



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/06706/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20 September 2018

Decision & Reasons Promulgated  
On 11 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MS A A J  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms A Jones, Counsel instructed by Chris & Co Solicitors  
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. The appellant in this case, was born on 2 July 1988 and is national of Grenada. The appellant appeals the respondent's decision dated 25 May 2017 refusing the appellant further leave. In a decision promulgated on 13 June 2018, Judge of the First-tier Tribunal Hussain dismissed the appellant's appeal on human rights grounds. The appellant appeals with permission on the basis that the judge refused to consider the details of the appellant's change of circumstances in the form of her relationship with her British partner and the birth of her child as the Tribunal considered this to be a new matter under Section 85(5).
2. The appellant and the respondent settled a judicial review by consent on 27 February 2017. By way of a supplementary bundle lodged on 21 February 2017 the applicant

had notified the respondent that she was pregnant and it was upon receipt of this evidence of change of circumstances that the respondent invited the applicant to consent to withdraw her JR application.

3. Mr Jarvis accepted that the First-tier Tribunal materially erred in subsequently failing to consider the appellant's claim to have a British partner and child as part of the Article 8 appeal. It was also accepted by Mr Jarvis that the appellant did raise the relationship with a British partner and that she was pregnant even though in the respondent's refusal dated 25 May 2017, which postdated the judicial review consent, there was no consideration of the matter despite the respondent settling the judicial review in order to consider this.
4. The "new matter" issue was therefore a red herring in that the evidence relating to the British citizen partner and pregnancy had previously been raised with the Secretary of State in the judicial review proceedings and the Secretary of State had consented to reconsidering that claim. Although therefore this new information was not considered by the decision maker in the Reasons for Refusal Letter dated 25 May 2017 as it ought to have been, it was not a new matter and the First-tier Tribunal ought to have considered this evidence in respect of the partner and child and made appropriate findings.
5. It was not disputed therefore that the decision of the First-tier Tribunal materially erred in law in failing to consider the evidence before it of the appellant's relationship with a British citizen and her British citizen child.

### **Remaking the Decision**

6. I was satisfied that the decision could be remade by the Upper Tribunal. The appellant's representative relied on the bundle of documents before the First-tier Tribunal in June 2018 which included an additional witness statement for the appellant, addressing the issue of her partner and son, together with supporting statements from her sister and her aunt. There was, in addition, a witness statement from the appellant's partner Mr A C (page 10 appellant's bundle).
7. I heard oral evidence from the appellant and from her partner. The appellant's sister adopted her witness statement although there was no cross-examination of the third witness. At the end of the hearing I reserved my decision on the remaking of the appeal. All of the evidence, together with the submissions of the parties is set out in the Record of Proceedings. In reaching my decision I have considered all of the information and evidence before me, even if not specifically mentioned below.
8. It was not disputed that the appellant's case rests largely now on her relationship with her partner and her British citizen child and to that extent the findings of the Tribunal in the decision promulgated in June 2018 in relation to the appellant's private life at [21] and following shall stand. I note that there was no findings in the First-tier Tribunal as to whether the appellant's relationship with her sister and her extended family in the UK could amount to family life. In any event the appellant is no longer living with her sister and is living with her partner and the issue of family life with her sister was not actively pursued before me. I am not satisfied it has been

demonstrated there is any family life with her sister over and above normal family ties and therefore no family life with regards to Article 8 in relation to her extended family (and again there was no specific argument made before me in relation to the relationship with her aunt).

9. I heard evidence from both the appellant and her partner. Mr Jarvis did not dispute the relationship and I am satisfied that it is as claimed. It was Mr Jarvis' submission that the appellant could not qualify under Appendix FM and that the Secretary of State was not requiring the British citizen child to leave the UK and therefore the reasonableness provisions "did not apply."
10. Mr Jarvis conceded that there was no decision from the Secretary of State in respect of the appellant's relationship with her British citizen child and partner. He apologised for that omission.
11. Mr Jarvis submitted that the application could not succeed as a parent. The appellant is a primary carer but living in the same house as her partner and could not therefore succeed under the parent route which is aimed at a situation where a relationship comes to an end. In respect of the partner route Mr Jarvis submitted that the appellant could not succeed and Mr Jarvis relied on S-LTR1.6 of the suitability requirements in terms of the appellant's conduct and her very poor immigration history. Even though he accepted she entered when she was a child at 15 and could not be held responsible for her stay in the UK between 2003 and 2006 she had nevertheless remained from 2006. As a consequence of S-LTR1.6 Mr Jarvis submitted that the appellant therefore had no access to EX.1. However, I take into consideration, as conceded by Ms Jones, that the appellant cannot meet the requirements of the partner route, as she has been in a relationship with her partner for less than two years.
12. Gen.1.2 provides as follows:
 

'For the purposes of this Appendix 'partner' means-

  - (i) The applicant's spouse;
  - (ii) The applicant's civil partner;
  - (iii) The applicant's fiancé(e) or proposed civil partner; or
  - (iv) A person who has been living together with the applicant in a relationship akin to a marriage or civil partnership or at least two years prior to the date of applicant, unless a different meaning of partner applies elsewhere in this Appendix
13. Ms Jones submitted that the starting point was Appendix FM did apply. She did not accept that the parent route did not apply as the parents were not separated. Ms Jones although initially relying on the entry clearance provisions, then relied on E-LTRPT.2.2 and 2.3. E-LTRPT.2.3 provides as follows:
  - (a) The applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent (who is a

British citizen or settled in the UK), and the applicant must not be eligible to apply for leave to remain as a partner under this Appendix; or

- (b) the parent or carer with whom the child normally lives must be –
  - (i) a British citizen in the UK or settled in the UK;
  - (ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and
  - (iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

14. I reject Ms Jones interpretation of E-LTRPT.2.3 as applying in the appellant's circumstances which is clearly founded on a misreading of those provisions. Although the appellant is indeed not eligible to apply for leave to remain as a partner, the appellant's partner, with whom she lives is a British Citizen. The appellant cannot qualify under E-LTRPT.2.3.

15. I am satisfied that the appellant cannot qualify under either the partner or the parent provisions of Appendix FM. I have considered Gen.3.2 of Appendix FM which provides as follows:

'Gen.3.2(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.'

16. This is a restatement of the current legal position: where an application cannot meet the Immigration Rules, it must be considered nonetheless whether the refusal would result in unjustifiably harsh consequences (**Agyarko and Ikuga v Secretary of State for the Home Department** [2017] UKSC 11).

17. I am satisfied that there are circumstances, whether they be considered exceptional or compelling which merit a grant of leave outside the immigration rules. In reaching this finding, I have considered the best interests of the appellant's child. The child is still an infant and it was not disputed that it is in his best interests to remain in the UK with his parents. Mr Jarvis conceded that it was not reasonable to expect the British citizen child to leave the UK. The importance of a child's British citizenship

was emphasised in ZH (Tanzania) v SSHD [2011] UKSC 4 as a powerful factor, although not a trump card.

18. I must take into account, when considering Article 8 outside the Immigration Rules, section 117B of the Nationality Immigration and Asylum Act 2002, which provides as follows:

‘Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
  - (a) Are less of a burden on taxpayers, and
  - (b) Are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interest of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such person-
  - (a) Are not a burden on taxpayers, and
  - (b) Are better able to integrate into society.
- (4) Little weight should be given to-
  - (a) A private life, or
  - (b) A relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.
- (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

19. I am satisfied that the appellant has a genuine and subsisting parental relationship with a qualifying child. I rely on my best interests’ assessment, that the best interests of that child lie in remaining in the UK with both parents. I must go on to consider whether it is reasonable to expect that child to leave the UK.

20. It was Mr Jarvis’ submission that such considerations did not apply as the Secretary of State was not requiring the child to leave the UK. I am not persuaded that such is

the case. Section 117B(6) is engaged, whether or not the child will leave the UK in practice. I must consider, as section 117B(6) does, whether the child should be expected to do so. Such consideration encompasses not only a best interests assessment but a wider consideration of reasonableness which requires the best interests to be balanced against the impact on the child (**MA (Pakistan) and others [2016] EWCA Civ 705** and **AM (Pakistan) and others [2017] EWCA Civ 180**). When resolved in an individual's favour such an assessment is determinative of proportionality (paragraph 51 **Rhuppiah v SSHD [2016] EWCS Civ 803**).

21. I take into account what was said in **SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC)** that in essence, absent criminal behaviour or a serious adverse immigration history, it is the respondent's position that it would be disproportionate to remove an applicant with a genuine and subsisting parental relationship with a British citizen child. The respondent's policy is a relevant factor to assist in the application of section 117B(6) (see **SF and others** and **Hesham Ali v SSHD [2016] UKSC 60** (at 15 to 17 and 46)).
22. Although I accept that the respondent can and does update his guidance, there was no evidence or submissions before me to suggest that there had been any substantive change to the respondent's guidance, in altering the circumstances in which it is envisaged that a refusal to grant leave to a parent, where a British citizen child is involved, is justified.
23. I have considered that although the appellant does not have a good immigration history, in not leaving the UK once she reached adulthood, there was no element of criminality or deception and I take into account that the appellant made attempts to regularise her immigration status. I am not satisfied that it can be said to be a 'very poor' or a serious adverse immigration history. Whilst the breaches committed by the appellant weigh against her, they are not sufficiently serious or weighty, in my findings, to outweigh the best interests of her British citizen child.
24. I am satisfied that it is not reasonable to expect the appellant's British citizen child to leave the UK and that the requirements of section 117B (6) are met. As a consequence, the public interest does not require the removal of the appellant, which would be a disproportionate and therefore unlawful interference with her Article 8 rights.

### **Decision**

25. The decision of the First-tier Tribunal contains an error of law and is set aside. I remake the decision allowing the appellant's appeal.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of

their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Dated: 4 October 2018

Deputy Upper Tribunal Judge Hutchinson

**TO THE RESPONDENT**  
**FEE AWARD**

No fee award was sought or is made.

Signed

Dated: 4 October 2018

Deputy Upper Tribunal Judge Hutchinson