



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/31153/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16 November 2017**

**Decision & Reasons  
Promulgated  
On 04 January 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN**

**Between**

**HEIDI PRADILLA YBANEZ  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr. G. Cutting, Counsel, instructed by RC Immigration Services

For the Respondent: Mr. P. Nath, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Row, promulgated on 23 November 2016, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse further leave to remain.
2. Permission to appeal was granted as follows:

"The grounds contend that the Judge erred in considering the position of the Appellant's 9 month British citizen child, born between the date of the

refusal and the date of the hearing. While it is unclear whether the Home Office policy set out at page 3 of the grounds was brought to the judge's attention by the Appellant representative at the hearing, the failure to have regard to it in the decision renders the grounds arguable."

3. The Appellant and Sponsor attended the hearing. I heard oral submissions from both representatives following which I stated that I found the decision involved the making of a material error of law and that my full reasons would follow.

### **Submissions**

4. Mr. Cutting submitted that, following the Home Office policy, it would be unreasonable for a British citizen child to leave the United Kingdom. It would be appropriate to grant leave in the Appellant's case because there were no considerations such as illegality or criminality which justified separation. At [28] the judge had found that the Appellant was trying to avoid an application made under the immigration rules but this was not the case. The Appellant had given birth in between the application and the hearing. The proper way to proceed was to amend the grounds to include the British citizen child, which was what had been done. It was not an attempt to circumvent the immigration rules but was the only way to deal with the circumstances which had arisen. He submitted that the policy should have been taken into account.

5. I was referred to the case of Mandalia [2015] UKSC 59, in particular paragraph [29]. This states:

"So the applicant's right to the determination of his application in accordance with policy is now generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation but free-standing, which was best articulated by Laws LJ in R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363, as follows:

"68 ... Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public."

6. Mr. Cutting submitted that he liked to hope that the Respondent would have made a different decision in the Appellant's case had the British citizen child been born at the time of application.
7. In response Mr. Nath asked whether the policy had been put to the judge to consider. He accepted that matters had to be considered as at the date of the hearing, and that the child had been born between the application

and the decision. However, the judge needed to be taken to the policy. The judge had considered the Appellant's circumstances from paragraphs [10] to [22] and whether it was reasonable for the Appellant to leave. He had considered the return as a family unit. The Appellant knew that her status was precarious but she had given birth to a child when this status was precarious. The judge considered this at [29] and found against her. It was a position that a judge could take.

8. Mr. Cutting submitted that it was clear, as shown by [19] of the decision, that the Appellant's case had been argued on the same terms as the policy, i.e. that it was unreasonable to expect the Appellant to leave the United Kingdom. The decision was muddled. In relation to section 117B(4), family life established when a person was in the United Kingdom legally, even if with precarious status, could be given weight. The Appellant had always been here legally. Little weight should not have been given to her family life as the precariousness of her leave was not an issue. Neither the Appellant's nor the Respondent's representative had provided the guidance, but it was the Respondent who was responsible for putting the policy before the Tribunal. The policy should have been considered and the Appellant's removal was not in the public interest in accordance with section 117B(6).

### **Error of law**

9. I find that the decision involved the making of a material error of law in the judge's failure to consider the Respondent's guidance, the Immigration Directorate Instruction Family Migration, Appendix FM 1.0b, Family Life (as a Partner or Parent) and Private Life: 10-Year Routes, August 2015.
10. The guidance was provided to me. Paragraph 11.2.3 addresses the question of whether it would be reasonable to expect a British citizen child to leave the UK. 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.”

11. The judge addressed the question of whether it was reasonable to expect the Appellant's child to leave the United Kingdom from [19] to [22]. This followed consideration of the welfare of the child from [13] to [18]. It was submitted by Mr. Nath that the judge was considering the case of the family returning together, but he also accepted that this was not the question that had to be asked. Under section 117B(6) the question to be asked is whether or not it is reasonable to expect a British citizen child to leave the United Kingdom.
12. I accept Mr. Cutting's submission that the decision is not very clearly set out, but I find that the consideration of the child's welfare is at [13] to [22]. The judge refers to the welfare of the child being a primary consideration [13]. At [18] the decision states that the child's best interests are to stay with his mother and father. However, at [18] it also states: "The child would not be adversely affected however if the family decided to move to the Philippines.
13. As stated above, this is not what has to be considered. The best interests of the child are to stay with his mother and father as stated. The effect of the Respondent's decision is to separate the child from his mother, the Appellant. Therefore, as found by the judge, the best interests of the child are not served by the decision. This has to be taken into account when the reasonableness of return is considered.
14. Further, I find that the judge has not considered the age of the child as at the date of the decision. The child was born on 22 April 2016 and therefore at the decision would have been seven months old. Therefore the finding that he could return whenever he wished to the United Kingdom is not founded on the facts. Further, I find that the finding at [20] that the child could remain with his father does not fully take into account his very young age at the date of the hearing.
15. The judge has considered reasonableness of return by applying other factors such as the entire family moving to the Philippines, but this is not what has to be considered. The consideration is what is in the best interests of the child and to weigh up the effect of the decision on those best interests.
16. There is no reference at all to the Respondent's guidance which provides that, in a case where a British citizen child would be required to leave the United Kingdom, the starting point is that removal of that child would be unreasonable. If the Appellant's mother were to leave the United Kingdom, the best interests of the child would not be served. The judge has looked at it from the point of view of the Appellant and Sponsor moving to the Philippines as a family unit, but this was not the question before the judge under section 117B(6).
17. I find that the judge's decision has also been influenced by the finding that the Appellant was trying to circumvent the immigration rules. This was not the case. The child was born after the Respondent's decision had been made, and an appeal had been lodged. The situation as at the date

of the hearing was that there was a young British child who needed to be considered. I find the failure to consider the guidance and the failure to properly apply it to the facts as at the date of the decision is a material error of law.

## **Remaking**

18. Following the case of Mandalia, the Respondent's guidance should be taken into account. I was also referred to SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC), which states in the headnote:

"Even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal."

19. I have considered the Appellant's appeal under Article 8 outside the immigration rules in accordance with the case of Razgar [2004] UKHL 27. Evidence was provided in the form of utility bills to show that the Appellant and Sponsor are still living together and I find that their relationship is genuine and subsisting. Evidence was also provided of their family life in the form of the photographs taken at the Appellant's child's christening. I find that the Appellant, Sponsor and their child have a family life sufficient to engage the operation of Article 8. I find that the decision would interfere with this family life.
20. 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.
21. In assessing the public interest I have taken into account section 19 of the Nationality, Immigration and Asylum Act 2002. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. However, section 117B(6) provides that 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."

22. I find that the Appellant's child is a British citizen, and is therefore a qualifying child. I find that the Appellant has a genuine and subsisting parental relationship with her child. In considering whether it is reasonable to expect the child to leave the United Kingdom, I have considered his best interests. I find that it is in his best interests to remain with both of his parents. I find that at the date of the hearing before me he was under one year old. I find that, especially given his young age, it is not in his best interests to be separated from either of his parents, particularly not his mother.
23. I have set out the relevant part of the Respondent's guidance above [10]. I find that there are no other factors which would lead to a reason to justify separation and therefore, in accordance with the Respondent's policy, I find that it is not reasonable to expect the Appellant's child to leave the United Kingdom. I therefore find that the requirements of section 117B(6) are met and that the public interest does not require the removal of the Appellant from the United Kingdom.
24. Taking into account all of the above, I find that the balance comes down in favour of the Appellant. I find, in carrying out the balancing exercise required, that the Appellant has shown on the balance of probabilities that the decision is a breach of her rights, and those of the Sponsor and their child, to a family life under Article 8 ECHR.

### **Decision**

25. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside.
26. I remake the decision allowing the Appellant's appeal on human rights grounds. Section 117B(6) applies.
27. No anonymity direction is made.

Signed

Date 2 January 2018

Deputy Upper Tribunal Judge Chamberlain

### **TO THE RESPONDENT** **FEE AWARD**

I have allowed the appeal and a fee has been paid. The circumstances of the Appellant changed following the Respondent's decision. In the circumstances I do not make a fee award.

Signed

Date 2 January 2018

Deputy Upper Tribunal Judge Chamberlain