



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/15298/2014

THE IMMIGRATION ACTS

Heard at Field House
On 9 April 2015

Determination Promulgated
On 14 April 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

Halime Midili

[No anonymity direction made]

Claimant

Representation:

For the claimant:

Mr A Burrett, instructed by EA Law Solicitors

For the appellant:

Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Bird promulgated 25.11.14, allowing on human rights grounds the claimant's appeal against the decision of the Secretary of State, dated 12.3.14, to remove her from the UK pursuant to section 10 of the Immigration and Asylum Act 1999. The Judge heard the appeal on 28.10.14.
2. First-tier Tribunal Judge Fisher granted permission to appeal on 16.1.15.

3. Thus the matter came before me on 9.4.15 as an appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Bird should be set aside.
5. Judge Bird dismissed the appeal on immigration grounds but allowed it on article 8, finding it unreasonable to expect the claimant, or her partner or children to leave the UK, and not in the best interests of the first child, diagnosed with diabetes.
6. The grounds of application for permission to appeal assert that the judge erred in law by failing to have regard to the public interest considerations under section 117B of the 2002 Act.
7. In granting permission to appeal, Judge Fisher noted that although it is clear that the judge was addressed on section 117B, the decision contains no reference to any of the public interest considerations under that section. "The judge was obliged to have regard to Sec 17 when considering the public interest question. It is arguable that she failed to do so, and that her conclusions on proportionality are, therefore, flawed. Accordingly, permission to appeal is granted."
8. I find that there is no consideration in the decision of the section 117B public interest considerations, which in this case would include that, immigration control is in the public interest; that little weight should be given to a private life or a relationship developed with a partner whilst the claimant has been unlawfully present in the UK; and potentially as to the claimant's English language ability. These are very significant considerations and their absence from the decision renders the article 8 proportionality assessment rather one-sided and unfair to the Secretary of State and the public interest, so that it is flawed.
9. The judge also erred at §22 in stating that as the claimant was in the UK without lawful authority she could not meet E-LTRP 2.2. That is not required if the claimant can meet E-LTRP 1.2-1.12, and E-LTRP 2.1, and EX1 applies. To that extent the refusal decision was also in error at §24.
10. Similarly, in relation to an application for indefinite leave to remain as the parent of a child under R-LTRPT both the decision of the First-tier Tribunal and the refusal decision of the Secretary of State misstates at §27 & §28 the requirements of the Rules, and suggests that the claimant cannot meet E-LTRPT 3.1. The claimant has to meet E-LTRPT 2.2 -2.4 and E-LTRPT 3.1 and demonstrate that EX1 applies. There is no reason why the claimant fails under E-LTRPT 3.1, as she was not in the UK as a visitor or with temporary admission. By E-LTRPT 3.2 she can be in the UK unlawfully, provided EX1 applies.
11. The judge was misled and in error to state that the application fell to be refused under Appendix FM, for the reasons set out in §27 and §28 of the refusal decision,

without first considering whether the claimant could meet either EX1(a) in relation to a genuine and subsisting relationship with a child under the age of 18 who is a British citizen and whether it would be reasonable to expect the child to leave the UK; or EX1(b) a genuine and subsisting relationship with a partner who is in the UK and a British citizen and whether there are insurmountable obstacles to family life with that partner continuing outside the UK, with insurmountable obstacles defined by EX2 as very significant difficulties faced by the applicant or their partner in continuing family life outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

12. I note that there are a number of flaws in the layout, language and considerations in the refusal decision, some of which may have misled the First-tier Tribunal Judge. For example, at §34 there is reference to “the ten year route.” Nevertheless, it remains the case that there has not been proper consideration of Appendix FM in the First-tier Tribunal. Whilst EX1 was separately considered in the refusal decision, the judge made no such consideration. It follows that there was an entirely inadequate consideration of Appendix FM in the decision of the First-tier Tribunal.
13. Mr Burrett submitted that, as the judge conducted an article 8 assessment outside the Rules it which it was found unreasonable and disproportionate on the facts of this case to remove the claimant, the errors were not material, as the outcome would still have been to allow the appeal, even if the claimant did not meet the requirements of the Rules. However, I do not accept that necessarily follows, even though the claimant has a genuine and subsisting relationship with a British partner and two British children. An assessment whether it is unreasonable to expect either child to leave the UK, following EX1(a) must take into account the situation of the parents. Whether there are insurmountable obstacles to family life being continued outside the UK, must be relevant to the assessment as to whether it is reasonable to expect the children to leave the UK. Further, whether the claimant meets the requirements of the Rules is highly relevant to any article 8 proportionality assessment.
14. In the circumstances, whilst the outcome of the appeal could be the same, I find that it does not necessarily follow; it is not possible at this stage to conclude that the appeal would have to be allowed on the facts of this case. It follows that the decision must be set aside for error of law to be remade.
15. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiates the findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
16. In all the circumstances, at the invitation and request the claimant’s representative to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President’s Practice Statement at

paragraph 7.2. The effect of the error has been to deprive the parties of a fair hearing and having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

17. Whilst it seems to me that much of the factual background is uncontentious, it would make the task of the First-tier Tribunal Judge more difficult to preserve the factual findings. In the circumstances, the decision should be made afresh.

Conclusions:

18. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the decision in the appeal to the First-tier Tribunal to be made afresh.



Signed
Deputy Upper Tribunal Judge Pickup

Consequential Directions

19. The appeal is to be relisted for a fresh hearing before the First-tier Tribunal at Taylor House before any First-tier Tribunal Judge, except First-tier Tribunal Judge Bird;
20. It has been listed for 15.5.15, with an estimate of 1.5 hours;
21. Either party may adduce further evidence, such evidence to be served and lodged with the Tribunal no later than 7 days before the hearing in the First-tier Tribunal.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.

A handwritten signature in black ink, appearing to read 'J. Pickup', written in a cursive style.

Signed
Deputy Upper Tribunal Judge Pickup