



IAC-AH-LR-V1

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

Appeal Number: IA/46241/2013
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THE IMMIGRATION ACTS

Heard at Field House

On 30 June 2015

**Decision &
Promulgated**

On 10 July 2015

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS VERONICA RONDON LONDONO (FIRST CLAIMANT)
MR EDWIN JAVIER TORREZ COSSIO (SECOND CLAIMANT)
(ANONYMITY DIRECTION NOT MADE)**

Claimants

Representation:

For the Appellant: Mr S Whitwell (Home Office Presenting Officer)

For the Claimants: Mr S Rungasamy (Lawrence & Associates Solicitors)

DECISION AND REASONS

1. This is an error of law hearing. For convenience I shall refer to the parties as the Secretary of State, who is the appellant in this matter, and to the Claimants. The Secretary of State appeals a decision of the First-tier Tribunal (Judge Andonian) (FTT) who, in a decision promulgated on 3 November 2014 allowed the Claimants appeals under Article 8 ECHR outside of the Rules.

2. The first Claimant, whose date of birth is 25 June 1986, is a citizen of Venezuela. She is married to the second Claimant, who is a Bolivian national and whose date of birth is 11 May 1976. They have a child, Hayley, born on 4 November 2007. The first Claimant entered the UK as a visitor in 2002 and thereafter she was granted leave to remain as a student. On 24 November 2005 she was granted approval to marry the second Claimant. Their lawful leave continued on the basis of student and dependent leave until 13 September 2014. The first Claimant's leave was curtailed on 23 October 2012 and expired on 22 December 2012 because her Tier 4 sponsor's licence was revoked. She submitted her present application for leave to remain outside of the Immigration Rules on 22 December 2012.

Reasons for refusal

3. The Secretary of State decided that the Claimants could not meet the requirements of the Immigration Rules, the long residence rules. Consideration was given to the child Hayley but she was not a British citizen and had not lived continuously in the UK for seven years at the date of hearing in September 2014. Reliance was also placed on a break of four months in the Claimant's period of lawful residence in the UK notwithstanding that she and her husband lived in the UK for some twelve years.

First-tier Tribunal

4. The FTT found exceptional circumstances for considering Article 8 outside of the Rules; there was only a four month break in continuous lawful residence by the main Claimant, out of a residence period of ten years [10]. Further, it found that the Claimants were in a relationship in the UK for twelve years [11]. The FTT considered where the best interests of the child lay and concluded that this was met by remaining in the UK with her parents, and extended family members with whom she had close relationships. It was acknowledged that the child at the time of the hearing was just under 7 years of age and was not a qualifying child, but in 2 months time, by November 2014 she would have attained that age [13/14]. The FTT took into account the public interest factors under Section 117B of the 2002 Act (as amended).

Grounds of Application for Permission

5. The Secretary of State argued that the FTT failed to apply the proper test in considering Article 8 outside of the Rules as per **Gulshan/Nagre** - whether there were circumstances that would be considered as unduly harsh. The Secretary of State argued that
 - (1) The FTT's findings failed to show undue harshness, compelling or exceptional circumstances.
 - (2) The findings regarding the child were not supported by evidence.

- (3) The public interest in providing State education for the child had not been taken into account.

Permission to appeal

6. Permission was initially refused by the First-tier Tribunal but granted on renewal by Upper Tribunal Judge Kekic. She found that it was arguable that the four months unlawful residence did in fact amount to a compelling circumstance, and further that the FTT failed to take into account conflicting evidence as to ties in Bolivia and/or Venezuela.

Error of Law Hearing

Submissions

7. Mr Whitwell submitted that the two factors relied on by the FTT to justify consideration of Article 8 outside of the Rules were the four month gap and family residence in the UK for twelve years, were inadequate. The fact that there was a break in the lawful period was material, and essentially the decision made by the FTT equated to a “near miss” argument. The Claimants failed to establish twenty years’ residence in the UK, albeit that the twelve year residence was lengthy. Reliance was placed on **SSHD v SS (Congo) & others [2015] EWCA** (para. 48) that public interest factors had not been taken into consideration under Section 117B or as per **AM (S117B) Malawi [2015] UKUT 0260 (IAC)**.
8. Mr Whitwell conceded the main point in the grounds as to the necessity of an intermediary test as **Gulshan** was no longer good law.
9. Mr S Rungasamy relied on the grounds of appeal to the First-tier Tribunal. There were compelling circumstances including the length of residence, best interests of the child and the short gap in residence. The FTT heard credible oral evidence from the Claimants about their child. The Secretary of State never considered nor addressed the issue of where the best interests of the child lie which was an error of law. This appeal was distinguished from **EV (Philippines)** save for factors set out in paragraph 35 including age, length of residence in the UK, education, etc.
10. The FTT referred to Section 117B at [15] and took into account public interest considerations.

Discussion and Decision

11. It was common ground that the point raised in the grounds of application regarding **Gulshan/Nagre** was no longer relevant in view of the recent decision **Sunasseer [2015] EWHC 1604 (Admin)**. It was also common ground that the Secretary of State had not met her obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009, although it was acknowledged that this was a matter the Tribunal could deal with

(Jo). It was agreed that the correct approach to Article 8 outside of the Rules was to identify compelling circumstances not recognized by the Rules and which would lead to an unjustifiably harsh outcome.

12. I am satisfied that the FTT followed the correct legal approach in identifying compelling circumstances to justify consideration outside of the Rules. The FTT considered the length of residence and relationship in the UK of twelve years, the four months' gap in a ten year lawful residence and the best interests of the child born and brought up in the UK and whose close relationships included extended family members living in the UK. On all of the evidence before the FTT, which included credible oral evidence from the Claimants, the FTT found that Article 8 outside the Rules was engaged and that the interference was disproportionate. This approach is compatible with **SS (Congo)** (which in the main focuses on leave to enter cases) at [44] and as to near miss [56].
13. It is submitted that FTT failed to respond to inconsistencies in the evidence between the Claimants as to family ties in Bolivia and Venezuela. I find that this is of little significance given the FTT's clear finding that the Claimants evidence was entirely credible. I am satisfied that it was open to the FTT to rely on the oral evidence of the child's parents in its assessment under Section 55 (2009 Act). In the event that there were inconsistencies in the evidence, I am not persuaded that any such inconsistencies would be material given the weight placed by the FTT on the life in the UK. The FTT took into account that evidence and the fact that the child was not a qualifying child at the date of hearing but nevertheless found that her interests lay in remaining in the UK with her parents and extended family members including her grandparents. It is clear from the decision that the FTT heard detailed evidence as to the life of the child, her inability to speak Spanish, her education, social and family connections, her independent life and the lack of ties in either Bolivia or Venezuela [12 & 13]. The FTT emphasised the focus of this particular child's life aside from her parents [14]. It concluded that taken together with the other factors that her interests were such that they were capable of outweighing any public interest factors. Whilst acknowledging that the FTT did not specifically consider the issue of public funds as regards to education, I am satisfied that the FTT did engage sufficiently with Section 117B and regard was had to public interest considerations (**AM Malawi**) [37]. The decision and reason must be read as a whole.
14. I am satisfied that the grounds of the application simply amount to a disagreement with the decision made by the FTT. The assessment of weight and credibility are properly the functions of the FTT who heard the appeal, and whilst another Tribunal may have made a different decision, I find no material error on a point of a law. The FTT considered all the relevant factors and made an assessment as to whether or not these amounted to compelling reasons and/or were proportionate having found that Article 8 was engaged. The factors taken cumulatively are capable of amounting to unjustifiable harsh consequences. The grounds relied on reveal no material error in law that requires the decision to be set aside

and remade. The reasons given by the FTT were adequate and established that the relevant statutory provisions has been considered and applied.

Notice of Decision

I find no material error of law. The decision shall stand.

No anonymity direction is made.

Signed

Date 10.7.2015

GA Black
Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award as a hearing was necessary.

Signed
GA Black

Date 10.7.2015

Deputy Upper Tribunal Judge G A Black