



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

Appeal Number: PA/12213/2018

THE IMMIGRATION ACTS

**Heard at Bradford
On 13 February 2020**

**Decision & Reasons
Promulgated
On 27 February 2020**

Before

UPPER TRIBUNAL JUDGE LANE

Between

**BT
(ANONYMITY DIRECTION MADE)**

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hussain

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 25 November 2019, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons for reaching that decision were as follows:

1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant was born in 1985 and is a female citizen of Cameroon. On 7 December 2016, she was convicted of the offence of assisting unlawful immigration into an

EU member state and was sentenced to 2 years in prison. As a consequence of her conviction and imprisonment, she became subject to the automatic deportation provisions of the 2007 Act. By a decision dated 28 September 2018, the Secretary of State refused her protection and human rights claims. She appealed against that decision to the First-tier Tribunal which, in a decision promulgated on 16 June 2019, allowed the appeal on Article 8 ECHR grounds but dismissed the appeal on asylum grounds (upholding the section 72 certificate) and on Article 2 and 3 ECHR grounds. The respondent now appeals, with permission, to the Upper Tribunal in respect of the Article 8 decision. There is no cross-appeal in respect of the decision on asylum, section 72 and articles 2/3.

2. There are two grounds of appeal. First, the respondent submits that the judge incorrectly recorded that the parties had agreed that the appellant is in a genuine and subsisting relationship with N (2005) UKHL 31, who is also citizen of Cameroon and who has indefinite leave to remain in the United Kingdom. The respondent submits that the decision letter made it clear that he did not accept that the relationship is genuine and subsisting and further that no concession in respect of the relationship was made by the Presenting Officer on behalf of the Secretary of State at the hearing before the First-tier Tribunal.

3. I accept that the decision letter disputes the nature of the relationship but, even if I were to accept that no concession was made at the hearing, I do not find that the judge has fallen into error such that her decision should be set aside on this ground. The judge heard evidence from the appellant and N and it is plain from her analysis that she accepted that the relationship is genuine. Indeed, I am satisfied that, had the judge been required to make a finding of fact as to whether the relationship is genuine, she would have made such a finding. I note that the appeal was allowed because the judge found that the invidious choice which N would have to make between accompanying the appellant to Cameroon or being separated from his British child in the United Kingdom amounted to an unduly harsh consequence of the appellant's deportation. I consider that the judge would not have reached that conclusion had she had any doubts as to the genuineness of the relationship.

4. The second ground of appeal is made on the alternative basis that, if the relationship is genuine and subsisting, then the judge had failed to give clear reasons for finding that the consequences of deportation for an would be unduly harsh. Both parties are agreed that undue harshness is correct the test (see section 117C(5) (Exception 2) of the 2002 Act (as amended) and that the Article 8 appeal will fail if the test is not been met. If Exception 2 does not apply, then it follows that the public interest concerned with the appellant's deportation must prevail.

5. I have above characterised this case as being concerned with an 'invidious choice.' It is clear that the judge found that would be unduly harsh to expect N to choose between his partner and his British daughter with whom he does not live but with whom he has regular contact. The judge found [61] that 'N faces effectively the severance of his current relationship as daughter or the severance with marriage; if the appellant is forced leave the UK. He expressed in strong terms his close connection with his daughter and how he felt he could not let her down by leaving the UK... I accept the strong bond between N and his daughter would be significantly impacted.'

6. In my view, an 'invidious choice' such as N faces in this appeal is capable of amounting to an unduly harsh consequence of deportation but the reasons for so finding must be detailed and clearly articulated. The judge has concentrated on the relationship between N and his daughter, a relationship which will only be adversely affected if N accompanies his wife to Cameroon. The alternative scenario is that N remains in the United Kingdom and his relationship with his daughter remains unaffected but he is physically separated from the appellant. The important question is whether that act of deportation will have an unduly harsh consequence for N. By going no further than identifying the invidious choice facing N and concluding that N would remain in the United Kingdom, the judge has stopped short of analysing whether the consequences for N being separated from the appellant would be unduly harsh; the judge appears to have taken for granted that they would be; she has not provided adequate reasons. Moreover, if the judge intended to find that the very fact that N is confronted by an invidious choice is per se unduly harsh, then such a finding does not emerge clearly from her decision. In circumstances, I find that the judge's analysis is flawed. I set aside her decision. The appeal will be determined following a resumed hearing in the Upper Tribunal. Only the appeal on Article 8 grounds remains to be determined; the other grounds will not be revisited. Both parties may adduce fresh evidence provided copies of any documentary evidence, including witness statements, are sent to the other party and to the Upper Tribunal no later than 10 days prior to the resumed hearing.

Notice of Decision

The decision of the First-tier Tribunal is set aside. The Article 8 ECHR appeal will be remade in the Upper Tribunal following a resumed hearing (Upper Tribunal Judge Lane; Bradford; 2 hours)

2. At the resumed hearing on 13 February 2020, I was informed by counsel for the appellant that the circumstances of the appellant's family had altered since the initial hearing. First, the appellant is now 16 weeks pregnant with her second child. Secondly, the appellant's husband has been naturalised as a British citizen; a consequence of naturalisation is that he has lost his citizenship of Cameroon where joint nationality is not recognised.
3. In the light of the changed circumstances of the family, Mr Diwnycz, who appeared for the Secretary of State, helpfully informed me that he did not invite me to uphold the decision of the respondent which is the subject of the appeal. I find that it would be unduly harsh for the appellant's husband to travel with her to Cameroon; he is no longer a citizen of that country and for him to be separated from his daughter in the United Kingdom with whom he enjoys a good relationship would be extremely problematic for him. Moreover, I find it would be unduly harsh for the appellant's husband to remain in the United Kingdom separated from the appellant and the British child of their marriage. In the circumstances, the appellant's appeal is allowed on human rights grounds (Article 8 ECHR).

Notice of Decision

The upper tribunal has remade the decision. The appellant's appeal is allowed on human rights grounds (Article 8 ECHR).

Signed

Date 13 February 2020

Upper Tribunal Judge Lane

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.