Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16090/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 June 2019	**On 15 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

CARLA [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Jaquiss, counsel instructed by Farani Taylor solicitors
For the Respondent: Ms Jones, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of Miss Carla [B], who is a national of Bolivia born on 9 June 1983. She arrived in the UK in September 2006 as a visitor and thereafter overstayed. She made an application for leave to remain on the basis of her marriage to Mr [EV] on 13 February 2018 and this application was refused in a decision dated 18 July 2018.

2. The Appellant appealed against that decision and her appeal came before Judge of the First-tier Tribunal Eldridge for hearing on 22 February 2019. In a decision and reasons promulgated on 14 March 2019, the judge dismissed the appeal, finding that

although the Appellant was effectively the mother of her husband's two children born on 4 January 2002 and 19 February 2004 respectively, that the interest of immigration control outweighed the private interests of the family and thus the decision was lawful and proportionate.

3. Permission to appeal was sought in time on the basis that:

   (i) The FTTJ at [31] accepted that the Appellant is for all practical purposes now the mother of these two boys, their own mother having given up any responsibility for them in practical terms many years previously and in legal terms more recently with the signing of the power of attorney to that effect.

   (ii) On this accepted fact the concern of the FTT is then whether the Article 8 rights of any of the family members would be disproportionately affected by dismissing the appeal (Beoku-Betts).

   (iii) At [12] of the determination the FTTJ notes that one of the principal issues to the Article 8 assessment is whether it is proportionate for the two children to return to Bolivia and whether they were at a pivotal stage academically.

   (iv) Whilst the children are not qualifying children for the purposes of the Rules or statute, the judge quite rightly considers the impact of dismissing the appeal on their best interests at [45]. It was submitted that the judge erred in his application of the EV (Philippines) principles [2014] EWCA Civ 874 at [39] finding at [40] incorrectly that neither is in the immediate runup to public examinations whereas both boys are in fact well-established in the course of undertaking GCSE and A-levels.

   (v) It was further submitted that there were contradictory findings. At [45] the judge conclusively accepts *"from the point of view of these two children they would continue their education here and live with their father and the Appellant in a safe and loving family unit. It is probably in their best interests if they do so"*. Thus the only possible rational outcome for a proportionality assessment was to allow the appeal.

   (vi) It was further submitted that the Tribunal's conclusion at [47] is inadequately reasoned and irrational for this reason. All the more so given that the judge accepted at [46] that this is not a Chikwamba case and it could not be said entry clearance would definitely be granted. Consequently the decision to dismiss the appeal disproportionately breached the family life rights of the Appellant and her stepsons.

4. Permission to appeal was granted by First-tier Tribunal Judge Gumsley on the basis:

> *"I am satisfied that it is arguable that the judge erred in law. In light of the findings of the judge at [31] [32] [38] [45] and [47] it is arguable that the judge's proportionality assessment was flawed, that the judge's decision was irrational and/or that the reasons for the decision were inadequate."*

5. A Rule 24 response was submitted, dated 14 June 2019, which asserted that the grounds amounted to no more than a disagreement with the judge's findings of fact and that in essence that the Appellant was choosing where to conduct family life.

Hearing

6. At the hearing before the Upper Tribunal, Ms Jaquiss on behalf of the Appellant sought to adduce evidence that had been handed in on the day of the hearing from the children's schools. This shows that the younger child G, was due to take his religious education GCSE this year and that the older stepson E, was in the first year of his A-levels. She pointed out that at [17] of the First tier Tribunal's decision, the Presenting Officer in the First-tier Tribunal accepted that they were on the approach to public examinations. Ms Jaquiss submitted that, essentially, it was the Appellant's case that the judge had erred in finding the children were not at a pivotal stage of their education. At [40] the judge held "*Neither is in the immediate run-up to public examinations but they are each of them well into the first of the two years before their GCSEs or A-levels. Both have aspirations of attending university here*".

7. Ms Jaquiss submitted that the judge had further made contradictory findings in that at [45] he made the finding it was probably in their best interests to continue their education in the UK and to live with their father and the Appellant; and that the conclusion to the contrary at [47] that the interests of immigration control outweigh the private interests of his family were inadequately reasoned and irrational in light of the fact that that conclusion was contrary to what the judge had found would be in the children's best interests.

8. In her submissions, Ms Jones invited me to read the whole of [40] and the judge's consideration there of EV (Philippines). The judge there held "*As with the two boys here, the children in EV were neither British citizens nor settled nor had they been in this country for at least seven years*". Pausing there, it became apparent that that was a material error of fact as the Appellant's stepsons were given indefinite leave to enter the UK when they arrived in 2016. Thus the judge erred in fact in finding that the two boys are not settled. She submitted that the children had lived most of their lives in Bolivia: see [31], [41] and [47], and that most of their education had taken place there. She submitted that there was no material error of law as the judge had taken into account the relevant factors and that this was not a case where the children had resided in the UK for seven years; they were not qualifying children and had only been in the UK for 30 months at that time.

9. In reply, Ms Jaquiss said the appeal was heard on 22 February 2019 and G had his first exam on 13 May 2019. This was only a matter of months and so it could properly be termed as being in the immediate run-up to important public examinations. She accepted that the findings of the judge in relation to the children's history in Bolivia had not been challenged and that none of the links to any family in Bolivia would assist the boys in terms of mitigating the effect of disruption of not being able to take those important public examinations.

Findings and Reasons on the error of law

10. I found material errors of law in the decision of the First-tier Tribunal Judge for the reasons set out in the grounds of appeal and in light of what I find to be a material error of fact at [40] in relation to the immigration status of the Appellant's stepsons. It was agreed that the decision could be remade in the Upper Tribunal without the need for further oral evidence, in light of the evidence before the First-tier Tribunal and an additional supplementary bundle which includes, amongst other things, applications for naturalisation made on behalf of the two stepsons, who have now completed the three year qualifying period to render them eligible for British citizenship.

Re-making

11. In her submissions, Ms Jones pointed out that the presidential decision in JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) remains the current position in law. She noted the children had applied for naturalisation however the decision in ZH (Tanzania) [2011] UKSC 4 was not a trump card, albeit their best interests were clearly a primary consideration. She submitted that little weight should be given to the Appellant's private life because she formed her relationship with her husband at a time when she did not have leave to remain. However she was not pressing that issue in light of the current jurisprudence. She invited me to dismiss the appeal.

12. In her submissions, Ms Jaquiss sought to rely on her skeleton argument, which is dated 25 June 2019. However, this does not make reference to the decision in JG (op cit) because they are not qualifying children. In relation to the weight to be attached to the Appellant's private life, she sought to rely on the judgment of the Supreme Court in Rhuppiah [2018] UKSC 58 with the reference there to flexibility regarding section 117B(4) of the NIAA 2002 at [99] to [100]. She submitted that the jurisprudence, *cf.* EV (Philippines) [2014] EWCA Civ 874 and Azimi-Moayed [2013] UKUT 00197 (IAC) made clear that the stage of education reached by children who are affected is relevant. She submitted that the Appellant's stepsons were now at a pivotal stage in their education. The Appellant is to all intents and purposes their mother. There is now a power of attorney to that effect at pages 42 to 49 of the Appellant's bundle. The children were previously brought up by their paternal grandparents, their biological mother having been absent from their lives for a very long time. In terms of the current family set up, the Appellant stays at home and looks after the children whilst their father works. This is clear from the witness statement of her husband at [18] of page 15. There was also evidence from the Appellant's two stepsons at pages 70 to 71 who state that the Appellant has been like a mother to them since they came to London. She has always been there for them and she was the person to whom the younger child turned to when he was mugged.

13. Ms Jaquiss submitted that the children have both made applications to register as British citizens. There is no reason to doubt that those applications will not be granted. She submitted it was also relevant to the proportionality balancing exercise

that the Appellant's husband earns over the minimum income requirement and this is made clear from pages 9 to 41 of the supplementary bundle. He now has his own cleaning business as well as being employed and his combined projected income was £23,646. This is projected because he only started his self-employment at the beginning of 2009. She invited me to find that the balance falls in favour of the Appellant and to allow the appeal.

Findings and reasons

14. The basis of the refusal decision dated 18 July 2018 is that the Appellant's stepsons are not qualifying children and there are no insurmountable obstacles to the Appellant's husband returning to Bolivia: EX1(a) and (b) of Appendix FM. It was not considered that the Appellant met the requirements of paragraph 276ADE of the Rules nor that there were exceptional circumstances meriting the grant of leave outside the Rules.

15. In light of the fact that the Appellant is an overstayer and her stepsons are not, as yet, qualifying children, it was not contended that the Appellant is able to meet the requirements of the Appendix FM of the Immigration Rules. Thus the issue is whether there are exceptional circumstances, which would render refusal a breach of Article 8 because it would result in unjustifiably harsh consequences for the Appellant, her husband and stepsons. It is not disputed that there is a shared family life and that the Appellant has a parental relationship with her stepsons.

16. Given that this is a human rights appeal, the relevant date is the date of hearing before the Upper Tribunal. At that time it was apparent that there had been a change in circumstances in that the Appellant's stepsons have on 11 June 2019 made applications for registration as British citizens. Whilst no decision had yet been reached by the Respondent in respect of these applications, Ms Jones took the pragmatic position that, in the absence of any known countervailing circumstances, it was likely that the applications would be granted and that, in light of the current jurisprudence *cf. JG* (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) the appeal would fall to be allowed. However, the position at the date of hearing is that the Appellant's stepsons are not, as yet, British citizens.

17. The focus of the submissions by Ms Jacquiss was that the Appellant's stepsons are at a pivotal stage in their education in that G is half way through his GCSE course and is due to take his GCSEs next Spring and early Summer and has already taken a GCSE in Religious Education. E is half way through his A level course and is due to take his A levels next Spring and early Summer. Further, E has had offers to study at British Universities.

18. In *EV (Philippines)* [2014 EWCA Civ 874 the Court of Appeal per Lord Justice Christopher Clarke held at [36] that one of the material factors in the assessment of proportionality is "*the more advanced (or critical) the stage of his education … and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales.*"

19. Clearly, whilst both boys have only resided in the United Kingdom and have been pursuing their education here since October 2016, it would be very disruptive for them to have to leave at this particular stage, prior to completing their respective exams. I find it would be contrary to their best interests for them to leave the United Kingdom.

20. I have gone on to consider whether it would be proportionate or whether it would result in unjustifiably harsh consequences for this family if the Appellant were required to return to Bolivia to apply for entry clearance to return as a partner. The Respondent did not take issue with the Appellant's ability to meet the suitability and eligibility requirements of the Rules in the refusal decision, however, it was the case at the First tier Tribunal hearing that the requirements of Appendix FM-SE have not been shown to be met in respect of the documentary evidence of the Sponsor's self-employment.

21. The Appellant now seeks to rely on a supplementary bundle of evidence, which shows that he earned £16,146 as an employee in four cleaning jobs during the last tax year from April 2018 to April 2019 and that he also commenced self-employment in January 2019. The employed taxable income is evidenced by HMRC documentation at pages 9-10, a P60 at page 11 and payslips at pages 12-21. There are also invoices for his self-employment cleaning services at page 22, £720 dated 10.2.19; £680 dated 10.3.19; £650 dated 10.4.19 and £650 dated 10.6.19 and a letter from John Martin There is also a letter from Christian Lewis, accountant, dated 17 June 2019 stating that his estimated income for the year is £7500 and that they are due to complete his tax returns by 31 January 2020. However, in terms of the last tax year, on the evidence before the Upper Tribunal, the Sponsor's income is £16,146 employment plus 2 months income in self-employment of £720 and £680 is £17,546, which is under the minimum income requirement.

22. However, I am prepared to accept that it is reasonably likely that the Sponsor will meet the minimum income requirement for the current tax year from April 2019, if his self-employment and employed income remain the same. However, he cannot currently meet the specified requirements set out in Appendix FM SE, or the minimum income requirement in relation to the past tax year which I find means that any application for entry clearance would be likely to be refused until after April 2020 or until such time that the Sponsor is able to demonstrate that he meets the requirements of the Rules and Appendix FM SE.

23. I have also taken account of the public interest considerations set out in section 117B of the NIAA 2002. The First tier Tribunal Judge accepted that the Appellant speaks English and that she is financially independent, through her husband but that these are neutral factors. It is the case and I find that she developed her relationship with her husband at a time when she was residing unlawfully in the UK as an overstayer. As to section 117B(6), her stepsons are not currently qualifying children, however, it would be artificial to fail to take into consideration the fact that they have applied for registration as British citizens and thus are likely to very shortly become qualifying children. I have already found that it would not be in their best interests to leave the

United Kingdom given the stage they have reached in their education. I further find in light of the evidence that such applications have been made, that it would not be reasonable to expect them to leave.

24. It follows in light of my finding above, following JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) which itself follows the judgments in MA (Pakistan) & Ors v Upper Tribunal [2016] EWCA Civ 705 and KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53 that the Appellant's appeal succeeds because the public interest does not require her removal.

Notice of Decision

I find material errors of law in the decision of First tier Tribunal Judge Eldridge. I set that decision aside and re-make the decision. The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed *Rebecca Chapman* Date 9 July 2019

Deputy Upper Tribunal Judge Chapman