Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45831/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 March 2016	**On 7 June 2016**

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

CARLOS ARTURO JARAMILLO GALLEGO (1)
MRS JUDITH ZEPATA ECHEVERRI (2)
[D Z] (3)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr J Rene, of Counsel instructed by Messrs Thoree & Co Solicitors
For the Respondent: Mr Paul Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant's appeal, with permission, against a decision of Judge of the First-tier Tribunal Monro who in a determination promulgated on 21 May 2015 dismissed the appeals of the appellants against a decision of Secretary of State to refuse to grant them leave to remain on human rights grounds.

2. The principal appellant (the appellant), Carlos Arturo Jaramillo Gallego was born on 20 October 1962. The other appellants are his wife who was born on 13 June 1975 and their daughter, [DZ], who was born on [ ] 2007. The appellant entered Britain on 15 February 2003 and claimed asylum. His application was refused and his appeal was dismissed in June that year. An application for reconsideration was made in January 2011 which was refused the following year. Judicial review proceedings were refused after an oral hearing in October 2013 and an application to appeal to the Court of Appeal was refused in February 2014. In September 2014 the application for leave to remain, the refusal of which is the subject of this appeal, was made. It appears that his wife entered Britain in January 2004 as a visitor and overstayed. [DZ] was, of course, born here.

3. The detailed letter of refusal considered both family and private life and gave reasons why the appellant and his dependants could not succeed under the Immigration Rules. In particular the letter dealt with the rights of the appellants' child noting that it was asserted she had lived in Britain continuously for over seven years. It was stated that it was considered that she would be able to adapt to life in Colombia with her parents and it was stated that she would be returning to Colombia as part of a family unit and that the principal appellant and his wife would be able to support their child, who is also a citizen of Colombia, to enjoy her full rights as a Colombian citizen. Therefore it was considered reasonable for the family to return to Colombia together. It was accepted that there would be some disruption but it was considered that it was proportionate in order to meet the legitimate aims of the State.

4. The fact that the child had enrolled in education in Britain was taken into account but it was stated that there was adequate education in Colombia.

5. Exceptional circumstances were considered but weight was placed on the fact that both the appellant and his wife had entered Britain and remained without authority.

6. Before the hearing the appellants' solicitors lodged statements from the appellant, his wife and from his daughter and a psychiatric report from Dr Anjum Bashir who described himself as a consultant neuro-psychiatrist. He noted that her parents had said that [DZ] was basically a social child and took an active part in extracurricular activities and liked playing with her friends. They had said that [DZ] was "very much an English child and they did not see any Colombian traits in her". They had also told the psychiatrist that her first language was English and that she did not even comprehend Spanish. They had said that they did speak their own language at home but with [DZ] they had to revert to English as she felt comfortable with that. They had told Dr Bashir that [DZ] was distressed about leaving her school and going to school in Colombia where she would not speak the language and might be laughed at. She identifies London as her home and the talk of another home made no sense to her.

7. The neuro-psychiatrist stated that [DZ] came across as a busy, articulate and delightful youngster who talked readily about her school friends and activities. She had told them that she wanted to live in London and would cry if she were asked to move. He stated "coached or spontaneous this thought or cognition dominated this young person's mind". The appellant and his wife had said that they avoided any discussion which might escalate her fears. [DZ] said that she did not want to live in Colombia and knew nothing much about it. He said that [DZ] came across as an intelligent child whose general information was quite appropriate to her age and "except from the frequent crying and anxiety reported by her family and obvious in her examination, she was not suffering from any other health issues". There is no evidence of any other normal belief or perception and she did not present of any phobias or obsessions. She had partial insight into her emotional distress but could not work out a solution.

8. His opinion was that:

> "7.1 [DZ] is a playful, intelligent young girl, who has achieved her psychomotor development normally. She has no cognitive difficulties and was achieving to her potential in school. She has had a normal social development. Her relationship with her family are close and she has secure and affectionate attachment with her parents."
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> 8.2 [DZ] was identified with her parental fears about their country of heritage and has been presenting with fear (of moving, missing her familial school, social contacts, not being able to speak another language) and excessive crying. It seems that discussions about having to leave London has been a source of her fears and anxiety. She has ingrained the fears of relating to above and had developed cognitive errors (elaboration, arbitrary interference, magnification) to include catastrophic consequences if she were taken away from this country. These fears and anxiety are maintained by a parental pessimistic evaluation of their future if they left London. It seems that due to their circumstances [DZ] has been stuck in her dysfunctional emotional predicament."

He went on to say that he thought that [DZ] was picking up on the fears of her parents. However, he stated that he had no doubt that the parents loved their daughter dearly and would do all they could to protect her from emotional distress.

9. He concluded that [DZ] did not need any active interventional counselling for the time being as "rehearsing her anxious narrative would escalate her dysfunction". He went on to say that however if the symptoms were maintained there is risk of symptom escalation and if she developed physical symptoms then she would need to be referred to her GP to seek a

referral to the local child and adolescent mental health service for support and therapy. He ended by saying:

> "In the meanwhile her parents need to maintain a climate of reassurance, regular education and other activities of daily living so that her behaviour remains as normalised as possible. I have warned her parents that she was at risk of a culture shock and that they would need to take appropriate steps to support her if they moved from London to live elsewhere."

10. Having heard evidence from the appellant, his wife and from [DZ] the Judge set out her conclusions in her determination. She noted the parents' evidence regarding [DZ] and that the appellant said that he only spoke Spanish but that his wife spoke Spanish and some English and that their daughter spoke English but he would speak to her in Spanish and she would understand – they spoke Spanish in the household. [DZ]'s best friend [T] was born in Britain but was of Colombian nationality.

11. She noted it had been put to the appellant that he had told Dr Bashir that [DZ] understood and spoke a little Spanish. He said that there were times when [DZ] would not understand. The Judge noted that the appellant had told her that he had two children from a previous relationship who were in Colombia as well as five brothers and that he had contact with them every month or two and that his wife had her mother and sisters in Colombia and a daughter from a previous relationship was in contact with [DZ]. His daughter speaks to the other children in Colombia.

12. The Judge set out her consideration of the relevant matters in paragraphs 24 onwards. She noted the immigration history of the appellant and his wife and submissions by the Home Office Presenting Officer that there was much conflicting evidence in the case. The Presenting Officer relied on Section 117B of the 2002 Act and that the fact that languages and financial independence were relevant and that cultural and language ties had been maintained and they could return as a family unit.

13. Having referred to the relevant Rules – E–LTRPT.1.1 and ELTRPT.2.2 to 5.2 and the terms of paragraph EX.1 of the Rules is stated that:

> "EX1. This paragraph applies if
>
> (a)(i) the applicant has a genuine and subsisting parental relationship with a child who –
>
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) was in the UK;

(cc) is a British citizen or has lived in the United Kingdom continuously for at least the seven years immediately preceding the date of application; and

(ii) it would not be reasonable to expect the child to leave the UK."

14. In paragraph 31 she considered the report of Dr Bashir which she summarised in some detail not only with regard to what he had said about [DZ]'s fears of leaving Britain but also the fact that she did not needed counselling for the time being. In paragraph 33 she noted that Dr Bashir had stated that he had been told that [DZ] could only speak English but understood Spanish and that he had been told that [DZ] did not even comprehend Spanish although that the parents spoke Spanish at home. The Judge said that she found that it was not credible that [DZ] was limited in her Spanish language skills as her parents asserted but accepted that as she had been educated in English medium her Spanish may well not be fluent.

15. When considering specifically the position of [DZ] the Judge referred, in paragraph 34, to Section 55 of the Borders, Citizenship and Immigration Act 2009 as well as the judgment of the Supreme Court in **ZH (Tanzania) [2011] UKSC 4** and other relevant Upper Tribunal determinations. She referred to the Supreme Court judgment in **Zoumbas [2013] UKSC 74** before noting that [DZ] knew no country other than England and had friends here and that it would be a major wrench for her to move. She went on to state that "however children do relocate with their parents when the latter have to move for work purposes or when a parent is in the Armed Services, and that both adults and children have to adjust to their new life". It was her view, however, that if the members of the family were supportive to each other which was how she considered that the appellant and his wife had presented themselves then it must follow the impact of the move will be minimised. She stated:

> "The fact that the appellant and his wife have communicated their own misgivings about the move to [DZ] is not of itself a reason for leave to remain being granted. [DZ] told the doctor that she would cry and hide if she were told that she had to move. Many children resist decisions that their parents make for them; whether this pertains to bedtime, the need to do homework, restrictions on contact with friends; and a child of 7 cannot be allowed to be in a position to make decisions about where her family may live. It is for her parents to work through any difficulties she may experience and to provide positive messages about the move. I am not sure that Dr Bashir was right in his assessment that the parents have tried to protect [DZ] from anxiety about the proposed move; they brought her to the court hearing instead of sending her to school and that must have been a source of anxiety for her."

16. Having stated she found the parents as unreliable witnesses, she stated that she concluded that there was no evidence before her to demonstrate that it would be unreasonable for [DZ] to leave the United Kingdom to make a new life with her parents in Colombia.

17. She therefore dismissed the appeal under Article 8 of the ECHR.

18. The grounds of appeal stated that the Judge had erred in her approach to [DZ]'s welfare and that it was unfair for her to have used Dr Bashir's report against the parents.

19. Permission was granted by Judge of the First-tier Tribunal PJM Hollingworth who stated that an arguable error of law had arisen in relation to the report of Dr Anjum Bashir. He stated it was arguable that the Judge had set out the weight which she attached to that report and elements "within it in a specific analysis relating to that report in the light of his findings as to the nature and quality of the evidence which he had received during the hearing".

20. He stated that the Judge had referred to the issue of whether or not [DZ] comprehended Spanish and said that as she is being educated in English medium her Spanish may well not be fluent. His conclusion was that it was arguable that the references made by the Judge to Dr Bashir's report were insufficient.

21. At the hearing of the appeal before me Mr Rene argued that the Judge had not properly considered the best interests of [DZ] in the light of the report of Dr Bashir. He referred me to the judgment in **EV (Philippines) [2014] EWCA Civ 874** and in particular the criteria set out in paragraphs 35 and 36 of that judgment. The Judge, he stated should have considered, in particular, the extent of which [DZ] would have linguistic medical or other difficulties in adapting to life in Colombia. He stated that the Judge had not properly considered her best interests. He went through the various paragraphs in which the Judge had addressed the matters in Dr Bashir's report before suggesting that the Judge, by asking [DZ] questions had exacerbated the situation and had diluted Dr Bashir's findings. He put to me that the issue of possible integration into Colombia had not been properly considered and he argued that insufficient weight had been put on the report.

22. He particularly emphasised paragraph 6.2 of the report in which Dr Bashir had noted that [DZ] had insisted that she would not like to live in Colombia, that she was scared to go there and would cry and hide in her house if asked to go. She had gone on to say how happy she was in her school here. He stated that the Judge had not properly considered the rights of [DZ] under Section 55 of the 2009 Borders, Citizenship and Immigration Act.

23. Mr Duffy stated that the Judge had properly taken into account the report of Dr Bashir and that the impression which came over from the report was that [DZ] was a normal child and that her parents were worried about returning to Colombia and that she had picked up on that. He stated that there was nothing in the determination that would indicate that the Judge had not properly considered the evidence from Dr Bashir. The reality was, he stated, that there was nothing that flowed from the report that would indicate that that here was weight in the assertions made by Me Rene. It would not be unreasonable to expect [DZ] to go to Colombia with her parents.

Discussion

24. I consider that there is no material error of law in the determination of the Judge of the First-tier. She did properly consider all relevant factors and I consider that she properly took into account the terms of the report from Dr Bashir. The report is relatively short but it makes it clear that [DZ] is a healthy happy girl whose only anxiety comes from the fact that she wishes to remain in Britain. The judge was entirely right to point out that the information given by the parents to Dr Bashir regarding the ability of [DZ] to speak Spanish was misleading given that the appellant himself spoke no English and I note that [DZ] speaks to his parents and other children in Colombia and must therefore speak to them, on the telephone, in Spanish.

25. I consider that there was nothing in the report that would mean that it would not be reasonable for [DZ] to go to Colombia with her parents and, as Dr Bashir pointed out the reality is that the parents would have a decisive role in ensuring that [DZ] made as smooth a transition as possible. The reality is that [DZ] has no psychiatric condition or any health issues which would mean that she should not be able to adjust to living in Colombia with her parents: the Secretary of State and indeed the Judge were correct to emphasise the fact that this family would be returning to Colombia together. Moreover they will be returning to a country where they have a large number of relations with whom [DZ] has already been in contact.

26. I consider that there is nothing to indicate that the Judge did not properly consider the report of Dr Bashir or any other matter and that her conclusions were entirely open to her. She was entitled to conclude that it was not unreasonable for this family to relocate to Colombia. There is nothing to indicate that the judge did not follow the *dicta* of the Court of Appeal in their judgment in **EV (Philippines).** The Judge did properly consider all relevant factors and considered, as was accepted by Mr Rene, the report in some detail. I consider that her conclusions thereon were entirely open to her. I would note, of course that Mr Rene accepted before me that the way in which the Judge had heard what [DZ] had to say was an entirely appropriate way in which to hear evidence from a child and that she properly gave [DZ] a chance to say what she wished about her situation here and about living in Colombia.

27. Accordingly I find no material error of law in the determination of the Immigration Judge and her decision dismissing these appeals on Article 8 grounds shall stand.

Notice of Decision

The appeal is dismissed.

Signed Date
Upper Tribunal Judge McGeachy 7th June 2016