



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01621/2015

THE IMMIGRATION ACTS

Heard at Bradford
on 30 May 2018

Decision & Reasons Promulgated
on 10 July 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MISH

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Schwenk instructed by Parker Rhodes Hickmotts Solicitors

For the Respondent: Mrs Petterson, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Following a hearing at Bradford on 12 December 2017 it was found the First-tier Tribunal had erred in law in a manner material to the decision to dismiss the appeal with further directions being given for the further hearing of this appeal. The matter comes back before the Upper Tribunal today for the purposes of a hearing after which the Tribunal shall substitute a decision to either allow or dismiss the appeal.

Background

2. There has been a fundamental change in the appellant's position since the hearing before the First-tier Tribunal. The chronology provided by Mr Schwenk, which is not disputed by Mrs Petterson, is in the following terms:

- a. Appellant arrived in the United Kingdom in 2001.
 - b. In February 2009 the appellant undertook an Islamic marriage in England with FIS.
 - c. Two children have been born to the appellant and his wife, Ay I on the 30 December 2009 and An I on 12 October 2012.
 - d. The appellant lived with his wife and their first child until shortly after the birth of An I.
 - e. Initially after the appellant and his wife separated the appellant remained in London whilst his wife took the children to Barnsley. The appellant used to visit Barnsley weekly from London in order to have contact with his children.
 - f. After the appellant claimed asylum in 2012 he moved to Barnsley, to an address five minutes travelling time from his ex-wife. He had overnight staying contact with his children every weekend and saw them on other days of the week.
 - g. FIS suffers from serious mental health problems. In February 2017 she was admitted to a mental health unit in Barnsley.
 - h. Following FIS's admission, the children commenced living with the appellant on a full time permanent basis.
 - i. The appellant currently lives with his two children in NASS accommodation.
 - j. The children have contact with their mother.
 - k. FIS has a new partner with whom she has a child. That child is a British citizen.
3. The fact the children currently live with the appellant is not disputed. It was also accepted by the advocates that the issue in this appeal was the reasonableness of expecting the children to return to Sri Lanka and continue their life there with the appellant.
 4. Supplemental witness statements have been provided in which the appellant states the children do not have much understanding of Tamil. Evidence was given of ongoing contact between the children and their mother in the United Kingdom by both indirect telephone or video link and occasional direct contact. The children last physically met their mother on 26 April 2018 but have had telephone/video contact since.
 5. Mrs Petterson, in her submissions, accepted the appellant's circumstances have changed and it is accepted the eldest child has lived in the United Kingdom for at least seven years and that paragraph 276ADE(1)(iv) is relevant. It was submitted there was a need to consider the family life as a whole in assessing the question of reasonableness.
 6. Mrs Petterson submitted it was not unreasonable for the children to go to Sri Lanka with their father. There was no evidence from the children's mother and no reason for the children only to speak English at home. They could learn Tamil. There is no evidence the children have any relationship with the appellants ex-

wife and contact via indirect means could carry on with little evidence of physical contact between the children and their mother. It is submitted the children have moved on to a new relationship and that it was not unreasonable for the children to go to Sri Lanka.

7. It was submitted that when considering section 55, it was still reasonable for the children to go with their father and that the appeal should, accordingly, be dismissed.
8. Mr Schwenk posed the question, at the outset of his submissions, which family unit Mrs Petterson was actually referring to. It was submitted there is one family unit between the appellant and the children but also another with the children and their mother with whom they would lose direct contact if they had to leave the United Kingdom.
9. It was submitted that a finding has been made that the mother sees the children and that the appellant had a lot of contact before the children were handed to him. The children have two family units, that with their father and mother.
10. Mr Schwenk submitted that interference in the children's private and family life, particularly if the children cannot see their mother, is unreasonable. Even if the children could have daily FaceTime contact from Sri Lanka they could not have fortnightly physical contact either with their mother or with their mother's new child. Mr Schwenk referred to the fact children had lived with their half-brother and their mother prior to moving to live with their father.
11. It was submitted both mother and the child are British citizens and that although the appellant's mother lost her recent appeal before the First-tier Tribunal, permission to appeal has been sought from the Upper Tribunal although a decision is awaited. Mr Schwenk submitted it was hard to see how the respondent could remove the appellant's ex-wife without breaching the Zambrano principle since there is a British Citizen child. Accordingly, she would have to remain in the United Kingdom.
12. Mr Schwenk submitted section 117B(6) is also applicable when considering article 8 outside the Rules which provides that in the case of a person who is not liable to deportation the public interest does not require the person's removal where (a) the person has a genuine and subsisting parental relationship with a qualifying child, and (b) it would not be reasonable to expect the child to leave the United Kingdom.
13. Mr Schwenk accepted there is family in Sri Lanka but that although there may have been contact between the adults there was little or no contact between the children and their relatives in Sri Lanka. It was submitted lack of language was an issue as the children would need to speak Tamil to be educated in Sri Lanka. It was argued the children would find it difficult to establish bonds without speaking the local language. Mr Schwenk submitted the best interests of children are to remain in the United Kingdom and that there are strong reasons for finding accordingly.
14. It is accepted the appellant himself has overstayed but it is submitted there is nothing exceptional about his circumstances that would warrant his removal.
15. It was submitted there are powerful reasons why, on the facts of this matter, the appeal should be allowed.

Discussion

16. It is not disputed that if it were not for the need to consider the children the appellant's appeal would be dismissed as it would be reasonable for him to return to Sri Lanka as a relatively young healthy individual. It is also not disputed that this is a case in which the children have come to live with their father; as a result of very unfortunate and sad circumstances when their mother, who was their primary carer, had to be admitted to a psychiatric hospital in February 2017 as a result of difficulties she has experienced.
17. The children have experienced two forms of separation in their lives already the first when the appellant who used to live in the family unit left following the breakdown of the relationship between their father and mother and, secondly, when they moved to live with their father. It is not disputed, however, that the children have been looked after by their father since February 2017 in what appears to be a permanent arrangement. It is also not disputed that the appellant is providing a stable home environment for the children.
18. If the children were removed from the United Kingdom to accompany their father back to Sri Lanka they would remain in his care albeit in different circumstances. It is not established the children are British nationals and it must be accepted that the reality of the appellants intervention kept the children out of the care system and in a safe environment in the United Kingdom. It is accepted within that environment the children have developed relationships with the appellant and settled in their community and schooling.
19. The children would therefore lose the bonds they have currently formed. One of the children has been in the United Kingdom for more than seven years and so the applicable statutory provision and rules referred to above apply.
20. Whether it is reasonable to remove the children is a question of fact. Taking into account the immigration history of the appellant and all that has occurred it is still important to consider the children's own position. If the children go to Sri Lanka with the appellant it is not made out they speak Tamil which is the local language of the area in which they will resettle. It is accepted that English is widely spoken in Sri Lanka but that in a Tamil area it is reasonable to expect that to integrate into society and to be able to attend school and follow a curriculum knowledge of Tamil will be required, unless the appellant has the resources to put the children in a school that teaches the curriculum in English only.
21. Of more importance, perhaps, in relation to this matter is the impact on the children of the loss of the direct contact they have with their mother. As stated, from the date the children were born until 2 February 2017 their mother was their primary carer. This is not a case in which the children only have indirect contact by way of video or telephone with their mother as they also have occasional direct face-to-face contact. Such contact may be important to their mother but it is more important for the children who must not feel they have been rejected by their mother who was effectively abandoning them. There is therefore an arguable psychological aspect to this case in relation to the effect on the children of denying any further face-to-face contact with their mother who it has not been found presents any real risk to them. Such contact may be weekly, fortnightly, monthly

and maybe not as much as may be seen in other cases, but it is the best that can be arranged for these children at this point in time.

22. In addition, the children have a British national half-brother in the United Kingdom. The children lived with their mother and a half-brother until they came to live with their father and so contact between the siblings is something of which both the appellant's and younger child have knowledge of. No evidence was provided showing an adverse impact of such contact not being able to continue and it is not found that that is the primary reason for the finding reached, albeit it is part of the factual matrix that needs to be considered in this appeal.
23. The core element in this appeal is the consequence of the removal of the appellants from the opportunity to enjoy contact with their mother. I do not find in all the circumstances that it is reasonable to take the children away from their current environment in which contact with their mother will form an important element. The appellant is doing his best for his children but he is only one parent and maintaining knowledge and identity of their mother and the ability to spend time with her I consider, at this stage in their development, makes their removal from the United Kingdom unreasonable.
24. If the circumstances change and the children's mother becomes too ill for any future direct contact or is deemed a threat to the children, or her appeal proceedings fail as a result of which she is to be removed from the United Kingdom, it is arguable that the decision may be different in that indirect contact can be enjoyed from Sri Lanka as much as the United Kingdom or direct contact occurred if she is in Sri Lanka. On the facts of this matter as currently known, I find the respondent has failed to discharge the burden upon her to the required standard to establish that the decision to remove the appellant from the United Kingdom is proportionate.

Decision

25. **I remake the decision as follows. This appeal is allowed.**

Anonymity.

26. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson

Dated the 6 July 2018