



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/21093/2016

THE IMMIGRATION ACTS

Heard at Field House
On 21 August 2018

Decision & Reasons Promulgated
On 04 September 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

MARIBETH [W]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Nwokeji (Solicitor)

For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of the USA born 10 December 1963. She appeals the decision of the respondent on 15 August 2016 to refuse her application for leave to remain in the UK on the grounds that this would violate her human rights. The appellant appealed and her appeal came before a First-tier Judge on 15 January 2018. She was not represented on that occasion. The judge records that while he had the respondent's bundle there was no witness statement or further supporting documentation submitted by the appellant.

2. The judge heard oral evidence from the appellant and her husband who is a British citizen. They had got married in 2009 in the USA having met online. They lived together in the USA and had a daughter who was born in March 2010. The appellant was in employment but on a low wage and her husband was awaiting a green card. The couple decided to leave although the green card arrived just two weeks before their departure in September 2010. Initially their intention had been to return to the USA but the husband had secured employment in the UK and earned a comfortable salary. The judge records that the appellant was unable to explain exactly why she did not apply to regularise her stay in the UK when her visit visa expired six months after her arrival. The appellant's husband's evidence was that it was because they lacked the funds to make the application. Both the witnesses said it would be difficult for them if they had to return to the USA.
3. It was submitted on behalf of the respondent that the appellant was an overstayer who had broken the conditions of her visit visa and there would be no insurmountable obstacles to the family relocating to the USA and there were no exceptional circumstances. Also, the appellant had the option of applying for an entry clearance from the USA in order to regularise her return to the UK.
4. Although in the decision the respondent had stated that the child was not a British citizen the judge found that as her father was a British citizen by birth the daughter was a British citizen by descent under the British Nationality Act 1983 as she had been born outside the UK to a parent who was a British citizen otherwise than by descent. I should mention that the respondent filed a response on 11 July 2018 on the basis that there was no record of the child being registered as a British citizen. She had entered the country on a US passport.
5. At the hearing Mr Deller conceded that the child was a British citizen as the judge had stated.
6. The judge found there had been no challenge to the genuineness of the relationship between the husband and wife or between the appellant and her child.
7. The judge directed himself by reference to Agyarko [2017] UKSC 11 noting that the appellant did not meet the immigration status requirement unless she could bring herself within EX.1 and the key questions were therefore whether "it would not be reasonable to expect the child to leave the UK" and/or "there are insurmountable obstacles" to family life with her partner continuing outside the UK.
8. The judge referred to MA (Pakistan) [2016] EWCA Civ 705, in particular to paragraphs 42 and 47 of the judgment. The determination concludes as follows:
 - "16. In this case the Appellant's daughter, although born in the USA, has spent almost the whole of her life in the UK and no doubt is as integrated into life in the UK as any other British child resident in the UK. As a seven-year-old, her best interests must be overwhelmingly for her to remain living with her parents, whether that is in the UK or in the USA. It may well be preferable for her to remain in her current

home and school where she has established her social and educational ties. However, I am not satisfied that a move to the USA would be severely prejudicial. At seven years of age, her educational development is still at an early stage. Even allowing for differences in the American education system, she should be able to adapt at such an early age and importantly she does not need to learn a new language. There is no evidence that she has any health problems or that she has special educational needs. The difficulties that the child may face have to be balanced against the very poor immigration history of her mother. The Appellant has been unable to give any adequate explanation for her failure to regularise her stay on expiry of her six-month visit visa. She in fact made no effort to do so even after receiving a Home Office notice on 18.9.13 requiring her to leave as an overstayer and a further notice RED0001 on 24.8.15 notifying her of her liability to removal. The given reason that they could not afford the cost of an application is very weak, considering that her husband obtained employment within two months of his return here in 2010 well before the visit visa expired. In considering the issue of reasonableness, I also bear in mind that it is open to the Appellant to make an entry clearance application as soon as she returns to the USA (with or without her daughter) and if successful, this means her absence from the UK would be only temporary. Taking all these factors into account, I am not persuaded that she meets the criteria of EX.1(a)(ii) *'that it would not be reasonable to expect the child to leave the UK'*.

17. I turn to the issues relating to family life with her partner under EX.1(b) namely *'that there are insurmountable obstacles to family life with that partner continuing outside the UK.'* This expression is further defined in EX.2 which states:

'... insurmountable obstacles means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.'

In the case of *Agyarko*, Lord Reed gave guidance as to how 'insurmountable obstacles' should be construed. He referred to the judgement of the European Court in the case of *Jeunesse v The Netherlands*(2015) 60EHRR17 and stated as follows:

43. *It appears that the European court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned. In some cases, the court has used other expressions which make that clearer: for example, referring to "un obstacle majeur" "Insurmountable*

obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test.....'

18. I do not doubt that there would be difficulties for the Appellant and her partner in relocating to the USA. The primary difficulty would be in relation to Mr [W]'s employment. He has a well-paid job in the UK, having been with the same company since 2010 and he may be unlikely to find an equivalent job in the USA or one earning an equivalent salary. He would also have to apply for a Green Card to allow him to work in the USA (although no reason has been given as to why he would not qualify for this). Mr [W] gave no evidence of any enquiries he has made as to job opportunities for him in the USA. The fact that the Appellant has lived the great majority of her life in the USA and that she still has close relatives there including three sisters and her two adult sons are likely to be factors which would make it somewhat easier for the family to resettle in the USA. Even if it took some time for Mr [W] to find a job, the Appellant may be able to find employment and she has confirmed that she was previously employed in Social Services in the USA. Mr [W] would have to leave behind his elderly parents in the UK but he mentioned that he has a sister who lives near them in Bedford. Taking all the evidence before me into account I am not persuaded that the 'stringent test' of 'insurmountable obstacles' is met.
19. I have to conclude that the Appellant does not fall within the scope of Appendix FM of the Immigration Rules in relation to her family life.
20. It also seems to me that the Appellant has even less chance of meeting the provisions of the Immigration Rules with regard to her private life. She would have to show that there would be 'very significant obstacles' in reintegrating into life in the USA. Given that she was born and raised there; has lived by far the majority of her life there; that she continues to have close family members there; and that she may be able to find employment again there, I find that she simply cannot meet this criterion on the basis of her private life.
21. However, this appeal being on human rights grounds, the focus of my assessment must be on Article 8 itself and I must therefore consider the position under the Convention outside the ambit solely of the Immigration Rules. The Appellant clearly does have a family life in the UK. It is arguable that her removal would not constitute an interference with that family life as the family could travel together to the USA. However, given the ties that her husband has over here in the form of his employment and the difficulties that he would have to find an equivalent job in the USA, I will accept that her removal may constitute such an interference of sufficient gravity

as to engage her Article 8 rights and those of her associated family members including her 7-year old daughter.

22. This brings me to the key issue of proportionality and the balance between on the one hand the public interest represented by the Secretary of State in the maintenance of immigration control and on the other hand the interference with Convention rights. In this connection, I must take into account S.117B(6) of the 2002 Act which states:

'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 relationship with a qualifying child, and (b) it would not be reasonable to expect the child to leave the UK'.

I also refer again to the duty of the Secretary of State (and of this Tribunal) in relation to Section 55 of the 2009 Act to consider the best interests of the child as 'a primary consideration' which I have already discussed above and in relation to which I have quoted the judgement of Elias LJ in the case of *MA(Pakistan)*. I have already addressed the issue of reasonableness (in the context of paragraph EX.1 of the Immigration Rules). I have also mentioned the Appellant's very poor immigration record which amounts to a strong factor in support of the Secretary of State's legitimate aim in the maintenance of effective immigration control. I also bear in mind that it is open to the Appellant to apply for entry clearance to return to the UK from the USA and, if successful, this would mitigate the adverse effects on the family. I have to conclude that the Respondent's decision does not amount to a disproportionate interference with the Appellant's Article 8 rights."

9. There was an application for permission to appeal and permission was granted by the First-tier Tribunal on 21 May 2018. The grounds were described as "somewhat convoluted" but the point highlighted in the grant of permission was that while the judge had recognised that the appellant's daughter was a British citizen he had not considered whether in expecting the appellant to leave the UK with her daughter the daughter would be denied the enjoyment of her rights as a citizen of the European Union and the omission was significant in the light of the Home Office policy which had been explained in **SF and Others (guidance - post-2014 Act) [2017] UKUT 120**.
10. The other grounds appeared to the judge to be weaker and the findings in relation to insurmountable obstacles appeared to be well made and the judge could not be criticised for not considering evidence which had not been provided.
11. Mr Nwokeji referred to Appendix FM. The judge had been harsh to refer to the appellant's "very poor immigration history" in paragraph 16 of his determination. Although the appellant had overstayed she had eventually attempted to regularise her position and there had been no criminality or false applications. She had given a genuine and reasonable explanation for her failure to make an in-time application.

12. Reference was made to **MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88 (IAC)**. The fact that a child had been in the UK for seven years would need to be given significant weight. Powerful reasons were required where a child had been in the UK for over ten years and there were no such powerful reasons. Mr Nwokeji contrasted the position in **MT and ET** where the mother had received a community order for using a false document to obtain employment. She had been described as a somewhat "run of the mill immigration offender". She had made a false asylum claim and yet it had been held that such behaviour did not constitute a powerful reason. There was no such criminality in the case of the appellant.
13. The family would face difficulties in returning to the USA and although the appellant had family in the USA she was estranged from them. Her husband's father was terminally ill. The appellant's daughter had been in school in the United Kingdom effectively for all her life and it would be hard to adapt.
14. The policy guidance that had been referred to in the case of **SF** had been replaced by new guidance dated 22 February 2018. Although the general rule was that it would not be reasonable to expect a British citizen child to leave the UK with the applicant parent or primary carer facing removal –

"In particular circumstances, it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the threshold for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules..."

It was submitted that the behaviour of the appellant did not fall within these categories.

15. Mr Avery pointed out that the appellant had come to the UK as a visitor and had overstayed. She had failed to comply with the terms of the visit visa and the judge had been entirely correct to describe her as having a very poor immigration history. The determination was very well reasoned and the judge had been entitled to find that it would be reasonable for the child to leave. The grounds were no more than a disagreement with the judge's findings. The findings in relation to insurmountable obstacles were again well reasoned and there was no error in the judge's approach. The case of **SF** had been based on the previous guidance. The parties had a choice as to whether to relocate.
16. At the conclusion of the submissions I reserved my decision. I can only interfere with the determination of the First-tier Judge if it was flawed in law.

17. The grounds of appeal are correctly described by the judge granting permission as “convoluted”. Points were taken in relation to the difficulties in getting a green card, but it is quite clear that the judge had in mind the difficulties for the appellant. It was said that the appellant would have enlarged on his evidence had he been asked to do so but I detect no conceivable unfairness in the judge’s approach. As is pointed out in the decision granting permission the judge cannot be criticised for not considering evidence which had not been provided. The judge in any event reminds himself that the primary difficulty would be in relation to the appellant’s husband’s employment. I do not find that the judge erred or misdirected himself in his consideration of the question of the green card as contended in the grounds. The approach of the judge was perfectly reasonable throughout.
18. In paragraph 18 of the determination the judge did not arguably err in my view in referring to the appellant having close relatives in the USA as being factors which would make it “somewhat easier” for the family to resettle. He had in mind that finding a job might take some time and the fact that the appellant’s husband would have to leave behind his elderly parents. I agree with the grant of permission referring to the findings in relation to insurmountable obstacles appearing to be well made. As Mr Avery submits, the grounds amount to little more than a disagreement with a carefully analysed and reasoned decision. Furthermore the judge points out it is open to the appellant to apply for an entry clearance to return to the UK from the USA.
19. In relation to the argument on which permission to appeal had been specifically granted, it is made clear by Lord Reed in Agyarko at paras 61 to 67 that while EU citizens should not be deprived of the “substance of the rights” they enjoy by virtue of their status, in a case such as this the British Citizen child would not be compelled to leave the EU - it was a matter of choice as Mr Avery submitted. Lord Reed distinguished the circumstances in Ruiz Zambrano v Office national de l'emploi (Case C-34/09) [2012] QB 265 from others where “the same relationship of complete dependence between the EU citizen and the third-country national was not present” and referred to Dereci v Bundesministerium für Inneres (Case C-256/11) [2011] ECR I-11315. In paragraph 67 Lord Reed stated:

“In the light of these cases, this ground of challenge to the Rules and Instructions cannot be upheld. In the event that a situation were to arise in which the refusal of a third-country national's application for leave to remain in the UK would force his or her British partner to leave the EU, in breach of article 20 TFEU, such a situation could be addressed under the Rules as one where there were "insurmountable obstacles", or in any event under the Instructions as one where there were "exceptional circumstances". Typically, however, as in the present cases, the British citizen would not be forced to leave the EU, any more than in the case of *Dereci*, and the third-country national would not, therefore, derive any rights from article 20.”

The First-tier Judge having cited extracts from Agyarko would have been familiar with the applicable principles and did not err in his approach to the question of insurmountable obstacles or his conclusions generally.

20. For the reasons I have given I am not satisfied that the decision of the First-tier Judge is flawed in law and accordingly this appeal is dismissed.

Anonymity

21. The First-tier Judge made no anonymity order and I make none.

Fee Award

22. The First-tier Tribunal Judge made no fee award and I make none.

Signed

Date 28 August 2018

G Warr, Judge of the Upper Tribunal