Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/47172/2013**
IA/47173/2013

THE IMMIGRATION ACTS

Heard at Field House
On 6 June 2014 & 18 July 2014

Determination Promulgated
On 11 March 2015

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

MITZY JULIEAN GRANT-SCOTT
TATYANNA ANTONIA BURNETT
(ANONYMITY ORDER NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Solomon, Counsel instructed by Zaidi Solicitors
For the Respondent:
On 6 June 2014: Ms J Isherwood, Senior Home Office Presenting Officer
On 18 July 2014: Ms L Kenny, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Although this case concerns the welfare of a child the issues are not personal and I see no justification for making an order restraining publication of the facts of this case.

2. I gave an extempore ruling on 6 June 2014 that the First-tier Tribunal had erred in law and the first part of this Decision is based closely on that extempore ruling.

3. These are appeals by citizens of the United States of America against decisions of the First-tier Tribunal dismissing their appeals against the decision of the respondent to remove them by way of directions. The respondent's decision was made on 31 October 2013.

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4. The first appellant is female. She was born in 1975. The second appellant is her daughter who was born in October 1996. They came into the United Kingdom as visitors at a time when the first appellant was already pregnant and wanted to be with her husband, a British national. They subsequently applied to remain and the application was refused under the Rules primarily because the Rules do not permit a person who has entered the United Kingdom as a visitor to remain as a husband or wife.

5. The application was also refused with reference to Article 8 of the European Convention on Human Rights as expressed in the Rules and currently from the decision also by considering the case as a freestanding human rights claim.

6. The appeal to the First-tier Tribunal was unsuccessful. The First-tier Tribunal Judge was satisfied that the appellants could not satisfy the requirements of the Rules because they did not have the necessary capacity in the United Kingdom. They were visitors and for that reason could not succeed.

7. The First-tier Tribunal Judge also decided that they had not made a valid application under the Rules. That is a rather surprising decision. It was supported by neither party before me. Indeed before me Ms Isherwood quickly disassociated herself from it. It is plain that the First-tier Tribunal Judge was wrong in law in reaching that conclusion although as far as I can see right in law in deciding to dismiss the appeal under the Rules unless special circumstances applied.

8. Mr Solomon sought to get around that conclusion by an interesting construction of the Rules which I will seek to explain. The appellants were excluded from succeeding under the Rules by E-LTRP.2.1. This provides that an applicant intending to enter the United Kingdom as a wife or dependent child as the case may be

> … must not be in the UK-
> (a) as a visitor,
> (b) with valid leave granted for a period of six months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings, or
> (c) on temporary admission or temporary release (unless paragraph EX.1. applies).

9. Mr Solomon submits that the qualifying words "unless paragraph EX.1. applies" are intended to apply to the whole of E-LTRP.2.1 and therefore a person in the circumstances of these appellants is entitled to say that their case comes within the scope of EX.1. This submission is made more attractive by his observation that if his submission is wrong then a person who enters the United Kingdom without permission but is given temporary admission is in a better position than a person who enters the United Kingdom lawfully as a visitor.

10. I agree that seems rather strange but I do not agree that the interpretation required by a plain reading of the Rules is so bizarre or otherwise impossible to understand that it is necessary to step back and look for an interpretation of the Rules other than the plain meaning. The plain meaning of the Rules is against Mr Solomon's submission and I rule against it too. This is an interesting point that may have to be considered further on another occasion but that is my finding about it now.

11. The First-tier Tribunal Judge's finding that the appeals should be dismissed outside the Rules for consideration under Article 8 includes the observation at paragraph 42:

    "I do not find that the proposed removal of the appellants would amount to an interference with the exercise of their right or private or family life, nor those of Mr Scott and Kayden."

12. I have to say I find that both startling and wrong. Firstly it shows the wrong test. It was not about respect for "private *or* family life". The separation of "private life" and "family life" is encouraged by the Rules but is not what the Convention protects. It protects private *and* family life as one concept along with a person's home and correspondence. It is my experience that separating the two can lead to a misunderstanding for the purposes of the Convention.

13. More significantly I do not see how it can be sustained that a decision which requires a mother of a young person in school, and that young person, to leave the United Kingdom and for the mother's husband to make arrangements for the welfare of their infant child either by leaving the United Kingdom or by completely reorganising his domestic arrangements to care for his child, can be anything other than an interference with the private and family lives of all the people involved including the husband and father of the child.

14. Whether or not the removal is proportionate is an entirely different question. There may be circumstances in which it could be found properly that it was proportionate but it is completely wrong to say that there is no interference. It follows therefore that I find the First-tier Tribunal erred in law in its decision to dismiss the appeal on human rights grounds.

15. Ms Isherwood, who has argued energetically and forcefully, contends that the decision is not material because at the material time the appellants could not satisfy the other requirements of the Immigration Rules. So, even if it had been possible to consider other aspects of the case it would still have led to the appeal being refused because the appellant's husband was not earning enough money.

16. Her argument in this respect is flawed. The consideration of the case outside the Rules would no doubt be illuminated by the financial requirements of the Rules but it is not necessarily the case that the appeal would have to be dismissed if the financial requirements could not be met. I cannot say that the evidence was immaterial because I cannot say that proper consideration under Article 8 would necessarily have led to the appeal being dismissed. It may have done but I cannot say it would have done, so the evidence is material.

17. It follows therefore that I find that there is before me a material error of law on Article 8 grounds and the decision has to be remade.

18. Mr Solomon had indicated that in the event or my ruling that the First-tier Tribunal erred in law he would want to apply to call further evidence.

DIRECTIONS

19. I adjourned the case and I gave the directions set out below:

> Any party wishing to rely on further evidence must written copies of that evidence, including a witness statement drawn to stand as evidence-in-chief without need for further questions, on the tribunal and the other party no later than 5 days before the date fixed for hear, which is presently 18 July 2014.

20. I think it right to record that E-LTRP.2.1 was amended and E-LTRP.2.2 inserted on 28 July 2014. The amendment, I find, makes it clear that the interpretation I favoured in June 2014 is the interpretation Parliament wants given to the Rule. I do not see that as being an effort to make a special case for a person in the United Kingdom on temporary admission. Rather, I see it as a Rule showing Parliament has set its face firmly against allowing visitors or persons with no more than six months leave to settle in the United Kingdom unless very particular conditions applied.

21. On 18 July 2014 the respondent was represented by Ms L Kenny, Senior Home Office Presenting Officer. By 18 July a further bundle had been prepared which she had been able to consider. It was accepted that the appellants would now satisfy the maintenance and accommodation requirements of the Rules. Given that entirely sensible concession it is not necessary to say much about the additional evidence but basically the First Appellant's husband has got two jobs.

22. Mr Solomon submitted that dismissing the appeal would be a disproportionate interference with the private and family lives of the appellants. In particular it would interfere significantly with the right of the appellant's child, who I accept is a British citizen the even if his passport has not yet been given to him, to live in the country of his nationality. His best interests clearly require his mother to be with him, and for him to live with both parents and his stepsister, absent any evidence to the contrary, would be an ideal arrangement.

23. Mr Solomon relied heavily on the Home Office own guidance which, he submitted, pointed in favour of allowing the appeal. The relevant part of the guidance is in the following terms:

> "In cases where the decision being taken in respect of the person with parental responsibility would require that person to return to a country outside the EU then the case must always be assessed on the basis that it would be unreasonable for the child to leave the UK with their parent. In such cases it will usually be the case that the person with parental responsibility will be allowed to stay in the UK with the child provided that there is satisfactory evidence as to the genuineness of the subsisting relationship. It may, however, be appropriate to refuse to grant leave where the conduct of one of the parents gives rise to considerations of such weight as to justify separation, if a British citizen child could otherwise stay with another parent or primary carer in the UK. The circumstances envisaged would cover amongst other things:
>
> - minor criminality falling below the threshold set out in paragraph 398;
> - a poor immigration history."

24. The first appellant clearly has parental responsibility for the child although it is shared with the child's father. She is the primary carer of the infant. I accept

this in the absence of any detailed evidence because it is so obviously likely to be the case with the mother of a small child. Clearly the child's best interests are a primary consideration and they must lie in his remaining in his country of nationality with the care and support of both of his parents.

25. Ms Kenny submitted that there was a need for an outbreak of reality. This was not a case about separating a mother from a child or depriving the British citizen of its parent. All that was needed was for the family to go on holiday to the United States of America and make an application. If, as appears to be the case, they met the requirements of the Rules they would be back in a short space of time with everything done correctly. She said that three-quarters of those applying for settlement from the United Kingdom had their applications decided on within three weeks.

26. It is for the appellant to prove her case and in the absence of contrary evidence I accept that this is the kind of timescale that is involved.

27. It follows that if all went according to plan the delay would be minimal. However such a holiday would have to be funded. There was nothing before me to indicate how that could be done. Rather inspection of the appellant's bank statements suggests that although he is managing on his income money is tight. The appellant's husband needs his job to meet the maintenance and accommodation requirements of the rules. Going back and reapplying is not simple as Ms Kenny suggested. I am not satisfied that it was a practicable proposition in this case.

28. Further I remind myself that it for the respondent to justify the interference. Merely relying on the rules cannot be enough. If it were the protection of the convention could be circumvented by the rules whereas the convention exists to shape and form the rules.

29. This is different from a case of a person marrying during a visit to the United Kingdom. I can there that a requirement that a person returns and makes an out of country application is a way of discouraging sham marriages. Ms Kenny submitted that people should not be encouraged start "pregnancies of convenience" (my phrase, not Ms Kenny's) but manipulating immigration control is hardly likely to be a main reason for married people of this age getting pregnant. Her pregnancy was well advanced before she entered the United Kingdom as a visitor.

30. In the fast moving world of immigration and human rights law much has happened since the House of Lords decided the case of Chikwamba in 2008. Nevertheless, it is binding authority and it instructive to remember just how emphatically Lord Brown expressed himself. Having considered possible justifications for the policy, he said:

> "Rather it seems to me that only comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad".

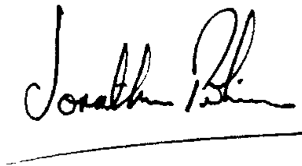
31. I find it very important in this case that the appellants did meet the rules apart from being in the United Kingdom as visitors. I think it extremely unlikely that I would have reached the conclusion that I do if the appellants could not be maintained accommodated by their British citizen husband or father but they

can and, mindful of the strong need to promote family unity and respect the relationship between a minor child and both his parents and I think that I must find that requiring their removal would interfere disproportionately with the private and family lives of those involved, especially the private and family life of the British citizen child.

32. I therefore set aside the decision of the First-tier Tribunal for error of law. I substitute a decision dismissing the appeals under the rules but allowing them on human rights grounds outside the rules.

33. Although I have allowed the appeal I make no fee award in this case. The respondent has applied the rules correctly and I have allowed the appeal in the light of facts that did not exist when the Secretary of State made her decision.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 6 March 2015