Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04622/2015

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice Belfast	**Decision & Reasons Promulgated**
On 27 November 2018	**On 10 January 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

SB
(ANONYMITY DIRECTION MADE)

Appellant

Representation:
For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr S Smith, instructed by R P Crawford & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal promulgated on 4 April 2018 allowing SB's appeal against the decision of the Secretary of State made on 27 February 2015 to refuse her asylum claim and refuse her human rights claim. There is a long history to this case which must be set out in some detail.

2. The appellant's case as put to the Secretary of State and to the First-tier Tribunal is that, having overstayed in the United Kingdom after a family visit which began on 12 July 2011 that she became pregnant and had a

child born on 9 October 2014. Her case was that she feared being killed by her parents having giving birth to a perceived illegitimate child outside of marriage.

3. The respondent's case is set out in the refusal letter of 27 February 2015. In summary, the respondent did not find the appellant to be credible concluding that there was in place in Morocco a sufficiency of protection for her. She therefore refused the application pursuant to the Refugee Convention.

4. The respondent also concluded that the appellant did not meet the requirements of Appendix FM or paragraph 276ADE of the Immigration Rules and refused her claim on that basis.

5. At her appeal on 5 July 2016 the appellant gave evidence as did KI, the father of her child and of her second child born on 15 December 2015. KI has leave to remain in the United Kingdom and has another child who is a British citizen in respect of whom there is a residence order in his favour; the mother (not the appellant) has a contact order.

6. The judge who heard the appeal found neither the appellant nor KI to be credible and specifically rejected the appellant's case that she had been threatened by her parents and did not accept the explanation given for the delay in claiming asylum.

7. The judge found that KI had lied to the Registrar of Births and Deaths about the birth of his daughter Y, maintaining that he had only done the appellant a favour by allowing his name to be added to the birth certificate to avoid any stigma that might be perceived to an unmarried mother yet the DNA report confirms that he is the father. The judge concluded that both the appellant and KI had known that he is the father of her child [27].

8. The appellant was given permission to appeal against that decision, and it then came before me on 26 July 2017. I set aside the decision but preserved some of the findings of fact. The appeal was, however, remitted to the First-tier Tribunal.

9. In its decision, the Tribunal noted [58] the findings that Judge Fox had made (and which were preserved) but observing that this appeal was constrained to the consideration of Article 8 issues and that in that regard the credibility of the appellant and her partner as to past known facts and her personal history it is of less relevance. The panel noted also that it was not in doubt that KI was the father of three children and it was clear from the evidence that he conducted himself, with respect to all three children, as a father would and that it was the housing circumstances of the appellant and her partner which would appear to prevent them living in the same premises. They found this did not in any way detract from the genuine and subsisting relationship which we they found the appellant enjoys with her partner.

10. The Tribunal noted also at [60] that there was daily contact between the five members of the family unit and that the previous findings of lack of credibility should not be applied to the evidence they heard in relation to the current family unit circumstances, there being no reason to doubt the accuracy of what they were told, cross-examination not causing doubt of the stated family arrangements. They also took into account the documents, including school correspondence confirming the view with respect to the family unit and the closeness of the relationships between each family member of the unit. It was also noted that a very small amount of time was spent by the younger child with his birth mother.

11. The panel then directed themselves that they needed to consider first the best interests of the children, addressing that of A who is a British citizen, the panel held this:-

> "62. Concerns particularly relate to A who is a British citizen and whose mother has British nationality. A's mother is entitled to have contact with him and that fact must be found to be a matter which is in the best interests of A. If the appellant's partner were to relocate to his home country with the appellant and her two Moroccan children, he would have to take A with him (assuming that consent were given by the appropriate Family Court). They agreed with the view expressed by Mr McTaggart that this simply is not a course of action which could reflect reality.
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> 63. Therefore we find that a requirement that the appellant should be removed to Morocco would undoubtedly interfere very significantly with the current family life enjoyed between the five members of the family unit. Whether it might be reasonable, in isolation, for the appellant and her two Moroccan children themselves to return to Morocco might well be a different matter. However we must consider the reality of the current family circumstances as we have clearly found them to be."

12. On that basis they found that any interference caused by removing the appellant would be a breach of Article 8.

13. The Secretary of State then sought permission to appeal in grounds which are, as Mr Duffy accepted, somewhat prolix. In short, as summarised by Upper Tribunal Judge Martin when granting permission on 30 May 2018, they argue that:-

    (i) the Tribunal erred in failing to give adequate consideration to the damning adverse credibility findings of an earlier judge; and

    (ii) failed to adequately conduct a proportionality exercise taking into account the public interest.

14. Judge Martin also said this:-

> "It is arguable also that the Tribunal has not given adequate consideration to the fact that four of the five family members are Moroccan and that the British child is not a trump card. There is no consideration of the possibility of the appellant and her two Moroccan children returning to Morocco. She is not the mother of the other child

> and her partner has a choice as to whether he goes to Morocco or remains in the UK with his child. There was no examination of whether the British child could live with his mother."

15. It should be borne in mind that even if an appellant is found to be generally incredible, it does not necessarily mean that his or her claim must fail; at best it is only his or her evidence and evidence derived from what he or she has said and done which is potentially undermined. Other evidence may put the appellant's evidence in a better light and may enable his claim to succeed. Simply because an appellant is disbelieved even on very large parts of her story that does not mean that other evidence in support of a case can be relied upon depending upon what that is. If, for example, it comes from wholly independent sources on the face of its impartial objective, it is difficult to see how a finding that the appellant herself is dishonest can materially affect the weight to be attached to it.

16. Bearing that in mind and bearing in mind that the Tribunal clearly directed themselves to the adverse findings of fact reached by Judge Fox and clearly took them into account, I do not accept that their approach to the evidence was flawed albeit that it may well have been generous. It was open to them to note what matters were put in cross-examination and also to note as they did that the evidence that the family was a unit were supported by external evidence.

17. The external evidence, particularly that in relation to the oldest child, A, which, with the benefit of hindsight, could have been more fully set out in the decision. That does not, however, absolve the Secretary of State from drafting grounds apparently in ignorance of the exact situation.

18. Turning to the oldest child, there is an unusual factor in the order made by the Family Court. The order is that the child, then barely over a year old, is to live with his father and that the mother is to have only limited contact every second Saturday at a contact centre for one and a half hours at a time. The order also provides for this to drop down to once a month if the mother fails to attend without providing a good excuse. It appears from the evidence before the First-tier Tribunal that this is what has now happened. It is in my experience very rare for a court to make an order limiting the mother's access to such an extent with a child who was at the time of the order barely over a year old.

19. Equally of note is the statement of special educational needs in respect of the child A. It is noted here the child has

> "Effectively no functional verbal communication skills expressing his needs through whole body language, facial expressions and hand gestures. The conclusion is that he has severely delayed expressive language skills coupled with significant difficulties in respect to auditory comprehension; the cognitive assessment would suggest that A has moderate learning difficulties, is hyperactive, impulsive and has very limited concentration and attention".

20. It is also of note that he is affectionate to his father and familiar adults

21. Subsequent to this, his needs were assessed as sufficiently acute such that as at 2018 it was decided that he required to be placed in a special educational needs school.

22. I note in passing from the medical report appended to the special educational needs assessment that Social Services became involved with the child's father during his mother's pregnancy. There is no indication that the biological mother has at any state been involved with the educational and psychological or with the school other than the observation that the child and she have regular visits as provided for in the court order.

23. In the light of this information there is in reality no real prospect of A living with his biological mother. It is also clear that his father is his sole carer and that realistically were he not here, the child would most probably have to go into care given the assessment that his best interests are such that his mother should only have very limited contact with him and only then in a contact centre. A has a number of additional needs which would not exist in the case of a child with normal levels of development such that it is wholly unrealistic to consider that he could go to live in Morocco even were the court permit that. Any order to that effect would have to take into account the best interests of a child and given the level of intensive support he receives from the special school he attends that is in my experience highly unlikely to be ordered.

24. I do, however, consider that the Tribunal did err in failing to consider properly whether the interference proposed in the appellant and her children returning to Morocco and being separated from the father would be proportionate. What is said at [63], even taking into account other matters, does not show how the public interest was taken into account. That, bearing this in mind that the appellant's case is clearly outside the Immigration Rules, it is a significant factor.

25. On that basis, I set aside the decision of the First-tier Tribunal and heard further submissions, it being agreed between the parties that there was no need to receive further evidence.

26. I consider that the best interests of the children in this case must be assessed first. In the case of A, for the reasons set out above, it is very strongly in his best interests to remain in the United Kingdom and for his father to be here with him. He has particular, special needs and his interests are very strongly to remain in this country. That is not only because of the educational support he receives but because of the lack of any viable contact with his mother beyond the very limited contact that exists. I see no reason to go behind the order made by the Family Court which must clearly have factored into account his interests, that those were to be with his father and to have some, limited, contact with his

mother. Whilst at that time his special education needs were not known, that now increases his best interests in being in the United Kingdom.

27. There is evidence that A has a relationship with the appellant. For example, it is evident from the letters from the school that the appellant is treated as one of A's parents. It is also important to note the findings of the First-tier Tribunal that they formed a proper family unit.

28. Mr Duffy did raise tentatively whether there could be more than two parental relationships. That is an issue which I consider requires further consideration. I accept that as a matter of law, there can only be two parents and also as a matter of biology. Here, the situation is complex; the biological mother has limited contact with the child and it is evident that the father's new partner (the appellant) has a closer relationship in terms of time spent with the child. It is important not to impose rigid bright lines between family life and private life which covers a spectrum of different relationships but on the facts of this case it is important to focus on why the relationship between the appellant and A is important and that is because of the importance that the relationship has to A in assessing his best interests. There is no evidence before me from, for example, a child psychologist or from a school as to how important A sees the relationship with the appellant. This is not meant as a criticism, merely as an observation. But it is difficult to see that the day-to-day care and support given by the appellant would not be seen by the A as being an important part of his life. It provides a degree of stability. Or, put it another way, it is difficult to see how what the school perceives as a supportive relationship for A would not be something which is important to him.

29. To an extent, the rationale behind Section 117B(6) as analysed in **KO (Nigeria) v SSHD [2018] UKSC 58** is an indicator that the strength of certain personal bonds are such that once the best interests of the child to remain in the United Kingdom are established, it is because of the effect on the best interests of that child that the public interest in in removal must be greater.

30. There is, I accept, a strong public interest in removing the appellant and her children. The appellant came here as a visitor, made a false asylum claim and has simply chosen to stay here without leave, to enter into a relationship and to have children. That is not to say that her conduct should be taken into consideration in assessing the children's best interests, but it is a factor to be taken into account in assessing the public interest in removal.

31. Apart from child A, none of the parties are settled in the United Kingdom and, in the case of the appellant and her two children, have no leave to be here. Significant weight must in the circumstances be attached to the need to maintain immigration control and therefore in the removal of A and her children.

32. The respondent's case that the appellant and her children should be remove presents a stark choice on the facts of this case: either the appellant's partner remains in the UK to look after his child, A, who otherwise faces severe consequences including effectively the severing of a family relationship, or he remains here, and his parental relationship with his younger children is effectively severed. The best interests of all the children require them and the appellant to remain here so that the family unit can be preserved. I conclude that viewed as a whole, on the particular facts of this case, that the effect on the children would be severe and harsh, especially in the case of A.

33. Further, given that they all now form a unit as a whole, I am satisfied that removal of the appellant would not be in child A's best interests. She clearly meets some of his needs and irrespective of whether she is a parent as such, that is effectively the role she plays.

34. Thus, on the particular facts of this case, there are a number of reasons of a compelling nature, not least the fact that the family life of the children which now exists, could not exist outside the United Kingdom, such that removal may not be in the public interest.

35. The public interest in this case is strong, bearing in mind the need to maintain immigration control. It is strengthened by the act that the appellant does not speak English well and is not financially independent. Little weight (but not no weight) can be attached to the family life she has established with her partner,

36. Nonetheless, given the impact of separation on the children, and in particular child A, which would inevitably flow from removal, I conclude that on the particular facts of this case, and the difficulty of maintaining the family life of the children which now exists, except within the United Kingdom, that removal would be disproportionate.

37. Accordingly, I conclude that the error made by the First-tier Tribunal was not material, and in the alternative, for the reasons set out above, I reach the same conclusion as the First-tier Tribunal and I allow the appeal on human rights grounds.

Summary of Conclusions

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the decision allowing it on human rights grounds.

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 27 December 2018

Upper Tribunal Judge Rintoul