



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/21684/2015
IA/21681/2015

THE IMMIGRATION ACTS

Heard at Field House
On 19 May 2017

Decision Promulgated
On 01 June 2017

Before

Upper Tribunal Judge Southern

Between

ROSITA DE SOUZA
[C P]

and

Appellants

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O. Ngwuocha, counsel instructed by Carl Martin solicitors.
For the Respondent: Mr K. Norton, Senior Home Office Presenting Officer

DECISION

1. The first appellant is the mother of the second appellant, who was born in the United Kingdom on [] 2004, so that she is now 13 years and 3 months old. Both are citizens of Brazil. The second appellant's father is an Iraqi national who is unlawfully present in the UK, as he has been for 17 years, his asylum claim having been rejected. He and the first appellant are no longer in a relationship. The first

appellant has sole parental responsibility for the second appellant but her father is said to maintain regular contact.

2. The first appellant first arrived in the United Kingdom in 2003 and was admitted as a visitor. She overstayed that leave and, as I have just said, the second appellant was born on 5 February 2004. The first appellant returned to Brazil in September 2004, accompanied by the second appellant, but they came back to the United Kingdom, the first appellant having again secured entry clearance as a visitor, in July 2008. Thus, the second appellant has lived in her country of nationality for 3 years and 9 months between the ages of 7 months and 4 years 5 months or thereabouts. Both have remained in the United Kingdom ever since, having no leave since the expiry of their visit visas.
3. In these proceedings, the appellants appeal against a decision of the respondent, made on 26 May 2015, to refuse their applications for leave to remain on the basis of rights protected by article 8 of the ECHR.
4. The parties are of course aware of the litigation history that brings the appeal before me and for present purposes it is sufficient to summarise it briefly. The appeal was dismissed by the First-tier Tribunal following a hearing before First-tier Tribunal Judge Woolley on 11 July 2016. Permission to appeal to the Upper Tribunal having been granted, the appeal came before Deputy Upper Tribunal Judge Hanbury on 14 December 2016. It was accepted before him by the respondent that Judge Woolley had made a material error of law and Judge Hanbury went on to substitute a fresh decision to dismiss the appeal. In response to an application for permission to appeal to the Court of Appeal, his decision was then set aside by Upper Tribunal Judge Rimmington under rules 45 and 46 of the Tribunal Procedure (Upper Tribunal) Rules 2008, because Judge Hanbury had overlooked a statutory provision, that being s117D Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), and so had wrongly concluded that the second appellant was *not* a qualifying child for the purposes of s117B.
5. It was common ground and agreed between the parties that my task, therefore, was to substitute a fresh decision as to whether to allow or dismiss the appeal against refusal to grant leave to remain.
6. Although the decisions of Judge Woolley and Judge Hanbury have been set aside, the judgment of Judge Woolley stands as a record of the evidence given before her. Mr Ngwuocha said that the facts are to a large extent not in dispute and so, although both appellants were present, he would not call either of them to give oral evidence. I made clear that I had before me only a brief witness statement of the first appellant prepared for the hearing in July 2016 and no written evidence from either the second appellant or her father so that all I did have was that recorded as the evidence of the first appellant and [SP] in the judgment of Judge Woolley. She had heard oral evidence from the appellant's father, [SP], although that related to the position as it was in July 2016, nearly a year ago, whereas I, of course, am

concerned with the circumstances as they are today. However, Mr Ngwuocha said he would proceed to his submissions and would not call oral evidence from either of the appellants. The only additional evidence put before the tribunal is a more recent progress report from the school attended by the second appellant which was introduced without objection from Mr Norton.

7. The issue to be addressed in this appeal is a narrow one. Both parties submitted and agreed that the question that is determinative of the outcome of this appeal is that posed by s 117B(6) of the 2002 Act, whether it would or would not be reasonable to expect the second appellant, who is a qualifying child because she has lived in the United Kingdom for a continuous period of more than seven years, to leave the United Kingdom. Although I agree that is the main focus of this appeal, given that s117A(2) is expressed in mandatory terms, I do not propose to confine my assessment to that provision alone and exclusively. S117 provides, so far as is relevant, as follows:

'117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts--

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard--

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English--

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons--

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(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.'

8. Mr Ngwuocha realistically accepts that the appeal cannot succeed on the basis of private life established in the United Kingdom while the appellants have been unlawfully present and that family life between the appellants themselves will not be disturbed as a result of the decision under appeal. He did not suggest either that the appellants could succeed under 276ADE(vi) on the basis of very significant obstacles to integration on return to Brazil. He said that the only basis upon which the appeal can succeed is if it is found that it would not be reasonable to expect the second appellant to leave the United Kingdom, a proposition with which Mr Norton agreed also. Therefore, I need not set out any discussion of the reasons given by the respondent for refusing the application under the partner or parent routes under the Immigration Rules or on the basis of private life. Although para 276ADE(iv) of Appendix FM contains a provision recognising the significance of a child having resided continuously in the United Kingdom for at least 7 years, there is a distinction in the rules that disqualifies this child because, unlike the position under s117B(6), the 7 year period must have been accumulated by the date of the application, which in this case it was not.
9. Having explained, correctly, why the appellants could not meet the requirements of the immigration rules the respondent went on to consider whether the application disclosed anything such as to require a grant of leave outside the rules. In respect of the second appellant's father, the respondent said that although it had been claimed that the relationship between the second appellant and her father would be "affected" if the appellants were to return to Brazil, he had no valid leave to remain in the United Kingdom.
10. Next, the respondent considered her duty under s55 Borders, Citizenship and Immigration Act 2009 which she said "requires that the best interests of a child are a consideration which need to be taken into account whenever UK Visas and Immigration undertakes enforcement action" and, uncontroversial, that the best interests of a child whose parents are being removed are served by remaining with the parents and being removed with them.

11. The respondent then set out a summary of the factors which she considered demonstrated that the decision to refuse to grant leave was “reasonable and section 55 compliant”:

- That your child is to be removed with their parent(s), clearly the most important people in their lives and this will help them to adapt to life in Brazil.
- That your child is a national of Brazil and will therefore be able to enjoy all of the benefits and advantages citizenship entails.
- That your child is to be returned to a country where there is provision for education.
- That your child is not yet old enough to have started to study towards a recognised qualification.
- That your child is not yet old enough to have developed any skills which are not transferable to Brazil.
- That you have provided no evidence of any special educational or medical needs for your child which need to be considered.
- That your child is to be removed to a country where you lived and it is assumed worked until the age of 19 and no explanation has been provided as to why you would be unable to secure similar employment on your return.
- That you have never possessed leave to enter or remain which leads to settlement in the United Kingdom. Therefore you cannot have had a realistic expectation that you will be able to remain in this country permanently and as such it was your decision not to educate them with a view to returning to Brazil.
- That your child has always remained in the care of Brazil nationals and therefore will be aware to some extent of the language and culture country.

12. The first point made is expressed clumsily, making reference, on one interpretation, to both parents. As was confirmed by Mr Norton at the hearing, there was no question of the second appellant’s father also being removed to Brazil because there was no basis upon which that could lawfully be done. It may be that this is a confused conflation of a general statement of principle, with a recognition that this was not a case where both parents would be removed with the child, which would explain why the reference is to “parent(s)” and not simply to “parents”.

13. In his oral submissions, Mr Ngwuocha identified what he said were the material facts relied upon as demanding an outcome in the appellants’ favour. He said the second appellant’s relationship with her father was a factor of particular significance. It was, he submitted, established by the evidence before the First-tier Tribunal that the second appellant had a “great relationship” with her father and that “she sees him every day”. This was not a case where the family would all be removed together, thus preserving family life, and the respondent’s decision was wrongly predicated on the basis that would be the position, speaking as it did of the child being “removed with their parent(s), clearly the most important people in their lives”. Also, the second appellant was doing well at school and her education would be disrupted. He submitted that the only thing that counted against the appellant was the fact that the first appellant had chosen to overstay her visit visa and remain without leave in the United Kingdom.

14. Pausing there, I do not accept Mr Ngwuocha's interpretation of the refusal letter. That the decision was not, in fact, predicated upon the misconception that the second appellant's father would be removed to Brazil is made clear by what the respondent said in the refusal letter concerning the second appellant herself. Addressing the question of whether it would be reasonable to expect the second appellant to leave United Kingdom the respondent said this:

"However, it is not considered to be unreasonable to expect you to leave the UK because you will be leaving with your mother Rosita De Souza as a family unit. Rosita De Souza will be able to help you reintegrate into life in Brazil. You will still be able to keep in contact with family and friends in the UK to (*sic*) modern communication methods."

15. As there is no evidence at all before me, written or oral, from the second appellant's father, I can only look to what is recorded about the evidence concerning him provided at the hearing before Judge Woolley in July 2016. At para 11 of her decision she recorded that the first appellant had said this:

"... She (the second appellant) had a great relationship with her father and sees him every day. He picks her up from school and takes her to the supermarket..."

and at para 12:

"It would be difficult for the father to go to Brazil as he had too many friends here and it would be difficult for him to leave. He was in the UK illegally. He claimed asylum some time ago. She did not know his situation but he had no status in the UK..."

and at para 13:

"She did not remember the address of the father as she does not go to his home and did not like her daughter going to his house. She was not living with him. She had supported herself doing some gardening jobs and the father helps..."

and at para 14:

"... she said the father looks at what his daughter did in school and her homework. He gives her £30 a week. There was no court or contact order in existence. He lives with another person and she didn't like going to his house. He sees his daughter after school and came to parents' evening".

And of the oral evidence given by [SP] himself, at paras 15-16 the judge recorded this:

"He gave his address in Swindon as c/o a charity as this was the address he had to give for the IS.96. He was close to his daughter and saw her every day. He could not relocate to Brazil as he had never been there. He had no ongoing application. He

came to the UK from Iraq in 1999 and had been refused asylum. He still reported to the Home Office. He had been told to leave. It would be hard to go back to Kurdistan.

...he said he was staying with friends for temporary periods and had no permanent address. ... He had not chosen to try to go to Brazil. He discusses any decisions about his daughter with her mother but would not mind what happened as long as his daughter was happy. She asks him about decisions and he always agrees. He worked illegally cash in hand in car washes and gardens. He gives her around £40 to £50 a month when he makes money. He is not supposed to work. He has no NAS support. If they were removed it would affect him badly. He was in no other relationship and saw his daughter Monday to Thursday and at weekends."

16. In her witness statement prepared for the hearing in July 2016 the first appellant said:

"I confirm that I live in a single family unit with my child. I have sole parental responsibility for her...

I confirm that my child does enjoy regular contact with her father and this close relationship subsists."

17. For the respondent, Mr Norton premised his submissions by saying that the outcome of the appeal would turn on the question of whether it was reasonable to expect the child to leave the United Kingdom. He accepted that the evidence indicated a number of factors that spoke in the appellants' favour: the length of residence of the child, which meant that she was a qualifying child for the purposes of s117B(6); her level of integration; given her age, a natural progression of relationships in the United Kingdom; the evidence suggested that the second appellant was an intelligent child who was doing well at school and, of course, her relationship with her father. Despite that, the fact remained that she and her mother are citizens of Brazil with no right of residence in the United Kingdom. Although Mr Norton accepts that the child has continuing contact with her father, sole parental responsibility rests with her mother. Her father has no immigration status in the United Kingdom and is liable to be removed at any time. It is the respondent's position that it is clearly reasonable to expect the child to leave the United Kingdom with her mother, even if this will affect the nature of contact she has with her father.

Discussion:

18. Mr Norton is, of course, correct to say also that a balance must be struck between the competing interests in play. The assessment of reasonableness in s117B(6) is informed by all of the circumstances and not just what is in the best interests of the child, although that is of course a consideration of primary importance.

19. In considering the public interest question, I am required by s117A(2) of the 2002 Act to have regard, in particular, to the considerations listed in s117B. Both appellants have remained present in the United Kingdom without leave, consuming public services, not least in terms of the education of the second appellant; a factor now relied upon as a reason for allowing her to remain permanently. That is a significant factor in terms of the weight of the public interest argument. The immigration history of the first appellant is a particularly poor one because I have no doubt at all that when she returned to the United Kingdom as a visitor in July 2008 she had every intention that she and her daughter would remain beyond the period allowed for the visit. Put another way, I am entirely satisfied that when she applied on that occasion for entry clearance she dishonestly misrepresented her purpose in doing so, thereby deliberately undermining the integrity of immigration control.
20. Both appellants speak English fluently, unsurprisingly given the length of time they have lived here and the fact that the second appellant has spent not just a period of more than 7 years living in the United Kingdom but most of her life. The evidence is that the second appellant has spoken both English and Portuguese at home.
21. The fact that the second appellant has now lived continuously in the United Kingdom for more than 7 years is a matter of significance that speaks in her favour. That is particularly so given that this period represents an important period in her life and is one during which all of her education has been experienced.
22. There is very little evidence before me about how the first appellant has provided for herself and her daughter but there is no suggestion that she is in receipt of public funds and it has not been part of the respondent's case that she is not financially independent. However, such evidence as there is indicates that both the first appellant and the second appellant's father have been working unlawfully with no suggestion that those earnings have been declared to HMRC.
23. It is a requirement of primary legislation that little weight is to be given to private life established while person is present unlawfully, but this is not a case that turns to any significant degree upon issues of private life.
24. Which brings us to s117B(6). The evidence in July 2016 established that, although the first appellant has sole parental responsibility for the second appellant, family life existed, actively, between the second appellant and her father. It is uncontroversial that, in the absence of reasons for concluding otherwise, the best interest of a child require that she maintain contact with both parents wherever that is possible. The second appellant's father has no lawful basis for being in the United Kingdom and, theoretically, is liable to be detained and removed to Iraq at any time. However, he has been in the United Kingdom for 17 years and I have not been told of any attempt by the respondent to remove him. That suggests that there is no indication that his removal is now imminent.

25. The evidence of the second appellant's father before Judge Woolley was that he had not explored whether or not he could move to Brazil to maintain face to face contact with his daughter. As the father of a Brazilian national child there may or may not be a lawful route to achieving that. His failure to investigate that possibility, taken together with his confirmation that he is happy to leave decisions about his daughter to her mother and his unexplained absence from the hearing, the outcome of which would determine whether or not his daughter was to remain in the United Kingdom are all factors to which I have regard. There may well be a good reason why he did not attend to support his daughter's appeal and why he has not provided a witness statement or even a letter of support but if there is I have not been told what it is.
26. Children do move with their parent or parents to different countries and do cope with the challenges of integrating and with interferences to their education. The second appellant speaks Portuguese, even if she probably regards English now as her first language. She would have the assistance and support of her mother in adjusting to life in Brazil, her mother having spent most of her life there and having chosen to return with the appellant between September 2004 and July 2008. There is a functioning education system in Brazil that she will be able to access. There is no reason to suppose that the first appellant, who has managed to support herself and her daughter here without resource to public funds would not be able to provide for them both in Brazil. Judge Woolley recorded that the first appellant attended university in Brazil and holds a professional qualification which enables her to work as a teacher in Brazil. There is no suggestion that the child has any special educational, social or medical needs. She is not at a critical stage of her education. All of this speaks compellingly in favour of a conclusion that it would not be unreasonable to expect the second appellant to leave the United Kingdom.
27. As Mr Norton acknowledged, there are factors that speak in the appellants' favour and point to a different conclusion. The second appellant was born in the United Kingdom and has lived most of her life here and all of her education has been in the United Kingdom. She has been here for nearly 9 years since returning from her single visit to her country of nationality. Her only experience of living in Brazil was when she was taken there as a baby and brought back to the United Kingdom aged 4 years old. She is unlikely to have much recollection of living there. In the United Kingdom she continues to have contact with her father but, as he has taken no steps to make it possible for him to accompany his daughter to Brazil, or to identify whether that is possible, that would not continue should she move to Brazil other than by telephone which is a poor substitute for a 13 year old girl who presently has regular face to face contact with her father. The child herself is not to be blamed for the poor immigration history of her mother. Her school reports demonstrate that she is fully integrated into the United Kingdom.
28. Ultimately, when I address the question of whether it is reasonable to expect this Brazilian national child to return to Brazil with her Brazilian national mother after a period of nine years living unlawfully in the United Kingdom, having regard to all

the factors discussed above, I am entirely satisfied that question returns a positive answer. There are two main factors that might provide support for a conclusion that it would not be reasonable, those being the length of time the second appellant has lived in the United Kingdom and the impact upon the contact the child presently enjoys with her father.

29. The fact that the second appellant has lived continuously in the United Kingdom for more than seven years is significant and weighs heavily in her favour and I do not underestimate the importance of it. But there is no evidence to suggest that she would be unable to cope with the challenge of integrating into life in Brazil or that her continuing education would be adversely effected. I have no doubt that she will have made friendships and built relationships outside her home here, but as I have no evidence from her or from her mother or father about this, I do not know what those are.
30. The evidence of contact with her father is unsatisfactory, for the reasons I have explained. I accept that such contact does take place but there is no current evidence of the nature and frequency of it. The father may well have remained in the United Kingdom for many years but he remains removable at any time. It may or may not be possible for the second appellant's father to secure a lawful entry to Brazil, either for the purpose of a visit to his Brazilian national child or for a longer stay, even if that means that he would not be re-admitted to the United Kingdom where, according to the first appellant, he would prefer to remain to enjoy the many friendships he has established here. If he does not find a way of securing entry to Brazil, either for visits or on a longer term basis, then contact can be maintained in other ways.
31. The consequence of that conclusion, that this is not a case where it would not be reasonable to expect the second appellant to leave the United Kingdom, is that when I consider the public interest question the appellants secure no assistance from s117B(6) to balance against the important consideration of s 117B(1), that the maintenance of immigration control is in the public interest.
32. Requiring the appellants to leave the United Kingdom will bring about an interference with their right to respect for their private and family lives, as they are presently being enjoyed. Given the time they have both lived in the United Kingdom, particularly the second appellant, and the nature of their private and family lives, article 8 of the ECHR is plainly engaged. As neither is lawfully present in the United Kingdom any such interference is in accordance with the law and is to serve a legitimate objective. Therefore, the question to be addressed is whether such interference is proportionate to the legitimate aim being pursued.
33. I have identified all of the factors that speak in the appellants' favour but I have concluded that these are outweighed by the public interest in maintaining immigration control. The public interest in regulating those who enter and remain in the United Kingdom in accordance with the immigration rules and domestic law

is a powerful consideration reinforced by primary legislation that, of course, has a reach beyond any individual case. The detriment to the appellants is of a nature that can be overcome, even if the nature of the private and family life presently enjoyed in the United Kingdom cannot be replicated precisely in Brazil. I have no doubt at all that the appellants, an educated and professionally qualified mother and an intelligent and diligent child, as can be seen from her school report, will rapidly establish themselves in Brazil where they will enjoy full rights of citizenship and the second appellant can maintain contact with her father, even though, for the reasons I have explained, that will not, for the foreseeable future, be in the form of regular face to face contact.

34. For all of these reasons I find that there would be no impermissible infringement of rights protected by article 8 of the ECHR as a consequence of the refusal to grant these appellants leave to remain in the United Kingdom.

Summary of decision:

The appeal against refusal to grant leave to remain is dismissed.

Signed



Upper Tribunal Judge Southern

Date: 30 May 2017