



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/18538/2018**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 4 June 2019

Decision &

Promulgated

On 25 June 2019

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR ALI IRBOUH

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Fisher, counsel instructed by ABN Solicitors

For the Respondent: Mr I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Algeria born on 13 July 1979. He arrived in the UK on 13 September 2008 as the spouse of an EEA national and was subsequently provided with a residence card as evidence of his right to remain in the UK issued valid until 28 April 2015. The marriage permanently broke down on 1 November 2013, his wife having moved out of the matrimonial home in 2011. In September 2013, the Appellant met L whilst on holiday in Algeria and they had a relationship. Ms L subsequently travelled to the United Kingdom and successfully claimed asylum.

2. On 1 July 2015, Ms L gave birth to a son. DNA results have confirmed the Appellant's paternity. The relationship between the Appellant and Ms L subsequently broke down but the Appellant maintains contact with his son on a very regular, almost daily basis. The Appellant made a further application for a residence card, which was refused on 2 October 2015. He appealed against this decision. His appeal came before the First-tier Tribunal for hearing on 21 April 2017 where First-tier Tribunal Judge Juss allowed the appeal with regard to Article 8 on the basis of his relationship with his son.
3. This appeal was subject to appeal to the Upper Tribunal on the basis that it had not been open to the judge to deal with Article 8 and in a decision and reasons promulgated on 1 September 2017, Upper Tribunal Judge Jackson found that the First-tier Tribunal had no jurisdiction to consider the appeal on human rights grounds and allowed the appeal of the Secretary of State.
4. On 14 September 2017 the Appellant made an in-time application on the basis of his human rights pursuant to Article 8 to remain in the UK with his son. This application was refused in a decision dated 21 August 2018, primarily on the basis that the Secretary of State found there was insufficient evidence e.g. a DNA test to show that the Appellant was his child's father.
5. His appeal came before Judge of the First-tier Tribunal Broe for hearing on 5 February 2019. In a decision and reasons promulgated on 11 February 2019, the judge dismissed the appeal finding that there were no circumstances justifying the grant of leave outside the Rules, it having been accepted that the Appellant could not succeed under the Rules. Permission to appeal was sought in time on the basis that the judge had materially erred in law in failing to determine whether it would be in the Appellant's child's best interests to be separated from him, in effect permanently, which would be the consequence of the Respondent's decision in light of the fact that the child is a refugee from Algeria who cannot be expected to return to that country and secondly in failing to address whether it was in the Appellant's son's best interests for his father to be required to leave the UK resulting in the cessation of their daily contact.
6. Permission to appeal was granted by Deputy Upper Tribunal Judge Symes in a decision dated 3 May 2019, on the basis that the First-tier Tribunal appeared to have afforded no distinct attention to the fact that the son being a recognised refugee would not be able to see his father in their country of origin (Algeria).

Hearing

7. At the hearing before the Upper Tribunal, Mr Jarvis helpfully accepted that the judge had materially erred in law in that, whilst the judge had considered the best interests of the child at [22] the judge had not considered the impact of separation from his father on the child.

8. On behalf of the Appellant Ms Fisher was content to accept Mr Jarvis' concession. In relation to the secondary issue i.e. the fact that the child has refugee status, she submitted that the point is that even if the child were not found to have a well-founded fear of persecution, he would not be able to travel alone to see his father, given that he is currently 3 years of age and that his mother cannot reasonably be expected to return to Algeria in order for her son to visit his father, thus this was a material issue affecting proportionality.
9. I found a material error of law and indicated that I was prepared to remake the decision. I gave the parties time to prepare for this and for Mr Jarvis also to consider the skeleton argument prepared for the hearing by Ms Fisher. It was agreed that as there was no factual dispute in terms of the evidence as recorded by the First-tier Tribunal Judge that there was no need for further oral evidence. I sought and obtained confirmation from Ms Fisher that the basis of the grant of refugee status to Ms L was that she had had a child out of wedlock and was at risk consequently from her family as she could not return to Algeria as a single mother.
10. In his submissions, Mr Jarvis confirmed that the Secretary of State was not taking issue with the evidence that the Appellant is engaged with his son and ex-partner and the findings of fact made by the judge were not contested or in dispute, thus it was expressly accepted that there is family life between the Appellant and his son. Mr Jarvis submitted that the Appellant is unable to benefit under the provision of Appendix FM or under the private life provisions of the Rules *viz* paragraph 276ADE, however, he pointed out that GEN.3.2 permits for exceptional circumstances following recognition by the Secretary of State of the judgments of the Supreme Court in MM (Lebanon) [2017] UKSC 10. He submitted that, following TZ (Pakistan) [2018] EWCA Civ 1109 the public interest and the policy considerations need to be given serious expression and consideration. The Appellant had previously resided in the UK pursuant to the EEA Regulations. The test was whether removal of the Appellant would constitute unjustifiably harsh consequences for him, his former partner or his child.
11. Mr Jarvis submitted that the public interest considerations reflected the fact that the Secretary of State considered it proper to draw a distinction between children who on the one hand were British or settled and those who were not. In respect of the fact that the Appellant's son had been recognised as a refugee, Mr Jarvis submitted that this cannot properly dilute the public interest in removal of the Appellant, however it might enhance his positive case. Mr Jarvis submitted in the real world the disruption and adverse impact on the child, which would be caused by the removal of the Appellant from the UK, was balanced by the absence of any additional or extra features that resulted from the failure by the Appellant to be able to benefit from the Immigration Rules and the Immigration (EEA) Regulations. In relation to the statutory public interest considerations under Section 117B of the NIAA 2002, it was accepted that the Appellant speaks English and that he was working as a bus driver until

September 2017, when he was no longer entitled to remain under the EEA Regulations. Thus he was not currently financially independent.

12. In respect of the Appellant's leave, it was ultimately accepted that the Appellant has resided continuously pursuant to the Immigration (EEA) Regulations since 13 September 2008 and that he made his human rights application within fourteen days of becoming appeal rights exhausted i.e. during the time frame whereby he could have sought permission to appeal to the Court of Appeal. Thus, it would seem he has had continuous leave, however, this was precarious. Mr Jarvis also sought to rely on OA and Others (human rights; 'new matter') [2019] UKUT 65 (IAC). He submitted that the right of the Appellant to stay on the basis of continuous lawful residence was a new matter.
13. In relation to the impact on the Appellant's son, he submitted that the relationship between father and child had already been impacted by virtue of the breakdown in the relationship between the child's parents so there had already been some element of disruption to family life. However, removal of the Appellant would be no more than the typical kind of impact on a child of immigration control.
14. Mr Jarvis submitted it was not disproportionate for the Secretary of State to require a person to leave when a child is not a qualifying child. He made reference to the decision in Kaur [2018] EWCA Civ and SB (Bangladesh) [2017] EWCA Civ 28 where the Court of Appeal found that it was not appropriate to consider the potential success of an entry clearance application when the case was not a *Chikwamba* case. He submitted that the Appellant could make an application for entry clearance.
15. In her submissions, Ms Fisher stated that the Appellant has now passed his life in the UK test on 25 March 2019, however, he had been unable to take the English language test as his passport had been retained by the Home Office. She accepted that the Statement of Additional Grounds did not raise the issue of the Appellant's ability to qualify for leave pursuant to 276B of the Rules due to ten years' lawful residence. She sought to rely on the judgment in JO (Nigeria) [2014] UKUT 00517 IAC at 12. She submitted that whilst the best interests of the child were not a trump card the welfare of the child was clearly of great importance, see Hesham Ali [2016] UKSC 60 and that the Appellant and his former partner were working hard to create a family unit for their child.
16. With regard to proportionality, Ms Fisher asked what is in the public interest. She submitted that ultimately the Appellant was someone who may have been in the United Kingdom precariously but he was under a route to settlement under the EEA Regulations until his marriage unfortunately broke down and his wife returned to France. She submitted that it was clear from the chronology that the entirety of the Appellant's leave had been arguably lawful and could be considered, if not under 276B then certainly as part of the overall proportionality consideration.

17. Ms Fisher also sought to rely on OA [2019] UKUT 00065 IAC. She sought to go through the test set out in Razgar [2004] UKHL 27. In respect of the factors material to the assessment of proportionality, Ms Fisher sought to rely on the fact that the Appellant has worked lawfully and resided lawfully. He clearly speaks English and is integrated. Whilst his child is not a qualifying child, she submitted that being a child of a refugee is different and in some ways this makes him more vulnerable. His mother has been accepted as a refugee and this is different from someone who has precarious leave, because it is a route to settlement after five years. She submitted it would be unjustifiably harsh to deny the Appellant's child his father, given the nature and extent of the family relationships involved. She submitted that this would clearly impact on the child if the Appellant were to be removed. In relation to the public interest, Ms Fisher submitted that this was multi-faceted *cf. Hesham Ali*. The Appellant is not an offender and this must reduce the public interest in removal, bearing in mind that given the daily contact between father and son, supported by the letters from his son's school and nursery, that it would not be in the child's best interests for the Appellant to be removed, that this would be a huge loss for the child and his best interests are a primary consideration.
18. I reserve my decision, which I now give with my reasons.

Findings and Reasons

19. The material findings of fact made by the First tier Tribunal Judge, which are preserved are as follows:
- 19.1. the Respondent now accepted that the Appellant is his son, M's father [13];
- 19.2. there is no dispute that M has refugee status in the UK [13];
- 19.3. he was satisfied in light of the evidence set out at [14] that the Appellant has regular contact with his son as he claims [15];
- 19.4. the Appellant cannot succeed under the Immigration Rules [20];
- 19.5. he was satisfied that it was in M's best interests that he remain in the secure environment that his mother provides [22];
- 19.6. the Appellant cannot benefit from section 117B of the NIAA 2002 [27];
- 19.7. he was satisfied that family life exists between the Appellant and his son [28].
20. The judge then went on to find that: "*whilst one may sympathise with his position I am not persuaded that there are circumstances justifying the grant of leave outside the rules.*" It is apparent, however, as was conceded by Mr Jarvis, that there is no consideration by the Judge of the impact upon the Appellant's son, M, if his father returns to Algeria, despite his reference to Beoku Betts [2008] UKHL 39 at [21]. This is clearly a material consideration

in any assessment of proportionality and the failure by the Judge so to do is a material error of law.

21. In order to re-make the decision I adopt the Judge's findings of fact set out at [19] above and I have further taken into consideration the detailed submissions made by both parties. The question I am required to decide is whether, it being accepted that there is family life between the Appellant and his father and that removal would inevitably interfere with their right to enjoy that life, whether removal of the Appellant from the United Kingdom would be proportionate.

22. It was accepted by Mr Jarvis that the Appellant has resided lawfully and continuously in the United Kingdom since 13 September 2008. He has not to date made any application for leave to remain pursuant to paragraph 276B of the Immigration Rules and I do not make any finding as to whether or not such an application would be successful, given that he has not yet taken or passed the English language test as his passport has been retained by the Home Office. I also accept, as submitted by Mr Jarvis, that this would constitute a new matter as it was not raised in the grounds of appeal to the First tier Tribunal and was not determined by the First tier Tribunal. However, I find as a matter of fact that the Appellant has always resided lawfully in the United Kingdom, having entered with entry clearance as the spouse of an EEA national on 13 September 2008 and that he made an application for leave to remain on the basis of human rights within 14 days of becoming appeal rights exhausted. Mr Jarvis did not seek to raise any factors which were adverse in respect of the Appellant's individual circumstances.

23. I also take account of the public interest considerations set out at section 117B of the NIAA 2002. I find that the Appellant speaks English and that, whilst he was residing pursuant to the Immigration (EEA) Regulations he was working as a bus driver and was financially independent. He has not retained the right to work, however, during the current proceedings pursuant to his human rights application and so is not currently financially independent. His leave has at all times been precarious but it has been lawful. His son, M, is not a qualifying child as he has refugee status and has not reached the age of 7 years nor is he settled.

24. Mr Jarvis submitted that GEN 3.2. of Appendix FM was applicable. This provides:

“GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.”

25. I have concluded that there are exceptional circumstances, which would render the refusal of leave to remain a breach of Article 8 because it would result in unjustifiably harsh consequences for the Appellant's son. It is apparent from the evidence that the Appellant is actively involved in his son's life. This evidence comprises a supporting letter from the Appellant's former partner and mother of his son, a letter from his son's primary school stating that they see the Appellant frequently as he drops off and collects him regularly throughout the week and a number of photographs showing the Appellant with his son over a period of time. I find that whilst it would be in M's best interests to remain residing with his mother in the United Kingdom it would also be in M's best interests for him to continue to have regular contact with his father. I find it is material that M's status in the United Kingdom and that of his mother is that of a refugee and therefore, this is not a case where it can reasonably be expected that M would be able to visit the Appellant if he is removed to Algeria, given his young age and the fact that he would have to be accompanied by his mother.

Decision

26. I find material errors of law in the decision of First-tier Tribunal Judge Broe. I set that decision aside and substitute a decision allowing the appeal on human rights grounds (Article 8).

No anonymity direction is made.

Signed Rebecca Chapman

Date 21 June 2019