Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17852/2015

THE IMMIGRATION ACTS

Determined On the Papers

Decision & Reasons Promulgated
On 12th February 2019

Before

UPPER TRIBUNAL JUDGE LANE

Between

J J
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. By a decision dated 18 May 2018 I found that the First-tier Tribunal had erred in law and gave directions for the disposal of the hearing in the Upper Tribunal. My decision and reasons were as follows:

> 1. The appellant, JJ, is a citizen of Guyana who was born in 1989. He appealed to the First-tier Tribunal (Judge S T Fox) against the decision of the Respondent dated 30 April 2015 refusing him further leave to remain in the United Kingdom on human rights grounds. The First-tier Tribunal in a decision promulgated on 3 March 2017, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.
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> 2. Mr Duffy, who appeared for the respondent, helpfully told me at the hearing that he did not seek to defend the First-tier Tribunal decision against the challenge in the first ground of appeal. The appellant has a young son (R-J) with whom, by virtue of an order made

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in the Family Proceedings Court in Antrim on 4 June 2015, he enjoys regular contact. The parties agree that, at the hearing before the First-tier Tribunal, the Home Office Presenting Officer did not challenge the appellant's account of the extent of contact between the appellant and R-J or the terms of the contact order itself. Notwithstanding that fact, the judge appeared to doubt that there existed a family life capable of protection under Article 8 ECHR between the appellant and the child. At [19], the judge considered that the contact order should attract less weight because the appellant had not addressed the question of the possible difficulties which might arise with contact given his uncertain immigration status. It does not appear that that issue was ever raised at the hearing before the First-tier Tribunal. Likewise, the judge stated that he had "concerns as to how much of the contact [the appellant] actually enjoys" [22]. For reasons that are not clear, the judge also appears to have asked the appellant whether he enjoyed contact "over and above the contact order". It is not clear to me why that question would have been relevant nor is it clear why the judge considered the answers which the appellant gave to those questions "in turn cast doubt as to whether he enjoys the contact that the contact order affords him." [23]. At [33], the judge observed that there was "a lack of evidence to show there was real and sustained relationship between the appellant and the child he claims is his son …".

3. Both parties accept that at the hearing before the First-tier Tribunal, the judge was told that contact continued in accordance with the court order. That evidence was not challenged by the Presenting Officer. The judge conducted his Article 8 analysis on a false basis. He failed properly to identify the strength of the relationship between the appellant and his son, a finding which was of crucial importance in the proportionality assessment. In consequence, I find that the judge's decision has been flawed by legal error.

4. As regards disposal, Mr Duffy submitted that, given that there had been a procedural error on the part of the judge, there would need to be a re-hearing de novo before the First-tier Tribunal. I am not persuaded that that is necessary in this instance. Time has elapsed since the First-tier Tribunal decision and I accept that there will need to be evidence updating the appellant's circumstances. I understand that that evidence will seek to confirm that contact continues in accordance with the court order. I accept also that, after that evidence has been filed and served, the Secretary of State may wish to cross-examine the appellant as regards the new evidence. It also seems likely to me that there may well be no cross-examination rendering a resumed hearing unnecessary. With those observations in mind, I make the following directions.

A. The decision of the First-tier Tribunal which was promulgated on 3 March 2017 is set aside. None of the findings of fact shall stand.

B. Within 21 days of service upon them of these directions, the parties shall file at the Upper Tribunal, serve on each other and send to Upper Tribunal Judge Lane (uppertribunaljudge.lane@ejudiciary.net) written evidence and submissions upon which they seek to rely in the remaking of the decision.

C. Within 14 days after service upon her of the evidence of the appellant, the Secretary of State shall indicate in writing to the Upper Tribunal and by email to Upper Tribunal Judge Lane whether she requires there to be a resumed hearing at which the appellant may be cross-examined.

D. If no such email is received in accordance with B above or if the Secretary of State indicates that a resumed hearing is not necessary, then the Upper Tribunal will proceed to remake the decision on the basis of the existing evidence together with any updating evidence and submissions filed and served in accordance with these directions.

2. I have received two further witness statements and an extract from social media conversation from the appellant's solicitors. I have also received a skeleton argument prepared by Ms Connolly of Counsel. No response has been received from the Secretary of State following the issuing of the directions.

3. Given that the Secretary of State, by deciding not to respond to the fresh evidence adduced by the appellant, has forfeited the opportunity to cross-examine either of the witnesses in respect of their additional statements, I accept the evidence contained in those statements (which is prima facie plausible and uncontroversial) as true and accurate. Accordingly, I accept that, subject to the existing contact order made in the Antrim Family Court in 2015, the appellant continues to enjoy the level of contact with his child which is described in the additional witness statement. I find as a fact that the appellant continues to enjoy a genuine and subsisting relationship with his child (R-J). Judge Fox, whose decision in the First-tier Tribunal has been set aside, noted that no evidence had been produced to show that the child (R-J) is a qualifying child for the purposes of Section 117 of the 2002 Act (as amended). Surprisingly, the opportunity has not been taken in the submission of the most recent evidence to adduce any evidence to show that the child R-J is a British citizen. The Secretary of State in the decision letter [27] refused to accept, without further evidence, that the child was a British citizen. What is clear, however, is that as at the date of the determination of this appeal on the papers the child has been living in the United Kingdom for seven years (R-J was born on 24 December 2011). It seems very likely, therefore, that the child is a "qualifying child" for the purposes of Section 117B(6) by reason of the length of his residence in the United Kingdom. Section 117B(6) provides as follows:

> '(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.'

4. In determining the appellant's appeal on Article 8 ECHR grounds, therefore, it would now appear that there is no public interest in the removal of the appellant at the present time. The Secretary of State has

not argued that it would be reasonable for R-J to leave the United Kingdom and live in Guyana with the appellant. R-J's primary carer is his mother and, although the appellant and the mother and R-J appear to enjoy good relations, the appellant and R-J's mother are not in a relationship nor is there any suggestion that they will be reconciled. I find that it would not be reasonable for R-J to live in Guyana with the appellant in those circumstances. It follows that the appellant should succeed in his appeal against the decision of the Secretary of State dated 30 April 2015 on human rights grounds (Article 8 ECHR).

Notice of Decision

5. The appellant's appeal against the decision of the respondent dated 30 April 2015 is allowed on human rights grounds (Article 3 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 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 1 December 2018

Upper Tribunal Judge Lane