IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18382/2014

THE IMMIGRATION ACTS

Heard at Taylor House (Field House)
On 20 October 2015

Decision & Reasons Promulgated
On 9 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MISS ALISON CAROLINE SOLOMON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No attendance
For the Respondent: Mr P Nath, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of South Africa, born on 23 May 1984.

2. This is an appeal by the respondent in the First-tier Tribunal (FtT). I will continue to refer to her as the respondent even though she is the appellant in this Tribunal.

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3. The hearing is to consider whether there was a material error of law in the decision of First-tier Tribunal Judge Flynn (the Immigration Judge) who in a determination promulgated on 19 May 2015 allowed the appellant's appeal to remain under the Immigration Rules.

Background

4. The appellant entered the UK on 24 March 2005 as a student with a valid visa until 23 March 2007. On 29 December 2006 she sought a certificate of approval to marry a Hungarian national by the name of Sandor Tamash Szekszardi which was issued on 2 February 2007. On 26 March 2007 the appellant sought family member residence status as his spouse. This was issued and was valid until 5 September 2007. On 4 September 2007 the appellant sought a residence card as the spouse of Mr Szekszardi which was issued until 27 November 2017. The appellant last entered the UK on 11 November 2010. On 29 October 2013 she sought a derivative residence card under the decision in the case of **Zambrano**.

5. The respondent considered her application under Regulation 18A of the Immigration (European Economic Area) Regulations 2006 ("EEA Regulations") but decided that in order to issue her with a derivative residence card she had to establish that she was the primary carer of a British citizen and that the citizen in question was residing in the UK.

6. On 1 April 2014 the respondent decided that the appellant was not the primary carer of Romeo Lucas John Goonewardena ("Romeo"), the son of Robert Stephen Goonewardena. The respondent pointed out that the requirements of Regulation 15(7) (ii) include sharing equally the responsibility for the person's care. Romeo had been given British nationality on the basis that his father was "an exempt person" which meant the appellant could not share equally the responsibility for his care. This meant that she did not qualify as "primary carer" for the purposes of Regulation 15A (7) (ii) of the EEA Regulations.

7. As the respondent pointed out, the burden rested on the appellant to show on a balance of probabilities that she was the primary carer of a British citizen who did not share the care of that British citizen with an "exempt person". Because the appellant shared the responsibility for the child with an exempt person (Mr Goonewardena) the child would not be required to leave the UK with the appellant in any event. Consequently, the principle in *Zambrano* was not engaged. There was no reason to suppose that the child would be required to leave the UK in the event that the appellant was required to return to South Africa.

8. The respondent specifically considered the appellant's right to a family or private life under Appendix FM and paragraph 276ADE but noted that the appellant had not made a valid application for Article 8 consideration. Nevertheless consideration was given to whether the removal of the appellant would breach her Article 8 rights, particularly having regard to the duty on the Secretary of State under Section 55 of the Borders, Citizenship and Immigration Act 2009 (the 2009 Act) to safeguard and promote the welfare of children in the UK. The respondent considered her duty to

protect the rights and interests of Romeo under this and various other legislation in the light of the ruling of the Supreme Court in **ZH (Tanzania) [2011] UKSC 4**. The respondent noted, however, that her decision not to issue a derivative residence card to the appellant would not require her to leave the UK if she could otherwise demonstrate a right to reside in this country.

9. The appellant had no alternative basis for staying in the UK. Accordingly, if she did not return to South Africa voluntarily, she was notified that her removal would be enforced. She was advised, however, of her right to appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 and Regulation 26 of the EEA Regulations.

The Appeal Proceedings

10. The appellant appealed the decision to refuse a derivative residence card by notice of appeal lodged on 16 April 2014. She claimed in that document that the decision was not in accordance with the Immigration Rules and that the decision breached her rights as an EEA national and was not in accordance with the UK's obligations to her under the ECHR and specifically Article 8 thereof.

11. This was the appeal that came before Judge Flynn (the Immigration Judge) on 26 November 2014. It appears to have been the evidence of the appellant at the hearing on 24 April 2015. She said that Romeo had formed a close relationship with his father but she did not know whether her partner, Robert, would go with her if she returned to South Africa. Robert gave evidence to say that he had not discussed with his partner (the appellant) what would happen if she had to go back to South Africa. However, he would support any new application she made for entry clearance. He thought that his son would have to go with her. He might go with her; he had not decided. He thought he would only get entry clearance for one month to do so if he decided to go to South Africa. His son would be upset by the separation, albeit temporary.

12. Mr Nath, who appeared for the respondent at the hearing, submitted that the basis for the appeal had changed completely in that it now rested "solely" on Article 8 and Appendix FM – EX1. The question was whether it would be reasonable in all the circumstances for the child to remain with his parent in the UK if his mother was required to leave. He submitted that the best interests of a child were to remain with one parent. There were no exceptional circumstances and **Chikwamba [2008] UKHL 40** applied. The appellant was not a refugee. It would not be disproportionate for her to return to South Africa and make a new application. Her child and partner could go with her or stay in the UK. There was no appearance on behalf of the appellant but it had been submitted before the FTT that there was a genuine and subsisting relationship between the appellant and Romeo and that it was unreasonable to expect that child to leave the UK.

13. As Mr Nath pointed out in the Upper Tribunal hearing that the Immigration Judge appears to have applied two different standards of proof. In paragraph 16 he referred to the "balance of probabilities", the correct test. However, later in his

decision, at paragraph 20, he referred to the appeal as being a "human rights appeal" to which a "lower" (than the civil) standard of proof applied.

14. In conclusion, the Immigration Judge decided that the appellant had failed to show that she met the requirements of Regulation 15A of the EEA Regulations but decided the appeal on an Article 8 ("freestanding") basis purporting to apply the guidance of the higher courts in **Razgar [2004] UKHL 27** and later cases. At paragraph 22 of his decision he referred to the case of **Gulshan [2013] UKUT 640** in which Mr Justice Cranston stated that there had to be arguably good reasons for considering Article 8 outside the Immigration Rules. Somewhat surprisingly, the Immigration Judge expressed himself to be satisfied that there were such reasons in that case. Nevertheless he allowed the appeal "under the Immigration Rules", which contradicts this comment.

15. Having concluded that there was insufficient evidence to demonstrate that the appellant was the child's primary carer, the Immigration Judge nevertheless thought she had a "more significant role in his life than his father" and was satisfied that the appellant had a genuine and subsisting relationship with her son. Separating her from the child at such a young age would be "very disturbing" and a proper consideration of a child's best interests and the application of the duty under Section 55 of the 2009 Act required the Immigration Judge to interfere with the respondent's decision. He purported to allow the appeal under Appendix FM.

16. The respondent took fundamental issue with these conclusions, pointing out that the requirements of Appendix FM under the "parent route" were different from those the Immigration Judge appears to have thought they were. The appellant was not the sole parent but shared responsibility for the child with the child's father. The Immigration Judge made no findings regarding the appellant's success or failure under the partner route. She pointed out in her grounds that the relationship requirements under Appendix FM (parent route) are set out in E-LTRPT.2.3 which states that the applicant must have sole responsibility for the child or the child must live with the applicant and not their other parent. Alternatively, the parent or carer with whom the child normally lives must be a British citizen or settled in the UK, not the partner of the applicant and not eligible to apply for leave to remain as the partner. These requirements could not be satisfied.

17. At the oral hearing fixed for consideration of these grounds there was no attendance on the part of the appellant or her representatives. This was despite notice having been sent out to BIC Limited on 29 September 2015, a full three weeks before the hearing. I proceeded to determine the appeal following brief oral submissions from Mr Nath. Mr Nath had pointed out that the only basis on which the appeal to the FTT could have succeeded was on "a freestanding" basis given the appellant's failure to satisfy the requirements of the Rules. He submitted it was not proper to embark on a freestanding analysis without having first considered the requirements of those Rules. Accordingly, the decision was fatally flawed and should be set aside. I was invited to substitute my own decision for that of the First-tier Tribunal.

18. I gave brief oral reasons for concluding that Mr Nath's submissions had been correct. I will set out my reasoning in fuller detail below having analysed the Immigration Judge's decision in greater detail.

Discussion

19. It appears that the appellant and Mr Goonewardena cohabited at the time of the hearing before the FtT. Their son, Romeo, who was born on 19 December 2011, was a British national. The appellant claimed before the Immigration Judge that Romeo was "very reliant" on her and the Immigration Judge appears to have accepted the closeness of the relationship by stating in paragraph 25 that she had "a more significant role in his life than his father" but then stated that the relationship was a "genuine and subsisting one".

20. However, a fundamental point was that the appellant had failed to show that she met the requirements of Regulation 15A of the EEA Regulations (paragraph 19). This appears to have been on the basis that the Immigration Judge rejected the appellant's evidence that she was the primary carer for Romeo (see paragraph 25). In the circumstances, the appellant could not succeed under the EEA Regulations. Furthermore, following the respondent's appeal, there has been no cross appeal by the appellant against that conclusion.

21. Neither party seems to have provided a full analysis of the law to the FTT. I note Mr Bonavero's analysis in his skeleton argument before the FtT did not quote the full requirements of Appendix FM. These are now set out by the respondent in the grounds of appeal to the Upper Tribunal. Mr Bonavero suggested that Appendix FM "codifies" Article 8. He suggested that an appellant was not required to raise Article 8 before it had to be considered as part of the appellant's claim under the EEA Regulations.

22. However, contrary to the appellant's skeleton argument, it was incumbent on the appellant to show that she had sole responsibility for the child or was at least the partner or carer with whom the child normally lived. She had to satisfy the requirements of LTRPT2.3. (b). It appears that she failed to satisfy those requirements because of her lack of "sole responsibility" for the "child". An exception to the requirements of LTRPT2.3 is EX1 under the "child route". However, the appellant would need to show to the ordinary civil standard of proof that it "would not be reasonable to expect the child to leave the UK".

Conclusions

23. Unfortunately, the Immigration Judge became confused over the correct standard of proof to apply. At paragraph 20 of his determination he considered that the standard ought to be "lower than the normal civil standard" having regard to the fact it was a human rights appeal. However, earlier (in paragraph 16 of his decision) he referred to the "balance of probabilities" being the standard of proof. These alone may not have been significant errors of law but his failure to properly consider the Immigration Rules before embarking on an apparently "freestanding" Article 8

analysis appears to have been such an error. The Immigration Judge purported to "allow" the appeal under the "Immigration Rules" but his analysis is directed at a freestanding discretion which he could apply. He ought to have asked himself whether there were at least arguably good reasons for departing from the requirements of the Rules. Those reasons had to be exceptional or compelling. The circumstances here were neither exceptional nor compelling. The Rules fully catered for the situation in which the appellant found herself. The appellant was not the primary carer for Romeo but in any event, if EX1 of the Rules were applied to the facts of this appeal, there did not appear to be adequate evidence to support the conclusion that it was not "reasonable" to expect the child to leave the UK having regard to his young age. He was not at the time of the hearing of school age. If the "partner route" under EX1 were to be chosen instead, the appellant needed to show "insurmountable obstacles" to family life continuing outside the UK and this test appears not to have been met either.

24. The burden rested on the appellant to show to the civil standard either that she fell within EX1 or that there were exceptional or compelling reasons for considering her appeal outside the Immigration Rules. In the absence of any special features of the case, such as serious ill-health affecting her child, exceptional or compelling circumstances appear not to have existed. The child can probably continue to live with the father in Scotland, as has been the situation to date. Respect for immigration control and the need for the economic wellbeing of the UK to be safeguarded were factors which needed to be taken into account and were of sufficient weight to justify the respondent's decision.

25. Importantly, the respondent considered her duty to safeguard the welfare of the appellant's child in the UK under Section 55 of the 2009 Act before she reached her decision. However, there was no adequate basis for concluding that there would be a breach of Section 55 or of the respondent's wider duties to the child on the facts of this case. Paragraph 27 of the Immigration Judge's decision is inadequately reasoned and there appears to be no proper basis for his conclusion to the contrary.

26. Having carefully considered the decision of the FtT, there are a number of errors within it. Were the confusion over the standard of proof to be the only error it may have been possible to have concluded that the decision was one the Immigration Judge was entitled to come to. However, given the Immigration Judge's conclusion that the appellant was not the primary carer for the child, proper weight should have been given to the requirements of the Immigration Rules. Plainly these were not met, despite the best efforts of the appellant's counsel to argue to the contrary. I find that there were material errors of law in the decision of the FtT which require that decision to be set aside.

27. It is not necessary or proportionate to hold a further hearing given that the evidence in the case is not essentially disputed. I substitute the decision of the Upper Tribunal for the FtT's decision, which is to dismiss the appellant's appeal against the respondent's decision to refuse further leave to remain.

Notice of Decision

28. The decision of the FtT contains a material error of law. I set aside that decision. I remake that decision which is to dismiss the appeal against the respondent's decision to refuse further leave to remain.

No anonymity direction is made.

Signed Dated

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore the fee award made by the FTT is set aside.

Signed Dated

Deputy Upper Tribunal Judge Hanbury