Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15047/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 September 2017	**On 23 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS JCMM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms A Childs, Counsel

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I 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 original Appellant. This direction applies to,

amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Zahed who, in a decision promulgated on 17 November 2016, allowed the appeal of Ms JCMM. To avoid confusion I will refer to the Secretary of State as such throughout and to the appellant before the First-tier Tribunal as the claimant in this appeal.

3. The claimant is a Dominican national born on [ ] 2004. She entered the United Kingdom in July 2014 on a visit visa with entry clearance valid from 6 July 2014 until 6 January 2015. On 6 January 2015 the claimant made an application for leave to remain in the United Kingdom as the child of a parent with limited leave to remain. The Secretary of State refused the claimant's application on the basis that her parent's application under Appendix FM had been refused and therefore the claimant could not meet the eligibility criteria in E-LTRC.1.6(a), (b) and (c).

The appeal to the First-tier Tribunal

4. The claimant appealed against the Secretary of State's decision to the First-tier Tribunal. In the decision promulgated on 5 August 2016 First-tier Tribunal Judge Zahed allowed the claimant's appeal. The judge found that the claimant met the requirements of the Immigration Rules and therefore allowed her appeal.

5. The Secretary of State applied for permission to appeal against the First-tier Tribunal's decision and on 24 May 2017 First-tier Tribunal Judge Osborne refused permission to appeal. The Secretary of State renewed her application for permission to appeal to the Upper Tribunal and on 3 August 2017 Upper Tribunal Judge McWilliam granted the Secretary of State permission to appeal.

The hearing before the Upper Tribunal

6. The grounds of appeal assert that the findings of the judge are contradictory. The claimant's application was refused because her mother's leave to remain had expired. The judge notes at paragraph 9 that it was the mother's evidence that her leave had expired in June 2016 and that she had made an as yet unresolved application. However, the judge states at paragraph 10 that the respondent has produced no evidence that the mother's leave has expired. The judge then found, at paragraph 12, that at all relevant times the appellant's mother has had leave to remain. This is very odd given that it does not seem to have been in dispute that in fact her leave expired in June 2016. It was submitted that in terms of practicality it is very difficult to see how the Secretary of State can grant leave as a dependant when the person they are dependent on has no extant leave. The second ground of appeal asserts that the judge found, at paragraph 12, that he can see no reason why the mother would be refused leave but this was not a matter before him. He does not know exactly what was submitted with that application or what the Secretary of State's view is of that application. The third ground of appeal is that the judge's

reasoning in respect of sole responsibility is wholly inadequate. It is confined to paragraph 14 and completely fails to address the position of the claimant's father.

7. In oral submissions Mr Tufan submitted that the Reasons for Refusal Letter was wrong because at the date of that letter the claimant's mother's application had not been refused. Mr Tufan accepted that at the date of the application the claimant's mother had extant leave to remain in the United Kingdom valid until 24 June 2016. He submitted that the First-tier Tribunal erred in law in finding that the claimant met the requirements of the Immigration Rules because the judge erred with regard to the mother's extant leave and also because the judge failed to make any or any adequate findings on all the other requirements that the claimant had to meet in order to satisfy the Rules. He submitted that a judge has to be satisfied that all the conditions have been met before a finding can be made that the claimant has met the Immigration Rules. He submitted that the judge had looked perfunctorily at the documents merely setting out documents that were in the bundle at paragraph 5 of the decision. No findings have been made as to whether or not the claimant meets the financial requirements of the Rules. The judge has not considered whether all the relevant documents that needed to be submitted in accordance with Appendix FM or whether they were in the specified form as required by Appendix FM-SE and no specific findings had been made by the judge on these points. He submitted that the judge has not set out any or any adequate reasons with regard to the requirement that the claimant's mother had sole responsibility for her. He submitted that in E-LTRC.1.6, when looking at the eligibility criteria, you have to look at Part 8 which deals with applications to remain in the United Kingdom. With reference to paragraph 301 and 301(b) he submitted that the claimant had arrived in the United Kingdom for a six month period as a visitor. She had been living in the Dominican Republic with her grandmother. He asked the question can a mother whose child is in the United Kingdom purely as a visitor have sole responsibility.

8. He submitted that at the date of the hearing the claimant's mother did not have extant leave because it had expired by then. The Secretary of State cannot grant dependent leave when the person upon whom the dependent leave is made does not themselves have extant leave. He submitted that the suggestion that the appellant's mother had 3C leave cannot be relied upon. He referred to the case of **QI (Pakistan)** and submitted that extension of leave until the application is decided does not grant a person any specific form of leave. Mr Tufan referred to the case of **Greenwood (No. 2)**. He submitted that the judge ought not to have concluded that the appeal was in accordance with the Immigration Rules. He submitted that the judge should have found that the decision was not in accordance with the law (put this in relevant place).

9. Ms Childs submitted that the claimant's mother had extant leave by virtue of 3C. She submitted that the claimant could be granted leave in line with the sponsor's extant leave because leave could be granted for a shorter period of time than requested.

10. She submitted that with regard to the sole responsibility issue permission had not been granted by Judge McWilliam on this issue. Judge McWilliam had very specifically granted permission only in relation to the issue of extant leave.

11. Ms Childs submitted that the Secretary of State now accepts that the mother had leave at the date of the decision. In **QI (Pakistan)** the extension of the leave until the application is decided extends leave on the same terms as was current at the date of the application. She submitted that at the date of the decision the appeal should have been heard under the old Rules which enabled the judge to consider whether or not there was a breach of the Immigration Rules. She submitted that the judge does go on to look at the date of the hearing. The claimant could still be granted leave as a dependant because the 3C leave extended the leave of the parent under its original terms and therefore the claimant could have been granted leave on the basis of her parent's 3C leave. She submitted that the judge had not reversed the burden of proof but that in any event that could not be material. Reference was made to the case of **QI (Pakistan) v SSHD [2011] EWCA Civ 614** which confirms that Section 3C of the Immigration Act 1971 afforded the claimant's mother an extension of her original leave until such time as her application was decided. The Secretary of State provided evidence that the appellant's mother was refused leave to remain in 2013. However, the appellant's mother gave evidence that she subsequently returned to the Dominican Republic to make an application for leave to enter as the spouse of her husband and was granted leave to enter on 24 September 2013 to 24 June 2016. Therefore the refusal of leave to remain in 2013 did not prevent the claimant's mother from having leave at the date of the decision and the date of the hearing. The judge merely finds that they have not provided any evidence that the appellant's mother was refused leave to remain after this date which would be necessary in order for her to no longer have had leave to remain.

12. It is asserted that if the judge has erred then this error is not material. The decision of the judge was not in error. Since the hearing the Secretary of State has granted the claimant's mother leave to remain in any event which confirms that she has had continuous leave since 24 September 2013.

13. In support of the submission that permission to appeal on the ground of sole responsibility has not been granted, reference was made to the case of **VV (Grounds of appeal) Lithuania [2016] UKUT 53 (IAC)** at paragraph 23. She submitted that even if the matter were to be considered in this appeal the reasons provided are adequate. The case of **VV** sets out the necessary considerations when deciding whether a judge provided adequate reasons. Reference is made to paragraph 24 of **VV** .

14. The First-tier Tribunal Judge found that there was substantial evidence that the appellant's mother has sole responsibility at paragraph 14 of the decision. The evidence before the judge in relation to this is set out fully at paragraph 5 of his decision. It is asserted that it is not necessary for the judge to assess each document in turn in his written decision. Alternatively even if there is insufficient evidence of sole responsibility this was not material. There is ample evidence that the appellant

normally lives with her mother and not her father as set out at paragraph 5 of the First-tier Tribunal decision. Reference is made to E-LTRC.1.6(b):

> "The applicant's parent has had and continues to have sole responsibility for the child's upbringing or the applicant normally lives with this parent and not their other parent."

Therefore it is submitted that any errors in terms of sole responsibility would not be material. With regard to the submission that the claimant might not be able to demonstrate other parts of the Rules were met, she submitted that the Secretary of State has not provided any evidence or raised that issue. At paragraph 5 of the decision the judge sets out all the evidence that was considered.

15. An application for costs against the respondent was made. It is submitted that the Secretary of State has the capacity to check whether the appellant's mother did have leave to remain before submitting her grounds. It is asserted that the grounds appear to show that the respondent checked the status of the appellant's mother's application. This check would have shown that the claimant's mother had 3C leave at the time of the hearing as set out above. It is asserted that it is unacceptable that the respondent would submit grounds that they knew or should have known was not a material error. Reference is made to the case of **Nixon (Permission to appeal: grounds) [2014] UKUT 368 (IAC)** at paragraph 9 where it was found that:

> "There can be no substitute for properly tailored and carefully crafted grounds of appeal which clearly reflect the unique facts, features and issues pertaining to the individual case."

16. It is asserted that the claimant has alerted the respondent to the error in the Rule 24 response and provided proof of the claimant's mother's immigration status. The Secretary of State is covered by the Civil Code of Conduct which requires them to set out the facts and relevant issues truthfully and correct any errors as soon as possible. This has not been complied with. Furthermore, it was incumbent on the respondent to review the grounds of appeal after receiving the Rule 24 response as per **VV (Grounds of appeal)** where Upper Tribunal Judge McCloskey set out the following:

> "(3) Where permission to appeal is granted, an Appellant should review whether the grounds of appeal are genuinely arguable in light of any response from the Respondent to the appeal. Whether or not the original grounds are pursued it is generally inappropriate to seek to raise new grounds of appeal close to the date of the hearing if for example that would cause unfairness to the Respondent or result in the hearing being adjourned."

17. In light of the above it is submitted that the Secretary of State's conduct is unreasonable. The claimant has had to defend and fund an appeal brought by the Secretary of State on an erroneous basis.

Discussion

18. The First-tier Tribunal Judge set out at paragraph 5 the documents that had been submitted. The judge set out correctly, at paragraph 8, that in immigration appeals the burden is on the appellant and she must discharge that burden on the balance of probabilities. This was a very short decision extending to only 14 paragraphs. With regard to the confusion regarding whether or not the claimant's mother had extant leave the judge sets out:

> "6. The respondent has submitted a bundle of documents for this appeal which includes a printout of the Home Office database for the appellant and her mother and the appellant's mother's entry clearance details that show that entry clearance was issued to her for 33 months from 24th September 2013 to 24th June 2016. I have taken all the documents into account in reaching my decision.
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> …
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> 9. In evidence before me the appellant's mother claimed that she had been granted entry clearance as a partner and entered the UK in October 2013, which expired in June 2016. She had made an application for further leave to remain and had put in her husband's documents that show that his business makes profits in excess of £34,000. The appellant's mother stated that her daughter's father had not had any contact with her since 2006 and that her mother was looking after her daughter. However her mother had slipped and disc and was no longer able to look after her daughter.
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> 10. The decision letter is dated 31st March 2015 and thus the appellant falls into the old regime of grounds of appeal to include that the decision is not in accordance with the Immigration Rules. The sole reason that the respondent refused the appellant's application has been based on the fact that the appellant's mother/parent does not have leave to remain. I find that the respondent has produced no evidence of this.
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> 11. I note that the respondent has produced an extract from a database search which shows that leave to remain was refused in February 2013, but I note that the appellant's mother explained that and that after the refusal she went back to Dominica and applied for entry clearance as a spouse from there which I have seen through the respondent's documents was issued in September 2013. I note that there are no other entries that the appellant's mother has been refused leave to remain in 2015 or in 2016.
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> 12. I find that the appellant's mother as at the date of application, decision and date of hearing at all other relevant times has had lawful leave to remain in the UK as the spouse of a British citizen.

19. The finding of the judge was correct (although it is not clear if he considered that the reason, at the date of the hearing, that she had lawful leave to remain was because it had been extended by section 3C). As became clear during the course of the hearing the claimant's mother's leave was extended by virtue of section 3C because she had made an in time application to vary her leave. Mr Tufan accepted that the reasons for

refusal letter was incorrect to state that the claimant's parent's application had been refused. There was a refusal in February 2013 but limited leave to enter was subsequently granted. There is no error of law with regard to this ground of appeal.

20. With regard to the argument that leave could not be granted whilst the outcome of the claimant's mother's application was unknown I accept Ms Child's submission that a shorter period of time could be granted and that in accordance with the decision in **QI (Pakistan)** section 3C (paragraph 14) '*The leave as extended is not a new or different species of leave; the existing leave is extended'* so leave could be granted on the basis of the mother's original leave.

21. The second ground of appeal falls away as, even if it was an error for the judge to consider what the outcome of the claimant's mother's application was likely to be, it is not material as the mother had extant leave.

22. The third ground of appeal is that the judge failed to give adequate reasons regarding the finding on sole responsibility. The claimant argues that permission to appeal has not been granted in respect of this ground of appeal. Upper Tribunal Judge McWilliam did not refuse permission on grounds 2 or 3. There was no specific restriction on the grant of permission. If Judge McWilliam intended to refuse to grant permission on those grounds a specific indication was necessary.

23. The claimant asserts that the Secretary of State has not produced any evidence that this issue was raised at the First-tier Tribunal hearing as a substantial issue between the parties referring to **VV (Grounds of appeal).** This was a very short decision and it is not clear from the decision itself what submissions were made as there is no record of them within the decions. However, it is clear that this issue was raised by the claimant's mother as is evidenced by her witness statement where she sets out in detail why the claimant's grandmother can no longer look after her, how her biological father has played no role in her upbringing and how there is no other person who can look after her (paragraphs 7-10 and 12). The judge simply states '*I have also seen substantial evidence that the appellant's mother has sole responsibility for the appellant and that her grandmother was looking after her which she can no longer do'*. In the grounds it is argued that the judge fails to address the position of the claimant's father. This was a case of a child entering the UK purely as a visitor for 6 months. She had been living for a considerable period of time with her grandmother before entry. With that background on the face of it this reasoning could be considered to be inadequate sufficient to amount to an error of law. The judge does not set out in any detail anywhere in the decision whether the evidence was disputed by the Secretary of State in cross examination or in submissions. One has to infer that the judge accepted the claimant's mother's evidence and that the documentary evidence was also accepted. However, I consider that the lack of reasoning is on the borderline as there was evidence before the judge, in the form of an affidavit from the claimant's father that her mother has sole responsibility, evidence that the claimant's grandmother has a slipped disc and is unable to look after her, together with the witness statement and oral evidence of the claimant's mother which was set out at paragraphs 5 and 9 of the decision. The Secretary of State has not indicated that this

evidence is insufficient to discharge the burden of proof. I consider that, although I accept that the reasons for reaching the conclusion are not clear, the judge did have ample evidence to reach the conclusion and had set out what that evidence was earlier in the decision so that the Secretary of State can ascertain the reasons for the finding from reading the decision as a whole.

24. The judge found that the claimant met all the requirements of the Immigration Rules and allowed the appeal under the Immigration Rules. Mr Tufan argued at the hearing before me that the judge had not made findings on the financial requirements of the Immigration Rules including whether the evidence was in the specified form. This was not raised in the grounds of appeal and no application to amend the grounds of appeal was made. I have not considered these arguments. In any event the claimant's mother has been granted limited leave to remain as a partner.

25. An application was made for a wasted costs order. The basis of the application is that the Secretary of State has acted unreasonably in submitting grounds that they knew, or should have known, were not material errors. The claimant's representative alerted the Secretary of State to the error in the rule 24 response. The Secretary of State has not corrected any errors after receiving the rule 24 response and therefore such conduct is unreasonable.

26. Section 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008,provides:

> *10.—(1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) in proceedings [transferred or referred by, or on appeal from,] another tribunal except—*
>
> *(3) In other proceedings, the Upper Tribunal may not make an order in respect of costs or expenses except—*
>
> *….*
>
> *(c) under section 29(4) of the 2007 Act (wasted costs) [and costs incurred in applying for such costs];*
>
> *(d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.*"

27. There must be a casual nexus between the conduct complained of and the costs incurred. It is for the claimant to demonstrate that the behaviour is unreasonable. In **Ridehalgh v Horsefield [1994] Ch 205** the court set out what unreasonable means in the context of wasted costs (paragraph 232 d-h):

> **Unreasonable** also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives

> would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable …….'

28. There has been confusion about the claimant's mother's leave - not just on the part of the Secretary of State. In the claimant's solicitor's letter of 29 July 2016 it is stated that her 'leave to remain **expired** on 24 June 2016'. Her witness statement, as referred to by the judge, says that her leave **expired** on 24 June 2016. In granting permission Upper Tribunal judge McWilliam considered that it was arguable that the claimant's mother did not have leave to remain and arguable that the judge erred. There was no discussion or analysis of the basis of the claimant's mother's leave after it had been said by her and her representative to have expired on 24 June 2016 (i.e. pursuant to section 3C of the Immigration Act 1971) in the First-tier Tribunal's decision.

29. Further, there were also other grounds being pursued. The threshold is described in **Cancino (costs – First-tier Tribunal – new powers) [2015] UKFTT 00059 (IAC)27** as being reserved to the clearest cases. A party being wrong or misguided is not the same as being unreasonable.

30. I do not consider that the Secretary of State has acted unreasonably in this case. No order as to costs is made.

Notice of Decision

The appeal of the Secretary of State is dismissed. There were no material errors of law in the First-tier Tribunal such that it should be set aside. The decision of the First-tier Tribunal stands. No order as to costs is made.

Signed P M Ramshaw Date 22 October 2017

Deputy Upper Tribunal Judge Ramshaw