



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10429/2017

THE IMMIGRATION ACTS

Heard at North Shields
On 10 August 2018

Decision & Reasons Promulgated
On 23 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

A G
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Cleghorn, counsel, instructed by Latif solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, her husband and their child, preserving the anonymity order made by the First-tier Tribunal.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Arullendran promulgated on 18 January 2018, which dismissed the Appellant's appeal

Background

3. The Appellant was born on 10 August 1985 and is a national of Tunisia. The appellant applied for leave to remain in the UK with her husband and her British child, relying on appendix FM of the Immigration Rules. On 5/09/2017 the Secretary of State refused the Appellant's application.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Arullendran ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 14 May 2018 Judge Mailer gave permission to appeal stating

"1. First-tier Tribunal Judge Arullendran dismissed the appellant's appeal against the respondent's decision to refuse her application for leave to remain in the UK on human rights grounds. The decision was promulgated on 18 January 2018. It was not contended that she met the Rules. There had been a change of circumstances since the date of refusal. The appellant had separated from her husband. The child remained living with him [22]. She found that the best interests of the child would be for her to return to Tunisia with her mother. There was nothing to suggest her father would not be able to visit her there as she had in the past. There was no reason to suppose that her father would not allow her to return to Tunisia with her mother [46].

2. The grounds prepared by counsel representing the appellant at the hearing content that the Judge "minimised" the reality of the situation and failed to consider the matters set out in paragraphs 5 and 6 of the grounds, including the fact that, contrary to the Judge's findings, it is unlikely that her ex-husband would allow the child's returned to Tunisia. The rights of her husband were not considered in the assessment. The Judge's "proposal" may even be a breach of the Hague Convention. The appellant had stated that she wanted to obtain advice from a family law solicitor.

3. It is arguable that the Judge has not undertaken a proper assessment of the child's best interests having regard to the recent change of circumstances since October 2017 when the appellant went to live with a friend where she could not take her daughter.

4. The grounds are arguable"

The Hearing

5. Ms Cleghorn moved the grounds of appeal and told me that the appellant has now raised family law proceedings for contact to her daughter. Before she expanded on the grounds of appeal Mr Diwnycz told me that the grounds of appeal were illuminating and that he could no longer oppose the appellant's appeal. Both parties'

agents asked me to set the decision aside and substitute my own decision allowing the appeal on article 8 ECHR grounds.

Analysis

6. Between [34] and [37] the Judge summarises the submissions that were made for the appellant. The Judge clearly records that she was told that the appellant had separated from her husband and planned to raise family court proceedings to secure contact to her daughter. At [41] the Judge finds that the relationship between the appellant and her husband has broken down. At [41] The judge finds that it is in the appellant's daughter's interest to return to Tunisia with the appellant.

7. The finding at [41] is not safe because the appellant's daughter remains with the appellant's estranged husband, who refuses to allow contact between the appellant and her daughter. Parties' agents agree that circumstances have now moved on because the appellant has instructed proceedings in the family court.

8. The decision contains a material error of law. In an otherwise carefully reasoned decision the Judge fails to take account of the apparent implacable hostility between the appellant and her husband and the intransigent refusal to allow contact to the appellant's daughter. That failure undermines the consideration of the child's best interests and so undermines the overall proportionality assessment. I set the decision aside.

9. Although I set the decision aside I am able to substitute my own decision. It is common ground that the appellant has been trying to secure contact to her daughter since she was ejected from the family home in October 2017. It is not disputed that the appellant has now raised family law proceedings to secure contact to her daughter.

10. In MH (pending family proceedings-discretionary leave) Morocco [2010] UKUT 439 (IAC) the Tribunal held that (i) In MS (Ivory Coast) [2007] EWCA Civ 133 it was accepted, following Ciliz v Netherlands (Application no. 29192/95) [2000] ECHR 365, that a decision to remove an applicant in the process of seeking a contact order may violate Article 8 ECHR, in particular on the basis that removal of a parent/applicant during contact order proceedings would be unlawful because it prejudged the outcome of the contact proceedings and, more importantly, denied the applicant all possibility of any further meaningful involvement in the proceedings which may breach Article 6 ECHR; (ii) a refusal to adjourn proceedings before the Tribunal may have similar consequences; (iii) It is the respondent's practice (consistent with the Human Rights Act 1998), not to remove or deport parent(s)/parties when family or other court proceedings are current and to grant short periods of discretionary leave, to extend temporary admission, or release a person pending the outcome of the family proceedings. The use of curtailment is discretionary in such circumstances (see Home Office Guidance re-issued in October 2010) (iv) Where such a case arises before the Tribunal it is usual for the appeal to be allowed pursuant to Article 8 ECHR, rather than for the proceedings to remain within the Tribunal system to be adjourned, perhaps more than once. The respondent will normally then grant a short period of

discretionary leave bearing in mind any relevant facts found by, or observations of an Immigration Judge. It is for the respondent to decide on the period of leave in each case.

11. The appellant cannot meet the terms of the immigration rules. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed..." In Agyarko [2017] UKSC 11, Lord Reed (when explaining how a court or tribunal should consider whether a refusal of leave to remain was compatible with Article 8) made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered.

12. Family life and private life within the meaning of article 8 are both engaged because the appellant is trying to resolve issues arising from the breakdown of her marriage and is actively seeking a court order for contact to her daughter. Relying on MH (pending family proceedings-discretionary leave) Morocco [2010] UKUT 439 (IAC) I find that the respondent's decision is a disproportionate interference with the appellant's article 8 family and private life. To remove the appellant could prejudice any realistic chance she has of securing contact to her daughter. The appeal is therefore allowed on article 8 ECHR grounds.

Decision

13. The decision of the First-tier Tribunal promulgated on 18 January 2018 is tainted by material errors of law and is set aside.

14. I substitute my own decision

15. The appeal is allowed on article 8 ECHR grounds.



Signed
Deputy Upper Tribunal Judge Doyle

Date 15 August 2018