Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU044802015

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On Wednesday 26 April 2017	**On Thursday 5 May 2017**

Before
UPPER TRIBUNAL JUDGE SMITH

Between

MS VINUS OLARTE AZON

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr O A Ogunbiyi, Counsel instructed by Auleys solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. There is no good reason to make an anonymity direction in this case.

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge Jessica Pacey promulgated on 8 November 2016 ("the Decision"). By the Decision the Judge dismissed the Appellant's appeal against the Respondent's decision dated 23 June 2015 refusing her application for leave to remain on human rights grounds as the mother of a British citizen child.

2. The facts of the Appellant's case are not in dispute. She is a national of the Philippines. She has a daughter (S) from a previous relationship. S was

born on 9 May 1999 and will therefore soon be eighteen years old. S is a British national based on her father's nationality. He is a British national but resident in Hong Kong and she has little contact with him. The Appellant is in an unmarried relationship with Mr Ewing who is a US citizen working in the UK. They met about ten years ago in Hong Kong where he was working before being posted to the UK. Whilst in Hong Kong and since, Mr Ewing has apparently supported the Appellant and S. Mr Ewing has a visa to remain in the UK until 27 July 2017. It appears that he intends to remain working in the UK after that date but that will of course depend on his employment. He regularly travels for his work. The Appellant and Mr Ewing apparently intend to marry once the Appellant's divorce is finalised.

3. Mr Ewing was posted to the UK in his job in 2014. On 15 August 2014, the Appellant arrived in the UK as a visitor on a multi visit visa valid until 2 July 2019. She was accompanied by S who as a British citizen does not require a visa. The Appellant left the UK on 18 January 2015 and returned to Hong Kong leaving S with her stepfather. She returned to the UK on 30 January 2015 again as a visitor. She was interviewed at port on arrival and was refused leave to enter. It appears this was based on a change of circumstances since it appears that the multi visit visa was granted on the understanding that the Appellant was resident in Hong Kong with her British husband and daughter whereas she was in fact already in a relationship by then with Mr Ewing. The Appellant was however given temporary admission.

4. The Appellant submitted a statement of additional grounds on 12 February 2015 seeking to remain based on her relationship with S. In response to a request for further information, the Appellant's solicitors informed the Respondent that one of the reasons for seeking to remain in the UK was that she would prefer her daughter to continue with her education in the UK and that university fees would be higher if S had not been resident here for three years prior to going to university. The Appellant indicated that although she did not initially intend to settle in the UK, her circumstances changed when her daughter "demanded her presence at home".

5. The Judge dismissed the Appellant's appeal finding that it would be reasonable to expect S to leave the UK and return with her mother to Hong Kong even though she is a British citizen. In so finding the Judge considered the human rights claim outside the Immigration Rules ("the Rules") applying section 117B(6) Nationality, Immigration and Asylum Act 2002 ("section 117B").

6. Permission to appeal was granted by First-tier Tribunal Judge Gibb on 3 March 2017. The grant is in the following terms:-

> "[2] The grounds, which were in time, complain that the judge erred in: (1) unreasonably/irrationally taking into account some speculations as to future events but not others; (2) not giving proper consideration to the best interests of a British child and the difficulties of the child living apart from her mother; and (3) failing to consider whether the appellant met the requirements for family life as the parent of a child in the UK in Appendix FM.

> [3] The first 2 grounds appear to me to have little merit, in that they fall within the area of a disagreement with the outcome of a balancing exercise by the judge, rather than raising arguable legal points. The third ground, however, does appear arguable (although the reference to 'insurmountable obstacles' in the grounds should be one to 'reasonable'). The judge at [22] based her decision not to consider the Rules on a concession by the appellant's counsel, but the judge's record of proceedings records counsel as indicating 'no instructions to concede on any point' at the start, and asking for the appeal to be allowed under EX1 in closing submissions.
>
> [4] Although there is no separate ground under the Rules in this appeal an ability or not to meet the requirements of Appendix FM to HC395 is still of great relevance to a consideration of Article 8. Under the Rules both the issues of 'sole parental responsibility' and that of 'reasonable to expect the child to leave the UK' required the judge's consideration, and it is arguable that the judge erred in law by not doing so. The first issue is not entirely clear cut in that the Rules could be said to focus only on parents (and here the father was in Hong Kong and not involved), rather than step-parents; and the second may be impacted by the 'reasonable misapprehension' issue (see [53] of the SC judgment in Agyarko [2017] UKSC 11). Although the appellant would do well to temper any hope these points, along with the importance of all relevant issues being given judicial consideration, suggest that the same outcome might not have been inevitable without the arguable error."

7. The appeal comes before me to determine whether there is an error of law in the Decision and if so to either re-make the decision or remit to the First-tier Tribunal to do so.

Discussion and conclusions

8. I begin with the main reason why permission was granted although this was not the way in which the case was presented to me by Mr Ogunbiyi. I can deal with the point there made relatively shortly.

9. Mr Duffy submitted that Judge Gibb has in fact misconstrued the Rules as EX.1 has no relevance if a person is present on a visit visa. Having looked again at the chronology, though, it appears that, contrary to what Mr Duffy perceived the position to be, the Appellant was in fact in the UK on temporary admission at the time she made the claim. As such, it may have been possible for her to succeed under the Rules if EX.1 applies. EX.1 reads as follows:-

> EX.1. This paragraph applies if
> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who –
> (aa) is under the age of 18 years…;
> (bb) is in the UK;
> (cc) is a British citizen …; and
> (ii) it would not be reasonable to expect the child to leave the UK
> or
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen……..and there are insurmountable obstacles to family life with that partner continuing outside the UK.
> EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their

> partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

10. It is not suggested that the Appellant can succeed on the basis of her relationship with Mr Ewing as he is not a British citizen or settled in the UK. Notwithstanding Mr Ogunbiyi's submission at the outset that the Judge had wrongly focussed on the relationship between the Appellant and Mr Ewing as the basis on which she sought to stay, it is readily apparent from reading the Decision that this is not the case and Mr Ogunbiyi appeared to accept later in his submissions that this assertion was unsustainable.

11. I accept that Mr Duffy may have been wrong to submit that the Appellant is precluded from relying on EX.1 because she had leave as a visitor at the time of her application. It appears from what I say at [3] above that she was in fact in the UK on temporary admission. However, section 117B(6) was considered by the Judge. Section 117B(6) reads as follows:-

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
> (a) The person has a genuine and subsisting parental relationship with a qualifying child, and
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

There can be no dispute that S is a qualifying child for the purposes of that section at least at the date of hearing which led to the Decision (October 2016) and at the date of the hearing before me. As such, the same qualification criteria apply when considering s117B(6)(a) and EX.1(a)(i). The Judge has therefore considered precisely the same question as arises under EX.1 when looking at Section 117B(6) and has determined the appeal against the Appellant squarely on the basis that it would be reasonable to expect S to return to Hong Kong with her mother. Any error in that regard is therefore immaterial and I decline to set aside the Decision on that basis.

12. Turning then to the issue of "sole parental responsibility", it may be that Judge Gibb had in mind the case of Zambrano and the Respondent's policy of not removing a parent where that would have the effect of obliging a British citizen child to leave the UK. There are two difficulties which stand in the way of the Appellant on this point. The first is that the Judge took into account Zambrano when considering whether the impact of removal of the Appellant would be to deprive S of the enjoyment of her rights as an EU citizen ([57] and following). Second, although I note that Mr Ewing says in his statement that he considers it "morally wrong" to have S live with him without the Appellant, in the information provided to the Respondent by the Appellant's solicitors following the claim, it was said that "[Mr Ewing] is extensively involved in both their lives. He pays for everything they enjoy as a family unit including the education of the daughter when she was in Hong Kong since her father has abdicated his role as a parent… it could be said that he has assumed parental role for the child ever since her parents separated."

13. Judge Gibbs makes the point when granting permission that the Rules in relation to "sole parental responsibility" may focus only on natural parents and not step-parents. It appears from what is there said that the Judge may have misquoted from EX.1 as that refers to a "genuine and subsisting parental relationship" and not "sole parental responsibility" which is an entirely different rule. That latter rule could have no relevance to this case as it concerns the ability of a child to settle with a parent who is entitled to stay if that parent has sole parental responsibility which is not this case. Whichever rule Judge Gibb had in mind, however, the issue of whether there is parental responsibility is in my judgement one of fact. Although in the interpretation section of the Rules a parent is defined as including a step-father only if the biological father is dead, the issue of whether a person has parental responsibility is a wider one as confirmed by the case of R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship") IJR [2016] UKUT 00031 (IAC), the headnote to which reads as follows:-

> *"[1] It is not necessary for an individual to have "parental responsibility" in law for there to exist a parental relationship.*
>
> *[2] Whether a person who is not a biological parent is in a "parental relationship" with a child for the purposes of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 depends on the individual circumstances and whether the role that individual plays establishes he or she has "stepped into the shoes" of a parent. "*

14. "Sole parental responsibility" and whether S has a parental relationship with Mr Ewing is though nothing to the point. The question is the relationship enjoyed between the Appellant and S. That the Appellant is in a genuine and subsisting parental relationship with S is not in doubt. What the Judge decided is that it would not be unreasonable for S to leave the UK with the Appellant. Unless the Appellant can show that the Judge failed lawfully to consider the issue whether it would be reasonable to expect S to leave the UK with the Appellant if the Appellant is removed, she cannot succeed. For the foregoing reasons, any error in failing to consider that issue applying EX.1 is not material; the Judge considered the same issue applying section 117B(6).

15. That then disposes of the ground which Judge Gibb considered to be arguable in the grant of permission. However, the grant of permission was not limited and I permitted Mr Ogunbiyi to argue all the grounds notwithstanding what is said at [3] of the grant of permission. His submissions were formulated as a challenge to the Judge's reasoning on the central issue of reasonableness of S leaving the UK with her mother.

16. The first of the grounds relates to what is said to be impermissible speculation by the Judge. The example given in the grounds relates to whether the Appellant intends to marry Mr Ewing and may be expected to leave the UK at some point in the future depending on his work commitments. That relates to what is said at [33] and [34] of the Decision. It is said at [1] of the grounds that there is no evidence that they will ever marry. That is simply factually incorrect since, although it is not covered in their witness statements, the

Appellant indicated at interview that this is their intention ([Q44]). However, this submission as developed orally is directed at what is said to be the Judge's speculation as to S's future education. That challenge is focussed on [53] and [55] of the Decision. I do not need to set those paragraphs out because in my judgement, Mr Ogunbiyi is wrong in his submission that the Judge has there speculated. Indeed, particularly as appears at [55] of the Decision, she expressly declined to do so.

17. The real basis of the Appellant's complaint in this regard is that the Judge did not find that the need for S to remain in the UK for three years in order to qualify for home tuition fees renders it unreasonable to expect her to leave the UK with her mother. However, as the Judge notes at [54] of the Decision, she had to determine this issue on the evidence before her. The Judge has simply made findings based on the evidence before her as to whether S intends to go to university which was one of the principle reasons why the Appellant asserted that it would not be reasonable for S to leave the UK now. The Judge had no evidence from S to show that she either wished or intended to go to university and whilst the evidence as to S's educational achievements in her short time here suggests that she is doing reasonably well, there is no evidence from teachers that she is bound to go on to further education.

18. Mr Ogunbiyi also developed his submission on this ground by reference to what is said in the Decision about the case of EV (Philippines) v SSHD [2014] EWCA Civ 784. He made the point (correctly) that EV (Philippines) concerns a foreign national child whereas S, as a British citizen, is entitled to receive education in the UK. That is of course correct. However, the facts of this case are highly unusual as S has lived outside the UK with her mother until 2014 and has never in fact received the education to which she is entitled other than in the past few years.

19. Mr Duffy submitted and I accept that the principles set out at [37] to [39] of the Decision apply equally to S because the consideration is what is in her best interests and whether, having determined what those best interests require, it is reasonable for her to leave the UK with her mother. She cannot of course be removed in the same way as she could if she were a foreign child and, for so long as Mr Ewing remains in the UK, he and the Appellant may choose for S to stay with him (or indeed on her own once she turns eighteen). As Mr Duffy pointed out, though, the reference to EV (Philippines) is really the "flip side" to the principle enunciated in that case which is cited at [39] of the Decision. Whereas it might not be in the best interests of a foreign child to go to another country if that child has been in education in the UK for a long period and is well integrated here, it is equally the case that the best interests of a British citizen child are not necessarily to be educated in the UK, particularly where, as here, that child has been brought up and educated outside the UK for most of her childhood. The Judge recognised at [45] of the Decision that EV (Philippines) is not directly on point since that case did not involve a British citizen. However, as the Judge noted at [62] of the Decision, the period which S has spent in education in the UK as compared with her education abroad is a factor relevant to the issue whether she can reasonably be expected to leave the UK.

20. For those reasons, ground one is simply a disagreement with the Judge's findings about S's future intentions and the impact on her education if the Appellant is removed. There is no error of law in the Judge's reasoning on those issues when looking at the reasonableness of S leaving the UK.

21. Turning then to ground two, the focus of that ground as pleaded is the impact on S's family life and private life outside the Rules and whether removal of the Appellant is disproportionate for that reason. Mr Ogunbiyi submitted that, just because S will be eighteen soon does not affect the fact that she has a strong family life with her mother and that it would be disproportionate to remove the Appellant and separate her from S. I accept the proposition that eighteen is not a "magic number" when analysing family life between parent and child.

22. The issue for me at this stage is whether the Judge made an error of law as at the date of the hearing before her at which date S was seventeen and a half and was not as close as she is now to her eighteenth birthday. As I have already observed, whether S goes with her mother is a matter of choice for the Appellant, Mr Ewing and S. It is at least possible for S to remain in the UK with Mr Ewing and even to remain here on her own once she is eighteen. However, the basis on which the Judge decided the issue is that it would not be disproportionate for S to leave the UK notwithstanding her British citizenship. The Judge gave reasons at [35] to [63] of the Decision for that conclusion. She took into account as she was required to do S's best interests as a child. She gave those best interests appropriate weight. The findings made were open to the Judge, particularly given the lack of evidence concerning the intentions of S in relation to her future education and the fact that S has only been in the UK for a few years. Given the expectation of the Judge that S would accompany the Appellant if she left, there would be no interference with the family life between the Appellant and S. The impact on S's private life is amply considered by the Judge on the evidence before her.

23. As Mr Duffy submitted, the outcome of this appeal might not have been the same before all Judges but that is not the test for me. The question for me is whether there is an error of law in the Decision. As observed by Judge Gibb when granting permission, grounds one and two are really a disagreement with the outcome of the balancing exercise by the Judge. The Judge has given sufficient reasons for her conclusions which were open to her on the evidence. It cannot be said that the Decision is perverse. I have explained at [9] to [14] above why any error of law based on the main ground in relation to which permission was granted cannot be material.

24. For those reasons, I am satisfied that the Decision does not contain a material error of law. I therefore uphold the Decision with the outcome that the Appellant's appeal remains dismissed.

DECISION

The First-tier Tribunal Decision did not involve the making of an error on a point of law. I therefore uphold the First-tier Tribunal Decision of

Judge Pacey promulgated on 8 November 2016 with the consequence that the Appellant's appeal is dismissed.

Signed Dated: 3 May 2017
Upper Tribunal Judge Smith