



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

Appeal Number: HU/18882/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 29th November 2019**

**Decision & Reasons Promulgated
On 6th December 2019**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

**MISS YENNEY ALEXANDRA GONZALES OCHOA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: *Mr G Dingley*, instructed by the appellant through direct access

For the respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

These are the approved record of the decision and written reasons which were given orally at the end of the hearing on 29 November 2019.

Introduction

The parties are referred to as they were before the First-tier Tribunal. This is an appeal by the respondent against the decision of First-tier Tribunal Judge Chana (the 'FtT'), promulgated on 24 July 2019, by which she allowed the appellant's appeal against the respondent's

refusal of her human rights claim. While the grounds of appeal had referred to a claim of humanitarian protection, the parties confirmed that no such claim had been made to the respondent and this was not relied on by the appellant. The respondent had refused the appellant's application of 2 February 2018, in a decision ('the Refusal Letter') dated 24 July 2018. The gist of the refusal had been that the appellant had applied for leave to remain based on lawful long residence; which had been broken by extended absences in her country of origin, Colombia; a relationship with a previous partner had broken down, and the appellant could not qualify under the 10-year private or family life routes of the Immigration Rules. There were not very significant obstacles to her integration in Colombia.

The FtT's decision

The FtT concluded that there was a break in lawful residence, but also that the appellant and her new partner were in a genuine relationship, which had begun shortly after the appellant's February 2018 application. The FtT concluded that as the appellant's new partner worked in the aerospace industry and Colombia did not have an aerospace industry, he could not, as a British national, be expected to relocate to Colombia. Noting section 117B of the Nationality, Immigration and Asylum Act 2002, the FtT concluded that the respondent's public interest considerations would not be compromised by granting the appellant leave to remain in the UK to continue her family life with her current partner.

The grounds of appeal and grant of permission

The respondent lodged grounds of appeal which are that the FtT had failed to consider that the relationship between the appellant and her current partner was of sufficiently recent duration that it did not qualify as a 'partner' relationship under paragraph GEN 1.2 of Appendix FM of the Immigration Rules. The assertion that because the partner had specialised in aerospace in his area of work, that he would be unable to work in other industries was unsupported by evidence. Whilst the FtT had referred in passing to section 117B of the 2002 Act, the FtT had failed to consider the limited weight to be given to the appellant's private life and the fact that the couple's relationship had been established when the appellant's status was precarious. Those submissions had been made by the respondent at the FtT hearing but had not been considered, or rejected without adequate explanation.

First-tier Tribunal Judge Bristow granted permission on 15 October 2019. He regarded it as arguable that when considering section 117B of the 2002 Act, the FtT had not identified which, if any, of the statutory factors applied in the appellant's case and the FtT had arguably not considered how those factors affected the proportionality exercise carried out by the FtT.

The hearing before me

The appellant's submissions

In terms of the hearing before me, without discourtesy to the representatives, their submissions were relatively brief. Mr Dingley provided a Rule 24 response, noting that the FtT had clearly considered the appeal outside the Immigration Rules, so that whether the couple met the definition of paragraph GEN 1.2 was not relevant. The FtT had considered whether there were insurmountable obstacles to the couple's family life continuing in Colombia, as referred to at paragraphs [31] and [33] of the decision, and accordingly, the appellant satisfied section EX.1(b) of the Immigration Rules. Similarly, the FtT had considered the factors under sub-sections 117B(1) to (5) of the 2002 Act, including: the fact that the appellant gave her evidence in English, at [15] and [34]; she had been in the UK for eleven years lawfully and was not a burden on society, running a business as a self-employed person. I was invited not to 'pick over' the FtT's decision in a 'microscopic search' for an error, as counselled by the Court of Appeal in NH (India) [2007] EWCA Civ 1330.

The respondent's submissions

Mr Melvin reiterated that the FtT had given very limited reasoning about why the appellant's partner could not relocate, simply because he worked in a specific industry; and why it would be unduly harsh to expect the couple to relocate to Colombia. The FtT's decision was simply not sustainable in terms of the adequacy of her reasoning.

Error of law discussion

While brevity in a decision is to be commended, I concluded that the FtT's conclusions on the couple's ability to relocate to Colombia; and consideration of the proportionality of refusal of leave to remain, in the context of section 117 of the 2002 Act, were inadequately explained, to the extent that they amounted to an error of law.

In simple practical terms, the FtT did not explain why, if the appellant's partner was an engineer, he would not be able to work in an industry other than the aerospace industry in Colombia. Whilst I have no reason to doubt Mr Dingley's submission that far more detailed evidence was provided to the FtT, the practical difficulty was that the more detailed evidence on claimed obstacles to the couple's return to Colombia had not been analysed and explained by the FtT. Instead, the impression from the FtT's decision was that because the appellant's partner worked in a relatively specialised industry, he would be unable to reskill or retrain. The FtT's reasoning on that issue was not adequately explained. Whilst the FtT was entitled to take

into account the other relevant factors such as the couple's unborn child and the fact that the appellant spoke English, nevertheless the insufficiency in the reasoning about the couple's inability to relocate to Colombia materially affected the proportionality assessment and meant that the FtT's decision did contain an error of law, and must be set aside. However, in reaching that decision, I preserve the findings that the appellant and her partner, Mr Chessman, are in a genuine relationship and that Mr Chessman works within the aerospace industry, in a specialised role and is not able to speak Spanish, the first language of Colombia.

Decision - error of law

I conclude that the FtT's decision did contain an error of law and I set it aside, while preserving the findings set out above.

Remaking

The parties' representatives were content that I remake this decision rather than remit it back to the First-tier Tribunal.

The appellant had made an application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, to submit the birth certificate of the couple's son, born on 11 June 2019. Mr Melvin expressly consented, on behalf of the respondent, to my considering the fact of the birth of the couple's child as a new issue, for the purposes of remaking the FtT's decision. The couple's son is a British citizen, and so is a 'qualifying child' for the purposes of the Immigration Rules and section 117B(6) of the 2002 Act. While he made no formal concession, Mr Melvin indicated that he could see that in the current circumstances, on the basis that the appellant now appeared to meet the Immigration Rules, requiring her to leave the UK and apply for entry clearance might be disproportionate, noting the well-known authority of Chikwamba v SSHD [2005] EWCA Civ 1779.

Mr Dingley urged me to consider the authorities of ZH (Tanzania) [2011] UKSC 4, Zoumbas [2013] 1 WLR 690; and MA (Pakistan) & Ors v Upper Tribunal (Immigration and Asylum Chamber) [2016] EWCA Civ 705, now that the appellant was the mother of a very young British child. The respondent's previous decision had obviously had no regard to considerations under section 55 of the Borders, Citizenship and Immigration Act 2009 or the primary consideration of the best interests of the child. Noting section 117B(6) of the 2002 Act, the fact that the appellant had a genuine and subsisting parental relationship with her son was not disputed; and it was in the best interests of such a young child to remain with both his parents in the UK. There were no issues concerning her eligibility (e.g. criminal convictions or dishonesty) and while her continuous presence had been broken by her visit to Colombia, her country of origin, her presence in the UK had been lawful.

Discussion and conclusions

I concluded that on the basis of the circumstances as they now existed, namely the genuineness of the relationship between the couple; and the fact that they had a British son, while the barriers to the couple's returning to Colombia due to Mr Chessman's specialism remained far from clear, it would be wholly disproportionate to expect the appellant to leave the UK and to reapply for entry clearance from Colombia. I concluded this for the following reasons. First, it is highly likely that the appellant would meet the requirements of the Immigration Rules, noting that there are no issues about her suitability or eligibility and the fact of her genuine relationship with Mr Chessman, which is nearly 2 years in duration. Second, not only would it be in the best interests of the appellant's son to remain the UK with both parents, but it would not be reasonable to her expect to leave the UK with her very young son, or to leave that son in the UK without her. The child is a British national, is only three months' old and needs the stability and support of both parents, in a setting with which both parents are familiar. It would not be reasonable to expect the child to leave the UK, noting the absence of powerful reasons justifying a decision expecting him to do so, so that the appellant meets the requirements of section 117B(6) of the 2002 Act, which is determinative of the proportionality issue.

Remaking - decision

I remake the FtT's decision by allowing the appellant's original appeal to the FtT. The refusal of her leave to remain is disproportionate and in breach of her rights under article 8.

Signed **J.Keith**

Date: 4 December 2019

Upper Tribunal Judge Keith

To the respondent - fee award

In light of the fact that the appeal only succeeded because of the new matters, to which the respondent gave consent that I consider, I did not regard it as appropriate to make a fee award in the appellant's favour.

Signed **J.Keith**

Date: 4 December 2019

Upper Tribunal Judge Keith