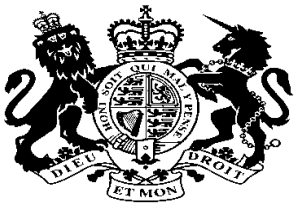

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/07686/2014**
IA/07538/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 5th August 2015	**On 14th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROGER MIGUELA URENA FLOREZ
ANA ISOBELLA URENA FLOREZ

Respondents

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr B Ali, solicitor Advocate, instructed by Kilic & Kilic, solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of the Appellants. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal, but in order to avoid confusion, the parties are referred to as they were in the First Tier Tribunal. This is an appeal by the Secretary of State against the decision of First Tier Tribunal Judge Iqbal promulgated on 13 April 2015 which dismissed both appellants' appeals under the Immigration Rules but allowed the appellants' appeals on Article 8 ECHR grounds.

Background

3 Both appellants are nationals of Venezuela. The first appellant was born on 2 September 2002. The second appellant was born on 30 March 2007. Both appellants entered the UK as visitors. Their parents remain in Venezuela. They live with their grandmother in the UK. On 13 January 2012, the first appellant applied for indefinite leave to remain as a dependent relative of his grandmother. That application was refused on 22 October 2012. However, the first appellant was granted leave to remain outside the Rules until 22 April 2013, specifically to facilitate arrangements for the first appellant's return to Venezuela.

4 The second appellant entered the UK as a visitor. She applied for indefinite leave to remain on 10 August 2012 as the dependant relative of her grandmother (who lives in the UK). That application was refused on 29 May 2013 but she too was granted leave to remain outside the Immigration Rules until 28 November 2013 to allow arrangements to be made for her return to Venezuela.

5 On 12 April 2013, the first appellant made a further application for leave to remain in the UK. On 25 November 2013, the second appellant made a further application for leave to remain in the UK. Both applications were refused by the respondent on 30 January 2014.

The Judge's Decision

6 The appellants both appealed to the First Tier Tribunal. First Tier Tribunal Judge Iqbal ("the judge") dismissed the appellants' appeals under the Immigration Rules but allowed both appellants' appeals on Article 8 ECHR grounds (outwith the Immigration Rules).

7 Grounds of appeal were lodged and on 16 June 2015, First Tier Tribunal Judge Reid granted permission to appeal, stating *inter alia*:

> *"It is arguable that at [37] and [38], the judge did not give adequate reasons for her findings in respect of the grandmother's evidence relating to the appellants' father's imprisonment and their mother's illness given the lack of reliable documentary evidence. Moreover, it is arguable that in the Section 117B assessment, the judge failed to take into account the extent to which the appellant's had already been in receipt of an education in the UK at public expense."*

The Hearing

8 Mr Avery submitted that the judge gave inadequate reasons to support a finding that the appellants' grandmother was a credible witness and that there is an inconsistency in the judge's findings in fact, which should have prevented the judge from finding the appellant's grandmother to be a credible or reliable witness. That (he said) amounts to a fundamental flaw. The second ground argued by Mr Avery

was that the judge's approach to Section 117B of the 2002 Act was an inadequate balancing exercise and that there are insufficient findings in fact to demonstrate that a correct assessment of proportionality has been carried out.

9 Mr Ali, Counsel for both appellants, submitted that credibility was an issue for the judge at first instance and that the first ground of appeal, the respondent was simply trying to re-litigate because the respondent was dissatisfied with the conclusion reached by the judge. Mr Ali's position is that there are adequate findings in fact and that the conclusions reached by the judge are supported by the evidence placed before the judge, that the judge's findings are fact based on that evidence. Mr Ali took me through the determination paragraph by paragraph and argued that a careful assessment of proportionality had been carried out, with the necessary Section 117B exercise a prominent part of that assessment.

Analysis

10 The respondent's first challenge is to credibility. The judge clearly found that the appellants' grandmother was a credible witness and placed reliance on the evidence of the appellants' grandmother. The judge's findings in fact are not clearly set out but they are contained in fragments of [37], [38], [40], [41] and [44]. In the final phrase of [37], the judge says "…*I believe the evidence in relation to the background which has led the children to be in the UK*". The judge commences [37] by stating that she finds the appellant's grandmother to be a credible witness.

11 It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigrations Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law.

12. Credibility assessments by first instance fact finding Tribunals will normally be challengeable only on the basis of irrationality: Edwards – v – Bairstow [1956] AC 14. Credibility is a matter for the judge at first instance.

13 The second ground of appeal is that the judge did not properly apply the provisions of Section 117B of the 2002 Act. It is argued that failings there taint the decision in relation to proportionality. In short, an inadequate balancing exercise has been carried out.

14 The judge rehearses the provisions of Section 117B of the 2002 Act at [42] and at [43]. The judge finds the decision to be disproportionate but the judge does not set out a reason for finding the decision to be disproportionate. In [44], the judge refers to two of the sub-sections of Section 117B and draws the conclusion that because the appellants' have financial support from the sponsor (their maternal uncle) they are financially independent.

15 I find that the proportionality exercise and the consideration of Section 117B of the 2002 are inadequate. The reasoning at [44] contains flawed logic. Both

appellants are young children. They are not financially independent. The judge has taken account of the sponsor's financial independence rather than the financial independence of the appellants. It is the financial independence of the appellants which falls for consideration in terms of Section 117(3). The judge's findings in fact indicate that the appellant are not financially independent.

16. I therefore find that the decision is tainted by a material error of law and must be set aside.

The Facts

17 The facts of the case are that the appellants both entered the UK as visitors. They were brought to the UK by the sponsor (the appellants' grandmother) when the sponsor discovered that they were being cared for by a neighbour because their father was imprisoned and their mother was struggling to cope.

18 Since arriving in the UK, the appellants have been cared for by their grandmother. The respondent has granted discretionary leave to remain to enable them to return to Venezuela and a family decision has been made not to return the appellants to Venezuela, but to make repeated applications for leave to remain in the UK.

19 Both children now attend school in the UK. Both children speak English. Neither of the appellants have been adopted by their grandmother. The children have been entrusted to their grandmother.

20 The appellants live with the sponsor in a three bedroom rented property. The sponsor is in employment and receives council tax benefit and working tax credit. The sponsor has indefinite leave to remain in the UK.

Analysis

21 No challenge is taken to the finding that the appellants cannot succeed in terms of the Immigration Rules. For the sake of completeness, I note that because the appellants' parents are both in Venezuela, they cannot fulfil the requirements of Appendix FM.

22 The appellants cannot meet Paragraph 276ADE(iii), (iv) and (v) because of their ages and because of the length of time they have been in the UK. They cannot meet Paragraph 276ADE(vi) because (as the decision in this case was 30 January 2014) they have not lost all ties to their country of origin.

23. I am mindful of Section 55 of the Borders, Citizenship and Immigration Act 2009, and the case of ZH (Tanzania) v SSHD [2011] UKSC 4.

24 The appellants live with their grandmother, but their grandmother has not adopted them. Their parents remain in Venezuela and they were cared for in Venezuela after their father's imprisonment. It is not suggested that there are inadequate care facilities or reception facilities for children in Venezuela.

25 The determinative issue in this case is the consideration of proportionality weighed against the principles of Section 117B. The starting point is that the maintenance of fair and effective immigration control is in the public interest. Neither of the appellants are qualifying children, so that Section 117B(6) does not apply.

26 Taking account of the appellants' immigration history, their immigration status is quite clearly precarious. Each of the appellants were granted limited leave to remain for a specific purpose. The purpose was not fulfilled because those caring for the appellants did not take advantage of the opportunity presented. Throughout the time they have been here (since 22 April 2013 for the first appellant and 28 November 2013 for the second appellant) their stay in the UK has been in the shadow of uncertainty because initially, they were awaiting for their application to be dealt with, then their application was refused, and since then they have been engaged in the appeals process.

27 The appellants both speak English. Section 117B(2) weighs in their favour; but neither of the appellants are financially independent and as the respondent argues at appeal, they have benefitted from education and health care in the UK. Section 117B(3) weighs against the appellants.

28 Sections 117B(1), (3) and (5) weigh against the appellants. Only Section 117B(2) is in their favour. Sections 117B(4) and (6) are not relevant to these appeals.

29 There are therefore more matters weighing against the appellants than in their favour. The respondent's decision must therefore be proportionate.

Decision

30 The decision of the First Tier Tribunal Judge promulgated on 13 April 2015 is tainted by a material error of law and must be set aside.

31 I remake the decision and substitute the following decision.

32 The appeals are dismissed on Article 8 ECHR grounds.

Signed Date 7 August 2015

Deputy Upper Tribunal Judge Doyle