



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/01492/2017

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 22 February 2018**

**Decision & Reasons  
Promulgated  
On 1 March 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**DALLBOR [P]  
(ANONYMITY DIRECTION NOT MADE)**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

Respondent

**Representation:**

For the Appellant: Mr I. Komusanac, Solicitor, Igor & Co

For the Respondent: Mr S. Walker, Senior Home Office Presenting Officer

**DECISION AND REASONS**

- 1.** The appellant, who is an illegal entrant, appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge NMK Lawrence sitting at Hatton Cross on 3 October 2017) dismissing his appeal against the decision of the respondent made on 9 January 2017 to refuse to grant him leave to remain on private or family life grounds.
- 2.** The respondent accepted that he was the father of a boy born to a Namibian mother, [EU], in the UK on [ ] 2015. But as none of them had status (the Namibian mother being an overstayer) the respondent

contended that it was reasonable to expect the appellant to go back to his home country of Serbia with his son or to go to Namibia *“as a family unit”*.

3. At the hearing before Judge Lawrence, both parties were legally represented. Mr Komusanac applied for an adjournment because [EU], who had provided a witness statement, had given birth to a second child by the appellant on [ ] 2017, and she was not yet fit to attend the hearing to give oral evidence. The Judge refused the adjournment request because Mr Komusanac told him that the appellant was not in a relationship with [EU], and that they had only been living under the same roof since the birth of the second child.
4. In his subsequent decision, the Judge found that the appellant did not enjoy family life with his children. He held that there was no evidence that he had gone to see his first child when that child was living with his mother in Wellingborough, or that he had been providing financial support for the first child. He noted that the appellant was convicted of fraud in 2008, which meant that what he said should be treated with caution. The lack of cogent evidence of any visits or provision of funds led him to find that the assertions made by the appellant and [EU] were made *“for the benefit of securing status in the UK and nothing more”*.

### **The Reasons for the Grant of Permission to Appeal**

5. On 22 December 2017, Upper Tribunal Judge Blum granted the appellant permission to appeal for the following reasons:

The central issue in this appeal is whether the appellant enjoyed family life with his children and whether the refusal of his human rights claim was disproportionate. Although the appellant is not in a relationship with the mother of his children, it is arguable that the FtJ erred in law by refusing to adjourn the hearing to enable her to attend ... as she could have given first-hand evidence of the claimed relationship, and that the FtJ erred by failing to consider the travel card evidence which was capable of supporting his claim to have travelled to Wellingborough to see his child.

### **The Rule 24 Response**

6. In a Rule 24 Response dated 16 January 2018, a member of the Specialist Appeals Team vigorously opposed the appeal, asserting that the Judge had directed himself appropriately and that he had given cogent reasons for concluding the appellant’s removal was proportionate.

### **The Hearing in the Upper Tribunal**

7. At the hearing before me to determine whether an error of law was made out, the appellant confirmed (as I suspected – see below) that his case was that [EU] had moved with their first child to London to live with him before she had conceived their second child. He said this happened in April 2016, and that they had lived together in the same household ever since.

8. Mr Walker conceded that the Judge had made a factual error in his decision which was material to the outcome, and he agreed with Mr Komusanac that the decision was thereby fatally flawed.
9. I gave brief reasons for finding that an error of law was made out, and undertook to provide fuller reasons in due course.

### **Reasons for Finding an Error of Law**

10. The case presented to the Judge was a confusing one. On the one hand, it was said that the appellant did not have family life with the mother of his two children, but on the other hand she was said to be living under the same roof as him and the children. Their prospects of being able to obtain status in the UK were much better if they presented themselves as not being in a relationship than if they declared themselves to be partners who lived in the same household as their two children, neither of whom were qualifying children for the purposes of s117B(6) of the 2002 Act.
11. Against this background, and taking into account the appellant's conviction for an offence of dishonesty, it was open to the Judge to treat the appellant's evidence with considerable scepticism. However, with the benefit of hindsight, his refusal to adjourn has led to material unfairness. The Judge made an adverse credibility finding on the issue of contact without hearing from the mother, who would have been able to give first-hand evidence on this issue as well as on the status of her relationship with the appellant; and her evidence could have been tested in cross-examination, and compared with that given by the appellant.
12. As recorded in paragraph [8] of the decision, the appellant's explanation in oral evidence for fathering a second child by her, even though they were supposedly not in a relationship, was that they were living in the same house, "*and sex just happened*".
13. The Judge assessed the family life claim on the basis that they had allegedly only started living together as a family unit following the birth of the second child. This may have been what he was told at the outset, but the appellant's oral evidence indicated that they had begun to cohabit before the second child's conception. The Judge failed to engage with this aspect of the appellant's evidence, and he also misdirected himself in saying that there was "*no evidence*" that the appellant had travelled from London to Wellingborough to see his son. There was evidence before him in the form of travel card evidence.
14. Accordingly, as I ruled orally at the hearing, the decision of Judge Lawrence is unsafe and erroneous in law such that it must be set aside and remade.

### **Future Disposal**

15. Having heard from both representatives, I was satisfied that this was not an appropriate case for retention by the Upper Tribunal, but that it should

be remitted to the First-tier Tribunal for a fresh hearing, due to the extent of judicial fact-finding that was going to be required to remake the decision.

- 16.** In the light of the case that the family have been living together under the same roof since April 2016, one of the issues is likely to be whether it is reasonable for the entire family to relocate to either Namibia or Serbia. Even if the appellant and [EU] are not partners, they have - on the appellant's case - come together for the sake of the children. So this arrangement could potentially continue elsewhere, subject to any significant obstacles to integration which either of them, or the children, may face in the country of return.

### **Conclusion**

- 17.** The decision of the First-tier Tribunal contained a material error of law, such that it must be set aside and remade.

### **Directions**

- 18. The appeal is remitted to the First-tier Tribunal at Hatton Cross for a de novo hearing before any judge apart from Judge Lawrence. None of the findings of fact made by the previous Tribunal shall be preserved.**

### **Anonymity**

The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

Signed

Date

Deputy Upper Tribunal Judge Monson