



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/21977/2014

THE IMMIGRATION ACTS

Heard at Field House
On 20 October 2014

Decision and Reasons Promulgated
On 6 January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

MR UMESH SARDANA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Biggs (Counsel)
For the Respondent: Ms A Holmes (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant's appeal against decisions to refuse to vary his leave and to remove him by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006 was dismissed by First-tier Tribunal Judge Prior ("the judge") in

a determination promulgated on 12 August 2014. The appellant arrived in the United Kingdom with leave as a student, in 2009. In December 2013, his leave in that category was curtailed for non-attendance, so as to expire on 18 February 2014. Shortly before that date, the appellant applied for leave to remain as the unmarried partner of a British citizen. That application was refused on 8 May 2014 and the appellant brought his appeal.

2. The appellant's relationship with his partner began in 2011 and led to cohabitation from March 2013. His partner is the mother of two children, aged 14 and 17 as at the date of hearing. The appellant, his partner and her children live together and form a single household. It was contended on the appellant's behalf that GEN.1.2 of Appendix FM of the rules was misunderstood or misapplied by the Secretary of State. The decision maker had treated that paragraph as applying to the appellant himself, rather than to his partner, and so the adverse decisions were not in accordance with the law. It was also contended that factors contained in the Immigration Directorate Instructions, relevant to determining whether there are exceptional circumstances warranting a grant of leave outside the rules on Article 8 grounds, were not properly applied. In particular, the best interests of the children fell to be assessed, in accordance with section 55 of the 2009 Act.
3. The judge agreed that GEN.1.2 had not been correctly applied but found that this error had no substantive impact on the adverse decisions. The Secretary of State was entitled to maintain her stance that the appellant did not have a partner in the United Kingdom within the terms of the rules and the requirements of section R-LTRP.1.1(a) were not met. The relationship and period of cohabitation had not lasted for a sufficiently long period of time.
4. The judge accepted that the best interests of the sponsor's two children and other matters set out in the Immigration Directorate Instructions were not expressly addressed in the letter giving reasons for the decisions. However, this was not a case where the decision maker had failed to exercise a discretion. The letter contained a paragraph in which the decision maker stated that the question of exceptional circumstances had been considered but none were shown in the appellant's application. The judge found at paragraph 16 of the determination that "there was no information as to the relationship of the sponsor's two daughters with the appellant" and "no information before the Tribunal at the hearing as to that relationship". So far as Article 8 is concerned, the judge found that there were no circumstances not sufficiently recognised by the rules and concluded that the grounds of appeal were not made out. The appeal was dismissed.
5. In an application for permission to appeal, it was contended that the absence of any mention of the children in the letter giving reasons for the adverse decisions showed that the decisions themselves were flawed and the judge erred in failing to properly engage with the appellant's case in this context. Permission to appeal was granted on 3 September 2014, on the basis that it was arguable that the respondent and the judge ought to have taken into account and assessed the best interests of the children.

The appellant had made clear in his application that his British partner had two children, who formed part of his household.

Submissions on Error of Law

6. Mr Biggs relied upon his skeleton argument. The welfare of the appellant's stepchildren had not been considered by the Secretary of State or assessed by the judge. The correct course was for the appeal to be allowed on the basis that the decisions did not adequately take into account the welfare of the children or the human rights of the appellant and his family members. Although the grounds of appeal to the First-tier Tribunal were rather general, they were sufficient to show that section 84(1)(e) of the 2002 Act was in issue. The First-tier Tribunal ought to have determined that ground, in accordance with the duty arising under section 86 of the 2002 Act. The appellant's case was expressly put on the basis that the decisions were not in accordance with the law as relevant factors in the Immigration Directorate Instructions were not taken into account and there was an absence of any regard to section 55 of the 2009 Act. Similarly, the judge failed to engage with the Secretary of State's failure to take these matters into account.
7. Moreover, the judge's approach to Article 8 of the Human Rights Convention was flawed. He accepted that there was no proper consideration in the decision letter but went on to make the point that this was not a case where discretion had not been exercised. Mr Biggs submitted that, on the contrary, the Tribunal was obliged to make an Article 8 assessment and the assessment of the children's best interests formed part of this. Where there was so little in the decision letter, unless the Tribunal felt able to make the section 55 assessment itself, the proper course was to remit the matter back to the decision maker. There was, after all, nothing to show that the decision maker had considered the point and this was a clear public law error. The First-tier Tribunal ought to have allowed the appeal under section 86(3)(a), as the decisions were not in accordance with the law.
8. Ms Holmes said that if the children came into play at all, the section 55 duty fell to be considered. In this case, however, there was nothing of substance before the judge or the decision maker to require a section 55 assessment. The onus was on the appellant to put his case. There appeared to be no evidence regarding the relationship between the appellant and the stepchildren. There was no material error in these circumstances.
9. Mr Biggs responded by saying that even though there was limited information before the decision maker and the Tribunal, the absence of any consideration of the best interests of the children amounted to an error in the decisions themselves and by the judge in determining the appeal as he had. There was no reason to depart from ordinary public law principles, as explained in FI [2014] EWHC 2287. The Secretary of State was alive to the interests of the children. The appellant's bundle included a letter sent by the respondent to the appellant, on 27 March 2014, asking for documentary evidence. In that letter, mention was made of the stepchildren. The

rather brief “exceptional circumstances” paragraph in the decision letter was simply not enough.

Conclusion on Error of Law

10. Mr Biggs drew attention to a letter dated 27 March 2014, from the respondent to the appellant’s solicitors, in which mention is made of the children. The Secretary of State requested evidence about them. The form of application completed by the appellant in February 2014 mentioned the children in two places. First, in paragraph 4.7, they are identified as living with their mother at her address and that address is also identified (at paragraph 120) as the appellant’s own address. The children are mentioned again, in paragraph 7.13, as living at the premises and their names and ages (they were then 13 and 17 years old) also appear.
11. The decision letter, summarised by the judge, contains nothing at all about the children and the focus is instead on the relationship between the appellant and his partner or sponsor. The Secretary of State acknowledged that this was genuine and subsisting but found that it was one which fell outside the rules in view of its relatively short duration. The letter also gives reasons for a conclusion that the appellant cannot meet the requirements of paragraph 276ADE of the rules and there is then a short paragraph beneath the heading “Decision on Exceptional Circumstances”. A careful reading of this paragraph reveals that it contains no reasoning or analysis as such. Mention is made of consideration of the application and whether it raises or contains any exceptional circumstances. The decision maker concludes: “It has been decided that it does not” but there are no supporting reasons.
12. The decision of the Administrative Court in FI provides some support for Mr Biggs’ submissions. In that case, an application for registration as a British citizen, by a child, met with a decision in which the focus was on the circumstances of the claimant’s parents. Registration was refused as neither parent was a British citizen. In further letters from the Secretary of State, that decision was maintained and in due course section 55 of the 2009 Act was mentioned. The court concluded that the decision did not withstand scrutiny, largely because of the exiguous reasoning in the first decision letter.
13. With great respect to Ms Holmes, I do not accept her submission that the absence of any assessment by the decision maker or the judge cannot amount to a material error because there was no evidence of any substance about the relationship between the appellant and the stepchildren. In this context, I accept Mr Biggs’ submission that the bare facts of the case were before the Secretary of State and the judge. I have drawn attention to the identification of the stepchildren in the application form, as living with the appellant and his partner. Although detail was certainly lacking, that was sufficient, I conclude, to put the Secretary of State on notice that the section 55 duty required some reasoning, even if fairly brief, in the decision letter. Paragraph 9 of the determination records a submission made on behalf of the appellant regarding

the best interests of the children and the absence of any consideration of this important and relevant matter by the respondent.

14. With great respect to the judge, the determination does not include any consideration of the best interests of the children. What was missing was an engagement with the section 55 duty. An assessment of the best interests of the children was required and, stepping back from that, an Article 8 assessment which took those best interests into account (in accordance with guidance given by the Court of Appeal in AJ (India) [2011] EWCA Civ 1191).
15. In these circumstances, I conclude that the decision of the First-tier Tribunal contains a material error of law and must be set aside and remade.
16. The two representatives agreed that if a material error were shown, there would be no need for a further hearing because if the adverse decisions were flawed by want of any proper consideration of the best interests of the children, the judge making a similar error, it would follow that they were not in accordance with the law.

Remaking the Decision

17. The First-tier Tribunal's decision having been set aside under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, I remake it in the Upper Tribunal. As the Secretary of State's decisions were not in accordance with the law, I allow the appeal. The appellant awaits a lawful decision or decisions from the Secretary of State, which should take into account the duty arising under section 55 of the 2009 Act. Any decision on whether exceptional circumstances are present in the appellant's case should be accompanied by reasons.

NOTICE OF DECISION

18. The appeal is allowed.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell

ANONYMITY

There has been no application for anonymity at any stage in these proceedings and I make no order on this occasion.

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal on the basis that the Secretary of State's decisions were not in accordance with the law, and taking into account my findings regarding the absence of a best interests assessment of the children and an absence of reasons in support of the conclusion that no exceptional circumstances are present, I make a whole fee award in relation to any fee that has been paid or is payable in these proceedings.

Signed

Date

Deputy Upper Tribunal Judge R C Campbell