



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)**

**APPEAL NUMBERS: OA/02658/2014
OA/02659/2014**

THE IMMIGRATION ACTS

**Heard at: Field House
On 20 August 2015**

**Decision and Reasons Promulgated
On 21 September 2015**

Before

Deputy Upper Tribunal Judge Mailer

Between

ENTRY CLEARANCE OFFICER: RIO DE JANEIRO

Appellant

and

**MR MOISES ROLANDO SANDOVAL
MR FRANKLIN ARON MORON SANDOVAL
NO ANONYMITY DIRECTION MADE**

Respondent

Representation

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer

**For the Respondent: Mr A Mackenzie, counsel, instructed by Southwark Law
Centre**

DETERMINATION AND REASONS

1. I shall refer to the appellant as “the entry clearance officer” and to the respondents as “the claimants.”
2. The claimants are nationals of Bolivia, who applied for entry clearance to enter the UK as the children of their mother, who held discretionary leave to remain in the UK

until 16 May 2015¹. The claimants were born on 9 January 1998 and 6 November 1999 respectively.

3. They both appealed against the entry clearance officer's decision dated 10 January 2014 refusing their claims for entry clearance to the UK with a view to settlement as the child of a parent having limited leave to remain in the UK under paragraph 301 of the Immigration Rules. In each case the notice of refusal was identical.
4. In a determination promulgated on 9 April 2015, First-tier Tribunal Judge Iqbal dismissed their appeals under the Immigration Rules but allowed them under Article 8 of the Human Rights Convention.
5. On 3 June 2015 First-tier Tribunal Judge Brunnen granted the entry clearance officer permission to appeal, finding that the grounds were arguable.
6. In her decision Judge Iqbal set out the immigration history of the claimants referred to in the notices of refusal. Their sponsor attended the hearing and gave evidence.
7. Mr Mackenzie, who represented the claimants before the first-tier Tribunal, accepted that they were unable to satisfy the immigration rules. Judge Iqbal therefore went on to consider their circumstances with reference to Article 8 of the Human Rights Convention. She directed herself in accordance with Razgar.
8. She considered family life between the claimants and their mother. She referred to Berrehab v Netherlands [1989] 11 EHRR 322 at [21]. She found that the claimants and their mother do have a family life. She answered the next three questions affirmatively.
9. In considering the proportionality of the interference she took into account the determination of First-tier Tribunal Judge Mayall promulgated on 22 February 2012. That was an appeal by the claimant's mother and two children, who were Bolivian nationals, who were then aged 16 and 9 years respectively.
10. They appealed against the decision of the secretary of state refusing their applications for leave to remain in the UK as well as the decision to remove them from the UK.
11. Having taken into account the facts of the mother's case as well as the best interests of her two children and in particular her son, Luis, who was eight and a half years old at the date of application, Judge Mayall found that the removal of the family would be a disproportionate interference with their Article 8 rights and allowed the appeal. All three were subsequently granted discretionary leave.
12. Luis was born in the UK and was granted British citizenship by virtue of being registered and having reached the age of 10 - [30].
13. Judge Iqbal found that the mother and her two children have lives which are fully integrated in the UK and it would not be reasonable to expect them to relocate to Bolivia to establish family life with the sponsor's two children there [30].

1 At the hearing I was informed that the mother's leave to remain has now been extended to 22 July 2018

14. The Judge accepted on balance that the claimants' grandmother's health is deteriorating and more recently she required surgery following the loss of her eyesight. Her medical history was fully documented in various reports the basis of which she accepted [31]. The claimants' aunt, whom the entry clearance officer had asserted was the other carer of the claimants, had suffered a heart attack and stroke in August 2013. She was admitted to hospital for over a week and it took a while for her to recover from this. She was unable to help the children's grandmother in caring for them. She found that it would be difficult to expect her to continue to care for the claimants as she had done in the past [32].
15. She found that the lack of proper carers for the claimants was even more important in the light of the fact that Moises appears to suffer from epilepsy, as supported by medical evidence which she set out at [33].
16. There were also recent developments regarding Franklin's biological father who was not a good role model and was recently released from prison. That evidence came from the sponsor, whom the Judge found to be credible. Whilst he had not officially been registered as Franklin's father, he was harassing the sponsor and attempting to become involved in Franklin's life. She feared that he was going to take Franklin. He was known to be violent as well and was involved in drugs, which is another reason why she wished to remove her children away from the influences in Bolivia [34].
17. The Judge also considered a report dated 7 February 2015 of an independent social worker, who analysed the effects of a lengthy separation from their mother. The current arrangements for their care in Bolivia were stated to be precarious, linked to the health problems of their grandmother and aunt; the threat of Franklin's father and concerns about the true nature of Moises's health condition [35].
18. The children were desperate to be reunited with their mother and siblings. It was his professional opinion that it is in the best interests of all the children of the family that the claimants be reunited with their family. The Judge found that these amounted to important considerations to be weighed in the balancing act [35].
19. The Judge also accepted that the sponsor's private life had further developed and that she was in a relationship with a British citizen who has two British children. They have been living together for a year and a half and were considering marriage. This would create further obstacles in family life continuing outside the UK [36].
20. Whilst noting that the sponsor is on benefits, and there may well be additional recourse to public funds with the addition of the claimants, she considered the best interests of the children, referring to the guidance in T (Entry Clearance – s.55 BCIA 2009) Jamaica [2011] UKUT 483 (IAC).
21. She considered that the starting point must relate to the best interests of the children to be with one or more of their parents. On the facts of this case, the claimants were left in the care of the sponsor's mother and sister who were not in a position to continue that care 'for quite serious reasons' that had been set out. She found that on balance, these boys who still have family life with their mother ought to be cared for by her [38].

22. The Judge had regard to the provisions of s.117B of the Immigration Act 2014 which she set out in full. Having considered the totality of the factors, she found that they weighed in favour of the claimants and that the refusal of entry clearance accordingly constituted a disproportionate interference. She set out the basis for that conclusion at [41-42].
23. In seeking permission to appeal to the Upper Tribunal the entry clearance officer raised two grounds. The first challenged the Judge's finding that family life existed between the claimants and their mother in the UK. It was contended that Berrehab also found that subsequent events may break the tie between the mother and her children. It was noted that the appellant in that appeal saw his daughter four times a week for several hours at a time, showing that he "valued them very greatly". With regard to the first ground, it was contended that unlike Berrehab, the instant appeal disclosed no such frequency of contact.
24. The Judge had referred to there being evidence of ongoing interaction but does not state what forms these interactions take, nor their frequency. Accordingly it had not been demonstrated that family life exists between the parties as claimed.
25. It was also contended that the Judge failed to explain how the claimants' mother is integrated into the UK or why she could not return to Bolivia to be with her children, the claimants. It is contended that the Judge's assessment of reasonableness "...is absent of any due regard for the public interest (i.e. proportionality), and fails to establish how the sponsor and her children are integrated into UK society, nor reasons against comparable private life being established in Bolivia."
26. Ms Isherwood relied on the entry clearance officer's grounds. She emphasised that the facts in Berrehab were different. There the father had status in the Netherlands. He lost status and was deported.
27. She submitted with regard to the findings relating to the Bolivian carers that the aunt when interviewed stated that she was working. The Judge did not pay sufficient regard to the reasons for refusal letters.
28. Ms Isherwood relied on the decision of the Court of Appeal in SSHD v SS (Congo) and others [2015] EWCA Civ 387. In the current appeal, the sponsor had left the children in Bolivia some 12 years ago. The claimants were 14 and 15 at the date of the application.
29. She also submitted that weight is to be given to the fact that the claimants cannot meet the requirements under the rules. The Judge had failed to consider the nature of the family life, having regard in particular to the gap of the separation between them and their mother.
30. She referred to [39 iii] in SS (Congo), where the Court stated that in deciding whether to grant leave to enter to a family member outside the UK, the state authorities may have regard to a range of factors, including the pressure which admission of an applicant may place upon public resources, the desirability of promoting social integration and harmony and so forth. Refusal of LTE in cases where these interests may be undermined may be fair and proportionate to the legitimate interests identified in Article 8(2) of "the economic well being of the

country” and “the protection of the rights and freedoms of others” (taxpayers and members of society generally).

31. A court will be slow to find an implied positive obligation which would involve imposing on the state significant additional expenditure which will necessarily involve a diversion of resources from other activities of the state in the public interest, a matter which usually calls for consideration under democratic procedures.
32. The court went on to state at [39 iv] that on the other hand, the fact that the interests of the child are in issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the State authorities would otherwise enjoy. Article 8 has to be applied in the light of the UN Convention and the rights of the child.
33. Ms Isherwood noted that SS (Congo) was only published on 23 April 2015, several weeks after the promulgation of the decision under appeal.
34. She asked with regard to ground 1 “where can it be seen that the Judge has addressed the element of family life in these circumstances?”
35. With regard to ground 2, she emphasised that the sponsor and her children in the UK only have discretionary leave and are thus here in a temporary capacity. In reaching a conclusion on matters including the weight to be given to the public interest, there was not a balanced consideration of both sides and in particular the weight that needs to be given to the public interest.
36. She referred to the entry clearance manager's report where it was noted that in the interests of fairness, the ECO took into consideration the claimants' allegations and circumstances at the time of the applications and referred the cases to RCU to be assessed whether there might be sufficient evidence to warrant issuing outside the rules. The decision was thus put on hold pending a decision by RCU and the outcome was to maintain the refusal.
37. She accordingly submitted that the claimants' appeals should have been dismissed.
38. Mr Mackenzie in reply submitted that there has been an attempt to raise new grounds relating to the failure to give a proper balance so as to provide sufficient weight to the public interest. No permission had been sought and no permission had been granted. Although he objected to their permission, he nevertheless contended that the grounds were “not meritorious.”
39. Mr Mackenzie submitted in conformity with the Rule 24 response that the claimants' mother was granted discretionary leave to remain on 16 May 2012 following a successful appeal against removal. Her other children, born in 1996 and 2003, were also granted discretionary leave in line with their mother. Luis has subsequently been registered as a British citizen.
40. He contended that ground 1 amounts to no more than a disagreement with the decision properly reached. There was voluminous evidence of contacts between them. Over 300 pages were produced in the claimants' bundle. There was in addition the report.

41. The Judge did explain the basis upon which family life was continuing at [42]. There was a proper evidential basis for justifying that finding. She had additional regard to regular contact, including some visits by the sponsor, demonstrating the nature of the relationship between them. Accordingly, it is not correct to assert that family life had been severed since their mother came to the UK.
42. With regard to ground 2, he again submitted that this amounted to re-arguing submissions that had been rejected by the First-tier Tribunal. He relied on the earlier decision of Judge Mayall that it would be unlawful to require the sponsor to return to Bolivia as referred to at [29] of Judge Iqbal's judgment. In the earlier decision, it was accepted that the best interests of the UK based children and in particular, Luis, outweighed the interests of immigration control. The Judge was accordingly bound to follow and apply that conclusion.
43. He also referred to the fact that Judge Brunnen did not even mention this ground in the grant of permission. However, the entry clearance officer is not precluded from pursuing it.
44. The contention for the first time that the Judge was not entitled to take into account the fact that Luis was granted British citizenship which post dated the date of decision was not a material error in the circumstances. The Judge has given a full decision regarding the interests of the claimants to join their mother in the UK.
45. With regard to the entry clearance officer's public interest grounds, he submitted that the Judge dealt with these considerations adequately at [41]. She is obliged to take into account the factors set out in the legislation. The entry clearance officer however simply disagrees with the conclusion reached. It cannot be said that the Judge failed to address the public interest considerations or that she failed to realise that this was an entry clearance case.

Assessment

46. The entry clearance officer has advanced two grounds of appeal which I have set out. The first issue raised is whether the First-tier Tribunal wrongly held that family life existed between the claimants and their mother in the UK. The contention is that it had not been demonstrated that family life exists between the parties as claimed, having regard to the absence of evidence relating to frequency of contact. Although the Judge referred to evidence of ongoing interaction, the form those interactions took, by way of letters, texts, Skype, etc. nor their frequency was addressed.
47. I have considered the evidence available to the Judge as set out in the bundle of evidence before her, which contained over 300 pages. The Judge stated at [42] that she has considered the totality of the documentary evidence and has found that it does demonstrate the nature of the relationship between the claimants and their mother.
48. Although she has not set out in detail what that evidence constituted, she has referred to an examination of the bundle before her. The evidence considered from the bundle included a report from Peter Horrocks, an independent social worker, dated 7 February 2015. The report is almost 40 pages in length (bundle tab 2, pages 340-379). The social worker noted that in about May 2013, one of the carers suffered

from a heart attack and a stroke, leaving her partially paralysed. In September 2013, the mother went to Bolivia with her child, Andrea, for a month in order to apply for their visas to come here. The social worker had also undertaken detailed telephone interviews with the claimants on 24 January 2015. Both confirmed that they wished to come to the UK to join their mother, brother and sister. The sponsor stated that in Bolivia she pays for Moises to have private medical treatment. She currently pays \$150 a month for his medication.

49. The social worker has set out his final conclusions and recommendations at 5.3 and 5.4. The claimants' situation is one of insecurity; they have suffered from the lengthy separation from their mother and although they have different needs in terms of their functioning, a uniting factor is the need for them to live together with their mother for at least a period of their childhood.
50. Current arrangements for their care in Bolivia are precarious, partly related to health problems of their grandmother and aunt, but also linked to the threat of Franklin's father and concerns about the true nature of Moises' health condition. The claimants are willing to accept the challenges to learn English and to adapt to life in the UK.
51. There are also records of money transfer receipts to the claimants. There are Facebook messages between the sponsor and the first claimant for the period 28 August 2011 to January 2015 as well as Facebook messages between her and the second claimant from 4 August 2011 to 2 August 2014. There are "What's App" messages between her and the first claimant between August 2011 and January 2015. There are also mobile records produced for the period January 2014 to January 2015 relating to calls to the claimants which have been marked with an asterisk. The electronic communications are from pages 27 to 339.
52. In addition, the social worker report referred to ongoing emotional ties between their mother and the claimants. The Judge has confirmed that she had taken account of all the documentation before her.
53. I have also had regard to the ECM report which asserted that the claimants have provided no evidence to suggest that their mother had supported either of them in any substantial way, either financially or emotionally. Nevertheless, the ECM took into consideration the claimants' allegations and circumstances appearing at the date of application and referred the cases to RCU to assess whether there might be sufficient evidence warranting the grant of permission outside the rules.
54. The conclusion was that whilst there may be a perceived interference of their Article 8 rights, this is justified for the purposes of maintaining an effective immigration control and is proportionate.
55. There appears at least to be an implied acceptance that family life did exist, otherwise the need to justify "the perceived interference" would not be relevant.
56. I accept the submission of Ms Isherwood that the Judge has only given brief reasons for her conclusions regarding the family life. There was nevertheless considerable evidence which she took into account in making that finding; the evidence demonstrated regular contact by telephone, social media, as well as

financial support and a trip to Bolivia shortly before the entry clearance applications were made.

57. I conclude therefore that the entry clearance officer's first ground of appeal is not made out.
58. Insofar as the second ground is concerned, the position is, as submitted by Mr Mackenzie, that Judge Mayall had already decided in or about February 2012 that it would be unlawful to require the sponsor and her children to return to Bolivia. He accepted that the best interests of the UK based children and in particular Luis outweighed the interests of immigration control.
59. In those circumstances, it is not surprising that Judge Iqbal followed and applied that conclusion.
60. The ground asserts that the Judge's assessment of reasonableness fails to establish how the sponsor and her children are integrated into UK society.
61. However, their Article 8 claims had been upheld in 2012. There has been no change in their circumstances. The sponsor attended the hearing before the First-tier Tribunal and gave evidence. She had set out her position with regard to her integration into the UK in her evidence.
62. I accordingly find that the Judge was entitled on the evidence before her to conclude as she did that their mother could not reasonably be expected to return to Bolivia to be with the claimants.
63. Insofar as the ground raised during the course of the hearing regarding the public interest, I find that the Judge has had proper regard to s.117B and has concluded that they weigh in favour of the claimants.
64. She noted that whilst individuals who are unable to speak English or may not be financially independent and may constitute an additional burden on the taxpayer is to be considered, she nonetheless found on balance that these matters in themselves do not weigh in favour of the public interest. As to their ability to speak English, they are children, and the progression of their sibling Andrea after her arrival in the UK, through college and school, constitutes a testament to what they may be able to achieve in the future.
65. The findings of the Judge Iqbal are sustainable and were open to her on the evidence presented. The decision is neither irrational or perverse.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any material error of law. The decision shall accordingly stand.

No anonymity direction is made.

Signed

Date 18 September 2015

Deputy Upper Tribunal Judge Mailer