IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05239/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th March 2016	**On 6th April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MRS NAOMI NATIVITA VAN LANCKER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Ikeh, Moorehouse Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Belgium, appealed to the First-tier Tribunal against a decision of the Secretary of State to remove her from the UK on the grounds that her removal is justified on the grounds of abuse of her EEA right to reside in the UK by entering into a marriage of convenience under regulation 21B (2) of the Immigration (EEA) Regulations 2006 (the EEA Regulations). First-tier Tribunal Judge Bradshaw dismissed the

Appellant's appeal along with that of her husband under the EEA Regulations and on human rights grounds. The Appellant now appeals with permission to this Tribunal.

2. The Appellant's husband's application for permission to appeal was refused. Permission to appeal was granted in relation to the Appellant only in relation to the Article 8 decision on the basis that it is arguable that the judge erred in failing to give any consideration to the Appellant's child who was born and lives in the UK and in failing to consider the best interests of the child.

Error of Law

3. Judge Ford, who granted permission to appeal, decided that the grounds seeking to challenge the judge's decision under EEA Regulations were not arguable. I agree that there is no merit in those grounds as the judge gave full and sustainable reasons for his finding that the Appellant's marriage was one of convenience.

4. In relation to Article 8 Mr Kotas submitted that the judge did not make a material error. He accepted that the judge was aware of the child as noted in paragraph 12 but submitted that no submissions had been made in relation to this issue and the judge could not be criticised for dealing with what really matters which was the EEA issue. He submitted that the child was not a qualifying child. He submitted that credibility had to be considered.

5. At paragraph 10 of the decision the First-tier Tribunal Judge reminded herself of the need to take into account, inter alia, Section 55 of the Borders, Citizenship and Immigration Act 2009 which relates to the best interests of the child. At paragraph 12 the judge noted that the Appellant has a son who was born on 19th July 2012 and that the child's father pays child support and sees his son every week.

6. However, at paragraph 25, in considering the Appellant's private and family life, the judge states: "The Appellants cannot succeed in any argument as to family life under Article 8." The judge went on to consider the Appellant's husband's private life but gave no further consideration to the Appellant's family life with her son. The judge gave no consideration to the child's nationality or his relationship with his father nor did he give any consideration as to the consequences of the child's removal. In these circumstances I am satisfied that the judge made a material error of law.

7. Due to the error in relation to Article 8 I set aside that part of the decision only.

8. I indicated to the parties that I would proceed to remake the Article 8 decision. I noted that the Appellant had not submitted any further evidence in accordance with the directions and the Tribunal Procedure (Upper Tribunal) Rules 2008. Mr Ikeh confirmed that no further

documentary evidence was to be filed. Mr Ikeh made no application for adjournment and indicated that he was content to proceed on the basis of the evidence before me.

Remaking

9. The Appellant attended the hearing with a man said to be her husband. The Appellant is said to be pregnant with her husband's child. The Appellant gave oral evidence and Mr Ikeh relied on the bundle of documents submitted to the First-tier Tribunal.

10. In her oral evidence the Appellant said that the father of her child lives ten minutes from her house. She said that the child and his father have a very good relationship, they are very close, the father sees the child three or four times a week, he picks him up from the childminder and the child stays with his father from time to time. She said that the father would not be happy if the child was removed. She said that the child's father also has a stepdaughter who is part of his family and that she and the Appellant's child are like brother and sister. She said that the child attends a childminder from Monday to Thursday and that she has applied for him to attend a primary school and will find out about that next week. She said that the child's father does everything a normal father would do, for example he buys the child clothes.

11. In cross-examination the Appellant said that the child's father is also Belgian and that he lives in the UK and has established a life here. She accepted that her child also calls her husband 'daddy' and that he therefore has two daddies. She said the child is in good health and so is she.

12. In response to questions I asked her the Appellant said that the child's father works as a security guard in Acton. She said that she is a student nurse and that she currently works in Great Ormond Street Hospital 36 to 40 hours a week as part of her course. She said that the father of the child pays child support. She said that the stepdaughter she referred to in the examination-in-chief is the child of the father of her child from a previous relationship. He does not live with the mother of that child.

13. In response to further questions from Mr Ikeh the Appellant said that the father of her child came to the UK in 2005. She said that her course as a student nurse ends in June 2017.

14. In his submissions Mr Kotas said that the starting point is that the child does not come within the Immigration Rules as he is not a British citizen. He submitted that, despite two appeal hearings and the way the case was put, the father of the child was not present and there is nothing to say that separation would have a serious adverse impact on the child. He submitted that the child has been put in this position by the Appellant

entering into a sham marriage. There is no reason why the father of the child cannot relocate to Belgium or maintain the relationship from the UK. He accepted that a primary factor is the best interests but submitted that that is not a paramount factor. It is a matter of choice of the parties so they can relocate to Belgium.

15. Mr Ikeh submitted that the oral evidence was sufficient to demonstrate the relationship between the Appellant's son and his father and the bond between them and the relationship between the Appellant's child and his stepsister. He submitted that, as an EEA national child, the Appellant's son has a right to remain in the UK under the EEA Regulations. He submitted that oral evidence that the father is exercising treaty rights in the UK is sufficient in the absence of documentary evidence. He submitted that the child's father has been in the UK for over eleven years, is working and is exercising treaty rights in the UK, therefore his son has a right to reside in the UK.

16. Mr Ikeh referred to the case of **Abdul (section 55 – Article 24(3) Charter) [2016] UKUT 00106 (IAC).** He submitted that there was no dispute that the Appellant is Belgian, no dispute in relation to the birth of the child and that the child is a Belgian citizen also, the same nationality as his mother and father. He submitted that the best interests of the child are to remain in the UK where he has family life with his father and stepsister and where he is going to be going to school. The Appellant is a student nurse who will complete her programme of training in June 2017.

17. In considering Article 8 I firstly consider the Immigration Rules. No case was made to me that the Appellant meets the requirements of the Immigration Rules in relation to family life or private life developed in the UK and there is nothing before me to suggest that she can meet the provisions of the Rules.

18. I therefore go ahead to consider the appeal under Article 8. I note the guidance in **R v SSHD ex parte Razgar [2004] UKHL 27** and I follow the five stage approach set out therein. The first issue is whether the Appellant has established that she has a family life in the UK. It was not challenged by the Respondent and I accept that the Appellant has a family life in the UK with her son. I accept that her removal may interfere with that family life if her son remains in the UK. However, there is no evidence that this would be the case. Even if there were to be an interference with the Appellant's family life in the UK I note that such interference is in accordance with the EEA Regulations and therefore in accordance with the law.

19. I must consider the best interests of the child. However I am hampered by a lack of evidence. The only evidence before me as to the child and his claimed relationship with his father is the Appellant's oral evidence. However the Appellant's credibility was fundamentally undermined by the findings of the First-tier Tribunal. I further note that the Appellant's oral evidence contradicts her witness statement of 23 July 2015 where she said

that her ex was not there when she needed him most after her son was born (paragraph 7) and that her spouse assumed the role of father to her son (paragraph 11). There is no mention in her witness statement about the role of her child's father. In these circumstances I cannot rely on her oral evidence without further supporting evidence.

20. The Appellant's claimed spouse has no basis of stay in the UK following the dismissal of his appeal. The Appellant did not say in her oral evidence how the child's claimed relationship with her husband would be affected by his removal from the UK.

21. The Appellant's son is three years old. He is said to be a Belgian national, but there is no evidence before me as to his nationality.

22. There is insufficient evidence before me to establish that the child's father is in the UK or that the child has a relationship with his father. There is insufficient evidence as to the nature and extent of the claimed relationship between the child and his father or his claimed step/half sister. There is no documentary evidence as to the father's claimed employment. There is nothing from the father as to what would happen if his son relocates to Belgium along with his mother. I cannot therefore be satisfied that the child has any ongoing relationship with his father or that his father is in the UK.

23. In the absence of evidence to the contrary I assume that it is in the child's best interests to be with his mother. In these circumstances the Appellant has not shown that there would be an interference with her family life if she were to be removed to Belgium. She has not provided evidence as to the nature and extent of any private life in the UK. There is nothing to support her oral evidence that she is a student nurse. However, I consider the proportionality of the decision to remove on the basis that the Appellant has shown that there will be an interference with her private and family life.

24. In considering proportionality I consider the Appellant's decision to breach the EEA Regulations by entering into a marriage of convenience. I consider the fact that her claimed husband has no right to remain in the UK. I consider the fact that there is insufficient evidence to establish the Appellant's child's claimed relationship with his father.

25. I consider the factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002. The Appellant gave evidence in English so I accept that she speaks English. The Appellant claims to be a student nurse but there is no evidence to demonstrate that she is financially independent. There is insufficient evidence as to her immigration status so I cannot be satisfied that the Appellant has at all times been in the UK lawfully or that her status has not been precarious. The Appellant's child is not a 'qualifying child' as defined in section 117D. There is insufficient evidence to show that it would not be reasonable to expect the child to leave the UK.

26. In these circumstances I am satisfied that the decision to remove the Appellant does not breach Article 8 of the European Convention on Human Rights.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law in relation to Article 8 only. I set aside the decision in relation to Article 8 and preserve the decision under the EEA Regulations.

I remake the decision in relation to Article 8 by dismissing it on human rights grounds.

No anonymity direction is made.

Signed Date: 23rd March 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date: 23rd March 2016

Deputy Upper Tribunal Judge Grimes