



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01259/2017

THE IMMIGRATION ACTS

Heard at Field House
On 19 March 2019

Decision & Reasons Promulgated
On 9 April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

DAMSEL [H]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Wilcox of Counsel, J M Wilson

For the Respondent: Mr E Tufan, HOPO

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Watson dismissing her appeal against the refusal of the respondent to grant her leave to remain on Article 8 human rights grounds.
2. The appellant is a citizen of Jamaica born on 17 March 1970. She came to the UK as a visitor in 2002. She has been living with Omar [T] as an unmarried partner. Mr [T] has a British child from a previous relationship and he has regular contact with that child. The appellant's case is that she is the main carer for that child on those contact

visits and Mr [T] would not be able to exercise his frequent contact to the child if the appellant was not here to help look after the child. The child has a wonderful relationship with the appellant who is effectively a second mother to the child. The relationship is completely genuine. It cannot be in the interests of the child who is British to leave the UK and therefore the appellant must stay in the UK to exercise her right to family life with her genuine partner and his child. It is not in the child's interests for the appellant to have to leave the UK. The decision of the respondent is disproportionate.

3. The judge said that with regard to the Rules the issue in dispute is whether there are insurmountable obstacles to family life with the partner outside the UK. The relationship is accepted as genuine and it is the position of the partner's child that forms the cornerstone of the appellant's case. If the partner were to move to Jamaica so that family life were exercised outside the UK, the child would be adversely affected and would lose her life with her father and this is not in her interests. She would also lose her very close ties to the appellant who is effectively her stepmother.
4. The judge had the court order regarding [O] dated 29 April 2016. This makes a Child Arrangements Order which includes provisions for the child to be taken abroad with the consent of the other parent and gives alternate weekend contact and half school holidays to Mr [T]. The judge held that this was consistent with the claims made by the appellant that Mr [T] has had regular contact with his daughter who was age 7 from 2016.
5. The judge had a wage slip for Mr [T] for February 2018 showing 47 hours worked in the month and wages of £375. The judge held this was consistent with his claim to work two and a half hours a day as a cleaner. The bank statement for Mr [T] showed his wages were paid in and regular maintenance of £30 per month for his daughter.
6. The judge found both the appellant and her partner's oral evidence to be exaggerated and unreliable in many ways. For example, the partner claimed he would not be able to have contact with his daughter as the appellant was needed to wash the child and do her hair and even cook for her as he was unable to do any of that. The judge did not accept this. On cross-examination Mr [T] confirmed that he had two sisters but claimed they would be unable to help him as one worked and the other was disabled. The judge said the appellant only mentioned one sister and the judge found that the appellant was being untruthful in this. The couples' claim that Mr [T] was unable to cook for his daughter and feed her was rejected by the judge as untrue. Mr [T] referred to his daughter being mature and could give no reason why she would be unable to bath herself if it was inappropriate for him as a man to assist. The judge found that the appellant's presence in the UK was not required for [O] to have contact with her father.
7. The judge said he had read the letter of [O] which explains her affection for the appellant. The judge accepted that [O] is fond of the appellant and that the appellant looks after [O] for the few hours that Mr [T] is at work on contact days. Mr [T] gave

evidence that he worked from 5 to 7.30 in the evening. The judge found that it was in the interests of [O] for the current arrangements to continue as stability was normally in the best interests of a young child. However, the judge found that [O] would be able to continue to have contact with her father in the appellant's absence and that other arrangements could be made to ensure this continued to happen. He again repeated that the appellant's presence was not necessary for the child to continue to have contact with her father. Whilst the judge found that [O] may miss the appellant should she return to Jamaica, she would continue to live with her own mother and see her father and other relatives and that her situation would continue to be stable in this way and that her welfare would not be significantly harmed by the absence of the appellant. [O] has not been shown to have any special needs or vulnerabilities.

8. The judge noted that Mr [T] gave evidence that the appellant has family including her mother in Jamaica and that he has family in Jamaica. The judge found that the appellant has contacts and family in Jamaica who can give her some emotional support on her return and that she has not shown that she will be alone or destitute. She will be able to remain in contact with Mr [T] through modern media and with [O] if she wishes.
9. The judge found that the appellant's partner was fully aware of her status and entered into the relationship in the knowledge that she had no right to be in the UK. The judge found that the appellant had made no attempt to regularise her stay in the UK until the application made in 2016 after Mr [T] had obtained his court order.
10. In conclusion the judge accepted that the appellant has a genuine relationship with Mr [T]. If Mr [T] wishes he can move to Jamaica to be with the appellant. He has a relationship with his daughter who lives with her mother. The daughter could visit him in Jamaica and they can maintain contact. Whilst he may not wish to leave his daughter in the UK, her presence is not an insurmountable obstacle to family life of the couple taking place outside the UK. His daughter's welfare and interests is something that he will take into account when making a choice as to whether to move to Jamaica. The judge found that the appellant does not satisfy EX.1 as a partner.
11. With respect to private life under paragraph 276ADE, the judge found that the appellant has not lost all contacts and knowledge of her homeland. She has no particular health problems that would prevent her from looking after herself in Jamaica. She has not shown very significant obstacles to integration and does not satisfy Rule 276ADE(vi).
12. The judge then considered whether the respondent's decision was disproportionate. The judge found that the appellant does not satisfy the Immigration Rules. The judge questioned whether there were any compelling or exceptional reasons to look outside the Rules. The judge found that there was nothing in the appellant's situation that his consideration of the Rules above have not taken into account.

13. The judge held that the appellant has not shown that she is self-sufficient and stated that she relied upon Mr [T]. This weighed against her. The appellant has been in the UK since 2002 after a short period as a visitor. She has been here unlawfully and made no attempt to make any application for lawful status. Any private life she has built up has occurred when she has been here precariously. The judge gave the private life little weight. The judge found that she entered into her relationship with her partner when she was here unlawfully. The partner has always known about her status and the relationship they have had in the UK has been in that full knowledge. The judge gave the relationship little weight on that basis. The judge found that the relationship can continue outside the UK if that is the decision that the couple make. Alternatively, they can communicate through Skype and other means.
14. The judge held that the appellant can make an application to enter under the Rules if she is in a position to do so in the future. The child [O] is of course affected by the decision and the judge found that it is in her interests that the current situation remains as it is. However, the judge found that [O] will not be so adversely affected by the appellant's removal that the appellant's presence is necessary for the child's wellbeing. In view of the blatant disregard of the UK immigration laws and the fact that the child's main home will not be affected by the decision, the judge found that the child's welfare, which is a primary consideration but not the only consideration, does not require that the appellant remains in the UK. The public interest in firm and fair immigration control is met by the appellant's, who has shown such disregard for the UK laws, removal. In all the circumstances the judge found that the decision to refuse leave was proportionate.
15. Mr Wilcox submitted that there was no proper consideration of EX.1 by the judge. He said there are clearly insurmountable obstacles to the appellant continuing her relationship with her partner were she to be removed to Jamaica. The insurmountable obstacle is that her partner has parental responsibility for his child and ongoing contact rights which he exercises with the child which he would not realistically be able to exercise were he to relocate to Jamaica. The important consideration is that he would not have direct and continued regular contact with the child which is mandated in a court order. The judge found it would not be in the child's best interests to disrupt the current arrangement which includes the way in which the appellant facilitates the ongoing contact that the child is able to have with her father. Mr Wilcox submitted that for that to happen it would require the appellant's partner to be with the appellant. For that not to happen would amount to an insurmountable obstacle for the application of EX.1.
16. Mr Wilcox further argued that in consideration of proportionality outside the Rules, the judge made a clear error. He submitted that **Ruppiah** says that it is not in the public interest in terms of Section 117B(5) if such an arrangement does not violate the requirement of self-sufficiency in the way that the judge stated.
17. Mr Tufan said that Mr Wilcox was right about **Ruppiah** but argued that the point raised therein is a neutral factor in Section 117B.

18. Mr Tufan said the situation is this, the appellant's partner has a child he has contact with on alternative weekends and half school holidays. The judge considered this evidence and found that other arrangements could be made. Mr Tufan submitted that the appellant has not stepped into the shoes of [O]'s mother. He relied on the Tribunal's decision in **R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship")** IJR [2016] UKUT 0031 (IAC). The Tribunal in its headnote 2 held:

"2. Whether a person who is not a biological parent is in a 'parental relationship' with a child for the purposes of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 depends on the individual circumstances and whether the role that individual plays establishes he or she has 'stepped into the shoes' of a parent."
19. Mr Tufan submitted that the judge considered the best interests of the child and made detailed findings on that issue.
20. Mr Tufan submitted that the judge found that the appellant can go to Jamaica and make an entry clearance application. He relied on **Chen** and **Agyarko** which he said confirmed that if need be an entry clearance application can be made. He relied on **SB Bangladesh** which held that the outcome of an entry clearance application is not a consideration in the proportionality exercise. Mr Tufan submitted that there would be no unjustifiably harsh consequences for the child if the appellant were to be removed to Jamaica. He submitted that the judge's decision disclosed no material error of law.
21. I found no error of law in the judge's decision. I find that judge properly considered whether there were insurmountable obstacles to the appellant continuing her relationship with her partner were she to be removed to Jamaica. I find that the judge cleared considered the contact order and the arrangement within that court order for the appellant's partner to have the child on alternate weekends and half school holidays. The judge found that the appellant's presence in the UK was not required for [O] to have contact with her father. Alternatively, the judge found that other arrangements could be made for the care of the child. In any event, applying **RK**, I find that the appellant has not stepped into the shoes of [O]'s mother. I agree with the judge's finding that [O] will continue to live with her own mother and that her situation will continue to be stable in this way and that her welfare will not be significantly harmed by the absence of the appellant. Therefore, I find that the contact order and the appellant's partner's relationship with [O] does not amount to an insurmountable to their relationship continuing were she to be removed to Jamaica.
22. The judge properly found that the appellant can go to Jamaica and make an entry clearance application to join her partner in the UK. I find that the outcome of an entry clearance application is not a consideration in the proportionality exercise. Therefore, the appellant should be able to make the application when her partner's circumstances change, and he is able to support her application.

23. The judge's finding that it is in the interests of [O] for the current arrangements to continue as stability is normally in the best interests of a child does not materially undermine the overall findings made by the judge. The point raised in **Ruppiah** is a neutral factor in Section 117B.
24. I find that the judge's decision is well reasoned and sound. The decision does not disclose an error of law.

Notice of Decision

25. I find that on the evidence the judge's decision dismissing the appellant's appeal should stand.

No anonymity direction is made.

Signed

Date: 3 April 2019

Deputy Upper Tribunal Judge Eshun