IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/33279/2014
IA/33282/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 January 2016	**On 28 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MRS M BALDIVIEZO MARTINEZ MARIELA (1)
MISS MARIA LUISA CASSANOVA BALDIVIEZO (2)
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr P V Thoree of Counsel
For the Respondent: Mr P Nath, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The first appellant (Mariela) is the mother of the second appellant (Maria Luisa). The respondent to this appeal is the Secretary of State for the Home Department.

2. Mariella came to the UK in 2002 and met her present husband (Elahie) the same year. They have been living together as husband and wife since

2012. Mariela was given limited leave to remain outside the Rules in 2011 but that expired on 5 April 2014. Mariela's daughter, Maria Luisa, first came to the UK in March 2005. Maria Luisa was born on 27 February 1998 and is therefore now 17.

3. On 20 March 2014 the appellants made their present applications for leave to remain in the UK outside the Immigration Rules. Their applications were considered under paragraph 322(1), Appendix FM and paragraphs 276ADE (1)-DH of the Immigration Rules but were refused on 6 August 2014 for reasons set out in a detailed letter of that date.

4. The appellants appealed the refusal to the First-tier Tribunal (FTT) and the appeal came before Judge of FTT Manuell (the Immigration Judge) sitting in Richmond upon Thames Magistrates' Court on 23 March 2015. The Immigration Judge, in his decision promulgated on 2 April 2015, decided to dismiss the appeal against the respondent's decision to refuse permission for further leave to remain.

The Upper Tribunal Proceedings

5. By a notice of appeal lodged on 9 April 2015 the appellants sought permission to appeal to the Upper Tribunal. The grounds are wide-ranging and include allegations that the Immigration Judge was subjective in his determination and that he failed to demonstrate an objective approach. The second appellant was a minor when she arrived in the UK aged 6 and was still only 16 at the date of the hearing. The Immigration Judge had allegedly given insufficient weight to the second appellant's private life and the need to continue her studies here. It is alleged that it would be unfair and unsafe to allow the decision to stand and on that basis permission to appeal was sought.

6. Deputy Upper Tribunal Judge Archer thought that the grounds raised a properly arguable point at paragraphs 21-33 of the decision in relation to the best interests of the second appellant. The reasonableness test in Section 117B(6)(b) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) needed to be considered as the appellant was a qualifying child under Section 117D of that Act.

7. The respondent submitted a response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (S.I. 2008 no. 2698 (l. 15)) indicating that the appeal was opposed. Mariella was an illegal over stayer and Maria Luisa could relocate with her mother and step-father to Bolivia. It was not argued before the FTT that the best interests of Maria Luisa lay in being separated from her parents. However, it was argued that the Immigration Judge was entitled to conclude that the appellants had strong cultural ties to Bolivia, that the second appellant was able to speak the Spanish language and the Immigration Judge came to a reasoned conclusion having taken account of all material considerations. Mr Nath said that the grounds of appeal raise no more than sustained disagreements with the findings.

8. Directions were made that the parties were to file any documents with the Tribunal no later than seven days before the hearing and that the Tribunal would not entertain any new evidence that was not before the FTT.

The Hearing

9. At the hearing I heard submissions by both representatives. Mr Thoree said that the judge had been over-subjective in his approach and failed to assess the situation "objectively." He then identified certain passages in the decision of which he was critical. These included at paragraph 18 where the Immigration Judge pointed out that the appellants only had leave pursuant to Section 3C of the Immigration Act 1971. This, it was submitted, meant they were in the UK lawfully. It was pointed out, however, that in 2011 the appellants had been given a further three years leave to remain and no indication had been given as to why the respondent had granted them further leave. It was submitted that if the respondent had formed the view that the appellants ought to be removed she would have said so. But, it was acknowledged that, the application considered by the respondent on 6th August 2014 could only succeed under Article 8. It was submitted that if there had been "sustained deception", as had been claimed, this would have resulted in a refusal to grant even limited leave to remain. If they had used deception, it had been largely forgiven by the respondent. Secondly, the Immigration Judge had unfairly characterised the first appellant and the sponsor's work as being "illegal." Thirdly, as far as Maria Luisa was concerned, she had been in the UK most of her life and was entitled to be educated here. It appeared to the appellants that the Immigration Judge had made an unsupported allegation (in paragraph 21 of his decision) that the second appellant's education had been at the expense of the tax payer. It was accepted that the decision in relation to Maria Luisa stood or fell with that of her mother, Mariela. It was also accepted by Mr Thoree that the main point raised in the grounds of appeal (that the public interest considerations under Section 117B of the 2002 Act did not require the removal of a person where there was a genuine and subsisting relationship with a qualifying child in circumstances where it would not be reasonable to expect the child to leave the UK) was no longer available to him given that the younger of his two clients had reached the age of 17. Mr Thoree realistically accepted that he was "in difficulties" in relation to this argument. He accepted that the basis on which his client had been given permission to appeal no longer appeared relevant therefore. However, he maintained that the appellants' human rights would be infringed by their removal. In the circumstances, I was urged to allow the appeal.

10. Mr Nath did not accept a number of the assertions that had been made on behalf of the appellants. He pointed out that as far as he could tell Mariela had not been working lawfully in the UK. The fact that the respondent had granted a limited form of leave did not in any way absolve the appellants from compliance with the Immigration Rules and the need to regularise their status. In fact, they had not formed a private or family life in the UK such as would be recognised under the relevant Rules. I was specifically referred to paragraphs 22, 24, 25 and 26 of the decision. It was submitted

that despite the lengthy period of residence in the UK by Maria Luisa, she was brought up in Bolivia until the age of 6, would be familiar with the culture there and it was incredible that her knowledge of Spanish would not be adequate given her parents both spoke that language at home. It would not be unduly harsh to require the family to return to Bolivia. The second appellant had now reached the age of 17 and many of the points made before the Immigration Judge were no longer valid therefore.

11. Mr Thoree briefly replied to say that it was not clear why the leave had been granted to his client on a temporary basis. He said it was disproportionate to require them to leave the UK and return to Bolivia in any event.

12. At the end of the hearing I reserved my decision as to whether the decision of the FTT contained a material error of law, which I will later give having set out the reasons.

Discussion

13. I note that according to the letter in support of the application dated 8 March 2011, Mariella came to the UK as a student for nine months. She brought her daughter into the UK in March 2005 having already established a relationship with Elahie. The letter claims that Maria Luisa suffered a sexual assault from a fellow school mate. Maria Luisa is said to have a poor relationship with her own father, who was violent. Mariela is said to have experienced domestic violence herself and the various observations in the letter support an application on the basis that Article 8 of the ECHR operates to prevent the respondent's unlawful interference with the significant family and private life formed in the UK. The case is described as "the most exceptional and compassionate" one.

14. I was referred to the case of **Bossadi [2015] UKUT 00042 (IAC)**. That case was concerned with the suitability requirements set out in paragraph 276ADE of the Immigration Rules. A "rounded assessment" had to be made as to whether an appellant's familial ties in the country of return were sufficiently strong to support the appellant in the event that he had to return to his own country. The failure to properly consider these issues would be an error of law.

15. I turn to consider the judge's reasons. The permission to appeal to the Upper Tribunal seems to have solely related to the treatment of Maria Luisa's appeal by the Immigration Judge. However, it seems appropriate to consider the case more generally given the submissions made before me.

16. The Immigration Judge expressed himself in trenchant language but, with respect to Mr Thoree, it cannot be said that the Immigration Judge's views coloured his judgment. Ultimately, the decision contains a detailed consideration of the facts and an application of the facts to the law as it was presented to him. It was open to the respondent to grant a limited form of leave without thereby waiving any objection to the appellants' long-term settlement in the UK. The respondent does not thereby

recognise that the appellants' presence in the UK has been entirely lawful. The grant of limited leave until 2014 may well have been stimulated by the fact that Maria Luisa was at a sensitive stage in her schooling and it may have been thought by the respondent appropriate to allow her to complete her studies. In any event, the earlier grant of temporary leave appears to be a minor issue, given that it has not been contended that either appellant qualifies under the Immigration Rules for long-term leave to remain in the UK.

17. There are no compelling reasons for considering the claim outside the Immigration Rules. The argument that the appellants cannot reasonably continue their family life with Elahie in Bolivia, where Mariela had spent the majority of her life and Maria Luisa the first six years, was not made out. In any case where a foreign national forms a private or family life in the UK (undisputedly the case here) significant disruption is likely to be caused by his return. However, the respondent is entitled to consider the need to maintain effective immigration control. No medical or other evidence was supplied to the respondent to indicate that Maria Luisa was unable to travel. Neither the respondent, nor the Immigration Judge, accepted that Maria Luisa's Spanish was limited or that she would be handicapped in settling back into a Latin culture. This is not to say that Maria Luisa will not need to improve her written Spanish. It was open to the Immigration Judge to find, as he did, that the appellants could return as a family unit with their UK-based partner, the sponsor/step father. There are no "very significant obstacles" to their integration into Bolivian society.

18. It is noteworthy that the respondent did not place specific reliance on the conduct of the appellants and it is unnecessary therefore to consider this aspect further. The finding made by the FTT that the appellants had formed a private or family life in the UK precariously in circumstances where they could be expected to have to return to Bolivia could not be seriously argued with. I consider it unnecessary to consider this aspect further. The appellants had not satisfied the FTT that this was one of those exceptional cases which fell to be decided outside the Immigration Rules. The Immigration Judge gave full and careful consideration to all the evidence in the case and reached clear and sustainable conclusions which were available to him on that evidence. If some of his language was inappropriate it does not damage the essential findings. His conclusion was well within his discretion.

Conclusion

19. The only point on which the appellants were given permission to appeal to the Upper Tribunal (that the second appellant was a minor and therefore Section 117(6)(b) of the 2002 Act applied) has not been effectively pursued before the Upper Tribunal. The attack upon the Immigration Judge in oral submissions before the Upper Tribunal was very wide-ranging but, I have concluded, ultimately fails. Accordingly, the decision of the FTT stands.

Notice of Decision

The appellants' appeal against the decision of the FTT is dismissed and the decision of the respondent to refuse further leave to remain stands.

No fee award or anonymity direction has been made in this case and that decision also stands.

Signed Date

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

No fee award has been made.

Signed Date

Deputy Upper Tribunal Judge Hanbury