



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42935/2014**

THE IMMIGRATION ACTS

**Heard at Field House, London
On 21 October 2015**

**Determination Promulgated
On 23 October 2015**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SS

ANONYMITY DIRECTION MADE

Respondent

Representation:

For the appellant: Mr Clarke, Senior Home Office Presenting Officer

For the respondent: Mr Bajwa, Bajwa & Co solicitors

DECISION AND DIRECTIONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

1. The respondent is a citizen of India. I have anonymised the respondent because this decision refers to sensitive, medical information and the

circumstances of two minors. The respondent has suffered from tuberculosis in the past.

2. The respondent arrived in the United Kingdom ('UK') in June 2009 as a working holiday maker (with leave until June 2011), and has remained in the UK ever since. He married his British citizen wife in November 2010 and made an in-time application to remain as a spouse but this was refused. The respondent and his wife have two British citizen children (born in 2011 and 2012 respectively). They both have significant health concerns. The respondent made a further application to remain on the basis of his relationship with his wife and children but this was refused by the SSHD in a letter dated 17 October 2014. The respondent appealed against this decision to the First-tier Tribunal.
3. In a decision dated 27 May 2015 First-tier Tribunal Judge K Wiseman allowed the respondent's appeal on Article 8 grounds only. The hearing before the judge proceeded in the absence of the SSHD's representative, save that she made submissions at the beginning of the hearing (before the judge heard any oral evidence).
4. The matter now comes before me to decide whether the Tribunal has acted unfairly in proceeding with the hearing in the absence of the SSHD's representative. I must decide whether the Tribunal acted unfairly in proceeding in this manner, not whether it acted reasonably - see Nwaigwe (adjournment: fairness) [2014] UKUT 418 (IAC).
5. After hearing submissions from both parties I reserved my decision, which I now provide with reasons.
6. I accept that the Tribunal followed an unusual procedure that did not bear all the necessary hallmarks of fairness. The judge acknowledged that submissions in advance of hearing the evidence was unlikely to be sufficient in advancing or clarifying the SSHD's case. Neither party has provided me with any evidence as to what happened at the hearing. I have checked the record of proceedings but it did not assist as to what happened at the beginning of the hearing.
7. Having weighed up all the information that is available to me I have decided that whilst the course adopted by the judge is likely to have been unfair to the SSHD in many cases, it was not unfair given the particular circumstances of this case, for the reasons I set out below.
8. It is not clear from the decision but it appears that the SSHD's representative did not invite the judge to adjourn the appeal to enable the respondent to provide medical evidence that he was no longer suffering from tuberculosis. The SSHD's representative explained that in the absence of such evidence the SSHD's policy required her to withdraw from the hearing. The judge was satisfied that the appeal should proceed even though that meant that the SSHD's representative felt compelled to withdraw but has not recorded any objection to this or any other application on the part of the SSHD.

9. Mr Clarke was not able to take me to any evidence that an adjournment had been requested. He was able to show me a copy of a note summarising what happened at the hearing, but as he acknowledged this did not assist. Where as here the SSHD's representative fails to seek an adjournment and appears to accept the judge's suggested course in proceeding with the hearing, it will be more difficult to establish that there has been procedural unfairness to the SSHD.
10. Mr Clarke reminded me that this is a case in which the full ambit of the relevant facts did not become known until the hearing, particularly when the respondent gave evidence. The judge observed [2] "*most of the relevant facts of the case only emerged in oral evidence...the case considered in the refusal letter appears to bear little resemblance to the full case put forward at the appeal hearing...*". However, the SSHD's representative would have been provided with a copy of the respondent's bundle of evidence in advance of the hearing. This contained evidence supporting the subsistence of the marriage as well as powerful and persuasive evidence concerning the long term and serious welfare and care needs of the respondent's children and his role in assisting in meeting those needs, alongside his wife and social services.
11. Whilst the SSHD disputed the subsistence of the marriage in the decision letter, the respondent's bundle provided cogent evidence that the marriage was genuine and subsisting at all material times. Mr Clarke has submitted that the SSHD was deprived of a fair opportunity to test this evidence. In my judgment there is very little to support the submission that by the time of the hearing before the judge these matters were seriously in dispute. The SSHD's representative said it "*was for the tribunal to decide*". This is not a case in which an application for an adjournment was made in order for the evidence to be tested. This gives a strong implication that the issues, which had previously been disputed, were no longer seriously in dispute.
12. Rather, the SSHD's representative agreed with the course suggested by the judge. There is nothing to indicate that the SSHD was concerned about the procedural fairness of such a course. When considering the appropriate way for the hearing to proceed the SSHD's representative must have considered the cogent evidence now available to support the genuineness of the parties' marriage and the very compelling circumstances of the children. Indeed, I invited Mr Clarke to clarify the SSHD's current position on the relevant facts. He accepted that the SSHD no longer disputed the genuineness of the marriage and accepted the medical and social care evidence concerning the children.
13. It is noteworthy that an earlier hearing listed on 24 April 2015 had been adjourned the day before on 23 April due to a lack of judiciary. This caused the respondent and his family considerable expense and inconvenience as they were already on their way to the hearing in London from Scotland when told about the adjournment. Mr Bajwa asked me to find that this is likely to have been a relevant consideration when the

SSHD's representative agreed to take the course suggested by the judge. There is likely to have been a shared concern that the appeal should not be adjourned on a second occasion, particularly when any adjournment would inevitably impact upon the care arrangements for the children. In addition, when the appeal was adjourned on the first occasion the SSHD did not take the opportunity to set out her concerns regarding the respondent's tuberculosis in advance of the second hearing so that the appropriate arrangements could be made and / or to put the respondent on notice that he needed to bring with him evidence confirming the medical position regarding his tuberculosis.

14. In all the circumstances I am satisfied that the appeal was justly determined. The SSHD's consented to the approach suggested by the judge. The judge conducted a critical and detailed assessment of the relevant evidence and has made comprehensive findings. As set out by the judge the findings are consistent with the detailed documentary evidence available. Mr Clarke was unable to indicate how those findings might have been different if the witnesses were cross-examined. He was unable to take me to any evidence that called into question the judge's findings. As I set out above Mr Clarke confirmed that the SSHD no longer disputes the genuineness of the marriage and the very compelling circumstances of the children.
15. Having reached those findings the judge was entitled to find that it would not be reasonable to expect the children to leave the UK, and to allow the appeal under Article 8 of the ECHR. The children have been diagnosed as having an abnormality of part of chromosome 22 as well as autism. There was clear evidence that these were having and were expected to continue to have a major impact on the children. They required and would continue to require a high level of constant support and care from both parents, with the assistance of social services.
16. If am I wrong and the hearing was infected by procedural unfairness, I would still not exercise my discretion to set aside the decision. The factual issues that were in dispute are no longer in dispute. Mr Clarke accepted on behalf of the SSHD that the marriage has been genuine and subsisting at all material times. He also accepted the circumstances of the children as set out by the judge. The reasoning of the judge as to why in the particular exceptional circumstances of this case it would be a disproportionate breach of Article 8 of the ECHR to remove the respondent or require him to apply for entry clearance (paras 40-42) is unassailable.

Decision

17. The decision of the First-tier Tribunal did not involve the making of an error of law and I do not set it aside.

Signed:

Ms M. Plimmer

Judge of the Upper Tribunal

Date:
23 October 2015