



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/07173/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 26 May 2016

**Decision & Reasons
Promulgated
On 31 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**MR CHIBUIKE ANELE
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr L Tarlow, a home office presenting officer
For the Respondent: Mr I Pang Chung

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of Mr Anele ('the claimant') who appealed against a decision taken on 3 February 2015 to refuse to grant him leave to remain in the United Kingdom.

Background Facts

2. The claimant is a citizen of Nigeria who was born on 17 January 1988. He applied for leave to remain under the Immigration Rules HC395 (as

amended) on the basis of his private and family life. That application was refused because the Secretary of State considered that the appellant failed to meet the Immigration Rules as he had not been in a relationship with his partner for two years or more and she did not consider that there would be very significant obstacles to the claimant's integration into Nigeria. The Secretary of State did not consider that there were any exceptional circumstances warranting a grant of leave to remain outside the Immigration Rules.

The Appeal to the First-tier Tribunal

3. The claimant appealed to the First-tier Tribunal. In a determination promulgated on 22 October 2015, Judge Majid allowed the claimant's appeal. The First-tier Tribunal found that the claimant satisfied the relevant Immigration Rules.

The Appeal to the Upper Tribunal

4. The Secretary of State sought permission to appeal to the Upper Tribunal. The grounds in essence were; i) the judge committed a procedural irregularity by restricting cross examination and preventing the home office presenting officer from making submissions on certain points, ii) that the judge failed to give adequate reasons and iii) that he misdirected himself by failing to apply the Immigration Rules or to consider section 117 of the 2002 Act. On 6 April 2016 First-tier Tribunal Judge Pooler granted the Secretary of State permission to appeal in respect of grounds ii) and iii) only. Thus, the appeal came before me.

Summary of the Submissions

5. Mr Tarlow relied on the grounds of appeal. He submitted that the determination has a lacuna. We do not know what Immigration Rules the judge considered. We do not know what factors judge took into account. There is just no reasoning. The judge took into account *ZH Tanzania v Secretary of State for the Home Department* [2009] EWCA Civ 691 ('*ZH Tanzania*') and considered the best interests of child were paramount and a trump card because she is British which is contrary to case-law. The judge allowed the appeal but as is clear from paragraph 27 we do not understand why. There is much reference to case law but how it is relevant to the determination is unclear. The reasoning is absent. Mr Tarlow submitted that it is clear from case-law that a determination must contain reasons why the party has won or lost the appeal. The parties must know what the reasons are. He submitted that if were to find a material error of law there was sufficient information to remake the decision myself.
6. I indicated to Mr Chung that I was struggling to find the reasoning in the decision and asked him to point me to any paragraph where the judge has given reasons or has undertaken an analysis and applied the Immigration Rules or case law to the facts of the case.

7. Mr Chung relied on the Rule 24 response and his skeleton argument. He submitted that the judge took into account the written statements. He found that the claimant and his partner are in a genuine and subsisting relationship. I asked where the judge has considered the insurmountable obstacles test. Mr Chung submitted that at the First-tier Tribunal hearing the parties gave evidence. The claimant's partner witnessed her parents being killed in the Congo. I again asked where there is any finding that this amounts to an insurmountable obstacle to the partner relocating to Nigeria. Mr Chung conceded that the judge did not conclude this in his determination. I asked Mr Chung to point me to any paragraph where the judge has considered whether or not it would be reasonable for the child to leave the UK. Mr Chung responded that the judge considered that the child was a British Citizen. I indicated that this was insufficient to fall within the Immigration Rules. The first hurdle is that the child must be a qualifying child, in this case she is a British Citizen, but that to satisfy the requirements of the Immigration Rules the First-tier Tribunal had to consider whether it would be reasonable for the child to leave the UK.
8. Mr Chung referred me to paragraphs 19 and 20 where the judge considered *ZH Tanzania*, however, he accepted that the judge had not considered the reasonableness of the child leaving the UK.
9. I invited Mr Chung to make submissions on the assertion in the rule 24 response that it was incorrect that the appellant's immigration status was precarious when he met his partner. Mr Chung submitted that he had leave to remain as a student when he first met her. I indicated that the appellant's leave was and still is limited therefore the appellant had and still has a precarious immigration status. Mr Chung accepted that his immigration status is precarious.
10. Mr Chung submitted that the children's welfare has been ignored. The Secretary of State did not take this into account. When pressed, Mr Chung accepted that the child was not born when Secretary of State made her decision.

Discussion

11. As set out above I indicated to Mr Chung at the outset that I considered that the First-tier Tribunal decision did not engage at all with the relevant Immigration Rules in order to provide an opportunity for him to address me on that point. The Immigration Rules are not set out (which would not be an error of itself) and there is no reference to what the requirements of the Rules are. The judge at paragraph 3 sets out:

"I put on record that in considering this appeal I shall bear in mind the legal provisions of the relevant paragraphs of the immigration rules (as amended). There are detailed but I have bought every provision of these paragraphs in mind meticulously during the assessment of the appellant's case. I am also taking into account the new changes in the rules brought into force on 9 July 2012 which materially changed the application of article

8 of the ECHR. The provisions of the Immigration Act 2014 are also taken into account.

12. The judge's recital of the oral evidence during the proceedings is contained in a single paragraph. At paragraph 7 of the decision the judge set out:

"In response to Ms Tabbassam's, Mr Pang-Chung's and my questions, the Appellant made statements consistent with his assertions in the application. Further his wife gave evidence and confirmed the fact that she was the mother of the child, L and was living with the appellant at the address from which they had travelled together this morning to court. She also drew my attention to the letter of the health visitor who had said that whenever she visited L she found the appellant giving her his fatherly love."

13. The judge makes one further reference to the oral testimony at paragraph 13:

"The Appellant told me in his oral evidence that he is totally bereft of his Nigerian parents' care and attention because they regard him as an outcast because he has married out of his tribe."

14. The judge correctly notes that he is not required to isolate every piece of evidence and indicate whether he has found it relevant and that he is obliged only to give sufficient and adequate reasons. The judge at paragraph 6 records that he has carefully read all the statements and other documents and the oral evidence. At paragraph 8 the judge sets out that:

"I have outlined the evidential elements of the evidence adduced on behalf of the Appellant which are relevant to the fair disposal this appeal. I have taken into account all the documentary and oral evidence in making up my mind on factual issues. To avoid repetition, I shall refer to some evidence in my deliberations below."

15. At paragraph 10 the judge again refers to the evidence he has considered.

16. What then follows is a lengthy exposition and commentary on the law some of which I struggle to understand how it is relevant to the issues before the First-tier Tribunal judge.

17. The judge then correctly sets out the relevant statutory provision (section 55 of the Borders, Citizenship and Immigration Act 2009) and relevant case-law on the best interests of the child. This runs to 8 paragraphs. Although the judge has identified all the relevant considerations that should be taken into account there is a failure to identify what he considers the best interests of the child to be. What the judge says is:

"One must be cautious been working out the "the best interests of the child" because the Secretary of State holds all the cards. The Secretary of State draft the Immigration Rules; the Secretary of State

issues IDI's and guidance statements; the Secretary of State authorises the public statements made by his/her officials - Pokhriyal v SSHD [2013] EWCA Civ 1568, per Jackson LJ."

18. This is insufficient. There is no analysis of the child's circumstances and how the factors identified in the case-law apply to her. There is no finding on what the best interests of the child are.

19. The only other reference to any identification of the child's best interests is at paragraph 12 where the judge sets out:

"Mr Pang-Chung said the appeal should be allowed because the Appellant was in a genuine marital relationship and should be supported by the judicial system in this country. I accept his submission because the Appellant's wife now has a baby whose best interest has to be taken into account particularly since the baby is British."

20. The conclusions of the judge are set out at paragraphs 26 and 27:

"I am fully conscious of the "legal requirements" stipulated by immigration law. It is incumbent upon me to advert to the new Rules giving respect to the animus legis dictated by the supremacy of Parliament. The rule of law demands that this Appellant should be helped by the system because he is in a genuine relationship and his wife has been granted asylum in the UK. The best interest of the child has to be taken into account. It should also be remembered that this Appellant is a good student. He has spent 4 years in Essex University and with high marks, obtained an undergraduate degree and an LLM.

Accordingly, in view of my deliberations in the preceding paragraphs and having taken into account all of the oral and documentary evidence as well as the submissions at my disposal, cognisant of the fact that the burden of proof is on the Appellant and the standard of proof is the balance of probabilities, I am persuaded that the Appellant comes within the relevant immigration law, as amended."

21. There is no analysis of the Immigration Rules and the requirements that the claimant must meet. It is not clear to me which Immigration Rules the judge has considered. Presumably appendix FM and paragraphs EX.1(a) and (b). However, there is no consideration as to whether or not there are insurmountable obstacles to family life with his partner continuing outside the UK. In fact, the words insurmountable obstacles do not appear anywhere within the judgement. Neither is there any analysis as to whether or not it would be reasonable for the child to leave the UK.

22. The decision is woefully inadequate. There is no analysis of the requirements of the Immigration Rules, no application of the case-law to the facts, insufficient findings of fact and virtually no reasons given for the conclusion reached. I am not even sure what aspect of the 'relevant immigration law' the judge was persuaded the appellant came within.

23. It is not clear that had a judge directed himself/herself appropriately the outcome would have been the same.
24. I find that there is a material error of law in the First-tier Tribunal decision. I set that decision aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').
25. I considered whether or not I could re-make the decision myself. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.
26. I remit the case to the First-tier Tribunal for the case to be heard before a First-tier Tribunal other than Judge Majid pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. A new hearing will be fixed at the next available date.
27. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Decision

The decision of the First-tier Tribunal involved the making of a material error of law. I set aside that decision pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').

I remit the case to the First-tier Tribunal for a de-novo hearing before a different judge pursuant to section 12(2)(b) and 12(3)(a) of the TCEA to be listed on the next available opportunity.

Signed P M Ramshaw

Date 29 May 2016

Deputy Upper Tribunal Judge Ramshaw