



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/08766/2016

THE IMMIGRATION ACTS

Heard at Field House

On 30 November 2017

**Decision & Reasons
Promulgated**

On 14 December 2017

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR FELIPE ALBERTO JUSTINIANO CAMACHO
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer

For the Respondent: Ms R Moffatt, Counsel instructed by ITN Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Housego which allowed the Article 8 appeal of the respondent.
2. For the purposes of this decision I refer to the respondent, Mr Camacho, as the appellant and to the Secretary of State for the Home Department as the respondent, reflecting their positions before the First-tier Tribunal. Further, although the appeal also concerns Mr Camacho's wife, her material circumstances are the same as his and I need only refer to him.

3. The background to this matter is that the appellant arrived in the UK on 8 October 2002 with a visit visa. He obtained leave as a student until 31 March 2005 but became an overstayer thereafter. His wife came to the UK in 2006, again on a visit visa and overstayed at the end of that leave.
4. The couple remained in the UK with their adult son and his family. As they were overstayers they could not work and were, in the main, supported by their relatives in the UK. When this became too burdensome, on 12 September 2015 the couple attempted to leave the UK having purchased their own one-way ticket for Bolivia. They were stopped at immigration control and refused access to the flight. They were advised to make an application to regularise their status. The couple did so on 17 December 2015, applying for further leave to remain on Article 8 ECHR grounds. That application was refused on 16 March 2016. The appellant appealed and had a hearing before the First-tier Tribunal on 7 September 2017.
5. The arguments put to the First-tier Tribunal were that there were very significant obstacles to the couple establishing a private life on return to Bolivia. Further, it was argued that if the provisions of the Immigration Rules were not met, there were exceptional circumstances that made the decision disproportionate in an assessment of Article 8 outside the Immigration Rules.
6. First-tier Tribunal Judge Housego made cogent findings that the couple could not meet the provisions of the Immigration Rules. He found at [48]-[50] that where the couple were attempting to go back to Bolivia voluntarily in 2015, just two years earlier, and their evidence was clear as to having relatives in Bolivia, including three other adult children, it was not possible to find that there would be “very significant obstacles” to them returning as of the date of the hearing.
7. The judge went on to conduct an Article 8 assessment outside the Immigration Rules. The First-tier Tribunal identified at [54] that the couple had a family life with their son, a British national, and his children. There were adverse findings made, however, as to the evidence of the couple attempting to “airbrush out” the fact of the other three adult children in Bolivia; see [52]. Judge Housego also identified at [53] that the “immigration history of the appellants is poor”. That is unarguable. Further, in the same paragraph he identified correctly that the fact of their not speaking English “even to a rudimentary level” weighed against them in the proportionality assessment. He also identified correctly in the same paragraph that any family or private life had to be given “little weight” as it had been established whilst they were in the UK illegally.
8. At [57], however, the judge identified what he found to be “exceptional circumstances”. This was the simple fact of the attempt to return to Bolivia voluntarily in 2015. The judge found that the decision of the respondent’s officers not to let them leave and in advising them to return home in order to regularise their status, the appellants doing as they were

told, “reduces the weight of the public interest in their removal – the Secretary of State would not let them go”.

9. The judge went on to find at [58]:

“With the weight of public interest so reduced on the Secretary of State’s side of the scales, while what would otherwise be not enough weight to tip the scales in favour of the appellants now is enough, and the decision is unduly harsh.”

10. The Secretary of State challenges that decision in the following terms:

“It is submitted the FtT at [57] have given undue weight to the appellants’ claimed failed departure. The FtT has failed to give adequate consideration to the fact that this incident does not impact on the appellants’ ability to meet the Immigration Rules and/or Article 8.

In addition it is respectfully submitted that the appellants could have left at any time since the noted incident, the appellants have family and property in Bolivia therefore it is unclear as to why the Judge would find return to be unduly harsh. In addition family life between two countries has clearly also always existed and the Judge has not accepted the no contact aspect with the Bolivian families is not accepted [49-50].


In making the findings of undue harshness it is submitted that the FtT has erred in law as he has failed to identify what in the appellants’ circumstances over the past two years has changed.”

11. Although not well drafted, the respondent’s point is clear. The fact of the failed attempted return was not something that the judge was entitled to find amounted to an exceptional circumstance that was capable of either reducing the weight attracting to the public interest or added to the weight on the appellants’ side of the balance such that the decision could be found to be disproportionate.
12. The challenge is a simple one and I have no hesitation in accepting it. In my judgment, the fact of the appellant and his wife being prevented from leaving in 2015 is not a factor that can amount to an exceptional circumstance capable of outweighing the other factors weighing against the appellant. The conclusion that it is was irrational. The Immigration Rules were not met. They had breached immigration control knowingly for nine years or more. As the judge correctly identified, their family and private life could attract little where that was so. The couple had three other adult children in Bolivia and other relatives there with whom they were in contact. The respondent’s officers preventing the couple from getting on their flight in 2015 is simply not a factor that any reasonable decision maker could reasonably take as being of sufficient weight to justify Article 8 leave outside the Immigration Rules.
13. I must therefore find that the proportionality assessment under Article 8 was in error and set it aside to be remade.

14. The same reasoning means that I must refuse the appeal because there is nothing here which amounts to exceptional circumstances such that the decision can be regarded as disproportionate. On the contrary, the weight of the evidence is significantly against the appellants. The Rules are not met. Their immigration history is poor. They remained here knowingly in breach of immigration control for a very extensive period of time. Their private lives and family life with their son and his children attract only little weight, formed whilst they were here illegally. They retain relationships with their other adult children and relatives in Bolivia. They have not learned to speak English to any significant level in the time that they have been here. They have not supported themselves financially while they have been here. The fact of their being unable to get onto their flight that they paid for in 2015 is not a factor that can assist them to any significant degree in the proportionality assessment in light of those various and significantly adverse factors. The fact of their son having separated from his wife since 2015 is also not a factor that can, in the context set out above, make out an exceptional or compelling case. It is reasonable and proportionate to expect the appellant and his wife to return to Bolivia.
15. I therefore remake the appeal under Article 8 as refused.

Notice of Decision

16. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade to the extent identified above.
17. I remake the appeal under Article 8 ECHR as refused.

Signed 

Date 13 December 2017

Upper Tribunal Judge Pitt