IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/46082/2013
IA/46103/2013
IA/46115/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th January 2016	**On 1st February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MRS PATRICIA CORTES BORDA (1)
MR ROLANDO FRANCO ORDONEZ CASTELLON (2)
FC (3)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr F Farhat, Solicitor
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. In this decision I will continue to refer to the parties by their designations before the First-tier Tribunal (FtT).

2. The background to this appeal is set out in the decision and reasons dated 29 January 2015 which I issued following the hearing at Field House on 12 November 2014.

3. At that hearing, following representations by both parties, I decided that the FtT had made a material error of law such that the decision had to be set aside. However, the findings of fact of the FtT were preserved.

4. Directions were made for the further conduct of the appeal, including a further hearing at which both parties were to return to with a time estimate of two hours. The parties were to file updated evidence limited to developments since the decision of the FtT and an interpreter was required for the adjourned hearing.

5. The hearing was listed before me on 14 January 2016 at 10am. Again, both parties attended and were represented.

The Hearing

6. At the outset of the hearing Mr Farhat confirmed that the following documents would be required:
   (1) the bundle for the first FtT;
   (2) his client's witness statement.

7. Mr Farhat notified the Tribunal that FC's application for nationality had been successful.

8. In the paragraphs that follow I will refer to the page numbers in the original appeal bundle before the FtT as "AB" and those in the supplemental bundle as "SB".

9. Mrs Borda confirmed that her witness statement at page 26 of SB was correct. She said that her son, FC, had achieved a high level of competence in maths. He was regarded as being well ahead of his age group. I was referred to some certificates that he had achieved. Her son was also a keen swimmer. He had progressed from being afraid of the water to being skilled and accomplished at stage 9. He was also a top table tennis player. As to his language ability, the appellant said she did not think her son could express himself in Spanish but he could speak some of the language. He could not read or write it. She thought it would damage his confidence if he had to return to Columbia or Bolivia.

10. Mr Nath challenged the assertion that FC would find it difficult to pick up a higher level of proficiency in Spanish. In answer to some further questions from Mr Nath, Mrs Borda said that she had a mother, uncle and cousins in Columbia but that she was an only child and therefore had no siblings. She stated that her mother and her uncle were still in Columbia. Only five cousins were left in Columbia, the others having left that country. Both her mother and uncle were getting elderly. They lived together in the same two-bedroomed property. As far as FC's identity was concerned, he did not regard himself as being either Bolivian or Columbian. Mrs Borda was able to name her cousins but said she had not talked to them for "many years" save for the cousin called Astor, whom she had spoken to more recently.

11. The appellant also had friends in Columbia but she claimed to have lost touch with some of them.

12. As far as her husband's family is concerned he had a mother and brother living in Bolivia. Mrs Borda claimed that she had no contact with her mother-in-law. She was "not really" in touch with other family members either.

13. It was put to the appellant that although the cost of educating her son may be greater in South America than it is in the UK, all the extracurricular activities that her son enjoyed would be available there. She seemed to suggest that the standard of education is more basic than it is here and the extracurricular activities would have to be bought at some expense.

14. Mr Nath then suggested that Mrs Borda's English language skills would stand her in good stead when taking up paid employment in Columbia. However, her husband achieved only modest earnings as a waiter, of anything between £600 and £2,500 a month net. However, Mrs Borda worked for an American company arranging travel workshops for its staff and other events.

15. Rolando Castellon was then called to give evidence. He referred to his witness statement at page 24 of SB. He said that his son had kung fu lessons and had progressed to the "orange" level. Rolando Castellon, having been excluded from the hearing room during his wife's evidence, gave a slightly different version of his family's relationship with his wife. Mr Castellon had a mother, a brother, nephews, nieces and two sisters. However, the sisters were at the time of the hearing living in Spain. He said that they stayed in touch with each other and that his sisters went to see his mother who was not well. They also stayed in touch with his son FC. Mrs Borda regularly spoke to his mother because she was not well. Their son also stayed in touch with his mother. Mrs Borda had no problems with Mr Castellon's family but had not actually met his mother; only his sister.

16. Mr Castellon said that he had been in the UK for fourteen years but if he did return to Bolivia would have to find somewhere to live. He had worked in his present job in the UK for four years, he thought, earning approximately £400 per week. He said that the "basics of life" in the UK were different from those in Bolivia.

17. It was submitted on behalf of the respondent that the burden rested on the appellants to prove the extent of their private and/or family life in the UK. There were good quality schools in Bolivia and Columbia and it had not been established that FC would receive a worse education there. Mrs Borda worked for an American company which should make it easier for her to gain employment in a Latin American company and both partners had extended family members in their respective countries of origin. Accommodation was probably available for them. Certainly, there is no evidence that they were homeless when they left Columbia and Bolivia respectively. The adult appellants were probably fluent in both Spanish and English and both had been able to find employment in the UK. I was referred to the case of **AM Malawi [2015] UKUT 260 (IAC)**. In particular, I was referred to the sixth paragraph of the headnote. As far as 117B (6) of the 2002 Act was concerned, the question was whether it was reasonable to expect a child to follow his parents to their country of origin. I was also referred to the case of **SS (Congo)** where, at paragraph 39, the Court of Appeal reiterated that it was not open to a couple to

choose which state to form a family life in. The state was entitled to control immigration. The right under Article 8 to a protected private or family life was operated negatively to prevent the respondent interfering with that right in circumstances where the Convention was engaged. Finally, I was referred to the case of **Bassadi** (reference not supplied). The reasons for refusal were relied on in full and I was invited to conclude there were no satisfactory documents to support the earnings claimed.

18. The appellant submitted that FC had become well-established in the English school system and compelling reasons would be needed for disrupting his education. I was referred to the case of **Moayed [2013] UKUT 00197 (IAC)** where, at paragraph 3 of the headnote, it was emphasised that the Tribunal had to act on the evidence. It was stated in that case that the period between the age of 4 and 7 are particularly important in the life of a child. Azamin Moayed was a foreign national whereas FC had now been given British citizenship. Although the presence of a child in the UK was not a "trump card" it was necessarily a weighty factor. **ZH (Tanzania) [2011] UKSC 4** was authority for the proposition that there is a duty not to deprive a UK citizen of the benefits of his nationality. It was also submitted that FC's Spanish would not be sufficiently good to engage in as many activities as he had done in the UK. Both parents provided a stable home for FC and his subsisting relationship with the child means that they should not be removed at least while he is a child. An additional factor, which does not appear in the respondent's papers, is that Mr Castellon had assisted the police with a murder enquiry.

19. At the end of the hearing I reserved my decision as to the outcome of the appeal.

Discussion

20. Mrs Borda first came to the UK in November 2001 with entry clearance valid until April 2002. As a result of various extensions to her leave, on the basis of being a student, and as a result of various appeals that were pursued, she was allowed to stay until May 2006. Since then she has not been in the UK legally as her appeal rights had been exhausted, although she has, from time to time, been working.

21. Mr Castellon is also an illegal overstayer who has not had any right to be in the UK since 2003.

22. Their son, FC, was born here in May 2005 and has lived here ever since. He has been educated at the taxpayer's expense in English schools and is presently aged 10. He has recently become a British citizen.

23. The appellant's representatives have made a number of valid points in their "brief outline of case" dated 14 January 2016 and I am grateful to both parties for their submissions. Essentially, Mr Farhat focused on the degree of cultural and educational assimilation of FC and pointed out that FC's welfare was a primary consideration in this case having regard to the provisions of Section 55 of the Borders, Citizenship and Immigration Act 2009 ("2009 Act"). The respondent's own guidance (in a document headed "Every Child Matters") places emphasis on the need to safeguard and promote the welfare of children in relation to immigration decisions as well as support their intellectual, emotional, social and behavioural

development. Other points that were emphasised in submissions included the fact that a child's development between the age of 4 and approximately the age of 11 are likely to be particularly important to his long-term future. Those years have been spent by FC in the English school system.

24. A persuasive point in the appellants' favour is that there must be compelling reasons for removing FC or, to put as Moses LJ put it in the case of **Jagot [2000] INLR 501**, a child is not responsible or to be punished for the behaviour of his parents. FC as a British national has every right to be educated here and to receive the same high welfare rights as fellow citizens. His removal will inevitably result in a significant interference with these rights. Do FC's welfare needs outweigh other considerations?

25. First of all, the extensive submissions, orally and in writing, in support of FC's welfare need to be qualified by the fact that he has in fact completed or is about to complete the seventh year of the important "four to seven years" referred to in the case of **Azimi-Moayed [2013] UKUT 00197 (IAC)**. If he does need to be moved this may not be a bad time to move him. He has a much better relationship with Mr Castellon's family in Bolivia than Mrs Borda was prepared to admit. Indeed, his relationship with his grandparents appears to be good and it will possibly develop further if he lived in the same country as them. Exposure to the Latin American culture and a close relationship with his extended family are undoubtedly positives to be weighed into the balance of any suggestion that his welfare will be disrupted by his removal with his parents. Some disruption inevitably flows from moving school but many children have to endure this. I do not accept that the removal of FC will have a negative long-term impact on his education, although it will undoubtedly cause some short-term disruption.

26. The fundamental point here is that this family is likely to leave the UK as one unit. Regrettable though it is that FC will not continue to enjoy all the benefits of the English education system, he will undoubtedly gain other benefits mentioned. With respect, the appellants' submissions do not attach proper weight to the respondent's interest in the need to maintain effective immigration control. The fact cannot be ignored that FC's parents are two illegal overstayers who have remained in the UK in circumstances where they must have known that their private or family life was precarious. They acknowledged that they do not qualify under any of the Immigration Rules which were put in place to ensure that those settling in the UK meet proper criteria, including financial criteria, before being given indefinite leave to remain. Their claim is put forward on a "freestanding" Article 8 basis but in recent authorities it is clear that some exceptional reasons are needed to justify considering a case outside the Immigration Rules, which are intended to provide a complete code. Those rules appear to cater adequately for settlement in cases such as this one.

27. The respondent has a powerful argument in saying that consideration of the merits of removing FC cannot be the end of the discussion. FC's parents have no right to be in the UK and this, along with other factors, distinguishes the case from **ZH (Tanzania)**, a case involving one foreign parent, two British national children and a British parent. Additionally, it is not the case that FC has no connection with either

Bolivia or Columbia. He undoubtedly would have been exposed on a daily basis to the Spanish language at home and there may be some refinement to his written and linguistic skills but both parents will be going to a country with which they are culturally and linguistically familiar. As I have said, the consequential connection between FC and his extended family in one of those Latin American countries is undoubtedly a positive in my view.

28. Both appellants are well-educated and would have good prospects of obtaining employment in their respective countries. Additionally, Mr Castellon acknowledged that his family would provide accommodation if he was unable to provide accommodation for his wife and child. I note that there was apparently no problem in finding accommodation when the adult appellants last lived in their respective countries.

Conclusions

29. The circumstances where neither of them satisfied the requirements of the Immigration Rules. This is not an exceptional case in which the claim fell to be considered outside the Immigration Rules. I have not accepted that the adult appellants should be allowed to stay in the UK for the purposes of providing an environment for their child to be brought up in the English education system when there is no adequate evidence that FC cannot be educated in either Bolivia or Colombia.

Notice of Decision

Having carefully appraised the facts afresh I am satisfied that the decision of the respondent to refuse leave to remain on human rights grounds was correct. Accordingly, that decision stands and the present appeal by the respondent against the decision of the FtT is allowed and the decision of the FtT is set aside.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

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

Signed Date

Deputy Upper Tribunal Judge Hanbury