



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/14414/2018**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated
On 25th June 2019**

On 11th June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

**MR CAESAR RAMON GODOY ORTIZ_
(NO ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Jegede (Legal representative)

For the Respondent: Ms J Isherwood (Home Office Presenting Officer)

ERROR OF LAW DECISION AND REASONS

1. This is an error of law hearing. The appellant appeals against the decision of the First Tier Tribunal (Judge Cameron) (FtT) promulgated on 25th February 2019 in which the appellant's application on human rights grounds was dismissed.

Background

2. The appellant is a citizen of Paraguay born on 6th July 1976. He entered the UK in February 2007. He married his wife on 18.2.2011. His wife has leave as an EEA resident until 30.11.2022, his stepson aged 12 years is a

British citizen and his daughter aged 7 years has leave until 30.11.2022. It was accepted that the appellant entered the UK on the date given.

Grounds of appeal

3. In grounds of appeal the appellant argued that the FtT erred by
 - a) making a flawed assessment under section 55 regarding “best interests of the child”;
 - b) failing to give sufficient weight to the fact that the children and his wife were lawfully resident, in considering if there were exceptional circumstances;
 - c) making a flawed assessment of section 117B 2002 Act and under section 117B(6) as to reasonableness;
 - d) failing to correctly interpret the judgment in **KO (Nigeria) [2018] UKSC 53**.

Permission to appeal

4. Permission to appeal to the Upper Tribunal (UT) was granted by FTJ PJM Hollingworth on 26.4.2019. Permission was granted on all grounds.
5. The respondent produced a Rule 24 response opposing the appeal.

Submissions

6. At the hearing before me Mr Jegede representing the appellant relied on the detailed grounds of appeal. He emphasised that the FtT failed to consider the position that the appellant was the primary carer for the children and did not explore the possible circumstances for the children if either the appellant left the UK or if all the family left with him.
7. In response Ms Isherwood for the Respondent, contended that the FtT had properly considered all the relevant evidence. The FtT ought not to given weight to the appellant’s inability to meet the Rules in the event of an out of country application being made. There was no evidence submitted as to the stepson’s special needs, other than he was a high achiever. It was accepted that another Tribunal may well have reached a different decision but there was no material error of law. The FtT followed the approach in **KO** at the time of the hearing. The best interests of the children was not a trump card and the FtT found that the children could reasonably have learned Spanish in Paraguay.
8. Mr Jegede submitted that **MT & ET** was decided at the time of the determination. The FtT found that it was in the best interest of the children to remain in the UK with both parents.

Discussion and conclusion

9. I found that there were material errors of law in the decision and reasons which I set aside. The FtT accepted that both children were qualifying children under section 117B; one as a British citizen and the appellant's daughter had resided in the UK for over 7 years [17]. The FtT failed to place sufficient weight on the fact that one child was a British citizen and the other had valid leave until 2022. The latter would be in a position to apply for citizenship in 2021. The FtT appeared to be confused and contradictory as to whether or not the appellant's wife and children would be "required" to leave the UK with the appellant. Clearly as the FtT then points out they are not required to leave as they have rights to remain or British citizenship [33].
10. The FtT failed to consider the starting point that it would be unreasonable to expect a British child to leave the UK, as incorporated in the respondent's guidance. The FtT failed to carry out any assessment of the impact on the children leaving the UK or of the appellant having to leave in terms of where the best interests of the children lie. The FtT despite making findings favourable to the appellant (set out at paragraph 13 of the grounds of appeal) appeared then not to have taken them into account in assessing the public interest factors under section 117B(6). Having set out all the reasons why it would not be reasonable to expect the children to leave the UK, the FtT then focused on matters in relation to the appellant's immigration history and concluded that it would not be unduly harsh to expect the family to relocate and that the interests of the children failed to outweigh the public interest. Such an approach is manifestly an error in law in the application of section 117B(6). The grounds of appeal are made out.
11. There is a material error of law in the decision which shall be set aside. The findings of fact were not challenged and are preserved. I heard brief submissions from both representatives prior to re making the decision. I allowed the appeal and now give my reasons.

Re making

12. I go on to remake the decision and allow the appeal on human rights grounds. The FtT found that the two children had lived all of their lives in the UK [22] and accepted that the appellant's step son is a high achiever and that it is important that he remains suitably challenged and supported by his family [25], for whom the appellant is the primary carer. It was found that it was in both children's interests to remain in the UK [25 & 32 & 42] with both parents. None of the family save for the appellant is a national of Paraguay [35]. There would be considerable disruption to the children's lives were they required to leave with the appellant [38]. None of the children has lived in Paraguay and spent their entire lives in the UK.
13. In applying the respondent's own guidance (Family migration App FM January 23 2019) the starting point is that the children would not be expected to leave because they are qualifying children. This is supported by **MA (Pakistan)** v SSHD [2016] 1 WLR 5093 which reflects the current

jurisdiction. The FtT found that it was in the best interests of the children to remain in the UK with both parents having taken into account relevant factors. The FtT also found that the appellant had lived in the UK since 2007, was the only father figure to his step son who he had known since the age of 2 years and they had a close bond. On the facts as found by the FtT I am satisfied that there is family life in the UK and Article 8 is engaged. The decision was lawful as the appellant failed to meet the Immigration Rules. The appellant was the primary carer for the children as his wife worked full time. The appellant's removal would be an interference in the family life which it was accepted by the FtT would be "disrupted". In considering section 117B factors I find that the appellant speaks English, is financially dependent on his wife and is the primary carer for the children. There would be no additional recourse to public funds. I find that the appellant has made a number of applications to regularise his stay. The Suitability requirements are met [10]. In applying section 117B (6) the appellant has a genuine and subsisting relationship with two qualifying children. The findings as set out above establish that it would not be reasonable to expect the children to leave the UK. The interference was not proportionate having regard to the best interest of the children which is a primary consideration. There is no public interest in removal of the appellant where section 117B(6) applies.

Decision

The appeal is allowed on human rights grounds.

Signed
Date 19.6.2019

GA Black
Deputy Judge of the Upper Tribunal

Direction Regarding Anonymity - rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

NO FEE AWARD

Signed
Date: 19.6.2019

GA Black
Deputy Judge of the Upper Tribunal