Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/19880/2016**

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 6 August 2018	**On 20 August 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

JARGALASIKHAN DORJKHUU

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Present but not legally represented
For the Respondents: Mr. T. Melvin, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Mongolia. He entered the United Kingdom as a visitor on 25 February 2007 and remained here after his visa expired until 1 February 2016 when he applied for leave to remain as the partner of a British national. He and his partner are planning to get married and they have three British national children. Their children were born on 23 April 2014, 29 July 2015 and 26 June 2017. The Appellant's application was refused on 24 May 2016 and he appealed against this decision.

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2. The Appellant's appeal was dismissed by First-tier Tribunal Judge Anstis at Harmondsworth in a decision promulgated on 23 March 2018. The Appellant sought permission to appeal and Upper Tribunal Judge Plimmer granted him permission to appeal on 21 June 2018.

ERROR OF LAW HEARING

3. The Appellant was not legally represented and handed up documents which indicated that when he and his partner tried to book their marriage at a register office, their case was referred to the Home Office. He said that they were interviewed for three or four hours and then the Home Office informed the register office that the marriage could go ahead. He also relied on the fact that he had three British children and that the oldest child was about to start school in September 2018. One of the documents showed that the marriage was now booked for 27 September 2018. The Home Office Presenting Officer relied on the grounds of refusal and the Rule 24 response which he handed in at the hearing and said that he had no copy of any marriage interviews.

ERROR OF LAW DECISION

4. In the refusal letter the Respondent accepted that the Appellant met the suitability and eligibility requirements of Appendix FM but noted that he could not meet the immigration status requirements because he had overstayed his previous leave.

5. However, paragraph EX.1. of Appendix FM states that:

"This paragraph applies if

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the ager of 18…
(bb) is in the UK;
(cc) is a British citizen or has lived in the United Kingdom continuously for at least the 7 years immediately preceding the date of application; and.
(ii) it would not be reasonable to expect the chid to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian

protection and there are insurmountable obstacles to family life continuing outside the UK".

6. In his decision letter the Respondent failed to apply EX.1. correctly in relation to the relationship which the Appellant may have with his British children. Instead, he found that EX.1. could not apply as the Appellant did not have sole parental responsibility for his daughter. This is clearly not part of the test in paragraph EX.1.

7. The Respondent also failed to even consider whether the Appellant had a genuine and subsisting parental relationship with the child, whose birth certificate did not list him as the father.

8. When dealing with the best interests of the children under the heading **Decision on Exceptional Circumstances** the Respondent went no further that asserting that "it is generally accepted that the best interests of a child whose parent are facing removal from the UK are best served by that child remaining with the other parent".

9. In his grounds of appeal the Appellant challenged the refusal on the basis that the had a genuine and subsisting parental relationship with his British children and also a genuine and subsisting relationship with his British partner. He also requested an oral hearing.

10. The Appellant's appeal was heard on the papers after the Appellant's solicitors wrote to the Tribunal on 13 March 2018 asking for the appeal to be heard on the papers. Before me the Appellant asserted that his second solicitor had told him that he and his partner did not have to attend the hearing. It was the Respondent's case that the Appellant would have been aware that he and his partner needed to attend after reading the refusal letter. However, the Appellant does not appear to have been represented by very conscientious solicitors and further documentary evidence had been submitted on his behalf. Therefore, it is possible that he did not understand the importance of an oral hearing.

11. The First-tier Tribunal Judge referred to various official documents addressed to the Appellant and his partner at the same address between 2016 and 2018 and some photographs but found in paragraph 13 of his decision that "the evidence submitted by the Appellant suffers from multiple problems, and in many ways give rise to more questions than answers".

12. The First-tier Tribunal Judge did not go on to make a decision as whether there was or was not a genuine and subsisting relationship between the Appellant and his partner under EX.1. This gives rise to an issue of procedural fairness, as the Appellant is entitled at common law to know the case being made against him and against which he may appeal. Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the Procedure Rules") states that:

"(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes-

…

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings".

13. It is arguable that if the First-tier Tribunal Judge did not have sufficient material on which to reach a decision, he should have used his powers under Rule 4(3)(h) of the Procedure Rules to adjourn the hearing and his powers under Rule 4(3)(f) to hold a hearing to consider any matter.

14. This is particularly the case as the manner in which First-tier Tribunal Judge Anstis dealt with EX.1. in relation to the Appellant's British children was far from satisfactory. In paragraph 15 of his decision he did not appear to consider that EX.1. may apply but went on to consider their circumstances outside the Immigration Rules under Article 8 of the ECHR, having found in paragraph 14 that "there is really nothing of substance from which I can derive any proper indication of his present relationship with his children". He did not take into account the birth certificates, the evidence of cohabitation and the very young ages of the children. He also did not take into account the fact that, even if the Appellant was not in a genuine and subsisting relationship with their mother, the Appellant may have genuine and subsisting parental relationship with his children, who were British citizens living in the United Kingdom.

15. Paragraph 15 also begins with the assertion that "the Appellant's first task in this appeal is to demonstrate that he has a right of appeal". It is clear from the papers that the Appellant had a right of appeal and had exercised it. It may be that the First-tier Judge meant to refer to a need to demonstrate a right to family life for the purposes of Article 8.1 but, if this is the case, he did

not address this issue in any detail before saying "I am prepared to assume in his favour that he has".

16. The rest of the paragraph appears to deal with proportionality for the purposes of Article 8.2 of the ECHR and he finds that the Appellant does not meet the Immigration Rules in the middle of this paragraph. However, he does not make clear which Immigration Rule he is referring to and nowhere in the decision does he clarify this or address EX.1.in any detail.

17. He also found in that paragraph that there was insufficient material before him to conclude that any particular action was in the best interests of the children in this case. Therefore, he failed to consider the children's best interests as a primary consideration, even on the limited evidence before him.

18. In *JO and Others (s55 duty) Nigeria* [2014] UKUT 00517 (IAC) the Upper Tribunal found that:

(1) The duty imposed by section 55 of the Borders Citizenship and Immigration Act 2009 requires the decision-maker to be properly informed of the position of a child affected by the discharge of an immigration etc function. Thus equipped, the decision maker must conduct a careful examination of all relevant information and factors.

(2) Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations.

(3) The question whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the court or tribunal considering this question will frequently be confined to the application or submission made to Secretary of State and the ultimate letter of decision.

19. However, this did not preclude the First-tier Tribunal Judge from directing that an oral hearing was appropriate in order to obtain further oral evidence from the children's parents.

20. Therefore, it is arguable that the First-tier Tribunal should have adjourned the hearing and set it down for an oral hearing.

21. As a consequence, there were errors of law in First-tier Tribunal Judge Anstis' decision.

Decision

(1) The appeal is allowed.

(2) The decision of First-tier Tribunal Judge Anstis is set aside.

(3) The appeal is remitted to the First-tier Tribunal in Hatton Cross to be heard *de novo* before a First-tier Tribunal Judge other than First-tier Tribunal Judge Anstis or Robertson.

Nadine Finch

Signed Date 6 August 2018

Upper Tribunal Judge Finch