



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/05045/2015
HU/05046/2015
HU/05047/2015

THE IMMIGRATION ACTS

Heard at Field House
On 25 April 2018

Decision and Reasons Promulgated
On 29 May 2018

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CARMEN [S]

[S C]

[E C]

(No anonymity order made)

Respondents

Representation:

For the Appellant: Ms Willocks-Briscoe, Home Office Presenting Officer
For the Respondent: Mr Coleman of Counsel

DECISION AND REASONS

1. For convenience I treat the parties as they were before the First-tier Tribunal. Thus Mrs Sernades, [SC] and [EC] are the appellants and the Secretary of State is the respondent.

2. The appellants are citizens of Bolivia born in 1977, 2013 and 2014 respectively. The first appellant is the mother of the other two appellants. She has been in the UK since 2005. Having arrived on a visit visa she overstayed.
3. They appeal against the decision of the Secretary of State made on 21 August 2015 to refuse their application for leave to remain.
4. The first appellant's husband and the father of the children is a citizen of Peru. He has limited leave to remain.
5. The Secretary of State accepted that the first appellant has a genuine and subsisting parental relationship with the children but was not satisfied that the eligibility requirements were met. It was not accepted that there would be very significant obstacles to her reintegration into Bolivia. Her children are young and would quickly adapt to living there. There were no exceptional circumstances.
6. They appealed.

First tier hearing

7. Following a hearing at Hatton Cross on 9 June 2017 Judge of the First-tier Swinnerton allowed the appeals.
8. He found that the first appellant and her partner have a '*genuine and subsisting relationship*', that she has a '*genuine and subsisting parental relationship with her children*'; that she, the children and her partner live together as a family [22].
9. In proceeding to proportionality he stated that the best interests of the children are a primary consideration and intrinsic to the proportionality assessment. He added that it is '*generally in the best interests of a child to be with both parents if both the parents are being removed from the UK*' and that it is '*generally in the interests of the children to have stability and continuity in their education and social situation*'.
10. His proportionality analysis is at [25] to [28]. In summary, he accepted the evidence that the first appellant and her husband have little contact with family in Bolivia or Peru and that the children have never visited. He went on to state that the children being young are of an age where they should be able to '*adapt more readily to a change in familial circumstances*' were they to go to Bolivia or Peru [25].
11. He found that the first appellant had '*blatantly transgressed*' the immigration laws of the UK, that her partner was aware of her '*precarious status*' when they met in 2011, that she did not seek to regularise her status for many years [26].
12. He then found that the husband, who has limited leave to remain, would be able later to apply for indefinite leave to remain which if granted would allow the second and third appellants to apply for British citizenship [27].

13. He concluded (at [28]) that the Secretary of State's decision was not proportionate to the legitimate aim and that it is in the best interests of the children for the appeals to be allowed in order that they '*can remain living as a family unit together with their mother and father*'.
14. The Secretary of State sought permission to appeal which was granted on 24 January 2018.

Error of law hearing

15. At the error of law hearing before me Mr Coleman did not pursue a submission that the Secretary of State's application for permission to appeal had been made out of time.
16. Ms Willocks-Briscoe relied on the brief grounds. Simply, that the proportionality assessment had been inadequate. The judge had not made clear what weight had been attributed to each factor in the assessment. In particular it was not clear that he had given weight to the public interest.
17. Mr Coleman's response was that whilst the analysis was brief it did not show legal error. He had balanced the competing interests, giving the various factors the weight he considered appropriate and reached a conclusion that was open to him. The Secretary of State's position amounted to no more than a disagreement.

Consideration

18. I found that the decision showed material error.
19. The appellants could not meet the relevant provisions of the Rules. The judge considered the application outside the Rules to determine whether removal would amount to a breach of article 8. There is no challenge to the existence of family life. The consideration of article 8 outside the Rules is a proportionality evaluation.
20. The correct approach to the assessment of proportionality is set out in *R (on the application of Agyarko) v SSHD* [2017] UKSC11 where the court (at [57]) said the Tribunal '*... has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined ... The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.*'

21. The difficulty with the judge's decision is that it is not apparent that he has carried out a proper balancing exercise.
22. Having stated, correctly, that the starting point was the consideration of the best interests of the children and that such was generally to be with both parents and to have stability in their education and social situation, he then accepted the evidence that the children, who were born in the UK, had never been to their parents' home countries and that the parents no longer had connection with these countries. However, he did not then go on to reach a reasoned conclusion as to the significance of these findings in the context of whether it was reasonable for the family to go and live in Bolivia or Peru.
23. Further, if he meant his findings to be a factor in favour of the appellants he immediately negated them by stating that being very young and yet to start school they '*should be able to adapt more readily to a change in familial circumstances*' were they to be removed there. The judge failed to make clear findings and reach a reasoned conclusion on this matter.
24. He then went on in the most detailed paragraph of his brief analysis to find that the first appellant had '*blatantly transgressed*' the immigration laws having entered on a visit visa in 2005 with the intention of not returning to Bolivia. Also, that her partner was aware of her status when they met in 2011 when the relationship started and, thus, when they married later that year, and when they had the children together in 2013 and 2014. The judge also noted that she did not seek to regularise her status for many years.
25. Some factors are heavily weighted. The most obvious example is the public policy in immigration control. The weight depends on the legislative and factual context. Whether someone is in the UK unlawfully or temporarily and the reason for that circumstance will affect the weight to the public interest in his or her removal and the weight to be given to family/private life. The findings in respect of the first appellant's immigration history were clearly significant negative factors in the balancing exercise. Although he stated that he had borne in mind the '*strong public interest in maintaining immigration control*' it is not apparent that he did, in fact, give weight to the public interest given the history set out by him and when considered in the context of the other very limited findings which are indicated in the previous contradictory paragraph.
26. The only other matter considered by the judge was that the children's father, having lawful leave to remain would fairly soon be able to apply for indefinite leave to remain (ILR) which if granted would then allow the children to apply for British citizenship.

27. Such clearly, to the judge, weighed in the appellants' favour in the balancing exercise. However, I do not consider that it was open to the judge to take as a factor in favour several hypothetical future events.
28. The final paragraph states that it is in the best interests of the children that the appeals be allowed so that the children can remain living as a family unit with their parents. As the judge reached limited and conflicting findings as to whether it was reasonable for the children to adapt to family life in Bolivia that paragraph adds nothing.
29. In summary, to paraphrase Lord Thomas in *Hesham Ali (Iraq) v SSHD [2016] UKSC 60* at [82-84] the proper approach for the tribunal is to find the facts and having done so, set out those factors which weigh in favour of immigration control – 'the cons' – against those factors that weigh in favour of family/private life – 'the pros' in the form of a balance sheet which it then uses within the framework of the tests being applied. Of course, the factors are not equally weighted and the tribunal must in its reasoning articulate the weight being attached to each factor. The First tier Tribunal did not properly carry out that exercise. I concluded that the failure to give proper consideration to the article 8 assessment amounted to a material error of law such that the decision had to be set aside.
30. I agreed with Mr Coleman, who indicated that he wished to lead further evidence but was not in a position to do so on the day, that the appropriate course was for the appeal to be remitted for rehearing.

Notice of Decision

31. The decision of the First-tier Tribunal is set aside. No findings stand. The nature of the case is such that it is appropriate in terms of section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 to remit the case to the First-tier Tribunal for a fresh hearing. The member(s) of the First-tier Tribunal chosen to consider the case are not to include Judge Swinnerton.
32. No anonymity order has been requested or made.

Signed

Date: 25.5.18

Upper Tribunal Judge Conway