



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: HU/15241/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decision & Reasons Promulgated

On 16 November 2020

On 19 November 2020

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SYKUL [I]

(ANONYMITY ORDER NOT MADE)

Respondent

For the appellant: Mr A McVeety, Senior Presenting Officer

For the Respondent: Mr M Schwenk, instructed by Amin Haque Solicitors

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion

of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. For the purpose of this decision and to avoid confusion, I refer below to the parties as they were at the First-tier Tribunal appeal hearing.
2. The appellant is a citizen of Bangladesh with date of birth given as 15.5.90.
3. The respondent has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 16.1.20 (Judge Durance), who allowed on human rights grounds the appellant's appeal against the decision of the Secretary of State, dated 29.8.19, to refuse his application made on 21.8.18 for leave to remain in the UK on the basis of family life with his British citizen partner and child.
4. The grounds argue that the judge erred in law in relation to the TOEIC deception issue, in failing to invoke the Family Court Protocol, and that, applying *RS (India) [2012] UKUT 00218 (IAC)*, he should have awaited the outcome of Family Court proceedings before making the article 8 assessment. In particular, it is argued that the judge erred in failing to provide adequate reasoning for finding that the respondent had not discharged the burden of proof and in considering the evidence no more than generic.
5. In granting permission on all grounds on 15.5.20, the First-tier Tribunal Judge considered that the judge arguably erred in the approach to Family Court proceedings and the impact on the article 8 issues. "The judge appears to have been unaware of the Family Court Protocol by which he could have requested from the Family Court information necessary to make findings on the outcome of the Article 8 appeal and the best interests of the appellant's son particularly in the light of the unsatisfactory nature of the undated photographs supplied."
6. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions made in the remote hearing and the grounds of application for permission to appeal to the Upper Tribunal.

ETS TOEIC Issues

7. I am not satisfied that the First-tier Tribunal Judge made an entirely accurate self-direction in relation to the burden and standard of proof, as set out at [15] of the decision. As held in *SM and Qader (ETS -Evidence- Burden of Proof) [2016]*, although there is an initial evidential burden that may switch to the appellant to provide an innocent explanation, the legal burden of proof rests on the respondent throughout. That is not necessarily clear from the judge's self-direction.
8. More significantly, I am satisfied that the judge made a crucial factual error in asserting that the ETS bundle was entirely generic and that there was no evidence

specific to the appellant. To the contrary, the bundle contained a spreadsheet extract which showed that the appellant's English language test had been invalidated on evidence of fraud in the taking of the test. This together with the other evidence, including that which shows that the likelihood of a false positive is less than 2%, has been held in SSHHD v Shehzad & Anor [2016] EWCA Civ 615, to be sufficient satisfy the evidential burden on the Secretary of State.

9. Mr Schwenk argued that the judge was clear about the differing burdens and at [17] found that the legal burden of proof had not been discharged. He also submitted that the judge had accepted that there was evidence specific to the appellant, by referring to the appendix at the rear of the witness Sarah Marsh's evidence. I am not persuaded by Mr Schwenk's submissions, as the judge does not recognise that the type of evidence submitted has been repeatedly held by the superior courts to be sufficient to discharge the evidential burden. The judge does not acknowledge that case law nor make a finding that the evidential burden was discharged.
10. It follows that there was a material error of law, one which necessarily infects the rest of the decision, including the article 8 proportionality balancing exercise. The import of the error is that, if the deception issue is made out, and in that respect I note that the judge found the appellant dishonest in another aspect of the appeal, his relationship with his former partner, that means that the appellant fails the suitability requirements under Appendix FM and paragraph 276ADE, and cannot meet the requirements for Leave to Remain, as he cannot reach EX1(a). A finding in favour of the Secretary of State in this regard would be highly relevant to the proportionality assessment outside the Rules.

The Article 8 Considerations

11. It is clear that the appellant's relationship with his partner had broken down. As stated above, the judge found the appellant's attempts to depict the relationship in a positive light and belief that it could be revived not credible; "it has been at an end for some considerable time." This is repeated in stark terms at [28] of the decision. However, I accept Mr Schwenk's submission that this dishonesty about his partner does not necessarily mean his intentions with regard to the relationship with his child are not what he claims. However, the adverse credibility finding and the timing of the application for contact with his child, made only after the respondent's refusal decision (as the judge noted), should have put the judge on notice of a risk of being misled by the appellant about his relationship with his child and required a careful approach.
12. Nevertheless, I accept that relying on the decision of the Upper Tribunal in SR (subsisting parental relationship - s117B(6) Pakistan [2018] UKUT 334 (IAC), at [32] the judge set out considerations with regard to the appellant's relationship with his son. The conclusions drawn at [33] and [34] were that "little can be said which creates

a depth of bond or relationship between SI and his son. The best that can be said is that he spends 2 hours every fortnight with him in ASDA," and, "I find that SI fails the meet the relationship requirement under the Rules." The respondent submits that it is clear that any contact was extremely limited and "was commenced at an extremely recent juncture in October 2019 thus raising questions as to the appellant's motivation and genuine intentions in regard to his child."

13. However, at [35] the judge accepted that the appellant provides at least some care, "albeit it is at the lower end of the threshold. To that extent the appellant has a genuine and subsisting relationship for the purposes of s117B(6)." The judge went on at [36] to find the best interests of the child were for the appellant to remain in the UK. The judge also noted that there was an interim Family Court order. On the basis that there were insurmountable obstacles to the family relationship between the appellant and his son continuing if he were returned to Bangladesh, and that it would not be reasonable to expect the child to go to Bangladesh, the judge allowed the appeal on article 8 ECHR grounds.
14. At the hearing before me, Mr McVeety suggested that the findings at [32] should have led the judge to conclude that there was no genuine and subsisting relationship, disputing that 2 hours once a fortnight could properly be characterised as providing 'care' for the child. He also pointed to the absence of any evidence as to the best interests of the child. I agree that it would be difficult to characterise the limited contact as 'care' but it does not necessarily follow that the relationship was not genuine or subsisting. One has to bear in mind that the limited contact was imposed on the appellant.
15. In the grounds, the respondent relies on RS (immigration and family court proceedings) India [2012] UKUT 00218 (IAC), and complains that the judge failed to follow the correct guidance for a case in which there are outstanding family proceedings in relation to a child of the appellant. It is submitted that the judge appears to have been ignorant of the Family Court Protocol and should have adjourned to await the outcome of the recently instituted family proceedings, invoking the Protocol.
16. I have to consider whether the finding in relation to a genuine and subsisting relationship with a qualifying child under s117B(6) of the 2002 Act was open to the judge on the evidence and adequately reasoned.
17. That as a British citizen the child is a qualifying child is beyond dispute. Also not in dispute is that there were ongoing family proceedings in which the appellant sought an order for contact with his son. The evidence indicates that the appellant's relationship with the child's mother broke down prior to the child's birth in September 2018, and there is no prospect of it being revived, as the judge found. The respondent suspects that the appellant's only interest in belatedly seeking contact

with his son is in order to frustrate his removal to Bangladesh when he has no other basis to remain in the UK.

18. However, apparently under the terms of an interim order, the appellant previously had contact with his son at ASDA every two weeks. The child is now just over 2 years of age. It is not known whether the child knows or recognises the appellant or understands his role as father. Neither is it known what the Family Court may make of the child's best interests, whether it is considered appropriate and of benefit to the child for contact with his father to continue. Neither was the Tribunal aware of the wider circumstances, having access only to the appellant's over-optimistic perspective.
19. These were all issues likely to have been pending before the Family Court, in respect of which a hearing was listed for 13.1.20, just 10 days after the Tribunal appeal hearing. In a section marked, 'Postscript' the judge was asked for an extension of time in which to provide information from the Family Court, but having apparently previously agreed that there should be no extension, the application was refused. It is not clear why the judge did not consider invoking the Family Court Protocol and await the outcome of proceedings. That outcome may or may not have assisted the appellant; it is impossible to know at the present time.
20. It is clear from RS that where there are outstanding family proceedings relating to a child of a claimant, the judge should first consider whether the outcome of those proceedings was likely to be material to the immigration decision. Without knowing what the outcome was, it is clear that they were highly material to the issue of the child's best interests and whether the appellant had a genuine and subsisting relationship. RS also guides the judge to consider whether the contact proceedings were initiated to delay or frustrate removal rather than promote the child's welfare.
21. I am satisfied that the judge should at the very least have either awaited the outcome of the family proceedings and considered invoking the Family Court Protocol, or allowed the appeal to the limited extent suggested in MS (Ivory Coast) [2007] EWCA iv 133. The issues described above were obviously highly pertinent to the appeal and whether the appellant enjoyed a genuine and subsisting relationship with his qualifying child so that his removal would not be proportionate. Neither did the judge allow a further delay pending the attempt to obtain release of the Family Court proceedings, nor was consideration given to invoking the Family Court Protocol to assist in obtaining the relevant information. I am satisfied that to act on such limited information in the circumstances of this case was an error of law.
22. In the circumstances and for the reasons set out above, I find material error of law in the decision of the First-tier Tribunal so that it must be set aside to be remade.

23. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal vitiate the findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
24. Mr McVeety suggested that the decision could be remade in the Upper Tribunal. Mr Schwenk pointed out that if I were to find an error of law on both grounds there would need to be evidence not only as to the family proceedings, but the ETS issue. In all the circumstances, at the invitation and request of Mr Schwenk, I relist this appeal for a fresh hearing in the First-tier Tribunal, on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

Decision

The appeal of the Secretary of State to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

I remit the decision in the appeal to the First-tier Tribunal to be made afresh with no findings preserved.

I make no order for costs.

I make no anonymity direction.

Signed: *DMW Pickup*
Upper Tribunal Judge Pickup

Date: 16 November 2020