



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02072/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment
Tribunal (IAC)
On 30th November 2017

Decision & Reasons Promulgated

On 6th December 2017

Before

UPPER TRIBUNAL JUDGE COKER

Between

DUONG [T]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Pipe, instructed by Genesis Law Associates

For the Respondent: Ms H Aboni, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a Vietnamese citizen and an illegal entrant, was granted permission to appeal a decision by First-tier Tribunal Judge Raikes dismissing his appeal against a refusal of his human rights claim for leave to remain on the grounds of his relationship with Thi [D].
2. Mr [T]'s claim had been refused by the respondent on the grounds that he could not prove that his relationship with Ms [D] was genuine and subsisting because he had not been living with her for two years; he could not meet the partner or parent Rules because his partner and child were not British Citizens or settled

in the UK and there was no reason why they could not return to Vietnam as a family unit.

Error of law

3. Permission was granted on the grounds that despite the judge being provided with a copy of the relevant extract from the respondent's policy *Immigration Directorate Instruction Family Migration: Appendix FM section 1.0b Family life (as a partner or parent) and private life: 10 year routes August 2015*, and despite *MA (Pakistan) [2016] EWCA Civ 705*, the First-tier Tribunal judge found that it was reasonable for the British Citizen child of the family to relocate to Vietnam. Ms Aboni acknowledged that the First-tier Tribunal judge had failed to refer to the policy guidance in her decision but submitted that the decision was in any event not subject to material error of law.
4. The First-tier Tribunal judge made findings with regard to the family make-up which were not the subject of challenge. These include:
 - (i) The relationship between Mr [T] and Ms [D] became serious in November 2013 and they have lived together since the beginning of February 2014;
 - (ii) They have a daughter born [] 2015;
 - (iii) Ms [D] has a daughter (H) by an earlier relationship who has just started school and is a British Citizen. That child has no contact with her birth father. Ms [D] has discretionary leave to remain in the UK;
 - (iv) Mr [T] does not have sole parental responsibility for H but he is effectively her step-father and the four of them have a family life together such as engages Article 8;
 - (v) H speaks English and Vietnamese;
 - (vi) Mr [T] cares for the two young children on a daily basis whilst Ms [D] works;
 - (vii) Although Mr [T] is not H's father, H views Mr [T] as her father and Mr [T] treats her as his child.
5. The First-tier Tribunal judge set out in her determination her reasons for finding it reasonable for Mr [T] to leave the UK. The judge concluded that the best interests of the children were to remain with both Mr [T] and Ms [D]; both children are young enough to adapt to life in Vietnam if Ms [D] chose to go to Vietnam with Mr [T] and there was no reason why, if the family chose to remain together as a family unit, that could not be in Vietnam.
6. The judge concluded that Mr [T]'s circumstances did not outweigh the public interest in maintaining immigration control.
7. The judge considered s117B (6) and concluded that it was reasonable for the children to leave the UK. It is plain that, in reaching that conclusion, the judge failed to take into account the respondent's policy that it would rarely be reasonable for a British Citizen child to leave the UK.
8. The First-tier Tribunal judge erred in law such that I set aside the decision to be remade, findings of fact retained.

Decision

9. Although public interest considerations may be relevant in determining whether it is reasonable for a child to remain in the UK, that analysis of reasonableness has to retain within its consideration all relevant matters. Being a British Citizen is not a 'trump' card but it is of more weight than whether a child has been in the UK for more or less than seven years and during what period of life those seven years have accrued. The respondent's policy makes that clear.

10. Extracts from that policy were reproduced in *SF and others (Guidance, post 2014 Act)* [2017] UKUT 120 (IAC) where Vice President Ockelton said

7. Mr Wilding, however, has with the fairness which Presenting Officers always attempt to apply, drawn our attention to an important guidance document. It is the Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes". It is the edition of August 2015 and therefore not in force at the date of the decision under appeal, but it was in force at the date of the First-tier Tribunal hearing and decision, and is still in force. It contains important guidance about the following topic at 11.2.3: *Would it be unreasonable to expect a British Citizen Child to leave the UK?* We will set out the relevant parts, they are as follows:

"Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice Judgment in Zambrano.

...

Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.

It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:

- criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
- a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision."

We were not specifically referred to any other part of this document and we do not need to set any more out.

8. Mr Wilding very properly accepted this was not, from the point of view of the relationship between the first appellant, the mother, and the British citizen child, a case which involves criminality; and this was not a case in which the conduct of the mother or of the other children was such as to give rise to considerations of such weight as to justify separation: but in any event it does not appear that there has been any consideration given to the possibility of the British citizen child staying with another parent or alternative primary care in the EU. There is said to be a grandmother here. No other details are known; certainly the Secretary of State has not at any stage taken the view that there was an alternative primary carer, and in any event, of course the result of the decision would be the separation of the youngest child from his siblings and from his mother if they had to return to Albania leaving him here.
11. H is not the biological daughter of Mr [T] and, as Ms Aboni submitted, the relationship between Mr [T] and H does not fall within the definition of 'parent' as set out in the Immigration Rules. The finding of the First-tier Tribunal judge is however unequivocal: the child considers Mr [T] to be her father and Mr [T] treats her as his daughter; they are living in a family unit and he cares for her on a daily basis; she has a younger sibling of whom Mr [T] is the birth father. In circumstances such as this the family plainly fall within the policy. Mr [T] plainly has a parental relationship with H.
12. It follows that it would only be in circumstances where the conduct of the parent or parents was of such weight that it would be reasonable for there to be a separation.
13. Mr [T] is an illegal entrant and has been in the UK since May 2010. The respondent has not relied upon other illegality or behavioural matters that could lead to the conclusion that separation was justified. It follows that it would not be reasonable for the child H to leave the UK.
14. I allow the appeal.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal by allowing it.



Date 30th November 2017

Upper Tribunal Judge Coker