Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07450/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 January 2016	**On 15 February 2016**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

OI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Reuben Solomon, Counsel, instructed by Jein Solicitors
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant appeals against the decision of the First-tier Tribunal (Judge Wilson) dismissing the appellant's appeal against a decision taken on 9 February 2016 to refuse the appellant's application for further leave to remain in the UK and to remove the appellant from the UK.

Introduction

3. The appellant is a citizen of Nigeria born in 1979. She had been working in Spain for a number of years and has an EU residence card for Spain that is valid until August 2019. She was issued with a visit visa for the UK valid from 2 November 2012 to 2 May 2013. She was then issued with another visit visa valid from 29 May 2013 to 29 May 2015. Her child, a baby boy, G, was born in the UK on 8 September 2013 in Croydon. She applied for leave to remain in the UK as a parent of a UK citizen child on 5 December 2014. She had met the father when he was in holiday in Barcelona and had come to the UK to have her child. However, it transpired that the father had another family although he saw G four or five times a week and objected to the appellant leaving the UK.

4. The Secretary of State accepted the appellant's identity and nationality but concluded that the requirements of Appendix FM or paragraph 276ADE of the Immigration Rules were not met and there were no exceptional circumstances. The appellant could apply for leave to enter from abroad to continue family life with the father and G.

The Appeal

5. The appellant appealed to the First-tier Tribunal and attended an oral hearing at Richmond on 1 July 2015. She was represented by Mr Solomon. The First-tier Tribunal found that the appellant had sole care of G but with the father having regular contact. That was in the best interests of G. The appellant could not meet the Rules because she entered the UK as a visitor. It was unlikely that the father could successfully apply for an order from the family court to prohibit G from being removed from the UK and to grant him primary responsibility. Removal of the appellant would mean G leaving the UK and that would be an interference with the family life between the father and G and would be against G's best interests. The best interests of G favoured regulation of the appellant's position in the UK. However, the father could keep in contact if the appellant and G went to Spain although there would be practical difficulties. Removal was proportionate.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law in that the judge failed to consider section 117B(6) of the 2002 Act and failed to make any finding as to whether it was reasonable for G to leave the UK. Given the accepted facts the only finding reasonably open to the judge was that it would not be reasonable to expect G to leave the UK.

7. Permission to appeal was granted by Designated First-tier Tribunal Judge McClure on 29 October 2015 on the basis that it was arguable that the judge materially erred in law by failing to consider section 117B(6).

8. In a rule 24 response dated 5 November 2015 the respondent submitted that the failure to mention section 117B(6) was not a material error. The judge considered the circumstances of the mother, child and father in the decision and the conclusion that it was reasonable for G to leave the UK could be implied from the conclusions.

9. Thus, the appeal came before me

Discussion

10. Mr Solomon submitted that if the judge had applied the correct test then it was not reasonable to expect G to leave the UK. The child is a UK citizen. The decision under the Immigration Rules was not disputed.

11. Ms Holmes submitted that the judge had effectively considered the reasonableness issue and paragraph 13 of the decision takes into account the clear interference in family life.

12. I have considered Forman (ss117A-C considerations) [2015] UKUT 00412 (IAC). The public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The list of considerations in section 117B is not exhaustive and a tribunal is entitled to take into account additional considerations provided that they are relevant in the sense that they properly bear on the public interest question. The judge was not simply required to take account of the statutory provision but was also obliged to have regard to all of the considerations. That required identification and analysis of each of the provisions concerned. In cases where the provisions of section 117B arise the decision of the First-tier Tribunal must demonstrate that they have been given full effect.

13. There was no dispute as to credibility in this appeal. The judge made various positive findings of fact and correctly reached the stage of considering proportionality but then failed to consider section 117B in general and section 117B(6) in particular. I reject the submission that consideration of section 117B can be inferred merely from the proportionality decision. That flies in the face of decided authority and would largely nullify the provisions of section 117B. I find that the judge materially erred in law. Thus, the First-tier Tribunal's decision to dismiss the appellant's appeal under Article 8 involved the making of an error of law and its decision cannot stand.

14. The judge made extremely clear findings of fact at paragraphs 7-10 of the decision, summarised at paragraph 5 above. The crucial findings are that it was in the best interests of the child to maintain the current regular contact visits from the father which would not be possible if G left the UK, it was in the best interests of the child for the appellant's position in the UK to be regularised in order that contact with the father was not closed off, the decision would cause very clear interference to family life between

G and the father, the father's contact with G would be very severely breached if the appellant returned to Spain or Nigeria and the father would not accompany the appellant and maintain a separate household elsewhere in the EEA.

15. On the basis of those findings of fact, I accept Mr Solomon's submission that the only course reasonably open to the judge was to find that it would not be reasonable to require the child to leave the UK. There is no dispute that the appellant has a genuine and subsisting parental relationship with G under section 117B(6)(a) of the 2002 Act or that G is a qualifying child under section 117D as a British citizen. I give appropriate weight to the best interests of the child and find that the public interest does not require the appellant's removal because under section 117B(6)(b) it would not be reasonable to expect the child to leave the UK. The appeal therefore succeeds under Article 8.

Decision

16. Consequently, I set aside the decision of the First-tier Tribunal. I remake the decision as follows;

    (i) The appeal is allowed under Article 8 of the ECHR.

Signed  Date 10 February 2016

Judge Archer
Deputy Judge of the Upper Tribunal