



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000411
First-tier Tribunal No:
PA/51030/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 December 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

AAD
(ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr M Madhani, CB Solicitors

For the Respondent: Mr P Lawson, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 8 June 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant is a national of Sudan. He claims to have arrived in the United Kingdom in November 2010. He made a claim for asylum that was refused by the respondent in June 2011. An appeal against that decision was dismissed by the First-tier Tribunal on 4 August 2011. He was granted permission to appeal to the Upper Tribunal. Upper Tribunal Judge Hanson found there to be an error of law in the decision of the First-tier Tribunal and he set that decision aside. He remade the decision and dismissed the appeal on 25 January 2012.
2. The appellant remained in the UK unlawfully. On 5 March 2019 he made further submissions to the respondent. The appellant maintained he is at risk upon return to Sudan and claimed that he has established a family and private life in the United Kingdom. The respondent refused the appellant's claims for reasons set out in a decision dated 17 February 2021. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Robertson for reasons set out in a decision dated 26 August 2021.
3. The appellant claims Judge Robertson erred in reaching her decision for reasons set out in grounds of appeal dated 27 September 2021. In summary, the appellant claims Judge Robertson failed to properly assess the implications of the refugee status of the appellant's partner (Eritrean) and children (born in the UK) when considering the relocation of the family together to the appellant's home country of Sudan. The appellant advances two grounds of appeal. Judge Robertson; (a) failed to ask the correct question, and (b) failed to take account of material matters. Permission to appeal was granted by Upper Tribunal Judge Pickup on 14 March 2022. He said:

"5. ... it is at least arguable that the refugee status of the partner and their children was given inadequate weight when considering the article 8 family life claim and the proportionality balancing exercise. It is at least arguable that refugee status accords an entitlement to a degree of stability in the host country."

The hearing before me

4. At the outset of the hearing before me, Mr Lawson confirmed the appellant's partner, who I refer to as SAM, is an Eritrean national who has been granted refugee status in the UK. The appellant's children who I refer to as D (the appellant's son, born 23.03.19) and A (the appellant's daughter, born 23.02.18) were born in the UK and have been granted refugee status in line with their mother. The appellant's partner had given birth to their third child, S, on 3 July 2021. The children are nationals of Eritrea.
5. The appellant claims Judge Robertson accepted it is in the best interests of the children to live with both their parents. The central issue in such a case is not with whom the children should live, but where they should live. The appellant claims it is in the children's best interests to reside in their country of birth where they are recognised as refugees, because they are a class of persons for whom stability is key. The appellant claims the promotion of stability and certainty in the affairs of refugees is a key tenant of the refugee convention and the assessment of the appellant's

family and private life should have been considered in that light. The appellant refers to the decision of the Upper Tribunal in *AH (Article 8 – ECO – Rules) Somalia* [2004] UKIAT 00027 and claims the fact of the appellant's partner and children being beneficiaries of refugee status was a material fact that gives a different complexion to the Article 8 claim.

6. Mr Madhani adopted the grounds of appeal and submits Judge Robertson failed to place significant weight upon the fact that the appellant's partner and children are refugees. He submits the evidence of the appellant's partner as set out in paragraphs [37(vi) and (vii)] of the decision was that she had previously spent three years in Sudan (2006 to 2009) and had been subjected to rape and abuse and her evidence was that she did not want to re-experience such trauma and she did not wish her children and husband to experience the same. Mr Madhani submits the essence of refugee status is to give the person a right to reside in the UK and the appellant's wife and children cannot be expected to join the appellant in Sudan.
7. In reply, Mr Lawson submits the appellant's partner and children have refugee status and cannot return to Eritrea. However Judge Robertson gives good reasons why the appellant, his partner and their children could live together as a family in Sudan. The Judge reaches a decision that was open to her for the reasons particularly set out at paragraphs 37(vii) to 37(xi) of the decision. The family can continue their family life together in Sudan.

Decision

8. The appellant's Article 8 claim is based upon his relationship with his partner and children. The appellant claims in his witness statement dated 17 May 2021 that he married SAM "religiously in Smethwick sometime in March 2017". There are three children of that relationship, all under the age of six. The appellant's partner and children are all nationals of Eritrea, and have been granted refugee status in the UK.
9. Although set out as two grounds of appeal, the appellant claims Judge Robertson erred in her assessment of the appellant's Article 8 claim, by failing to have regard to the fact that the appellant's partner and his children are recognised refugees in the United Kingdom.
10. Judge Robertson found that Article 8 is engaged on family and private life grounds. She found that it is in the best interests of the appellant's children to live with their parents, whether that is in the UK or in Sudan. She referred to the relevant public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002, and noted that the appellant's relationship with his partner was formed at a time when he was in the UK unlawfully, and that the private life established by the appellant was established when his immigration status is precarious.
11. Judge Robertson noted at paragraph [37(iii)] that other than the eldest child, A, having experienced some sinus difficulties that were treated in June 2021, there is no evidence of the children having any on-going health problems. She noted, at [37(iv)], that it is in the best interests of the

children to be with both parents, who have taken care of them and met their physical, emotional, social and educational needs, and will continue to do so wherever that may happen to be. At paragraph [37(v)], Judge Robertson rejected the claim that the appellant's partner would have difficulty caring for her children in the absence of the appellant.

12. At paragraph [37(vi) and (viii)], Judge Robertson referred to the evidence of the appellant's partner regarding the time that she had previously spent in Sudan between approximately 2006 and 2009. Judge Robertson accepted the appellant's partner may not want to go to Sudan, but said she had not established that she was ill-treated in the way she claimed. At paragraph [37(viii)], Judge Robertson noted the appellant has family in Khartoum including his mother, sisters, a wife and child. At paragraph [37(ix)] she noted the appellant was 35 years of age when he came to the UK, having spent much of his life in Sudan. He speaks Arabic and has no health concerns. She noted the appellant will be reunited with his family in Sudan on return. At paragraphs [37(x) and (xi)], Judge Robertson concluded:

“x. As to family life, I accept that the appellant is the partner of Ms SAM, and that they have three children together, and that the appellant has been in the UK since 2010. They met in 2017, and started to live together in the same year. They have both known throughout their time together that the appellant does not have leave to remain in the UK, and their family life was therefore formed in the full knowledge of the fact that he may be removed at any time.

xi. As the appellant (*sic [appellant's partner]*) has refugee status, even if I were to find that she is a qualifying partner, it is not established that there would be insurmountable obstacles to their continuing their family life in Sudan; the appellant is a Sudanese citizen, and there was no evidence before me that Ms SAM, as his partner, or their children would be refused entry to Sudan. Neither was there any reliable evidence before me to establish the reason given by her for her desire not to return to Sudan. Ms SAM stated in her witness statement that she was learning to speak Arabic (para 4, p119) as were her children. It is also recorded in her medical notes that she speaks “Arabic and Amaric (*sic*)” (p 131). It is therefore likely that she will be able to learn the language to enable her to communicate in Arabic in Sudan. No real physical or mental disability has been reliably evidenced, nor is it suggested that there are cultural or religious barriers to Ms SAM living in Sudan. On the facts found, I find that it is reasonable to expect her to go with her partner to Sudan. However, should she decide that she does not wish to, she would be in a position to provide care for the children. She does not have any reliably evidenced health reasons for not being able to do so, she speaks English, and she has sufficient English to have been able to communicate with the authorities to put in place nursery provision for the children, although I accept that the children will miss their father if he is removed and that maintaining contact via modern means of communication is not the same as having their father with them.”

13. Drawing the threads together, Judge Robertson summarised her findings at paragraph [40] of the decision and concluded at [41], as follows:

“Weighing up the various factors, I find that the rights of the appellant, Ms SAM and the children are outweighed by the considerable public interest in maintaining immigration control, and this includes the best interests of the children. It is open to the family to move to Sudan together and no reliable evidence was provided of very significant obstacles to their enjoying family life together in Sudan. In so deciding I have taken into account that Ms SAM stated that she has decided that she will not go to Sudan with the appellant, but given the facts as found, it is open to her to do so because their family life can be enjoyed in Sudan and a couple does (sic) not have the right to decide where they wish to enjoy their family life.”

14. The leading authority on section 55 remains *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. In her judgment, Lady Hale confirmed that the best interests of a child are “a primary consideration”, which, she emphasised, was not the same as “the primary consideration”, still less “the paramount consideration”. Judge Robertson accepted it is in the children’s best interests for them to remain with both parents wherever that may be. The appellant claims the central issue in this appeal is not with whom the children should live, but where they should live. It is said that it is in the best interests of the children to continue to reside in the UK, the country of their birth where they are recognised as refugees.
15. The fact that the appellant’s partner and children are nationals of Eritrea and have been granted refugee status was plainly a relevant factor in the analysis of the Article 8 claim. It is a factor that Judge Robertson plainly had regard to. The appellant relies upon the decision of Upper Tribunal in *AH (Article 8 ECO Rules) Somalia* [2004] UKAIT 00027. The observation made by the Tribunal at paragraph [14] that it cannot be right to approach the disruption to family life which is caused by someone having to flee persecution as a refugee as if it were of the same nature as someone who voluntarily leaves, or leaves in the normal course of the changes to family life which naturally occur as children grow up, was made in an altogether different context. The Tribunal there was concerned with a decision to refuse the appellant’s entry clearance to join their sibling and aunt, who had fled Somalia.
16. Here, there was no question that the appellant has a family life with his partner and children and that Article 8 is engaged. At paragraph [37(i)] of her decision the judge found that the appellant’s partner has refugee status and that the children have refugee status in line with their mother. Whilst I acknowledge that the grant of refugee status to the appellant’s partner and children entitles them to some stability and certainty, that is not to say that a choice made by the appellant and his partner to enter into a relationship when they both knew of the unlawful presence of the appellant in the UK and his precarious immigration status, was bound to outweigh the public interest in immigration control. The appellant’s partner and children will not be returning to Eritrea but on the findings made, can live with the appellant in Sudan. Judge Roberston noted the appellant’s partner had lived in Sudan previously for a period of about three years and rejected her claim that she was ill treated there in the way she claimed. She considered the claim made by the appellant’s partner

that she would not live in Sudan with the appellant. She concluded it is reasonable to expect the appellant's partner to go to Sudan or in the alternative, she can remain in the UK. It is clear in my judgement that reading the decision as a whole, Judge Robertson clearly had in mind the immigration status of the appellant's partner and children and whether it is in the best interests of the children to live with the appellant in Sudan, rather than the UK.

17. In any event, Judge Robertson found, should she decide she does not wish to live in Sudan with the appellant, SAM is in a position to provide care for the children in the UK. She accepted the children will miss their father but would be able to maintain contact with them albeit that would not be the same as having their father living with them.
18. Judge Robertson noted that the appellant has family in Sudan, including his mother, sisters and perhaps more importantly, a wife and child, to whom he would be returning.
19. It is now well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. An appeal before the Upper Tribunal is not an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, even surprising, on their merits. Here, the decision of Judge Robertson must be read as a whole. She gives adequate reasons for the findings she made. A fact-sensitive analysis was required. The findings and conclusions reached by the judge were neither irrational nor unreasonable in the Wednesbury sense, or findings and conclusions that were wholly unsupported by the evidence. Judge Robertson had proper regard to the immigration status of the appellant, his partner and their children. She did not consider irrelevant factors. The weight to be attached to the evidence either individually or cumulatively, was a matter for her. The conclusion reached by the judge was based on the particular facts and circumstances of this appeal and the strength of the evidence before the Tribunal. Where a judge applies the correct test, and that results in an arguably harsh conclusion, it does not mean that it was erroneous in law.
20. In my judgment, the grounds of appeal do not disclose a material error of law capable of affecting the outcome of the appeal.
21. It follows that I dismiss the appeal.

Notice of Decision

22. The appeal is dismissed. The decision of First-tier Tribunal Judge Robertson stand.

Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal

Case No: UI-2022-000411
First-tier Tribunal No: PA/51030/2021

Immigration and Asylum Chamber

10 November 2023