



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

Appeal Number: HU/05553/2015

THE IMMIGRATION ACTS

**Heard in Manchester
On 5 June 2017**

**Decision & Reasons Promulgated
On 14 June 2017**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MRS THI HUE NGUYEN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Timson, Counsel instructed by A G I solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was not granted by the First-tier Tribunal. There is no reason in this case to make an anonymity direction.

DECISION AND REASONS

Background

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Birrell promulgated on 31 October 2016 ("the Decision") dismissing the Appellant's appeals against the Secretary of State's decision dated 9 September 2015 refusing her leave to remain based on her private life

and her family life with her British citizen partner, Nhieu Qang Nguyen and their two children who are now aged two years and under one year. Both children are British citizens by virtue of their father's status.

2. The Appellant met her partner in Vietnam in 2012. She came to the UK two years later as a visitor. She claims to have discovered that she was pregnant after her arrival here. An airline refused to allow her to fly back when she tried to return to Vietnam when she was twenty-eight weeks pregnant. She has not returned since. The Appellant is therefore an overstayer. Both children were born in the UK.
3. The Appellant's partner claims to earn a sufficient income to maintain the Appellant and their children for the purposes of the Immigration Rules ("the Rules"). The Appellant is though unable to meet the Rules because of her immigration status. She is unable to meet EX.1 as she had not been cohabiting with her partner for two years as at date of application and cannot therefore meet the eligibility requirements as a partner. The Appellant cannot meet the Rules in her capacity as the children's parent as she does not have sole parental responsibility for the children (E-LTRPT.2.3 of the Rules refers).
4. The Appellant says that she does not wish to return to Vietnam in order to apply for entry clearance in accordance with the Rules as she fears that her immigration history would lead to refusal of her application. Since the Appellant cannot meet the Rules, her case was considered by the Judge outside the Rules applying section 117B Nationality, Immigration and Asylum Act 2002 ("section 117B"). The Appellant relies in particular on section 117B(6).
5. The Judge found that the Appellant could return to Vietnam, leaving the children in the care of their father, in order to apply for entry clearance under the Rules to return as a partner and parent. She found that temporary removal would therefore be proportionate.
6. Permission to appeal was granted by First-tier Tribunal Judge Zucker on 20 April 2017 in the following terms (so far as relevant):-

"[2] It is clearly arguable, if the concession recorded at paragraph 47 of the Decision was made on behalf of the Respondent, that having regard to s117B of the 2002 Act the appeal should have been allowed. The Upper Tribunal may be assisted in its consideration of the matter by the guidance in the case of NR (Jamaica) [2009] EWCA Civ 856 because arguably the judge has gone behind the concession."

7. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

The grounds and submissions

8. Mr Timson relied heavily on the Respondent's concession as recorded at [47] of the Decision which I set out below. He submitted that, based on the concession and the Respondent's policy on which that concession is based it was not open to the Judge to dismiss the appeal. He accepted that the Respondent's policy (to which I also refer below) does permit the Respondent to refuse leave even where there are British citizen children involved but only where there is a very poor immigration history and Mr Timson submitted that this case does not warrant a refusal on that basis.
9. The case of MA (Pakistan) and others v Secretary of State for the Home Department [2016] EWCA Civ 705 ("MA (Pakistan)") is of some relevance. The Appellant's case is that the judgment was not something to which the Judge should have referred in light of the Respondent's concession. Mr Timson submitted in any event that those cases concerned children who had been resident in the UK for seven years and not British children. The position is different for British children, particularly in light of the Respondent's policy. That policy is not confined to the application of "Zambrano" criteria.
10. In response, Mr Kotas pointed out that the Judge dealt with the way the Appellant put her case at [48] of the Decision. There is no error therefore in the Judge's approach.
11. Mr Kotas accepted that the concession recorded at [47] of the Decision had been made. The Respondent's position though as accepted by the Judge is that it is not disproportionate for the Appellant to return to Vietnam in order properly to apply for entry clearance. Although Mr Kotas accepted that the children in this case are very young and at an age where separation from their mother might not generally be appropriate, he submitted that the Appellant can take the children with her to Vietnam while she seeks entry clearance if she decides to do so. That is not an acceptance that the Respondent's decision forces the children to leave the UK; it would be a matter of choice for the Appellant and her partner.
12. In reply and in discussion, Mr Timson accepted that the issue whether it is reasonable for a child to leave the UK in section 117B(6) imports consideration also of a parent's immigration history (following MA (Pakistan)). He submitted, however, that once the issue of reasonableness under that sub-section is disposed of, it is no longer appropriate to bring into the equation the remainder of section 117B in order to determine the issue of proportionality. He submitted that it is this approach which led the Judge into error.
13. I reserved my decision in relation to whether there is an error of law in the Decision. In discussion with the representatives, it was

agreed that if I found an error of law I could re-make the decision on the papers before me. Mr Kotas accepted that if I found the concession dispositive of the appeal, the appropriate outcome would be to allow the Appellant's appeal.

Policy and Legal Framework

14. Before turning to deal with the concession recorded at [47] of the Decision, it is necessary to set out the Respondent's policy on which that concession relies (so far as relevant). That is to be found in a document entitled Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes (August 2015). Although that document deals largely with leave sought under the Rules and as I observe at [3] above, the Appellant does not qualify on that basis, at [9.1] of the document under the heading "Exceptional Circumstances", the Respondent notes that the best interests of the child remain relevant in determining whether there are exceptional circumstances to justify a grant of leave outside the Rules and that this entails consideration of section 11 of the guidance.
15. Section 11 then deals with the best interests of children affected by the relevant decision and at [11.2.3] deals with the position of British citizen children under the heading "Would it be unreasonable to expect a British citizen child to leave the UK?". Having made reference to the ECJ judgment in Zambrano, the guidance says this:-

"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.

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the

Office of the Children’s Champion on the implications for the welfare of the child, in order to inform the decision.

Where the applicant has made an application under the family and/or private life Immigration Rules, the application must:

- a) be considered under those Immigration Rules first;
- b) where the applicant falls for refusal, the decision maker must go on to consider whether there are any exceptional circumstances that would warrant a grant of leave to remain outside the Immigration Rules; and
- c) where the applicant falls for refusal under the Immigration Rules and there are no exceptional circumstances, and where satisfactory evidence has been provided that all of the following criteria are met, the case must be referred to European Casework for review:
 - i) the child is under the age of 18; and
 - ii) the child is a British Citizen; and
 - iii) the primary carer.... of the child is a non-EEA national in the UK; and
 - iv) there is no other parent/guardian/carer upon whom the child is dependent or who could care for the child if the primary carer left the UK to go to a country outside the EU.

.....”

16. It is next necessary to set out section 117B(6) as this is the source of the requirement for determination of the reasonableness of a British child going to live abroad. That sub-section reads as follows:-

“(6) In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where –

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom”

As British citizens, the Appellant’s children are “qualifying” children.

17. In reaching her Decision, the Judge also had regard to the case of MA (Pakistan) and it is therefore necessary to say something more about those cases. The Court of Appeal there considered six individual cases all concerning children who had been resident in the UK for more than seven years and therefore fell within the definition of “qualifying” children. The Court held, following the Court of Appeal’s judgment in MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450 that the consideration of “reasonableness” for the purposes of section 117B(6) imports other public interest considerations including such matters as the parent’s immigration history. The focus of section 117B(6) is however the best interests of the child and, as such, those are a primary consideration. Moreover, section 117B(6) provides that the fact of the child being resident for more than seven years or being a British citizen is a factor to be given some weight in favour of leave to remain being granted (see [45] of MA (Pakistan) as cited at [12] of the Decision). As such, as noted at [49] of MA (Pakistan), section 117B(6) “establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.”

Discussion and conclusions

18. As the permission grant makes clear, the starting point for determination whether there is an error of law is the concession recorded at [47] of the Decision. That is in the following terms:-

“I accept that the Respondent’s policy was adopted by Mr Harrison in conceding that it would not be reasonable to expect these children to leave the UK.”

I do not need to refer to case law concerning whether and in what circumstances a Judge can depart from a concession made by a party. The Respondent accepts that the concession was made. She does not seek to withdraw it. The extent of the concession is clear. The Judge does not say that she does not accept the concession nor does she purport to depart from it. She simply does not appear to appreciate the impact of the concession.

19. The error of law made by the Judge then appears from the paragraph immediately following:-

“[48] I do not accept Mr Timson’s argument that this results in automatic success for the Appellant without more as this is made clear at paragraph 47 of MA. While Mr Timson sought to distinguish the case on the basis of the fact that the children in MA were not British citizens I am satisfied that the test of reasonableness applies to ‘qualifying children’, and children qualify by virtue of length of residence or being a British citizen. As is made clear in MA the application of the reasonableness test requires me to have regard to the wider public interests, and they require consideration of the immigration history and status of the parents while nevertheless giving weight to the fact that the children are qualifying children and in this case they are British citizens.”

20. Had it not been for the concession made by the Presenting Officer, that paragraph would be unobjectionable. Similarly, if the only concession made by the Presenting Officer were that the best interests of the children as British citizens would be to remain in the UK but leaving open the question whether those best interests could be outweighed by other factors in order to determine the reasonableness of return, the Judge’s analysis could not be criticised.

21. Nor do I accept Mr Timson’s submission that MA (Pakistan) is distinguishable from this case because the children in those cases were not British citizens and that a different approach is required in relation to British citizen children. True it is that a parent cannot be removed if the effect would be to force a British citizen child to leave (per Zambrano) but that is not otherwise the case. As the Judge herself observed at [45] of the Decision, the nationality of the children is an

important consideration. However, as the Court of Appeal noted in MA (Pakistan), the same is true of seven years' residence for a child as after that period of residence, Parliament has decreed that a child becomes a "qualifying child" in the same way as a child who is a British citizen at birth.

22. Of course, a British citizen child cannot be removed. Instead, as Mr Kotas submitted, it would be for the parents to determine whether the children should leave with their mother or remain with their father (or whether the family should relocate as a unit, whether temporarily or permanently). Once it is accepted though that it is not reasonable for a child to return with the person to be removed, the position is, applying section 117B(6), that the public interest does not require that person to be removed.
23. In this case, the Judge not only failed to appreciate the importance of the concession made by the Presenting Officer but also herself reached a conclusion which was not open to her on her own findings. The Judge appears to accept from [49] onwards of the Decision that the children should not be removed but should remain with their father while their mother returns to obtain entry clearance. That may well be a factor which weighs in the overall assessment of the proportionality balance if that assessment is at large. However, in light of the statutory considerations to which the Judge is bound to have regard, that would first require a finding that it is not unreasonable for the children to leave the UK applying section 117B(6) and having regard to their best interests. Once it is accepted that the children cannot be expected to leave with their mother, a finding that temporary removal is proportionate is inconsistent with the statutory guidance.
24. I note in this regard that section 117B(6) is different from section 117C(5) (which was considered also in MA (Pakistan) with reference to the case of MM (Uganda)). That latter section requires the Tribunal to consider whether the "effect of deportation" would be unduly harsh which imports consideration not only of whether it would be unduly harsh to require a child to leave with the parent to be deported but whether it would also be unduly harsh for the child to remain in the UK without that parent. That is not the way in which section 117B(6) is drafted and no doubt that is deliberately so in light of the different levels of public interest in play. If section 117B(6) were drafted in the same way as section 117C(5), the Judge's analysis might have been open to her. As it was, her conclusion based on a finding that the children could remain in the UK while their mother returned to Vietnam fails properly to apply section 117B(6).
25. For those reasons, I am satisfied that the Decision involves an error of law and I set aside the Decision.

26. In light of my findings in relation to the error of law, the Respondent's concession has the effect of determining the central issue for the purposes of section 117B(6) namely that it would not be reasonable to expect these children to leave the UK. It therefore follows that section 117B(6) is satisfied and since there is no issue concerning the remainder of that section, the public interest does not require the Appellant's removal. Accordingly, the appeal is allowed.

DECISION

I am satisfied that the Decision contains material errors of law. The decision of First-tier Tribunal Judge Birrell promulgated on 31 October 2016 is set aside. I re-make the decision by allowing the Appellant's appeal on the basis that removal would breach her human rights.



Signed
Upper Tribunal Judge Smith

Dated: 13 June 2017