Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38373/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 31st March 2014	**On 30th April 2014**
	……

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

M L B

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Williams, Andrew Williams Solicitors
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Scobbie made following a hearing at North Shields on 11th December 2013.

Background

2. The Appellant is a national of Venezuela residing in Tenerife, born on 16 October 1968. His history is as follows. He met his partner, M H, a British citizen, in 2001 in Tenerife. In 2002 their baby daughter was born and she is now 10 years old and a UK citizen. Between 2003 and 2006 the Appellant established three restaurants in Tenerife and in 2006 M H decided to join the Appellant there. The restaurants subsequently ran into financial difficulty. In 2008 M H had a heart attack and decided that she should remain in the UK with her daughter.

3. The Appellant continued to work in Tenerife, continuing to visit his partner and child, and in 2013 decided to apply for leave to remain in the UK as a partner.

4. The judge considered whether the Appellant could succeed within the Immigration Rules and in particular whether he could benefit from paragraph EX1 but decided that he could not. He then considered Article 8. He accepted that there was family life between the Appellant, his partner and child and that refusal of the application would potentially interfere with that family life. He took into account the fact that the family had previously been content to live apart and noted that the circumstances had changed because the Appellant's daughter now wishes to live with her father. He said that the best interests of the child was to be with both parents. However he also had to take into account other factors and said that the visits could continue in the future if the Appellant returned. He noted that the Appellant's partner was now earning in excess of the minimum requirement under the Rules and if they married he would have the option of applying for entry clearance in the normal way. On that basis he dismissed the appeal.

The Grounds of Appeal

5. The Appellant sought permission to appeal on the grounds that the judge had failed to correctly apply EX1 and had failed to properly assess the proportionality of the decision. There was no real consideration of Section 55 of the 2009 Act nor of the case of ZH (Tanzania).

6. Permission to appeal was granted by Judge Kimnell on 28th January 2014.

7. On 15th February 2014 the Respondent served a reply defending the determination.

The Hearing

8. Sabir [2014] UKUT 63 is determinative of the issue with respect to the Immigration Rules. Sabir held that it was plain from the architecture of the Rules as regards partners, that EX1 is parasitic on the relevant Rule within Appendix FM which otherwise grants leave to remain i.e the structure of the Rules as presently drafted requires it to be a component part of the leave granting Rule.

9. Since the Appellant was last granted leave to enter the UK as a visitor he does not comply with E-LTRP.2.1. Furthermore he has not been living with his partner in the

two years prior to the date of application and therefore does not meet the definition of partner as set out in GEN.1.2.

10. Whilst the judge's determination could have been a little clearer at paragraph 32, he reached the correct conclusion at paragraph 33 and was right to say that the Appellant cannot succeed under Appendix FM.

11. There is more merit in the argument relating to Article 8.

12. Whilst the judge states that it is in the best interests of the child to be with both parents and he accepted that it would not be ideal for the Appellant to continue to visit her from Tenerife, in reaching his overall conclusion that removal would be proportionate the judge did not take into account the evidence from the school and the family doctor who state that continuing separation was having a significant adverse affect on the daughter's welfare.

13. At page 63 of the bundle there is a letter from Meanwood Church of England Primary School which states that, since the refusal there has been a worrying decline in the Appellant's daughter S. The head teacher writes as follows:

> "She has been very tearful, very unhappy with everything, found it hard to concentrate and seems unable to cope. ... S has been in more arguments with her classmates and has been far more confrontational. This really isn't S's usual conduct. We worry that this is going to impact on S's long-term emotional health and have no doubt that the underlying problem is the uncertainty around her father's status. Staff are working really hard to support S emotionally in ways we have never had to before. ... It is only by the staff keeping her on task all the time that S is maintaining her current academic levels. Previously we have never had to cajole S into doing her work but she seems to have no concentration whatsoever at the moment. She also seems to lack motivation and interest, her response being tears when staff ask her why she hasn't completed a task. I sincerely hope that S's father will be able to remain in the UK. The impact on his daughter is already so sad for us as staff who have known her for a very long time to see."[1]

14. There is also a letter from the Meanwood Group Practice in relation to the daughter. Dr Hayes writes:

> "The stress caused to S by not having her father as a regular presence is significant. S has had problems with bedwetting when he is away and having to constantly readjust to the changes in her home situation affects her mood and behaviour. If M were to have his application rejected then his only option would be to move back to Venezuela. This would obviously not be the best outcome for the family as a whole and I would have serious concerns about the effect this might have on S and M's mental health."

15. In failing to take account of relevant evidence the judge erred in law. The decision is set aside.

16. The best interests of the child in this case are clear. Absent countervailing factors, they should normally be followed (ZH (Tanzania) UKSC 4). There are none here. The Appellant has complied with the requirements of immigration control at all times. There would be no economic detriment to the UK by his remaining here since his partner earns over £23,000. The circumstances in his case are highly unusual, and this is a very longstanding relationship. Although the reasons for refusal letter makes reference to the ability of the child to settle in Venezuela and to go to school there, sensibly neither the Presenting Officer at the hearing before Judge Scobbie nor Mr Diwnycz pursued that line of reasoning. S is a British citizen who has right to enjoy the benefits which her citizenship entitles her to, including being educated in the UK. Chikwamba remains good law and it is difficult to see what purpose could be served by requiring the Appellant to return to Venezuela to make an application for entry clearance which on the facts is very likely to succeed. When balanced against the clear best interests of the child, it would be disproportionate to require him to do so.

Decision

17. The original judge erred in law. His decision is set aside. It is remade as follows. The Appellant's appeal is dismissed with respect to the Immigration Rules and allowed under Article 8.

18. An anonymity order is made.

Signed Date

Upper Tribunal Judge Taylor