



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no: HU113202015

THE IMMIGRATION ACTS

Heard At **Field House**
on **24.07.2017**

Decision and Reasons Promulgated
On **07.08.2017**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Rolando Jr SANTIAGO ILLESCAS

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Guy Davison* (counsel instructed by Gordon Dadds LLP)

For the respondent: Miss Jill Isherwood

DECISION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Helena Suffield-Thompson), sitting at Newport on 3 November 2016, to allow a private and family life appeal by a citizen of the Philippines, born 1983.

2. The appellant was here with leave as a student from 2009 – 11. He met his partner [KF] earlier in that stay, but they got together towards the end, and in December 2012 moved in together, first of all at her parents'. Both of them confirmed before the judge that they knew by then that the appellant was an overstayer with no right to be here.
3. However on [] 2014 the appellant and his partner had a son, [C]. She has now been granted British citizenship, though when she signed her statement she had yet to apply for a passport. In any case, she already had indefinite leave to remain, and so their son was a British citizen by birth, and holds a passport showing that. The appellant has helped to support his family by working, almost inevitably cash in hand, as a waiter.

NOTE: (1) *no anonymity direction made at first instance will continue, unless extended by me.*
(2) *persons under 18 are referred to by initials, and must not be further identified.*

4. On 10 February 2015 the appellant made a private and family life application. This was refused on 4 November that year, under the Rules on the basis that he did not have a 'genuine and subsisting relationship' with Kathleen, nor any active rôle in their son's upbringing. There were no 'very significant obstacles' to his return to the Philippines, and in those circumstances his application was not considered to raise any exceptional reasons why it should be granted under article 8.
5. It was accepted before the judge that the appellant did not meet the requirements of the Rules; so the only issue for her was on article 8. Here she made the following commendably robust findings at paragraph 33:

"The Appellant and his partner invoke little sympathy from this Tribunal as he was aware of the terms of his visa and chose to ignore the Rules of the UK. To compound matters he now openly accepts he is not working legally but is working "cash in hand", thus evading paying tax. Were it not for the child I would have no hesitation in refusing the Appellant's application as I would find that [his] removal ... was legitimate and proportionate to maintain effective immigration control."

6. However the judge noted the terms of the Home Office policy guidance: she cited the 2010 policy, but the 2015 one, still apparently in force, is in similar terms.

"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 where the effect of that decision would be to force a British child to leave the EU, regardless of the age of that child."

7. The judge referred to the guidance, and summarized it as saying that there would be exceptions, but "... mainly in relation to criminality of an Appellant or appalling immigration history which is not the case here". 'Appalling' is perhaps an over-emphasis of the guidance, as it still stands, including (see 11.2.3) "a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules".
8. The judge went on to refer to *Abdul* (section 55 - Article 24(3) Charter : Nigeria) [2016] UKUT 106 (IAC), cited by Mr Davison, though for no further purpose than to extract the following citation from the Charter on the Rights of the Child:

"(3) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless this is contrary to his or her interests."

She found that the appellant looked after his son while Kathleen was out on 12-hour shifts at work, and that they had "... a significant amount of contact and ... a close bond". Removing the appellant would have "a huge negative impact on the child".

9. The judge then considered the effect of s. 117A and B of the Nationality, Immigration and Asylum Act 2002. She did not set out the provision to which she referred, but clearly it was s. 117B (6):

'In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.’

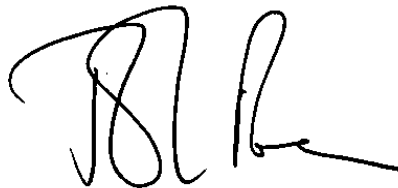
10. Having made the findings of fact she did, the judge concluded that “... the balance comes down in favour of [the child’s] article 8 rights as against the principle of legitimate immigration control, and allowed the appeal. That decision was challenged by the respondent on the basis that it did not take account of *MA (Pakistan)* [2016] EWCA Civ 705.
11. While that decision does not seem to have been cited to the judge by either side, as it should have been, especially as both were represented by counsel, it was of course binding on her. After extensive consideration of the legislation and authorities, the Court of Appeal (Elias LJ giving the only reasoned judgment) decided to follow a previous decision of the Court, and hold (see paragraph 45) that ‘wider public interest considerations’ must be taken into account when applying the reasonableness criterion in s. 117B (6). As made clear at paragraph 101, these include, not only the immigration history of the child’s parents, but “all other aspects of the public interest”.
12. At paragraph 38 the judge had noted the difficulties likely to be posed by delay and lack of funding in the appellant’s returning to the Philippines and applying for a visa to rejoin his family here. While on the authorities these were not relevant considerations on the question of whether he could be removed, that was not one of the respondent’s grounds of appeal.
13. These challenged the judge’s decision on the basis that she “... should have taken into account the appellant’s immigration history, the fact that he had been working illegally and has been a tax evader, as well as the circumstances of the family as a whole in relocation to the Philippines, rather than deciding the ‘reasonableness’ point “... solely on the basis of the best interests of the child alone”.
14. As Mr Davison pointed out, the judge had considered those considerations quite expressly at paragraph 33. The question for me is whether she did so in a way which brought them into her decision on the ‘reasonableness’ point. She was certainly entitled to have regard to the policy guidance in doing so; but not without considering the requirements of the law as a whole, including, though not cited, *MA (Pakistan)*. The point where she mentions it at paragraph 35 (11.2.3) refers to “a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules”.
15. The judge may have been generous in not finding that the appellant’s four years’ overstaying and working without paying tax did not come into that category, but that is not directly the basis on which her conclusion is challenged. The 11.2.3 policy guidance appears by way of an exception to the general rule at 11.1, which she had cited earlier (see 6). That means an exception to the principle, in the first place on the basis that the child “... could otherwise stay with another parent ... in the UK”.
16. That is of course the position of the child in this case. He can stay with his mother, whether or not she chooses to return to the Philippines (from where she too originally came) with the appellant. The difficulty with the judge’s decision in this case, realistic and comprehensive as it was, is that she seems to have excluded the appellant’s immigration

history from her consideration altogether on the ‘reasonableness’ point, on the basis that it did not satisfy her interpretation of the policy at 11.2.3. Once she reaches that conclusion at paragraph 35, there is no further reference to it in her decision on ‘reasonableness’.

17. In my view, what the judge needed to do, having noted the terms of the policy, was not to exclude the appellant’s immigration history, including his employment history, but to continue to consider it, when answering the question posed by *MA (Pakistan)* at paragraph 101 (see **10**). The phrase ‘all other aspects of the public interest’ of course includes the considerations set out in s. 117B (2) – (4), and, while the judge will be fully entitled to rely on the findings of fact she made on the appellant’s family life with his son, as well as what she said about his history, she will need to take account of the admitted facts on (4), and make findings of fact on (2) and (3) in reaching her decision on ‘reasonableness’ under (6).

Appeal allowed

Direction for resumed hearing in First-tier Tribunal, before Judge Suffield-Thompson

A handwritten signature in black ink, appearing to be 'JLR', written in a cursive style.

(a judge of the Upper Tribunal)

Signed: 24.07.2017