Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14332/2018

THE IMMIGRATION ACTS

Heard at Field House
On 15th May 2019

Decision & Reasons Promulgated
On 26th June 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

LUIS [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr P V Thoree, Thoree and Co, Solicitors.
For the respondent: Ms S Jones, Senior Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is a national of Ecuador. He came to the United Kingdom on 21 August 2017 on a six-month visit Visa, valid to 29 May 2018. On 3 May 2018 he applied for further leave so as to remain here with his British wife and child. They had been living with him in Ecuador and arrived here around the same time. The couple had been together since 2008 and married on 21 August 2017.Their daughter [D] was born in Ecuador on 15 May 2015.The

appellant's parents remain in Ecuador. His wife's parents originally lived there and are settled in London in a property they share with the appellant and their daughter and granddaughter.

2. His application was refused on 18 June 2018. The relationships were accepted as genuine and subsisting. However, he could not meet the eligibility requirements of appendix FM because he was here on a visit Visa. Furthermore, his wife had provided insufficient evidence to confirm her earnings met the financial requirements. He also did not have the necessary English test. The respondent took the view that he could return to his home country and then reapply.

The First tier Tribunal

3. His appeal was heard by First-tier Tribunal Judge Pedro at Hatton Cross on 4 February 2019. Mr Thoree appeared for the appellant then as he does now. In a decision promulgated on 18 February 2019 the appeal was dismissed. Mr Thoree accepted that the appellant did not meet the requirements of Appendix FM and was not seeking to rely upon paragraph 276 ADE and his private life. By the time of the appeal hearing the appellant had obtained confirmation of his English ability.

4. The judge accepted the existence of family life as well as private life and progressed in the sequential Razgar approach to the final issue, proportionality. The judge also referred to the best interests of their child as a primary consideration.

5. The judge accepted the appellant had a genuine relationship with his child and that it was in the best interests of the child to be with both parents. The judge accepted the appellant shared responsibility with his wife for the upbringing of their child. The judge was satisfied that the best interests of their child was to remain in the United Kingdom with both parents. The judge indicated that the appropriate application should have been made from Ecuador instead of the appellant coming on a visit Visa and then applying. However, the judge said the child should not be made to suffer as a consequence.

6. In the appeal the argument centred on the reasonableness of the respondent's view that the appellant should return to Ecuador and make a proper application. Reference was made to the decision of Chickwamba [2008] UKHL 40. The judge referred to the appellant circumventing the rules and in effect jumping the queue. The judge said that any separation by the appellant returning to his home country and applying from there would only be temporary. His in-laws would help care for their child. The judge did not accept as true the account given of a lack of family support in the United Kingdom.

7. The judge referred to section 117B and that the maintenance of effective immigration control was in the public interest. The judge did not find there would be insurmountable obstacles for family life continuing outside the United Kingdom, pointing out they had lived as a family unit in Ecuador before and they still had family support there. The judge noted that the appellant's wife was working and at paragraph 19 found they were financially independent.

8. The judge then turned to section 117B(6) and referred to the appellant's child being a qualifying child. A genuine and subsisting parental relationship had been accepted. The child, as a British national was not required to leave the United Kingdom. She could remain here with her mother whilst the appellant made an application from Ecuador. Alternatively, the child could return to Ecuador with the appellant. The judge concluded it would not be unreasonable to expect the child to leave for a temporary period. However, the judge took the view that this was hypothetical because the respondent does not expect the child to leave.

The Upper Tribunal

9. Permission to appeal was granted on the basis that it was arguable the judge did not apply section 117B(6) correctly. Reference was made to the decision of JG (section 117B(6) : reasonable to leave) Turkey [2019] UKUT 00072. Furthermore, in considering the possibility of the child accompanying the appellant to Ecuador it was necessary to also consider whether the child would be accompanied by her mother. If her mother travelled with her she would be unlikely to be able to keep a job in the United Kingdom.

10. Mr Thoree relied upon the ground and submitted the judge erred in concluding it was reasonable to expect the appellant's child to leave. He made the point that unlike the appellant in JG who had a poor immigration history, the appellant came here legally, the application was made whilst he still had leave. There was no criminality involved. The financial requirements were met. An English test has been taken.

11. In response, Ms Jones pointed out the family had lived in Ecuador before coming here. Furthermore, the appellant and his wife had not been truthful in suggesting family members here could not assist. The factual situation in Chickwamba was considerably different.

12. Both representatives were in agreement that if I find a material error of law the relevant facts were sufficiently established for me to remake the decision.

Consideration

13. JG (section 117B(6): reasonable to leave) Turkey [2019] UKUT 00072 considered what was said at paragraphs 18 and 19 of the judgement of KO (Nigeria) and others -v- SSHD [2018] UKSC 53.

Lord Carnwath, reflecting on the reasonableness enquiry, said that it was relevant to consider where the parents of the child, apart from the relevant provision, would be. To this extent the conduct of the parents became indirectly relevant if it meant they ceased to have a right to remain and had to leave. Based on that hypothesis they may acquire a right to remain if it would not be reasonable for the child to leave. At paragraph 19 he referred to the reasonableness question being considered in the context of the real world in which the children find themselves.

14. In JG Counsel for the Secretary of State argued Lord Carnwath's comments supported the argument that the application of section 117B(6) was dependent upon the Tribunal finding the child would be expected to leave if the person concerned were removed. On the facts, the Upper Tribunal concluded that if the Turkish mother of the British children concerned were removed to Turkey it was very unlikely they would follow her. The children would, in the 'real-world scenario' most likely remain and continue to live with their British father and his parents and continue attending school. The appellant's Counsel argued section 117B(6) did not depend on what was likely to happen in the real world but required the tribunal to hypothesise that the children would leave the United Kingdom and then ask whether that would be reasonable.

15. Focusing upon the expression `to expect' the Upper Tribunal favoured the hypothesis interpretation advocated by the appellant's representative.

16. On the facts, the Upper Tribunal found the appellant to be dishonest and unscrupulous to a high degree. The Upper Tribunal found there were powerful reasons why the appellant should be removed. In the circumstance the Upper Tribunal concluded it would be proportionate to insist upon the appellant returning to Turkey to make an application for entry clearance. Her removal would not have a disproportionate effect upon her children or her partner remaining behind.

17. However, even though it was unlikely the children would leave the Upper Tribunal went on to consider the situation on the hypothesis they would leave. This was based on its construction of section 117B(6). It was in this context the reasonableness of expecting them to do so had to be considered. The Upper Tribunal went on to say that the child's destination and future are to be assumed to be with the person being removed. At paragraph 92 the Upper Tribunal said that the likely temporary nature of the absence from the United Kingdom could make it unreasonable to expect the children to leave and have their education disrupted. The conclusion therefore was that based on this hypothetical situation it was not reasonable to expect the children to leave.

18. In the present appeal the factual background is somewhat different. The child was born on 15 May 2015 and so is only 4 years of age. The appellant does not have the poor immigration history of the appellant in JG. Furthermore, the First-tier Tribunal found that he gave a frank account about his intentions when entering on a visit Visa, that is, to seek to settle. In the present appeal the child's mother is entitled to be here as a British national. Her parents are here. Mindful of the child's young age it may well be the case that if the appellant were removed the child would remain here with its mother. For its mother to leave with the child is unlikely. This would be an impediment for the appellant's future entry clearance application. A practical consideration is that she is unlikely to be able to keep her job open and satisfy the financial requirements.

19. Section 117B(6) is a free standing provision. Aside from this a fresh application may well succeed given the relationship is accepted; the sponsor's employment and the appellant's ability in English. If section 117B did not assist the appellant the it is still necessary to consider the proportionality in the circumstance of the decision effectively requiring the appellant to leave and the consequent expense and disruption to make an application likely to succeed.

20. JG requires an assessment of the child's best interests on the hypothesis she in fact would go to Uruguay. While she has lived there before it was only as a baby. She is now at an age when she can be expected to have some awareness of her surroundings. She has been attending nursery school and will transit to primary school. The hypothetical scenario of travelling to Uruguay to wait on the outcome of her father's entry clearance application is not in her best interest. A possible separation from her mother is most definitely not in her best interests.

21. Paragraph 20 of the First-tier decision is premised upon the possibility of the child remaining in the United Kingdom with her mother whilst the appellant seeks entry clearance. The decision was promulgated before JG and so the judge did not have the benefit of the hypothetical concept. Clearly the comments at paragraph 20 are at odds with that. I am required to apply the law as it is currently understood.

22. The First-tier Tribunal judge has accurately set out the factual background and specifically considered the best interests of the child at paragraph 15 and dealt with section 117B(6) at paragraph 20. However, bearing in mind the guidance given in JG the analysis is fundamentally flawed. Consequently, I set that decision aside and to remake the decision, allowing the appeal. This is based upon the application of section 117B(6) as now understood and on the hypothesis of the child being in Uruguay. As stated, in that scenario the child's interests are not best served by the appellant having to leave.

Decision.

The decision of First-tier Tribunal Judge Pedro materially errs in law and is set aside. I remake the decision allowing the appeal.

Deputy Upper Tribunal Judge Farrelly.

Data: 25 June 2019