



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/17797/2015

THE IMMIGRATION ACTS

Heard at Field House
On 5 July 2017

Decision & Reasons Promulgated
On 13 July 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

A A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Kannangara, Counsel, instructed through Direct Access
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge A A Wilson (the judge), promulgated on 10 November 2016, by which he dismissed the Appellant's appeal. That appeal had been against the Respondent's decision of 27

April 2015, refusing his human rights claim. That decision arose from an application made in February 2015 relying on a relationship with a Latvian national (the application was on human rights grounds rather than under the EEA Regulations for some reason).

The judge's decision

2. Over the course of time since the Respondent's decision the Appellant's circumstances had changed. He had entered into a relationship with a British national and they had had a child together.
3. The Appellant's appeal first came before the First-tier Tribunal in June 2016 where amended grounds of appeal were submitted and the issues of new relationship and the child were canvassed. At that hearing the Presenting Officer disputed the genuineness of the relationship and the paternity of the child. In light of this an adjournment application was made and then granted. The judge concluded that it was important for the Appellant to be able to obtain DNA evidence in relation to paternity. At that stage no clear directions as to the possible application of section 85(5) of the Nationality, Immigration and Asylum Act 2002, as amended, were made.
4. The matter then came before the judge on 25 October 2016. DNA evidence was produced. The judge considered the application of section 85(5) as a preliminary matter. He set out the relevant provision and then in paragraph 6 concluded that the First-tier Tribunal had no power to direct the Respondent to consider any "new matter". In light of this (and on the assumption that the judge was regarding the new relationship as a "new matter") he decided it would be futile to adjourn the hearing. He therefore concluded that he had no jurisdiction to consider the issue of the new relationship and the British child.
5. Between paragraphs 8 and 11 the judge goes on to make alternative findings and conclusions on the Article 8 claim, including the relationship and the child. On the basis of the law and findings set out in these paragraphs, the judge concluded that if he had had jurisdiction he would have found that it was not reasonable for the child to leave the United Kingdom and therefore the appeal would have been allowed, with particular reference to section 117B(6) of the 2002 Act.

Grounds of appeal and grant of permission

6. The grounds assert (albeit not entirely clearly) that the Appellant had varied his grounds of appeal and that the Respondent had taken no issue on these. In other words, by implication it is said that the issue of section 85(5) was never raised. The grounds go on to say that the judge did not raise this issue either, and that he had acted with procedural unfairness in taking the point himself and concluding against the Appellant.
7. Permission was granted by First-tier Tribunal Judge P J M Hollingworth on 8 May 2017.

The hearing before me

8. At the outset of the hearing I enquired of both representatives as to whether section 85(5) had ever in fact been raised by the Respondent at any time: having looked at the Record of Proceedings for both First-tier Tribunal hearings I could see no indication that this was the case. Mr Tarlow indicated that there was nothing in the Presenting Officer's minutes to suggest that the issue of a new matter had been raised. For his part, Mr Kannangara informed me that no such matter had been raised (he had in fact appeared at both hearings).
9. Mr Kannangara submitted that the change in the nature of the Appellant's case on appeal was not a "new matter" for the purposes of section 85(5). It was simply an element of his original Article 8 claim.
10. Alternatively, he submitted that if it had been a "new matter", the Respondent, by her actions/inactions, had given implicit consent to the Tribunal considering the matter. In light of this the judge was wrong to have taken the point against the Appellant, particularly when he had not raised the matter with the representatives at the hearing before him. Mr Kannangara suggested that I should set aside the judge's decision and remake the decision for myself, adopting in effect what the judge had said in paragraphs 8 to 11 of his decision.
11. Mr Tarlow acknowledged that he could see no reference to the issue of section 85(5) ever having been raised or relied upon by the Respondent. He agreed that I could, if I were to find there was an error of law, remake the decision on the evidence before me. He candidly accepted that in light of the unchallenged evidence, the Appellant would very probably succeed with regards to the British child and the effect of section 117B(6) of the 2002 Act.

Decision on error of law

12. I find that the judge has made material errors of law. I base this conclusion on the following matters.
13. In my view the change in emphasis of the Appellant's case after the Respondent's initial decision did not constitute a "new matter" for the purposes of section 85(5), with reference to section 85(6).
14. The relevant provisions of section 85 read as follows:
 - "(5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.
 - (6) A matter is a 'new matter' if -
 - (a) it constitutes a ground of appeal of a kind listed in Section 84, and
 - (b) the Secretary of State has not previously considered the matter in the context of -

- (i) the decision mentioned in section 82(1), or
- (ii) a statement made by the Appellant under section 120."

15. My reasons for concluding that the judge was wrong in his interpretation of the law are as follows.
16. First, the effect of section 85(5) is to limit the jurisdiction of the Tribunal. Therefore, in my view, it is necessary to interpret the meaning of the phrase, "a new matter" with caution and narrowly.
17. Second, the "matter" which constitutes the second element of the term, "new matter" clearly means that it is one of the grounds of appeal under section 84. In the present appeal, the ground of appeal in question is that contained in section 84(2): that the refusal of the human rights claim is unlawful under section 6 of the Human Rights Act 1998. The ground of appeal does not specify "an Article 8 claim".
18. In this case the Appellant's original application was made on the basis of Article 8. The specific facet of the Article 8 claim related initially to family life with a previous partner. As time moved on there was a change of circumstances and the Appellant sought to bring into his Article 8 claim his relationship with the new partner. The limited change in emphasis has not taken the claim outwith the boundaries of "a human rights claim", nor has it changed in a substantive way the basis upon which the Appellant resists removal: a removal in consequence of the refusal of the claim is unlawful under section 6 of the 1998 Act.
19. Third, in this regard I note the wording of Article 8(1) itself:

"Everyone has the right to respect for his private and family life, his home and his correspondence."
20. In my view, Article 8(1) encompasses what may be described as a 'composite right', comprising two elements of the same protected fundamental right. They are, in effect, part and parcel of the same protected right. I note that the Court of Appeal has stated that there is no substantive difference between the assessment of the two facets of this right where removal is proposed (see, for example, Singh [2015] EWCA Civ 630, at paragraph 25). Relationships are part of an individual's private life, just as they are part of family life (as confirmed in Strasbourg on numerous occasions: see, for example, Petty v UK [2002] 35 EHRR 1 and Niemietz v Germany App No. 13710/88). In other words, any distinction to be drawn is one without a material difference.
21. Fourth, if any distinction is to be made within the ambit of a human rights claim (and the right of appeal attached to the refusal thereof), it would lie as between an Article 8 case on the one hand, and an Article 3 protection case on the other. There is an easy line to draw here.
22. Fifth, I have borne in mind the Respondent's guidance on the changes to appeal rights brought about by the Immigration Act 2014 (a document dated 8 May 2017),

but it is just that: guidance. It is of no assistance in interpreting the correct meaning of the section 85(5) and (6). I have not been provided with any other materials to aid with the issue of construction. I have been able to look at the explanatory memorandum which accompanied the introduction of the amendments through the Immigration Act 2014, but could find nothing of any value therein.

23. Sixth, even on a generous interpretation of what constitutes a “new matter”, the change in the Appellant's case was one of evidence and fact only. He was not even ‘switching’ from private life to family life.
24. Seventh, even if I were wrong about that interpretation of what constitutes a “new matter”, in light of the evidence before me I conclude that the Respondent either did not regard the matter as being a “new matter”, or implicitly gave consent to the Tribunal considering the issue on appeal. There is absolutely no indication whatsoever in either of the Records of Proceedings or in the Presenting Officer’s minutes, or anything from the Appellant’s side, to show that the point was ever taken by the Respondent. Indeed, the evidence firmly points towards the Respondent’s willingness to deal with the merits of the new relationship.
25. It is clear from what occurred at the first hearing in June 2016 that the Presenting Officer had taken issue with the genuineness of the relationship and paternity, but was not stating that section 85(5) applied and therefore the issue was irrelevant for the purposes of the appeal. Further, I note that in respect of the hearing before the judge, there was cross-examination of the Appellant and his partner. Plainly, the Respondent was addressing and testing the merits of the new relationship. If the Respondent had taken the view that this was a “new matter: and/or that consent was being withheld, no such questioning or submissions would have been put forward. Therefore, the judge erred in taking the jurisdictional point at all.
26. Eighth, if the judge was to take the jurisdictional point of his own volition it was incumbent upon him to raise the matter with both parties at the outset of the hearing (particularly in view of the lack of clarity on the issue following the previous hearing). On the evidence before me this did not occur. There was at the very least procedural unfairness on the part of the judge.
27. Ninth, the errors were clearly material given the judge’s alternative findings in paragraphs 8 to 11 of his decision.
28. In light of the above I set aside the judge’s decision.

Remaking the decision

29. Both representatives were agreed that I should remake the decision myself and that I now do.
30. There has been no challenge or dispute as to the judge’s findings and conclusions set out in paragraphs 8 to 11. Although they were put in the alternative, and in light of what the judge concluded was a lack of jurisdiction, they nonetheless represent a clear assessment of relevant factors. All of the points he has made are backed up by

the evidence before me, and Mr Tarlow has taken no issue with any of the evidence whatsoever.

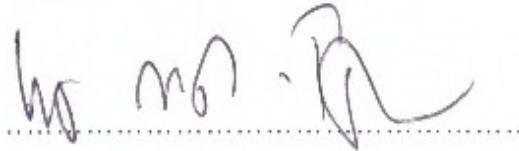
31. In light of the above, I make the following findings.
32. The Appellant has been and is in a genuine and subsisting relationship with his current partner, a British national. I find that she has a chronic physical disability and a history of depression. I find that she also has two children from a previous relationship. The two children live with her, aged fifteen and eleven. Both are British. I find that the older child has regular contact with his biological father. I find that the Appellant is the father of the couple's British citizen child, and he has a genuine and subsisting relationship with that child.
33. There has been no suggestion that the Appellant can succeed in respect of the Article 8-related Rules. The new partner is not a "partner" for the purposes of GEN.1.2 of Appendix FM. The Parent Route does not assist because the family unit live together.
34. I consider the claim outside the scope of the Rules. I move first to section 117B(6) of the 2002 Act and have regard to the decision of the Court of Appeal in MA (Pakistan) [2016] EWCA Civ 705 and AM (Pakistan) [2017] EWCA Civ 180.
35. The best interests of the couple's child as a British citizen lie in being with both of his parents and in remaining in the country of his nationality.
36. In respect of the partner's two other children I note that their respective ages, being eleven and fifteen. One is about to move into secondary education, the other will be in the midst of GCSEs. The older child at least has contact with their biological father, and it must be in their best interests for this to continue. All of this, plus the fact of their own nationality, make it wholly unreasonable for them to leave the United Kingdom.
37. I have regard to all other aspects of the public interest factor set out in section 117B including the overriding public interest in ensuring effective immigration control, what appears to be a lack of financial independence on the Appellant's part, the precariousness of his status during the currency of the relationship and the fact that best interests are never a trump card. The English language point is neutral. I also have regard to section 55 of the Borders, Citizenship and Immigration Act 2009, together with the Respondent's own policy guidance on Appendix FM at paragraph 11.2.3. The policy guidance clearly supports the Appellant's case.
38. As it would be unreasonable for the partner's other children to leave the United Kingdom, she could not leave either. This is a very significant factor in the Appellant's favour.
39. I fully agree with the First-tier Tribunal Judge that, taking all relevant matters in the round, it would be unreasonable for the couple's child to leave the United Kingdom.
40. In light of the above, I conclude that the Appellant is able to meet the criteria set out in section 117B(6) and that therefore he succeeds in his appeal.

Notice of Decision

The First-tier Tribunal's decision contained material errors of law.

I set aside that decision of the First-tier Tribunal.

I re-make the decision by allowing the Appellant's appeal. The refusal of the Appellant's human rights claim is unlawful under section 6 of the Human Rights Act 1998.



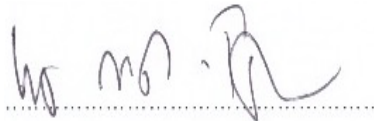
Signed

Date: 12 July 2017

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of £140.00. Although the Appellant's case did change over time, relevant evidence had been submitted before the First-tier Tribunal and the Respondent has been aware of the essential facts for a considerable period of time now, and has maintained her original position, despite the obvious merit in the appeal (as indicated by the Senior Presenting Officer before me).



Signed

Date: 12 July 2017

Deputy Upper Tribunal Judge Norton-Taylor