



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/41977/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 13th February 2018**

**Decision & Reasons
Promulgated
On 27th February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**ANNIE STACIA ALICIA SMITH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Jafurally of Callistes Solicitors

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

DECISION AND REASONS

Introduction and Background

1. The Appellant is a female Jamaican citizen born 12th January 1988. She appealed against the decision of Judge R G Walters of the First-tier Tribunal (the FTT) promulgated following a hearing on 22nd December 2016.

2. The Appellant had arrived in the UK on 19th June 2002 as a visitor. The initial application made by the Appellant was for indefinite leave to remain, based upon her relationship with her sister. This application was refused in September 2003. Refusal was reconsidered and maintained. The Appellant remained in the UK.
3. On 23rd September 2014 the Appellant applied for leave to remain, the application being based upon Article 8 of the 1950 European Convention on Human Rights. This application was based upon family life with her sister and her sister's son and private life. The application was refused on 10th October 2014. The Respondent considered family life pursuant to Appendix FM, noting that the Appellant did not have a partner or children. Her private life was considered with reference to paragraph 276ADE(1) of the Immigration Rules, the Respondent not accepting that the Appellant could satisfy any of the requirements therein. The application was also considered pursuant to Article 8 outside the Immigration Rules, the Respondent finding no exceptional circumstances which would justify granting leave to remain.
4. The Appellant's appeal was heard by the FTT (Judge Higgins) and dismissed in a decision promulgated on 18th November 2015. However the FTT decision was set aside by the Upper Tribunal (Judge Roberts) who found an error of law, and remitted the appeal to be reheard afresh by the FTT.
5. The appeal was then considered by Judge Walters and dismissed.
6. Permission to appeal was granted by Judge Pooler who found it arguable that the FTT had erred by failing to deal with submissions made on the Appellant's behalf, that by the time of the FTT hearing, she was the wife of a British citizen, and it was submitted that she satisfied Appendix FM, and the FTT should have considered section EX.1.(b) as it was contended that the Appellant had a genuine and subsisting relationship with her British husband, and there were insurmountable obstacles to family life continuing outside the UK, as her husband has a daughter from a previous relationship in the UK.

Error of Law

7. On 21st September 2017 I heard submissions from both parties in relation to error of law. On behalf of the Respondent it was accepted that the FTT had materially erred in law in failing to consider Appendix FM. The hearing was adjourned for further evidence to be given. Full details of the application for permission, the grant of permission, submissions made by both parties, and my conclusions are contained in my decision promulgated on 29th September 2017. I set out below paragraphs 13 - 17 which contain my conclusions and reasons for setting aside the FTT decision;

- “13. As I announced at the hearing, the decision of the FTT is set aside. The FTT erred in law as contended in the grounds submitted on behalf of the Appellant, read together with the grant of permission.
14. The Appellant made it clear to the FTT that she wished to rely upon her relationship with the Sponsor, and it was argued that she satisfied the requirements of Appendix FM, and in particular EX.1.(b). The FTT did not make any findings upon Appendix FM and that constitutes a material error of law.
15. This appeal had previously been remitted to be considered afresh before the FTT. In my view it is not appropriate for a further remittal to take place. I have considered paragraph 7 of the Senior President’s Practice Statements.
16. I agreed that it would be appropriate for further up-to-date evidence to be given by the Appellant and Sponsor in relation to their claim that insurmountable obstacles exist to family life continuing outside the UK.
17. The hearing was adjourned for further evidence to be provided. The FTT finding that the Appellant and Sponsor have established family life is preserved.”

Re-Making the Decision

8. The human rights application considered by the FTT in December 2016 contained different circumstances to the application that was initially made and refused in October 2014. That was because the Appellant had married Anthony James Williams (the Sponsor) a British citizen on 22nd June 2016. The Sponsor had a British child from a previous relationship born on 7th January 2013.
9. At the commencement of the Upper Tribunal hearing on 13th February 2018 I ascertained that the Tribunal had all documentation upon which the parties intended to rely, and each party had served the other with any documentation upon which reliance was to be placed. The Tribunal had received the Respondent’s bundle which was before the FTT, with Annexes A – K, and bundles served on behalf of the Appellant which are in three sections, comprising a total of 354 pages. These bundles contained some evidence that had not been before the FTT, admitted pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 without objection.
10. Mr Jafurally sought to introduce further documentary evidence, that being a birth certificate of a child born to the Appellant and Sponsor on 7th January 2018 and the British passport of that child. Mr Avery did not object and I decided that it was appropriate for that evidence to be submitted if the birth of the child was going to play a part in the appeal.

11. There was therefore a different set of circumstances before the Upper Tribunal, in that I was now being asked to consider that the Appellant and Sponsor had a British child, which was relevant to consideration of EX.1., and also relevant if section 117B of the Nationality, Immigration and Asylum Act 2002 was considered, in particular section 117B(6).
12. Mr Avery indicated that the Respondent did not object to the Tribunal considering the change of circumstances, and stated that it was appropriate to consider that the Appellant and Sponsor now had a British child. Mr Avery had seen the birth certificate and the passport and was satisfied that the child is British.

Oral Evidence

13. Oral evidence was given by the Appellant who adopted her witness statements dated 6th January 2015, 16th December 2016, and 4th January 2018. The Appellant was not asked further questions by Mr Jafurally, and was cross-examined by Mr Avery only in relation to the Sponsor's contact with his daughter from a previous relationship. Oral evidence was then given by the Sponsor who adopted his witness statements dated 22nd December 2016 and 13th February 2018. He was not questioned by Mr Jafurally and was asked by Mr Avery as to when he had contact with his daughter from a previous relationship. He said that he had contact on a monthly basis. His daughter lives in Manchester and he lives in London. He did not see her in December because the Appellant was in the later stages of her pregnancy.

Oral Submissions

14. Mr Avery questioned whether the relationship between the Sponsor and his daughter from a previous relationship meant there were insurmountable obstacles to the Sponsor and Appellant continuing family life outside the UK. However, with reference to EX.1.(a) it was accepted that the Sponsor had a genuine and subsisting relationship with her British child, and Mr Avery accepted that it would be appropriate to follow the Respondent's policy in relation to British children, which is referred to in SF Albania [2017] UKUT 00120 (IAC).
15. Mr Jafurally submitted that the appeal should be allowed on the basis that the Respondent accepted that the suitability and eligibility requirements of Appendix FM were satisfied, and the evidence indicated that EX.1.(a) and (b) were satisfied. Mr Jafurally submitted that it was appropriate to rely upon the guidance in SF, and the Respondent's policy was that it was not reasonable to require a British child to leave the UK.
16. With reference to EX.1.(b) I was asked to find that the insurmountable obstacles to family life between the Appellant and Sponsor continuing

outside the UK, resulted from the Sponsor having a British child from a previous relationship. There is a Family Court order in place, permitting him contact with that child, and he exercises his contact rights.

17. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

18. The Appellant and Sponsor have family life with each other and with their daughter born 7th January 2018. Article 8 is therefore engaged.

19. The Respondent does not dispute that the Appellant satisfies the suitability requirements and the eligibility requirements set out in E-LTRP.1.2 - 1.12 and E-LTRP.2.1 - 2.2 and that it is appropriate to consider EX.1. and EX.2. which are set out below;

“EX.1. This paragraph applies if

- (a) (i) the applicant has a genuine and subsisting parental relationship with a child who –
 - (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
 - (bb) is in the UK;
 - (cc) is a British Citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of application; and
- (ii) it would not be reasonable to expect the child to leave the UK; or
- (b) The applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) ‘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.”

20. I find that the Appellant has a genuine and subsisting parental relationship with her daughter and I am satisfied, as accepted by the Respondent, that the daughter is a British citizen.

21. I must therefore consider whether it would be reasonable to expect the daughter to leave the UK. In considering this point I follow the guidance given in MA (Pakistan) [2016] EWCA Civ 705. I must not focus on the position of the child alone but must have regard to the wider public interest, including the immigration history of the parents.

22. The fact that a child is British is a weighty consideration and was described in ZH (Tanzania) [2011] UKSC 4 as being of particular importance. I take into account the guidance in SF which indicates that a Tribunal ought to take into account the Secretary of State's guidance if it points clearly to a particular outcome in a case as only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal. That case involved considering whether it would be unreasonable for a British child to be removed from the UK and reference was made to the Secretary of State's own guidance on that point, and that guidance is relevant in this case.
23. In brief summary, the guidance indicates that where a decision to refuse an application would require a parent or primary carer to return to a country outside the European Union the case must always be assessed on the basis that it would be unreasonable to expect a British child to leave the EU with that parent or primary carer. It may 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. Such cases would involve criminality or a very poor immigration history where a person has repeatedly and deliberately breached the Immigration Rules.
24. There is no suggestion of criminal convictions in this case. The Appellant has remained in the UK without leave for a very considerable period of time, but I do not find her immigration history is such that it would be appropriate to refuse her leave to remain in the UK. The best interests of the child are clearly to be brought up by both parents if possible, and as it is accepted that the child is British, my conclusion is that it would not be reasonable to expect the child to leave the UK. Therefore the Appellant succeeds with reference to EX.1.(a).
25. I find that the Appellant also succeeds with reference to EX.1.(b). It is accepted that she has a genuine and subsisting relationship with the Sponsor who is a British citizen. A copy of the Manchester Family Court order dated 9th February 2017 is included in the Appellant's bundle at page 327. This confirms that the Sponsor is entitled to contact with his daughter on a monthly basis. If the Sponsor and Appellant had to relocate to Jamaica, this would mean that the Sponsor and his daughter from the previous relationship would no longer be able to have physical contact. In my view, that would amount to very serious hardship for the Sponsor and therefore I find that insurmountable obstacles to family life continuing outside the UK exist. Therefore the appeal succeeds with reference to Appendix FM. As set out in GEN.1.1. Appendix FM sets out the requirements to be met and, in considering applications under this route, reflects how, under Article 8 the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK, the prevention of disorder and crime, the protection of health or morals, and the protection of the rights and freedoms of others. It also reflects the

relevant public interest considerations set out in Part 5A of the Nationality, Immigration and Asylum Act 2002, and takes into account the need to safeguard and promote the welfare of children in the UK, in line with the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009.

26. Had I been considering this appeal with reference to Article 8 outside the Immigration Rules, the result would have been the same in that the appeal would be allowed. I must have regard to the considerations in section 117B of the 2002 Act. Section 117B confirms that the maintenance of effective immigration controls is in the public interest. It is in the public interest that a person seeking leave to remain can speak English. The Appellant can speak English although this is a neutral factor in the balancing exercise.
27. It is also in the public interest that a person seeking leave to remain is financially independent. The Sponsor has employment, but I do not find that evidence has been submitted to prove that the Appellant is financially independent.
28. Little weight should be given to a private life or a relationship formed with a qualifying partner established by a person at a time when the person is in the UK unlawfully. The Appellant was in the UK without leave when she commenced her relationship with the Sponsor.
29. Section 117B(6) states that in the case of a person not liable to deportation, the public interest does not require the person's removal, where the person has a genuine and subsisting parental relationship with a qualifying child, and it would not be reasonable to expect the child to leave the UK. This therefore is the same test as in EX.1.(a). The Appellant does have a genuine and subsisting parental relationship with her daughter who is a qualifying child because she is British. For the reasons given earlier, it would not be reasonable to expect the British child to leave the UK.
30. Therefore, notwithstanding financial independence has not been proved, and the Appellant has been in the UK without leave for a considerable period of time, my conclusion is that section 117B(6) means that the appeal should be allowed, which reinforces my finding in relation to section EX of Appendix FM.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and was set aside. I substitute a fresh decision. The appeal is allowed.

Anonymity

No anonymity direction was made by the FTT. There has been no application to the Upper Tribunal for anonymity and I see no need to make an anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

16th February 2018

**TO THE RESPONDENT
FEE AWARD**

Although the appeal has been allowed I do not make a fee award. Evidence was considered by the Tribunal which was not before the initial decision maker.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

16th February 2018