



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06070/2015**

THE IMMIGRATION ACTS

**Heard at Birmingham
On 10 February 2016**

**Decision & Reasons
Promulgated
On 16 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

**MH
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. T. Lay, Counsel instructed by Wilson Solicitors LLP
For the Respondent: Mr. D. Mills, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Birk promulgated on 3 August 2014 in which he dismissed the Appellant's appeal against the Respondent's decision to refuse to grant asylum, and to remove him from the United Kingdom.
2. I have made an anonymity direction, following that made in the First-tier Tribunal.
3. Permission to appeal was granted as follows:

“Whilst I find nothing of arguable merit in the grounds relating to risk on return, it is arguable, in relation to Article 8, that the judge failed to take account of the appellant’s wife’s pregnancy in concluding that he did not have a genuine and subsisting relationship with her and the children. Arguably his conclusions on the genuineness of the family relationships are flawed owing to an arguable absence of any consideration and findings in that regard.”

4. The grant of permission is clear that there was nothing of arguable merit in the grounds in relation to asylum, and the Appellant’s representative did not seek to advance these grounds, focussing only on Article 8.

Submissions

5. Mr. Lay relied on his skeleton argument. Additionally he submitted that it was not clear from the decision that the judge had accepted that the unborn child was the Appellant’s. The judge was aware of the pregnancy, but had made no finding as to whether or not the Appellant was the father. It was submitted that it would have been open to the judge to say that there was not enough evidence before him that the Appellant was the father, or to find that he was the father, but find that this showed only that the Appellant had been in a physical relationship with M at a certain point in time but that there was no subsisting relationship. However the judge had made no findings at all in relation to the pregnancy.
6. He submitted that the error of law was either the failure to have regard to a relevant matter, or the failing to make a finding on a critical issue. It was not possible to tell from the decision whether the judge considered M’s unborn child to be the Appellant’s child or not.
7. I was referred to paragraph [7] of the decision where the judge refers to a document issued by the midwife which has the incorrect name of the father on it, and the appointment which had been arranged to correct this. Despite this, no finding had been made as to parentage. In paragraph [41] the judge does not state that the Appellant is the father.
8. Mr. Mills accepted that there was no clear statement as to whether or not the pregnancy was as a result of the Appellant and M reconciling, whether there had been a casual physical relationship, or whether the Appellant was not the father of M’s unborn child. He submitted that it could be inferred from the judge’s credibility findings that he had found that the Appellant was not the father of M’s unborn child. In relation to the document which did not name the Appellant it was submitted that the Respondent’s case was that the Appellant and M were not back together, and the Appellant was not the father. The judge’s findings were clear and complete when he rejected the Appellant’s claim to have reconciled with M. From this it could be inferred that the child was not the Appellant’s – this was a reasonable conclusion on the part of the judge. The failure to state this point explicitly did not undermine the decision as a whole.

9. In response Mr. Lay referred me to paragraphs [14] and [15] where the Respondent's case and submissions are set out. It did not state that the Respondent's case was that the Appellant was not the father. The submissions referred to the family unit, not the paternity. If the Tribunal was trying to divine a finding through inference, the decision involved the making of an error of law. The fact of the unborn child was relevant as to whether or not the relationship was subsisting.

Error of law

10. I find that the decision involves the making of a material error of law.
11. The judge refers to M's pregnancy in paragraphs [7] and [10] when setting out the Appellant's case. In paragraph [7] it states:

"He said that the baby is expected in October. He said that the midwife had made a mistake about his name at p.22 as the father is recorded as "MAB" and there is an appointment with the midwife to correct it on the 30th of this month."
12. There is no reference in the Respondent's representative's submissions to the pregnancy, and no reference to any submission that the Appellant was not the father of M's child [15].
13. The next mention of the pregnancy comes at the end of the judge's consideration of Article 8. In paragraph [41] it states:

"As for the forthcoming pregnancy, I find that [M] has shown that she is able and fit and was prepared to look after all three children on her own until March 2015 and as I do not find her credible that she has resumed her relationship with the Appellant I find that she can continue to do so."
14. It is clear from paragraph [7] that the evidence provided was not clear as to whether the Appellant was the father of M's unborn child. However, the judge does not make any finding on this issue. Therefore there is no consideration of whether the pregnancy is evidence that they have reconciled and that they are in a genuine and subsisting relationship. The fact of the pregnancy does not figure at all in the judge's consideration.
15. Given that there was evidence before the judge that M was pregnant, and given that the Appellant claimed to be in a genuine and subsisting relationship with M, the pregnancy was clearly a relevant matter. It is not enough to have to infer from the decision that the judge had rejected the Appellant's claim to be the father of the child based on his credibility findings. It is simply not clear from the decision that the judge has considered it at all. His credibility findings were made without considering a relevant matter which goes to the issue of the nature of the relationship between the Appellant and M.
16. The failure to consider the pregnancy in the round with the other evidence, and to make findings on this matter, is an error of law.

Notice of decision

The decision involves the making of an error on a point of law. The findings and the decision in relation to the Appellant's asylum claim, his claim to humanitarian protection, and his claim under Articles 2 and 3, are preserved (paragraphs [21] to [28]). The findings and decision in relation to his claim under Article 8 are set aside (paragraphs [29] to [42]).

The appeal is remitted to the First-tier Tribunal for a re-hearing of the Appellant's Article 8 claim.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 12 February 2016

Deputy Upper Tribunal Judge Chamberlain