



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA047452015

THE IMMIGRATION ACTS

Heard at Field House
On 19 May 2016

Decision & Reasons Promulgated
On 8th June 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

OMOLOLA BASIRAT RAIMI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr. S. Kandola, Home Office Presenting Officer
For the Respondent: Mr. T. Ogunnubi, TM Legal Services

DECISION AND REASONS

1. By way of a decision promulgated on 18 March 2016, the decision of the First-tier Tribunal promulgated on 28 August 2015 was set aside to be remade.

2. For the purposes of this decision I refer to the Secretary of State as the Respondent and to Mrs. Raimi as the Appellant, reflecting their positions as they were before the First-tier Tribunal.
3. The Appellant and Sponsor attended the hearing but did not give evidence. The Appellant provided a bundle of evidence consisting of 28 pages. I heard submissions from both representatives, following which I reserved my decision, which I set out below with reasons.

Submissions

4. Mr. Kandola relied on the grounds of appeal. At the error of law hearing it had been found that the Appellant could not meet the requirements of the immigration rules. In relation to the appeal under Article 8, the Appellant had entered the United Kingdom on 20 May 2013 as a Tier 4 student. He submitted that the remedy was for her to return to Nigeria in order to apply for entry clearance with a fresh application.
5. The public interest in maintaining effective immigration control was not diminished by the failure to meet the technicalities of Appendix FM. I was referred to the case of SS Congo [2015] EWCA Civ 387. He submitted that the time away from the United Kingdom making a new application would have to be very protracted in order for the decision to breach Article 8. Given the Appellant's recent entry into the United Kingdom, the public interest required her to seek the requisite entry clearance. It was a matter of choice if she wished to take her child with her to Nigeria while seeking entry clearance. The short duration of the period which she would be waiting was not against the best interests of the child given her very young age.
6. Mr. Ogunnubi submitted that the reason why the judge in the First-tier Tribunal had allowed the appeal was because there was evidence of earnings for 12 months. Some bank statements were missing but the judge accepted that the requirement was met. The Sponsor had explained why he could not provide the statements. The Sponsor's oral evidence had been accepted. The Appellant had provided a great deal of information. The Appellant's application should not be refused because a few bank statements were missing which was not her fault.
7. The Appellant and Sponsor had a child born in April who was a British citizen. It was submitted that the Appellant met the requirements of Appendix FM in relation to family life as she had a British citizen child. Paragraph EX.1(a) applied. The Appellant was the primary carer of a British citizen child.
8. In relation to Article 8, the Appellant had been in the United Kingdom for over three years living with the Sponsor. The Sponsor had been settled in the United Kingdom for over two years and their child was British. The Sponsor was working. The burden would be too great on the Appellant to go back to Nigeria to seek entry clearance, and would place a strain on marital life. There was no evidence that a visa

application from Nigeria would be forthcoming. The Appellant's child would be separated from the Sponsor. It was not proportionate to make her return to Nigeria.

Remaking

Immigration rules

9. I found in the error of law decision that the Appellant had not provided evidence to show that she met the requirements of Appendix FM-SE, and therefore the appeal could not succeed on this basis. It was acknowledged that she had not provided bank statements covering a 12 month period. I did not consider whether or not the Appellant could meet the requirements of the immigration rules by another route.
10. I have considered the reasons for refusal letter. The Respondent first considered whether the Appellant met the requirements as a partner under the five year route, but found that she did not meet the financial requirements by reference to Appendix FM-SE. On page 3 of the reasons for refusal letter the Respondent considered the Appellant's application as a partner under the ten-year route. The Respondent was not satisfied that the Appellant met the requirements of R-LRTP1.1(d)(iii) as she considered that paragraph EX.1 did not apply to the Appellant. The Respondent did not refuse the application with reference to the suitability or eligibility requirements (bar the financial requirement which forms part of the eligibility requirements) in her consideration of the five year or the ten year route.
11. The only reason that the Respondent refused the Appellant's application under the ten year route was because she considered that paragraph EX.1(b) did not apply. The Respondent's decision was made in January 2015. The Appellant gave birth to her daughter in April 2016. Therefore the Respondent did not consider whether paragraph EX.1(a) applied as the Appellant did not have a child at the time.
12. Paragraph EX.1(a) paragraph applies if:
 - “(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
 - (ii) it would not be reasonable to expect the child to leave the UK.”
13. The Appellant's child is under 18, is in the United Kingdom and is a British citizen. I therefore need to consider whether or not it would be reasonable to expect the child to leave the United Kingdom.

14. In considering whether or not it is reasonable to expect the Appellant's child to leave the United Kingdom, I have taken into account her best interests in accordance with section 55 of the 2009 Act. Her best interests must be a primary concern. I find that she was born in the United Kingdom and is a British citizen. Her father, the Sponsor, has indefinite leave to remain and is settled and working in the United Kingdom. I find that the Appellant's child is very young, only two months old. I find that it is in her best interests to remain with both of her parents, and I find that she is currently living with both of her parents in the United Kingdom.
15. I find that at this young age it would not be in the child's best interests to be separated from her mother, and I find therefore that if the Appellant were to leave the United Kingdom, her daughter would have to accompany her given her age and dependence on the Appellant. I find that this would involve separation from her father. If she were to stay with the Sponsor, which would not be in her best interests as she would be separated from her mother, I find that the Sponsor would not be able to continue to work as he would have to look after his daughter, thereby making it impossible for the Appellant to make an application for entry clearance as she would not be able to meet the financial requirements.
16. I have carefully considered the Respondent's own guidance contained in Immigration Directorate Instruction Family Migration: Appendix FM, August 2015. At paragraph 11.2.3. under the heading "Would it be unreasonable to expect a British Citizen child to leave the UK?" it states:

"Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano."

17. Later in the same section it states:

"Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.

It may, however, 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.

The circumstances envisaged could cover amongst others:

- criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
- a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.”

18. I find that there is no evidence of any criminality, and none has been alleged by the Respondent. The Appellant does not have a poor immigration history. She has had leave to remain at all times. Given the very young age of the Appellant’s child, a decision to refuse leave to the Appellant would require a British citizen child to leave the EU as she would have to return to Nigeria with the Appellant. This is contrary to the Respondent’s own guidance to decision makers.
19. I find, on the balance of probabilities, at the date of the hearing, given the circumstances of the recent birth of the Appellant’s daughter, and taking into account the Respondent’s own IDI, that it is not reasonable to expect the Appellant’s child to leave the United Kingdom, and therefore paragraph EX.1(a) applies. I therefore find that the Appellant has shown, on the balance of probabilities, that she meets the requirements of the immigration rules, D-LTRP.1.2.

Article 8

20. In case I am wrong in this, I have considered the Appellant’s appeal under Article 8 outside the immigration rules in accordance with the steps set out in Razgar [2004] UKHL 27. I find that the Appellant has a family life with the Sponsor and their child and that the decision to remove her would interfere with this family life.
21. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.
22. In carrying out the proportionality exercise, I have taken into account the factors set out in section 117B of the 2002 Act, insofar as they are relevant. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. The Appellant came to the United Kingdom as a student and so would have to have demonstrated a certain level of English language ability. Her application was not refused because she did not meet the English language requirements, and I therefore find that she can speak English (117B(2)).

23. In relation to her financial situation, (117B(3)), the Appellant did not provide the specified evidence required to show that the Sponsor's income was in excess of £18,600. This was because the Sponsor was unable to obtain bank statements covering the period from June 2014 to October 2014 owing to a closure of an online bank account. He provided the payslips for this period showing that he was paid during this time. It was submitted at the hearing that the Sponsor is working to provide financially for the family. I find on the balance of probabilities that the Appellant and Sponsor are financially independent.
24. Sections 117B(4) and (5) are not relevant to any family life. I find that the Appellant has had leave to remain in the United Kingdom at all times. She came with leave as a student, and made her application for leave to remain as a spouse before her leave expired.
25. Section 117B(6) provides that, in the case of someone who is not liable to deportation, the public interest does not require the person's removal where they have a genuine and subsisting parental relationship with a qualifying child, and it would not be reasonable to expect the child to leave the United Kingdom. The Appellant's daughter is a British citizen, and is therefore a qualifying child for the purposes of section 117B(6). I find that the Appellant has a genuine and subsisting parental relationship with her child.
26. I have found above in relation to paragraph EX.1 that it would not be reasonable to expect the Appellant's daughter to leave the United Kingdom, with specific reference to the Respondent's IDI. The wording is the same under section 117B(6) as in paragraph EX.1(a). Taking into account all of my findings as set out above in relation to the Appellant and her family, in particular the young age of her daughter, and taking into account the factors set out in section 117B, I find that the balance comes down in favour of the Appellant. I find that the Appellant has shown on the balance of probabilities, at the date of the hearing, that the decision is a breach of her rights, and those of the Sponsor and their daughter, to a family life under Article 8 ECHR.

Decision

27. The appeal under the immigration rules is allowed.
28. The appeal is allowed on human rights grounds.

Signed

Date 8 June 2016

Deputy Upper Tribunal Judge Chamberlain