Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08939/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and reasons Promulgated**
On 24 January 2018	**On 6 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IVAN [B]
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms N Willock-Briscoe (Home Office Specialist Appeals Team)
For the Respondent: Mr J Collins

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal of 29 August 2017 to allow the appeal of Ivan [B], a citizen of Ukraine born 20 October 1976, itself brought against the decision of the Secretary of State of 22 March 2016 to refuse his human rights claim.

2. Mr [B] first entered the UK some years ago. He was served with papers as an illegal entrant on 20 September 2008, and removed from the UK to Ukraine on 16 January 2009.

3. On 7 December 2015 he applied for leave to remain as the partner of a British citizen; their child was British too. He and his wife Olha [B] originally married in 2000 in Ukraine where they then both resided, and became separated in 2005, and subsequently divorced. They resumed their relationship in Summer 2012 when Olha visited Ukraine. They remarried on 15 August 2013. He subsequently stated he had entered the country on 1 October 2013. Their daughter Yuliya was born on [ ] 2000, where she had lived until the age of 11; she was now in full-time education in the UK, presently at the Kingsley Academy.

4. The application was refused. Summarising his immigration history as above, the decision maker noted that there was no evidence of the date of his return to the UK, his word aside. Mr [B] was considered unsuitable for the partner route under Appendix FM as he had been convicted of possessing false documentation and sentenced to twelve months' imprisonment, and thus failed to meet S-LTR-1.4 of Appendix FM. Furthermore, there were no very significant obstacles to his integration back in Ukraine. There were no relevant exceptional circumstances present: he had entered the country illegally and commenced a relationship knowing he lacked immigration status, and thus with no expectation of long-term residence here.

5. The First-tier Tribunal heard evidence from the family, which it accepted as credible. The daughter arrived in this country without knowing English, and had struggled, and also missed her father. She had achieved a lot here, doing well in school, and spending time at the library with her friends; indeed she was herself involved in teaching children in Feltham Maths and English. She hoped to study law, and was presently undertaking voluntary work for a law firm. She spent time at the park with her friends at the cinema.

6. The First-tier Tribunal noted that Mr [B]'s conviction prevented him from meeting the suitability requirements of Appendix FM. Given he did not face deportation, the public policy position struck by section 117B(6) of Nationality Immigration and Asylum Act 2002 applied to him; thus his removal would be appropriate only if it was reasonable, bearing in mind the public interest issues. Here the child was a British citizen, unlike the child in *MA Pakistan*. She was at a very crucial stage of her education and was owed the benefits of British citizenship, suggesting her departure was unreasonable. The consequences of her father's conviction should not be visited on her. Mr [B] spoke some English, was supported by his wife, and lived with his daughter in a stable family unit that had cohabited for some time: overall his removal would be disproportionate.

7. Accordingly the First-tier Tribunal allowed the appeal.

8. The Secretary of State applied for permission to appeal on the basis that the First-tier Tribunal had erred in law in failing to take account of the circumstances of Mr [B]'s removal from the United Kingdom, and in failing to explain adequately explain its reasoning as to why the public interest was overcome given his past conviction. Permission to appeal was granted on the basis that these grounds were arguable.

9. Before me Ms Willock-Briscoe developed the grounds of appeal, emphasising the fact that the Respondent had returned to the UK illegally notwithstanding that he had previously been removed. She drew my attention to the Home Office Guidance on the circumstances where removal of a parent of a British citizen child was appropriate, which took account of the possibility that "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 Secretary of State had not proposed that the daughter should leave the UK. She emphasised that the section 117B factors had not been considered, and that the Home Office guidance needed to be considered when the policy on British citizen children fell to be considered.

10. Furthermore, Ms Willock-Briscoe provided a Rule 15A notice seeking to adduce further material: firstly, an exclusion order of 18 February 2009. She did not suggest the order had been served on the Respondent, but pointed out that it was nevertheless relevant to the assessment of proportionality. Secondly, GCID notes from the Secretary of State's electronic records of 20 May 2011 indicating that the Respondent had been encountered in the UK on another occasion and though he gave the name of Ivan [B] then, his fingerprints matched those of one Ivan [G], previously removed to Ukraine on 16 January 2009.

11. Mr Collins submitted that the judge was well aware of the fact of the Appellant's departure as an illegal entrant, and accordingly had in mind the elevated public interest in upholding immigration control. Home Office policy lacked the force of law. There was nothing in the decision that was inconsistent with the Home Office Guidance found in Appendix FM.

Findings and reasons

12. The essential finding of the First-tier Tribunal in this appeal was that the Respondent enjoyed a close family tie with his daughter who was heavily assimilated into her life in the UK and was at a vital stage in her education. That conclusion might well be a legitimate one, though it needs to be reached via a structured consideration that has regard to the legal framework.

13. Both parties referred me to this Guidance on the Appendix FM "ten year route" to settlement as a partner:

> "**11.2.3**: **Would it be unreasonable to expect a British Citizen Child to leave the UK?**
>
> Save in 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:
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> • criminality falling below the thresholds set out in paragraph 398 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 should 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."

14. Mr Collins emphasised the fact that forcing a British child to leave the EU would be unreasonable *per se*; Ms Willock-Briscoe took from it the proposition that a parent's conduct may have been such as to exclude them from that otherwise routine outcome. This Guidance must, of course, be interpreted in line with the case law that explains the ambit of the *Zambrano* principle. Elias LJ in *Harrison* [2012] EWCA Civ 1736 (similar reasoning appears in *Sanneh* [2016] QB 445 stated:

> "... there is really no basis for asserting that it is arguable in the light of the authorities that the *Zambrano* principle extends to cover

> anything short of a situation where the EU citizen is forced to leave the territory of the European Union. If the EU citizen, be it child or wife, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 Convention rights may then come into the picture to protect family life as the Court recognised in *Dereci* [2012] 1 CMLR 45, but that is an entirely distinct area of protection."

15. Ms Willock-Briscoe relied heavily on *SF Albania* [2017] UKUT 120 (IAC) where the Upper Tribunal states at [13]:

> "10. … it appears to us that the terms of the guidance are an important source of the Secretary of State's view of what is to be regarded as reasonable in the circumstances, and it is important in our judgement for the Tribunal at both levels to make decisions which are, as far as possible, consistent with decisions made in other areas of the process of immigration control.
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> 11. If the Secretary of State makes a decision in a person's favour on the basis of guidance of this sort, there can of course be no appeal, and the result will be that the decision falls below the radar of consideration by a Tribunal. It is only possible for Tribunals to make decisions on matters such as reasonableness consistently with those that are being made in favour of individuals by the Secretary of State if the Tribunal applies similar or identical processes to those employed by the Secretary of State.
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> 12. On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance. But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it."

16. It was her submission that the First-tier Tribunal had erred in law in failing to cite this Guidance. That failure meant that it was deprived of the possibility of taking a decision that was consistent with that which the Secretary of State might have made.

17. Having reviewed the relevant materials and the reasoning below, it seems to me that the First-tier Tribunal was perfectly well aware of the fact that the Respondent's conduct was relevant to the balancing exercise: it expressly cited his conviction but considered it was outweighed by the interests of his daughter. The Home Office Guidance does not suggest another process of reasoning would have been appropriate. I note that, not for the first time, the Secretary of State's Guidance in relation to *Zambrano* seems to have been relied upon in a vacuum, rather than in the context of its subsequent interpretation by the domestic courts. As shown by *Harrison* and *Sanneh*, the *Zambrano*

principle applies only where a child is required to leave the European Union due to a primary carer's departure: given the daughter's mother is not threatened by expulsion, this was not the case here. The true barrier to removal was the strength of family life established in this country having particular regard to the best interests of the daughter, as to which the governing authority was *MA (Pakistan)* [2016] EWCA Civ 705 (interpreting the proper approach to interpreting section 117B of the Nationality Immigration and Asylum Act 2002). The First-tier Tribunal was plainly alive to the relevance of the best interests of the child.

18. As I indicated at the hearing, although the First-tier Tribunal was clearly aware of the Respondent's prior conviction and factored that into the proportionality assessment, it did not take account of his return to the UK notwithstanding an earlier removal. Whether or not this was in breach of an Exclusion Order is besides the point: it still represented an egregious breach of immigration control that transcended the circumstances of a bare overstayer or illegal entrant; and is also the kind of conduct which potentially falls for consideration as "a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules."

19. This egregious breach of immigration control required assessment in the proportionality balance, being relevant to the assessment of the precariousness of his residence within section 117B. That kind of factor is of course relevant to the assessment of whether a parent's departure from the UK is relevant notwithstanding a child's best interests, see generally *MA (Pakistan)* which identified that wider public interest considerations must be taken into account when applying the reasonableness criteria.

20. In *Campbell* [2013] UKUT 147 (IAC) the Upper Tribunal held that there is no requirement for personal service of an exclusion decision for it to be legally effective. Nevertheless, the other side of the consideration was that actual knowledge of such a decision was a relevant consideration when assessing proportionality, noting that "the true circumstances of the appellant's departure from the UK and the subsequent decision to exclude him have a bearing on … the proportionality [of] the decision." These considerations will require assessment when the appeal is finally determined.

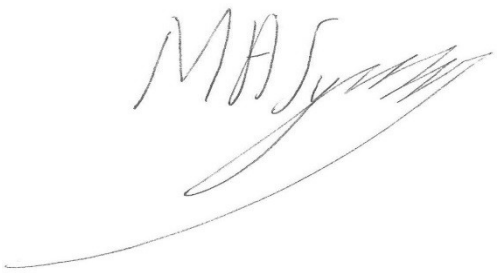
21. I accordingly find that the decision of the First-tier Tribunal cannot stand. The matter must be re-heard. Formally this will be a hearing afresh, albeit it is difficult to imagine that much would be gained by revisiting the findings as to the strength of the father's relationship with his daughter, which were not the subject of any criticism by the Secretary of State before me. It is clearly appropriate for the further evidence sought to be admitted by the Home Office in relation to Mr [B]'s immigration history to be admitted at any future hearing. He will of course be entitled to provide rebuttal evidence if he so chooses.

Decision:

The decision of the First-tier Tribunal cannot stand. The appeal must accordingly be re-heard afresh.

It is not appropriate for the Upper Tribunal to direct the First-tier Tribunal to case manage this hearing in any particular way: however attention is drawn to the fact that the Appellant's daughter is at a vital stage of her education and achieving certainty as to her father’s future must be viewed as a priority. Accordingly the appeal should be treated with appropriate despatch in re-listing.

Signed: Date: 5 February 2018



Deputy Upper Tribunal Judge Symes