Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04143/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 April 2017	**On 23 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR LEON CLARKE
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr D. Coleman, counsel instructed by Barar & Associates
For the Respondent:	Ms J. Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Jamaica, born on 7 October 1977. He arrived in the United Kingdom on 9 July 2001 with leave to enter as a visitor until 25 July 2001. He was granted further leave until 9 July 2002 and a further application for leave to remain as a student was refused. On 14 May 2015, an application was submitted on his behalf for leave to remain on the basis of family and private life in the United Kingdom. This application was refused on 25 August 2015 and he appealed against this decision.

2. The appeal came before First tier Tribunal Judge Cassel for hearing on 30 September 2016. In a decision promulgated on 18 October 2016, the Judge dismissed the appeal, both under the Immigration Rules and with regard to Article 8 of ECHR. An application for permission to appeal to the Upper Tribunal was made, in time, on 25 October 2016. The grounds in support of the application submitted that the First tier Tribunal Judge had erred materially in law: (i) in failing to properly consider the Appellant's British citizen child, born on 5.9.15; (ii) in failing to take account of the Home Office policy *viz* the Immigration Directorate's Instructions "Family life as a partner or parent and private life: 10 year routes."

3. Permission to appeal to the Upper Tribunal was granted by First tier Tribunal Judge Colyer in a decision dated 21 February 2017 on the basis that: "*it is arguable that the judge may have erred in law for the reasons outlined in the appellant's representatives' detailed submissions … permission to appeal to the Upper Tribunal is granted on all grounds submitted."* In a rule 24 response dated 8 March 2017, the Respondent opposed the appeal on the basis that the Judge directed himself appropriately; was clearly aware that the child was British and appropriately concluded at [29] that it would be reasonable for the child to leave, thus no error of law arises.

Hearing

4. I heard detailed submissions from Mr Coleman on behalf of the Appellant. He acknowledged that the Appellant is an overstayer but he has been in a relationship with a British Citizen for the past 8 years. He has one British Citizen child and one on the way and is the primary carer for the child. Mr Coleman submitted that British Citizens are in a stronger position than a child who has resided in the United Kingdom for 7 years *cf. ZH (Tanzania)* [2011] UKSC 4. Whilst the Judge's attention was drawn to the Home Office guidance at 11.2.2 and 11.2.3. at [27] she erroneously did not refer to it and it should have been the starting point for her consideration. Therefore at [28] her reference to the Appellant's son that "he is very young" is erroneous and fails to implement the approach of the Court of Appeal in *MA (Pakistan)* [2016] EWCA Civ 705 at [38] and [46] where consideration was given to the guidance at 11.2.4. and the "*very strong expectation for a child to remain in the United Kingdom with his parents as part of the proportionality assessment*." Consequently, the Judge erred in finding that maintenance of effective immigration control must take priority and failed to conduct a proportionality exercise in light of the best interests consideration pursuant to section 55 of the Borders, Citizenship & Immigration Act 2009.

5. Mr Coleman submitted that the Judge further erred in the emphasis placed on the Appellant's immigration history. Whilst the Appellant is an overstayer he is no more than that and there is no criminality. Moreover, whilst at [28]

the Judge notes in line with the judgment in *Zoumbas* [2013] UKSC 74 cited at [52] of *MA (Pakistan)*[2016] EWCA Civ 705 that a child should not suffer as a result of his parent(s)' actions, the Judge looks entirely at the immigration history of the father and does exactly that. In respect of the Article 8 assessment at [34] the Judge clearly erred in finding that there were no circumstances that required her to carry out an analysis outside the Rules and also in finding at [38] that the maintenance of effective immigration control must take priority. Further, there was no assessment of the reasonableness of the British Citizen child leaving the United Kingdom and the judgment in T*reebhawon* [2017] (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 00013 (IAC) was not taken account of. At [34] the Judge fails to give reasons as to why it would not be disproportionate. Mr Coleman submitted that the whole Article 8 assessment fails to engage with section 55 *cf.* [39] of *PD Sri Lanka* (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC). He submitted that "reasonableness" was a much less exacting test and falls into a different category of consideration. Mr Coleman submitted that the cumulative effect amounts to a material error of law and that the Judge misdirected herself in applying the decision in *Azimi Moayed* [2013] UKUT 0197 (IAC) in that this relates to 7 years residence not British Citizen children. Similarly, in *Zoumbas* [2013] UKSC 74 the children had no status and in *EV (Philippines)* [2014] EWCA Civ 874 they were not qualified children so this was not relevant at all.

6. Ms Isherwood, on behalf of the Respondent, submitted that there was no material error of law. She argued that the Appellant was not the primary carer of his son but cares for him whilst his partner is working part time as a dental nurse for which she earns £15,000 pa and, consequently, they share the care. On the evidence presented to the Judge, the Appellant was illegally in the UK as an overstayer and the Judge was entitled to put weight on this. In respect of the Home Office Guidance, throughout the determination the Judge acknowledges that there is a British Citizen child and at [4] of the determination that the relationship is genuine and subsisting. At [16.2.] it is clear that the Judge is fully aware of the Appellant's partner and British Citizen child. The Judge clearly refers to the best interests of the child and there is a heading to this effect after [22] and reference to *ZH (Tanzania)* [2011] UKSC 4. At [26] the Judge directed herself correctly that the issue of reasonableness is an intensely fact finding exercise.

7. The Judge acknowledges the Home Office guidance at [27] but also notes that the Appellant does have a poor immigration history and one cannot choose where one wants to live. Taking that into account at [28] the Judge was entitled to place weight on the fact that the Appellant has lived in the UK unlawfully for 13 years and that his child is very young and that there was no credible evidence to show that to leave the United Kingdom would be unreasonable. Ms Isherwood submitted that the findings made were open to

the Judge and that the challenge put forward is a matter of disagreement with Judge's findings of fact.

6. In his reply, Mr Coleman submitted that it was not his case that the child's best interests are paramount but they are a primary consideration. His partner clearly stated at [8] of her witness statement that she would not relocate to Jamaica.

Decision

7. I found an error of law in the decision of First tier Tribunal Judge Cassel and indicated my decision at the hearing. My reasons for so finding are as follows:

7.1. whilst it is the case that the First tier Tribunal Judge considered the jurisprudence in respect of the best interests of the Appellant's child in some detail at [23]-[24] of the decision, I find that the Judge erred materially in law in applying those principles to her consideration of the best interests of the British child in this case. As Mr Coleman pointed out, none of the cases relied upon by the Judge bar *ZH (Tanzania)* [2011] UKSC 4 *viz EA (Nigeria)* [2011] UKUT 315; *Azimi Moayed* [2013] UKUT 0197 (IAC); *Zoumbas* [2013] UKSC 74 and *EV (Philippines)* [2014] EWCA Civ 874 involved a British citizen child. Moreover, in finding at [38] that "*the maintenance of effective immigration control must take priority"* there is no reference to her statutory duty to consider the Appellant's son's best interests as part of the proportionality assessment and it would appear that she did not do so. Further, the Judge failed to give any reasons as to why she concluded that the maintenance of effective immigration control must take priority.

7.2. The Appellant sought to rely upon the Home Office guidance in the form of the Immigration Directorate's Instructions "Family life as a partner or parent and private life: 10 year routes" August 2015 and this was acknowledged by the Judge at [27] of her decision, however, I find that the Judge erred materially in law in her approach to the guidance. At 11.2.3. the guidance provides that where a refusal would require a parent to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU. The Respondent retains a discretion to refuse leave, "*where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation*." The examples given include criminality or "*a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules*". The Judge acknowledged at [28] that the period of overstay was not a repeated breach although it was arguably a deliberate one, however, this is insufficient to constitute circumstances justifying the refusal of leave, given that the guidance provides that "*the person has repeatedly **and** deliberately breached the Immigration Rules*." Even if that were the case, it is clear from the

guidance that refusal in such circumstances is discretionary and " *the decision maker must consider the impact on the child of any separation.*" The Judge failed so to do on the basis that the family would return to Jamaica together [28] and [29] but this is contrary to and fails to take account of the position of the Appellant's partner that she would not relocate to Jamaica and this is not addressed by the Judge;

7.3. I further accept Mr Coleman's submission that there is no analysis of the reasonableness of expecting the child to leave the United Kingdom and there is no reference to or engagement with the decision of the Court of Appeal in *MA (Pakistan)* [2016] EWCA Civ 705, despite the fact that this was expressly referred to in Ms Akhtar's skeleton argument before the Judge at [22]. This is a material error in that, whilst the cases concerned children with residence in the United Kingdom of 7 years or more, it is recorded at [35] that counsel for the Respondent acknowledged that it would be "relatively rare for it to be reasonable to expect a child who is a British citizen to leave the UK."

8. The parties agreed that I could proceed to re-make the decision so I then heard submissions from both parties.

Submissions

9. In her submissions, Ms Isherwood submitted that, despite the fact that there is a British Citizen child, it has to be borne in mind that the Appellant has abused the system and this was material in respect of the assessment of reasonableness pursuant to both EX1 of Appendix FM and section 117B(6) of the NIAA 2002. She submitted that there was no evidence as to whether or not the Appellant would meet the requirements of the Rules, including the financial requirements, given that his wife is currently working part time and there was an absence of evidence to show it would be unreasonable to expect the Appellant to leave. He chose to be unlawfully here, only submitted the application form when his partner was pregnant and everything was done in a precarious manner. Ms Isherwood sought to rely on the judgment in *MA (Pakistan)* [2016] EWCA Civ 705 at [75] and [85]. The Judge found if the child was to leave he would not be expected to learn a new language and nothing has been put forward to dispute that or that they would not get support from the United Kingdom. She submitted that, taking account of the Appellant's actions and his circumstances in the United Kingdom and looking at the question of reasonableness there were no insurmountable obstacles and no compelling circumstances. The child is 1 year old and is dependent on his parents and it is a choice for them to go back together or make an entry clearance application.

10. In his submissions, Mr Coleman sought to rely on the skeleton argument drafted by Ms Akhtar prepared for the hearing before the First tier Tribunal. He further sought to rely on the judgment in *MA (Pakistan)* [2016] EWCA Civ

705 at [35] and [37] but submitted that that concerned a 7 year case rather than a British Citizen child and counsel for the Respondent conceded that it was relatively rare for it to be reasonable to expect a child who is a British Citizen to leave the United Kingdom. The evidence of the Appellant's wife is that she would not go to Jamaica so the family would be broken up. He submitted with respect to the Home Office guidance that the Appellant's immigration history was not such as to fall to be excluded from the guidance in that it was not a "very poor" immigration history, which would need to be both repeated and deliberate. Mr Coleman submitted that the child's age is not relevant as he is a British Citizen and that the Appellant and his wife were expecting a baby due on 5 May 2017.

Findings and reasons

11. I reserved my decision, which I now give with my reasons.

12. The issue to be decided is whether or not the Appellant qualifies for leave pursuant to Appendix FM of the Immigration Rules, specifically with reference to the requirements of R-LTRP 1.1.(d)(i)-iii) *cf. Sabir* (Appendix FM – EX1 not freestanding) [2014] UKUT 00063 (IAC) or Article 8 of ECHR. There is no dispute about the Appellant's ability to meet the relevant requirements of the Appendix FM, except for EX1 (a) which provides

"EX.1. This paragraph applies if
(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
(bb) is in the UK;
(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
(ii) it would not be reasonable to expect the child to leave the UK."

13. It is not disputed that the Appellant has a genuine and subsisting parental relationship with his son, who is a British citizen, aged 8 months. The issue is whether or not it would be reasonable to expect the child to leave the United Kingdom. Relevant to the consideration of reasonableness are the following:

13.1. the Appellant's fiancée has made clear at [8] of her witness statement that she intended continuing her life in the United Kingdom and would not relocate to Jamaica due to her work and social commitments and the fact that their son was born here and is a British citizen. In the refusal decision of 25 August 2015, the Respondent asserted that there would be no insurmountable obstacles to her relocating to Jamaica, given that she was born there and would have familiarity with the culture and could seek employment there. The First tier Tribunal Judge upheld the Respondent's decision in this respect, with reference to EX1(b) of Appendix FM and there has been no challenge to

that finding. However, the Appellant's fiancée is a British citizen and is not obliged to relocate and I accept her evidence that she would not. It is also the case that the Appellant's fiancée is pregnant with their second child;

13.2. the Appellant's fiancée works as a dental nurse and receptionist, currently part time as she is on maternity leave and the Appellant is responsible for the care of their son while she is at work. Whilst it was submitted by Mr Coleman that this showed that the Appellant was the child's primary carer, Ms Isherwood's submission was that, in truth, they share the care of their son, given that the Appellant's fiancée is only working part time and I accept that submission. That is not to say that removal of the Appellant would have no impact upon his son but that he is not the only person responsible for his care, which he shares with his wife;

13.3. In *VM (Jamaica)* [2017] EWCA Civ 255, the Court of Appeal per Lord Justice Sales, accepted the submission by the Respondent that the concession previously made by the Respondent in *Sanade* [2012] UKUT 00048 (IAC) was wrongly made, skews the position and obscures the proper analysis [52]-[53] refers. His Lordship adopted the reasoning put forward in *FZ (China)* [2015] EWCA Civ 550 that: "*the critical question is whether there is an entire dependency of the relevant child on the person who is refused a residence permit or who is being deported*" and at [64] held: "*It follows that the presence of children in the UK does not, as a result of the operation of EU law, have to be treated as a fixed point for the purposes of the proportionality analysis under Article 8.*" The Appellants in both *Sanade* and *VM (Jamaica)* were subject to deportation orders.

13.4. The question of how the test of reasonableness should be applied after a child has been resident for more than 7 years was considered by the Court of Appeal in *MA (Pakistan)* [2016] EWCA Civ 705. The Court did not consider EX1(a) nor the position of British children however, at [35] leading counsel for the Respondent accepted that: "*it will be relatively rare for it to be reasonable to expect a child who is a British citizen to leave the UK.*"

13.5. Moreover, the Home Office guidance in respect of Appendix FM: Family Life (as a Partner or Parent) and Private Life: 10 year routes, remains that of August 2015 and provides at 11.2.3.

"*Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano…*

Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary care, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.

The exceptions to this principle are set out at 7.2 above *viz* criminality or a "*very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules*." It is also necessary for the decision maker to consider the impact on the child of any separation.

Whilst it is the case that removal of the Appellant would not force his British son to leave the EU, because he could be cared for by his mother, the second paragraph of the guidance suggests that it would be unreasonable to expect a British child to leave the EU with a parent or primary carer, which would appear to include a parent who is not a primary carer and that leave in such cases will usually be appropriate. In respect of the exceptions, the Appellant's application for leave to remain as a student was refused on 9 January 2003 since which time he overstayed and then made an application for leave to remain on the basis of his private and family life on 14 May 2015. Whilst this is a substantial period of time and was a deliberate breach of the Immigration Rules, I do not consider that a period of overstay can be properly considered to be repeated conduct, which would appear to indicate something that happened more than once eg repeated entries to the United Kingdom unlawfully or in a false identity. Moreover, whilst I consider that the Appellant's immigration history is poor, the fact that the guidance utilises the phrase "very poor" would indicate that the word "very" is more than mere surplusage and that it requires an aggravating feature. In these circumstances, I find that the Appellant is entitled to the benefit of the guidance and he does not fall within the exceptions to the principle that it will usually be appropriate for leave to be granted.

13.6. It is also necessary to consider the best interests of the Appellant's son, pursuant to section 55 of the Borders, Citizenship & Immigration Act 2009. Whilst he is only 20 months old, he is a British citizen and as Lady Hale makes clear in *ZH (Tanzania)* [2011] UKSC 4:

> "*30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8)…*
>
> *32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. As Jacqueline Bhaba (in 'The "Mere Fortuity of Birth"? Children, Mothers, Borders and the Meaning of Citizenship', in Migrations and Mobilities:*

Citizenship, Borders and Gender (2009), edited by Seyla Benhabib and Judith Resnik, at p 193) has put it:

> *'In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.'*

I further find that it is clearly in the best interests of the Appellant's son to be brought up by both his parents, as he is currently: *cf E-A (Article 8 – best interests of child)* Nigeria [2011] UKUT 315 (IAC.) Removal of his father would adversely impact upon him not only at the current stage of his development but in the future, given that he would be brought up by a single mother, unless or until such time that she is in a position to work full time and earn sufficient income so as to support an application for entry clearance of the Appellant as a fiancé or spouse under the Rules.

14. Consequently, for the reasons set out at 13. above, I find that it would not be reasonable to expect the Appellant's British son to leave the United Kingdom and that the Appellant meets the requirements of the Immigration Rules. In these circumstances, I am not required to go on to consider whether removal of the Appellant would constitute a breach of Article 8 of ECHR, but for the avoidance of doubt and taking account of the public interest considerations set out at section 117B of the Nationality Immigration & Asylum Act 2002, in particular, section 117B(6), I find that the decision to remove the Appellant constitutes a disproportionate interference with his right to family life in the United Kingdom, also for the reasons set out at [13] above.

Decision

15. I find that First tier Tribunal Judge Cassel erred materially in law in dismissing the Appellant's appeal. I substitute a decision allowing the appeal on human rights grounds, in light of the fact that the Appellant meets the requirements of R-LTRP 1.1. (d) (i)-(iii) and EX1(a) of Appendix FM of the Immigration Rules.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

19 May 2017