Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10687/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 July 2019	**On 19th August 2019**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

AB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms R Popal, Counsel, instructed by Hunter Stone Law
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before me following a hearing on 24 April 2019 at which I decided that the decision of the First-tier Tribunal ("FtT") promulgated on 12 February 2019 was to be set aside for error of law and that the decision was to be re-made in the Upper Tribunal. It is convenient to quote in full the error of law decision as follows:

> "1. The appellant is a citizen of Morocco born in 1966. He appealed to the First-tier Tribunal against a decision dated 2 May 2018, being a decision to refuse leave to remain on Article 8 grounds. The application was made

ostensibly on the basis of the appellant's relationship as a partner. His appeal came before First-tier Tribunal Judge Hussain at a hearing on 4 January 2019 who dismissed it.

2. The grounds of appeal in relation to Judge Hussain's decision, to summarise, argue that he should have considered the circumstances of the appellant's wife's two children who, at the date of the decision, were 9 and 15 years of age respectively, or thereabouts.

3. At the start of the hearing I canvassed with the parties the extent to which there was material before Judge Hussain in relation to those children such as to mean that he ought to have made an assessment of their circumstances in terms of Article 8.

4. It was very fairly accepted by Mr Bramble that there was such material before Judge Hussain and that he had materially erred in law in failing to consider Article 8 in the context of those children, in particular in terms of their best interests. Amongst other things, that material was what was said in the grounds of appeal to the First-tier Tribunal about the extent to which the appellant has family life, not only with his wife but with his stepchildren.

5. Having considered Judge Hussain's manuscript record of proceedings I indicated to the parties that submissions do appear to have been made on the point, albeit relatively briefly, as far as I can tell. Those submissions were to the effect that there are two young children under the age of 18 to consider; both British citizens. To reinforce her argument Ms Popal referred me to the witness statements that were before the First-tier Tribunal in relation to the extent of the appellant's relationship with the children.

6. In the light of the material that was evidently before Judge Hussain, the submissions made to him, and considering what was accepted on behalf of the respondent in terms of there having been an error of law in Judge Hussain's decision such as to require the decision to be set aside, I am satisfied that he did materially err in law in his decision. That decision did plainly need to give consideration to the circumstances of the affected children in this case. Thus, I am satisfied that there is an error of law in Judge Hussain's decision such as to require it to be set aside.

7. I canvassed with the parties the issue of whether the appeal was more appropriately to be remitted to the First-tier Tribunal or retained in the Upper Tribunal for a re-making of the decision. Having heard submissions from the parties it seems to me that the appropriate course is for the matter to be retained in the Upper Tribunal.

8. In coming to that view I take into account the extent to which any appeal remitted to the First-tier Tribunal will have to consider what findings of fact are to stand. Furthermore, I have regard to the Senior President's Practice Statement at paragraph 7.2.

9. At the next hearing submissions will need to be made by both parties as to what findings of fact can be preserved. Mr Bramble argued that actually there was no challenge in the grounds of appeal to Judge Hussain's decision on the financial aspects of the Rules. That is true. It is also seems

to me to be the case, although I do not express a definite view about this, that the financial requirements needed to be met at the date of the application, although I am willing to hear further submissions from the parties in due course about that.

10. Even if the findings of Judge Hussain in relation to the financial requirements are to stand as preserved findings, it may well be that the appellant would be entitled to make submissions on the extent to which the appellant would now, if an application were presently made, be able to meet the financial requirements of the Rules. Provisionally, I consider that that is a matter that may be relevant to an assessment of Article 8 outside the Rules.

11. Accordingly, at the next date of hearing submissions are to be made by the parties as to what findings of fact are to be preserved.

12. **The appellant must file and serve a skeleton argument no later than seven days before the next date of hearing**, dealing with all issues and all arguments relied on. If the appellant seeks to argue that the financial requirements of the Rules were met at the date of the respondent's decision or at the date of hearing before Judge Hussain, or could be met on an application made now, the skeleton argument must set out the appellant's arguments on that issue.

13. I want to make it clear to the appellant's representatives that the skeleton argument must be drafted with specific reference to what the financial requirements of the Rules are and with reference to the evidence that is relied on in that respect.

14. It is clear from Judge Hussain's decision that the issue of the financial requirements of the Rules was not properly addressed on behalf of the appellant. That situation must not be repeated at the resumed hearing before the Upper Tribunal.

DIRECTIONS

The parties, in particular the appellant, are to note that paragraphs 11-14 above take effect as directions which **must be complied with**, in particular in terms of the filing and service of a skeleton argument within the timeframe set out above."

2. For this, the resumed hearing, there was an updated and consolidated bundle served on behalf of the appellant, as well as a skeleton argument. I was further provided with an extract from Home Office guidance to caseworkers dated 19 December 2018 on the issue of the reasonableness of expecting a child to leave the UK.

3. In the light of submissions made to me on behalf of the appellant, I gave a direction pursuant to rule 37(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 in order to explore in more detail certain matters concerning the evidence to be given, brought to my attention by Ms Popal. Having heard submissions, I decided that no further direction under rule 37(2) was necessary. Both parties expressed themselves as being content with my approach to the issues arising in this context. I then heard oral evidence which is summarised below.

The oral evidence

4. LB, the appellant's wife, adopted her witness statement dated 9 July 2019. In cross-examination she identified the schools that her daughter, A, and her son, J, go to, and the school years which they are in. She gave evidence about what J hopes to do in the future.

5. She said that neither of the children have contact with their biological father. So far as A's relationship with the appellant is concerned, since they met in 2015 the appellant has become more or less her biological father whom she does not know much about. She has become brighter and more confident at school. Prior to meeting the appellant, her daughter was not involved in any activities at school and now she is involved in swimming and basketball. The appellant has taught her how to be a parent. She was a single, working mother and he taught her the other side of life.

6. A refers to the appellant as 'papa' and she is very happy and confident. She receives feedback from the school that she never received before. The appellant does the school runs, parents' meetings and he attends school activities. As a single mother she was not able to do those things. She is employed as a theatre nurse.

7. Anything that happened now in relation to the appellant would totally break her. She has a friend and father to the children that she never had before.

8. If he had to return to Morocco to make an application to come back it would break her daughter. She is settled now. It would reverse the (good things) that had happened. It would affect them greatly even if it was not a permanent separation.

9. As regards her son J's relationship with the appellant, as a teenager he was a bit rebellious. He is now developing into a responsible young man. She had bought him a phone and an Xbox, thinking that she was being a good mother. However, after school that was all he did. She was unable to pay much attention to him. He had written a letter to the appellant to thank him for being his father.

10. The appellant had trained him to become a competitive swimmer. He is very into sport in terms of running, swimming and cycling. The appellant told him that he should not always be on the phone and he has encouraged him to study. When J goes shopping he is given a budget by the appellant, which she never did. J is also now decorating the house, stripping wallpaper and helping around the house; things he has never done before. The appellant has trained him to be a responsible young person and to have a structure in his life. J feels that he has a person to mentor him. He feels happy. She could not ask for more.

11. A has attended all parents' meetings and has helped J to be better than before. He is a great role model for him.

12. If the appellant had to go to Morocco and apply to re-enter the UK, J would probably lapse into how he was before. It would be emotionally disturbing for him.

13. So far as she is concerned, for the first time she has normality in her life. If the appellant had to leave it would have a great impact on her, physically and emotionally. He has helped her in her work in that she does not have to worry about what would happen at home. She has peace of mind. She has developed her confidence. If he had to leave it would definitely break her down. It would also affect her job.

14. There was no re-examination. In answer to my questions she said that her first marriage was not a happy one. It was definitely not a marriage in which the children could be happy.

15. The appellant adopted his witness statement dated 19 November 2019 in examination-in-chief. In cross-examination he gave details of A and J's schooling in terms of where they went to school and at what stages of their education they are. That evidence was consistent with that of his wife.

16. If he had to go to Morocco and apply for entry clearance, it would be very hard on A and J. He prepares their food and helps remind them about their homework and going to bed (on time). His wife is always working to pay the bills and they need an adult in the house. There was no re-examination.

Submissions

17. Mr Bramble referred to the Home Office guidance on the issue of the reasonableness of expecting a child to leave the UK. It was submitted that the focus in this case was, quite rightly, on the children.

18. As at the date of application, the appellant could not meet the requirements of the Immigration Rules and therefore the matter was to be determined with reference to Article 8 outside the Rules. Weight was to be attached to all the circumstances. It was not disputed on behalf of the respondent that the appellant could now meet the financial circumstances of the Rules.

19. Mr Bramble pointed out that the situation in terms of the evidence now, was that there was a rather more information in relation to the appellant's daughter, for example in terms of the letter from her and from the school. She had also changed her name by deed poll to that of the appellant.

20. On behalf of the respondent the decision letter dated 2 May 2018 was relied on. As at the date of the application the appellant could not satisfy the financial requirements of the Rules contained in Appendix FM-SE. Furthermore, in terms of whether there would be very significant obstacles to the appellant's integration on return to Morocco in terms of paragraph 276ADE(1)(vi), that requirement of the Rules could not be met either. Therefore, consideration needs to be given to Article 8 outside the Rules.

21. It was accepted on behalf of the respondent that the appellant has family life with his wife and her children. S.55 of the Borders, Citizenship and Immigration Act 2009

("the 2009 Act") needed to be considered, as did s.117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

22. It was accepted that the appellant has a genuine and subsisting parental relationship with the children. The evidence from the appellant's wife expanded on the information previously before the Tribunal.

23. It was accepted that it would not be reasonable to expect the children to leave the UK. In terms of *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 as set out at [18] and [19], one has to look at the appellant's circumstances in a 'real world' context.

24. As regards the public interest, and s.117B of the 2002 Act, the appellant's immigration status has been precarious at all times and therefore his private life ought to be afforded less weight. It would be possible for the appellant in the short term to return to Morocco and apply to enter the UK.

25. Mr Bramble referred to *JG (s 117B(6): "reasonable to leave" UK) Turkey* [2019] UKUT 72 (IAC), accepting that the appellant's case was on all fours with that case.

26. In her submissions, Ms Popal referred to the appellant having entered on a spouse visa and not as a visitor, as set out in the FtJ's decision at [10] – [12]. The matter was conceded before the FtJ, as can be seen from [12].

27. Given that it was conceded on behalf of the respondent that the financial requirements of the Rules as of now would be met, it would not be fair to separate the appellant from his wife and her children simply for an application for entry clearance to be made.

28. It was conceded on behalf of the appellant that there was no evidence put before the Tribunal in terms of how long it would take for a visa from Morocco to be issued, although it was submitted that the Home Office website reveals that it could take up to six months.

29. The appellant's situation was different from that in *KO* and *JG*, as well as of the appellant in *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40. Although his immigration status was precarious, he had never been in the UK unlawfully. The application for leave to remain was made in time. Given that there was no unlawful stay in the UK, the legitimate aim of maintaining immigration control falls away. There was therefore less of a public interest in his removal. His removal would interfere with his family life (and those of his wife and the children).

30. Relying on *MA (Pakistan) & Ors v Upper Tribunal (Immigration and Asylum Chamber)* [2016] EWCA Civ 705, it was submitted that the maintenance of effective immigration control was not a strong and powerful reason in this appellant's case requiring him to leave and make an application for entry clearance that would succeed.

Assessment

31. Although Mr Bramble relied in his submissions on the respondent's decision dated 2 May 2018 refusing the application for leave to remain, part of that decision includes the conclusion that because the appellant entered as a visitor he did not meet the requirements of Appendix FM, paragraph E-LTRP.2.1, the eligibility immigration status requirements. However, that was an issue that was conceded before the FtJ, as can be seen from [12] of the FtJ's decision. Ms Popal explained why that concession was made, in summary because the appellant had a fiancé visa which benefited from transitional provisions allowing an in-country application for settlement. There has been no application on behalf of the respondent to withdraw the concession made at the hearing before the FtJ and it was not submitted that the FtJ was in the circumstances wrong to conclude as he did, namely that the appellant did in fact meet the eligibility requirements of the Rules.

32. It is accepted on behalf of the respondent, and indeed the evidence before me is incontrovertible in this respect, that the appellant does have family life with his wife and with her two children. Mr Bramble very properly sought to test LB's evidence that the appellant is closely involved in the children's education, welfare and upbringing. It was very soon apparent that the appellant was clearly very familiar with the children's circumstances in terms of their schooling, the stage of their education, and their upbringing. I accept the evidence of both the appellant and LB as credible.

33. S.117B(6) of the 2002 Act provides as follows:

> "**117B Article 8: public interest considerations applicable in all cases**
>
> …
>
> (6) 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."

34. That this appeal requires consideration of Article 8 outside the Rules is incontrovertible. At the time of application the appellant failed to produce evidence which established that he met the financial requirements of the Rules. That was the clear conclusion of the FtJ. In my error of law decision dated 3 June 2019 I made it abundantly clear that if it was to be argued on behalf of the appellant that at the time of the application for leave to remain he met the financial requirement of the Rules, there needed to be a skeleton argument drafted with specific reference to the evidence showing that at the time of application those Rules were met, and with specific reference to the particular requirements of the Rules for specified evidence. Those directions were not complied with. All that is asserted on behalf of the appellant in this respect is to be found at [29] of the skeleton argument, which simply states that all the relevant specified evidence has now been disclosed and that the

appellant did meet the Rules in this respect at the time of application. It is not explained why or how that conclusion is justified.

35. The burden of proof is on the appellant to establish that he meets the requirements of the Rules, and indeed met them at the time of the application. He has not done that in terms of the financial requirements.

36. Having said that, Mr Bramble not only conceded that there was family life between the appellant and his wife and her children, but that the financial requirements of the Rules are now met, or at least would be if an application were made now.

37. Therefore, the issue boils down to one of proportionality. It was conceded on behalf of the respondent that it would not be reasonable to expect the children to leave the UK. That concession seems to me to carry over to any such requirement for them to leave even where the appellant would be away only temporarily for the purposes of making an application for entry clearance. That must inevitably be the case since it could hardly be said to be proportionate for children of the ages of 9 and 15 in full-time education, being British citizens, to leave the UK for a temporary period. The disruption that that would cause goes without saying. That is quite apart from the fact that they would be separated from their mother if she had to remain in order to continue her employment.

38. Furthermore, as I have indicated, it was accepted on behalf of the respondent that it would not be reasonable to expect the children to leave the UK. In *JG* a similar situation arose and in that case it was concluded that the appeal under Article 8 outside the Rules must succeed because the appellant's removal would be disproportionate.

39. Quite apart from that, it does otherwise seem to me that requiring the appellant to leave the UK to make an application for entry clearance in circumstances where the application would be successful and in circumstances where his status in the UK has never been unlawful, would also be a disproportionate interference with his family life weighed against the public interest in maintaining effective immigration control.

40. The answer to the appeal is in any event provided by the clear words of s.117B(6). The public interest does not require the appellant's removal because he has a genuine and subsisting parental relationship with qualifying children and it would not be reasonable to expect the children to leave the UK.

41. In those circumstances, the appeal falls to be allowed under Article 8 of the ECHR.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, I re-make the decision by allowing the appeal under Article 8 of the ECHR.

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 his 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
Upper Tribunal Judge Kopieczek Date: 14/08/19