Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: PA/02047/2015
PA/02821/2016

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 8 August 2019	**On 22 August 2019**
Decision given orally	

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

(1) FB
(2) EB
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S McTaggart, Elliot-Trainor Partnership
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

1. As this appeal involves children I make an order for anonymity pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting disclosure of any matter that may lead to the identification of the appellants and other parties to these proceedings. Any breach may lead to contempt proceedings.

2. The appellants, daughter and mother, who were born in 1978 and 1956 respectively, are citizens of Brazil. Their appeals are against the decision of First-tier Tribunal Judge Fox who for reasons given in his decision dated 19 February 2018 dismissed their appeals against the Secretary of State's decision refusing their protection claims for reasons set out in letters dated 12 October 2015 and 17 March 2016. Those letters also dealt with the human rights aspects in play for these appellants as well the children of the first appellant G, who is now an adult, and J, who was born in the UK and has been here for 10 years.

3. The judge set out the appellants' immigration histories and circumstances as follows:

> "6. The Appellants' immigration history is as follows. The Appellants are in effect a family unit. They are from Anapolis in Brazil. They have extended family members remaining there. The first Appellant claims that 12 years ago, or thereabouts, her son's father, Carlos, used to beat her when she was living with him and her son. She claims to have reported this to the police on two occasions. Police officers came to speak of him. In 2008, when the family were in Dublin, the first Appellant claims that her son's father, Carlos threatened her and said that if she did not stay with him, he would kill her. It is also maintained that he has been in various relationships one of which she claims is a marriage.
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> 7. She further claims that when Carlos is on the phone speaking to their son, he will ask to speak to the first Appellant and threaten her. She also claims that he abuses her on the telephone. The last time that he is claimed to have done this was in January 2015. She claims not to know what Carlos does for a living now. She is not in touch with him.
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> 8. The Appellant claims that her daughter's father lives in Switzerland. He has claimed that if she returns to Brazil he will take their daughter away. He has made this thread [sic] on three occasions. The last occasion he did this was in November 2014. She claims never to have discussed returning to Brazil with her daughter's father. She claims that her daughter's father does not help with the daughter's life and has never contacted her.
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> 9. The first Appellant has maintained that she does not want to return to Brazil or be forced to leave the United Kingdom, because she cannot provide the same level of education for her children in Brazil, as she can in the UK. She also claims that her daughter's medication is expensive in Brazil.
>
> 10. The first Appellant fears return to Brazil as her son's father will try to kill her and her daughter's father will try to take her daughter away from her.
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> 11. The second Appellant is the mother of the first Appellant. She mirrors her daughters claim in the detail of her account. She has claimed that her daughter was in a relationship with Carlos Passos Curado for five years, during which time their son [G], a dependent upon the first Appellant's claim, was born. The second Appellant claims that the relationship was turbulent, and Carlos

would regularly threaten to kill the first Appellant, and her daughter would come to stay with her when they argued. In the alternative it is claimed that the threats to kill her daughter only began when the relationship had ended.

12. The second Appellant claims that 10 years before her asylum interview the first Appellant had discovered that Carlos was involved in selling illegal drugs and this caused her to end the relationship. Carlos had gone to the second Appellant's house on several occasions and said that he would kill her, no matter how long it took. It is claimed that her daughter ended the relationship with Carlos and she and her son left Brazil approximately 12 years prior to the second Appellant's asylum interview. This would suggest that the first Appellant left Brazil in and around 2003. Neither the first and the second Appellant have returned to Brazil since that time. They both claim to fear Carlos.

13. The second Appellant gives an alternative version of events to that recorded above, in that, Carlos and the first Appellant went to live in Portugal together before travelling to Northern Ireland, in and around 2007. The purpose of the visit was to visit Carlos's mother who used to live in the United Kingdom. It is claimed that after 56 months in the UK, Carlos returned to Brazil, unable to force the first Appellant to accompany him.

14. An alternative claim has also been made that Carlos has never been to the UK to visit his son. The second Appellant also claims of [sic] prior to her departure from Brazil Carlos asked her to help him re-establish his relationship with the first Appellant. The second Appellant refused to do so. She did not agree that they should be in a relationship. She claims Carlos told her that he was aware that she did not approve of the relationship and that if the first Appellant refused to return to the relationship he would kill the second Appellant and her husband. The second Appellant claims to be estranged from her husband. He is an alcoholic and has abused her.

15. It is claimed that the threats made by Carlos were reported to police on two occasions at two different police stations. It is claimed the police did not do anything to help her.

16. In November 2009 she claims she travelled to Ireland to visit the first Appellant and help her following the birth of her second child, Jennifer, in and around March 2009. The first Appellant asked her mother to remain at [sic] with her and help with the children. She agreed to do this.

17. The second Appellant fears that if she were to return to Brazil, that Carlos would carry out his threats to kill her."

4. After a survey of the evidence, the judge directed himself in respects of aspects of the case including a concession that the appeals were proceeding on the basis of the human rights claims only. He reached a number of conclusions and finally explained at [65] as follows:

"65. On the evidence before me today I am satisfied that the Appellants have not provided any credible basis for challenging

> the assertions, analyses and conclusions in the Respondent's refusal letters. On the evidence before me today, I am satisfied those assertions, analyses and conclusions are valid and tenable and I reach similar conclusions myself [sic] like reasons. I find that the Appellant's failure to claim asylum when they could have first claimed while in Portugal and The Republic of Ireland, as well as in the UK, without a satisfactory explanation, undermines the credibility of the Appellant's claim to have come to the United Kingdom to escape persecution. That credibility is further undermined by the inconsistencies and implausibilities in the story, examples of which I have referred to above and more fully outlined in the Respondent's reasons for refusal letters. I find therefore that the core of the Appellants' account of persecution lacks credibility and is a fabrication designed to gain access to the United Kingdom."

5. The judge continued at [66] and [67] :

> "66. On the evidence before me today [sic] am satisfied that the Appellants are economic migrants and have not come to the United Kingdom to seek international protection.
>
> 67. In light of the above conclusions, I find that the decision Appealed against which would not cause the United Kingdom to be in breach of the law or its obligations under the 1950 Convention."

6. The grounds of challenge remind the reader that the asylum claim was not pursued and the appeal proceeded under Article 8 only. It is contended that the judge had failed to apply Appendix FM and Rule 276ADE to his consideration (ground one). The reference that he had made to *Devaseelan* was irrational as there had been no previous determination by a judge. Furthermore, the judge had erred materially in failing to have regard to the provisions of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 in the light of the submissions made to the effect that there were "qualifying children"(ground two). In addition, it is contended that the judge failed to adequately deal with an expert report by Dr Bratten (ground three). Furthermore, other areas are identified, including consideration of *Zambrano* which had not been advanced at any stage. It is argued that the judge appeared not to have understood that the youngest dependant had been born in Northern Ireland and had lived her entire life there (ground four).

7. Permission to appeal was initially refused by the First-tier Tribunal but granted on renewal to the Upper Tribunal by Upper Tribunal Judge Coker.

8. Submissions began with the candid observation by Mr Diwnycz that Mr McTaggart might well be pushing an open door particularly in the light of the reference to *Devaseelan.* Mr McTaggart agreed the summary grounds that I have set out above. He argued that the first appellant fell to be considered under Appendix EX1 as referred to in [56] of the relevant refusal letter based on the elder of the two children having lived in the United Kingdom for seven years and being a minor when the application was made to the Secretary of State.

9. I consider that Mr Diwnycz was correct to express as he did his position in relation to ground one. The approach of the judge to the Rules as set out in [36] of his decision appears to have been on the basis that he was stopped from considering this aspect further by reference to *Devaseelan*. It is not clear why the judge thought this to be the case. Mr McTaggart accepted that the elder of the two children was an adult by the time of the hearing but the younger child had been in the United Kingdom for more than seven years by that date and fell for consideration under these provisions.

10. As to the second ground which required considerations of reasonableness with reference to in particular the younger of the two children, having regard to her age at the time of the hearing, the only reference in the decision by the judge to this test appears in [55] as follows:

> "55. With regard to the **Zambrano** argument the position is that the Immigration Rules are the first port of call for such an application. The Appellants and their dependents cannot meet the requirements of the Immigration Rules. It is not unreasonable or unfair, in the balancing exercise to expect them to return to Brazil in the absence of any evidence regarding insurmountable obstacles or exceptional circumstances which would make it too difficult for the children."

11. It is difficult to understand why the judge considered that *Zambrano* is relevant to the issue in this case. Furthermore, the judge appears to have regarded the test of reasonableness to be one which required a proportionality exercise hence his reference to balance, which is not provided for in section 117B(6). Although Mr McTaggart argued that the best interests of the youngest child had not been considered, in [47] the judge explained in respect of the elder of the two children, and I quote:

> "47. With regard to Jennifer's medical condition she is on standard frontline treatment for her thyroid problem. Her grandmother's condition, which Jennifer inherits, was originally diagnosed in Brazil and treated there. Medical facilities are available to Jennifer upon return. There is a suggestion that this may have to be paid for but there is no objective material put before me today to indicate how much this would be, whether it would be prohibitively expensive or difficult to obtain."

And he continued at [48]:

> "48. … There are no circumstances before me today that he [the elder of the two children] should depart from the family unit under any circumstances".

12. It is not clear why the judge was considering the best interests of a child who had become an adult by the time of the hearing. In respect of the younger of the two children, the best that can be said in respect of "best interests" appears in [50] of the decision:

> "50. … The younger dependant is still in primary school. They must accompany their parent (the first Appellant) in order to provide the greatest comfort and support to them."

I accept however Mr Diwnycz's submission that this may be taken in substance to be the judge's "best interests" consideration.

13. The third ground of challenge related to treatment of the expert report by Dr Bratten, an Educational Child and Adolescent Psychologist, on the two children. The judge referred to the report in [34] of his decision and summarised its essence in terms that as to the elder of the two children, there will be adverse consequences for his educational vocational progress if removed. The judge noted Dr Bratten's findings in relation to the younger child, and then proceeded to identify as crucial not just the potential removal and its impact but whether similar services, treatment, medication, clinical and educational input and the like are available to them upon return to Brazil. He observed that there did not appear to be any investigation into the services available to children if returned to Brazil undertaken by Dr Bratten, and concluded that as a consequence, "less weight must be attributed to the report's findings and conclusions". There is no indication that Dr Bratten had expertise of matters in Brazil and to my mind the judge clearly erred by marginalising the report and its findings by reference to that absence.

14. In dealing with the final challenge (ground four), I accept Mr McTaggart's argument that the judge appeared to have proceeded on the misconception that the younger of the two children had been brought to the United Kingdom. This is betrayed in [29] of his decision in which he referred to the children not being held:

> "29. … accountable for the acts, omissions, errors or otherwise of the first Appellant and to a lesser extent the second Appellant for being brought to Europe (Portugal and the Republic of Ireland) and thereafter to the United Kingdom."

15. In his short submissions, Mr Diwnycz explained that he had had the opportunity of going through the decision and considered that the only thing that could be said in its defence related to the judge's conclusions on the "best interests". He readily acknowledged the error by the judge as to basis on which the younger of the two children was in the United Kingdom and furthermore, he considered the decision was coloured by the judge's application of section 8 of the 2004 Act to the Article 8 analysis. He accepted that the judge materially erred and I consider that he was correct to do so.

16. Accordingly, I set aside the decision of First-tier Tribunal Judge Fox. The appeal is remitted to the First-tier Tribunal for its further consideration by a differently constituted tribunal.

Signed Date 19 August 2019

UTJ Dawson
Upper Tribunal Judge Dawson