IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43502/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 October 2015	**16 November 2015**

Before

UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS CHERYL ORINTHIA WOLLCOCK STEWART
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms E. Savage, Senior Home Office Presenting Officer
For the Respondent: Ms K. Reid, instructed by Obadiah Rose Solicitors

DECISION AND REASONS

Introduction

1. The appellant in the appeal before the Upper Tribunal is the Secretary of State for the Home Department. We refer to Mrs Stewart as the claimant herein.

2. The claimant is a Jamaican national born on 4 April 1974. She appealed to the First-tier Tribunal against a decision made by the Secretary of State for the Home

Department on 14 October 2014 to remove her from the United Kingdom pursuant to s.10 of the Immigration and Asylum Act 1999. On the same date the Secretary of State refused an application made by the claimant for leave to remain in the United Kingdom.

3. First-tier Tribunal Judge Haria heard the claimant's appeal on 21 April 2015 and in a decision promulgated on 17 June allowed it on the basis that the respondent's decision to remove the claimant would lead to a breach of Article 8 of the Human Rights Convention.

4. The following facts are uncontroversial:

   (i) The claimant entered the United Kingdom on 28 August 2008 with leave to remain as a work permit holder conferred until 13 August 2012. The claimant's spouse and two children - N, who was 13 years old at that time and C, who was 5½ years old - entered as her dependants on 5 March 2010. According to the Home Office bundle they were each given leave to enter in line with the claimant. A third child of the relationship was born in the United Kingdom on 4 March 2012 (A). N and C are at school in the United Kingdom, and both are doing well in their studies;

   (ii) The appellant worked as a teacher in Jamaica for approximately twelve years and has a Bachelor's Degree in Guidance and Counselling. She taught in the United Kingdom for a year after her arrival. In 2010 she was offered further employment as a teacher, but that offer was terminated because she failed to obtain a work permit in time. She currently works on a part-time basis as a tutor in Maths, English and Science;

   (iii) On his arrival in United Kingdom the claimant's husband obtained employment as a sanitising cleaner in a hospital in Essex, and undertook such employment until the expiry of his permission to work.

First-tier Tribunal's determination

5. In paragraph 21 of her determination judge Haria observes that it was no part of the claimant's case that she met the requirements of the Immigration Rules. She described the main issue between the parties as being the "*consideration of the appellant's Article 8 rights outside the Immigration Rules*".

6. Thereafter the judge sets out the material factual matrix in some detail and directs herself to pertinent decisions of this Tribunal, and of the higher courts, in relation to the consideration of the best interests of a child [35-41 and 46]. In relation to this aspect of the appeal the judge concluded as follows:

   "42. Applying the principles and bearing in mind the guidance offered in the above cases in my view in this case the best interest of the two youngest children certainly lies in remaining with their parents. In relation to [N], he is now 18 years old and he could if he wishes remain in the UK to pursue his studies subject to obtaining a LTR to do so in his own right.

   43. ... If both [A's] parents are to be removed then it is in her best interests to be removed with them. Since A is still quite young it is reasonable to expect that she will easily adapt to life in Jamaica with the support of her parents.

> 44. C is 10 years old and attends [a Primary Academy]. She has been at the school since January 2009 ... Following the principles detailed in the case of *Azimi-Moayed* it is clear that the need to maintain both stability and continuity of social and educational provision is an important factor, which should be considered amongst other factors. [C] has now lived in the UK from the age of 4 years, for a relatively significant period of her life of over 6 and a half years. She has only ever been educated in the UK and has no experience of the Jamaican education system. Removing [C] to Jamaica would disrupt the stability and continuity. [C] is at a critical stage in her education and uprooting her to Jamaica could be devastating. It is understandable that it would be difficult to adapt from a British school system to a completely new system in Jamaica without her friends and peers. It is undoubtedly difficult enough for any child to move from primary school to secondary school in a country in which the child has lived for the majority of his or her life, but a move to a country where the child lived only as an infant up to the age of 4 in addition to moving school would have added challenges and be very disruptive as well difficult for any child. It is clear that [C] has developed social, cultural and educational ties in the UK and removing her to Jamaica will be detrimental. It is in [C's] best interest that the appellant is granted leave to remain in the UK.
>
> 45. [N] is 18 years old he is currently studying for his A levels having completed his GCSE's exams... [N] is now an adult so he is of an age where if he wished to continue to study in the UK he could apply to do so..."

7. Having cited from paragraph 24 of the Supreme Court's decision in Zoumbas v SSHD [2013] UKSC 74 the judge stated:

> "[47] … I accept that the appellant and her family are not British citizens, and they have no rights to future education or healthcare in this country. They are a close-knit family. The appellant is highly educated. But this case differs from the case of *Zoumbas* in that in [C's] case her best interests require the maintenance of stability and continuity of social and educational provision as well as remaining in the family unit with her parents. In [N's] case he is of an age where he is establishing a private life of his own outside the family unit."

8. Thereafter the judge set out the familiar five stage test from Razgar [2004] UKHL 27 [48] and cited from the equally well-known authorities of EB (Kosovo) [2009] 1 AC 1159 and Beoku-Betts [2008] UKHL 39 [50-51]. At paragraph 52 of her decision the judge concluded that: *"I do not add much weight to the effect of the decision on the members of the extended family and friends".*

9. Immediately preceding paragraph 54 of judge Haria's decision is the sub-heading "Proportionality". Thereafter the judge directs herself, *inter alia*, that she is required to take account of the *"the factors set out in s.117A and 117B"* of the Nationality, Immigration and Asylum Act 2002 and she subsequently set out the terms of section 117B in full. The following conclusions are then articulated:

> "57. For the reasons given above and having regard to the age of the children, the nature and extent of their integration into UK society, the length of time they have been in the UK being just under seven years (in the case of C and N during the most formative years of their lives) and the close-knit family unit in which they live is in my view a strong case which outweighs the need to maintain effective immigration control. The appellant, her spouse and children all speak

English. They have shown they are able to integrate into society. The appellant is a qualified teacher and would not have much difficulty in finding a job. The appellant's husband has shown he is able to find employment. There will obviously be some burden on the taxpayer in that children will be entitled to education and the family will be entitled to access to the National Health Service.

58. On balance, for the reasons stated above, in particular the best interests of the children, I find that removal would be disproportionate."

Appeal to the Upper Tribunal

10. The respondent brings challenge to the First-tier Tribunal's decision on three grounds, which can be summarised in the following terms:

(i) The First-tier Tribunal erred in failing to give any or any adequate reasons for allowing the appeal outside the Rules:

(ii) Insofar as the First-tier Tribunal identified the circumstances of the claimant's case which led to it allowing the appeal outside the Rules - and in particular those relating to her children – the conclusion drawn therefrom was irrational. The features of the case relied upon by the First-tier Tribunal to allow the appeal are all covered by the Rules.

(iii) Although the First-tier Tribunal properly directed itself in relation to s.117 of the 2002 Act, it failed to apply such direction to its consideration of the appeal. In particular the First-tier Tribunal failed to attach little weight to the claimant's private life in the United Kingdom and erred in attaching *"some weight"* to the fact that the claimant can speak English.

Discussion and conclusions

11. The correct approach to the consideration of Article 8 of the Human Rights Convention has been deliberated upon *in extenso* by this Tribunal, the High Court and the Court of Appeal. We are assisted greatly by decision of the Court (Richards LJ, Underhill LJ and Sales LJ) in SS (Congo) and Others [2015] EWCA Civ 387 in bringing these various considerations together In delivering the judgment of the Court Richards LJ said as follows:

"40. ... we consider that the state has a wide margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to the decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding s.EX.1 as a basis for grant of LTE, although it is available as the basis for a grant of LTR. The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particular pressing nature so that a good claim for LTE can be established outside the Rules. In our view the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave.

41. This formulation is aligned to that proposed in *Nagre* at [29] in relation to the general position in respect of the new Rules for LTR, which was adopted in this

court in *Haleemudeen* at [44]. It is a fairly demanding test, reflecting the reasonable relationship between the Rules themselves and the proper outcome of application of Article 8 in the usual run of cases. But, contrary to the submission of Mr Payne, it is not as demanding as the exceptionality or very compelling circumstances test applicable in the special context explained in *MF* (Nigeria) (precariousness of family relationship and deportation of foreigners convicted of serious crimes) ...

44. The proper approach should always be to identify, first, the substantive content of the relevant Immigration Rules, both to see if an applicant for LTR or LTE satisfies the conditions laid down in those Rules (so as to be entitled to LTR or LTE within the Rules) and to assess the force of the public interest given expression in those Rules (which will be relevant to the balancing exercise under Article 8, in deciding whether LTR or LTE should be granted outside the substantive provision set out in the Rules). Secondly, if an applicant does not satisfy the requirements in the substantive part of the Rules, they may seek to maintain a claim for grant of LTR or LTE outside the substantive provisions of the Rules, pursuant to Article 8. If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules (cf *Nagre*, paragraph [30]), then in considering the case the individual interests of the applicants and others whose Article 8 rights are an issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of s.6(1) of the HRA read with Article 8."

12. Before leaving the decision in SS Congo we also draw attention to the following passages therein; which bear on a consideration of the best interests of a child.

"39 (iv) ... The fact that the interest of a child are in issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the state authorities would otherwise enjoy. Article 8 has to be interpreted and applied in light of the UN Convention on the Rights of the Child (1989)... however, the fact that the interest of a child are in issue does not simply provide a trump card so that a child applicant for positive action to be taken by the state in the field of Article 8(1) must always have their application acceded to; ... It is a factor relevant to the fair balance between the individual and the general community which goes someway towards the tempering the otherwise wide margin of appreciation available to the state authorities in deciding what to do. The age of the child, the closeness of their relationship with the other family member in the United Kingdom and whether the family could live together elsewhere are likely to be important factors which should be borne in mind ..."

13. In submissions on behalf of the claimant Ms Reid commended to the Tribunal that the First-tier judge had properly directed herself in law, taken full account of all material matters and had come to a conclusion which was adequately reasoned and rational. For this reason she submitted there was no basis upon which the First-tier Tribunal's decision could lawfully be interfered with.

14. In relation to the application of s.117B (5) Ms Reid asserted that although the judge made no explicit reference to the weight that she had attached to the claimant's private life in the United Kingdom when carrying out the balancing exercise required under Article 8, she had nevertheless properly directed herself to the terms of this provision and presumption must be, absent anything in the decision to indicate to the contrary, that she lawfully applied it.

15. Ms Savage maintained the Secretary of State's position as set out in the grounds of appeal, drawing attention to those passages in the decision said to support such grounds.

16. It is readily apparent from the Court of Appeal's decision in SS Congo that neither the weight to be attached to the public interest as expressed through the Immigration Rules, nor the weight to be attached to the private and/or family life of an applicant whose circumstances are under consideration, are to be treated as a fixity. As a general rule significant weight must be attached to the public interest as expressed in the Immigration Rules. There must exist compelling circumstances not sufficiently recognised under the Rules in any given applicant's case if such applicant does not meet the requirements of the Rules, but is nevertheless to successfully resist removal on Article 8 grounds. A consideration of Article 8 outwith the Immigration Rules is not, therefore, a freewheeling exercise of discretion by a judge, but one which requires a careful and nuanced approach.

17. It is uncontentious that when undertaking such a consideration judges are required by statute to take account of the considerations detailed in s.117A and 117B of the 2002 Act. Section 117B (5) thereof specifically directs a judge that: *"little weight should be given to a private life established by a person at a time when the person's immigration status is precarious."* The importance of this has been emphasised in a number of recent decisions from this Tribunal including: Dube (ss.117A-117D) [2015] UKUT 00090, AM (s117B) Malawi [2015] UKUT 00260 and Deelah and others (section 117B – ambit) [2015] UKUT 00515 (IAC).

18. Although in paragraphs 54 to 56 of her decision the judge directed herself to section 117B of the 2002 Act, it cannot be discerned, either from the substance of her conclusions or the reasoning leading thereto, that she gave lawful application to such direction. In particular in our view it cannot be discerned from a fair reading of the decision as a whole that the judge attached little weight to the claimant's, and the claimant's family members, private lives as required by section 117B(5).

19. There is no explicit reference in the decision to the claimant's immigration status being precarious, or as to consequences which flow therefrom – either generally or on the facts of the instant case. Of the reasons provided in paragraph 57 of the decision as to why the judge found the claimant to have a "*strong case which outweighs the need to maintain effective immigration control*", the majority directly relate to aspects of the claimant's, or her family members, private lives in the UK i.e. aspects of the claim to which little weight ought to have been attached. If judge Haria did indeed attach little weight to these aspects of the claimant's, and her family members, private lives, it is difficult to understand from the decision the reasoning which underpinned the allowing of the appeal.

20. When the First-tier Tribunal's decision is considered as a whole it is readily apparent to us that it lacks the sort of rigorous analysis and reasoning that was required to be undertaken on the facts of the instant case when the Article 8 ECHR ground was being considered.

21. This conclusion is further supported by the judge's consideration of the best interests of the children, and in particular C. Whilst the judge cited from the decisions in EV Philippines [2014] EWCA Civ 874 and Zoumbas [2013] UKSC 74 she both failed to engage in any meaningful way with the principles set out there, and failed to grapple with the potential relevance of the introduction of section 117 of the 2002 Act since those decisions were handed down. Furthermore, although it was found that C's best interests required the "*maintenance of stability and continuity of social and education provision*", as well as "*remaining in the family unit*", there was no detailed analysis of the position C would find herself in if she were move to Jamaica with her family members and, in particular, no identification of the particular detriment to her wellbeing that would be occasioned thereby.

22. For these reasons we set aside the decision of the First-tier Tribunal. Having announced our conclusion at the hearing, both parties commended to us that the case should be remitted to the First-tier Tribunal for the decision on appeal to be remade. We agreed that this should be so, given the need for further evidence – in particular in relation to the youngest two children.

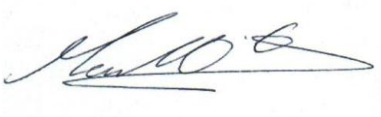
23. There has been no contention that any of the evidence that has thus far been presented to the Tribunal by the claimant or her family members lacks in credibility. Consequently, we direct that the primary findings of fact made by the First-tier Tribunal are to remain standing.

Decision

The decision of the First-tier Tribunal contains an error on a point of law capable of affecting the outcome of the appeal and is accordingly set aside.

The case is remitted to the First-tier Tribunal to be reconsidered in light of our conclusions above.

Signed:



Upper Tribunal Judge O'Connor
Date: 12 November 2015