



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/47430/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 17th September 2014

Determination Promulgated
On 1st October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MD
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Miss C Johnson, Senior Home Office Presenting Officer
For the Respondent: In person

DETERMINATION AND REASONS

Anonymity

1. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to her as the Claimant. An application for anonymity was made by the Claimant and I granted the application because part of this appeal

concerns considering the best interests of the Claimant's minor daughter born 12th April 2013. The Claimant is granted anonymity throughout these proceedings unless and until directed otherwise. No report of these proceedings shall directly or indirectly identify her or any member of her family. Failure to comply with this direction could lead to contempt of court.

Introduction and Background

2. The Claimant is a female citizen of the United States of America born in July 1981. On 15th July 2013 the Claimant applied for a residence card as confirmation of a right of residence in the United Kingdom as the spouse of a British citizen, in reliance upon regulation 9 of The Immigration (European Economic Area) Regulations 2006 (the 2006 Regulations). The application was based upon the claim that the Claimant's spouse had been residing and working in an EEA state, that being Hungary, as a worker, before returning to the United Kingdom.
3. The application was refused on 7th November 2013, the Secretary of State not being satisfied that the Claimant and her spouse had been residing together in Hungary, nor that the Claimant's spouse had been working in Hungary, before returning to the United Kingdom.
4. The appeal was heard on 21st February 2014 by Judge Davies who found that the Claimant's spouse was a worker in Hungary and the Claimant and her spouse had lived together and therefore the requirements of regulation 9 of the 2006 Regulations were satisfied. The appeal was allowed on that basis. The judge therefore did not find it necessary to go on and consider either the Immigration Rules, or Article 8 of the 1950 European Convention of Human Rights (the 1950 Convention).
5. The Secretary of State was granted permission to appeal to the Upper Tribunal contending, in brief summary, that the judge had misdirected himself in law as to the definition of a worker and had failed to take into account relevant case law.
6. Full details of the application and the grant of permission are set out in my written decision dated 16th June 2014, which followed a hearing before me on 9th June 2014. At that hearing I found that the judge had erred in his consideration of the 2006 Regulations, and full reasons for this finding are set out in my written decision. The decision of the First-tier Tribunal was set aside and the hearing adjourned so that the decision could be re-made by the Upper Tribunal.

Re-Making the Decision

Preliminary Issues

7. Both the Claimant and her spouse attended the hearing. The Claimant advised that she did not have legal representation and wished to represent herself. She told me that she did not intend to give or call any further evidence but would rely upon the evidence that had been given before the First-tier Tribunal and that she wished to

make representations as to why she should be allowed to remain in the United Kingdom based upon Article 8 of the 1950 Convention.

8. The Claimant did not appreciate that regulation 9 of the 2006 Regulations still fell to be considered, as she mistakenly thought that had been dismissed at the earlier hearing. I explained that I would look at all issues of the appeal again.
9. I ascertained that I had received all documentation upon which the parties intended to rely. I had the Respondent's bundle containing Annexes A-E, and the Claimant had consolidated all documents that had been prepared on her behalf in a bundle comprising 160 pages which was presented to myself and Miss Johnson.
10. Both the Claimant and Miss Johnson indicated that they were ready to proceed and there was no application for an adjournment.

The Claimant's Submissions

11. In relation to the 2006 Regulations, the Claimant stated that she had nothing to add to what was contained in the documentary evidence, which had been placed before the First-tier Tribunal.
12. In relation to Article 8 the Claimant submitted case law, MA and SM Iran [2013] UKUT 00380 (IAC) and Izuazu [2013] UKUT 00045 (IAC).
13. The Claimant confirmed that she had established both a private and family life since arriving in the United Kingdom. She had married her spouse on 18th September 2011 in the United States. She had not wished to remain in the United States because of difficulties she experienced with her family, and she and her spouse travelled to Hungary on 22nd August 2012. It was intended that her spouse would teach English.
14. The couple were let down by an agent, and employment which they had initially anticipated in the Czech Republic did not materialise but there was employment in Hungary. Although free accommodation was provided, the Hungarian authorities would not issue a residence permit, and because of numerous difficulties which were not the fault of either the Claimant or her spouse, including the fact that her spouse was not paid his salary, they left Hungary on 11th September 2012 and travelled to the United Kingdom.
15. They have a daughter born in the United Kingdom on 12th April 2013. Both the Claimant's spouse and her daughter are British citizens.
16. The Claimant referred to Appendix A, of Izuazu and in particular the response to question (ii) which asks whether it is reasonable to expect a British citizen who has genuine family life in the United Kingdom to relocate permanently abroad if a family member has to leave the United Kingdom. The Claimant contended that it was conceded by the Secretary of State that it would not be reasonable for a British citizen to have to leave the United Kingdom. She stated that if she had to leave the United Kingdom, her daughter would also have to leave with her, as she is the primary carer

and is still breast feeding. Her spouse would not be able to adequately look after her daughter in her absence.

17. In relation to her mental health issues, which relate to severe anxiety the Claimant pointed out that page 106 of her bundle contained a note from a clinical psychologist which referred to her suffering from acute distress syndrome. The Claimant had not needed to seek any medical attention since she had been in the United Kingdom.
18. I was asked to take into account both the Claimant's witness statement and that of her spouse, and to note that he has been a longstanding member of the community in Manchester and to take into account the family and other ties that he has in the northwest of England. The Claimant's spouse had lived with her in the United States where they married, but had surrendered his green card when they left the United States, and therefore he may not be able to return.
19. The Claimant used to be a lawyer in the United States, and wishes to be able to work in the United Kingdom but has not worked illegally.
20. When I asked the Claimant whether an application had been made for leave to remain under Appendix FM of the Immigration Rules, she confirmed that it had not, because she thought she would be entitled to remain under the 2006 Regulations.

The Submissions of the Secretary of State

21. Miss Johnson relied upon the reasons for refusal letter dated 7th November 2013. By way of case law she relied upon Begum (EEA – worker – jobseeker) Pakistan [2011] UKUT 00275 (IAC) and O v Minister voor Immigratie, Integratie en Asiel, Case C-456/12. I was asked to find that the Claimant and her spouse had only resided in Hungary between 22nd August 2012 and 11th September 2012, and it was accepted that the Claimant's spouse had not been paid for any work undertaken, and the case law confirmed that the Claimant did not satisfy regulation 9 of the 2006 Regulations.
22. Miss Johnson submitted that the Claimant could have made an Article 8 claim pursuant to Appendix FM but had not done so. Miss Johnson accepted that the Claimant was entitled to rely upon EX.1.(a) as she has a genuine and subsisting parental relationship with a British child. Miss Johnson's position was that it would not be reasonable to expect the child to leave the United Kingdom because she is a British citizen, but it would be reasonable for the Claimant to leave the United Kingdom and return to the United States and make an entry clearance application from abroad. The child could stay with her father.
23. Therefore the Article 8 family life claim should be dismissed with reference to EX.1. of Appendix FM, and Miss Johnson submitted that there were no arguable grounds to consider Article 8 outside the Immigration Rules. However if Article 8 was considered outside the rules, I should take into account the factors referred to in section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) and conclude that it would be proportionate for the Claimant to leave the United Kingdom and apply for entry clearance from abroad.

The Claimant's Response

24. Prior to hearing the Claimant's response I explained to her the legal issues involved in relation to Appendix FM, and Article 8 of the 1950 Convention. The Claimant explained that if she had to leave the United Kingdom she would have to take her daughter with her.
25. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

26. The burden of proof is on the Claimant in relation to the 2006 Regulations and the Immigration Rules. The standard of proof is a balance of probability. As this is not an entry clearance case, I am not restricted to considering circumstances appertaining at the date of decision, and can consider evidence as at the date of hearing.
27. I have taken into account all the documentation placed before me, even if I do not specifically refer to that documentation. Included within the documentation are statements made by witnesses supporting the Claimant, and I have taken those into account.
28. I deal firstly with the application for a residence card pursuant to regulation 9 of the 2006 Regulations. I set out below regulation 9 as it was at the date of decision, although it has been subsequently amended;
 9. (1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a United Kingdom national as if the United Kingdom national were an EEA national.
 - (2) The conditions are that -
 - (a) the United Kingdom national is residing in an EEA state as a worker or self-employed person or was so residing before returning to the United Kingdom; and
 - (b) if the family member of the United Kingdom national is his spouse or civil partner, the parties are living together in the EEA state or had entered into the marriage or civil partnership and were living together in that state before the United Kingdom national returned to the United Kingdom.
 - (3) Where these Regulations apply to the family member of a United Kingdom national the United Kingdom national should be treated as holding a valid passport issued by an EEA state for the purpose of the application of regulation 13 to that family member.
29. I do not find that the Claimant has discharged the burden of proof. I accept that she and her spouse married on 18th September 2011, and that they travelled together from the United States to Hungary on 22nd August 2012. They initially expected to find employment in the Czech Republic, but that employment did not materialise and arrangements were made for the Claimant's spouse to work in two schools in Hungary.

30. I accept the Claimant's evidence in her witness statement, paragraph 20, that having arrived in Budapest she was shocked to hear that the Czech Republic job was not available, and thereafter for five days she and her spouse "were messed about as to where in Hungary we would be working."
31. I accept that the Claimant's spouse commenced some training and the Claimant's evidence at paragraph 27 of her witness statement that her spouse was due to start teaching students on September 3rd at two schools. I accept that the couple were let down by those who had promised the employment and although they had accommodation for which they did not have to pay, the Claimant's spouse did not receive any salary. I also accept that the Hungarian authorities refused to issue residence documentation. The couple left Hungary on 11th September 2012. Therefore the Claimant's spouse had been working for approximately eight days.
32. The Upper Tribunal in Begum considered Court of Appeal case law, and jurisprudence of the Court of Justice of the European Union and set out in paragraph 6 the features identified by the Court of Appeal for a Union citizen to be regarded as a worker and these are set out below;
- (a) The terms 'worker' and 'activity as an employed person' have a Community meaning and may not be defined by reference to the national laws of the Member States (see para 11 of Levin, cited in para 18 of the judgment).
 - (b) Since it defines the scope of freedom of movement, the Community concept of a 'worker' must be interpreted broadly (see para 16 of Lawrie-Blum, cited in para 39 of the judgment).
 - (c) The right of residence as a worker is not subject to any condition relating to the type of employment or to the amount of income derived from it (see para 14 of Levin, cited in para 18 of the judgment).
 - (d) A worker is a person who pursues effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary (see para 17 of Levin, cited in paragraph 18 of the judgment).
 - (e) The concept of 'worker' must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that for a period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see para 17 of Lawrie-Blum, cited in para 39 of the judgment).
 - (f) Such activities must have economic value to the employer (see para 19 of Lawrie-Blum, cited in para 39 of the judgment).
33. This issue was considered in the Court of Justice of the European Union in Q who in summary indicated that when considering whether the non-EEA family member of an EEA national is entitled to a residence card, following the EEA national working in another member state this will only arise where the residence of the EEA national in the host member state has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that member state. This will apply once Article 7 of Directive 2004/38 is engaged, which means after the initial right of three months' residence has expired.

34. I set out below paragraph 51 of Q, and paragraph 54 in part, which were both referred to in the Secretary of State's application for permission to appeal;
51. An obstacle such as that referred to in paragraph 47 above will arise only where the residence of the union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that member state. Article 21(1) TFEU does not therefore require that every residence in the host member state by a union citizen accompanied by a family member who is a third country national necessarily confers a derived right of residence on that family member in the member state of which that citizen is a national upon the citizen's return to that member state.
54. Where, during the genuine residence of the union citizen in the host member state, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38, family life is created or strengthened in that member state, the effectiveness of the rights conferred on the union citizen by Article 21(1) TFEU requires that the citizen's family life in the host member state may continue on returning to the member of state of which he is a national, through the grant of a derived right of residence to the family member who is a third country national.

Applying the principles outlined in the case law, I am satisfied that the Claimant and her spouse lived together in Hungary, but I do not find that it has been proved that the Claimant's spouse satisfies the definition of a worker such that the Claimant would be entitled to a residence card pursuant to regulation 9 of the 2006 Regulations. The Claimant's spouse did not receive any remuneration, and only had employment for approximately eight days, and it could not be said that the period of time spent in Hungary created or strengthened family life. Therefore the appeal under the 2006 Regulations fails.

35. I next consider Article 8 of the 1950 Convention, which was raised as a ground of appeal before the First-tier Tribunal. I therefore must consider Appendix FM of the Immigration Rules which relates to family life, and paragraph 276ADE, which relates to private life.
36. It was not contended that the Claimant could satisfy paragraph 276ADE and it is clear from the evidence that she cannot. This is because she has not resided in the United Kingdom for at least twenty years, as she has only been resident since 11th September 2012, and it is not the case that she has no ties to the United States of America.
37. Appendix FM sets out the requirements for leave to remain both as a parent and as a partner.
38. Section R-LTRP sets out the requirements for limited leave to remain as a partner which are as follows;
- R-LTRP.1.1 The requirements to be met for limited leave to remain as a partner are –
- (a) the applicant and their partner must be in the UK;
 - (b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
 - (c) (i) the applicant must not fall for refusal under section S-LTR;

44. I set out below EX.1.;

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 7 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 EX1.1.(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.

- 45. The Claimant has a British child who is in the United Kingdom. It is not disputed that she has a genuine and subsisting parental relationship with that child. The issue is whether it would be reasonable to expect the child to leave the United Kingdom.
- 46. This involves considering the best interests of the child. The Supreme Court in ZH (Tanzania) [2011] UKSC 4 stated that best interests of a child broadly means the well-being of the child, and a consideration of where those best interests lie will involve asking whether it is reasonable to expect the child to live in another country. Nationality is not a "trump card" but in paragraph 30, it was stated that it is of particular importance in assessing the best interests of any child. When considering proportionality the best interests of the child must be a primary consideration, and it is accepted that the best interests of a child can be outweighed by the cumulative effect of other considerations.
- 47. The Upper Tribunal in Azimi-Moayed [2013] UKUT 00197 (IAC) confirmed that as a starting point it is in the best interests of children to be with both their parents. If both parents are to be removed from a country, it would generally be in the best interests of dependent children to be removed with them, unless there are reasons to the contrary.
- 48. It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
- 49. I take into account that the Claimant's daughter is very young, and it could be argued that she could, because of her young age, easily adapt to life in the United States if she had to leave the United Kingdom. However, that argument does not

attach weight to the fact that the Claimant's daughter was born in this country and is a British citizen, and therefore is entitled to live in this country.

50. So far as her best interests are concerned, it is clear that those lie in being brought up by both parents in a stable home. The present situation is that the child's father is in employment and it is said that he earns in excess of the required amount of £18,600 per year, although no financial evidence was submitted. I do accept that he has employment with the Cooperative, and that he also has a small IT business. The Claimant is not working and she does not have permission to work although she was a qualified lawyer in the United States.
51. If the Claimant had to leave the United Kingdom, it is my view that in practical terms, her daughter would have to leave with her. I accept the Claimant is the primary carer and I accept the Claimant's evidence that she is still breast feeding. If the family left as a unit, there is no guarantee that the Claimant's spouse would be admitted to the United States, although I accept that he previously resided there and held a green card but that has now been surrendered.
52. I accept that although financial evidence has not been produced, the family have an adequate income, and adequate accommodation. I accept their evidence that they have a joint tenancy. There is no evidence that there has been any claim by the Claimant or her spouse for benefit.
53. The best interests of the child are to remain with both her parents in the United Kingdom, where she has emotional support, and adequate maintenance and accommodation.
54. Therefore I conclude that on the facts of this case, it would not be reasonable to expect the Claimant's child to leave the United Kingdom, and return to the United States, where the Claimant would have no immediate prospect of employment, and I accept would not seek the support of her family there. There has been no detailed medical evidence as to the Claimant's mental health difficulty. There has been a note written by a clinical psychologist dated 17th July 2012, requesting that the Claimant have leave of absence from her employment for one month as a result of suffering from an acute distress syndrome. I accept the Claimant's evidence that contact with her family makes her condition worse, and she therefore would not seek to obtain assistance from them if she had to return to the United States.
55. In my view it would not be reasonable for the Claimant to leave the United Kingdom and leave her daughter in this country for an unknown period of time while an application for entry clearance is made. I therefore conclude this appeal succeeds with reference to EX.1.(a).
56. In relation to EX.1.(b) I accept that the Claimant has a genuine and subsisting relationship with her spouse who is in the United Kingdom and is a British citizen. There is however a different test to be considered in this case, the test is not whether it would be reasonable for the couple to continue their family life outside the United Kingdom. They have to prove that there would be very significant difficulties which

could not be overcome, or would entail very serious hardship for one or both of them. I do not allow the appeal on this basis. Although there would be serious difficulties if the family had to relocate to the United States, evidence submitted does not prove that these difficulties could not eventually be overcome.

57. As I allow the appeal under EX.1.(a) of Appendix FM, I conclude that there is no need to consider Article 8 outside the Immigration Rules. If Article 8 was considered outside the rules, I would conclude that family and private life exists, and following the five stage Razgar [2004] UKHL 27 approach, the issue would be whether proposed interference with the Claimant's family and private life was proportionate. This would involve considering the best interests of a child, as I have done under the Immigration Rules, and would involve a proportionality test which would involve considering a similar test to that set out in EX.1., whether it would be reasonable to expect the child to leave the United Kingdom, and in addition whether it would be reasonable to expect the Claimant's spouse to leave the United Kingdom.
58. If I had proceeded to carry out that test, I would find in favour of the Claimant. The present situation is that the Claimant's spouse has employment and can financially support the family, the family have adequate accommodation, and have not needed to rely on benefits. I would therefore have allowed the appeal under Article 8 outside the Immigration Rules.

Decision

The determination of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The Claimant's appeal pursuant to The Immigration (European Economic Area) Regulations 2006 is dismissed.

The Claimant's appeal is allowed with reference to section EX.1.(a).

Anonymity

I remind the parties that an anonymity order has been made.

Signed

Date 19th September 2014

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

As the appeal has been allowed I have considered whether to make a fee award. The appeal has been allowed because of the Claimant's family life with her child. That was not the application made to the Secretary of State. The application was for a residence card and the appeal on that issue has been dismissed. There is no fee award.

Signed

Date 19th September 2014

Deputy Upper Tribunal Judge M A Hall