Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: HU/18806/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC
On 7 January 2020

Decision & Reasons Promulgated
On 18 January 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

OSAMUDIAMEN [E]

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Mr M Moksud, Lincoln Solicitors

For the Respondent: Mr A McVeety, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I indicated that I would allow the appeal but reserved my reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Nigerian national with date of birth given as 5.2.96, has appealed with permission to the Upper Tribunal against the decision of the First-

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tier Tribunal promulgated 12.3.20, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 5.11.19, to refuse his application for Leave to Remain in the UK on article 8 ECHR family and private life grounds as the father of a British citizen daughter (date of birth 7.8.16) and his relationship with a national of Sierra Leone having settled status in the UK.

2. Permission to appeal was refused by the First-tier Tribunal on 17.6.20. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Kamara granted permission on 30.7.20, considering it arguable that in view of the fact that there were ongoing Family Court proceedings, evidence from the Family Court would have assisted the judge, and the failure to invoke the Family Court Protocol left the judge to make assumptions about the progress of those proceedings and the quality of the appellant's contact with his British child.

3. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal. I have also received the respondent's Rule 24 reply, dated 21.8.20,

4. The appellant has sought to adduce further evidence from the Family Court, said to have been attached to a late-submitted fax sent to the Upper Tribunal on 4.1.21. However, no such attachment was provided with the single-page fax letter. The letter purports that the Family Court has authorised the disclosure of certain documents to the appellant's immigration legal representatives but prohibits the public disclosure. It is not clear from this whether authority has been given to make disclosure to the Upper Tribunal for the purpose of considering this appeal.

5. In any event, at this stage this appeal is limited to considering not whether the appellant has or has not been granted contact with his daughter, but whether the First-tier Tribunal erred in law in its handling of the issue of there being Family Court proceedings relevant to the issues before the First-tier Tribunal, including the extent of the appellant's family life with his daughter and her best interests. In the premises, at this stage I decline to consider any Family Court proceedings or related material that was not before the First-tier Tribunal and in respect of which it remains unclear whether the appellant is entitled to disclose the documentation to the Tribunal. As this matter is to be remitted to the First-tier Tribunal, for the reasons set out below, it will be open to the appellant to seek permission of the Family Court to disclose the materials and decisions he wishes to rely on, or for the First-tier Tribunal to invoke the Family Court Protocol, if deemed appropriate.

6. Contrary to the understanding of the judge granting permission, the First-tier Tribunal Judge was aware of and did consider the Family Court Protocol, as can be seen from the reference to the Protocol at [34] of the decision. The judge set out

from [31] onwards the very limited information provided to the Tribunal as to the progress of the appellant's attempt to obtain contact with his daughter in the face of opposition by her mother. The judge was told that a Cafcass report had been commissioned but that by the date of the First-tier Tribunal appeal hearing the appellant had not then been contacted for interview. I understand that report has now been completed, although I have not seen it.

7. At [34] of the decision, the judge found that the considerable delay in pursuing contact with his daughter seriously undermined the appellant's credibility. The judge concluded that the belated institution of an application for contact was motivated by an intention to delay or prevent his removal from the UK, rather than any genuine interest or commitment on his part. It was in those circumstances that the judge declined to invoke the Family Court Protocol. The judge then went on at [37] of the decision to observe that no evidence had been adduced to show that it was in the child's best interests to see the father she has not seen since May 2017, and then only briefly. Ultimately, the judge concluded that the appellant could not meet the requirements of the Rules in respect of either daughter or current partner, and in consideration of family and private life outside the Rules pursuant to article 8 ECHR, concluded that the respondent's refusal decision was proportionate to those rights.

8. At [34] of the decision the judge also referenced the guidance of RS (India) [2012] UKUIT 00218 (IAC), which held that, (i) Where a claimant appeals against a decision to deport or remove and there are outstanding family proceedings relating to a child of the claimant, the judge of the IAC should first consider: a) Is the outcome of the contemplated family proceedings likely to be material to the immigration decision? b) Are there compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interest of the child? c) In the case of contact proceedings initiated by an appellant in an immigration appeal, is there any reason to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare? (ii) In assessing the above questions, the judge will normally want to consider: the degree of the claimant's previous interest in and contact with the child, the timing of contact proceedings and the commitment with which they have been progressed, when a decision is likely to be reached, what materials (if any) are already available or can be made available to identify pointers to where the child's welfare lies? (iii) Having considered these matters the judge will then have to decide: a) Does the claimant have at least an Article 8 right to remain until the conclusion of the family proceedings? b) If so, should the appeal be allowed to a limited extent and a discretionary leave be directed as per the decision on MS (Ivory Coast) [2007] EWCA Civ 133? c) Alternatively, is it more appropriate for a short period of an adjournment to be granted to enable the core decision to be made in the family proceedings? d) Is it likely that the family court would be assisted by a view on the present state of

knowledge of whether the appellant would be allowed to remain in the event that the outcome of the family proceedings is the maintenance of family contact between him or her and a child resident here.

9. Although referencing RS, the First-tier Tribunal did not make a reasoned assessment of the above considerations. Clearly, the judge formed the opinion that the belated contact proceedings did not reflect a genuine interest in his young child, whom he had only briefly last seen in May 2017. However, the judge did not identify compelling reasons to exclude the appellant notwithstanding whatever the child's best interests might be. Neither did the judge overtly consider whether the outcome of those proceedings would likely be relevant to the article 8 private and family life considerations in the appeal against refusal of an application for leave to remain on article 8 grounds. Essentially, the judge jumped to the third consideration set out above and effectively disregarded the others.

10. Further, as the judge granting permission pointed out, paragraph 6 of the Protocol provides:

> *"It is not the role of judges in either jurisdiction to predict the outcome of the proceedings in the other jurisdiction. Where the decision in the Family Court is likely to be a weighty consideration in the immigration decision, it is anticipated that it will normally be necessary for the Tribunal to wait until the Family Court judge has reached a decision on the issue relevant to the immigration appeal. If so, either the appeal will be allowed by the Tribunal in anticipation of a short period of leave being granted or the hearing will be adjourned, depending on the anticipated timescale of the family proceedings."*

11. The facts of this case seem to fall entirely within the situation described above. I am satisfied that even on the limited information available to the First-tier Tribunal, the issue of contact was likely to be relevant to the issues in the appeal and a "weighty consideration in the immigration decision", so that the First-tier Tribunal should have either invoked the Family Court Protocol or, at the very least, awaited the outcome of the Family Court proceedings or further information from that court. This was not a deportation case and a further period of time whilst the contact proceedings were resolved would not seem unreasonable, given the relevance to the article 8 issues, including the best interests of the child. To his credit, in his submissions Mr McVeety accepted that there were no compelling reasons for removal regardless of the outcome of contact proceedings.

12. In the premises, and for the reasons summarised above, I find a material error of law in the decision of the First-tier Tribunal so that it must be set aside to be remade. I am conscious that I have not addressed the second ground of appeal, which relates to the appellant's relationship with his present partner. However, it would, in any event, be entirely artificial to preserve any part of the decision

where an overall proportionality assessment of family life considerations will be necessary; to do so would hamper a tribunal remaking the decision.

13. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiate all findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

14. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Decision

The appeal of the appellant to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside and remitted to the First-tier Tribunal, to be remade afresh with no findings preserved.

I make no order for costs.

I make no anonymity direction.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 7 January 2021