



Neutral Citation Number: [2019] EWCA Civ 1095

Case No: C5/2015/3902

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
Deputy Upper Tribunal Judge Davey
OA/04588/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2019

Before :

LORD JUSTICE FLOYD
and
LORD JUSTICE COULSON

Between :

UT (SRI LANKA)
- and -
THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Appellant

Respondent

Shivani Jegarajah (instructed by **David Benson Solicitors**) for the **Appellant**
John Jolliffe (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 12 June 2019

Approved Judgment

Lord Justice Floyd:

1. The sole issue in this appeal, which involves no new issue of principle, is whether the Upper Tribunal was correct to find an error of law in a decision of the First Tier Tribunal in which the First Tier Tribunal allowed an appeal from a refusal of entry clearance. If the Upper Tribunal was correct to find that the First Tier Tribunal had gone wrong in law, then there is no challenge to the Upper Tribunal's subsequent remaking of the decision. If the Upper Tribunal was wrong to detect error, then the decision of the First Tier Tribunal stands. In this judgment I will refer to the two tribunals as the UT and FTT. To avoid confusion, I will refer to the appellant (who has been anonymised as "UT" to safeguard the interests of the children involved) as A.
2. A is a national of Sri Lanka born in 1968 who came to the UK in June 2000 and claimed asylum. No decision was ever made on his asylum application. By 2003 A's wife, Mrs A, who had been in this country for longer than A but who also came originally from Sri Lanka, had obtained or was about to obtain permanent residence. The couple had also had two children. These were K, born on 4 August 2001, and S, born on 30 November 2002. A was granted indefinite leave to remain in September 2008, but his application for British citizenship was refused on 3 August 2010 because of a driving conviction. The applications of Mrs A and of K and S for British citizenship were granted. In 2012, K and S were 10 and 9 years old, and had spent all their lives in the United Kingdom with their mother and father.
3. In May 2012 A's father, who lived in Sri Lanka and was 94 years old, became very ill and the family planned to visit him. While Mrs A, K and S all had British passports, A did not even have a Sri Lankan one. A attended the Sri Lankan embassy in order to obtain an emergency travel document to enable him to travel to Sri Lanka. There he was told that he needed to supply at least some form of identification. Unwisely, with the help of an agent and his parents in Sri Lanka, he produced a false birth certificate. On the basis of this false document the requested emergency travel document was issued. On 10 July 2012 the family travelled to Colombo, A using the emergency travel document and Mrs A and the children using their British passports. Once in Sri Lanka, A applied for entry clearance to the United Kingdom as a returning resident. By a decision dated 19 December 2012 which was sent to A on 4 January 2013, the Entry Clearance Officer, Colombo ("ECO") refused A's application on the ground that his birth certificate had been found to be false. The application was therefore refused, principally under paragraph 320(7A) of the Immigration Rules. The consequence of this was that Mrs A and the two children could and did return to the United Kingdom, but A could not. A has remained in Sri Lanka ever since.
4. A appealed from the decision of the ECO. His appeal came before FTT Judge Plumtre ("the FTTJ") on 25 February 2014. By her decision issued on 28 March 2014 she dismissed his appeal against the decision of the ECO under paragraph 320(7A), but allowed his appeal under Article 8 ECHR. The Secretary of State appealed to the UT against the decision under Article 8. Although A cross-appealed against the decision under paragraph 320(7A), that appeal was dismissed by Deputy UT Judge Davey ("the DUTJ") in a decision issued on 19 December 2014, and there is no further appeal to this court from that decision. The DUTJ found, by the same decision, that there were errors of law in the FTT decision under Article 8. He therefore set it aside and directed that it be remade in the UT. By a further decision

issued on 26 August 2015, the same DUTJ set aside the FTT decision on Article 8 and substituted a decision that A's Article 8 appeal be dismissed.

5. Permission for a second appeal to this court was granted by Jackson LJ at an oral hearing on 28 March 2017, limited to the ground I have identified above.

The FTT decision

6. Before the FTT, A accepted that the birth certificate which he had produced to obtain his travel documents was false, but contended that he did not know it to be so. The FTTJ rejected that contention at [34], and turned to Article 8. At [43] she said:

“Given my finding that the ECO's decision to refuse entry clearance should be upheld under paragraph 320, which means that the appellant cannot return to the United Kingdom for 10 years, there is a real tension in this refusal and any claim under Article 8.”

7. Having drawn attention to this tension between A's conduct in relation to the immigration authorities, on the one hand, and the interference with family life on the other, the FTTJ then gave herself a variety of directions as to the correct legal approach, referring to or citing from a large number of cases. Some of the matters to which she drew attention were the following:

- i) The five step approach to human rights claims set out by Lord Bingham in *Razgar v SSHD* [2004] UKHL 27 and his approach to Article 8 claims in *Huang and Kashmiri v SSHD* [2007] UKHL 1;
- ii) The principle that the best interests of the children were a primary but not a paramount consideration, and that these interests should be addressed first, and as a distinct stage of the enquiry, before addressing other factors such as the public interest;
- iii) The fact that British citizenship had an intrinsic value;
- iv) The principle that, if an applicant did not succeed in gaining admission under the rules, he or she may nevertheless succeed on a direct application of Article 8 if there are circumstances not sufficiently recognised in the rules;
- v) Very strong reasons must to be shown to separate a child from its natural parent.

8. Having set out these principles, the FTTJ turned to the facts of the case in what is admittedly a very compressed passage of reasoning at [52] to [55].

9. At [52], the FTTJ said, in essence, that she had given weight to the fact that both children were born and brought up in the United Kingdom, were now aged 12 and 11, had lived all their lives here, had been educated here, were settled in schools here and had the benefit of British citizenship. On the other hand, in Sri Lanka, they would have the benefit of forming a relationship with their grandparents, which they did not have here. The argument as to whether they could readjust to life in Sri Lanka was

“finely balanced”. The paragraph concludes with the question: “Are these circumstances sufficient to constitute compelling circumstances?”

10. At [53] the FTTJ pointed out that (a) British citizenship was clearly of benefit to A’s children and (b) that the dilemma of their father’s true identity (by which I think she meant the facts surrounding his reliance on a false birth certificate) were “not of their own making”.
11. In paragraph [54] the FTTJ found that, although there were no “insurmountable obstacles” to the return of A’s wife and children to Sri Lanka, “it would be difficult for this family to re-establish given that both parents have spent either 13 or 14 years in the United Kingdom”.
12. The FTTJ’s conclusions are at [55]. She concluded that “[A]fter conducting the balancing exercise as best I can”, the refusal of entry clearance would be a disproportionate interference in the appellant’s family life. She said “[to] separate the British children and the British wife from the primary breadwinner and their father/husband constitutes a disproportionate interference with Article 8 family life.”

The errors of law found by the UT

13. The UT error of law decision issued on 19 December 2014 addresses the Article 8 appeal at [5] to [8]. At [5], the DUTJ appears to accept that the FTTJ treated the best interests of the children as a primary consideration. He goes on to say, however, that she never addressed the significance of the outcome of the appeal on paragraph 320(7A), and the public interest, when assessing proportionality.
14. Having said at [5] and [6] that this error was sufficient to justify setting aside the decision of the FTT in relation to Article 8, the DUTJ then went on to say that he found the FTTJ’s reasoning “confusing and contradictory”. His specific criticisms were (a) that the judge had not answered the question whether there was a basis for considering the application of Article 8 outside the rules; and (b) the judge had not reached “any clear conclusion on the issue of the unreasonableness of [A] and the children establishing family life in Sri Lanka when they were born here and spent their formative years in the United Kingdom and of course their mother is a British national as well”. There was therefore, in his view, a lack of adequate reasoning in the decision.
15. In the later UT decision issued on 26 August 2015, the DUTJ re-characterised his reasons for setting aside the FTT decision as being that he was “satisfied the [FTT] judge had failed to deal with the children’s (K and S) best interests or the issue of the public interest or why the Respondent’s decision was disproportionate.” This is not, in fact, an accurate summary of the reasons which he had previously given.

The appeal

16. Ms Jegarajah, who appeared for A, submitted that there was no error of law in the FTT’s decision. It was incorrect to say that the FTTJ had lost sight of the findings on paragraph 320(7A) or the public interest when conducting the balancing exercise, as she had referred at [43] to the tension between those findings and the Article 8 claim. The FTTJ was acutely aware of the circumstances relating to the use of the false birth

certificate, having devoted a large part of her written decision to making findings on this very topic, and had mentioned them at the outset of her consideration of Article 8. Accordingly, she must have had them in mind when performing the balancing exercise.

17. As to whether the FTTJ had answered the question of whether there was justification for considering the application of Article 8 outside the rules, the judge had answered it in favour of A by making the decision which she made. On the question of the reasonableness of the family being required to return, the judge had referred to the difficulties involved for the family in re-establishing itself in Sri Lanka, and again, by her decision, must have concluded that it would be unreasonable to expect them to do so.
18. Mr Jolliffe, who appeared for the Secretary of State, submitted that the remade decision of the DUTJ was to be preferred, because its reasoning was fuller. The decision of the FTTJ had failed to engage with the totality of the evidence when addressing the question of whether it was reasonable for the family to return to Sri Lanka. The authorities showed that the consideration of Article 8 outside the rules needed to be holistic and universal. It was not enough to pick out a couple of factors which pointed in the appellant's favour. Finally, he submitted that the FTTJ had approached the matter from an incorrect perspective. The effect of the decision of the ECO was not to remove the family from the UK, or to separate the family from their father. It was a matter of choice for the rest of the family whether they stayed in the UK or not.

Discussion and disposition

19. I start with two preliminary observations about the nature of, and approach to, an appeal to the UT. First, the right of appeal to the UT is “on any point of law arising from a decision made by the [FTT] other than an excluded decision”: Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”), section 11(1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12(1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although “error of law” is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in *AH (Sudan) v Secretary of State for the Home Department* at [30]:

“Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.”

20. The first of these preliminary observations is sufficient to answer the submissions of the Secretary of State which invite us to “prefer” the decision of the DUTJ to that of the FTTJ. Even if I were persuaded that the former was far and away the superior of the two decisions, that would not answer the question raised by this appeal, which is whether the latter decision involved any error of law. The second observation is one which I will need to keep firmly in mind when examining the issue of whether there was in fact any error of law which entitled the UT to remake the decision.

21. The core issue in the present case was whether the decision to refuse A entry clearance was a justified or a disproportionate interference with the right to respect for family life. This is an issue which faces judges of the specialist immigration tribunals on a daily basis, and the paradigm of one on which appellate courts should not “rush to find misdirections” in their decision-making. In such cases, as is well known, section 117A of the 2002 Act requires the decision maker to have regard to the factors identified in section 117B. The further factors in section 117C, which are concerned with the deportation of foreign criminals, were not relevant in this case. Section 117B provides:

“(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.”

22. Subsection (1) is of importance in this case, and is the principal factor placed in the balance against A by the SSHD. The decision appealed against was a decision taken to ensure that entry to the United Kingdom is not obtained on the basis of deception. Preventing entry on a false basis is in the public interest. This consideration is entitled to appropriate weight in the balancing exercise, often decisive weight. Sub-sections (2) and (3) are factors which do not weigh against A, as he speaks English and, as the FTTJ noted, he was the breadwinner for the family and therefore not a burden on the state. Subsection (4), which operates to diminish the weight to be given to a relationship with a qualifying partner which is established while a person is in the UK unlawfully, has no application in this case. A has had indefinite leave to remain in the UK since 2008. Having failed to deal with A's asylum application, the SSHD was not in a position to suggest that his relationship with Mrs A was established when he was in the United Kingdom unlawfully. Accordingly, A's family life with Mrs A was entitled to be given proper weight.
23. Subsection (6) sets out circumstances which do not require the removal of a person who is not liable to deportation from the United Kingdom. This case is concerned with re-entry clearance rather than removal, but the subsection shows that Parliament considered that a parent's relationship with a qualifying child might not assist an applicant for leave to remain if that relationship could reasonably be carried on in the country of origin. What it is reasonable for a qualifying child to do does not involve a consideration of the public interest, but needs to be decided in the context of where the parents are expected to be. In the present case this reduces to a question of whether it is reasonable to expect the children to join their father in Sri Lanka: see *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53.
24. Finally, any specialist decision maker approaching this case would know that the best interests of the children were a distinct, primary consideration. What is in the best interests of the children is also not dependent on the public interest but needs to be decided in the context of where the parents are expected to be: see *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, at [58].
25. Against this background of what one might call the common knowledge of immigration judges, the first issue is whether the FTTJ lost sight of her finding that A had knowingly used a false document to obtain his entry clearance, and the public interest, when conducting her proportionality assessment under Article 8. I think it would be most unfair to the judge to assume that this was so. The judge spent the first part of her decision examining, in painstaking detail, the case under paragraph 320(7A) and reaching very clear conclusions on it. She then reminds herself at [43], at the start of the section on Article 8, of the competing considerations of the findings she has made on paragraph 320(7A) as against the consideration of A's claim that to refuse him entry was an unjustified interference with the right to family life. She plainly does so in order to remind herself that her finding on the use of a false document was a matter which fell to be placed in the balance as a factor weighing against A, together with all the other considerations relevant to the proportionality assessment. Later, at [49], she explains that maintenance of effective immigration control is a "countervailing factor" which must be placed in the balance, and may outweigh the considerations which favour the appellant. When she comes to perform that balancing assessment, although she does not refer back to the finding on paragraph 320(7A), and the public interest in firm immigration control, it is fanciful

to suppose that she was overlooking these matters. Paragraph 320(7A) was, after all, the beginning and the end of the reason why A was not allowed back into the UK, where he had already enjoyed indefinite leave to remain.

26. The remaining errors of law in the decision of the FTT identified by the DUTJ in his error of law decision are based on the suggestion that the FTT's reasoning was confusing and contradictory. For my part, whilst, as I have already said, the FTT's reasoning is compressed, I did not find it contradictory, and the DUTJ does not, in fact, himself identify any such contradiction. I would also accept, if it were suggested, that the FTT's reasoning is not as well-structured or expressed as it might be. If an error of law based on inadequate reasoning is to be identified, however, one must venture beyond general, literary criticism of this kind. In *R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19, Lord Hope said (at paragraph 25):

"It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it."

27. In *R v Immigration Appeal Tribunal, ex parte Khan* [1983] QB 790 (per Lord Lane CJ at page 794) it was explained that the issues which the tribunal is deciding and the basis on which the tribunal reaches its decision may be set out directly *or by inference*. If a tribunal fails to do this then the decision may be quashed. He continued:

"The reason is this. A party appearing before a Tribunal is entitled to know, *either expressly stated by it or inferentially stated*, what it is to which the Tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the Tribunal; in other cases it may not. Second, the Appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in others it may not." (emphasis supplied)

28. The DUTJ's first specific criticism in relation to the adequacy of the FTT's reasoning was that the FTTJ "*had never answered the question, applying the law she had set out, whether or not Article 8 was engaged with outside of the Rules*". This criticism is, in one sense, correct. As I have already pointed out, having set out the facts surrounding the longstanding establishment of this family in the United Kingdom, the judge concluded paragraph 52 with a question rather than an answer. Anyone reading the decision as a whole, however, would appreciate that the judge had concluded that the circumstances with which she was confronted in this case required her to conduct an Article 8 proportionality assessment. The rule which had been applied to refuse entry was not one which was drafted to reflect human rights considerations. She had just explained, at [51], the principle in *Nagre v Secretary of State for the Home Department* [2013] EWHC 720, which requires the tribunal to identify any gap between the application of the rules and Article 8, and no criticism is made of her

self-direction in this respect. It is implicit in what follows in her decision at [52] and [55] that she considered this a case in which it was necessary to conduct an Article 8 assessment independently of the Rules. It was for that purpose that she had explained how such assessments are to be carried out, referring to *Razgar* and *Huang*. For what it is worth, when the UT came to remake the decision, it also readily concluded that this was a case where the circumstances were such that it would be appropriate to consider the application of Article 8 outside the rules. It plainly was. The UT's first point was not an error of law by the FTT.

29. The DUTJ's second specific criticism was that the judge had not reached "*any clear conclusion on the issue of the unreasonableness of A and the children establishing family life in Sri Lanka when they were born here and spent their formative years here and where their mother was a British national as well*". This is a somewhat puzzling way of stating the point of law, as the facts to which the DUTJ draws attention are facts which would point towards, rather than contradict, unreasonableness. I do not think there is any substance in the DUTJ's criticism. The FTTJ referred to the difficulties which would be involved in moving the family to Sri Lanka, namely that the children have lived all their lives here, were settled in schools in this country, were British citizens and were at an age where it was questionable whether they could adjust to life in Sri Lanka at all. She also referred to the length of time that the parents had spent in the United Kingdom. Finally, she reminded herself entirely correctly that A's use of deception to re-enter the UK was a problem which was not of their making. It is clear to a reader of the decision that the FTTJ had concluded that it was not reasonable to expect Mrs A and the children to give up their life in the UK and join their father in Sri Lanka.
30. I have mentioned that the DUTJ somewhat recharacterised the errors of law on which he had relied in his error of law decision when he came to remake the decision. The first point was now that the FTTJ had "*failed to provide adequate reasons when dealing with the childrens' (K and S) best interests.*" Mr Jolliffe sought to take advantage of this in his skeleton argument by contending that there was no challenge by the appellant to this, rather different, finding of error on this appeal. Given that the DUTJ was expressly seeking to describe the grounds on which, in his earlier decision, he had found there to be an error of law, I regard the reformulated point as relating to the reasonableness of the children having to return to Sri Lanka, i.e. the point I have dealt with at [29] above, and not to any new point. I regard the second reformulated point "*failure to provide adequate reasons to deal with ... the issue of public interest*" as corresponding to the point I have dealt with at [25] above, namely whether the judge had in fact weighed the public interest in the balance. The third reformulated point "*failure to provide adequate reasons to deal with ... why the Respondent's decision was disproportionate*" does not find any obvious counterpart in the reasons given in the error of law decision, unless this is what the FTTJ really meant when he identified the point which I have dealt with at [28] above.
31. For my part I think the reasons why the FTTJ held that the respondent's refusal of entry clearance was a disproportionate interference with respect for family life are tolerably clear. The factors which were to be put in the balance on either side are all set out in her decision. Not every judge would have decided that the best interests of the children, the family's ties to the UK, the difficulties of reintegration into Sri Lankan life and the shock to the children of having their education in this country

interrupted at the particular stage they had reached were sufficient to outweigh the public interest in firm and consistent immigration control. That, however, is both the decision this judge reached and the reasons for it. There was no error of law revealed by reaching that conclusion, or by failing to give “reasons for reasons”.

32. Mr Jolliffe’s other points of criticism of the decision of the FTTJ did not form part of the DUTJ’s reasons for finding an error of law, either as originally stated or as reformulated. Ms Jegarajah did not raise any objection to them being advanced, so I will deal with them. The first of these points was that the FTTJ had failed to engage with the totality of the evidence when addressing the question of whether it was reasonable for the family to return to Sri Lanka. I do not accept this argument. It is not necessary for a judge to set out every item of evidence on which he or she relies, and I see no basis for supposing that the FTTJ had not engaged properly with the relatively limited amount of evidence in this case.
33. The second point was that the judge had wrongly treated this as a separation case, when in truth it was not such a case because Mrs A and the two children were free to leave the UK and return to Sri Lanka. It was a matter of choice that they decided to remain here. I do not accept this submission. From the point of view of the two children, whose best interests lay in continuing their education in this country and for whom the difficulties of adjusting to life in Sri Lanka were sufficient to make it unreasonable for them to follow their father there, this was indeed a separation case. It was no less so for their mother who was faced with the dilemma of staying with the children in the UK or uprooting the children and joining their father in Sri Lanka. The consequences of the decision appealed against need to be assessed in the real world, and not stripped of their context. The FTTJ did not commit any error of law by approaching the issues in this way
34. The DUTJ’s decision that there was an error of law in the FTT’s decision was flawed. The UT should not have embarked on remaking the decision. For the reasons I have given I would allow the appeal, set aside the decision of the UT, and reinstate the decision of the FTT.

Lord Justice Coulson:

35. I agree that the appeal should be allowed for the reasons given by Floyd LJ.
36. In my view, this case highlights two unsatisfactory practices or attitudes of the parties in the FTT and the UT which are frequently highlighted in cases before this court.
37. The first is the almost endless citation of authority by the parties’ representatives, which makes many judges so concerned to be seen to be applying all the relevant dicta that any application of those principles to the particular facts of the case is presented almost as an afterthought. Although here the FTT judge’s application of the principles to the facts was adequate, it could have been much clearer. I believe that it would have been, if the parties had relied on fewer authorities and provided more analysis of the balancing exercise on the facts that the judge was being asked to do.
38. The second problem is the erroneous belief that every decision, no matter its provenance, nature or form, is always capable of being appealed or at least reviewed, such that neither side ever regards any decision as final. It follows from the outcome

of this appeal that the FTTJ's decision in 2014 should have been accepted without further argument.

39. In my view, these twin factors serve only to increase the burden on already over-worked judges and diminish the quality and efficiency of justice, particularly in immigration and asylum work.