



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/21030/2018

THE IMMIGRATION ACTS

Heard at Birmingham
On 9 October 2019

Decision & Reasons Promulgated
On 7 November 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MS UBONRAT [W]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ahmed, Optimus Law Solicitors

For the Respondent: Ms H. Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Thailand, born on 1.2.84. On 15.9.17 she applied for leave to remain in the UK as the partner of a British citizen, a marriage having taken place on 25.8.16. This application was refused in a decision dated 30 July 2018, on the basis that the Appellant had not provided sufficient evidence to demonstrate that the sponsor was divorced from his first wife at the time she married him. It was not disputed that the relationship was genuine and subsisting nor that they have a child together, born on 17.10.17.

2. The Appellant appealed against this decision and her appeal came before First tier Tribunal Judge Anthony for hearing. In a decision and reasons promulgated on 20 May 2019, the Judge dismissed the appeal, finding significant concerns about the Sponsor's evidence in respect of his previous marriage and that it would be reasonable for the Sponsor and the British child of the marriage to leave the UK if they wished to and/or accompany the Appellant to Thailand whilst she applied for entry clearance.

3. Permission to appeal was sought, in time, on the basis that the Judge erred in failing to properly consider the best interests of the child; failed to consider section 117B(6) of the NIAA 2002; failed to give consideration to the Home Office policy dated 29.1.19 where the Respondent stated: "*The starting point is that we would not normally expect a qualifying child to leave the UK....*" Reliance was also placed on the decision in *SF (Guidance - post 2014 Act) Albania* [2017] UKUT 00120 (IAC); *KO (Nigeria)* [2018] UKSC 53; *JG (Turkey)* [2019] UKUT 00072 (IAC) and *JO (section 55) Nigeria* [2014] UKUT 00517 (IAC).

4. Permission to appeal was granted by First tier Tribunal Judge Foudy in a decision dated 10 July 2019 on the basis that it is arguable that the Judge failed to correctly apply *KO (Nigeria)* [2018] UKSC 53. It is also arguable that the best interests of the child were not treated as a primary consideration.

Hearing

5. At the hearing before the Upper Tribunal, Ms Aboni on behalf of the Respondent conceded that because there is a British citizen child there is an error with regard to consideration of the best interests of the child. She stated that the Home Office's latest policy is 25 July 2019 and does not distinguish between qualifying children and British citizen children: see page 50 and in fact is in the same terms as that set out in the previous guidance cited in the grounds of appeal. Consequently, Ms Aboni accepted that the finding that the Appellant, Sponsor and their child could have family life in Thailand is contrary to the Home Office policy. She invited the Upper Tribunal to re-make the decision in accordance with section 117B(6) of the NIAA 2002.

6. Mr Ahmed submitted that the appeal should be allowed. He submitted that the Appellant should properly be considered a partner pursuant to EX1(a) of the Appendix FM of the Immigration Rules. Ms Aboni submitted that there should be a finding that the Appellant cannot meet the partner rules because the Appellant cannot meet the eligibility requirements at E-LTRP 1.8 but the parties have been living together and there was a subsisting parental relationship, thus the appeal fell to be considered pursuant to section 117B(6) of the NIAA 2002 and Article 8 outside the Rules.

Findings and reasons

7. I accept Ms Aboni's concession, which I find was properly made, that the decision of the First tier Tribunal Judge Anthony was vitiated by material errors of law *viz* a failure to apply the material Home Office policy "*Family Policy Family life (as a partner or parent), private life and exceptional circumstances*" published on 23 September 2019 and the material jurisprudence in respect of the reasonableness of expecting a British child to leave the UK.

8. There was no challenge to the decision by the First tier Tribunal Judge to uphold the Respondent's decision in respect of E-LTRP 1.8 of Appendix FM of the Rules and thus I find that the Appellant cannot meet the requirements of the Immigration Rules.

9. The Appellant's appeal is thus predicated on whether, following consideration of Article 8 and the public interest considerations, it would be disproportionate to expect the Appellant's British child and thus by extension, the Appellant, to leave the UK for Thailand.

10. Section 117B(6) of the NIAA 2002 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."

11. The relevant Home Office guidance provides *inter alia* at pages 50-

"The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK."

12. In JG (s117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC) the Presidential panel held *inter alia* as follows:

"8. In October 2018, the Supreme Court gave judgment in KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53. The Court's judgment was given by Lord Carnwath.

9. The first thing to note is that there is nothing in the judgment that overturns the conclusion of the Court of Appeal in MA (Pakistan) regarding the free-standing nature of section 117B(6), in the sense that where the application of that provision results in the public interest not requiring the removal of the person concerned, he or she must succeed under Article 8 on the basis that the proportionality balance

contains nothing on the Secretary of State's side of the scales. The words "the public interest does not require the person's removal" mean what they say...

40. ... *If, as we have found, Parliament has decreed a particular outcome by enacting section 117B(6), then that is the end of the matter.*

41. *We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A of imposing greater consistency in decision-making in this area by courts and tribunals. The fact that section 117B(6) has such an aim was expressly recognised by Elias LJ at paragraph 44 of MA (Pakistan)...*

13. There is no dispute that the relationship between the Appellant and Sponsor is genuine and subsisting nor that they have a British child, born on 17.10.17. It is apparent from the jurisprudence and the Home Office policy in respect of Family Life, updated on 23 September 2019, that the public interest does not require the removal of the Appellant where it is not reasonable to expect the child to leave the United Kingdom. Applying the best interests consideration pursuant to section 55 of the BCIA 2009, I find that it is not in the best interests for the Appellant's child to remain in the United Kingdom with her father whilst her mother returns to Thailand in order to obtain entry clearance to re-join her husband and child in the UK. The Appellant's child has just turned two years old and I find it would not be in her best interests for her to be separated from her mother, given her very young age. Consequently, if the Appellant is required to leave the UK then her child will have to accompany her and I find that this would not be reasonable *cf. SF and others* (Guidance post-2014 Act) [2017] UKUT 120 (IAC).

14. It is clear from the Presidential decision in *JG (Turkey)* at [12] above, that where the public interest does not require the Appellant's removal, her appeal must succeed with regard to Article 8 "*on the basis that the proportionality balance contains nothing on the Secretary of State's side of the scales.*" This was also the approach taken by Ms Aboni on behalf of the Respondent.

15. For the reasons set out above, I allow the appeal on the basis that the removal of the Appellant to Thailand would constitute a disproportionate interference with her right to family life with her British partner and child in the United Kingdom.

Rebecca Chapman

Deputy Upper Tribunal Chapman

4 November 2019