



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000024
First-tier Tribunal No: EU/52004/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 May 2024

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Artur Plotr Cieslinksi
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms N Wilkins of Counsel, Direct Access
For the Respondent: Ms C Newton, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 23 April 2024

DECISION AND REASONS

1. To avoid confusion, the parties are referred to herein as they were before the First-tier Tribunal.
2. By the decision of Upper Tribunal Judge Owens issued on 4.3.24, the respondent has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Cole) promulgated 1.11.23 allowing the appellant's appeal against the respondent's decision of 7.2.23 to refuse his human rights submissions against the Notice of Decision to Deport issued 3.11.22.
3. The relevant background is that the appellant is a national of Poland who first came to the UK in 2009 and was subsequently granted Indefinite Leave to Remain (ILR) under the EUSS provisions on 8.2.21. However, as the result of an attack on his former partner's new partner, the appellant was convicted on 20.4.22 of assault occasioning actual bodily harm and dangerous driving and on 18.10.22 sentenced to 14 months imprisonment. The respondent

issued a Notice of Decision to Deport on 3.11.22. The appellant did not respond within the time limit provided but his subsequent representations were considered as a human rights claim. In short, the appellant claimed a relationship with his daughter born to his former partner.

4. The respondent was not represented at the First-tier Tribunal appeal hearing on 1.11.23 but the judge decided not to adjourn and ultimately concluded that it was premature to consider either the exceptions to deportation, or the 'very compelling circumstances' over and above the exceptions until the outcome of Family Court proceedings was known. For that reason, the judge found that removal of the appellant was disproportionate and, therefore, allowed the appeal. The allowing of the appeal in such a way, without deciding the underlying issue is consistent with CJ (family proceedings and deportation) South Africa [2022] UKUT 00336 (IAC). In such circumstances, the appellant would only be granted sufficient leave to enable the Family Court proceedings to be resolved.
5. What is at issue is whether there was a material error of law by admitting fresh evidence and continuing the appeal without at least an opportunity for the respondent to make submissions on that fresh evidence. In summary, the grounds argue that continuing with the hearing and accepting new evidence relating to Family Court proceedings issued only the day before the First-tier Tribunal appeal hearing, amounted to procedural unfairness.
6. The respondent was not served with the new evidence produced only on the day of the hearing and the respondent had no opportunity to consider or make submissions on it. It is complained that whilst an amended skeleton argument was served on the day of the hearing, only that and not the new evidence was uploaded to the CCD platform.
7. The second ground is interlinked, arguing that the First-tier Tribunal misdirected itself in law or failed to provide adequate reasoning in accepting that there was a parental relationship when there was no evidence of parentage. It is also argued that the judge failed to properly apply the relevant tests in RS (immigration and family court proceedings) India [2012] UKUT 00218 (IAC), where the appellant provided no evidence of any current or previous contact with the child in question. The respondent's concern was that the Family Court proceedings issued only the day before the appeal hearing was a device to delay deportation rather than a genuine intention to establish contact between the appellant and his daughter.
8. Upper Tribunal Judge Owens observed in granting permission on all grounds, "*It is arguable that the decision not to adjourn was procedurally unfair given that the appellant produced new evidence of family court proceedings on the day of the hearing and the respondent was not represented. It is also arguable that the judge misapplied the law by failing to consider all of the factors in RS (immigration and family court proceedings) India* [2012] UKUT 00218 (IAC)."
9. Ms Newton relied on the grounds as drafted, stating that the basis of the appeal had altered by the production of new evidence when beforehand there was not even evidence that the appellant was the father of the child or that he had any contact with her. Even the new skeleton argument was only uploaded to the case file after the hearing. The new evidence bore directly on the issue of contact with the child.
10. In response, Ms Wilkins' primary argument was that because of CJ, which post-dated RS, the allowing of the appeal on article 8 ECHR grounds was inevitable in the circumstances so that any alleged procedural unfairness was immaterial to the outcome of the appeal. The decision was in effect to allow the appellant to remain to await the outcome of the Family Court

proceedings and did not address the underlying claim, which would need to be resolved at a later date.

11. However, I am not satisfied that the outcome was as inevitable as Ms Wilkins submitted. CJ required the Tribunal to consider all but one of the questions in RS. Inter alia, those questions invites the Tribunal to consider whether the Family Court proceedings were initiated only to delay or frustrate removal, and in assessing the questions to consider the degree of the appellant's previous interest in and contact with the child and the timing of contact proceedings. Those were all matters on which the respondent would have had something to say, had there been an opportunity to consider the new evidence. Without the respondent's input into the process, the perspective offered to the First-tier Tribunal Judge was entirely from the viewpoint of the appellant. It cannot be said that there was a balanced assessment.
12. Had there been no new evidence, the respondent could not have complained given the failure to send a legal representative to the appeal hearing in the First-tier Tribunal. But there was new evidence and that evidence was susceptible of being viewed in a different light to that advanced by the appellant. Ms Wilkins argued that the respondent had notice from the previous skeleton argument that the appellant intended to pursue Family Court proceedings but that was a far cry from actually doing so. As the state of the evidence stood as far as the respondent knew, the appellant was the subject of a restraint order and that any contact with his daughter or the other children was to be facilitated.
13. In summary, I am satisfied that the respondent has been deprived of the opportunity of considering, challenging, and making submissions in respect of the new evidence and Family Court proceedings. I find that the failure to at least adjourn to allow the respondent to consider the new evidence and make at least written submissions in respect of it was procedurally unfair.
14. I am also concerned as to the adequacy of the reasoning provided for allowing the appeal on article 8 proportionality grounds pending the outcome of the Family Court proceedings. The judge did not refer to any evidence as to the appellant's current or past contact with the child, which was a key question in RS.
15. The respondent had also argued that at [27] of the decision the judge made a finding as to the level of protection to be afforded to the appellant, which was at the very least premature. Further, it appears that the judge also considered potential arguments as to the Withdrawal Agreement as part of the reason for allowing the appeal. However, I am not satisfied that [27] can necessarily be read in that way. In any event, given the materiality of the other errors identified, this alleged error makes no difference to my decision and I do not make a finding of such an error.
16. In all the circumstances, I am satisfied that the decision of the First-tier Tribunal is flawed for error of law and must be set aside to be remade. Both legal representatives submitted that this was a case that fell squarely within paragraph 7.2 of the Practice Direction and should be remitted to the First-tier Tribunal to be remade afresh.

Notice of Decision

The respondent's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside in its entirety with no findings preserved.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal to be made afresh.

I make no order as to costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 April 2024