OUTER HOUSE, COURT OF SESSION

[2021] CSOH 80

P1094/20

OPINION OF LORD MALCOLM

In the petition of

OA

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Caskie; Drummond Miller LLP

10 August 2021

Introduction

[1] The petitioner, a Dutch national currently residing in the UK, seeks the judicial review of a decision of the First-tier Tribunal (Immigration Chamber) (FtT) dated 8 December 2020. In particular, he craves reduction of the determination that there is no right of appeal against a decision of the Secretary of State for the Home Department dated 3 August 2020. The petition is brought on behalf of his wife's adopted son, who is a minor. At an early stage permission to proceed with the petition was granted by the court. Somewhat unusually, no appearance has been entered on behalf of the Secretary of State in the proceedings.

Factual background and refusal of family permit

[2] In April 2019 the petitioner's wife, who is Ugandan, adopted a child who is also a citizen of that country. At that time, and also when these proceedings were raised, she and her adopted son lived in Uganda. The child was born in September 2018. His natural mother died when he was two days old. The petitioner and his wife also have two biological children.

[3] In November 2019 the petitioner's wife, along with the three children, made applications under the EU Settlement Scheme (EUSS) for family permits to allow them to travel to the UK to join the petitioner. This was on the basis that they are family members of a relevant EEA citizen who is exercising treaty rights in the UK. While there was no specific mention of a human rights claim or human rights issues arising within the applications, under the heading "Extra Information" the adopted child's application stated:

> "I have been adopted by my sponsor and mother, my biological father is unknown and my biological mother is deceased, my sponsor and mother have adopted me, and I cannot be separated from my family."

[4] Permits relative to the wife and her two biological children were granted. She has now been granted leave to remain in the UK for a period of 5 years, and her two other children have been granted indefinite leave to remain here. The application by the adopted child was refused. His adoptive mother and siblings having now moved to the UK to be with the petitioner; he is being cared for in Uganda by a family friend.

[5] The basis of the refusal was that the evidence provided did not demonstrate that the child was adopted in accordance with the requirements of Annex 1 of Appendix EU (Family Permit). The child must be adopted in accordance with a decision taken:

(a) by the competent administrative authority or court in the UK or the Islands; or

(b) by the competent administrative authority or court in a country whose adoption orders are recognised by the UK or the Islands; or

(c) in a particular case in which that decision in another country has been recognised in the UK or the Islands.

Because the adoption of the child was not issued by a competent administrative authority or court in the UK or the Islands, and since Uganda is not a country listed within the Adoption (Recognition of Overseas Adoptions) Order 2013, the Entry Clearance Officer (ECO), acting on behalf of the Secretary of State, reached the view that the requirements were not met. The competent administrative authority or court in Uganda is not an administrative authority or court whose adoption orders are recognised within the UK or Islands, and the order provided has not been recognised under domestic immigration rules in the UK or Islands.

Appeal to the FtT

[6] The adopted child appealed to the FtT. It was submitted that the decision to refuse the permit constituted a refusal of a human rights claim and that it was disproportionate. It was accepted that the Ugandan adoption was not recognised in terms of the 2013 order. However, the child's adoptive mother and siblings (with whom he had resided for almost all his life) had been granted family permits. The decision in *MY (refusal of human rights claim) Pakistan* [2020) UKUT 00089 (IAC) was of assistance relative to the question of whether the decision related to a human rights claim and accordingly, whether there was a right of appeal in terms of section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002.

[7] In *MY* the Upper Tribunal identified three categories of cases: first, those which are clearly human rights claims and in respect of which a right of appeal automatically arises;

second, applications to enter or remain in the United Kingdom which are not human rights claims, for example, an application for an extension as a student; and third, cases in which an application might be made in terms of the Immigration Rules, EU law or Appendix EU, but which inevitably on their facts give rise to an article 8 claim. Reference was made to an example of such a case in paragraph 74 of *MY*.

[8] It was submitted to the FtT that, in line with the decision in *MY*, the conclusion reached by the ECO was not determinative of whether there was a human rights claim. The ECO required to consider whether the granting of the permits relative to the child's three family members and the refusal of his application would give rise to a breach of the article 8 rights of any or all of the four applicants. Similarly the FtT required to engage with the consequences of refusing the application of one member of a family unit in terms of article 8.

The decision of the FtT

[9] The FtT addressed one question, namely was there a right to appeal against the decision of 3 August 2020? It answered in the negative. In a succinct judgement the FtT stated that under the EUSS anyone who makes a valid application for a family permit after 11pm on 31 January 2020 has a right of appeal against a refusal. Here the application was made prior to 31 January 2020 and therefore the appellant had no right of appeal. The ECO's decision did not constitute a refusal of a human rights claim. The reasoning was as follows. First, the application was not made on human rights grounds. Secondly, there was nothing in the decision to suggest that human rights were considered.

> "Thirdly, it is interesting to note that the appellant does not engage with the respondent's decision and appears to be oblivious to the fact that there is no right of appeal."

Submissions to this court for the petitioner

[10] The petitioner accepts the FtT's view that there was no express statutory right to appeal given that the application under the EUSS was submitted prior to 31 December 2020. It was said that this situation arose as a result of the UK's departure from the EU. However the jurisdiction of the FtT includes a right to hear an appeal against a decision that would give rise to a breach of section 6 of the Human Rights Act 1998, see sections 82(1)(b) and 84(2) of the 2002 Act, and therefore there is a right of appeal against a decision that would give rise to a breach of article 8 of ECHR.

[11] Two separate approaches to such cases have been held to be correct in respect of how the FtT derives such a jurisdiction. One approach is to consider whether the outcome of the application made (regardless of the terms in which it was submitted) would give rise to a breach of article 8 (*Balajigari and Others* v *Secretary of State for the Home Department* [2019] EWCA Civ 673). It is submitted that the child's rights under article 8 ECHR were engaged by the decision of 3 August 2020, and that this is in line with paragraph 88 of *Balajigari* in which it was stated:

> "It cannot be the case that a migrant's article 8 rights are not engaged until the moment of the knock on the door: what matters is the point of the legal decision".

It follows that the child had a right of appeal to the FtT, and it erred in concluding otherwise.

[12] Another approach is to consider whether the application and other materials submitted by the applicant constitute a human rights claim. If this approach is adopted the various categories of claim identified in the analysis carried out in *MY* require to be addressed. The petitioner's position is that this matter falls into the third category.

[13] Separately, it is contended that the FtT did not engage with the relevant facts and the submissions made to it. In any event, it failed to provide adequate reasons. It follows that the decision is unlawful.

Decision

[14] Notwithstanding the decision not to resist this petition, it would have been of assistance if the Secretary of State had entered appearance and lodged answers. The case has unusual features, and while of obvious significance for the child and wider family members concerned, it has the potential to be of more general importance. Although it was not challenged by the petitioner, the court is troubled by the FtT's view that rights of appeal in cases of this kind were created for the first time in respect of applications made after 31 January 2020. It would have been helpful to have the Secretary of State's submissions on this, and also on the impact of *MY* and other decisions in circumstances such as this.

[15] The application was for entry clearance via a European Family Permit under the EUSS on the basis that the child is a family member of a relevant EEA citizen. At the time it was governed by Annex 1 to Appendix EU (Family Permit) of the Immigration Rules. The decision of the ECO was that the eligibility requirements were not met. Since 2013 Ugandan adoption orders have not been recognised in the UK, thus the child is not a family member in terms of FP.6(2)(b) of the Appendix. The Appendix is silent with regard to rights of appeal.

[16] The child appealed to the FtT by lodging a Form IAFT-6 (appeal from out of country). It expressly allowed for appeals against the following types of determinations; human rights decisions; EEA decisions; decisions under the EUSS, and those regarding EEA family permit and EUSS travel permit applications. Those acting for the child ticked

only the box marked "human rights". The range of options said to be available to the child are difficult to reconcile with the view that rights of appeal in cases of this kind sprang into existence for the first time for refusals of applications which were lodged after EU exit day, namely 31 January 2020, all in terms of regulation 3 of the Immigration (Citizens' Rights Appeals) (EU Exit) 2020 (SI 2020/61). While this provides for such appeals in respect of applications made after that date, counsel for the petitioner was informed that it was not obvious to the court that this meant that no similar appeal rights existed for applications made before that date. No rationale for such a state of affairs was offered, or at least none that was grasped by the court. Given that this was not the focus of the challenge to the FtT's decision, no more will be said about it, other than to draw attention to regulation 82 and schedule 3 paragraph 5 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory provisions) (EU Exit) Regulations (SI 2020/1309); see also MacDonald's *Immigration Law and Practice* 10th ed. At 18.19 and 19.6.

[17] As for the proposition that the FtT's decision is unlawful because it failed to engage with the grounds for the appeal as presented to it, or, if it did, it did not provide adequate reasoning for their rejection, I have no difficulty in upholding this complaint. It follows that the decision will be quashed and the matter remitted to a differently constituted tribunal.

[18] Quashing the decision is the most that the court can do in respect of this petition. In these circumstances I intend to say little in respect of the merits of the submissions based on the case law mentioned above, partly because there has been no contradictor, or at least no input from the Secretary of State. And for the reason just mentioned, the court does not have the benefit of a reasoned decision from the specialist tribunal. There does however

seem to be sufficient arguable merit in them to justify their careful consideration, not least given the serious consequences for this child and his wider family members.