Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12037/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 12 March 2019	**On 25 April 2019**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MBW
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Rosemarine of Counsel
For the Respondent: Mr A Tan, Presenting Officer

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Unless and until a Tribunal or court directs otherwise, the appellant herein is granted anonymity. No report of these proceedings shall directly or indirectly identify the appellant or any member of the appellant's family. Failure to comply with this direction could lead to contempt of court proceedings

DECISION AND REASONS
(Decision given orally on 12 March 2019)

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Setting aside the First-tier Tribunal's decision

1. This is an appeal brought by MBW against the decision of the First-tier Tribunal (First-tier Tribunal Judge Cox) of 24 August 2018, in which the First-tier Tribunal dismissed an appeal brought by the appellant against a decision of the Secretary of State for the Home Department dated 16 May 2018 refusing the appellant's human rights application.

2. The appellant is a national of the Philippines born in 1990. She entered the United Kingdom lawfully as a visitor in 2017 and subsequently applied, in time, for leave to remain on the basis of her family life with her husband ("the sponsor") and children. The sponsor is a British citizen, born in March 1985. He has a diagnosis of Loeys-Dietz Syndrome. The couple have two British citizen children (born in 2013 and 2014 respectively). The appellant, sponsor and children previously lived together in the Philippines prior to the sponsor and children coming to the UK in 2016.

3. The appellant obtained permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision, such permission being granted by Upper Tribunal Judge Rintoul in a decision of 19 December 2018. The operative paragraph of that decision reads as follows

> "It is however arguable that the judge erred in concluding that it was reasonable for the father to relocate as it appears his condition has worsened such that, owing to aortic aneurysms and recent open-heart surgery-see letter from MP. This arguably infects the conclusions with regards to Section 117B(6). Permission is therefore granted only in respect to Article 8 issues."

4. The preceding paragraphs of Judge Rintoul's decision reject the contention that the children would be compelled to leave the EU if the appellant were denied leave to remain and, consequently, reject the contention that Zambrano has any application to the instant scenario.

5. The next relevant event is the 'Rule 24 response' from the Secretary of State, dated 17 January 2019, which materially reads as follows

> "2. The respondent does not oppose the appellant's application for permission to appeal. At paragraph 23 the FTIJ finds that the appellant has two British children. In light of the Secretary of State's policy guidance confirming that a British child is not expected to leave the EU it is accepted that the FTIJ's findings at 36, that it is reasonable to expect the children to leave the UK and return to the Philippines, constitute a material error of law.
>
> 3. The Secretary of State respectfully invites the Tribunal to set aside and remake the FtT determination allowing the appeal."

6. On the basis of the above concession which Mr Tan did not demur from at the hearing, and with the consent of the parties, pursuant to rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I set aside the decision of the First-tier Tribunal.

Re-making of the decision

7. On the basis of the aforementioned concession, and again with the consent of the parties, I remake the decision on appeal myself allowing the appeal on Article 8 grounds on the basis that the application of Section 117B(6) leads to the conclusion that it is not reasonable for the British citizen children to leave the United Kingdom and as a consequence there is no public interest in requiring the appellant to leave the United Kingdom.

Costs

8. The aforementioned conclusion on the substance of the appeal is not the last of the issues I must determine. In correspondence with the Secretary of State and ultimately with the Tribunal, the appellant seeks orders for costs and compensation.

9. Dealing with these in turn, the Tribunal's power to award costs in statutory appeals differs from that in its judicial review capacity in that it is restricted in statutory appeals to certain scenarios set out within section 29 of the Tribunals, Courts and Enforcement Act 2007, as supplemented by rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

10. These provisions provide that the Upper Tribunal (and the First-tier Tribunal in relation to the former) has jurisdiction to award a party "wasted costs" which is defined, *inter alia*, *as "any costs incurred by a party …as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative…"*.

11. The assertion made on behalf of the appellant is that the Secretary of State has acted unreasonably in defending this appeal throughout the entirety of the proceedings; indeed, the appellant goes as far as saying that it was unreasonable for the Secretary of State to reject the appellant's application in the first place.

12. I consider only the issue of wasted costs within the Tribunal proceedings rather than those incurred prior to the appeal being lodged.

13. There are numerous authorities illuminating the meaning of the word unreasonable in the context of wasted costs, the seminal authority being that of Ridehalgh v Horsefield [1994] CH 205 in which, at [32] the court concluded that unreasonable conduct could be described as:

> "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 a 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 reflecting on a practitioner's judgment but it is not unreasonable."

14. The Tribunal has itself given guidance on the award of costs in the statutory appeal context. The first decision seeking to give such guidance is Cancino (costs – First-tier Tribunal – new powers) [2015] UKFTT 00059. More recently, guidance was given by the President in Thapa and Others (costs: general principles; s.9 review) [2018] UKUT 00054.

15. Both of these decisions identify that concessions have an important part to play in contemporary litigation, and in particular in the overburdened realm of immigration and asylum appeals. Thapa particularly warns that the exercise of the Tribunal's cost powers should be undertaken with significant restraint and identifies the difference between the Tribunal's cost powers in judicial review and those in its appeal jurisdiction.

16. I have considered and applied the above authorities when coming to my conclusions.

17. Turning back then to the instant case, the appeal was ultimately allowed as a consequence of the concession found in the rule 24 response, which was confirmed by Mr Tan at the hearing. At the core of that concession is the Secretary of State's *"policy guidance confirming that a British child is not expected to leave the EU"*. Mr Tan indicated that the policy guidance was last issued in December 2018 (i.e. prior to the rule 24 response), however, upon being pressed by the Tribunal he accepted that the terms of this aspect of the guidance have always been in place – by which I take Mr Tan to mean that it has been the Secretary of State's policy throughout the life of the instant appeal proceedings.

18. In defending the application for costs Mr Tan relied upon the terms of the decision letter of May 2018 in support of the assertion that despite the Secretary of State's policy guidance being materially the same at all relevant times, it was not guidance which was thought to apply to this appeal. The Secretary of State did not engage in the decision letter with the issue of whether it was reasonable to expect the British citizen children to leave the United Kingdom. It is said that this is because the children are entitled to remain in the United Kingdom in the care of the sponsor as a consequence of the fact that they are British citizens.

19. Mr Tan further reminded the Tribunal that section 117B(6) of the 2002 Act is not a provision that the Secretary of State is bound to consider. The consequence of this is, submits Mr Tan, that any failure by the Secretary of State to consider and apply section 117B(6) is irrelevant for the purposes of deciding whether wasted costs should be awarded. I do not accept that is so.

20. The statutory provision reflects Parliament's view of where the public interest lies in any given case. The Secretary of State must take the same view of the public interest whether or not this means directly applying the statutory provisions. In any event, in circumstances where there is a

pending appeal before the Tribunal, the Secretary of State must be aware that the Tribunal is bound to apply section 117B(6) and therefore should address his mind to it at this stage.

21. Given the timeline I have set out above, it is difficult to understand what triggered the change of approach by the Secretary of State in this case. Mr Tan drew attention to paragraph 36 of the First-tier Tribunal's decision (as the rule 24 response does) in attempt to explain this. Therein the First-tier Tribunal engaged with section 117B(6) and concluded that it would be reasonable to expect the British citizen children to leave the United Kingdom. It is said by Mr Tan that the terms of this paragraph triggered the Secretary of State's consideration of this same issue and thereafter required him to follow his policy.

22. If this is so then this in my view this only serves to emphasise the fact that the Secretary of State could have considered this issue at an earlier juncture and that had he done so he would have come to a conclusion favourable to the appellant.

23. The further explanation provided by Mr Tan for the absence of a concession at an earlier stage of proceedings is, as far as I understand it, twofold. First, it is submitted that because the decision of the First-tier Tribunal was undertaken on the papers, the Secretary of State did not have opportunity to make the concession. Second, in any event, it was the Secretary of State's position that that section 117B(6) was not operative in this appeal because the British citizen children could remain in the United Kingdom.

24. Neither of these explanations bear scrutiny. The fact that an appeal hearing is undertaken on the papers does not absolve the Secretary of State of the responsibility of considering the appeal and applying his mind to the terms of the policy guidance. As to the latter explanation, this fails to incorporate a key ingredient, what changed between the hearing before the First-tier Tribunal and the drafting of the Rule 24 response? In any event, the explanation is legally hopeless because section 117B(6) does not on its face differentiate (or discriminate) as between those British citizen children who will remain in the UK and those who will not.

25. In the particular circumstances of this case, I conclude that that the Secretary of State's conduct in not making the concession before the First-tier Tribunal that was belatedly set out in the Rule 24 response was unreasonable, within the meaning given to that term in the cases set out above. I therefore conclude that the Secretary of State should pay the costs the appellant accrued in defending the appeal before the First-tier Tribunal and the Upper Tribunal. If necessary, I sit as a First-tier Tribunal judge in order to make the decision in relation to the costs in that Tribunal.

Damages

26. In pre-hearing correspondence, and again at the hearing, the appellant put forward a claim for "compensation" for, amongst other things, loss of earnings arising from the failure of the Secretary of State to grant her leave earlier.

27. I have carefully considered Mr Rosemarine's detailed skeleton argument on this issue, which separates the issue of liability and jurisdiction. Although the skeleton argument deals with the issue of liability first, inevitably it is the issue of the Tribunal's jurisdiction which I must first determine.

28. In my conclusion, the Upper Tribunal does not have jurisdiction to determine the issue of "compensation"/ damages when sitting in its appeal capacity. In his skeleton argument and at the hearing today Mr Rosemarine asserts that nothing in the Tribunals, Courts and Enforcement Act 2007 prohibits the Tribunal sitting in its appellate capacity from awarding compensation. He asserts that the Upper Tribunal has the powers of the High Court and can quash decisions of governmental bodies. Emphasis is put on the well-known decision of the Court of Justice in Francovich

29. As alluded to already, I reject Mr Rosemarine's submissions. Whilst I accept there is nothing in the 2007 Act which explicitly bars the Tribunal from considering the issue of compensation, the Tribunal is a creature of statute and the 2007 Act is its founding father. The 2007 Act does not provide the Upper Tribunal with jurisdiction to award damages/compensation when sitting its appellate capacity, this being in direct contrast to the jurisdiction the 2007 Act provides the Upper Tribunal when it is sitting in its judicial review capacity. Reading the 2007 Act in context with the Rules I do not accept that it was Parliament's intention to provide the Upper Tribunal with jurisdiction to award compensation and damages in its appellate jurisdiction. The decision in Francovich cannot provide the Upper Tribunal with jurisdiction. Insofar as that decision suggests that damages may be available for a breach of EU law, it is a matter for domestic legislation as the form any remedy will take. Parliament has not entrusted the Upper Tribunal with such a task when sitting in its appellate capacity.

Notice of Decision

The decision of the First-tier Tribunal is set aside

The decision is re-made allowing the appellant's appeal on the basis that the Secretary of State's decision leads to a breach of Article 8 ECHR

I award the wasted costs of the proceedings to the appellant – to be payable by the Secretary of State in a sum to be assessed by a Costs Judge, if not agreed.

The application for damages/compensation is refused.

Signed

Mark O’Connor
Upper Tribunal Judge O’Connor