



UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: IA/45475/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 22 February 2016

Decision and Reasons Promulgated on
13 April 2016

Before

Deputy Upper Tribunal Judge Mailer

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS OLIVIA AGRAVA ALDEZA
NO ANONYMITY DIRECTION MADE

Respondent

Representation

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer

For the Respondent: Ms S Haji, counsel

DECISION AND REASONS

1. I shall refer to the appellant as “the secretary of state” and to the respondent as “the claimant.”
2. The secretary of state appeals with permission against the decision of First-tier Tribunal Judge promulgated on 31 July 2015, allowing the claimant's appeal against the decision of the respondent dated 29 October 2014 refusing her leave to remain in the UK under the Immigration Rules.

3. In the course of his decision the Judge stated that the “rule of law” demands that a person should be able to benefit from the ECHR so long as the UK remains a party to that Convention [13]. He referred to the appellant's witness statement, noting that her son has been in the UK now for over seven years. He has progressed well at school and made friends. For as long as he can remember, he has lived in the UK and does not know the life in the Philippines. The second son was born in the UK and English is his first language.
4. The claimant also contended in her witness statement that her family in the Philippines would not be able to support them financially. Both her husband's parents have illnesses and are unable to work. Her mother is also financially vulnerable. She is not in a position to support herself, let alone support the appellant's family. They do not have an adequate home to go to in the Philippines. She asserted that her family in the UK has an established life here. She and her husband have been able to support and accommodate the family without relying on public funds. They are well integrated.
5. The Judge referred to s.55 of the Borders, Citizenship and Immigration Act 2009 relating to the best interests of a child. He also referred to various authorities including *ZH (Tanzania)*, *Beoku-Betts*, *Chikwamba* and *EB (Kosovo)*. He had regard to the Tribunal's decisions in *Azimi-Moayed and Others (decisions affecting children; onward appeals)* [2013] UKUT 00197 [16-21] and *Sultana and Others* [2014] UKUT 00540, where the Tribunal noted that the duties imposed by s.55 will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the Court or Tribunal in considering this question will frequently be confined to the application or submission made to the secretary of state and the ultimate letter of decision [22].
6. At [24] the Judge stated that he was fully conscious of the “legal requirements” stipulated by immigration law. It is incumbent upon him to “advert” to the new Rules ‘.....giving respect to the *animus legis* dictated by the supremacy of Parliament’. Being bound by superior precedents, the best interests of children is to be borne in mind [24].
7. He was thus persuaded that the appeal should be allowed. He stated that he had named in his decision three dependants, namely the two children of the claimant and her partner. Since it is in the best interests of the children to have both parents with them, “I must indicate that the father and other dependants should be allowed to remain here” [24].
8. On 5 January 2016, First-tier Tribunal Judge Fisher granted the secretary of state permission to appeal. He noted that in his decision, the Judge has made no 'meaningful reference' to the requirements of the Immigration Rules. He appears to have allowed the appeal under Article 8 of the EHCR, without addressing the

question of whether there were any compelling grounds which warranted consideration outside the rules, and he has made no reference whatsoever to the public interest considerations set out in s.117B. There is no attempt to balance the best interests of the children against the wider public interests.

9. He thus found that all grounds raised were arguable.
10. Mr Tarlow on behalf of the secretary of state submitted in line with the grounds seeking permission that the Judge's approach to Article 8 had been erroneous. First, he has failed to engage with the immigration rules and has failed to conduct any kind of balancing exercise outside the rules. The Immigration Rules are Article 8 compliant and can provide a complete code in the absence of circumstances not covered by the rules.
11. Although it is mentioned in the appellant's witness statement that [C] (her son) has been in the UK for over seven years, the Judge failed to give any reasons for his findings at [24] that the father and the other dependants should be allowed to remain. No consideration is given as to whether it is "reasonable" to expect the children to leave the UK pursuant to EX.1. The Judge simply quotes from the witness statements without making findings and case law without applying it to the facts.
12. Secondly, the Judge's approach to s.55 is erroneous. In accordance with EV (Philippines) [2014] EWCA Civ 874 the question should have been asked as to whether it was reasonable for the child to follow the parents to the Philippines as the parents have no right to remain in the UK. The Judge failed to consider s.55 on the basis of facts as they are in the real world, undermining the s.55 assessment.
13. Finally, the Judge "entirely failed" to take into account s.117B of the 2014 Act. The Tribunal is under a duty to consider the public interest identified in that section in its proportionality assessment outside the rules. Sections 117A-D are not an a la carte menu of considerations that it is at the discretion of the Judge to apply or not. Judges are duty bound to have regard to the specified consideration – Dube (ss. 117A-117D) [2015] UKUT 00090 (IAC).
14. Mr Tarlow's ultimate submission was that at [24] the Judge gave no reasons at all as to why the appeal should be allowed.
15. On behalf of the claimant, Ms Haji submitted in her Rule 24 response that there has been no material error of law. The Judge adopted the correct approach, noting the Immigration Rules, and properly considered the best interests of the children. She submitted that even if the Judge had considered s.117B of the 2002 Act, he would still have allowed the appeal for the reasons he gave in the determination.

16. In expanding her submissions during oral argument, she contended that on a proper analysis of the decision, the Judge at [24] must have been referring to s.117B as he stated that it is incumbent upon him to advert to the new rules giving respect to the spirit of the law dictated by the supremacy of Parliament. That therefore must constitute a reference to the public interest considerations under s.117.
17. It is also evident that the Judge did have in mind the relevant immigration rules, including paragraph EX.1, where the Judge stated that the claimant confirmed that her removal from the country would deprive her children of her care. They are doing very well in school. They are able to provide for them in the UK without being a burden on public funds and they will be lost in the Philippines.
18. At [10 (a)] the Judge noted from the documents in the bundle "... that this family has made its life in the UK substantially. To uproot them would indeed be contrary to the best interests of the children". Their best interests cannot be ignored [10(b)].
19. At [12] the Judge had regard to the submission that the appeal should be allowed and "the appellant should be given the benefit of Article 8." The ECHR should also be considered in assessing the claimant's case. Moreover, at [14 vii] the Judge noted that her son has been in the UK for over seven years and that he would not be in a position to be supported financially should they return.
20. The Judge also took into account at [14] the claimant's statement where she asserted that she and her family have established a life in the UK. They have been able to support and accommodate their family without relying on public funds. They have friends here and are well integrated into the community. That, she submitted, was the basis for the consideration of the matters referred to in s.117B.
21. The Judge had regard to the best interests of the children, albeit that he initially stated at [16] that the Supreme Court in ZH (Tanzania) held that the best interests of the child had to be considered and given "paramount weight" as part of the assessment of proportionality under Article 8.' He did however state in the next paragraph [17], that in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. In the event the Judge ultimately adopted the correct approach.
22. She submitted that even though the Judge had not set out the applicable Rules and the statutes, he has taken into account the relevant factors. The Tribunal cannot go behind findings of credibility.
23. In reply, Mr Tarlow submitted that it is an essential feature in the making of any decision for a party to know why they lose or succeed. It should be clear on the basis of the determination itself with sufficient and appropriate reasoning that the major issues have been properly assessed and considered.

24. The lack of any proper reasoning together with the failure to deal at all with s.117 interests renders the decision unsafe. It is wrong to have to attempt to identify the various rules and statutes 'by looking between the lines'.

Assessment

25. I find that the decision of the First-tier Tribunal Judge was diffuse and unfocused. There has been a failure to identify the relevant immigration rules which apply in this case. Moreover, as contended on behalf of the secretary of state, there was no reference to s.117B of the 2002 Act.
26. Ms Haji contended that there nevertheless had not been any material errors of law as the Judge appears to have given consideration to the relevant rules and the statutes.
27. However, I accept Mr Tarlow's submission that there has not been an appropriate identification of the rules which apply. There has not been any focus on the essential requirements under the rules. In particular, there has not been any accompanying reasoning as to why it would not be reasonable to expect the children to leave the UK. There had merely been assertions made by the appellant in that respect. No actual evidence relating to the family's position in the Philippines was adduced.
28. The Judge did not direct himself in accordance with EV (Philippines), *supra*. He did not therefore consider, as directed by the Court of Appeal, the best interests of the children on the basis of facts as they are in the real world.
29. Finally, in accordance with the decision in Dube, *supra*, the Judge did not take into account all the enumerated considerations in s.117A-D. It is not at the discretion of the Judge to apply or not apply the specified considerations.
30. I accordingly find that the decision of the First-tier Tribunal Judge involved the making of material errors on a point of law. I set it aside. The parties agreed that in that event it would have to be re-made.
31. As submitted by Mr Tarlow the whole decision has to be re-made; there will have to be substantial fact finding following detailed evidence and submissions. This is accordingly an appropriate case to be remitted to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and the decision is set aside.

The claimant's appeal is remitted to the First-tier Tribunal (Taylor House) for a fresh decision to be made before another Judge.

No anonymity direction is made.

Signed

Dated: 4 April 2016

Deputy Upper Tribunal Judge Mailer