the Appellant saw his son on a daily basis, and she found that there was a "strong and close relationship". Given this, it is arguable that the Judge has failed to properly consider the best interests of the Appellant's son."

Error of law

7. On behalf of the appellant it was submitted that it is relevant to the proportionality assessment that the appellant was found to have a strong relationship with his son J. It is argued the child's best interests are to maintain a relationship with both parents and that had the Judge given proper weight to this aspect a different decision may have been warranted. It was argued there was nothing that could be done to compel J to leave the territory of the European Union and that the relationship will be severed if limited to indirect contact. It was argued it was in the child's best interests for physical contact to be maintained. It was also asserted the Judge failed to consider the relevance of the rights of an EEA national and the fact the appellant provides care which allows the child's mother to work. It was accepted there was little evidence to assist the Judge as J's mother would not support the appellant as she did not 'turn up' or provide evidence or want to assist the appellant.
8. It was further submitted on behalf of the appellant that in relation to the economic well-being of the United Kingdom, if the appellant is removed J's mother will be unable to work and have to claim large benefits which will have a negative economic effect. It was argued the balancing exercise had not been conducted by the Judge. It was also submitted the Judge speculated regarding J and it could not be said that the correct balance had been carried out, making the decision arguably unsafe.
9. It is also submitted that insufficient weight had been given to the relationship between the appellant and J. It was argued the Judge erred in implying that family life could continue elsewhere and that it was wrong for the Judge to say that J may not remain in the United Kingdom as there was no evidence to this effect and as an EEA citizen J is able to exercise a right of free movement. It was submitted on the appellant's behalf that the relationship should not be severed by reference to section 117B(6). It is accepted on the appellant's behalf that J is not a 'qualifying child', but it was argued it would not be in the public interest to break the relationship between J and his father

and that the same weight should be given to this issue is if J is a 'qualifying child'.

10. On behalf of the respondent it was argued the Judge who made the decision is one of the most sensitive judges on the Bench in relation to family matters and that the Judge made the best of the limited evidence made available to her. There was no evidence from J's mother and it is accepted that as an EU citizen single mother she will be able to go where needed. It was submitted that the economic impact on the United Kingdom was part of the equation. It was not disputed that J's mother could remain and work in the UK and it is not a case of forcing her to leave the UK. The Judge looked at all the relevant issues but did not make hard findings on what may happen sufficient to amount to speculation. It was argued that there was nothing arguably wrong with the decision under challenge.
11. In his reply Mr Medley-Daley indicated that if the mother relied on state benefits this would not assist the economic welfare of the United Kingdom and it is not in the State's interests for her to have to rely on public funds which the respondent does not want people to do. It was argued the state benefit point was raised but not considered in the decision by the Judge.

Discussion

12. This is a family splitting case in which the decision under challenge seeks to remove the appellant from the United Kingdom. His son J and former partner will remain as J's mother is an EEA national exercising treaty rights in the UK.
13. In relation to submissions made on the appellant's behalf suggesting that a child who is not a 'qualifying child' should be treated in the same way as a 'qualifying child' pursuant to section 117B(6) of the 2002 Act, as it suits the appellant's case, has no arguable merit. The purpose of defining a child as a 'qualifying child' is in recognition of the period of time the child has been in the United Kingdom and whether it be reasonable for that child to leave the United Kingdom disturbing ties and roots they have acquired during the period required for them to become a 'qualifying child'. J is not a qualifying child as defined in section 117.
14. The second point is the submission made on the appellant's behalf that the public interest in the economic well-being of the United Kingdom is not served by the appellant's removal, if this meant J's mother may become dependent upon greater benefits as a result of a change to her working arrangements, has no arguable merit. The Secretary of State for the Home Department forms part of the Government of the United Kingdom which chooses to remove the appellant for the reasons set out in the refusal notice. The fact there may be a consequence in a member of the remaining family having to claim state benefits is not arguably unrealistic, but the State has a margin of appreciation in relation to such matters and it is not made out it is arguably irrational or unlawful for such to be exercised in this

way, so as to make the decision disproportionate if there is a greater demand on the public purse as a result of the increase benefits. The appellant fails to establish, even if this issue was relevant on the facts, that there would be a net cost to the United Kingdom if the appellant himself is removed in light of the costs incurred in providing services to an individual who is not one whose taxes paid exceed the notional cost of providing services to them as British citizens or those entitled to remain in the United Kingdom.

15. The third aspect is that it has not been established, and indeed was conceded by the appellant's representative, that no breach of rights under the Citizenship Directive was pleaded before the Judge or any EU law issue raised in the manner which it is now relied upon in support of the claim the Judge erred in law. This is not an obvious point and it is not made out the Judge was expected to do more than she did in relation to this aspect. It is not acceptable for a representative to present a case on one basis and then seek to assert arguable legal error on a completely different basis in relation to which the Judge's findings or opinion was not sought.
16. In relation to the evidence before the Judge, it is clear the Judge considered the evidence with the required degree of anxious scrutiny and has given adequate reasons in support of the findings made. The weight to be given to the evidence was a matter for the Judge. There is no credible challenge to the rejection of the appellant's claim under the Immigration Rules. The respondent does not challenge the finding at [16] that the appellant has a strong and close relationship with J and the Judge records at [17] that she was asked to consider section 55 of the UK Borders Act 2009 which she did, taking into account as a primary consideration the best interests of both J and a younger child B although recording in the same paragraph, *"However, there is an absence of clear evidence to indicate that removal of the Appellant from the life of J (or B) would have major consequences for him or them. If that were the case, I would expect [Ms C] to say so, and to say she intends to stay in the UK to facilitate the relationship. Be that as it may, as already indicated, I find there is family life between the Appellant and J on the evidence before me. I cannot find that there is family life between him and B, however, the evidence not being strong enough to demonstrate that"*. The grounds seeking to argue that the Judge should have given greater weight to the best interests assessment appear to completely ignore the fact that the Judge did undertake an appropriate assessment but noted a lack of evidence to support the appellant's contention of major consequences for the children if the appellant was removed. It was not made out this is a case in which the Judge should have done more than she did. It is not one of those rare cases where the Judge was required to undertake an investigative role or adjourned for further evidence when clear directions had been given for the parties to provide all the evidence they were seeking to rely upon. The grounds claim that J's mother [Ms C] was unwilling to assist the appellant and become involved in the proceedings but that is not the fault of the Judge. There was no

application for a witness summons to compel her attendance prior to the hearing which the Procedure Rules provide for. The Judge made the decision on the basis of the evidence before her and no arguable legal error is made out in her having done so.

17. The Judge adopts a structured approach to assessing the merits of the appeal outside the Immigration Rules and in relation to this aspect sets out relevant findings of fact at [18] - set out above. Again, the Judge notes that the evidence did initially support a finding there will be interference with the family life found if the appellant was removed to Cameroon but there was an absence of evidence to demonstrate what the situation would actually be, in reality. J and his mother are Portuguese nationals who may return to their home State or exercise a right of free movement elsewhere. The appellant did not adduce sufficient evidence to enable the Judge to make a firm finding on this point. The submission by the appellant's representative to the Judge that she should find the appellant could not go and visit his son in Portugal or live in that country was rightly rejected on the basis there was no evidence provided to show that this was correct. Having weighed up the competing interests the Judge concludes on the basis of the available evidence that removing the appellant serves the legitimate aim of protection of social and economic interests of the UK and the maintenance of fair and effective immigration control. The Judge makes a number of points in the appellant's favour but notes that during the 15 years he has been in the United Kingdom he has remained here unlawfully and only sought to regularise his status once he had been apprehended. Treatment is available for the appellant in Cameroon and, as the Judge notes, the appellant's only significant relationship is with J. There is nothing arguably wrong in the comment by the Judge that on the evidence before her J has no right to remain in the UK on a long-term basis and may not remain here. This is not speculation but merely a comment on the nature of the evidence, or lack of, made available. J may be an EU citizen, but he is a Portuguese national. It is not known what the effect of Brexit will be in terms of EU nationals exercising treaty rights in the UK and it is not known on what basis J would seek to remain, if he wanted to do so. It is not unlawful speculation but a reflection of the reality of the situation based upon the evidence provided.
18. Whilst the appellant wishes to remain in the United Kingdom he has failed to establish any arguable legal error material to the decision to dismiss the appeal warranting the Upper Tribunal interfering any further in this decision.

Decision

- 19. There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

20. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 28 December 2018