



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/13011/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 6 February 2018**

**Decision & Reasons
Promulgated
On 13 March 2018**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

**R.V
(ANONYMITY ORDER MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr Nath

DECISION AND REASONS

1. The appellant is a citizen of Bolivia born in 1975.

Anonymity Order

This appeal turns on the presence in the UK of the appellant's minor children. I am concerned that identifying the appellant could lead to the identity of the children being revealed in the public domain. Having had regard to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules I consider it appropriate to make an order in the following terms:

'Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or

indirectly identify him or any member of his family. This direction applies to both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.'

Background

2. The immigration history is that he arrived in the UK in May 2008 with entry clearance as a visitor until November 2008. He overstayed. In November 2009 he made an asylum claim which was subsequently withdrawn. In April 2012 he sought leave to remain which was refused in April 2013.
3. On 7 December 2015 he again sought leave to remain on the basis of his relationship with his partner and his child born in 2012. That application was refused on 6 May 2016.
4. The reasons for refusal in summary, were that he did not meet the eligibility requirement for leave to remain under the Immigration Rules on the basis of his relationship with his partner because she is not a British citizen and is not settled in the UK. Further there were no insurmountable obstacles to family life with his partner continuing outside the UK.
5. In respect of the child the requirements of paragraph EX1 could not be met because the child is not a British citizen and has not lived continuously in the UK for at least seven years.
6. The respondent went on to decide that there would not be very significant obstacles to the appellant's integration into his home country. It was noted that his partner was pregnant with their second child but the respondent considered that there would be family support for them in Bolivia.
7. In consideration of whether there were exceptional circumstances in respect of the young child who has disability including autism, the respondent considered that suitable medical care was available in Bolivia and Peru (his partner's home country).
8. He appealed.

First tier hearing

9. Following a hearing at Taylor House on 16 October 2017 Judge of the First-Tier Devittie dismissed the appeal on human rights grounds.
10. His findings are at paragraphs 11-14. In summary, he found (at [11]) that the appellant does not meet the requirements under the partner route as his spouse '*does not have any lawful residence status*' in the UK.
11. Having noted that a second child had been born (in December 2015) he found that there were no insurmountable obstacles to the continuance of

family life outside the UK. Also, he noted that the older child had not lived in the UK for more than seven years.

12. In going on to consider family life outside the rules, the judge accepted the gravity of the older child's condition which includes severe developmental issues and found that his best interests are served by his remaining in the UK where medical and support services may well be superior to those he would receive in Bolivia. However, he found that there are '*appropriate services*' in Bolivia for children who suffer from such conditions.
13. Having regard to section 117 of the Nationality, Immigration and Asylum Act 2002 he noted that both the appellant and his partner had overstayed and had developed a family life in the full knowledge of their precarious status. He concluded that the best interests of the child must yield to the public interest and that removal was not disproportionate.

Error of law hearing

14. He sought permission to appeal which was granted by a judge on 13 December 2017.
15. At the error of law hearing before me the appellant's submission was brief. The judge has made two fundamental errors. First, the partner has lawful status, namely, indefinite leave to remain. Further, their two children are registered as British citizens. That information was before the judge.
16. Mr Nath in response simply left the matter for me.

Decision on error of law

17. It is clear that the partner was granted indefinite leave to remain in May 2016. Such information was in the papers before the judge. As for the children, both of whom have disabilities, the judge made no reference at all in the decision to the relevant evidence which was also before him (copy of residence permit, certificates of registration of the children as British citizens). That evidence was stamped as received as far back as June 2017. Indeed, the grounds of appeal enclosed a letter from the Home Office to the appellant telling him his children had been registered as British citizens. In making errors of fact based on ignorance of established and relevant facts the judge materially erred.
18. The decision was set aside to be remade. I was able to proceed to do so at the hearing. There was no further evidence or submissions.

Consideration

19. By virtue of section 117D of the 2002 Act, a British child is a 'qualifying' child in the context of section 117B(6)(a). As indicated it is clear that both children are British. In such cases the Tribunal is required to weigh the public interest into its consideration of whether the children might

reasonably be expected to leave the country with the parent who is facing expulsion.

20. At Section 11.2.3 of the Immigration Directorate Instruction 'Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10 Year Routes' (August 2015), under the heading 'Would it be unreasonable to expect a British citizen child to leave the UK?' the following answers are given to case workers:

'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 there is satisfactory evidence of a genuine and subsisting parental relationship.'

(emphasis added)

21. It should be noted that the terms 'parent' and 'primary carer' are distinguished, and separated by an 'or'. The clear impact of that policy statement is that where a parent of a British child is being required to leave the EU, the case *must always be assessed* on the basis that it will be unreasonable to expect the British citizen child to leave the EU with that parent.
22. I consider what the significance of the guidance is. This case involves the family life of the appellant, his partner and their two very young children. There is no dispute that the appellant has a genuine and subsisting parental relationship. It would plainly be contrary to the best interests of the children and absent any criminality, disproportionate to separate the family unit. Realistically, there are therefore only two options: expect mother and children to go to Bolivia with the appellant, or allow him to remain in accordance with the principles in section 117B(6). Applying the terms of the policy, which I take to represent the respondent's case on where the balance should be struck, I find that it would not be reasonable to expect the children to leave this country. There is accordingly no public interest in the appellant's removal and his appeal must be allowed.

Notice of Decision

The decision of the First-Tier Tribunal involved the making of a material error of law. It is set aside.

The decision is remade as follows:

The appeal is allowed.

There is an order for anonymity.

Signed
Upper Tribunal Judge Conway

Date