



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/21623/2016

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons Promulgated

On 17 April 2018

On 23 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KIRK [B]
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Ahmad, Home Office Presenting Officer
For the Respondent: Mr Jesurum, Counsel for Irving & Co Solicitors, Croydon

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-Tier Tribunal.
2. The appellant is a citizen of Jamaica born on 18 May 1980. He appealed against the decision of the respondent dated 26 August 2016 refusing his human rights application against his removal from the United Kingdom. His appeal was heard by Judge of the First-Tier Tribunal Hussain on 31 August 2017. His appeal was allowed in a decision promulgated on 7 September 2017.

3. An application for permission to appeal was lodged by the Secretary of State for the Home Department. Permission was granted by Judge of the First-Tier Tribunal Swaney on 1 February 2018. The permission refers to the grounds which assert that the Judge erred in failing to give adequate reasons for his findings, including his findings on the appellant's credibility, placed undue weight on handwritten and unsigned evidence and made a material misdirection of the law. The grounds go on to point out that the Judge made a positive finding relating to the appellant's evidence about contact with his child while at the same time commenting on the fact that the evidence was scant and unimpressive. He failed to indicate which of the evidence before him was sufficient to persuade him that contact was taking place and in doing so failed to give adequate reasons for his findings. The permission states that failure to give adequate reasons is arguably a material error of law.
4. There is a Rule 24 response on file dated 18 March 2018. The response states that permission was granted on the basis that the Judge's reasons for reaching his conclusion that the appellant has contact with his children was inadequate. The response states that the refusal is based on an erroneous reading of the Rules and that the requirements of the Immigration Rules have been satisfied. The appellant's relationship with his British step-child has already been accepted by the respondent and was not under challenge. The First-Tier Judge accepted that the children have resided for over 7 years in the United Kingdom and it would not be reasonable for them to leave and this is a position previously accepted by the respondent. This is why the appeal was allowed under the Rules. The response goes on to state that the actual challenge is unclear and immaterial.

The Hearing

5. Counsel submitted that the Rule 24 response may have gone a bit too far as the refusal letter does not accept that the appellant is in a parental relationship with his step-child, but he submitted that the Judge's findings were open to him and any error is not material.
6. The Presenting Officer submitted that it is ground 1 which is the main ground and the Judge found that the appellant is involved in his step-child's life. I was referred to paragraph 33 of his decision in which the Judge accepts that the appellant sees his child 4 to 5 times a week and the step-child goes to stay with him on alternate weekends and so the Judge was satisfied that the appellant is taking and intends to take an active role in their upbringing. The Presenting Officer submitted that this finding fails to take into account the previous credibility issues. She submitted that the findings at paragraph 33 have not been reasoned. It is not clear on what basis the Judge finds the appellant is involved in his step-child's and child's life by his previous partner.
7. The Presenting Officer submitted that at paragraph 14 of the decision the Judge states that there is no evidence of contact. What there is, is a letter from the school which states that the appellant attends meetings at the school and went to sports day.

There is a parental responsibility agreement which the appellant obtained for this hearing. At paragraph 18 of the decision it is pointed out that the appellant is using different names and with regard to the letters of support the appellant states that he was told that the people who wrote the letters did not require to come to the hearing. The letters refer to him as Damien.

8. At paragraph 35 of the decision the Judge refers to the parental responsibility agreement which is in the form of a photocopy statement deposited by [LH], the appellant's ex-partner. The appellant stated that she did not attend the hearing because she suffers from black-outs and is responsible for fostering two children. There was no evidence of this and the Presenting Officer submitted that if [LH] does indeed wish the appellant to take an active part in her children's upbringing she should have come to the hearing. The Judge found that her non-attendance was significant. At paragraph 33 the Judge states that the evidence about the appellant's role in the upbringing of his children is sparse. The Presenting Officer submitted that the Judge did not use a holistic approach when making his decision.
9. The appellant and his new partner have now been together for more than two years and the Judge accepted this, but the Presenting Officer submitted that there are no insurmountable obstacles to his present partner and their new born child going to live in Jamaica. The Presenting Officer submitted that there are material errors of law in this decision as the Judge has made contradictory findings and has not given proper reasons for his decision.
10. Counsel submitted that the Judge's decision is made on the standard of proof of the balance of probabilities. He submitted that the respondent's challenge has no substance and even if another Judge might have come to a different conclusion that does not mean that this Judge's decision is wrong.
11. Counsel submitted that when paragraph 33 of the decision is considered the Judge does not require to keep repeating what he has already decided. He submitted that the respondent's challenge is purely a disagreement with the Judge's decision. He submitted that from paragraph 12 to paragraph 22 of the decision the proceedings of the hearing are set out clearly and there is no misdirection in law.
12. He submitted that the relationship between the appellant and his new partner is genuine and at paragraph 28 the Judge states that it would not be unreasonable for his partner and their child to go to live in Jamaica with the appellant. Counsel submitted that although the appellant's status was precarious when he entered into his new relationship, it has been accepted that this is a genuine relationship and that the appellant is telling the truth.
13. With regard to the appellant's previous partner and his child and his step-child, the children's mother is Irish and I was referred to the appellant's child's birth certificate from this relationship in which he is named as the child's father. His child was born in the United Kingdom and based on the British Nationality Act 1981 there is no

restriction on the length of time that an Irish national can spend in the United Kingdom and the child therefore is British.

14. At paragraph 32 Counsel submitted that the Judge finds that the appellant is eligible and that the appellant has access to his two children by his previous relationship. Although the agreement is not a court approved document there has been no challenge to it and when the Judge states that the appellant's evidence about contact with these children is sparse, that does not mean that what the appellant has said is not true and I was asked to find that it is true based on the rest of the evidence. He submitted that if evidence is not challenged it is taken to be accepted.
15. Counsel submitted that the decision makes it clear why the Judge has allowed the appeal. He has accepted the parental relationship, he has accepted that the appellant sees his children 4 to 5 times a week and he submitted that the Judge was entitled to accept the oral evidence he heard. He submitted that the Judge's approach was well thought out and there has been no suggestion that the appellant was not a witness of truth. The appellant has not got a poor immigration history apart from the fact that he is an overstayer.
16. I was referred to the appellant's bundle dated 13 April 2018 at page 182 onwards and the letters of support. Counsel submitted that although the Judge has not referred to these that does not mean he has not taken them into account. He submitted that the respondent is deemed not to dispute what is not challenged. I was referred to the British passport of the appellant's present partner and mother of his youngest child and he submitted that the respondent has not stated that the appellant is being untruthful.
17. He submitted that the appellant's youngest child cannot be taken into account when making the error of law decision as that child was not born at the date of the previous hearing. That child is however British and if I do find that there is an error of law in the decision that child will require to be taken into account in any further hearing.
18. I was referred to the case of SF (Albania) and Counsel submitted that it would not be reasonable for these British children to leave the United Kingdom. He submitted that with regard to [LH]'s health there has again been no challenge although the Judge has stated that there is no evidence before him about her health. He submitted that what the Judge means is no documentary evidence.
19. Counsel submitted that all the respondent is saying is that the Judge reached the wrong conclusion and he submitted that that does not mean that he has made an error of law.
20. He submitted that it is not clear what the respondent believes the Judge has done wrong. I was asked to dismiss the appeal and he submitted that the issue in this case is the best interests of the children.

21. The Presenting Officer submitted that if this case is remitted to the First-Tier Tribunal there will require to be a fact-finding exercise by both parties.

Decision and Reasons

22. I am aware that the appellant has now been in a relationship with [JA], a British citizen for over two years, less than two years at the date of application. At the date of the First-Tier hearing she was pregnant. There was no third child so this cannot be taken into account when I make my decision. The grounds of application for permission to appeal assert that the Judge erred in failing to give adequate reasons for his findings, failed to have regard to his findings in relation to the appellant's credibility, placed undue weight on handwritten and unsigned evidence and made a material misdirection of law.
23. The First-Tier Judge states "Although the evidence with regard to the appellant's role in the upbringing of his children was sparse, on balance I am inclined to accept that he does see his child about 4 to 5 times a week and that the child does come to stay with him on alternate weekends. I am therefore satisfied that he is taking and intends to take an active role in his child's upbringing." It is not clear how the Judge could have reached this finding on what was before him. The appellant has a biological daughter [K] and a step-daughter [S] who are Irish and British citizens respectively. The Judge finds that he also has family life with [JA]. The respondent accepts that he meets the suitability requirements but finds that he does not meet the eligibility requirements because he does not have sole parental responsibility for his daughter or step-daughter and he does not live with them. Oral evidence was given that he sees them 4 to 5 times a week but their mother did not attend the hearing. This is significant. If the appellant does indeed see these two children 4 or 5 times a week she should have been at the hearing and spoken up on behalf of the appellant and not just have provided a statement. The appellant's explanation for her not attending the hearing was not supported by any evidence. These two children live with their mother and the children can remain in the United Kingdom with their mother. Their mother has no relationship with the appellant now. Because of the lack of evidence of the appellant's contact with these children and based on the other matters brought out in the decision, I find that the Judge has misdirected himself in law.
24. At paragraph 28 the Judge states that he can find no good reason why the appellant's present partner cannot go and live with him in Jamaica. If he does that, he will be leaving his child and step-child with [LH] in the United Kingdom as it is certain that [LH] will not go with him and his new partner to Jamaica. This finding seems to indicate that the Judge accepts that the appellant, if he returns to Jamaica with his partner, will be leaving both [K] and [S] in the UK with their mother, his ex-partner with whom they stay at present without the appellant. The only evidence from their mother that he actually sees them 4 to 5 times a week is in her statement. The

parental responsibility agreement is not court approved and what it states is that the child [K]'s father and [S]'s step-father, (being the appellant), shall have parental responsibility for the children in addition to their mother having parental responsibility but this is a weak piece of evidence and has no details about contact. The appellant has not even signed it. The letter from the school helps very little.

25. Counsel stated that if evidence is not challenged it must be accepted by the respondent. He also stated every piece of evidence does not require to be mentioned by the Judge. There are letters of support on file but there is nothing to indicate that the Judge did not take them into account. With regard to [JA]'s evidence, the Judge noted her written evidence and oral evidence but found she cannot be held to be an independent witness as it is obviously in her interest to have the appellant remain in the United Kingdom.
26. The Judge finds that there is nothing exceptional about this case. At paragraph 31 the Judge states that the appellant's application was refused primarily because he could not show he had sole responsibility for the children. He does not stay with the children and the person they do stay with did not come to the court to support the appellant. At paragraph 32 the Judge states that an appellant can meet the eligibility requirement by showing he has direct access to the child as agreed with the parent with whom the child normally lives, but without [LH] coming to the court to give evidence I find that the Judge has made an error at paragraph 33 of his decision as there is insufficient evidence before him to enable him to reach the decision he did. Although the Judge allowed the appeal he found it implausible that [LH] did not attend the court as he states that surely if the appellant's evidence is true she must want the appellant to remain in order to continue his family life with her children. The appellant has not signed the parental responsibility agreement. No explanation of this has been given.
27. What I am deciding is whether there is a material error of law in the First-Tier Tribunal's Judge's decision and I find that based on what was before him he has misdirected himself in law and has made a decision contrary to the evidence before him. This amounts to a material error of law.

Notice of Decision

I direct that the decision of the First-Tier Tribunal is set aside. None of its findings are to stand other than as a record of what was said on that occasion. It is appropriate in terms of Section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 to remit the case to the First-Tier Tribunal for an entirely fresh hearing.

The members of the First-Tier Tribunal chosen to consider the case are not to include Judge Hussain.

Anonymity is directed.

Signed
Deputy Upper Tribunal Judge Murray

Date: 23 May 2018