



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/20766/2014

THE IMMIGRATION ACTS

Heard at Field House
On 15 July 2015

Decision & Reasons Promulgated
On 21 January 2016

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

L M D C
(anonymity direction made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Cronin, Counsel instructed by Wesley Gryk, Solicitors
For the Respondent: Mr S Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We make this order because the case turns on the rights of a small child who is entitled to privacy.

2. This is an appeal by a citizen of the United States (who is also a citizen of Colombia) against the decision of the First-tier Tribunal dismissing her appeal against the decision of the respondent on 29 April 2014 to refuse her leave to enter the United Kingdom and to give directions for her removal to the United States of America.
3. This is a case where there are many slightly unusual features which can serve to detract from the points that matter. Although we have been careful to consider all of the evidence before us it would not be helpful to refer to everything and might add to the confusion which, we find, has probably frustrated the proper examination of the case.
4. The respondent gave the appellant a "Notice of Refusal of Leave to Enter". The confusion began almost immediately. It said:

"You have sought leave to enter the United Kingdom for settlement but you are required to be in possession of a valid UK entry clearance for this purpose and you hold no such entry clearance. You have an appeal pending against refusal by the Home Office to grant you permission to remain in the UK as the dependant of an EU/EEA national but there is no provision in the Immigration Rules for you to gain entry to await the outcome of the appeal. I therefore refuse you entry."
5. The notice indicated that the right of appeal was limited because the appellant did not have entry clearance for the purpose for which the application for leave to enter was made and the appeal was pursued on human rights grounds only. The Secretary of State did not certify the case as clearly unfounded.
6. The notice explaining the decision is dated 8 November 2014 and although it begins by reciting, correctly, the summary of the decision mentioned above in paragraph 1, in what purports to be the explanatory statement, it refers to the appeal against "the decision of the Border Force Officer to cancel leave to enter on 29/04/14 at Heathrow Airport Terminal 3." As far as we can see there has never been a decision to cancel leave to enter in this case. The appellant entered the United Kingdom in August 2011, possibly as a visitor, but intending to remain as a student if that were permissible. She made a "transfer of conditions" application with the result that she had leave to remain as a student until 30 January 2014. That leave has not been extended.
7. She became attracted to, entered into a relationship with, became pregnant by and married a man working in London who was a joint citizen of the United Kingdom and of the Republic of Ireland. They married on 15 November 2012.
8. The appellant deferred her studies for the year and their child E was born in Londonderry on 16 March 2013. It follows that the child, like his father, has British and Irish nationality.
9. On 6 February 2013 the appellant applied for an EEA residence card based on her marriage to an EEA (in this case Irish) national exercising treaty rights in the United

Kingdom. The application was refused on 29 August 2013 (the appellant says wrongly) because the appellant's husband is a British national and therefore (according to the respondent) not an EEA national for the purpose of the Regulations.

10. It is plain beyond argument under Rule 25(4) of the Immigration (EEA) Regulations 2006 that "a pending appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom."
11. However it is also plain that appealing a decision on EEA grounds does not improve a person's right to be in the United Kingdom. There is no question, for example, of leave being continued by Section 3C of the Immigration Act 1971 because the person making an EEA application is not applying to vary her leave to remain in the United Kingdom. She is asserting a right and that does not depend on her having permission.
12. The appeal against the refusal to issue a residence card was heard and dismissed by First-tier Tribunal Judge Gillespie in a determination dated 17 September 2014. We are not here to criticise that decision. In summary Judge Gillespie accepted that the appellant's husband was not an EEA national but a British national. Ms Cronin has indicated before us that the appellant does not accept that that is a correct decision. If that is the appellant's position then it is open to her to pursue an appeal (although that would surely be out of time by now) or make a fresh application. We note that she disagrees with the decision. We can take it no further.
13. Perhaps more significantly for present purposes is Judge Gillespie's consideration of the claim with reference to Article 8 of the European Convention on Human Rights. He noted that the appellant had not been removed and could make an application on human rights grounds which could be decided. Importantly Judge Gillespie did not decide that either the appellant's removal or that refusing the appellant entry clearance as a wife, was consistent with the United Kingdom's obligations under Article 8 of the European Convention on Human Rights. He deliberately, and with respect, quite possibly correctly, declined to take the matters further on the case before him.
14. According to the explanatory statement the appellant was interviewed and said that she had not considered her immigration status when she married. She was responding to the fact that she was pregnant. She did not inform the respondent that she had married.
15. She was living on her husband's income as an artist, her own income from her part-time work and a grant from the government of the United States of America.
16. The explanatory statement shows the Secretary of State was particularly concerned that the appellant had not satisfied the requirements of paragraph 24 of HC 395 requiring a person seeking to settle in the United Kingdom to have obtained entry clearance. The appellant could not satisfy the Rules and should not be treated as if she were able to satisfy the Rules.

17. At paragraph 15 in the refusal letter the Secretary of State refers to the child being ill. This is a mistake. It is not absolutely clear what led to the points being taken but it is clear that the points should not have been taken and we draw attention to this only to make plain that we have otherwise ignored it.
18. The Secretary of State referred to Appendix FM of HC 395 and expressed the view that it “would be reasonable to expect the appellant to leave the United Kingdom with [her child] until her entry clearance application had been concluded.”
19. The letter then explained that it was not a matter for the Secretary of State that the appellant had been given wrong advice (assuming that to be the case) by her earlier solicitors. The fact is that she was not allowed to remain in the United Kingdom. The letter said that the appeal would be deemed to have been abandoned under Section 104(4) of the Nationality, Immigration and Asylum Act 2002. That assertion was wrong but the concluding part of the paragraph “the appellant’s expectation to be allowed to re-enter the United Kingdom on the pretence that she has an outstanding appeal is an unrealistic one” is a correct summary.
20. The letter then refers to the appellant’s husband (described as a “partner”) having a child from a previous relationship. It is not clear if that in fact is right but nothing turns on it. Again the Secretary of State seemed to be taking a wrong point.
21. Under the heading “in **Grounds 4 and 5**” the respondent makes pejorative comments that are not justified. The respondent says:

“It is accepted that the appellant may have enjoyed some form of family and private life in the United Kingdom as a result of the time that she spent in the United Kingdom as a Tier 4 Student. Her right to family life has been afforded to her as a consequence of her non-compliance with the conditions of her entry and by breaching the Immigration Rules by getting married in the United Kingdom without having the appropriate entry clearance to enable her to do so. She now appears to be attempting to circumvent the Immigration Rules yet again by not acquiring an entry clearance prior to her arrival so that she could remain in the United Kingdom as the spouse of a person who is present and settled in the United Kingdom. It is accepted that the appellant has a child who is 1 year and 9 months of age who is both a British citizen and an Irish national. It is considered that the severity and the consequences of this interference occasioned by the appellant’s removal would not be such as to cause the decision to remove her to be disproportionate to the Secretary of State’s legitimate aim of maintaining an effective immigration control, as pursuant to **Article 8(2) of the ECHR**. The appellant would qualify for a spouse entry clearance in America that would then enable her to join her husband once she has obtained the mandatory entry clearance required. Her son E could also return to America with her causing minimal disruption to their family life. The appellant has circumvented the entry clearance requirements when she got married in the United Kingdom whilst here as a student and should not be allowed to profit from doing so again. The Immigration Rules are in place to be adhered to by all of those persons who are subject to immigration control and the appellant should not be seen to be treated any differently.”
22. The penultimate paragraph says:

“This matter is simple, the appellant was required to have a mandatory entry clearance as the spouse of a person present and settled in the United Kingdom as she did not have one thus did not qualify for leave to enter the United Kingdom. Any interference caused to the appellant’s rights to private and family life by requesting that she return to America in order to get the appropriate entry clearance required for entry to the United Kingdom is an interference that is not considered to be disproportionate to the Secretary of State’s legitimate aim to maintaining the effective immigration control”.

23. The appellant appealed to the First-tier Tribunal. She was well-supported by friends and family members but also by acquaintances who testified to the private and family life that had been established in the United Kingdom.
24. However at paragraph 88 of his decision the judge said that the Presenting Officer’s:

“... key argument was that the appellant’s Article 8 claim had already been determined by Tribunal Judge Gillespie some three months earlier on 21 August 2014. He dismissed the Article 8 claim and therefore *Devaseelan* applied.”
25. The judge was clearly impressed with the evidence that he heard and concluded that there:

“... is a strong family unit and there exist strong bonds between all family members”.
26. He also recognised strong friendships had been established. The appellant had temporarily suspended her studies in the United Kingdom but that was because of her pregnancy as was her temporary relocation to the Republic of Ireland.
27. The judge accepted that the appellant’s husband works as an art technician and also undertakes commissions and said at paragraph 91(vi):

“He has spent many years building up his reputation and contacts in this country and that all this would be jeopardised if he were expected to relocate to the United States. I am further prepared to accept that even if he moved to the United States temporarily, that there would still be some damage to his career through his absence from the United Kingdom.”
28. He also recognised the appellant’s child had established some significant private and family life outside the home. Particularly he had settled in a nursery and was taking part in “extracurricular activities designed for small children and that he has made a number of friendships.”
29. He also accepted the appellant had been given bad advice before leaving the United Kingdom to return to America.
30. The judge had said at paragraph 92 that it was not practicable for the appellant’s husband to relocate to the United States even temporarily because of the material detriment it would bring to his career and maintaining his family. He also found it not practicable to expect the appellant to leave her young British national child in the United Kingdom. He noted, unsurprisingly, that the appellant’s husband would have difficulty raising the child on his own and meeting his extensive work commitments.

31. The judge purported to address his mind to Section 55 of the Borders, Citizenship and Immigration Act 2009.
32. However he found that the appellant's husband did not earn sufficient money to satisfy the requirements of the Immigration Rules. The judge decided that the appellant had to show her husband earned £22,400, for a partner and young child but that the appellant's husband received only £12,000 as a grant plus other payments. He had not produced evidence in the way required by the Immigration Rules. At paragraph 102 the judge found it was reasonable to expect the British national child to leave the United Kingdom. It goes on:

"The appellant has established a family and private life in the United Kingdom in circumvention of the Immigration Rules. She has close family in the United States, which she has visited on a number of times since her arrival in the United Kingdom. Her son is very young. He was born in March 2013 and is less than 2 years old. I accept that one of the reasons why the appellant has found herself in her current predicament is poor legal advice given to her in the past. However, as indicated above, there is no discretion within the Immigration Rules which an appellant may rely upon where they have been the victim of poor legal advice".

33. The judge then expressed the view that there were no "insurmountable obstacles" to stop the appellant's husband leaving the United Kingdom to be with his family even though it would involve some degree of hardship.
34. At paragraph 115 the judge decided that Judge Gillespie had made no finding on the Article 8 grounds.
35. The judge went on to remind himself of Section 55 of the Borders, Citizenship and Immigration Act 2009 and Section 117B(6) of the Nationality, Immigration and Asylum Act 2002. The judge directed himself that the starting point is to decide if the appellant's application meets the requirements of the Rules. He concluded, correctly, that it does not. He then had to ask himself if there were good reasons such as compelling circumstances to make a decision outside the Rules and he decided that there were not. At paragraph 121 he said:

"I accept that the appellant has been the victim of poor legal advice in the past. Nevertheless, this is a case where the appellant has established a family and private life in this country through circumventing the Immigration Rules. There is nothing to prevent her from returning to the United States with her young child and applying for the appropriate entry clearance. I fully accept that her husband will not be able to return with her due to his work commitments in the United Kingdom and that there will be temporary interference in the family and private life which they enjoy. However, even taking into account all of the factors which she cites (including the impact separation would have upon her young child in not being able to see his father every day), any interference would be proportionate to the legitimate aim of immigration control."

36. We agree with Ms Cronin that the First-tier Tribunal clearly erred in law. An immediate and obvious concern is the First-tier Tribunal repeating the error of the

Secretary of State in deciding that the appellant had done something manipulative or improper in entering the United Kingdom as a student and marrying. There is nothing in the Rules that prevents her from marrying. The interruption in the studies as a result of the pregnancy did not result in her leave being curtailed and was an excuse clearly accepted by her college. She returned to study.

37. Further, although we do not think this is a strong point, we agree that the suggestion (it does not appear to be a finding) that the mistaken belief that the appellant abandoned her appeal against the EEA decision when she left the United Kingdom has been used to add to the idea that she has behaved improperly. She did not abandon her appeal by operation of law or at all. We emphasise that we do not see this as a major plank in the judge's reasoning but to the extent it is relevant it is a point used against the appellant and it is a bad point.
38. We also accept that the judge was wrong to talk about the financial requirements of earning £22,400. That, we think, would be the correct sum for bringing in a foreign national child and wife. The appellant's child is a British national and does not have to meet any financial requirements. He is entitled to be in the United Kingdom.
39. We find that the Tribunal should have considered EX.1. The appellant was given temporary admission in April 2014 and so had been in the United Kingdom continuously for more than 6 months by December 2014 when the First-tier Tribunal heard the appeal. She might be able to satisfy the requirements of E-LTRP.2.2 if she could come within EX.1.
40. The material part of EX.1 is EC.1.(a)(ii) which provides that:

“... it would not be reasonable to expect the child to leave the UK”.
41. We do not agree that the First-tier Tribunal erred in finding that there were no insurmountable obstacles in the path of the appellant's husband joining the family in the United States of America. There were difficulties which the judge recognised. “Insurmountable obstacles” has to be construed in a realistic way rather than a strict way but it is more than simply inconvenience. The fact is that although it would cause financial hardship and a disruption to the career the appellant's husband could join the family in America. The Tribunal was entitled to find that the degree of hardship involved on his removal did not amount to “very serious hardship” for the appellant or her husband.
42. Section 117B of the 2002 Act most certainly has to be considered. Indeed it is a statutory requirement and is weightier than the Rules. This illuminates the public interest in Article 8 cases. Section 117B(6) is plainly relevant. It states:

“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.”

43. Clearly there is a genuine and subsisting parental relationship here. The question we have to ask ourselves here, as when considering EX.1, is whether it would be reasonable to expect the child to leave the United Kingdom.
44. The child is a British citizen. His father is a British citizen and they live together as a family unit. Although they are not weighty points the child, even at the tender age of 18 months or so, has started to have a life outside the home.
45. We have reminded ourselves of the decision of this Tribunal in **Sanade and Others (British children - Zambrano - Dereci) [2012] UKUT 00048 (IAC)** and its references to the decision of the Supreme Court in **ZH (Tanzania) v SSHD [2011] UKSC 4**.
46. To say it is generally unreasonable to require a British citizen child leave his country of nationality is another way of saying that a person’s right to reside in his country of nationality is something to be respected. One of the points made in **Sanade** is that unless it is generally thought unreasonable to expect a British citizen child to leave the United Kingdom there is a risk of the absurd situation arising where a British citizen is in a less secure position in the United Kingdom than would be an EEA citizen.
47. There were clear and uncontroversial findings here that the appellant is living with her son and husband as a nuclear family unit.
48. In the absence of contrary indications small children benefit particularly from the close relationship with their mothers although a close relationship with both parents is an ideal to be respected. There is every reason to believe that this is case where the child is benefitting from a close relationship with both of his parents.
49. We do not doubt that if by reason of some tragedy the appellant were to die then her husband’s family would rally round. Similarly the evidence suggests that if the appellant had to return to the United States of America with her child then somehow she manage. She is resourceful and educated and probably has some support there but the fact that an arrangement can be made to work does not make it desirable or even reasonable.
50. We do not see how we can possibly avoid concluding that the best interests of the child are that he remains in the United Kingdom with both his parents unless they decide it is better to go somewhere else.
51. We are satisfied that it is not reasonable to expect the child to leave the United Kingdom.
52. We reach this conclusion without particular regard to the financial circumstances of the family in the United Kingdom although we do take note of the fact that although the Rules would not be satisfied for readmission this is a family that is managing

financially. The appellant's husband is in regular work even if he is not particularly well-paid (if we may respectfully comment) and the appellant has resources of her own and an ability to work.

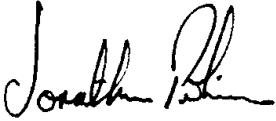
53. We decide this case on the basis that allowing the appellant to remain would not result in the family being dependent on the state.
54. We reminded ourselves of all the provisions of Section 117B. It is relevant that the appellant is an English speaker and well-able to integrate into society (there is an abundance of evidence that from her ability to get work and to study at college). We find that they would not be a burden on taxpayers. It is not a question of a private life or relationship formed with a qualifying partner when the person was in the United Kingdom unlawfully. The appellant has never been in the United Kingdom unlawfully. Clearly her status has been precarious but this is not a case based on private life. We remind ourselves that, in the circumstances we have here, the public interest does not require the person's removal.
55. We do not take this to mean that there is no public interest in removing the appellant. There is a public interest in maintaining effective immigration control but it is not a public interest that requires removal in all the facts of this case.
56. Before committing ourselves to this decision we have sat back and reflected because there is an element in it that concerns us. Parliament has set out a code in a serious and largely successful attempt to encapsulate the requirements of Article 8 of the European Convention on Human Rights within the Rules. Article 8 is a flexible instrument and it is, we find, extremely unlikely that it could be codified in a way that met every possible set of circumstances that present themselves unless there were large and undefined discretionary elements within the code.
57. We do understand that in allowing this appeal we allow a person to remain in the United Kingdom and they could not satisfy the requirements of the Rules for admission because they have not shown that they have earned sufficient money and because they are making an application within the United Kingdom that should only be made outside the United Kingdom.
58. Although the Respondent has taken bad points in the refusal letter it correctly makes the point that the appellant is seeking special treatment.
59. We have to look at this in another way. We have to look at it bearing in mind the best interests of the child. We have to do that because Parliament says that we must and the obligation under Section 55 is to the extent that there is a gradation in obligations greater than any obligation under the Rules.
60. The suggestion that a small child should be with its mother, if that can possibly be arranged in a way that is consistent with other policy, is wholly unremarkable. The suggestion that a nuclear family should be respected and upheld if possible is again unremarkable.

61. We also remind ourselves that the case is really about the child. The child cannot be held responsible for any deficiencies on the part of its parents. However we do make the point that this is not a case where the parents have shown disregard for the Immigration Rules. The worst that can be said about the appellant is that she acted in the mistaken belief that she was entitled to return to the United Kingdom to pursue her appeal. We do not know precisely what advice was given. It may be that she was told correctly that her appeal would not be abandoned by reason of leaving. It was not. It is not a point on which we have to rule.
62. The evidence also showed that the appellant went to the United States of America to be with her father who was seriously ill. The suggestion that the appellant was less than responsible in becoming pregnant and marrying without regard to immigration control is hard to resist but it cannot be made out that she has acted cynically. At worst she has not given as much thought to things as ought to have been given.
63. As is almost always the case in our experience in appeals that rely on Article 8 of the European Convention on Human Rights, we do not allow this appeal because of the rights of the appellant, although they are significant. We allow the appeal because of the rights of the appellant's British child. We find that, if the First-tier Tribunal had not erred by taking adverse points wrongly against the appellant, it would probably not have made the decision that it did. Certainly it made an unlawful decision because it directed itself wrongly in material ways.

Notice of Decision

64. For the reasons given above we aside the decision of the First-tier Tribunal and we substitute a decision allowing the appeal of the appellant.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 21 January 2016