IAC-YW-LM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17276/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 February 2015	**On 10 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARIE WENDY JESSICA MOOROOGEN
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr L Tarlow of the Specialist Appeals Team.
For the Respondent: Mr J Plowright of Counsel instructed by Shahnaz & Partners, Solicitors.

DECISION AND REASONS

The Respondent

1. The Respondent, to whom I shall refer as the Applicant, is a citizen of Mauritius born on 24 July 1984. She is married and with her husband has a child born in 2007. On 8 December 2005 she arrived and was given leave to enter as a visitor. Before expiry of her visit visa she applied for

further leave as a student which on 3 April 2006 was refused with no in-country right of appeal.

2. On 7 June 2006, immediately prior to expiry of her visit visa, she made a further application for further leave as a student which on 3 August 2006 was also refused with no in-country right of appeal.

3. The Applicant next applied on 13 June 2011 for discretionary leave outside the Immigration Rules (the Rules) based on her private and family life which on 10 August 2011 was refused with no in-country right of appeal. Subsequent to further representations made on 6 March 2014, the Appellant (the SSHD) made a further decision on 27 March 2014 refusing her claim by way of reference to paragraph 276ADE of the Immigration Rules and on the basis that the SSHD did not accept the Applicant "enjoys a family life in the UK or that her private life is sufficiently compelling to warrant allowing her to remain here". The SSHD rejected her claim on human rights grounds and made decisions to remove the Applicant, her husband and child under Section 10 of the Immigration and Asylum Act 1999.

The Decision

4. By a letter of 27 March 2014 (the reasons letter) the SSHD explained why the Applicant had been refused further leave. She noted the Applicant and her husband did not meet the appropriate requirements of the Rules for further leave and in particular Appendix FM. Her child born in 2007 at the date of the decision had spent all of the six years of his life in the United Kingdom but could return to Mauritius with the parents as a family unit. Such a return would not breach the duty of the State to have regard to the welfare of the child imposed by Section 55 of the Borders, Citizenship and Immigration Act 2009.

5. The Applicant and indeed her husband and child had remained in the United Kingdom beyond the expiry of her leave to enter. It was in the best interests of her child to remain with the parents and the family unit could return to Mauritius where the parents had spent most of their life and been educated. They could easily re-adapt to life there with the child.

6. The Applicant did not meet the requirements as to length of stay imposed by paragraph 276ADE of the Rules and there was no compelling evidence to show the Applicant's private life could not be continued and maintained in or from Mauritius. Any inconvenience caused by their return would not amount to an interference of sufficient gravity to engage the United Kingdom's obligations under Article 8.

7. On 9 April 2014 the Applicant, but not her husband or child, lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are lengthy and in summary assert the SSHD failed to take into account all the facts and circumstances of her case.

The First-tier Tribunal's Decision

8. By a decision promulgated on 14 November 2014, Judge of the First-tier Tribunal S Aziz dismissed the Applicant's appeal under the Rules but allowed it under Article 8 of the European Convention.

9. The SSHD sought permission to appeal on the basis that the Judge had failed properly and lawfully to balance the interests of the child against the countervailing public interest factors. The best interests of the child were a, but not the, primary consideration. Further, the Judge had concluded that because the child had started education in the United Kingdom the child would endure undue difficulty in relocating to Mauritius which was an error in the light of what the Supreme Court had said in *Zoumbas v SSHD [2013] UKSC 74*. Further, the Judge had erred in separating the public interest considerations identified in Section 117B of the 2002 Act from his consideration in the round of the Applicant's claim under Article 8 of the European Convention and consequently the Judge's assessment was flawed.

10. On 6 January 2014 Designated Judge of the First-tier Tribunal Zucker granted the SSHD permission to appeal, principally because it was arguable the Judge had erred in law in his understanding of the effect of Section 117B(6) of the 2002 Act.

The Upper Tribunal Error of Law Hearing

11. The Appellant and her husband were present. Mr Tarlow for the SSHD relied on the grounds for permission to appeal which he submitted were well-composed. The Applicant's child was not a British citizen and had not resided in the United Kingdom for seven years. The Judge's treatment of the considerations identified in Section 117B of the 2002 Act was in error and his finding at paragraph 59 of his decision that the child was 7 at the date of the hearing in the First-tier Tribunal, was wrong. I noted that in fact the child was under 7 at the date of the application and at the date of the decision but by the time of the hearing the child was 7 years old.

12. For the Applicant Mr Plowright submitted that there was nothing wrong with the legal approach which the Judge had taken and so he had not made an error of law.

13. He had noted at paragraph 11 of his decision the parties agreed the key issue was whether the Applicant fell within the provisions of Section 117B(6) of the 2002 Act which at paragraph 52 he had set out in full.

14. The Applicant had made her application before 9 July 2012 and so was entitled to the benefit of the transitional provisions. There had been an earlier decision on 27 March 2011 but the SSHD had not issued removal directions and so there had been no appeal. He did not address the point that the Applicant had had no right to an in-country appeal.

15. I enquired if the real issue was whether it would be unreasonable to expect the child to leave the United Kingdom and relocate in Mauritius as had been identified at paragraph 66 of the Judge's decision. Mr Plowright submitted it would be unreasonable to expect the child to leave. He accepted some Judges might have considered it would not be

unreasonable but Judge Aziz in this case had decided it would be unreasonable for which he had given adequate reasoning and consequently the SSHD's application for permission to appeal amounted to no more than a disagreement with the Judge.

16. In response Mr Tarlow submitted the key issue was whether it was reasonable to expect the child to leave having regard to the public interest in the maintenance of proper immigration control. The SSHD had clearly identified this at paragraph 4 of the grounds for permission to appeal. The Judge had failed to take account of the totality of the public interest and this was a material error of law.

Error of Law Decision

17. I took time to consider whether there was a material error of law in the First-tier Tribunal determination. I accepted the submission that Section 117B(6) required various factors had to be taken into account or that in respect of certain factors less or little weight should be given to them. I rejected the submission made for the Applicant that the legislation provided that the public interest required a child to stay unless the various circumstances or requirements of Section 117B were satisfied. Sections 117A-D of the 2002 Act set out considerations which needed to be taken into account by a Judge when assessing whether a decision rejecting a claim under Article 8 of the European Convention was proportionate to any of the legitimate public objectives identified in Article 8(2) of the European Convention.

18. At paragraph 65 of his decision the Judge had failed adequately to take into account the considerations referred to in Section 117. The only evidence of private and family life before the Judge had been the assertion that the Applicant, her husband and their child formed a family unit and documentary evidence relating to the child's schooling. The Judge had not made any positive findings in favour of the Applicant in respect of her private and family life in the United Kingdom. The Judge had not considered whether it would be in the best interests of the child to return to Mauritius with both the parents as part of a family unit, even if the facilities for health and education in Mauritius may not be of the same quality as those in the United Kingdom.

19. The Judge had erred at paragraph 68 of his decision in stating that the main focus was on the child. The best interests of the child were a primary interest but not the main focus. Although at the date of the hearing before the Judge it was the case the child had lived in the United Kingdom for just over seven years, the Judge had failed to take account of the fact that the seven years included the years between birth and starting school so that the number of years the child had been in education and engaging with the wider world outside his family was limited.

20. Taking these matters into account I found the Judge's decision contained a material error of law such that its conclusions should be set aside. Both representatives stated they were ready to proceed to a substantive re-

consideration of the case because the re-consideration would consist only of submissions.

The Substantive Re-Consideration

21. For the Applicant Mr Plowright conceded she and her husband had overstayed as visitors and had worked in the United Kingdom without permission. These aspects of the Applicant's immigration history were points properly taken by the SSHD but did not amount to what had been described as "an appalling immigration history".

22. There had been no challenge to the parental relationship between the Applicant and her husband and their child. The Judge had identified the relevant aspects at paragraphs 24-31 of his decision. The Applicant and her family had not relied on public funds and these matters must be weighed against the adverse factors to which he had already referred.

23. The child would be 8 within a few months and it was not his fault that he did not have lawful leave to remain. He had spent all of his life in the United Kingdom and the majority of the time he had spent here could be considered to have been formative years. Taking these matters into account, the removal of the Applicant and her family would amount to an interference with their family life disproportionate to the need to maintain proper immigration control.

24. For the SSHD Mr Tarlow relied on the reasons letter of 27 March 2014. The Applicant and her family had continued to remain unlawfully in the United Kingdom, their child was only just at the age of 7 entering what could be termed "the formative years" in that it was only now he would be moving out of the home circle and beginning to establish himself at school and in the wider world. The Applicant would be removed with her husband and her child as a family unit. It was in the best interests of the child to remain with the parents and it was reasonable to expect the parents to return to Mauritius and for them to take their child with them. The appeal should be dismissed.

25. Mr Plowright indicated that he had no further submissions to make and I reserved my decision.

Findings and Consideration

26. The standard of proof is the civil standard; that is on the balance of probabilities. The burden of proof is on the Applicant and matters subsequent to the date of the decision may be taken into account.

27. The Applicant married in Mauritius in March 2003. She came to the United Kingdom in December 2005 with her husband and their child was born in 2007. I attach no weight to the claim made in paragraph 8 of the husband's statement about the difficulties experienced in Mauritius because he is Hindu and she is a Christian. They met, married and spent a further two and three quarter years in Mauritius before coming as visitors to the United Kingdom. There was no other evidence of difficulties they had experienced because theirs was a mixed faith marriage.

28. The Applicant and her husband have had no right to remain in the United Kingdom since the decision of 3 August 2006. It was almost another five years before they made the application which led to a refusal in respect of which their further representations initiated the decision under appeal. There was no evidence of their private and family life beyond the fact that she is in a family unit with her husband and child and that the child is now attending school. There was no evidence that it would be unreasonable or unduly harsh for the Applicant and her family to relocate back to Mauritius.

29. Adopting the approach to appeals on grounds of Article 8 summarised at paragraphs 7-12 of *EB (Kosovo) v SSHD [2008] UKHL 41*, I find the Applicant has established a private and family life in the United Kingdom. Her proposed removal with her husband and her child would be an interference with that private and family life but not of such gravity as to engage the State's obligations under Article 8. There was no suggestion that any interference would be otherwise than in accordance with the law and for the legitimate public end of the economic well-being of the United Kingdom and the need to maintain proper immigration control.

30. There remains the assessment whether the decision to remove is proportionate to the need to maintain proper immigration control. Given the findings of fact already made I do not conclude that removal would be disproportionate. Accordingly, the substantive appeal falls to be dismissed. If I am wrong and the interference would be sufficiently great to engage the State's obligations then I find that, having regard to what the Court of Appeal said at paragraphs 60 and 61 of *EV (Philippines) v SSHD [2014] EWCA Civ.874* and all the evidence before me which was quite limited, it would not be disproportionate to the need to maintain proper immigration control to return the Applicant with her husband and child as a family unit to Mauritius.

NOTICE OF DECISION

The decision of the First-tier Tribunal contained a material error of law such that its conclusions are set aside. No appeal under the Immigration Rules was prosecuted.

The appeal is dismissed on human rights grounds (Article 8).

No anonymity direction is made.

Signed/Official Crest Date 09. iii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE SSHD:
FEE AWARD

The appeal has been dismissed so no fee award may be made.

Signed/Official Crest Date 09. iii. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal