



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01765/2017

THE IMMIGRATION ACTS

Heard at Field House
On 9th July 2018

Decision & Reasons Promulgated
On 9th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR ADEL HALIMI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Bando (Counsel)

For the Respondent: Mr P Duffy (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge NMK Lawrence, promulgated on 19th April 2018, following a hearing at Hatton Cross on 27th March 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Algeria, and was born on 14th May 1980. He appealed against the decision of the Respondent dated 16th January 2017, refusing his application for leave to remain in the UK on the basis of his relationship with a Ms SW.

The Appellant's Claim

3. The basis of the Appellant's claim is that he has formed a relationship with a Ms SW, a British national, who has children from a previous relationship, after the couple met in October 2015 and started cohabiting in December 2015.
4. He was previously married to a German national, JMH, with whom he has a daughter that was born to them on 8th December 2013, following which Ms JMH returned back to Germany with her daughter because the relationship has broken down.

The Judge's Findings

5. The judge held that there were no compelling or exceptional circumstances outside the Immigration Rules, such as to justify the grant of leave to the Appellant and that he ought to make a proper application from abroad by returning back to Algeria.
6. In relation to the Appellant's connection with the child of the family, the judge observed that the biological father of the child born to Ms SW, was still in touch with the child.
7. The judge accordingly went on to observe that,

"I note that Ms SW states that her children considered the Appellant as a 'father figure'. They also see their biological father at regular intervals. It seems to me that two father figures in the lives of such young children must be confusing for them and may be deemed not to be in their 'best interests'. In any event, the question for the Tribunal is whether this family can enjoy 'family life' in Algeria" (paragraph 18).
8. The judge went on to record the fact that the background information about Algeria was that there was fear there of terrorist attacks and kidnapping and that this "is still very high in that country" (paragraph 19).
9. The Appellant and Ms SW had in the meantime entered into a civil ceremony of marriage (paragraph 20), but the Appellant did not meet the English language requirement and given the importance of Section 117B and the public interest in immigration control the appeal could not succeed.

The Grant of Permission

10. On 14th May 2018 permission to appeal was granted on the basis that the judge had not appreciated that the Appellant was appealing both within the Immigration Rules and outside them.

Submissions

11. At the hearing before me Mr Bandoock, appearing on behalf of the Appellant, made the following submissions. First, the judge had proceeded on the basis that the appeal was substantially on the basis of the Appellant's relationship with Ms SW and their

children (paragraph 14). However, the judge did not then consider whether the Appellant met the requirements of Appendix FM or paragraph 276ADE. Instead, the judge went on to simply conclude later on in the determination (at paragraph 20), that “this is an appeal outside Appendix FM and under Article 8 of the Human Rights Convention”, without considering paragraph 276ADE and Appendix FM. In fact, the judge wrongly stated (at paragraph 21) that

“it is open to the Appellant to make a proper application to the Respondent based on his marriage to Ms SW and the Respondent could then be the ‘primary decisionmaker’ on all issues after conducting all relevant enquiries regarding EX.1”,

because the Respondent had already considered Appendix FM, including EX.1, and it was this decision that was the subject matter of the appeal, so that the judge ought not to have overlooked it.

12. Second, the judge also confusingly conflated the Immigration Rules with the Appellant’s position outside the Immigration Rules under freestanding Article 8 jurisprudence. He had accepted that the Appellant was married to a British national (see paragraphs 15 and 20). A marriage certificate was before him (see the Appellant’s bundle at page 113) and the Appellant met the “relationship requirements”, although this had not been accepted by the Respondent Secretary of State. However, the confusion arises because between paragraphs 15 and 22, the judge considers the position under Article 8 in a manner that has the appearance of it being evaluated both inside the Immigration Rules and outside the Immigration Rules. He then seems to consider (at paragraph 19) the test of “insurmountable obstacles” without using that statutory phrase. Third, the judge failed to make proper findings in relation to Appendix FM and in particular EX.1. In particular he misunderstood that if the requirements of EX.1 are satisfied then the Appellant does not need to meet the English language requirement.
13. Finally, the judge completely failed to take into account Section 55 of the BCIA 2009, affecting the children’s best interests. Although it was the case that the Appellant had stepchildren only, the fact was that they regarded the Appellant as a “father figure” (paragraph 18).
14. For his part, Mr Duffy submitted that he would have to accept that there was an error of law for a variety of reasons, but most principally on the basis that the judge had made a statement, unsupported by any expert evidence that having two people in the family who the children would see as a “father figure” would not be in their best interests (paragraph 18).

Error of Law

15. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

16. First, it is incontestable that the Appellant acts as a “father figure” in the lives of the children of Ms SW. Notwithstanding the fact that they also have a biological father who sees them at regular intervals, it is highly questionable that the proposition that having two father figures in their lives “must be confusing for them and may be deemed not to be in their ‘best interests’” (paragraph 18), in the absence of any expert evidence. Second, the question of there being “insurmountable obstacles” in the maintenance of the existing relationship between the Appellant and the children of Ms SW, were he to be returned to Algeria required proper consideration in the light of the evidence before the Tribunal that the background evidence about Algeria “demonstrates that fear of terrorist attack and kidnapping is still very high in that country” (paragraph 19). The judge did not engage with this evidence. Third, and no less importantly, there is no engagement by the judge with Appendix FM or paragraph 276ADE, given what has been stated above. Finally, there has been a conflation of the situation under the Immigration Rules with that outside the Immigration Rules (see paragraphs 15 to 22). All these matters need a proper evaluation in the light of the fact that, not only is the relationship between the Appellant and Ms SW recognised by the Respondent Secretary of State, but they have gone on to get married, and now comprise a family unit. Accordingly, this appeal is to be remitted back to the First-tier Tribunal, to be determined by a judge other than Judge NMK Lawrence pursuant to Practice Statement 7.2(a).

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, pursuant to Practice Statement 7.2(a).

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

3rd August 2018