



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/46909/2013

THE IMMIGRATION ACTS

Heard at Field House
On 8th December 2014

Determination Promulgated
On 15th January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

L L B
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Nathan, Counsel instructed by Greenfields Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS

Anonymity Direction

In order to secure the anonymity of the appellant throughout these proceedings I direct pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 that no report or other publication of these proceedings or of any part or parts of them shall name or directly or indirectly identify the appellant. Reference to the appellant may be by use of his or her initials but not by name. Failure by any person, body or institution whether corporate or incorporate [for the

avoidance of doubt to include either party to this appeal] to comply with this direction may lead to a contempt of court. The direction shall continue in force until this Tribunal, the Upper Tribunal (IAC) or an appropriate court shall list or vary it. This direction is in place because it affects a minor.

The Appellant

1. The appellant is a citizen of the Philippines born 24th August 1972 and she appealed against a decision made by the Secretary of State on 23rd October 2013 to refuse to vary her leave to remain in the United Kingdom and to remove her by way of directions under Section 47 of the Immigration and Asylum and Nationality Act 2006. The appellant worked as a nanny for employers and she cared for a profoundly deaf child aged 3 ½ years old. On 3rd July 2014 First Tier Tribunal Judge Scott-Baker dismissed her appeal finding that Section 55 of the Borders Citizenship and Immigration Act 2009 did not apply to the child she cared for as the decision was not within the Immigration context. An error of law was found in Judge Scott-Baker's decision as she did not factor in an adequate analysis of the child's interests or make adequate findings thereon. Although the Judge did consider the best interests of the child she did not factor in the specialist report of Dirk Flowers, dated 22nd May 2014, an educational psychologist or assess the degree of the private life formed in conjunction with the appellant's presence. In my error of law decision I preserved the findings of Judge Scott-Baker.
2. I carefully considered the submissions made by the parties in respect of the appellant and with particular reference to Section 55 of the Borders, Citizenship and Immigration Act 2009 which confirms that the Secretary of State

"55: Duty regarding the welfare of children

- (1) *The Secretary of State must make arrangements for ensuring that –*
 - (a) *the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and*
 - (b) *any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need;*
- (2) *The functions referred to in subsection (1) are –*
 - (a) *any function of the Secretary of State in relation to immigration, asylum or nationality;*
3. I find that the decision is within an immigration context and clearly the removal of the appellant will have an impact on the child L. I accept that the appellant does not have a residence order in relation to the appellant or a contact order and her relationship is that of employee to the family. There is no biological relationship between the appellant and L but nonetheless there may be an 'enhanced private life'

of the child with respect to his relationship with the appellant and further to **Beoku-Betts v SSHD** [2008] UKHL 39 her removal would have an impact on the child. I must take into account his human rights. I have considered L's best interests in line with **Zoumbas v SSHD** [2013] UKSC 74. Mr Nathan pointed out that no other consideration could be treated as inherently more significant and that it was important to have a clear idea of a child's circumstances before one asks whether those interests are outweighed by other considerations.

4. L is a child of 3 years and 7 months who three months after he was born was diagnosed with profound hearing loss and the appellant was employed when he was 4 months old. She understands his needs and is able to appropriately encourage and facilitate his attempts at communicating. I have no doubt that she has had a longstanding and excellent therapeutic relationship with L which Mr Flower, the educational psychologist, identified. The appellant also spends considerable amounts of time working with him on the therapeutic programme.
5. I therefore accept that there is a strong bond between L and the appellant such that she is part of his private life and the appellant's removal may have consequences of such gravity as to engage Article 8 following the principles in **Razgar** [2004] UKHL 27.
6. I find that the decision is in accordance with the law. There was limited information placed before the Secretary of State in relation to L and the bulk of the information was indeed presented to the First-tier Tribunal rather than the Secretary of State. I note **JO and Others (section 55 duty) Nigeria** [2014] UKUT 00517 (IAC), applies but I find the Secretary of State did consider the interests of L and the relevant factors as presented to her, and these are referred to in the Secretary of State's refusal letter of 23rd October 2013. The substance of consideration is present in that refusal as it is noted L is profoundly deaf, that the appellant played an important role in his habilitation and development but that he had the support of his parents and official agencies and it was not accepted that there would be a detrimental effect in his development on the appellant's return to the Philippines.
7. I turn to the question of proportionality. L's best interests are *a* primary consideration but not necessarily *the* primary consideration.
8. First and foremost he is living at home with his parents both of whom confirm that they have changed their working patterns and are both centred at home and the evidence given by the mother was that one of the parents could always collect him from school. Indeed L attends a mainstream nursery school and further to the evidence of the father has done so for a year. Both the appellant and Mrs D, the mother, confirmed that L attended nursery school from approximately 9:00 to 9:45 in the morning to 4:00 o'clock onwards in the afternoon on three days a week and also on Tuesday morning. Mrs D also confirmed that L has his own dedicated learning support assistant.

9. I accept Mr Flower's opinion that the disruption of the therapy programme should be kept to the minimum during the next few years "as changes in significant members of the therapy team is likely to reduce delay or possibly regress L's current levels of excellent progress by up to six months" but owing to the reasoning given below (not least that Mr Flower did not make reference to the full facts) I do not accept that the departure of the appellant would cause a significant disruption.
10. Judge Scott-Baker recorded the following at [21] and I take this into account

'At the reconvened hearing there was before me a report from Mr Flower, chartered psychologist, dated 22 May 2014. He confirmed that L was now 3 years of age and that approximately eighteen months ago he had received bilateral cochlear implants and before this he had been a non-speaker. He was now able to communicate using three to four words and sentences but there were still difficulties in the amount of verbal communication and the clarity of vocalisation. Many who did not know him would have difficulty in understanding what he was saying to them. He had observed the appellant and L together and noted that she was fully aware of his communicative needs and attempts to verbally interact with her. The appellant had learned many strategies in providing appropriate incidental learning and therapeutic responses and she generally understood the appellant's attempts at communication. Both parents and his current speech language therapist Ms M of [the speech and language centre] considered that the appellant was a very valued key member of the therapy team. She had developed her skills at the same time as L had developed so that his needs were consistently and appropriately being met. The parents also considered that she had similar abilities to themselves in extending L's understanding and verbal language communication skills. With themselves they view the appellant as being one of the three key members of the day-to-day therapy providers. Over a week the appellant would spend over 40 hours with L. She had attended over 100 hours of speech language therapy with various therapists and had learnt many of the recommended strategies. They hoped to take her to Los Angeles in July 2014 to attend the John Tracey Clinic which was a leading diagnostic and education centre for young children with hearing loss'

11. The fact is however that Mr Flower did not refer to the fact that L is currently in a 3 ½ day mainstream nursery place although he did identify that he attends the therapeutic centre, which he does every Wednesday. There is no doubt that L receives specialist treatment and that the appellant is involved in that treatment but as his mother stated he has a learning support assistant at school for 30 hours a week and I consider this to show that L is not so dependant on the appellant that her removal would have a significant effect on him or that the appellant is still such significant member of L's educational process. Albeit that Judge Scott Baker recorded that L spends 40 hours with the appellant per week, as he is at school and frequently in the company of other adults not least his parents when out of school, I do not accept that this is time that is exclusively with the appellant.
12. It is quite clear that L has been given a statement of special educational needs and that he attends mainstream nursery school on a regular basis (where he has a full-time place) and is based at the therapeutic centre where he is receiving special educational provision for his hearing impairment under the direction of a qualified professional. The point was made by Mr Melvin that the appellant was not qualified to address the needs of such a child and whilst it was accepted she had attended some therapeutic sessions it was not accepted that the appellant had any expertise

over and above her 'pleasant nature and patience' with the child and an ability to fit in with the work schedules of the parents. I take into account that the parents are the primary carers not the appellant and that the nature of nannying is that it can be temporary. The parents confirmed that they had set in train the process of seeking alternatives to employ.

13. Mr D, the father, also gave evidence that the appellant generally has weekends off. Evidence was also given by the parents that L's family took him to Los Angeles in July 2014 for a number of weeks to attend the John Tracey Clinic and the appellant did not accompany him. This did not indicate that the appellant was key to his ongoing therapy.
14. In view of the evidence given, although it may be in L's best interests to have no change in personnel at all, I am persuaded as he appears to be, as the father gave evidence, settled and happy at school that he is able to adapt to or move on to other members of staff, carers and professionals because the school experience shows that he has already done so.
15. Indeed Mr Flower confirmed in an addendum to his assessment report dated 3rd December 2014 that L had responded "well to the total therapeutic package" which included the appellant but I note the parents are also heavily involved with the therapeutic package, indeed the appellant confirmed that the parents attended [the speech and language centre] when the appellant could not attend. I conclude that his parents as well as the appellant are fully aware of the needs and therapy given to L to aid his progress. Indeed his progress was described as excellent.
16. The fact is that L has undergone significant change bearing in mind that he has attended school with a Learning Support Assistant and these skills will be generalised into his home environment. He is in receipt of significant speech and language therapy input from professional staff, not least trained speech and language therapists and a teacher of the deaf.
17. Mr D also confirmed that L's key special educational need was hearing impairment and his emotional difficulties stemmed from that, in particular he described confidence. I have assessed his best interests and find that these are to remain with the care of his parents and to remain educated and in receipt of his therapy.
18. Bearing in mind that he has, as Mr D confirmed, no cognitive difficulties I am not persuaded that L's needs in relation to his hearing impairment particularly as he is in receipt of such significant special educational provision and his parents and grandparents care and support outweigh the legitimate public interest as outlined in Section 117 of the Nationality Immigration and Asylum Act 2002 which I am enjoined to take into account.
19. The appellant speaks some English (but not fluent English) but has always known that her status was temporary at the very best and latterly since her visa was refused it was precarious. As recorded in the determination of Judge Scott Baker the

appellant entered the United Kingdom on 22nd October 2008 having obtained a Tier 4 visa. As Judge Scott Baker recorded with regards to the appellant

“29. She entered the UK as a student but did not complete her studies as planned as the college closed. Since August 2011 she has worked part time with the D family and has been working with them full time since September 2013. The family were aware at all times that the appellant did not hold a visa to work in the United Kingdom in this capacity, although under the terms of her visa she was permitted to work up to 20 hours per week. It was clear from the outset of her employment that her discretionary visa expired in September 2012. On this basis and without any specialist knowledge of caring for children with disabilities the parents chose to employ the appellant at the hourly rate of £6.80. It is now the case with the passage of time that the appellant has been able to grow into this job and develop some skills in caring for young L and has been in this role full-time for approximately nine months. I find that Mr and Mrs D were fully aware of the limitations on the appellant’s visa and indeed on the appellant’s skills set at the commencement of her employment.”

20. I have thoroughly explored the interests of L, and taken on board the careful submissions of Mr Nathan and although I have sympathy with the parents’ predicament that they wish to retain a carer who has been with the family for some time, I find that L’s progress from mainstream educational provision and the significant level of special educational provision he is receiving is evidence. The mainstream education is independent of the appellant and indeed that he appears to be responding very well. This does not lead me to conclude that the removal of the appellant is disproportionate or that the factors in the appellant’s removal are outweighed by L’s best interests.

21. Further to **Huang [2007] UKUT 640 (IAC)**

‘In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality.

22. Taking all of my reasoning above into consideration, I find that neither the family life nor the private life of the appellant nor L, or indeed of the parents, is prejudiced in a manner sufficiently serious to amount to a breach of any fundamental rights protected by Article 8.

Order

23. Appeal dismissed.

Signed

Date 14th January 2015

Deputy Upper Tribunal Judge Rimington