Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20763/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 June 2017	**On 23 June 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

[MARIA L.]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Khan instructed by Woodford Rise Solicitors
For the Respondent: Mr I Jarvis Senior Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Plumptre ('the Judge') promulgated on 21 October 2016 in which the appellant's appeal against the refusal of an application for leave to remain based on private and family life, due to the appellant's daughter, was dismissed.

Background

2. The appellant is a national of Mauritius born on [ ] 1965 who entered the UK lawfully as a student with leave valid to 10 August 2006. An

application for further leave dated 4 July 2006 was refused on 31 July 2006 with no right of appeal. A further application for leave to remain as an unmarried partner made on 3 November 2006 was refused on 5 February 2007.

3. On [ ] 2007, the appellant gave birth to a daughter [J].

4. On 15 August 2013, the appellant was served with Form IS.151A and on 10 June 2014 the appellant's case was reassessed by the Older Live Cases Unit and the application again refused. On 25 March 2015, the appellant returned a Statement of Additional Grounds for leave based on private and family life resulting in the impugned decision.

5. The Judge sets out the immigration history, grounds of appeal, relevant legal provisions and procedural aspects, before setting out findings of fact from [14] of the decision under challenge. Relevant findings can be summarised as follows:

    a. The best interests of the child are a primary but not paramount consideration. The immigration history of the mother is not the fault of the child. The child was born in the UK and has lived here all her life for some nine years at the date of the hearing and is a qualifying child per Section 117D (1) of the Nationality, Immigration and Asylum Act 2002 [14].
    b. [J]'s mother the appellant but not her father is liable to removal [17].
    c. It was found to be reasonable to expect [J] to leave the UK [17].
    d. [J]'s parents are both of Mauritian origin, born and educated in Mauritius, it is reasonable to expect a measure of Creole is spoken at home. [J] is of a sufficiently young age to adapt to both life and education in Mauritius [18].
    e. Weight is given to the fact [J] can speak, read and write French which is widely spoken in Mauritius in addition to English, both of which taught in schools. The education system in Mauritius is based upon the British model. [J] will be able to access this free education system and readily adapt to it given it is based on the British model [20].
    f. No evidence was adduced to suggest [J] suffers any medical or physical problems requiring specialist care or schooling [21].
    g. When conducting a balancing exercise and whether [J] should have the benefit of continuing her education in the United Kingdom at public expense, the observations at paragraph 60 of EV (Philippines) [2014] EWCA Civ 874 were considered [23].
    h. The respondent has fully considered the best interests of the child. Whilst there is no specific reference to Section 55 in the refusal letter, all relevant matters have been considered when answering the question whether or not it is reasonable for [J] to return to Mauritius [24].

i. Any interruption to [J]'s education would not be any more significant than that faced by any child forced to move from one country to the other. It has not been established [J] would suffer any undue hardship or ill effect in attending a new school in Mauritius [25].
j. Family members currently live in Mauritius with there being no evidence as to why family members could not adequately support and assist the appellant and [J] on return. It would be in [J]'s best interest to return to Mauritius and form relationships with her half-brother half-sister whom it is presumed she has not yet met [26].
k. [J] will have formed relationships whilst living in the UK that can be maintained from overseas [30].
l. The appellant cannot satisfy the requirements of EX.1.(b) for whilst she has a genuine and subsisting relationship with her partner [E], a British citizen, the appellant has not established insurmountable obstacles to family life with [E] continuing outside the UK [31].
m. No evidence or reasons have been put forward other than the appellant's medical conditions of diabetes, cholesterol problems and high blood pressure under exceptional or more correctly compelling circumstances for leave to remain outside the Rules [32].
n. The Judge considered the appellants evidence regarding the future fear a return to Mauritius due to aggressive behaviour of her ex-husband, gave weight to the fact no asylum application had been made, the fact the appellant entered the United Kingdom 10 years ago, with no reliable evidence her ex-husband would be interested in her due to the passage of time. No further up-to-date evidence from the appellant on that aspect of the claim was provided which was not pursued either in her witness statement nor in submissions [34].
o. The appellant cannot remain on the basis of being a parent of a qualifying child under Appendix FM as she cannot establish he has sole responsibility for [J] as they lived together as a family unit with [E].
p. The appellant cannot meet the requirement of paragraph 276ADE as she has not lived in the UK for at least 20 years and there would not be significant obstacles to her reintegration into Mauritius [36].
q. Medical conditions referred to above are not life-threatening and cannot meet the high threshold of article 3. Medical treatment is available in Mauritius [38 – 39].
r. There was no evidence to suggest threats from the appellant's ex-husband and nothing to prevent the appellant obtaining protection from the police if needed [40].
s. Significant weight is given to the fact [J] has lived in the UK for nine years but her interest, given that she has parents of

Mauritian origin who started their relationship in that country, make it reasonable for her to return [43].

t. Significant weight should be given to the public interest in effective immigration control [44].
u. Weight is given to the fact the appellant appears to speak little or no English and inevitably could be a burden upon the taxpayer and less able to integrate into UK society than if she did speak good English [45].
v. Little weight should be given to a relationship with a qualifying partner given the appellant was in the UK unlawfully and little weight should be given to a private life when the appellant's immigration status was precarious, as was the fact in this appeal [46].
w. The appellant cannot be described as being financially independent [47].
x. The appellant was aware that she would be required to leave the UK following the refusal of previous applications under her legal status [47].
y. The appellant's submission that refusal requires the family to become broken or separated was rejected as it was open either to the appellant to return to Mauritius to make an application to join her partner, a British citizen settled in the UK which would be a matter of months rather than years, or to return to their country of origin if they so choose. The fact [E] left Mauritius 12 years ago, does not necessarily make it unreasonable for him to return [48].
z. The appellant is not on state benefits as she is supported by [E] [49].
aa. There was no need to consider Article 8 ECHR outside the Rules as all issues raised are being adequately considered under the Rules [50].

6. The appeal was accordingly dismissed.

7. The appellant sought permission to appeal to the Upper Tribunal which was granted by another judge of the First-tier Tribunal. The operative part of the grant reads:

> 2. It is arguable that the judge erred as set out in grounds 1 and 2 by failing to give specific consideration to the fact that the appellant's daughter (date of birth 28 June 2007) is a British citizen born in the UK. The judge refers in passing to a copy of her British passport [12] but otherwise it makes no reference when considering whether it would be reasonable for the daughter to leave the UK to the fact that she is a British citizen; nationality is a factor which has weight in itself (see paragraph 4 grounds). The judge appears to have taken into consideration that the appellant's daughter would have the benefit of continuing her education in the UK at public expense without taking into account that as a British citizen she is entitled to such education [23].

Error of law

8. On behalf of the Secretary of State Mr Jarvis accepted the Judge had erred in law. The wording of the policy referred to by the Upper Tribunal in *SF and others (Guidance, post – 2014 Act) Albania [2017] UKUT 00120 (IAC)* of not taking a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force the British child to leave the EU, regardless of the age of that child, was the same as that appearing in the respondents earlier policy dated April 2015 which is applicable to this decision.

9. The decision is therefore set aside to be remade by the Upper Tribunal.

Discussion

10. The advocates were able to proceed with the process of remaking the decision on the day as there is little or no factual dispute between the parties.

11. A disagreement that did arise related to whether the Immigration Rules and specifically Appendix FM has any application to the merits of this appeal.

12. The application made was for leave to remain under the Partner Route – 10-year route. The Parent route was not available to the appellant as she could not establish sole responsibility for [J]. Appendix FM sets out the requirements for leave to remain as a partner in the following terms:

> R-LTRP.1.1. The requirements to be met for limited leave to remain as a partner are-
>
> (a) the applicant and their partner must be in the UK;
>
> (b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
>
> (c)
>
> (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
>
> (ii) the applicant meets all of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner; or
>
> (d)
>
> (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
>
> (ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1-2.2.; and
>
> (iii) paragraph EX.1. applies.

13. The decision maker concluded that the appellant was unable to meet the requirements of R-LTRP.1.1(d)(iii) as it was not found the appellant

was able to rely upon the exception to the general rule for leave found in EX.1.

14. In relation to EX.1, Appendix FM states:

> 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, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; 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, settled in the UK or in the UK with refugee leave or humanitarian protection, 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.

15. It is accepted the child is under the age of 18, is in the United Kingdom, and has lived here continuously for at least seven years. The issue in dispute therefore relates to whether it would be reasonable to expect [J] to leave the United Kingdom.

16. It is important to note that EX.1. sets out the Secretary of States own view of the situation in which an exception to the normal requirement to satisfy the provisions of the Rules applies. It is accepted it cannot be read in isolation.

17. Mr Jarvis refers at length to the conduct of the appellant who had overstayed her leave and accepted that the best interests of the child would be to remain with both parents but stated that this is not the determinative factor. It was submitted that it was proportionate to expect the applicant to leave the United Kingdom to apply for leave to remain as this would lead to nothing but disruption. Mr Jarvis relied upon several authorities.

18. The first is a reference to the decision of the Supreme Court in *Patel and others [2013] UKSC 72* at [29]. This is a case in which the Supreme Court was considering a different issue, namely whether the Secretary of State's failure to make a removal decision at the same time as refusing an application for leave to remain, or shortly thereafter, was unlawful. At [29] the Supreme Court find:

> "29. However, neither such general observations nor such incidental effects can be translated into an overriding policy requiring the Secretary of State to act in a particular way, nor into a right for the appellant to insist he does so. It is to be borne in mind also that exercise of the powers to direct removal, which alone are at issue in the *Patel* case, is likely to involve both public cost and personal hardship or indignity. The Secretary of State does not "thwart the policy of the Act" if she proceeds in the first instance on the basis that unlawful over stayers should be allowed to leave of their own volition "as on the evidence the great majority do….."

19. This general proposition is not disputed and indeed underpinned the finding of the Supreme Court that the appeals before them were to be dismissed. Even if there was a requirement by the Secretary of State for the appellant to leave the United Kingdom the exception found in EX.1. will still apply if the specific criteria set out in that rule are met.

20. Mr Jarvis also referred to the Supreme Court decision in *Agyarko and others [2017] UKSC 11* at [51] in which it is stated:

> "51. Whether the applicant is in the UK lawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant with otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, or at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated in the decision in *Chikwamba v Secretary of State for the Home Department.*"

21. In *Agyarko* the appeals focused primarily on the issues identified at [2] of the judgment which are (1) paragraph EX.1 (b) of Appendix FM, which imposed a requirement upon an application for leave to remain as a partner where that person was in the UK in breach of immigration laws, a requirement that there are "insurmountable obstacles" to family life with that partner continuing outside the UK and (2) a requirement in the Instructions that the must be "exceptional circumstances" for leave to remain to be granted in such cases outside the Rules. It is also said the cases raise an issue under EU law, relating to the effect of the judgment of the Court of Justice in *Zambrano* as well as other issues under domestic law.

22. The issue in this appeal does not relate to EX.1 (b) as the appellant claims a right to remain based upon EX.1(a). The question of an individual applicant being expected to return to their country of origin with a view to making an application to re-enter has not been shown to be applicable to a case in which the issue is whether it is reasonable to expect the child to leave the United Kingdom in a case in which a genuine and subsisting parental relationship exists.

23. On behalf of the appellant Mr Khan refers to [7-8] of the grounds seeking permission to appeal where it is written:

> 7. The Upper Tribunal in *Sanade and others (British children – Zambrano – Derici [2012] UKUT 00048 (IAC)*, further examined the issue of the 'best interests of the child. At paragraph 69 the Upper Tribunal considered the importance of nationality of the children and its impact on the proportionality exercise. It stated;
>
> > *… We give particular importance to the fact the children are British is a strong point to the fact that their future lies in the United Kingdom*
>
> 8. Thus the Upper Tribunal, at paragraph 95, took the matter to its logical conclusion when it stated
>
> > *This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so. The case serves to emphasise the importance of nationality already identified in the decision of the Supreme Court in ZH (Tanzania). If interference with the family life is to be justified, it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation.*

24. It was submitted on the appellant's behalf that the line of authorities clearly show that a British child cannot be expected to be removed from the United Kingdom and that in this case it was not reasonable to expect the child to do so.

25. In *SF and others,* the wording of the Respondents policy, accepted by Mr Jarvis as reflecting that in the earlier policy, is set out at [7] in the following terms:

> "Saving cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.
>
> ….
>
> Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.
>
> In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.
>
> It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to

justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others;

- Criminality falling below the threshold set out in paragraph 389 of the Immigration Rules;
- a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision-maker is minded to refuse, in circumstances where separation would be the result, this decision would normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision."

26. Mr Jarvis also submitted that outside the Rules it was not necessary to consider section 117B(vi) of the 2002 Act, arguing this section did not apply, as the wording "expect" had a specific function and meaning and the child was not expected to leave.

27. Mr Khan submitted section 117B (vi) is a self-contained provision as all the other factors referred to do not apply and that the respondent's own guidance did not expect the child to return. Therefore, it could not be reasonable for the child to be expected to relocate.

28. It is important to remember, as stated above, that section 117A-C operate as instructions to courts and tribunals to be applied in cases where the balancing exercise is being conducted in order to determine proportionality under Article 8 ECHR.

29. Section 117B(vi) states:

(vi) 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.

30. The point made by Mr Jarvis is that the wording of this section contains a specific requirement that it would not be reasonable to <u>expect</u> the child to leave the United Kingdom and that as this condition precedent is not engaged in this case, as the respondent does not expect the child to leave, the section has no application.

31. If this was a case where the Tribunal considered Article 8 and the requirements of section 117B and Secretary of State's position was that there was no expectation that the child would leave the United Kingdom, applying Mr Jarvis' logic, it would mean the prohibition on removal in subsection (vi) would not apply meaning the statement the public interest did not require the individual's removal would have no application. That would suggest the purpose of section 117 B (vi) is unclear. Is it a provision intended to identify, in statutory terms, when the public interest does not require a person's removal which actually has no effect if the purpose for which the section was passed, namely to protect a situation where a qualifying child is in the United Kingdom, means that statement as to the weight to be given to the public interest no longer has effect? It appears a nonsense when there is a clear relationship between the child remaining and the removal of the applicant not being required in this section for it then to be argued that the applicant's removal can now go ahead if the Secretary of State had no intention of expecting the child to leave. The relevant connection is between the child remaining in the United Kingdom and the child's parent being able to remain too.

32. If the proportionality of the decision is being considered all relevant factors must be taken into account. These include, on behalf of the Secretary of State, the Immigration Rules which it has been stated reflect the Secretary of States view of how Article 8 should be interpreted.

33. The wording in EX.1 (a) (ii) also states it would not be reasonable to expect the child to leave the UK but does not contain a specific statement similar to that in the statutory provision, although the purpose of EX.1 is to establish exceptions to eligibility requirements for leave to remain meaning, if the required criteria are met, a person will be entitled to remain under the Immigration Rules.

34. Whether it is reasonable to expect a child to leave the United Kingdom is a question of fact requiring assessment of all relevant issues including the child's legal status. It is not suggested this is a case involving criminality. What is not made out is that the child will be expected to leave the United Kingdom, or the boundary of the European Union, for the child has another parent, her father in the United Kingdom, who it has not been shown is incapable of meeting the child's needs or of supporting the child if the child's mother was required to leave the United Kingdom for the purposes of making a fresh application, if this was deemed to be an appropriate way forward.

35. It is not disputed as set out in EX.1.(a)(i) that the appellant has a genuine and subsisting parental relationship with [J]. The wording of the rule is clear. The focus is upon the applicant and her relationship to the child. The wording of EX.1. does not refer to there being only one parent in the United Kingdom able to care for the child and clearly

reflects a position in which there may be two parents both of whom are able to establish a genuine and subsisting parental relationship with the child, as is the case in this appeal.

36. It is accepted that [J] has both parents in United Kingdom and that if the appellant is removed the father will remain with her meaning [J] will not be required to leave the territory of the EU, but that is a principle of EU law whereas EX.1 is a domestic provision enshrined in the Immigration Rules.

37. It is arguable that as the requirements of EX.1. are satisfied, warranting it being found the applicant is entitled to benefit from the exceptions to the eligibility requirements for leave to remain as a partner, based upon the Secretary States own interpretation and policy regarding the weight to be given to the appellant's position, the appellant is entitled to succeed with this appeal under the Immigration Rules.

38. In the alternative, if it came down to a consideration of Article 8 outside the rules, it will be necessary to consider section 117B. In *R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705* it was held (notwithstanding reservations) that when considering whether it was reasonable to remove a child from the UK under rule 276ADE(1)(iv) of the Immigration Rules and section 117B(6) of the Nationality, Immigration and Asylum Act 2002, a court or tribunal should not simply focus on the child but should have regard to the wider public interest considerations, including the conduct and immigration history of the parents. It was also confirmed however that if section 117B (6) applies then "there can be no doubt that section 117B (6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal." It was additionally held, however, that the fact that a child had been in the UK for seven years should be given significant weight in the proportionality exercise because of its relevant to determining the nature and strength of the child's best interests and as it established as a starting point that leave should be granted unless there were powerful reasons to the contrary.

39. In *MA* the children were nationals of Pakistan. In this case [J] is a British national

40. The question of whether it is reasonable for a child to follow their parents to their country of origin is an issue that needs only be considered once. In this case the effect of the child having British nationality, the child's best interests being to remain with both parents and strength of the parental relationship have to be considered against the argument the appellant could return to reapply for entry clearance although if, as the judge identified, the appellant is

not financially independent and speaks little or no English, although not a burden on the taxpayer as she is supported by her husband, the chances of succeeding on a re-entry application may not be great, making it necessary to consider if an extended period of separation maybe disproportionate to the interference with the mother /daughter bond. It is also arguably disproportionate if the effect of the decision had the impact of requiring [J] to leave the United Kingdom to maintain contact with her mother which would then infringe the respondent's policy with regard to not taking removal decisions the consequences of which are that the child leaves the territory of the EU, which may be the case in relation to a child who needs her mother's care when the mother cannot re-enter.

41. Having considered the competing arguments in relation to this matter, I find it has not been made out that the appellant cannot succeed by virtue of EX.1 under the "Partner" route. On this basis, the appeal, which is fact sensitive, must be allowed.

Decision

42. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

43. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 22 June 2017