



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16726/2016

THE IMMIGRATION ACTS

Heard at Field House
On 26th April 2018

Decision & Reasons Promulgated
On 18th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR R S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Kerr
For the Respondent: Mr Duffy

DECISION AND REASONS

Introduction

1. The Appellant born on [] 1987 is a citizen of Albania. The Appellant was represented by Mr Kerr of Counsel. The Respondent was represented by Mr Duffy, a Presenting Officer.

Substantive Issues under Appeal

2. The Appellant had made application for leave to remain in the United Kingdom on 14th February 2014 based on his private life and family life with his son. That application had been refused by the Respondent.
3. The Appellant had appealed that decision and his appeal was heard by Judge of the First-tier Tribunal Morris sitting at Hatton Cross on 4th December 2017. The judge had dismissed the appeal under both the Immigration Rules and on human rights grounds.
4. Application for permission to appeal had been made on 11th January 2018 and permission had been granted by Judge of the First-tier Tribunal Landes on 13th February 2018. It was said that it was arguable that the judge should have considered Article 24(3) of the EU Charter as being engaged and explained why it was not engaged or how the conclusions in that respect factored into her decision.
5. Directions were issued for the Upper Tribunal to consider whether an error of law had been made by the First-tier Tribunal and provided other directions in that respect dated 23rd February 2018. It is in respect of those directions that the matter comes before me.

Submissions on Behalf of the Appellant

6. Mr Kerr said that the judge had not looked at Section 55 properly, and that although positive findings had been made of a relationship between the father and son, it was questionable whether the judge was entitled to reach conclusions based on the findings of fact. It was said that the situation was close to the spirit of Section 117B(6) save that it was accepted the child was not settled in the UK. It was further said the best interests of the child would be to maintain the status quo.

Submissions on Behalf of the Respondent

7. Mr Duffy submitted that the Appellant did not fit within any of the Immigration Rules and noted the Appellant had entered the country illegally and had no status in the UK. The judge had noted the public interest factors in such cases and had assessed the best interests of the child, and had conducted a proportionality exercise and was entitled to have reached the decision that he had and the reasoning was adequate.
8. At the conclusion of the hearing I reserved my decision to consider the evidence and submissions on the issue of the error of law.

Decision and Reasons

9. It is said in the permission granting appeal that the judge arguably should have considered Article 24(3) of the EU Charter. That section of Article 24 is phrased in very general terms. The core principles are essentially mirrored in Section 55 of the Borders Act 2009. If a judge has properly considered the facts in the case, taken account of the statutory requirements of Section 55 of the Borders Act and conducted a proper consideration of the case under Article 8, it does not appear that Article 24(3) adds

anything and appears to be merely repetitive of those features that if properly considered would have been taken into account by a judge in the normal way.

10. The Appellant in this case has entered the United Kingdom illegally in December 2012. He, and a Polish citizen from whom he is now separated, had a child together in December 2013.
11. The judge had noted at paragraph 11 that the concession made by the Appellant's representative that the Appellant could not meet the Immigration Rules was correct, and had therefore looked at the case under Article 8 outside of the Rules. She had found that the Appellant had a strong, genuine and subsisting relationship with his son, [O]. That was consistent with an earlier judge's findings in 2015, to which the judge applied the principle of Devaseelan (paragraph 10i) and his own observations at paragraph 17. He also found a private life had been established. He correctly identified the issue, therefore, being an assessment of proportionality, having particular regard to the final stage test in Razgar taking account, as a primary consideration, the child's best interests under Section 55 of the Borders Act 2009 and also the statutory requirements which he was bound to consider under Section 117 of the 2002 Act.
12. The judge had also reminded himself of recent case law, including R -v- Agyarko [2017] UKSC 11 where the Supreme Court said

"... where the true status of the family or some members of it is such that the persistence of that family life within the host state would from the outset be unlawful or precarious, it was stated that particularly where the individuals know this, an absent protracted delay by the immigration authorities, which there has not been in this case, it is likely only to be in exceptional circumstances that the removal of a non-national family member will constitute a violation of Article 8".
13. The judge had acknowledged the role of Section 55 of the Borders Act in the decision-making process (paragraph 22). He clearly had in mind a full and accurate picture of the contact between father and son. He acknowledged that in looking at Section 117B(4) and (5) little weight should be given to private life established when the Appellant was in the UK unlawfully or precariously. The judge had properly identified that those provisions were significant in the context of this case. He had not referred to the fact, but it was self-evident from the facts, that Section 117B(6) did not apply in this case. The judge therefore, at paragraphs 26 to 30, had looked at the case exclusively within the context of [O], the son, and had referred to relevant principles and case law pertaining to the best interests of the child. He had concluded, not unnaturally, that the child's best interests were to be with both parents, but noted that even now that was not the case, given [O] spent more of the time with his mother alone. The judge had given clear and careful thought to the interests and position of [O], as well as all the other factors that needed to be considered.

14. Insofar as any practical and useful points can be extrapolated from Article 24 of the EU Charter, they were applied by the judge as indeed they presumably are applied by the Supreme Court in their decisions affecting children, such as the one referred to above.
15. This was a careful, clear and balanced decision. The judge was entitled to reach the finding that she did, and it was neither unreasonable or contrary to established principles, rather, in line with the direction of travel in Article 8 cases emerging from the superior court. It cannot be said that an error of law was made by the judge or that the decision reached was so unreasonable that no other judge would have reached that conclusion.

Decision

16. I find no material error of law made by the judge in this case and I uphold the decision of the First-tier Tribunal.

Direction Regarding 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 their 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.

Signed

Date

Deputy Upper Tribunal Judge Lever

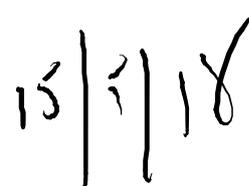
TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.



Signed

Date



Deputy Upper Tribunal Judge Lever