Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18638/2016

THE IMMIGRATION ACTS

Heard at Field House
On 23rd November 2018

Decision and Reasons for Promulgation
On 28 December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

JESUS [R]
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr D Lemer, Counsel, instructed by Mantini Montecristo
For the respondent: Ms L Kenny, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is a resumed hearing from 6 July 2018 when I found the material error of law in the decision of First-tier Judge Rowlands. The judge had dismissed the appellant's application for leave to remain on the basis of his article 8 rights. This related primarily to his relationship with his daughter [MU]. The parties are referred to the earlier decision promulgated on 21 August 2018 by way of background.

2. The preserved findings were that the appellant is a national of Bolivia who came to the United Kingdom in 2002, initially as a visitor. He obtained various leaves as a student until 2007 and then overstayed. In or around 2005 he began a relationship with another Bolivian national, [MV]. Their daughter [MU] was born on 14 March 2008. She has lived in the United Kingdom all her life and now holds British nationality.

3. The appellant overstayed until 17 February 2012 when he applied for leave to remain on the basis of his article 8 rights. This was refused with no right of appeal. In October he was served with a notice requiring him to leave which he did not comply with. In January 2014 he again unsuccessfully applied for leave to remain and then overstayed until 15 December 2015 when he applied again.

4. The appellant's relationship with [MV] ended in 2012 and she has now married a Spanish national and continues to live in the United Kingdom along with her husband and her daughter. The appellant has maintained a good relationship with his former partner and would see his daughter on a regular basis. [MV] has made her home in the United Kingdom with her husband and daughter and there is no suggestion they would relocate to Bolivia. Beyond overstaying the appellant is not engaged in any conduct which would render his continued presence undesirable.

5. The appellant has a genuine and subsisting relationship with his daughter. Section 117 B(6) of the Nationality, Immigration and Asylum Act 2002 applies. This provides:

> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

Consideration

6. In considering the appeal I now have the benefit of the Supreme Court decision in KO (Nigeria) and Others (Appellants) v Secretary of State for the Home Department (Respondent) [2018] UKSC 53.I have also been provided with a copy of the respondent's IDI guidance to decision-makers of the 22nd February 2018.

7. Mr Lemer argued that the Supreme Court decision was determinative in this case in the appellant's favour. I was referred in particular to paragraphs 23,32, 36 and 39 on the decision.

8. Ms Kenny referred me to the First-tier judge finding the appellant had an appalling immigration history. The judge had referred to him having overstayed since 2007 and when his partner became pregnant there was no reason why they both could not have return to Bolivia. The judge

suspected they remained to take advantage of the National Health Service.

9. The judge did not accept it was necessary for the contact between the appellant and his child to be as regular as it was or that it needed to be face-to-face.

10. I was referred to the IDI at page 9 and the reference to exceptional circumstances which would render the refusal a breach of article 8 because it would result in unjustifiably harsh consequences for the applicant or their family. Ms Kenny argued that the reality would be if the appellant were removed there would be a physical separation from his child but when balanced against the judge's finding of an appalling immigration history it did not meet the threshold to allow the appeal.

11. In response, Mr Lemer referred me to the wording of section117B(6) and the issue arising was whether it would be reasonable to expect the child to leave.

Conclusions

12. The primary consideration is the appellant's child. She is now 10 years of age and has been born and lived all her life in the United Kingdom. She holds British nationality. Her parents separated in 2012 at which stage she was 4 years of age. She has continued to see her natural father on a regular basis. She is now living with her mother and her stepfather.

13. It was suggested she could see her natural father less frequently and from a distance. Possibly she could visit him in Bolivia. However, this scenario would result in a dilution of their relationship. It is my conclusion the ongoing presence of her natural father is in her best interests.

14. Having determined were her best interests lie it is necessary to consider the wider public considerations. In this situation the statutory consideration in Section 117 B(6) of the Nationality, Immigration and Asylum Act 2002 is prescriptive. The Supreme Court decision in KO (Nigeria) and Others (Appellants) v Secretary of State for the Home Department (Respondent) [2018] UKSC 53 has considered this provision and whether this is to be tempered with the family's immigration history. The conclusion is that this is a freestanding provision.

15. The First tier judge had described the appellant as having an appalling immigration history. This is relative. He has been an over stayer for a number of years. The judge records that the appellant came here in July 2002 on a six-month visit Visa and in time he obtained leave to remain as a student which was variously extended until 31st August 2007. There are no other features however which would render his presence undesirable.

16. The judge did not have the benefit of the Supreme Court decision and the guidance on the relevance of the conduct of the parent. The judge failed to have regard to section 117B(6).

17. Paragraph 18 of the Supreme Court decision points out that parental conduct can be relevant when considering where the parent or parents are likely to be and why the child might have to leave. In the present case her mother has a right to be here and there is nothing to suggest she has any intention of leaving the United Kingdom. She has custody of the child and the reality is that irrespective of what happens to the appellant, the child would remain in the United Kingdom.

18. Looking at matters another way, that is, through section 117B(6), it clearly would be unreasonable to expect the child to leave the United Kingdom. The reality is she will not be leaving. It is my conclusion, bearing in mind the statutory provision and the guidance given by the Supreme Court, that it would be disproportionate to require the appellant to leave given the family life he has with his daughter. Consequently, I would remake the decision allowing the appeal.

Decision

The appeal is allowed on article 8 grounds

Francis J Farrelly
Deputy Upper Tribunal Judge

Date: 20 December 2018