



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/52381/2013

THE IMMIGRATION ACTS

Heard at Field House
On 5th November 2014

Determination Promulgated
On 1st December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

Z S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Bartram, Solicitor
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. On 26th September 2014 Judge of the First-tier Tribunal Nicholson gave permission to the appellant to appeal against the determination of Judge of the First-tier Tribunal Morrison in which he dismissed the appeal on human rights grounds against the decision of the respondent to refuse leave to remain on human rights grounds applying the Immigration Rules.

2. Judge Nicholson thought it arguable that the judge had failed to give consideration to the best interests of the child, R, born as a result of a relationship between the appellant and Ms M and also her child, Rn, a British citizen. Ms M and R had been granted discretionary leave to remain with Rn. Further, Judge Nicholson also thought it arguable that the judge had mixed up the two children when considering the human rights appeal.
3. At the hearing before me in the Upper Tribunal I heard submissions from both representatives which I now summarise.
4. Mr Bartram confirmed that the appellant relied on the grounds. These point out that, at paragraph 7(iii) of the determination, the judge wrongly stated that Ms M and her elder son, Rn, were granted a period of discretionary leave. In fact discretionary leave was granted to Ms M and R. Rn is a British citizen and leave would not have been required for him. The grounds also point out that the best interests of both children were not expressly considered in the determination. It was wrong of the judge to consider that the appellant could return to Uganda and make a further application from there because it had already been shown that the appellant did not qualify for leave to remain under the Immigration Rules and, for the same reasons, would not be able to obtain entry clearance on return. The judge was wrong to base his decision on an anticipated short interference to family life for that reason.
5. Mr Bartram also submitted that, at the time of the appeal in 2012, the parties had a home together even though it had been said in the refusal that the partnership Rules could not be met. He also emphasised that the judge's consideration of the best interests of the children was inadequate. He submitted that, if an error was found on that basis, the appeal should be remitted bearing in mind that human rights issues only were the subject of the appeal and the circumstances should be re-evaluated at the time of the next hearing. He also pointed out that Section 117B of the 2002 Act should then be taken into consideration when evaluating the proportionality of the respondent's decision in the light of the interests of the children. He also thought that the case was unusual because, at the time the application was made, neither the appellant nor Ms M had leave but the respondent granted Ms M and her Ugandan child, R, leave following the application but the appellant was refused leave.
6. Mr Tufan pointed out that the judge had applied the provisions of Section 117B in relation to the appellant's alleged partnership. He emphasised that Ms M had only discretionary leave. Further, no evidence had been put forward of contact between the British child, Rn, and his father. The appellant had started his relationship with Ms M when his status was precarious. Although the best interests of the children were not specifically considered they were not material in the facts of the case.

Conclusions

7. The determination shows that the judge dealt with human rights issues on the basis of the guidance set out in *Gulshan (Article 8 – new Rules – correct approach)* [2013] UKUT 640 (IAC) by considering whether or not there were any factors put forward in the appellant's case which would give rise to arguably good grounds for conducting a freestanding approach to Article 8 issues. That approach would now appear to be wrong in the light of the comments of the Court of Appeal in *MM* [2014] EWCA Civ

985 where the court considered that an intermediary test before proceeding to consider human rights issues outside the Rules was unnecessary.

8. However, the judge's adoption of the *Gulshan* approach might not necessarily lead to a material error if he had given comprehensive consideration to all of the issues relevant to the human rights claim made by the appellant. Unfortunately, he did not. Paragraph 19 of the determination shows that the judge only gave consideration to the effect of the return of the appellant to Uganda and the possibility of him returning after a successful application for entry clearance. He did not consider the best interests of the two children, particularly when his own child had been granted discretionary leave and Ms M's oldest child is a British citizen. Further, no consideration was given to whether or not it would be reasonable to expect Ms M to leave the United Kingdom taking into consideration the wider interests of the children particular, Rn. Such wider consideration of the issues was essential when the judge had found, contrary to the conclusions of the respondent, that the appellant and Ms M were in a genuine and subsisting relationship even if the appellant's position was precarious. If the judge had considered such issues then there is the possibility that his decision would have been different. The determination therefore shows an error on a point of law such that it should be re-made.
9. As the sole issue is the application of human rights to the appellant's situation bearing in mind his relationship with Ms M and the best interests of the children involved and because fresh evidence can be considered in relation to those matters, it is appropriate that this appeal should be heard afresh before the First-tier Tribunal. I have regard to the provisions of paragraph 7(2)(b) of the practice statements of the Senior President of 25 September 2012 in reaching that conclusion.

Anonymity

As this appeal involves the interests of children I make the following direction which will, no doubt, be renewed in the First-tier Tribunal.

Direction Regarding Anonymity

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 their 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.

OTHER DIRECTIONS

1. The appeal is to be heard afresh before the First-tier Tribunal sitting at Hatton Cross (or one of its satellite courts).
2. The appeal should take place on a date to be set by the Regional Judge at Hatton Cross.
3. The appeal should not be heard by Judge of the First-tier Tribunal Morrison.

4. No interpreter will be booked for the hearing unless representatives indicate to the contrary at least five days before the specified hearing date before the First-tier Tribunal.

Signed

Date

Deputy Upper Tribunal Judge Garratt