



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01704/2016

THE IMMIGRATION ACTS

Heard at Manchester
On 20th December 2017

Decision & Reasons Promulgated
On 15th May 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Janet [P]
(no anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: Mr R. O’Ryan, Counsel instructed by Paragon Law
For the Respondent: Mr G. Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Uganda born in 1997. By way of an application made in September 2015 she sought leave to remain in the United Kingdom on human rights grounds.
2. The Respondent refused her application on the 5th January 2016. The Respondent noted that the basis of the claim was the Appellant’s long-standing relationship with a British national. The Appellant could not be granted leave to remain under the ‘five-year route to settlement’ because she did not have leave in an applicable category: she had entered the UK as a visitor in 2001 and had

overstayed. The only way that she could therefore succeed with reference to 'Appendix FM' of the Immigration Rules would be under the 'ten-year route to settlement'. This required the Appellant to show that one or more of the 'exceptions' in paragraph EX.1 applied to her case:

EX.1. This paragraph applies if

- (a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
 - (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
 - (bb) is in the UK;
 - (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
- (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; *or*
- (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

3. At the date that the Respondent considered the claim the only EX.1 exception that might potentially apply to the Appellant was EX.1 (b). It was accepted that the Appellant has a genuine and subsisting relationship with her British partner, but it was not accepted that there would be "insurmountable obstacles" to him moving with her to Uganda. As to the alternative 'exception' in EX.1 (a) there was no scope for the Appellant to rely upon it as she did not have a child in the UK. It is accepted however that at the date of the decision the Respondent was aware that the Appellant was pregnant; indeed various documents relating to her ante-natal care appear in the Respondent's bundle.
4. The Appellant lodged her appeal with the First-tier Tribunal on the 18th January 2016.
5. The Appellant's child was born on the 29th March 2016.
6. On the 10th November 2016 the Appellant's representatives wrote to the Home Office Presenting Officer's Unit at Stoke inviting them to withdraw the decision and reconsider the matter in light of the Respondent's published policy on when it might be reasonable to expect a British child to leave the UK. A further letter was sent on the 21st December 2016 and then another on the 28th December 2016. All the letters were sent by Post Office recorded delivery and receipts have been provided.

7. The matter came before the First-tier Tribunal on the 13th January 2017. Mr Fowler, the Appellant's partner, explained the history set out above. He told the Tribunal that the Respondent had been aware that the Appellant was pregnant when the decision had been taken on the 5th January 2016. Since the child was born the Respondent had been sent several letters pointing out that the Appellant now had a British child, and asking that the decision to refuse leave be withdrawn. The Respondent had not dealt with any of these letters. The representative of the Respondent at the hearing before the First-tier Tribunal was a Home Office Presenting Officer, a Ms Alfred. Ms Alfred submitted that the birth of the child was a 'new matter' falling under s85 of the Nationality, Immigration and Asylum Act 2002 (as amended). She raised an issue about the child's paternity and said that the Respondent would like to see DNA evidence. She asserted that the Respondent needed time to consider documents including the birth certificate. The Tribunal records the conclusion of these discussions at paragraph 16 of its determination:

"It is clear that the Respondent was aware at the time of the decision that the Appellant was pregnant. The Appellant's representatives sent several letters to the Respondent about the birth of the child who was a British citizen. None of those letters were even acknowledged, and despite Royal Mail signed for proof of delivery being produced, the Respondent's representative claimed none had ever been received as they were not on file, and she didn't have a bundle from the Appellant either. Whilst the Appellant has taken all reasonable steps to get the Respondent to consider the new issue before the hearing, she has failed to do so. The application was made on the basis of leave to remain on account of her relationship with Mr Fowler, and since the decision on this matter, a child has been born. I find this is a new matter as it has not been considered by the primary decision maker and in the absence of the Respondent's consent to consider it I have no jurisdiction to deal with it. So I proceeded to determine the case on the basis of the original matters only. This is even though it would have been desirable in my view for a single appeal to consider all matters raised by the Appellant. However, the consent having been withheld, however unreasonably and causing some inconvenience to the Appellant and the Tribunal, I cannot do so".

8. The Tribunal went on to dismiss the appeal with reference to the Article 8 relationship with Mr Fowler, finding that the Appellant could not meet the high test of 'insurmountable obstacles'.

The Appellant's Challenge

9. The written grounds raise several points, most of which were not pursued before me by Mr O'Ryan. That is because on the morning of the hearing the decision in Mahmud (section 85 of the Nationality, Immigration and Asylum Act 2002 - 'new matters') became available, and Mr O'Ryan decided to modify his submissions in light of that reported decision. The appeal was pursued on the following grounds:

- a) The Tribunal misdirected itself as to its own jurisdiction and ability to decide as a question of fact whether the birth of the child is a 'new matter'; the birth was not a 'new matter' *because* it had not been considered by the Respondent. It either was, or it wasn't a new matter and that was for the Tribunal to decide. Had the Tribunal considered the facts in the round, Mr O'Ryan submits that the birth could properly be seen as a continuum of existing facts, given that the Appellant was pregnant at the date of the application and decision.
- b) The 'decision' under appeal could be taken to be the 'Respondent's position'. Since the Respondent's position – insofar as it related to the birth – was on the Tribunal's finding unreasonable, and taken contrary to published policy, it was not a 'lawful' decision. In its consideration of the *Razgar* questions the Tribunal could therefore have stopped at the third question and allowed the appeal on that basis.

The Respondent's Reply

10. Mr Harrison could do no other than agree that the Secretary of State had apparently failed to apply her own policy in two respects. She had failed to consider the letters that had been served at least two months prior to the hearing; it would further appear that Ms Alfred had failed to take instructions from Senior Case Worker, or to have provided her reasons for refusing consent in writing. Mr Harrison did however adopt the reasoning in Mahmud [§31] to submit that the birth of a child should be considered a 'new matter' and that any error would therefore be immaterial.

Discussion and Findings

A New Matter?

11. The relevant part of section 85 of the NIAA 2002, as amended by s15 of the Immigration Act 2014, reads:

“(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.”

12. In Mahmud the Upper Tribunal was asked to consider the application of this new provision. Rejecting the contention for the applicant that a ‘new matter’ simply meant a new basis of appeal (i.e. a human rights as opposed to an asylum ground) the Tribunal held:

A ‘new matter’ is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.

In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive.

13. Importantly the Tribunal clarified the practical consequences of the scheme. At paragraph 42 the Tribunal record the Respondent’s concession that it is not *her* view that is determinative as to what or what does not constitute a new matter. Whether something is a new matter goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine the answer to the question posed at s84 (6)(a) for itself: does the issue “constitute a ground of appeal”, or as the Mahmud has it, does the issue ‘constitute a new factual substance of claim’. That is a fact-sensitive exercise. It is also, it would appear, for the Tribunal to consider whether the second limb, at s84 (6)(b) has been met: is this a matter that the Secretary of State has not yet considered? It is only once these two stages have been completed, and answered in the affirmative by the Tribunal, that the question of the Secretary of State’s consent would arise.

14. In this case the First-tier Tribunal directed itself thus: “I find this is a new matter *as* it has not been considered by the primary decision maker”. As Mr O’Ryan correctly submits, what the Tribunal has done here is use the answer to s84(6)(b) (whether it has been considered) to deal with the question posed by s84(6)(a) (whether it is a new matter of fact). The answer to one did not provide the answer to the other. I am satisfied that the Tribunal was required to decide for itself whether the birth of the child was a new matter and to that extent, the decision is flawed for legal misdirection.

15. Is such an error material? Mr Harrison points out that the Tribunal in Mahmud specifically gives the example of the birth of a child as something that will likely be a new matter [at 31]:

“the matter [must be] be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive. By way of example, evidence that a couple had married since the decision is likely to be new evidence but not a new matter where the relationship had previously been relied upon and considered by the Secretary of State. Conversely, evidence that a couple had had a child since the decision is likely to be a new matter as it adds an additional distinct new family relationship (with consequential requirements to consider the best interests of the child under section 55 of the Borders, Citizenship and Immigration Act 2009) which itself could separately raise or establish a ground of appeal under Article 8 that removal would be contrary to section 6 of the Human Rights Act”.

16. This guidance echoes that provided to caseworkers by the Respondent in her policy paper ‘Rights of Appeal’ version 6.0. This gave support to the contention that the birth of a new child – a new relationship – was factually distinct from the rest of the Article 8 claim.
17. I have taken that guidance into account, and I see no reason to disagree with the reasoning in Mahmud. I note however that the Tribunal accepted the possibility that the birth of a child would not constitute a new matter: “evidence that a couple had had a child since the decision is *likely* to be a new matter”. In this instance I am prepared to accept Mr O’Ryan’s submission that this case can be distinguished from the norm.
18. It is not the case that the Respondent was completely taken unaware by the factual development. As Mr Foster had explained to the First-tier Tribunal, it had been made very clear at the date of application that the Appellant was pregnant. There is an allusion to the pregnancy at the page 3 of the refusal letter where the decision-maker writes: “you have not raised anything that would lead us to believe you have a child in the UK *that has been born* and so do not meet the requirements of paragraph EX.1 (a) of Appendix FM” (my emphasis). The pregnancy, and therefore the nature of this family unit, was at the centre of the Appellant’s case from the outset, as can be seen from the ante-natal notes and medical correspondence contained in the Respondent’s bundle. When Mr Foster supported the Appellant in her application to remain here with him he did not just do so because she was his partner: she was his pregnant partner. Whilst there is no scope within Article 8 to recognise family life with an unborn child, I find this factual matrix to be more nuanced than that considered in Mahmud. Where

the Respondent has been aware of the pregnancy all along, I find the birth to be evidence of an existing matter.

19. The point of this statutory provision is, presumably, to prevent the Respondent being ambushed by new issues that she has not a chance to consider (I discount the suggestion, made by some, that its intention was to generate income for the Home Office by encouraging multiple paid applications). Since any caseworker, or HOPO, who picked up this file at any point between December 2015 (when the medical records were submitted) and January 2017 (the hearing) would have been aware of the pregnancy (then baby) I find it very difficult to see why Ms Alfred considered that she was unable to deal with the issue. I note in particular that her assertion that she wanted to request DNA testing has been completely abandoned since the First-tier Tribunal hearing. There is no question that this is a genuine and subsisting relationship. Mr Harrison expressly declined to challenge the claimed paternity: a sensible concession given that the child has now been issued with a British passport on the basis of her father's nationality.
20. I am satisfied that the First-tier Tribunal misdirected itself as to its own power to consider whether this was a new matter. It was for the Tribunal to conduct its own assessment. I am satisfied that the birth of the child was not, on these particular facts, a 'new matter', and the test in s.85(6)(a) was not met.

Razgar

21. R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27 remains the leading authority for the application of Article 8 ECHR in the context of our domestic jurisprudence on the control of migration. At paragraph 17 Lord Bingham sets out the series of questions that a decision-maker must consider (in that instance in a removal case):

- “(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
- (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- (3) If so, is such interference in accordance with the law?
- (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?
- (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?”

22. In the instant case the First-tier Tribunal accepted that there was a family life, and that the refusal to grant the Appellant leave would interfere with it. What then of the third stage in the enquiry? Mr Harrison had accepted that the *prima facie* the decision making process had not accorded with published Home Office policy and to that extent it could be said to be “not in accordance with the law”: DS (Abdi) v Secretary of State for the Home Department [1996] Imm AR 148. Mr O’Ryan submitted that in those circumstances the decision, insofar as it turned on Article 8 ‘outside of the rules’ had to be allowed on that basis.

23. Attractive as that argument might be, it faces one insuperable obstacle: the change, since Abdi, of the in the statutory framework relating to appeals. As the Upper Tribunal noted in Greenwood No. 2 (para 398 considered) [2015] UKUT 00629 (IAC), the previous appellate scheme had allowed the First-tier Tribunal, upon consideration of an appeal, to dismiss it, allow it on the grounds that the discretion had been exercised wrongly by the Secretary of State, or to allow it to the extent that the decision was “not in accordance with the law”, in which case the matter would be remitted to the Secretary of State so that a lawful decision could be made. Part V of the Nationality, Immigration and Asylum Act 2002, as amended by s19 of the Immigration Act 2014, no longer provides for such an alternative. Today the rights of appeal under s82, and the grounds of appeal under s84, limit the jurisdiction of the Tribunal to consideration of whether the decision under appeal would breach the UK’s obligations under the Refugee Convention, the Qualification Directive or the European Convention on Human Rights. In respect of the latter the Tribunal is concerned specifically with whether the decision is unlawful under section 6 of the Human Rights Act 1998: s84(2).

24. Mr Justice Lane and Upper Tribunal Judge McWilliam recently considered the formulation “in accordance with the law” in the context of an appeal brought on new s84(2) grounds in Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC). The Presidential panel there specifically disapprove the approach taken in Greenwood and find:

“46. The correct approach to adopt in a human rights appeal under section 82(1)(b) is as follows. As section 84(2) makes clear, and as is reflected in the present notice of decision, served in compliance with the Immigration (Notices) Regulations 2003, the decision being appealed is the decision to refuse the claimant’s human rights claim. Section 84(2) provides that the only ground upon which that decision can be challenged is that “the decision is unlawful under section 6 of the Human Rights Act 1998”. Section 6(1) of the 1998 Act provides that it “is unlawful for a public authority to act in a way which is incompatible with the Convention rights”.

47. The definition of “human rights claim” in section 113(1) of the 2002 Act involves the making of a claim by a person that to remove him or her from or to require him or her to leave the United Kingdom would be unlawful under section 6.

48. The task, therefore, for the Tribunal, in a human rights appeal is to decide whether such removal or requirement would violate any of the provisions of the ECHR. In

many such cases, including the present, the issue is whether the hypothetical removal or requirement to leave would be contrary to Article 8 (private and family life).

49. In such a paradigm human rights appeal, therefore, we do not consider that paragraph 21 of the decision in Greenwood No 2, including its sub-paragraphs (a) and (b), has any purchase. If the decision to refuse the human rights claim would violate section 6 of the 1998 Act, the Tribunal must so find. In such a paradigm case, we see no purpose in the Tribunal making any statement to the effect that "a lawful decision remains to be made by the Secretary of State". It would certainly be wrong to conclude that, having allowed the appeal, the appellant's human rights claim remains outstanding, in the sense that the Secretary of State must make a fresh decision on that claim. The actual position will be that the Secretary of State, faced with the allowing of the appeal by the Tribunal, will decide whether and, if so, what leave to enter or remain she should give to the appellant. Any deportation decision or decision under section 10 of the 1999 Act that the Secretary of State may have made in respect of the appellant will fall away. Again, we see no need for the Tribunal to make any express statement to that effect.

50. What we have just said applies in the paradigm case where there is no discrete reason why any planned removal by the Secretary of State would be unlawful. In other words, but for the Tribunal's finding that removal would constitute a disproportionate interference with Article 8 rights, the Secretary of State would have had the power to remove.

51. In the present case, as we have seen, that was not the position. Judge Malone found as a fact that the claimant was more likely than not that to have arrived in the United Kingdom before 1 January 1973. Accordingly, the claimant was entitled to the benefit afforded by section 7 of the 1971 Act and was thus exempt from deportation.

52. The appeal before the judge was, however, a human rights appeal. As we have seen, the sole ground of challenge to the decision to refuse the human rights claim is that the refusal is unlawful under section 6 of the 1998 Act.

53. In the circumstances, Judge Malone was, we find, wrong in law to purport to allow the appeal on the freestanding basis that the decisions to make the deportation order, and to refuse to revoke it, were in each case unlawful. To repeat, neither of those decisions was the decision under appeal. The judge was therefore compelled to treat the section 7 issue as going to the determination of the sole ground of appeal; namely, whether refusal of the claim would violate the United Kingdom's obligations under the ECHR, by reference to Article 8.

54. At this point, it is necessary to focus on the wording of Article 8:-

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

55. As can be seen from paragraph 11 above, the so-called “*Razgar* questions” of Lord Bingham at paragraph 17 of the opinions of the House of Lords in [2004] UKHL 27 are designed to enable judicial fact-finders to navigate the wording of Article 8(1) and where appropriate Article 8(2), to the extent that the facts of the case so require.

56. Questions (1) and (2), if each answered positively, take the judicial fact-finder into the realm of Article 8(2). Questions (3) to (5) engage sequentially with the requirements of that part of the Article.

57. In the present case, as Judge Malone in effect found at paragraph 37 – and as is in any event manifest – the claimant enjoyed the protection of Article 8. The issue, therefore, was whether the Secretary of State could demonstrate that a positive answer fell to be given to each of *Razgar* questions (3) to (5).

25. Importantly, for my consideration of this appeal, the Tribunal go on:

58. So far as concerns the requirement addressed in question (3), that the interference be “in accordance with the law”, both Strasbourg and domestic authority suggests that the question is whether the proposed interference (here, deportation) has a proper basis in domestic law, including whether that law is accessible to the person concerned and foreseeable as to its effects (see eg *AB v Her Majesty’s Advocate* [2017] UKSC 25, paragraph 25). In the present case, the law of deportation under the 1971 Act, read with the UK Borders Act 2007 in the case of foreign criminals, satisfies these requirements.

26. The question before the First-tier Tribunal in this case was whether the decision to refuse to grant the Appellant leave was unlawful under s6 of the Human Rights Act 1998. Applying *Charles* that could not be done by simply identifying where the Secretary of State had erred in applying her own policy. There was therefore no error in the First-tier Tribunal not deciding to allow the appeal on the grounds that the decision was “not in accordance with the law”.

Disposal

27. I have found that in the particular and unusual circumstances of this case the fact that the Appellant had given birth between the application being made and the appeal being heard in the First-tier Tribunal did not constitute a ‘new matter’ under s85(6)(a). It was, as suggested by Mr O’Ryan, a development of the same facts, which should have been considered when assessing the grounds of appeal under s84(2).

28. The appeal before the First-tier Tribunal was an in-country human rights appeal and as such the relevant date for its enquiry was the date of hearing, so too in the remaking.

29. At the date that I remake this decision the Appellant is the mother of a British child who is now just over two years old. That child lives with father and mother in the family home. I find that if the Appellant were to be removed, the child, at her young age, would have to go with her, thus depriving the child of a normal

relationship with her father, and the benefits of her nationality. Whatever the circumstances she might face in Uganda, that in itself would be strongly contrary to her best interests. I have taken into account the public interest factors set out at s117B(1)-(5) of the NIAA 2002. I recognise the public interest in maintaining immigration control and the adverse weight to be attached to the fact that the Appellant is a long term overstayer. I note that she speaks English and is financially supported by her partner. I must also have regard to s117B(6). The consequence of the Appellant's removal is that her child would have to be removed with her. I find that in the absence of any strong countervailing factors pertaining to the Appellant (i.e. criminality etc) it would not be reasonable to expect this child to leave the UK and in those circumstances, the Appellant's appeal must be allowed on Article 8 grounds. I note for the sake of completeness that my conclusion accords with the Respondent's published guidance to caseworkers on such matters. At page 78 of Family Migration: Appendix FM Section 1.0b *Family Life (as a Partner or Parent) and Private Life: 10-Year Routes* the following statement is made:

"Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave the UK because, in practice, the child will not, or is not likely to, continue to live in the UK with another parent or primary carer, EX.1.(a) is likely to apply".

Decision

30. The decision of the First-tier Tribunal contains a material error of law and the decision is set aside.
31. The decision in the appeal is re-made as follows:

"The appeal is allowed on human rights grounds".
32. There is no direction for anonymity.

Upper Tribunal Judge Bruce
24th April 2018