



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/10067/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 18 February 2019**

**Decision & Reasons
Promulgated
On 11 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

**MR L H A
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Walker, Counsel instructed by Hersi & Co Solicitors
For the Respondent: Ms K Pal, Home Office Presenting Officer

DECISION AND REASONS

- 1.** The appellant, a citizen of Somalia born on 24 February 1990, is the partner of a Somalian citizen who has indefinite leave to remain in the UK and the father of their child (born on 5 July 2018) who is a British citizen.
- 2.** The appellant entered the UK on 5 August 2014 and claimed asylum. His asylum application was refused on 22 January 2015. A fresh claim was refused on 3 July 2018. His human rights application under Article 8 ECHR was also refused.

3. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge of the First-tier Tribunal Housego. In a decision promulgated on 1 October 2018 the judge dismissed the appeal, finding that the appellant would not be at risk on return to Somalia and that his removal would not be contrary to Article 8 ECHR.
4. The appellant is now appealing against the decision of the First-tier Tribunal to dismiss his human rights (Article 8 ECHR) appeal. He is not challenging the decision to dismiss his asylum appeal. Accordingly, only the Article 8 Claim will be considered in this decision.

Decision of the First-tier Tribunal

5. Judge Housego found that the appellant has been in a relationship with his partner for more than two years and that they have a son together (born on 5 July 2018) who is a British citizen. The judge found that even though it would be in the best interests of the child to remain in the UK with both parents it would nonetheless be reasonable for him to relocate to Somalia with his father.
6. The judge gave the following reasons for finding that it would be reasonable to expect the child to leave the UK:
 - (a) He is ethnically Somali and his parents will bring him up able to speak Somali wherever he resides.
 - (b) The family are well-connected and would not return to destitution.
 - (c) The child does not have to leave the UK as he can remain with his mother in the UK if that is what the family chooses.
 - (d) As a British citizen the child will retain the right to come to the UK when an adult.
 - (e) The appellant arrived in the UK using false documentation and when he lost his appeal he remained in the UK in breach of immigration law.
7. The evidence of the appellant's partner was that if the appellant is removed from the UK she would remain in the UK with their child without him. The judge stated that it was the family's choice whether to relocate together to Somalia or to be separated.

Grounds of appeal and submission

8. The appellant contends that the judge failed to properly apply the reasonableness test under Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") because he took into account the appellant's misconduct in using a false document and overstaying. Ms Walker argued that this was inconsistent with *KO (Nigeria)* [2018] UKSC 53 which is clear that parental misconduct is irrelevant in the assessment of reasonableness. She also argued that the judge erred by appearing to assume that any separation caused by the appellant having to leave the UK would only be temporary as he could apply to enter the UK from

Somalia. She argued that this failed to recognise that the financial requirements under Appendix FM would not be met and therefore the separation would be permanent.

9. Ms Walker also took issue with the judge finding that the appellant's child would not lose all the rights of citizenship if he relocates to Somalia as he could return to the UK as an adult. She maintained that the child would lose the advantages of growing up and being educated in the UK.
10. Ms Pal, in response, argued that the judge followed the correct approach by considering the best interests of the child as a distinct matter before dealing separately with the reasonableness test under the 2002 Act. The judge recognised that the child's best interests are the primary consideration and found his best interests are to remain in the UK. The judge then looked at reasonableness and took into account a range of issues. She argued that although the judge took into consideration the appellant's misconduct when assessing reasonableness this was only one of the factors considered, and even if this was an error (which she did not concede) it was not material.

Analysis

11. Section 117B(6) of the 2002 Act provides that the public interest will not require the appellant's removal from the UK if (a) he is not subject to deportation; (b) he has a genuine and subsisting relationship with his son; (c) his son is a qualifying child; and (d) it would not be reasonable to expect his son to leave the UK.
12. It was not in dispute that the appellant is not subject to deportation and has a genuine and subsisting relationship with his son, who is a qualifying child. Therefore the only area of contention before the First-tier Tribunal in respect of Section 117B(6) was whether it would be reasonable to expect the appellant's son to leave the UK.
13. In *MA (Pakistan)* [2016] EWCA Civ 705 Elias J found that the assessment of reasonableness in Section 117B(6) must include all potentially relevant public interest considerations including the conduct and immigration history of a child's parents.
14. However, the Supreme Court in *KO* rejected this approach, finding that there is nothing in Section 117B(6) that imports a reference to the conduct of the parent and that the only relevance of a parent's conduct is that reasonableness must be considered in the real world in which the child lives (which in this case is that the appellant has no right to remain in the UK but his partner, the child's mother, does).
15. One of the reasons Judge Housego gave for finding that it would be reasonable to expect the appellant's son to leave the UK was the appellant's misconduct. This approach is consistent with the Court of Appeal in *MA*, but not with the Supreme Court in *KO*. As explained above,

KO makes clear that parental misconduct is not a relevant consideration in the assessment of reasonableness under Section 117B(6). The judge therefore made an error of law in the assessment of reasonableness by not following the approach in *KO*.

- 16.** Ms Pal argued that if the judge erred by incorporating parental misconduct into the reasonableness test the error was not material as the same outcome would have been reached even if it had not been considered. I disagree. Reading the decision as a whole, it is apparent that the appellant's misconduct was a significant - although by no means the only - reason the judge reached the view that it would be reasonable to expect the appellant's son to leave the UK. I cannot discern from the decision whether, if the appellant's conduct had been excluded from the assessment of reasonableness, the judge would have reached the same conclusion.
- 17.** I reserved my decision at the error of law hearing. After doing so I invited the parties to make submissions as to how the appeal should be disposed of if I were to find there was an error of law. Both took the view that a decision could not be made relying only on the factual findings of the First-tier Tribunal and that the appellant should have an opportunity to give further evidence.
- 18.** Given the extent of further fact finding that is likely to be required in order to remake the decision, I have decided that the appeal should be remitted to the First-tier Tribunal to be considered afresh.

Notice of Decision

- 19.** The decision of the First-tier Tribunal in respect of the appellant's protection claim has not been challenged and stands.
- 20.** The decision of the First-tier Tribunal in respect of the appellant's human rights claim contains a material error of law and is set aside.
- 21.** The decision (in respect of the appellant's human rights claim) is remitted to the First-tier Tribunal to be heard afresh by a different judge.

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



Deputy Upper Tribunal Judge Sheridan

Dated: 7 March 2019