IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/11292/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 5th June 2015	**On 22nd June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHRIS VERDIER ASSONGWA DJOUSSE
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr N Smart, Senior Home Office Presenting Officer
For the Respondent: Mr S McLoughlin of TRP Solicitors Limited

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge of the First-tier Tribunal V A Osborne promulgated on 24th September 2014.

2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to him as the claimant.

3. The claimant is a male citizen of Cameroon born 19th March 1989 who on 21st September 2012 applied for leave to remain in the United Kingdom as the spouse of a person with refugee status. The claimant's spouse had entered the United Kingdom as the dependant of her mother, who had been granted refugee status.

4. The application was refused on 25th March 2013. The claimant appealed to the First-tier Tribunal.

5. The claimant's marriage broke down, but the claimant and his spouse had two children born in the United Kingdom on 21st August 2012 and 7th November 2013.

6. Tribunal proceedings were adjourned on a number of occasions as the claimant had made an application to the Family Court in order to be granted contact with his children. Eventually the Family Court made an order on 14th August 2014 that the claimant should have extended unsupervised contact on 23rd and 30th August 2014, which should thereafter progress to fortnightly staying contact from Friday to Sunday commencing on 13th September 2014.

7. The final Tribunal hearing took place on 10th September 2014. Judge Osborne (the judge) noted that the appeal could not succeed under the Immigration Rules and allowed the appeal under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

8. This prompted the Secretary of State to apply for permission to appeal to the Upper Tribunal, relying upon five grounds which I set out below;

> "Ground 1 – RS (India) was of no applicability
>
> At [44] and [45] the learned judge directed himself to RS (India) UKUT 00218 (IAC). Following his finding at [47] that the Family Court proceedings had concluded at the final date of hearing, it is clearly a misdirection in law to apply an authority directed at contemplated proceedings. There were no contemplated proceedings, they were concluded. Therefore going on to consider the questions in RS as the learned judge does at [47], [49] and [57] was entirely immaterial to the matter before the Tribunal.
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> Ground 2 – s117B(6) was of no applicability
>
> At [54] the learned judge finds s117B(6) to be of no applicability because the Appellant's children do not qualify. He then proceeds at [55] to misapply that provision anyway. This is submitted to be a clear error in law. Parliament cannot possibly be said to have intended the Appellant to benefit from that provision in any way by specifically excluding him from it.
>
> Ground 3 – Failure to give any or any adequate reasons
>
> Further it is unclear what finding the learned judge is making at [62] as the reasoning includes very lengthy sentences and double negatives. It is also unclear what the "low standard" the learned judge applies might be. It cannot be said that the civil standard which is applicable is a low standard.
>
> Ground 4 – Material consideration of an irrelevant factor

> At [63] the learned judge appears to consider it relevant what type of leave the Secretary of State would grant the Appellant. It is respectfully submitted that it is not. This is a matter entirely for the Secretary of State, and it is inappropriate for an FtJ to speculate on a hypothetical exercise of executive discretion.
>
> Ground 5 – Failure to apply a relevant recent authority
>
> Further the learned judge has failed to consider and apply the authority of EV (Philippines) v SSHD [2014] EWCA Civ 874 where the Court of Appeal held inter alia that appeals centred on children must be considered "in the real world." In this appeal the Appellant has no claim to immigration status independent of his children, whose own immigration status is precarious."

9. Permission to appeal was granted by Judge of the First-tier Tribunal E B Grant who found it arguable that the judge erred in law in finding there were compelling circumstances outside the Immigration Rules, to justify allowing the appeal under Article 8.

10. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal decision should be set aside. The claimant did not submit a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

Submissions

11. At the hearing before me Mr Smart opened his submissions by confirming that the claimant's estranged wife had been granted indefinite leave to remain in the United Kingdom. The children as yet had no status, although they would be entitled to apply for British citizenship.

12. Mr Smart relied upon the grounds contained within the application for permission to appeal in submitting that the judge had materially erred in law. I was asked to find that RS was irrelevant and should not have been considered.

13. In relation to section 117B at paragraph 55 of the decision, Mr Smart submitted that the judge appeared to apply a near miss principle.

14. In relation to paragraph 62 of the decision, I was asked to find that the judge had not set out what compelling circumstances existed to consider the appeal outside the Immigration Rules, and it would appear that the judge relied upon a near miss principle as being compelling circumstances, which was wrong in law.

15. Mr McLoughlin submitted that RS did not apply only to contemplated proceedings, as there was reference, in the third paragraph of the head note, to proceedings having been initiated.

16. In relation to section 117B(6) it was submitted that the judge had not relied upon a near miss principle, and had stated that the claimant's children were not "qualified" children and had not erred on this issue.

17. Mr McLoughlin submitted that the judge had not applied an incorrect standard of proof in paragraph 62, and the Secretary of State's complaint that the judge had considered the type of leave that would be granted, was irrelevant.

18. In relation to EV (Philippines), I was asked to find that the judge had not erred, and had considered the best interests of the children.

19. Mr Smart responded briefly, contending that RS was only concerned with contemplated proceedings.

20. At the conclusion of submissions I reserved my decision.

My Conclusions and Reasons

21. I will address the challenges made by the Secretary of State in the order that they are set out in the application for permission to appeal.

22. Ground 1

I do not find that the reference to RS (India) is entirely immaterial and the judge did not materially err in law on this issue. The judge recognised in paragraph 44 that RS applied to contemplated proceedings, but nevertheless found some of the principles to be relevant in determining the appeal before her.

The judge took into account the three questions which were considered in RS (India). The first of these was whether the outcome of the family proceedings was likely to be material to the Immigration Decision, and in RS (India) this was found to be relevant and material, as set out in paragraphs 50-54 of that decision. The Judge did not err in finding this a relevant consideration.

The judge also considered whether there were compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of family proceedings, and again I find the judge was correct to consider this as a relevant consideration. The third question considered by the judge was whether there was any reason to believe that the family proceedings had been instituted to delay or frustrate removal, and not to promote the child's welfare. Again that is a relevant consideration, even though family proceedings have been concluded.

23. Ground 2

The judge did not err in referring to section 117B(6) in paragraph 54, and did not misapply the provisions. In my view the judge rightly recognised that the Appellant's children could not qualify under section 117B(6), and was simply stating that there was a genuine and subsisting parental relationship between the Appellant and his children, even though they could not qualify under that subsection. I do not accept that the judge was making any reference to a "near miss" principle. I find no error.

24. Ground 3

In paragraph 62 the judge is considering the five stage test outlined in Razgar [2004] UKHL 27. Reference to a low standard is in my view a reference to what was stated by the Court of Appeal in AG (Eritrea) [2007] EWCA Civ 801 at paragraph 21 when it was stated;

> "It follows, in our judgment, that while an interference with private or family life must be real if it is to engage Art. 8(1), the threshold of engagement (the "minimum level") is not a specially high one."

25. The judge finds in paragraph 62 that there are compelling circumstances for considering the appeal outside the Immigration Rules. The compelling circumstances are set out in paragraphs 41 to 43, and amount to the decision by the Family Court that it was in the best interests of the claimant's two children, for him to have significant contact with them. The judge takes into account in assessing Article 8(2) factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002, and concludes that the claimant's removal would, in the circumstances of this case, be disproportionate.

26. In my view the finding in paragraph 62 is not unclear. The judge has found compelling circumstances to consider the appeal outside the Immigration Rules, and has then gone on to apply the five stage approach advocated in Razgar, and given adequate reasons for concluding that the best interests of the claimant's children make his removal disproportionate.

27. Ground 4

It is not an error to state at paragraph 63 that if the appeal was successful the claimant would be granted discretionary leave. This is not a particularly relevant statement by the judge and it is not necessary to make such a statement, but it is not a material error of law. This statement was made after the proportionality exercise had been considered, and the judge had decided that it would be disproportionate for the claimant to be removed.

28. Ground 5

There appears to be no evidence that the Secretary of State's representative referred the judge to EV (Philippines) and I do not find any merit in this ground of appeal. I find no evidence that the judge did not consider this appeal "in the real world". The judge placed weight upon the decision of the Family Court as she was entitled to do. The Upper Tribunal in RS (India) indicated that weight would be placed upon the decision of the Family Court. The judge was clearly aware of the immigration status of the claimant's children. I find this ground has no merit.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision must be set aside.

I do not set aside the decision. The appeal of the Secretary of State is dismissed.

Anonymity

The First-tier Tribunal made no anonymity order. There has been no application to the Upper Tribunal for anonymity and no anonymity order is made.

Signed Date 9th June 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The decision of the First-tier Tribunal stands and therefore so does the decision not to make a fee award.

Signed Date 9th June 2015

Deputy Upper Tribunal Judge M A Hall