



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16960/2018

THE IMMIGRATION ACTS

Heard at Field House
On 30 August 2019

Decision & Reasons Promulgated
On 26 September 2019

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MR ALBERT JUNIOR TAYLOR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Briddock, counsel instructed by Lighthouse Solicitors,
Harrow

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

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Callow, promulgated on 29 May 2019. Permission to appeal was granted by Upper Tribunal Judge Norton-Taylor on 26 July 2019.

Anonymity

2. No direction has been made previously, and there is no reason for one now

Background

3. On 17 September 2001, the appellant entered the United Kingdom with entry clearance as a student. He was granted further periods of leave in the same capacity until 31 October 2004. The appellant was hospitalised with a rare illness during 2003. He overstayed his leave. During September 2008, he submitted an application for further leave. This application was refused on 15 January 2010, with a right of appeal, which the appellant did not exercise because he was not served with the decision. On 22 November 2013, he sought leave to remain on human rights grounds, which was refused with no right of appeal on 3 January 2014. The appellant made further submissions on 20 January 2016, which followed service of a notice of removal. It is the refusal of those submissions, by way of a letter dated 31 July 2018, which is the subject of this appeal.
4. In the decision letter of 31 July 2018, the Secretary of State rejected the appellant's claim for leave to remain under the partner route because he had not been cohabiting with his partner, KSC, for two years prior to the date of the application and because there was no evidence to show that they cohabited. It was not accepted that the relationship was genuine and subsisting. The Secretary of State noted that there was no indication that the appellant had a biological child in the United Kingdom. Nor was it accepted that there were very significant obstacles to the appellant's integration in Jamaica, notwithstanding his medical condition, which did not appear to be life-threatening. Article 3 was not said to be engaged.

The hearing before the First-tier Tribunal

5. At the hearing before the First-tier Tribunal, only the Article 8 claim was pursued, outside the Immigration Rules, in relation to the appellant's relationship with KSC and her three children from a former relationship. The judge accepted that the appellant's relationship with KSC, who is a Jamaican national with indefinite leave to remain in the United Kingdom, was genuine and subsisting. He did not accept that the youngest child 'M' (who had no relationship with his biological father), was a qualifying child and therefore section 117B (6) did not apply. The judge found that the appellant's removal would not lead to unjustifiably harsh consequences, that there were no insurmountable obstacles nor exceptional circumstances sufficient to outweigh the public interest concerns.

The grounds of appeal

6. The grounds of appeal argued firstly, that there had been a failure by the judge to engage with the specific facts of the appellant's case in reaching his findings; secondly, that the judge failed to take into consideration the best interests of the affected children; thirdly, the judge made a mistake of fact in stating that he was misled by the appellant and in any event did not state how he was misled and

fourthly, the judge failed to take into account the submissions made on the appellant's behalf and relevant case law regarding M.

7. Permission to appeal was granted on the basis sought.
8. The respondent did not file a Rule 24 response.

The hearing

9. Mr Briddock contended that each ground stood alone. He made the following points.
10. Firstly, there had been a lack of consideration of the individual circumstances of the appellant, his partner and her children, particularly in relation to M who aged 6. While the judge was not bound to allow the appeal, had he considered all factors it could not be said he would have dismissed the appeal. The appellant's private life had not been considered, including his length of residence, his serious ill health which led him to overstay, his ignorance of the respondent's 2008 decision until it was disclosed in response to a Subject Access Request (SAR) in 2013, he had missed his right of appeal, he had given evidence regarding VAT fraud in a trial and his evidence led to a conviction and that he had family in the UK. Secondly, while the judge directed himself appropriately as to the best interests of the affected children at [16], his only consideration of this issue was to state that it was in M's best interests to remain with his mother, which was not the question. It was incumbent on the judge to consider whether the appellant's removal from the UK was in M's best interests. Thirdly, there was no evidence that the appellant had misled the respondent regarding his cohabitation with his partner. It was not in dispute that they had not lived together for 2 years at the date of the application. It was unclear where this comment came from. Lastly, the judge had failed to take into account the relevant case law, none of which depended on M being a qualifying child.
11. Mr Walker did not attempt to defend the decision. He accepted that the appellant did not try and mislead anyone regarding the length of his relationship; that there was a lack of findings by the judge regarding the individual children and nothing regarding the best interests of all 3 children, including M.

Decision on error of law

12. The lack of consideration by the judge of the individual features of the appellant's private and family life or the best interests of the children, amounts to a clear error of law. Accordingly, the judge's decision is set aside.

Remaking

13. Mr Briddock asked me to proceed to remake the decision, making the following submissions. The facts were not in dispute, reliance was placed on the same evidence and skeleton argument before the First-tier Tribunal, which had concluded that there was a subsisting relationship between the appellant and all 3 children. M's father had no involvement in his life and he had left the family home as a result of KSC's

pregnancy. It was not in M's best interests for the appellant to be removed. M would not leave the United Kingdom if the appellant left and it would not be reasonable to expect him to do so. The case boiled down to proportionality.

14. Taking into consideration s117B, the appellant spoke English, was not a burden on the taxpayer, he ran a successful business and was integrated which was shown by his cooperation with HMRC. While little weight was to be accorded to the appellant's private life or relationship formed while his stay was precarious, this was not a straight-jacket and in any event his partner and children were not to be blamed for him being an overstayer. It was disproportionate to expect the appellant to leave the UK.
15. Mr Walker stated that all points argued by Mr Briddock were made out, however he was not in a position to concede the appeal. He accepted that family life had been established and referred to the letters from the children in the appellant's bundle.
16. At the end of the hearing I reserved my decision.

Decision on Remaking

17. The undisputed facts are that the appellant has resided in the United Kingdom for 18 years and that his leave has either been precarious or unlawful. He did not extend his leave in 2004 because the year before he was hospitalised with a rare illness, Helicobacter Pylori and suffered from a range of unpleasant debilitating symptoms. Once he had recovered sufficiently, he applied to resume his studies, submitting such an application in September 2008, which was accompanied by details of his diagnosis, symptoms and treatment. A full account is set out in the appellant's witness statement and it is not necessary to replicate it here. The appellant did not receive the 2010 decision refusing that application until 2013, when his current solicitors received a response to a SAR. By then the appellant had missed his opportunity to appeal and his circumstances had changed by 2013, in that he was relying solely on human rights grounds.
18. The appellant has been in a genuine and subsisting relationship with KSC since the beginning of 2015 and they have been cohabiting since the end of 2015 onwards. They knew each other for about two years prior to the relationship commencing. Therefore, at the time of the application, theirs was not a qualifying relationship. The appellant has a genuine and subsisting relationship with KSC's children now aged 15, 10 and 6. His relationship with M, the youngest child, is particularly close because M has never had a relationship with his biological father, unlike his older siblings. That relationship was formed from when M was aged 2. The strength of that relationship is attested to in witness statements from the appellant, KSC as well as letters from all 3 children, including M.
19. The appellant recently gave evidence for Crown in a successful prosecution of an accountant found guilty of cheating the public revenue, money laundering and fraud offences. HMRC confirmed the same in a letter dated 28 February 2019. A newspaper

article confirms that the accountant was sentenced to a total of 9 years imprisonment and that the sum involved was over £700,000.

20. It was not in dispute that the appellant enjoyed a family life with KSC and her three children. I therefore examine the best interests of those children, as a primary consideration in the balancing exercise.
21. Having considered all the relevant circumstances, I find that M's best interests, in particular, are served by the appellant remaining in the UK, by some margin. The relevant factors are that M has spent his entire life in the United Kingdom, a period of nearly six and a half years. He has no significant ties to Jamaica, a country which his mother left many years ago and long before her eldest child was born in 2004. M does not have a relationship with his biological father and has forged a close bond with the appellant. The appellant is in a genuine and subsisting relationship with M's mother and has a close relationship to M's siblings.
22. In view of the content of the letters from the older two children and KSC's witness statement as to the extent of the appellant's involvement in their lives, I also find that it would be in their best interests for the appellant to remain in the United Kingdom.
23. I am mindful that the best interests' assessment is not determinative of the appeal, *ZH (Tanzania)* [2011] UKSC 4 at [26] considered.
24. Owing to section 117A (2) of Part 5A of the 2002 Act, in considering proportionality, I am obliged to have regard to the considerations listed in section 117B and do so below.
25. The public interest in the maintenance of effective immigration controls is clearly engaged in this case, but to a lesser extent for the following reasons.
26. The appellant came to overstay between 2004 and 2008 owing to ill-health which led to a series of hospital admissions and extensive treatment. He brought his circumstances to the attention of the respondent as soon as he was able to and sought to regularise his situation in 2008 so that he could continue his accountancy studies. The appellant was never served with the decision made to refuse that claim. By the time he became aware of it in 2013, his circumstances had changed. The appellant has continued to seek to regularise his claim thereafter. A further relevant matter is that the appellant gave evidence in a prosecution which contributed to the conviction of an accountant in 2018. The latter point is strong evidence of the extent of the appellant's integration in the UK.
27. I am mindful of the fact that the M is still not a qualifying child, because he does not turn 7 until April 2020. While the appellant has a genuine and subsisting relationship with M's older siblings, it is the case that their biological father is involved in their lives. Nonetheless, they are qualifying children it would not be reasonable to expect the older children to leave the United Kingdom because they have lived here their entire lives, they are educated in this country and the eldest child is at a crucial stage of her education. In addition, the older two children have a close relationship to their

biological father, have other relatives in the United Kingdom as well as friends and interests. The handwritten letters from all three children provide credible detail as to the impact the appellant has had on their lives. Whereas the statement from KSC states that the appellant's removal would have a devastating impact on all of the children and mentions the appellant's involvement with all parental responsibilities for the three children and that he takes an active interest in their respective development and progress.

28. That the appellant speaks fluent English is a neutral matter in the balancing exercise. As is the fact that he is not a burden on taxpayers, in that he has been self-employed and resides with his partner who works.
29. I have regard to the considerations at sections 117B (4) and (5) that little weight should be given to the appellant's private life or a relationship formed at a time when his immigration status was either precarious or unlawful. Considering the misfortunes and errors which led the appellant to overstay and be unaware of the decision on his 2008 application for five years, I am prepared to attach more weight to his private life than I otherwise would. I am guided by *Kaur (children's best interests / public interest interface)* [2017] UKUT 14 (IAC) where the Upper Tribunal concluded that the "little weight" provisions "do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case."
30. Furthermore, Sales LJ observed at [53] of *Rhuppiah* [2016] EWCA Civ 803; the "*generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question, where it is not appropriate in Article 8 terms to attach only little weight to private life.*" I find that this is such a case, the private and family life of the appellant has a special and compelling character in that it was established at a time when, despite his misfortune, he was doing his best to regularise his immigration status as well as that he was willing to assist the authorities in the above-mentioned prosecution.
31. The respondent's policy guidance, entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" updated on 22 February 2018, says the following; "*Significant weight must be given to such a period of continuous residence. The longer the child has resided in the UK, and the older the age at which they have done so, the more the balance will begin to shift towards it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more.*" As emphasised above M is not a qualifying child, however his residence in the UK to date helps to shift the balance towards it being unreasonable to expect him to leave the UK in order to continue his family life with the appellant. The only countervailing factor in this case is that the appellant has no legal right to remain in the UK and has not had such since 2004, albeit I accept that he had no intention to breach immigration law.

32. Having considered all the relevant matters in the round, including the public interest considerations set out above, I am satisfied that the strong factors in support of the appellant remaining in the UK are not outweighed by the countervailing considerations, outlined above. The appellant's removal would result in unjustifiably harsh consequences to him, his partner and all three children.
33. I conclude that it would be a disproportionate breach of Article 8 for the appellant to be removed. Accordingly, his appeal succeeds under Article 8.

Conclusions

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision to be re-made.

I substitute a decision allowing the appeal on human rights grounds.

No application for anonymity was made and I saw no reason to make such a direction.

Signed

Date

Upper Tribunal Judge Kamara

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 any fee which has been paid or may be payable for the following reason. The case advanced at appeal was not materially different to that made to the respondent in the application of 17 October 2016.

Signed

Date

Upper Tribunal Judge Kamara