IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30899/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16th December 2015	**On 19th January 2016**

Before

UPPER TRIBUNAL JUDGE SOUTHERN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

E. T. E.
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Home Office Presenting Officer
For the Respondent: Mr C Jacobs, Counsel instructed by Bureau for Migrant Advice & Policy

DECISION AND REASONS
(Given orally on 15 December 2015)

1. The appellant, Miss E.T.E., who is a citizen of St Lucia, is a 4 year old girl. She was born in St Lucia and lived with her mother and grandmother after her parents' relationship had broken down. Her father formed a new relationship with a lady who is a British citizen and in 2012 they were married. Her father secured leave to enter the United Kingdom on the basis of that marriage and in May 2013 he moved to the United Kingdom and is now settled with her, living as man and wife in the United Kingdom.

2. Meanwhile the health of the appellant's mother, who for some time had suffered from a progressive condition, was deteriorating. That meant that the appellant's grandmother continued to care both for the appellant and for her mother. In December 2013 the appellant was brought to the United Kingdom by a family friend. Both had entry clearance as visitors. The intention was a respite visit but after their arrival the health of the appellant's mother deteriorated further as a result of which an application was made for the appellant to be granted leave to remain with her father and stepmother so that they could live together as a family unit in the United Kingdom.

3. The application was refused in a decision made by the respondent on 16th July 2014, the respondent's position being that there was no good reason why the applicant could not return to St Lucia where arrangements for her to be cared for could continue as before.

4. The appeal came before Judge Khawar on 2nd June 2015 and he allowed the appeal on the basis that the appellant met the requirements of the Immigration Rules and so was entitled to a grant of leave. He allowed the appeal also on human rights grounds giving no real separate reasons for so doing.

5. The respondent has been granted permission to appeal effectively on two grounds, the first being that the judge had failed to appreciate the threshold of the legal test to be applied and therefore had taken an approach that was insufficiently rigorous, and secondly that in allowing the appeal under Article 8 he had given inadequate reasons. In fact it is hard to see that any reasons really were given at all.

6. The Rule in play with which we are concerned is E-LTRC.1.6, which I need to set out. The requirement is as follows:

> 'One of the applicant's parents (referred to in this Section as the 'applicant's parent') must be in the UK and have leave to enter or remain or indefinite leave to remain, or is at the same time being granted leave to remain or indefinite leave to remain, under this Appendix (except as an adult dependent relative), and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care.'

It has not been suggested that the final limb of that requirement is in issue.

7. In advancing the Secretary of State's case Mr Jarvis relies upon the reported decision of **Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088 (IAC)**. This is a decision by Blake J. sitting with Upper Tribunal Judge Dawson. At paragraph 34 the Tribunal said this about the test which was in play in this case, or in analogous terms in any event:

> "In our view, 'serious' means that there needs to be more than the parties simply desiring a state of affairs to obtain. 'Compelling' in the context of

> paragraph 297(i)(f) indicates considerations that are persuasive and powerful. 'Serious' read with 'compelling' together indicate that the family or other considerations render the exclusion of the child from the United Kingdom undesirable. The analysis is one of degree and kind. Such an interpretation sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition that may be."

8. Mr Jarvis submits that it was simply not open to the judge to find on the evidence that this demanding test was met. In his submission, effectively the judge should have found on the evidence that as things were going along pretty much as before, the position would be the same and therefore there was no unmet needs that demanded a grant of leave in this case.

9. Mr Jacobs on the other hand submits that before the judge was a broad range of evidence from those who were well-placed to speak of the difficulties that will be facing the applicant on her return. There was oral evidence from her father and from her stepmother. There was evidence from the grandmother and from the mother in written form from St Lucia. There was evidence from a relative named [KF], who is a registered nurse and has qualifications which the judge set out. Her evidence included this:

> "As a health professional I will add that due to the unpredictable nature of hyperthyroidism it is not possible to make arrangements for [EAE] when [her mother] suddenly falls ill. The situation is not only unsafe but also unhealthy and traumatising to the child."

10. The judge, significantly, heard oral evidence from the appellant's father and stepmother and had regard to a range of other written evidence which I have been referred to. Mr Jacobs took me to part of the 90 pages or so of medical evidence documenting emergency admissions and ongoing treatment incidents relating to the appellant's mother being taken to hospital in a state of unconsciousness and other events which plainly gave rise to challenging difficulties for this small child.

11. This led the judge to findings at paragraph 23 of his judgment which I shall reproduce. Before doing so I should say that he also had regard to a letter dated 21st November 2014 from Dr Ulric Mondesir, who said this:

> "This is a letter of confirmation that 35 year old female [EG] is a diagnosed case of severe Graves Disease (thyro-toxicosis), associated with an episode of a thyroid storm which is a life-threatening complication. [EG]'s symptomology is punctuated by episodes of exacerbation of her thyro-toxicosis which makes her undoubtedly unfit healthwise to care for her 4 year old [EAE]."

And finally, in oral evidence the judge was told that the appellant's mother was in the midst of such a thyroid storm and was presently an in-patient in hospital.

12. The conclusion reached at paragraph 23 of the judgment was as follows:

> "While the aforesaid medical report is somewhat brief and lacks detail, I am satisfied on the evidence before me and to at least the civil standard of proof, that of a balance of probabilities, that the appellant's mother is not in a medically fit state to be able to continue to look after the appellant. Accordingly I conclude that there is more than adequate evidence to establish that the appellant meets the criteria set out in paragraph E-LTRC.1.6(c) of Appendix FM – that there are serious and compelling family or other considerations which make the exclusion of a child undesirable and suitable arrangements have been made for the child's care in the United Kingdom."

This was essentially a fact-based assessment and the judge, having heard oral evidence as well as having reviewed a wide range of documentary evidence, was best placed to make it.

13. In doing so, in my judgment, he left out of account nothing of significance and had regard to no immaterial considerations. I do recognise though that this may well not have been the only outcome possible on the facts. In **Mukarkar v Secretary of State for the Home Department [2006] EWCA Civ 1045,** at paragraph 40, Carnwath LJ said, albeit in a slightly different context but with an eye on such a factual assessment exercise:

> "Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different Tribunals, without illegality or irrationality, may reach different conclusions on the same case (as is indeed illustrated by Mr Fountain's decision after the second hearing). The mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new. Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist Tribunal should be respected."

That in my judgment is the position here.

14. Mr Jarvis has carefully identified and illustrated the legal test applicable that has to be satisfied for a sustainable finding to be made that there exist serious and compelling circumstances such as to meet the demanding test in the Rule with which we are concerned. But I find it impossible to say that the conclusion of the judge that this had been established on the evidence in this case, the evidence which I have referred to only in part, was irrational or otherwise legally unsustainable. Therefore his decision to allow the appeal under the Rules discloses no legal error.

15. Given that conclusion it is perhaps unnecessary to say very much about the second challenge pursued against the conclusion of the judge to allow the appeal on Article 8 grounds despite saying as he did in his judgment that he did not propose to consider that claim in any detail. It simply did not follow inevitably that the appeal had to be allowed on Article 8 grounds as a consequence of the claim succeeding under the Rules and so

it was an error of law for the judge to proceed in that way. However, that error was not material to the outcome of this appeal because of what I said about the conclusion under the grounds.

Notice of Decision

For these reasons the appeal to the Upper Tribunal by the Secretary of State is dismissed and the decision of the First-tier Tribunal shall stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 15 January 2016

Upper Tribunal Judge Southern