Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/10835/2013

THE IMMIGRATION ACTS

Heard at Stoke on Trent	**Determination Promulgated**
On 24 October 2014	**On 10th November 2014**

Before

Deputy Upper Tribunal Judge Pickup
Between

Christian Antony Rodriguez Sifuentes
[No anonymity direction made]

Appellant

and

The Entry Clearance Officer Rio de Janeiro

Respondent

Representation:

For the appellant: Ms J Campbell, instructed by 1st Call Immigration Services
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Christian Antony Rodriguez Siguentes, date of birth 12.4.85, is a citizen of Peru.

2. This is his appeal against the determination of First-tier Tribunal Judge Gurung-Thapa promulgated 13.5.14 dismissing his appeal against the decision of the respondent, dated 3.4.13 to refuse him entry clearance to the United Kingdom the

partner of Natalie Louise Rodriguez, pursuant to appendix FM of the Immigration Rules. The Judge heard the appeal on 15.4.14.

3. First-tier Tribunal Judge Grant granted permission to appeal on 25.7.14.

4. Thus the matter came before me on 24.10.14as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Gurung-Thapa should be set aside.

6. The relevant background to the appeal can be summarised briefly as follows. The appellant lived (mostly unlawfully) in the UK from November 2004 until his voluntary departure in December 2012. The appellant and the sponsor have been in a relationship since 2006 and have a child together. At the date of the appeal hearing the sponsor was expecting the appellant's second child, born by the date of the First-tier Tribunal appeal hearing.

7. The application was refused because of failure to provide an undertaking in relation to accommodation and maintenance as requested under S-EC.2.4, which meant that the appellant did not meet the suitability requirements of EC-P.1.1.(c). This is fatal to further consideration of Appendix FM. In addition, the appellant failed to demonstrate that he met the financial requirements of the Immigration Rules under E-ECP of Appendix FM, with evidence meeting the requirements of Appendix FM-SE. Consideration was also given to family life of the appellant and his partner and child. However, the Entry Clearance Officer found nothing to prevent them enjoying family life together in Peru.

8. At the First-tier Tribunal appeal hearing Ms Campbell accepted that the appellant did not meet the requirements of Appendix FM and that had been made clear in the covering letter with the application. However, it was submitted under article 8 ECHR that the best interests of the children were to be with the appellant but not to be removed from the UK; the decision of the Entry Clearance Officer meant that family life would be extinguished.

9. Judge Gurung-Thapa made a careful consideration of the appellant and his family's circumstances and considered that there were good reasons on the facts of this case to consider article 8 outside the Immigration Rules, noting at §34 that the Entry Clearance Officer failed to consider the best interests of the first child and that a further child has been born, whose best interests the judge now had to consider. Both children are British citizens. The judge thus proceeded to a Razgar five-step consideration, taking care to address the best interests of the children as the primary consideration in line with section 55 of the Borders, Citizenship and Immigration Act 2009 and the relevant case law, including ZH (Tanzania) v SSHD [2011] UKSC4 and Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC).

10. The judge clearly included a consideration of the best interests of the children in conducting the proportionality balancing exercise. She found that although the best interests are normally to be raised by both parents, the needs of the children were being met by the sponsor and others. The judge also took into account that the family life was created at a time when both the appellant and the sponsor were aware that his immigration status was precarious. The judge did not accept that in the circumstances of this case family life would be extinguished, even though he found that it would not be reasonable to expect the sponsor and the children to relocate to Peru. In the judge's view the balance came down in favour of the refusal of entry clearance.

11. In granting permission to appeal, Judge Grant stated, "The grounds of application assert correctly that the First-tier Tribunal Judge arguably erred in law in that having found exceptional and compelling circumstances to make an Article 8 assessment and having then found that it is in the best interests of the British children of the marriage to be raised by both parents and that there is a positive obligation on the State to facilitate family reunion she went on to dismiss the appeal."

12. The Rule 24 response submits that the judge directly herself correctly to the relevant case law. There is no challenge to the decision that there was a good arguable case to consider article 8 family life outside the Immigration Rules, because of a failure to consider the best interests of the child(ren). "It is clear that here were no very compelling circumstances in the situation of the appellant and his partner and children. The circumstances were that he did not meet the income threshold of the rules and that this was a situation not uncommon in the slightest."

13. "As the judge found it was open to the sponsor to visit the appellant in Peru and to support an entry clearance when her finances improved. The judge accepted that normally the best interests of the child were to (be) brought up by both parents however the judge concluded that in the present case this was not determinative. Such a finding was clearly open to her on the facts."

14. There can be no valid criticism of the judge's decision to consider family life under article 8 ECHR outside the Rules. Indeed, she was required to do so under section 86 of the 2002 Act. The judge gave cogent reasons for doing so, the failure to consider the best interests of the first child and the need to give similar consideration to the second child born after the refusal decision but before the appeal hearing. In fact, as this is an out of country application, by reason of section 85A of the 2002 Act the Tribunal was confined to considering the circumstances appertaining at the time of the refusal decision, when there was only one child. However, there is little practical legal difference between considering the best interests of two children rather than just one child and no material error of law arises in that regard, although the appellant's case cannot be considered to have been strengthened by the fact of a second child.

15. In MM(Lebanon) and others [2014] EWCA Civ 985 The Court of Appeal held that in setting the maintenance limits the Secretary of State had "discharged the burden of

demonstrating that the interference was both the minimum necessary and strikes a fair balance between the interests of the groups concerned and the community in general. Individuals will have different views on what constitutes the minimum income requirements needed to accomplish the stated policy aims. In my judgment it is not the court's job to impose its own view unless, objectively judged, the levels chosen are to be characterised as irrational, or inherently unjust or inherently unfair. In my view they cannot be." There is nothing disproportionate about expecting the appellant to meet the requirements of the Immigration Rules in relation to financial requirements.

16. Even if the determination were to be set aside and remade, the requirement that I would have to consider section 117B(3) of the 2002 Act, to the effect that it is in the public interest and in particular the interests of the economic well-being of the UK that persons who seek to enter the UK are financially independent because such persons are not a burden on taxpayers and are better able to integrate into society, effectively closes the door on any argument that such a requirement is disproportionate. There was and remains a route for entry for a partner and/or parent of a child and it remains open to the appellant to make a fresh application. That he has failed to meet those requirements is a highly relevant factor in the proportionality assessment. Article 8 is not a shortcut to compliance with the Immigration Rules. The appellant and his family are not entitled to settle in the UK simply because they have chosen to do so. The judge made the compelling point that family life was established and developed by choosing to have a child when the appellant was in the UK unlawfully and could have had no legitimate expectation of being able to do so. Furthermore, no satisfactory explanation was offered for the failure of the sponsor to provide the undertaking requested, resulting in the application being dismissed under the failure to meet the suitability requirements. The appellant and the sponsor certainly did not help their case by this failure, although ultimately as EX1 does not apply the application fails in any event for failure to meet the financial requirements. The sponsor depends on state benefits. I also note that although their relationship allegedly started in 2006, the application was not made for some 6 years and in order to strengthen their case, the appellant and the sponsor deliberately waited until after both their marriage and the birth of their child before seeking to regularise the appellant's immigration status or apply for a visa. Their actions thus were quite calculated.

17. On the facts of the present appeal, I find that the judge properly considered all the relevant factors and reached conclusions for which cogent reasons were given. The best interests of the children to be raised in the UK with the appellant present were taken into account but in the event outweighed by those factors weighing against the appellant in the proportionality balancing exercise between on the one hand the article 8 family life rights of the appellant and his child(ren) and on the other the legitimate and necessary aim of the State to protect the economic well-being of the UK through objectively applied immigration control. This was a balancing judgement that the First-tier Tribunal was required to conduct. Whilst a different judge may have reached a different conclusion, there was nothing irrational or perverse about the conclusions reached on the facts of this case, which as the

Secretary of State has pointed out in the Rule 24 response, are not uncommon and do not disclose any compelling circumstances.

18. I do not accept the argument that on the facts of this case the decision could be regarded as unjustifiably harsh or disproportionate. The judge found that there were no insurmountable obstacles to family life continuing in Peru with the sponsor and the appellant, even though she found it was not reasonable to expect the sponsor and the children to relocate. Although they cannot be required or expected to do so, it remains open to the sponsor and her children to continue family life with the appellant in Peru. That is a matter for them, but an issue that they must surely have canvassed when deciding to form their relationship and have children.

19. In the circumstances, the determination discloses no material error of law and in effect the grounds are an attempt to reargue the appeal.

Conclusion & Decision:

20. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed: Date: 31 October 2014

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed:  Date: 31 October 2014

Deputy Upper Tribunal Judge Pickup