



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14492/2016

THE IMMIGRATION ACTS

Heard at Field House
On 15 May 2018

Decision & Reasons Promulgated
On 21 May 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

HUNG [P]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms M. Mac of Mac & Co.

For the respondent: Ms A. Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals the respondent's decision dated 31 May 2016 to refuse a human rights claim. First-tier Tribunal Judge C.A.S. O'Garro dismissed his appeal in a decision promulgated on 09 November 2017.
2. In a decision promulgated on 09 March 2018 the Upper Tribunal found that the First-tier Tribunal decision involved the making of an error of law and set aside the decision (see annex). The First-tier Tribunal's findings relating to the genuine and subsisting

nature of the appellant's parental relationship with the children were preserved. The Upper Tribunal listed the appeal for a resumed hearing in order to make findings relating to the best interests of the children and whether it was 'reasonable' to expect the British child to leave the UK within the meaning of section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

Decision and reasons

3. At the date of the resumed hearing, the appellant's wife and child had recently been granted further leave to remain in the UK. Ms Holmes confirmed that she was instructed to concede the appeal 'subject to criminal records checks'. She said that the appellant's wife was granted further leave to remain because she is the mother of a British citizen child (the first child). The second child was granted leave to remain in line with his mother. She said that it would be inconsistent not to grant the appellant leave to remain given that the First-tier Tribunal judge was satisfied that he had a 'genuine and subsisting parental relationship' with the British child albeit he is not the child's biological father. Ms Holmes accepted that the evidence showed that the appellant formed part of the family unit and was responsible for looking after both children.

4. A discussion followed as to the best way to proceed. The respondent's concession was qualified 'subject to criminal records checks'. However, the core element of the appeal as to whether it would be 'reasonable to expect the child to leave the UK' was conceded. It was accepted that it was in the best interests of the children to remain in the UK with their parents as a family unit. At the date of the hearing, the respondent had not adduced any evidence of criminal convictions that might outweigh the significant weight that should be given to the best interests of the children. After further discussion, I concluded that it was appropriate for the Upper Tribunal to determine the appeal in light of the concession. The respondent can make checks before granting leave to remain. If checks disclose any significant public policy considerations, it is open to the respondent to make a further decision. However, on the evidence before the Upper Tribunal at the date of the hearing, it is conceded that the appellant's removal in consequence of the decision would be unlawful under section 6 of the Human Rights Act 1998.

DECISION

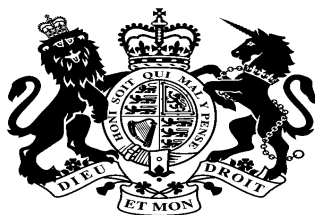
The appeal is ALLOWED

Signed 

Date 16 May 2018

Upper Tribunal Judge Canavan

ANNEX



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14492/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14 February 2018

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

HUNG [P]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr R. Jesurum, Counsel
For the respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision to refuse a human rights claim. In a decision promulgated on 09 November 2017 First-tier Tribunal Judge C.A.S. O'Garro ("the judge") dismissed the appeal.

2. The factual matrix of the claim was not in dispute. The judge accepted that the appellant was married to a person with Discretionary Leave to Remain (DLR) until 29 January 2018. She also accepted that the appellant had a genuine and subsisting parental relationship with their 2-year-old daughter and had a relationship akin to a parental relationship with his wife's 4-year-old son from a previous relationship. It was accepted that the oldest child is likely to be a British citizen and that he has an ongoing relationship with his father, who he has contact with every month.
3. The judge found that the appellant did not meet the requirements of Appendix FM of the immigration rules because his wife is not a British citizen and was not settled in the UK. When she considered Article 8 outside the immigration rules she accepted that the appellant had established a private and family life in the UK. She went on to consider the proportionality of removal with reference to the statutory provisions contained in section 117B of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). The judge took note of the fact that it was in the best interests of a child to live with and be brought up by both parents "subject any very strong contra-indication" [29]. She also directed herself to the decision in *Zoumbas v SSHD* [2013] UKSC 74 in so far as the Supreme Court made clear that the best interests of a child are a primary consideration, but not a paramount consideration [30]. The judge appeared to accept that the appellant had a 'genuine and subsisting parental relationship' with both children [31-32]. The only remaining issue for determination was whether it was 'reasonable to expect the child to leave the UK' for the purpose of section 117B(6)(b). The judge made a general reference to "the respondent's guidance" as set out by the Upper Tribunal decision in *SF (Guidance post 2014 Act) Albania* [2017] UKUT 00120 [34]. She went on to make the following findings:
- "35. I have taken into account the respondent's guidance and find the circumstances in this case is different to that in *SF* and others (*Guidance Post -4014 Act*) Albania [2017] UKUT (sic) because this appellant has a very poor immigration history having entered illegally, absconded for several years, used false name and gave false details to an Immigration officer and more importantly is not the only carer of the children. If the appellant is removed, the appellant's children can remain in the United Kingdom with their mother.
36. This of course will mean that the appellant will be removed without his family. I have considered the impact of this removal on the children. The children will continue to be cared for and looked after by their mother if the appellant is removed and I find that their health and development will not be affected as they are still quite young. I accept that the children will lose the parental contact with the appellant and that the best interest of the children will be in some measure impaired by loss of the company of their father and I recognise this is a consideration of the first importance. However, in the overall context of this case, it is certainly not the only consideration and neither in the last analysis is it the determinative one.
37. It cannot be overlooked that the appellant remained in the United Kingdom illegally has a poor immigration history and formed a family life knowing that both he and his partner's positions were precarious. This has to be taken into account and weight has to be given to the respondent's policy relating to the economic well-being of the United Kingdom.

38. I do not accept that the appellant's return to Vietnam will bring his family life with his partner and children to an end because they can communicate with the appellant by telephone or the internet, so all contact will not be lost. Further, in a month or so the appellant's partner will no doubt be making a further application for leave and if she is granted Indefinite Leave to remain then there is no reason why the appellant cannot make an application to rejoin his family in the United Kingdom. Alternatively if the partner's application for further leave to remain is refused then she too will be returning to Vietnam where the family can resume their family life."

4. The appellant appeals the First-tier Tribunal decision on the ground that the judge failed to consider the "reasonableness" test set out in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") properly. The written grounds were not clearly particularised, but Mr Jesurum narrowed the main grounds of appeal to the following broad points.
 - (i) The First-tier Tribunal failed to consider the best interests of the children adequately. In particular, the judge failed to consider what weight should be given to the rights of a British child and failed to consider the best interests of the appellant's non-British child sufficiently.
 - (ii) In finding that it would be reasonable to expect the children to leave the UK to live as a family in Vietnam the judge failed to consider a material issue i.e. that the British child would also be deprived on the regular contact he has with his father in the UK.

Decision and reasons

5. After having considered the submissions made by both parties I am satisfied that the First-tier Tribunal decision involved the making of an error of law.
6. The judge noted some of the relevant legal framework. At [30] the judge noted that the best interests of the children were a primary consideration. At [34] she mentioned the respondent's policy guidance, which was outlined by the Upper Tribunal in *SF (Albania)* albeit that she did not mention the details of the policy. It is not necessary to do so as long as adequate consideration is given to matters that are relevant to a proper consideration of the legal framework.
7. However, in this case the judge's findings relating to the best interests of the children were confined to a single paragraph [36]. There is little evidence in those findings to indicate that the best interests of the children were in fact given weight as a 'primary consideration'. Few of the factors outlined by the Supreme Court in *Zoumbas v SSHD* [2013] UKSC 74 or *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874 were considered. The respondent's policy places greater weight on the rights of a British citizen child. No consideration was given to the fact that the oldest child is likely to be a British citizen in assessing whether it would be reasonable to expect the children to leave the UK for the purpose of the test set out in section 117B(6) of The Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002").

8. The conclusion that the best interests of the children would be “in some measure impaired by the loss of the company of their father” appears to diminish the importance of the relationship that the appellant has with the children when it was accepted that he has a genuine and subsisting parental relationship with both children. No clear findings were made as to where the best interests of the children lay, given that the judge had recognised that it is in the best interests of children to live with and be brought up by both parents [29]. It is only after deciding what the best interests of the children are that it is then possible to consider whether the cumulative effect of public interest considerations might still outweigh the undoubted weight that should be given to the interests of children in the UK: see *ZH (Tanzania) v SSHD* [2011] UKSC 4.
9. Having referred to ‘reasonableness’ test set out in section 117B(6), the judge made little reference to the detail of the respondent’s policy in so far as it might apply to the facts of this particular case. At the date of the hearing, the respondent’s policy stated:

“Would it be unreasonable to expect a British Citizen child to leave the UK?

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*.

...

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."

10. The judge was required to take into account public interest considerations relating to the appellant's immigration history. It was open to her to take into account the fact that the appellant entered the UK illegally and that a subsequent protection claim was refused for non-compliance. However, for these matters to outweigh the interests of a British child the respondent's policy sets a stringent threshold. A poor immigration history is not necessarily enough to outweigh the interests of a British child. A "very poor immigration history" is required showing criminal behaviour or a history of "repeatedly and deliberately" breaching the rules. The judge's finding at [37] outlined the history, but failed to give reasons to say how or why she considered that his history was sufficient to outweigh the interests of the children in light of the respondent's stated policy, which recognises that it is not reasonable to expect a British child to leave the UK save in cases where the person has a "very poor immigration history". Whilst the appellant's immigration history undoubtedly is poor, there is an absence of analysis to explain why it was sufficiently poor to outweigh the interests of a British child.
11. The judge considered the appellant's family life in broad terms, and was entitled to consider his poor immigration history, but given the importance of the issues involved to the children in this case, I conclude that the First-tier Tribunal decision failed to take into account material matters and failed to make sufficiently detailed findings relating to the best interests of the children involved in this case.
12. The factual findings relating to the nature and extent of the appellant's family life are not in dispute. The First-tier Tribunal's findings relating to the genuine and subsisting nature of the appellant's parental relationship with the children shall stand. However, that part of the decision that deals with the best interests of the children, and whether it would be "reasonable" to expect them to leave the UK within the meaning of the test contained in section 116B(6), is set aside and will be remade at a resumed hearing.

DIRECTIONS

13. The parties shall lodge any updated evidence that they wish to rely on relating to the appellant's family life in the UK, including any evidence as to whether his wife's application for ILR has been decided, no later than **seven days** before the next hearing.

DECISION

The First-tier Tribunal decision involved the making of an error of law

The decision is set aside and will be remade at a resumed hearing

Signed  Date 06 March 2018
Upper Tribunal Judge Canavan