



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12818/2019

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)
On 25 November 2020

Decision & Reasons Promulgated
On 3 December 2020

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OOO

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the appellant: Ms J Isherwood, Senior Home Office Presenting Officer

For the respondent: Mr J Reynolds, counsel, instructed by Daniel Aramide Solicitors

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

Background

1. The Secretary of State for the Home Department (“the appellant”) has been granted permission to appeal against the decision of Judge of the First-tier Tribunal Monson (“the judge”), promulgated on 4 June 2020, allowing the human rights appeal of OOO (“the respondent”) against the appellant’s decision dated 15 July 2019 refusing the respondent’s human rights claim.
2. The respondent is a national of Nigeria born in 1991. She entered the UK on 21 January 2011 as a Tier 4 (General) Student and was granted further periods of leave in the same capacity until 15 October 2014. A human rights application based on the respondent’s relationships with her mother, siblings and cousins, all of whom are British citizens, was refused on 12 December 2014. Although an appeal to the First-tier Tribunal was initially allowed by Judge Malins, Deputy Upper Tribunal Judge Black found that judge Malins’ decision was vitiated by legal errors and the respondent’s appeal was ultimately dismissed. Deputy Upper Tribunal Judge Black observed however that there had been no challenge to Judge Malins’ findings of fact as regards the respondent’s circumstances. These included findings that the respondent had no immediate family in Nigeria and that her immediate family was living in the UK. Deputy Upper Tribunal Black also found that the respondent had lived the majority of her life in Nigeria, that she had not lost ties to the country, and that she would be able to rekindle her social ties, contacts and cultural links. The Deputy Upper Tribunal Judge found that the respondent was highly educated and motivated and would be able to find work in Nigeria using the skills and education she obtained in the UK. The respondent became appeal rights exhausted on 20 April 2017.
3. On 29 February 2019 the respondent made a fresh application for leave to remain on family/private life grounds. The application form FLR(FP) submitted by the respondent indicated that her application was based on private life rights and made fleeting reference to J, a child living in the same property as her. In completing the application form the respondent stated, in response to questions enquiring about individuals affected if her application was refused “[J] will be affected negatively”, and “I am a carer of [J] and he will be negatively”. The application form gave no further details of J or the nature of the respondent’s relationship with him.
4. A covering letter from Daniel Aramide Solicitors dated 4 March 2019 asserted in general terms that the respondent had close relations in the UK but made no reference to J. It does not appear that the human rights claim was supported by any other evidence relating to J. This is confirmed by reference to the Reasons for Refusal Letter. In summarising the respondent’s human rights claim no reference was made to J. This suggests that no further evidence or representations were made on the respondent’s behalf with respect to her relationship with J. The appellant concluded that the respondent did not meet the requirements of paragraph 276ADE(1) of the immigration rules, or that

there were exceptional or compassionate circumstances outside of the immigration rules such that the refusal of leave to remain would constitute a disproportionate breach of Article 8 ECHR. The respondent appealed the appellant's decision to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The Decision of the First-tier Tribunal

5. The appeal was initially listed before Judge of the First-tier Tribunal Shaerf on 16 December 2019. The appeal was on a float list which was unfortunate given that the respondent wanted to call 6 additional witnesses. Neither party had the judicial decisions in respect of the respondent's earlier appeals. Although an initial bundle had been prepared by the respondent for the hearing it became apparent to both the presenting officer and Mr Reynolds, who represented the respondent (and who continues to do so), and eventually to Judge Shaerf, that there was limited evidence in respect of one of the central issues being advanced by the respondent, namely, her relationship with J, her 2nd cousin. J, who was 4 ½ years old at the time, had been diagnosed on the autistic spectrum and the respondent was said to have a strong carer relationship with him. It was claimed that J's best interests would be deleteriously affected if the respondent was removed from the UK and that there would be a breach of his Article 8 human rights. The hearing was therefore adjourned to enable further evidence to be provided. It is important to note that Judge Shaerf's short record of proceedings makes no reference to any "new matter" issue as understood in s.85 of the Nationality, Immigration and Asylum Act 2002, and there is no reference to the appellant giving her consent to have the respondent's relationship with J treated as a "new matter".
6. The appellant was unfortunately not represented at the new hearing. The judge made it clear in his decision that the central issue in the appeal was the impact of the appellant's decision on an Autistic Spectrum Disorder child for whom the respondent acted as a carer [1]. The judge summarised the earlier decision of Judge Malins and the decision of Deputy Upper Tribunal Judge Black, and the Reasons for Refusal Letter. The judge summarised the evidence before him, which focused on the relationship between the respondent and J and his particular needs. The judge heard oral evidence from the respondent and her witnesses, most of which related to the negative impact that the respondent's removal would have on J.
7. In the section of his decision headed "Discussion and Findings" the judge found that the respondent exercised delegated responsibility for J's day-to-day care, particularly when J's mother was working, that J slept in the same bed as the respondent most nights, and that J was likely to have acquired a "very strong emotional attachment" to the respondent such that it would be in his best interests for the current care arrangements to continue. At [57] the judge satisfied himself that the respondent had built up a private life "of a special and compelling character through her role as a carer-giver to her autistic cousin, and

this, I combination with a due recognition of what is in [J's] best interests, tips the scales in the [respondent's] favour." Having satisfied himself that there were sufficiently compelling circumstances to justify the respondent being granted Article 8 relief outside the immigration rules, the appeal was allowed.

The challenge to the judge's decision

8. The grounds of appeal contend, firstly, that the judge was not entitled to conclude that the respondent's Article 8 rights had been breached on the evidence before him and for the reasons given. The second ground of appeal contends that the issue of the respondent's relationship with J constituted a "new matter" under s.85 of the Nationality, Immigration and Asylum Act 2002 and that the appellant had not given her consent for the "new matter" to be considered by the judge. Permission was granted on both grounds.
9. At the remotely conducted 'error of law' hearing I heard submissions from both representatives in respect of the "new matter" ground since this affected the jurisdiction of the First-tier Tribunal. Ms Isherwood relied on the written grounds and the decision in **Mahmud (S. 85 NIAA 2002 - 'new matters')** [2017] UKUT 00488 (IAC) ("**Mahmud**") and submitted that the respondent's relationship with J had never been considered by the appellant and that the appellant had never given her consent for it to be considered as a "new matter".
10. Mr Reynolds accepted that there had never been actual consent but submitted firstly, that mention had been made of J in the respondent's application form, and secondly, that the appellant would have been aware, at the latest by the time of the adjourned hearing on 16 December 2019, that the respondent was placing her relationship with J at the forefront of her human rights appeal. Mr Reynolds submitted that the appellant had implicitly given her consent to the "new matter" being considered given her knowledge of the basis of the respondent's appeal when the hearing was adjourned so as to obtain further detailed evidence.
11. I indicated to the parties that I was satisfied that the respondent's relationship with J constituted a "new matter" and that the respondent had not given any consent to this new matter being considered by the judge.

Discussion

12. Section 85 of the Nationality, Immigration and Asylum Act 2002 reads, in material part:

'85. Matters to be considered

(1) An appeal under section 82(1) against the decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

- (2) If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in a statement which constitutes a ground of appeal of a kind listed in section 84 the decision appealed against.
- (3) Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.
- (4) On an appeal under section 82(1) ... against a decision the Tribunal may consider... any matter which it thinks relevant to the substance of the decision, including... a matter arising after the date of decision.
- (5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.
- (6) A matter is a "new matter" if -
 - (a) it constitutes a ground of appeal of a kind listed in section 84, and
 - (b) the Secretary of State has not previously considered the matter in the context of -
 - (i) the decision mentioned in section 82(1), or
 - (ii) a statement made by the appellant under section 120.'

13. The Upper Tribunal considered the issue of "new matters" in **Mahmud**, the headnote of which reads:

"1. Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue.

2. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.

3. In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive."

- 14. The ground of appeal concerning the application of section 85 of the Nationality, Immigration and Asylum Act 2002 goes to whether the First-tier Tribunal had jurisdiction to determine the issues arising from the respondent's relationship with J for itself (see headnote 1 of **Mahmud**).
- 15. Although the respondent made fleeting reference to J in her application form, there was no exposition of her relationship with him, no details of his circumstances (or even how he was related to the respondent), no explanation as to how he would be affected by the respondent's removal from the UK, and no probative evidence in support of any of the above elements. The solicitor's

letter accompanying the application did not refer to J and gave no indication that the respondent was acting as a carer for a young child diagnosed with Autistic Spectrum Disorder. It is therefore not surprising that the respondent did not consider what subsequently became the core of the respondent's human rights appeal.

16. Mr Reynolds did not submit that the respondent's relationship with J was incapable of constituting a "new matter." He was right not to do so. With reference to headnote 3 of **Mahmud**, the nature and extent of the respondent's care-giving relationship with J is a distinct factual matrix that has not been previously considered by the appellant either in the context of her decision in section 82(1) of the Nationality, Immigration and Asylum Act 2002 or in respect of a statement made under s.120 of the Nationality, Immigration and Asylum Act 2002.
17. Mr Reynolds submitted that the appellant was aware that the respondent was relying on her relationship with J at the time of the adjourned hearing and thereafter. I accept that this is likely to be so. But the fact remains that the appellant did not make a decision giving her consent for what is undoubtedly a "new matter" to be considered by the First-tier Tribunal. Mr Reynolds argued that the appellant gave her consent by way of implication as she was aware that the respondent was relying on her relationship with J when the hearing on 16 December 2019 was adjourned and made no objection at that stage. This is similar to an argument advanced on behalf of the appellant in **Mahmud** that consent could be implied through omission, albeit in the particular context of the relevant procedure rules, in respect of a new matter. This was rejected by the Tribunal at [35] & [36]. The Tribunal held:

"... it would be contrary to the clear language in section 85(5) requiring the Secretary of State to have given consent, to find that by means of procedural rules, deemed consent can be inferred by inaction. Section 85(5) of the 2002 Act requires actual consent by the Respondent which cannot be deemed or implied."
18. I agree with and endorse the finding by the Tribunal. The plain meaning of the language used in section 85(5) of the Nationality, Immigration and Asylum Act 2002 is clear; the appellant must give her actual consent.
19. I have sympathy with the First-tier Tribunal judge given that there was no Presenting Officer and given that the relevance of section 85 had not previously been raised. He nevertheless should have considered for himself whether the principal basis upon which the respondent now put her case was a "new matter" and, having so concluded, he should either have determined the appeal without consideration of the evidence relating to the respondent's relationship with J or adjourned the hearing (once again) to enable the respondent to decide whether to give her consent (see **Quaidoo (new matter: procedure/process)** [2018] UKUT 00087 (IAC)).

20. As there was no consent to the “new matter” being considered, the judge was not entitled to consider the evidence relating to, and determine the issues arising from, the respondent’s relationship with J. The judge materially erred in law and his decision must be set aside. Having satisfied myself that the decision is not sustainable, no purpose would be served in considering the 1st ground of appeal.

Remittal to First-Tier Tribunal

21. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:
 - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
 - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.
22. The effect of the error has been that the judge determined an issue that it was not open to him to determine, and in so doing he made factual findings that must be, until consent is given, discarded. In these circumstances it was agreed by both parties that it was appropriate for the case to be remitted back to the First-tier Tribunal for a fresh hearing.
23. Whilst it is ultimately a matter for the appellant whether she consents to the “new matter”, and any refusal would only be amenable to a judicial review challenge, one would hope that the appellant would bear in mind the ‘one stop’ principle as applied in immigration appeals, and that the use of funds and resources may best be served by having all relevant issues in a human rights appeal determined at the same time.

Notice of Decision

The making of the First-tier Tribunal’s decision involved the making of an error on a point of law and is set aside.

The case is remitted back to the First-tier Tribunal to be decided afresh (de novo) by a judge other than judge of the First-tier Tribunal Monson.

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

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal (OOO) is granted anonymity. No report of these proceedings shall directly or indirectly identify OOO or any member of OOO's 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.

D. Blum

25 November 2020

Signed
Upper Tribunal Judge Blum

Date