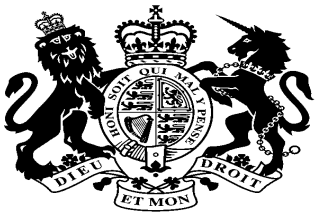

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/21684/2015
IA/21681/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 February 2019	**On 11 March 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

R S
and
C P (A CHILD)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity should have been granted at an earlier stage of the proceedings because the case involves child welfare issues. I find that it is appropriate to make an order. Unless and until a tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent.

Representation:
For the appellant: Mr O. Nguocha of Carl Martin Solicitors
For the respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant is a Brazilian citizen; the second is her 15-year-old daughter. RS entered the UK in 2003 with entry clearance as a visitor. She overstayed the visa. CP was born in the UK on 05 February 2004. Her father is an Iraqi national who has no leave to remain in the UK. It is accepted that CP has an ongoing relationship with both parents although they are not in a relationship with one another. Her mother is her primary carer. It is accepted that she also has a genuine and subsisting relationship with her father.

2. RS returned to Brazil with her daughter in September 2004 where she remained for nearly four years. RS returned to the UK on 28 July 2008 with entry clearance as a visitor. Again, she knowingly remained with her daughter in the full knowledge that she did not have permission to do so. She did not seek to regularise her status in the UK until 19 March 2015, when she made an application for leave to remain on human rights grounds. At the date of the application CP had been continuously resident in the UK for nearly seven years.

3. The respondent refused the application in a decision dated 26 May 2015. The respondent found that RS did not meet the requirements of Appendix FM as a parent. She did not meet the long residence requirement contained in paragraph 276ADE(1)(iii) of the immigration rules. There was no evidence to show that she would face 'very significant obstacles' to integration in Brazil for the purpose of the private life requirement contained in paragraph 276ADE(1)(vi). In respect of CP, she did not meet the private life requirement contained in paragraph 276ADE(1)(iv) of the immigration rules because she had not been resident in the UK for a continuous period of seven years at the date of the application. In any event, it was not considered unreasonable to expect her to return to Brazil with her mother, who would be able to help her to reintegrate.

4. The parties will be aware of the procedural history. It can briefly be summarised as follows. First-tier Tribunal Judge Woolley dismissed their appeal in a decision promulgated on 19 July 2016. Deputy Upper Tribunal Judge Hanbury found that the decision involved the making of an error on a point of law and set aside the First-tier Tribunal decision. In a decision promulgated on 03 March 2017 he went on to remake the decision and dismissed the appeal. The appellants applied for permission to appeal to the Court of Appeal. Upper Tribunal Judge Rimington set aside Judge Hanbury's decision in an order made under rule 45 of The Tribunal Procedure (Upper Tribunal) Rules 2008 on 11 April 2017. Judge Hanbury's findings on the error of law were preserved but the case was listed for a further hearing in the Upper Tribunal to remake the decision. Upper Tribunal Judge Southern dismissed the appeal in a decision promulgated on 01 June 2017. The appellants applied for permission to appeal to the Court of Appeal, which was initially refused by the

Upper Tribunal. Permission was granted on a renewed application to the Court of Appeal. The appeal was remitted to the Upper Tribunal by consent in an order dated 27 December 2018 in the following terms:

> "2. On 24 October 208 the Supreme Court handed down judgment in the cases of *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53.
>
> 3. In light of the Supreme Court's judgment, the respondent has reviewed this case and concluded that the tribunal erred in its consideration under section 117B(6) of the Nationality, Immigration and Asylum Act 2002, by taking into account the conduct of the parents when considering whether it was reasonable for the Appellant's child to leave the UK. Such an approach was rejected by the Supreme Court in *KO*.
>
> 4. In the circumstances the parties agree that the matter should be remitted to the Upper Tribunal for a substantive determination, having regard to the approach set out by the Supreme Court in *KO*."

Decision and reasons

5. Despite the importance of the issues involved for the appellants, those representing her had done little to assist them to prepare for the appeal. The only evidence before the Upper Tribunal is a brief witness statement made by RS for the First-tier Tribunal appeal in 2016 and nine pages of general documents relating to CP's schooling from the same period. Although I note that CP's father gave evidence at the hearing before the First-tier Tribunal; no witness statement was prepared. Although he attended the hearing before the Upper Tribunal to support his daughter; no witness statement had been prepared to explain the impact of his daughter's potential removal. Although CP is now old enough to give her own views about the situation; no witness statement was prepared. In short, the preparation of the appeal was inadequate.

6. However, as in many cases of this kind there is little dispute about the factual circumstances. The appellants' immigration history and length of residence is accepted. The fact that both parents have a genuine and subsisting parental relationship with the child is accepted. It is accepted that the child has now been resident in the UK for a continuous period of over ten years and that it is likely that she has established strong ties to the UK during that time.

Best interests of the child

7. In assessing the best interests of the child, I have considered the principles outlined in *ZH (Tanzania) v SSHD* [2011] UKSC4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874. The best interests of a child are a primary consideration, but not the only consideration.

8. The respondent must have regard to the need to safeguard the welfare of children who are in the United Kingdom. I take into account the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55 of the Borders, Citizenship and Immigration Act 2009. In the guidance, the respondent acknowledges the importance of international human rights instruments including the UN Convention

on the Rights of the Child (UNCRC). The guidance goes on to confirm: "The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies." The UNCRC sets out rights including a child's right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.

9. CP has lived in the UK for most of her life albeit she spent a period of nearly four years in Brazil with her mother at a young age (pre-school). She is now 15 years old and is studying for her GCSE exams, which she will take next year. CP has a genuine and subsisting relationship with both parents; one is a Brazilian citizen; the other an Iraqi citizen. It is in the best interests of the child to maintain her relationship with both parents.

10. Neither CP, nor her mother nor her father have leave to remain in the UK. Her parents are not in a relationship. It is difficult to see how her father would have any right to reside in Brazil if he is not in a relationship with her mother. Given that he is a failed asylum seeker with no leave to remain in the UK the possibility of him being able to make regular visits to see his daughter in Brazil is remote. The removal of CP with her mother is likely to result in the child being separated from her father for an uncertain and prolonged period.

11. There is no evidence to indicate that CP suffers from any serious health problems or any other evidence that might raise concerns about her welfare. It is accepted that she is likely to be well settled and has established close ties to the UK. Her most recent period of residence has taken place during an important developmental period. CP returned to the UK with her mother in 2008 just before she started school and has spent an important 10-year period of her life here. As a teenager it is likely that she is increasingly developing a private life away from her nuclear family through friends at school and associated activities.

12. For the reasons given above the best interests of the child clearly point to her remaining in the UK where she can continue to enjoy a relationship with both parents. Removal to Brazil clearly would not be in her interests because she would lose the regular contact she has with her father and her removal would sever the close ties she has now established in the UK albeit she would continue to benefit from the relationship with her mother.

Whether it is 'reasonable' for the child to leave the UK

13. Since I indicated my decision at the hearing the Upper Tribunal has published the decision in *JG (s 117B(6): "reasonable to leave" UK) Turkey* [2019] UKUT 72. I considered whether it might be necessary to ask for further submissions but have concluded that it is not. The Upper Tribunal's conclusions relating to the interpretation of *KO (Nigeria)* are broadly consistent with the respondent's position when this case was remitted by consent from the Court of Appeal. The only place in

which *JG (Turkey)* might depart from the respondent's current stated policy is whether the child would in fact be required to leave the UK. The point is not applicable in this case because neither parent has leave to remain.

14. Following the decisions in *KO (Nigeria)* and *JG (Turkey)* the focus is on whether it is reasonable for CP to leave the UK. Significant weight should be given to the best interests of a child who has been resident in the UK for over seven years. I have found that her best interests point strongly to her remaining in the UK so that she can continue her family life with both parents and is not uprooted from the long-standing ties that she has now established in this country. For these reasons I conclude that it would not be reasonable to expect the child to leave the UK even though she and her mother do not have leave to remain.

15. If CP were to make an application for leave to remain at the date of the hearing she would meet the requirements of paragraph 276ADE(1)(iv) of the immigration rules.

16. RS does not meet the requirements of Appendix FM to remain as a parent and there is no evidence to suggest that she would meet any of the private life requirements contained in paragraph 276ADE(1) of the immigration rules. She has not been resident in the UK for the required period of 20 years and there is no evidence to suggest that she would face 'very significant obstacles' to integration in her home country of Brazil where she was born and brought up.

17. Section 117B(6) of the NIAA 2002 says that the public interest does not require the removal of a parent if they are in a genuine and subsisting relationship with a qualifying child and it is not reasonable to expect the child to leave the UK. In light of my findings it follows that RS satisfies the requirements of section 117B(6). However, she should be aware that her position in the UK is wholly reliant on her relationship with her minor daughter. In time, CP will become an adult and begin to lead an independent life. Given the poor immigration history of her mother, it would be open to the respondent to review RS's position at some point in the future if he considered it appropriate to do so.

18. For the reasons given above I conclude that the decision to refuse leave to remain is unlawful under section 6 of the Human Rights Act 1998.

DECISION

The appeal is ALLOWED on human rights grounds

Signed  Date 07 March 2019
Upper Tribunal Judge Canavan