



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/25156/2014

THE IMMIGRATION ACTS

Heard at Field House
On 16 September 2015

Decision & Reasons Promulgated
On 17 September 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

Carlos Alberto Pina Bello
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr J Khalid

For the respondent: Mr T Melvin, Senior Home Office Presenting Officer

ERROR OF LAW DECISION AND REASONS

1. The appellant, Carlos Alberto Pina Bello, date of birth 5.12.85, is a citizen of Venezuela.
2. This is his appeal against the decision of First-tier Tribunal Judge Greasley promulgated 12.12.14, dismissing his appeal against the decision of the Secretary of State to refuse leave to enter and to cancel his leave to remain as a partner pursuant to paragraph 321A of the Immigration Rules. The Judge heard the appeal on 4.12.14.

3. First-tier Tribunal Judge Coates refused permission to appeal on 5.2.15. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Canavan granted permission to appeal on 20.5.15.
4. Thus the matter came before me on 16.9.15 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out herein, I find that there was no material error of law in the making of the decision of the First-tier Tribunal such as to require the decision of Judge Greasley to be set aside.
6. The relevant background can be briefly summarised as follows. The appellant first came to the UK in January 2010. In October of that year he met JB, a British national, and they subsequently entered into a relationship. She went with the appellant to visit his family on a couple of occasions in 2011. They married in December 2012. Their daughter was born in 2013, and is now two years of age. They made another visit to Venezuela in January 2014. However, JB separated from the appellant in February 2014 and she and their daughter returned to live with her own family. The appellant left the UK in May 2014, returning to the UK on 16.6.14. By that stage, JB had notified the Home Office that the marriage had broken down. On arrival at Heathrow the appellant produced his visa granting leave to remain as a spouse, issued on 22.3.13 and valid until 22.3.15. He claimed that he was seeking entry as a returning spouse of JB. He was questioned and further interviewed. The respondent was satisfied that false representations were employed or material facts not disclosed for the purpose of obtaining leave and there had been such a change of circumstances since the leave was granted that it should be cancelled, in accordance with the mandatory grounds under paragraph 321A of the Immigration Rules. The appellant spent about a month in detention.
7. Judge Greasley concluded that there had been such change of circumstances since leave had been granted to demonstrate that the decision of the Secretary of State was properly taken. The judge then went on to consider the appellant's circumstances under Article 8 private and family, finding that he could not meet the requirements of either Appendix FM or paragraph 276ADE. Ultimately, conducting the **Razgar** stepped approach of which the crucial stage is the proportionality balancing exercise between on the one hand the rights of the appellant and his daughter, and on the other the legitimate and necessary aim of protecting the economic well-being of the UK through immigration control, the judge concluded that the decision to cancel leave and refuse entry was proportionate.
8. I note that the First-tier Tribunal Judge failed to justify going on to consider whether the private and family life circumstances were so compelling and insufficiently recognised in the Rules so as to render the decision of the Secretary of State unjustifiably harsh so as to require, exceptionally, the appeal to be allowed outside the Rules on the basis of Article 8 ECHR, consistent with the principles set out in both **SS (Congo) [2015] EWCA Civ 387** and **Singh v SSHD [2015] EWCA Civ 74**. The judge simply moved to the second-stage of an Article 8 assessment. Whilst the Court of Appeal has held that there is no threshold or intermediary requirement of arguability before a decision maker moves to consider the second stage of

consideration outside the Rules on the basis of Article 8 ECHR, whether that second stage is required will depend on whether all the issues have been adequately addressed under the Rules. In other words, there is no need to conduct a full separate examination of Article 8 outside the Rules where in the circumstances of a particular case, all issues have been addressed in the consideration under the Rules. However, there is no appeal against the decision of the judge to go on to consider private and family life outside the Rules under Article 8 ECHR and thus there is no relevant error of law in this regard.

9. In essence, the grounds argue that the First-tier Tribunal Judge failed to take into account evidence material to a proper Article 8 assessment, including in particular evidence to show that despite separating from his wife, the appellant had supervised contact with his daughter and was in the process of family proceedings. In that regard, when granting permission to appeal, Judge Canavan considered it arguable that the judge failed to consider **Mohammed v SSHD (Family Court proceedings outcome)** [2014] UKUT 00419 and may have failed to take into account evidence material to a proper determination of the appeal, in particular the Article 8 assessment.
10. In addition, Judge Canavan considered it “quite apparent from the decision that the judge failed to make any findings in relation to the best interests of the child. The Tribunal finds that this is an obvious point of law and that it is arguable that this is a further error relating to the proper assessment of Article 8 in the circumstances of this particular case.”
11. Mr Khalid relied on the decision in **Mohammed v SSHD (Family Court proceedings outcome)** [2014] UKUT 00419, in which the Upper Tribunal considered the guidance of **RS (Immigration and Family Court) India** [2012] UKUT 00218 (IAC), and held that the guidance is concerned with whether there is a realistic prospect of the Family Court making a decision that will have a material impact on the relationship between a child and the parent facing immigration measures such as deportation, such as to justify an adjournment or allowing the appeal with a view to limited discretionary leave to pursue contact in the Family Court. Mr Khalid submitted that the appellant’s circumstances are more favourable as unlike the appellant in **Mohammed**, he had been granted supervised contact with his daughter.
12. It is evident from the decision that Judge Greasley carefully considered all the evidence placed before the Tribunal. He took into account evidence from the appellant’s former spouse as well as the appellant’s evidence, including his oral evidence and behaviour at the appeal hearing.
13. I reject Mr Khalid’s submission that as the family court at Uxbridge decided that a fact finding hearing was “not necessary in this case because the nature of the allegations are such that the court does not require such a hearing in order to be able to decide whether to make the orders sought,” that the First-tier Tribunal Judge should have adopted the same approach and not made findings of fact on the core dispute between the appellant and JB on the allegations of physical and emotional abuse to JB and their child. The family court did not need to resolve the factual dispute because the appellant was willing to make an undertaking not to harass,

pester or intimidate JB and not to contact her directly by phone, or attempt to enter her home. However, the First-tier Tribunal judge was entitled to address and make findings on this issue. In essence, the appellant was found to be a dishonest witness who failed to rebut any of the many allegations made against him. As noted at §26 neither in his witness statement nor his oral evidence did the appellant “deny the allegations, or suggest that they are fabricated, or indeed provide any general explanation in response to these complaints.”

14. At §27 the judge found “there has been significant discord within the marital relationship, including physical and emotional abuse, which has resulted in JB and her young daughter moving out of the family home and joining her parents.” At §28 the judge continued, “I accept, to a high degree of probability, that these incidents have occurred, as described by JB.”
15. The judge was also concerned about the attitude of the appellant, who was confrontational, belligerent, bordering on disruptive, interrupting the submissions of the Home Office Presenting Officer. He was threatened with being removed from the hearing. Of particular concern was the threat uttered by the appellant, and accepted by the judge to be genuine, that if he was given the chance he would remove the child on the first flight out of the UK.
16. It is obvious from the decision that the judge was fully aware of the supervised contact arrangements and that there had been family proceedings. However, those were several months before the appeal hearing, the undertaking had expired on 23.11.14, and it was not clear what stage any divorce or family court proceedings had reached. The judge was handed a handwritten application for child arrangements, dated 18.11.14, not stamped as being lodged with the court, and it is not clear if such an application for further contact was ever submitted. The judge was rather left in the dark as to the likely conduct of any further contact application. The burden is on the appellant to demonstrate that he was likely to be able to maintain or increase contact with his daughter, or that the extent of his family life with his daughter would continue in the light of the history. The most that could be said that he had been granted limited, supervised contact with the child. Further, there was no application to adjourn the appeal hearing to await the outcome of any family proceedings.
17. It is clear from several points of the decision that the judge had in mind the appellant’s wish to maintain, if not increase, the contact with his daughter. For example, at §32 the judge pointed out that it would be open to him to make application to visit the UK and noted that given the marital history any future contact arrangements would likely need to be supervised through the intervention of the courts. At §33 the judge also noted that the appellant would be able to maintain communication with his daughter from outside the UK through modern means of communication.
18. I note that “best interests” of the child was not a ground of the application for permission to appeal; it was raised only by the judge granting permission to appeal.
19. Although the judge does not specifically refer to an assessment of the best interests of the child, it is clear that the judge weighed in the balance the extent of the appellant’s

limited, supervised, contact (family life) with his daughter, when considering the public interest in removal and the proportionality of the decision of the Secretary of State. In that assessment, it is implicit from the way in which the judge addressed the issues that he had the best interests of the child at the forefront of those considerations. At §29, the judge was satisfied having considered the oral and documentary evidence, “that the appellant has not played such a significant and important parental role in the upbringing of his daughter as he appears to suggest, or would have me believe. The complaints suggest that the appellant has not been supportive of JB during her ectopic pregnancy or that he has shown a supporting role as a father, since the birth (of the child).” The judge also took account of his finding that the appellant did not deny the allegations of physical and emotional abuse. Effectively, the judge considered but rejected the appellant’s claim to care for his daughter, finding his account to be dishonest. It is clear that the judge had reached the conclusion that the appellant had no genuine interest in the child, but was using family proceedings as a device to remain in the UK.

20. In the circumstances of this case, and on the findings of the judge, it is far from clear that the best interests of the appellant’s daughter are to have any significant family life or contact with the appellant. It follows that the appellant has failed to demonstrate that had the judge outlined a specific assessment of the best interests of the child, that assessment would not have been of any assistance to the appellant, or made any difference to the negative outcome of the appeal. There remains an avenue open to the appellant to apply for discretionary leave to remain for the purpose pursuing contact with his daughter.
21. In the circumstances, I reject the submission in the grounds and advanced in Mr Khalid’s oral submissions that the judge failed to take account of material evidence in making the Article 8 ECHR proportionality assessment. It follows that I find no material error of law in the making of the decision of the First-tier Tribunal.

Conclusion & Decision:

22. For the reasons set out herein, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.



Signed

**Deputy Upper Tribunal Judge Pickup
Dated**

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 anonymity order. 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.

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

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.



Signed

Deputy Upper Tribunal Judge Pickup
Dated