Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21200/2018

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 4 December 2019	**On 14 January 2020**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

TANIA [O]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Peters, instructed by Terence McCourt Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge S Gillespie promulgated on 8 May 2019, dismissing her appeal against a decision of the respondent to refuse her human rights claim.

2. That decision is set aside as I am satisfied that it involved the making of an error of law, for the reasons set out in the grounds of appeal to the Upper Tribunal. In particular, the judge erred in going behind a concession that it would not be reasonable to expect the children of the appellant's partner to leave the United

Kingdom and as it had not been submitted that there was no genuine parental relationship between the appellant and those children; and, following R (ota RK) v SSHD SSHD (s.117B(6): "parental relationship") (IJR) [2016] UKUT 31, this was a relevant issue, the judge failing to make a finding on that issue.

3. Having found that the decision involved the making of an error of law, I set it aside, and proceeded to hear submissions as to the remaking of the decision.

4. The appellant is a citizen of Ecuador. She is married to a British citizen who formerly lived in Ecuador. He had previously been married to another Ecuadorian citizen and they had lived together in Northern Ireland where two of the children of that marriage were born before the family moved to Ecuador in 2009. That marriage broke down in 2014 and not long after that, the appellant's relationship with her now husband began. The appellant's husband then returned to Northern Ireland to look after his elderly parents, taking the two UK born children with him. Those children are now 13 and 15 years of age. Both are at secondary school and neither of them wishes to return to Ecuador.

5. The appellant sought leave to enter the United Kingdom as the unmarried partner of her now husband but this was refused. She then entered the United Kingdom in 2017 with entry clearance as a visitor granted until 20 February 2018. On the same date she made an application for leave to remain on the basis of her private life.

6. The Secretary of State concluded that the appellant did not meet all of the eligibility requirements of Section E-LTRP of Appendix FM of the Immigration Rules as although she met the eligibility relationship requirement in paragraph E-LTRP.1.1 to 1.12, she did not meet the eligibility requirement in E-LTRP.2.1 to 2.2 as she had entered as a visitor. The respondent then went on to consider EX.1. She accepted that the appellant had a genuine and subsisting relationship with her partner; that she had two British stepchildren in the United Kingdom and that her partner cared for his elderly parents but was not satisfied that there were insurmountable obstacles, that is very significant difficulties, that she or her partner would face in continuing family life together in Ecuador and which could not be overcome or would entail very serious hardship for her and her partner. It was accepted that the British stepchildren could reside with their British citizen father in the United Kingdom for a short period whilst she returned to obtain the correct entry clearance causing the least disruption to their education. It was noted also that the partner could arrange for care for his parents and accompany her and the children back to Ecuador to seek to obtain the correct entry clearance.

7. The respondent considered that the appellant did not meet the requirements of paragraph 276ADE(1) nor was she satisfied that there were exceptional circumstances such that pursuant to paragraph GEN.3.2 of Appendix FM that there were exceptional circumstances such that refusal of leave would be a breach of Article 8 as it would result in unjustifiably harsh consequences for her, her partner or a relevant child. That was on the basis that the best interests of any child were taken into account as a primary circumstance.

The Law

8. I turn first to the position under the Immigration Rules in a human rights appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002, a finding that a person) satisfies the requirements of a particular immigration rule, so as to be entitled to leave to remain, means that (provided Article 8 of the ECHR is engaged), the Secretary of State will not be able to point to the importance of maintaining immigration controls as a factor weighing in her favour in the proportionality balance, so far as that factor relates to the particular immigration rule in question. So far as is relevant, the Immigration Rules provide as follows:-

> **R-LTRP.1.1.** The requirements to be met for limited leave to remain as a partner are-
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> (a) the applicant and their partner must be in the UK;
>
> (b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
>
> (c)
>
> (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
>
> (ii) the applicant meets all of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner; or
>
> (d)
>
> (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
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> (ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1-2.2.; and
>
> (iii) paragraph EX.1. applies.
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> **E-LTRP.2.1.** The applicant must not be in the UK-
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> (a) as a visitor; or
>
> (b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings
>
> **E-LTRP.2.2.** The applicant must not be in the UK –
>
> (a) on immigration bail, unless:
>
> (i) the Secretary of State is satisfied that the applicant arrived in the UK more than 6 months prior to the date of application; and
>
> (ii) paragraph EX.1. applies; or
>
> (b) in breach of immigration laws (except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded), unless paragraph EX.1. applies.

9. I note as an aside that the appellant cannot succeed under the Immigration Rules as a parent as pursuant to E-LTRPT.2.3 she does not have sole responsibility for the child; she is eligible to apply for leave to remain as a partner; and, the parent or carer with

whom the child normally lives is her partner, expressly contrary to E-LTRPT.2.3(b)(ii). Accordingly, on that basis she cannot meet R-LTRPT.1.1(d).

10. Mr Peters submitted that there were compelling reasons as to why it was unreasonable to expect the children to go to Ecuador or to be separated from their stepmother, let alone from their father. He submitted further that the grandparents are frail and need their son.

11. Mr Govan submitted that the fact that EX.1 does not apply and that it was the clear purpose of the Immigration Rules that people in the appellant's position should not be permitted to say was an important factor to be taken into account in assessing the public interest. He submitted further that **JG v UTIAC** [2019] NICA 27 could be distinguished, on the basis that this case concerned a stepparent and was different from a real parent. He asked me to note that in this case the family relationship had been built up over time and would have been broken and that there was no expectation the children would leave.

12. He submitted further that the appellant had not integrated, did not speak English and that there was a significant interest in her having to leave the United Kingdom.

13. The wording of the Immigration Rules is sufficiently clear. Even if this appellant could meet the requirements of EX.1, she does not meet the requirements under E-LTRPT 2.1 and so, pursuant to R-LTRPT she cannot meet the requirements of the Immigration Rules. That, however, is not the end of the matter. Any assessment pursuant to GEN.3.2 must be undertaken in consideration of the best interests of the children concerned and also in light of Section 117B(6) of the 2002 Act.

14. I therefore turn to Section 117B(6) which provides.
Section 117B 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.

15. In considering how section 117B(6) should be applied it is relevant to have regard to **SSHD v AB and AO [2019] EWCA Civ 661** at paragraphs [59] to [61] and [73]:

> "59. Accordingly, the position has now been reached in which this Court is not only free to depart from the approach taken by Laws LJ in *MM (Uganda)* but indeed is required to do so in order to follow the binding decision of the Supreme Court in *KO (Nigeria)*. That can be done by following the preferred approach of Elias LJ in *MA (Pakistan)*, at para. 36, where he said:
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> > "Looking at section 117B(6) free from authority, I would favour the argument of the appellants. The focus on paragraph (b) is solely on the

> child and I see no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest. I do not deny that this may result in some cases in undeserving applicants being allowed to remain, but that is not in my view a reason for distorting the language of the section. Moreover, in an appropriate case the Secretary of State could render someone liable to deportation, and thereby render him ineligible to rely on this provision, by certifying that his or her presence would not be conducive to the public good."
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> 60. The essential submission which Ms Patry makes on behalf of the Secretary of State is that the condition for section 117B(6)(b) simply did not arise on the facts of the two cases before this Court now. She submits that there was no question of either of the relevant children concerned being expected to leave the United Kingdom. In those circumstances there was no need for the Tribunals to ask the question whether it was reasonable to expect them to do so.
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> 61. In my judgement, this submission must be rejected. It founders on the clear wording of the legislation. As Mr Drabble QC submitted to this Court on behalf of the Respondent AB, it requires the Court to insert words into the Act which are simply not there. Furthermore, as he submitted, it requires the Court to divide the concept of a "qualifying child" into two types. There is simply no warrant in the legislation itself for doing so.
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> …
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> 73. Speaking for myself, I would not necessarily endorse everything that was said by the UT in its reasoning, in particular at para. 25, as to the meaning of the concept "to expect". However, in my view that does not make any material difference to the ultimate interpretation, which I consider was correctly set out by the UT in *JG*. In my view, the concept of "to expect" something can be ambiguous. It can be, as the UT thought at para. 25, simply a prediction of a future event. However, it can have a more normative aspect. That is the sense in which Admiral Nelson reputedly used the word at Trafalgar, when he said that "England expects every man to do his duty." That is not a prediction but is something less than an order. To take another example, if a judge says late in the day at a hearing that she expects counsel to have filed and served supplementary skeleton arguments by 9 a.m. the following morning, so that there is no delay to the start of a hearing an hour later: although she may not be ordering the production of that skeleton argument, that is what she considers *should* happen. That is not a prediction of a future occurrence. It carries some normative force."

16. Thus, the key question is as is set out in **JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072**:

> "Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 requires a court or Tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so".

17. The first question to be asked is whether the appellant's stepchildren have a parental relationship with her. The refusal letter refers to them as stepchildren and the preponderance of the evidence which has not been challenged in any way before me

today is that there is a parental relationship. That there is no biological relationship is not determinative as can be seen from R (ota RK), I am satisfied on the basis of the material supplied both by the children, the appellant, the appellant's partner and also the supporting letters from the family and friends that the appellant has in effect stepped into the shoes of the mother, who continues to live in Ecuador with the other two children. I am therefore satisfied that, on the balance of probabilities, there exists in this case a genuine parental relationship between the appellant and the children of her partner. Both of the children are British Citizens. Accordingly, I am satisfied that Section 117B(6) is engaged.

18. I turn next to the position of the children and as to whether it would be reasonable to expect them to go to leave the United Kingdom. They have now lived in Northern Ireland again for some three and a half years. They are of an age when their wider circle is beginning to become more important than the family circle and I note their desire not to live in Ecuador. I have no reason to doubt that. I note also the letter from the children's senior housemaster that the boys are now both in a critical stage of preparation for GSCE exams (the letter was dated 17 December 2018) and so the situation has now moved on. The letter states as follows:-

> "I and the boys' tutors feel that we have developed a very positive relationship with them and there is a very strong network for both of the boys. For these reasons I would be very concerned if the boys were uprooted again having only just found their feet after their previous move".

19. I accept that this is reliable evidence, and that the children are still at a critical stage of their education, all the more so as major exams will need to be taken in the near future. It is evidence to which I attach significant weight.

20. Unusually, the children speak Spanish and do have a background of living in Ecuador. That was, however, some years ago and their relationship with their mother appears now to have become lesser than it was. They have of course already had one upheaval in moving from Ecuador to the United Kingdom in 2016. Were they to leave again, there would be yet further upheaval at a critical time in their development and which would take them away from the network into which as teenagers they have now grown.

21. Taking all of these factors into account, I conclude that it would on the particular facts of this case be unreasonable to expect the children to leave the United Kingdom. It therefore follows that there is no public interest in requiring the appellant to leave the United Kingdom.

22. I reach that conclusion bearing in mind that the appellant's English is far from perfect and that there is reliance on public funds to the extent that the family are not dependent. Whilst those factors would engage Section 117B(6)(2) and (3) of the 2002 Act, this has to be balanced against the clear proposition set out at Section 117B(6) that there is no public interest in the appellant's removal. That is a clear expression of the will of parliament. The same force does not apply to the submission that the scheme of the Immigration Rules indicates that people should not be able to remain if

they have come here as a visitor. I accept that that is the scheme of the Rules but equally I bear in mind that Section 117B(6) of the 2002 Act focuses on the best interests of children. Whilst these are not a paramount consideration, they are a primary consideration, and section 117b(6) reflects the clear will of parliament.

23. I conclude that on the facts of this case given the strong bond between the appellant and her stepchildren which is a genuine parental relationship that it would not be reasonable to expect the children to leave, that the appeal falls to be allowed on the basis that requiring her to leave the United Kingdom would be a disproportionate interference with her right to private and family life pursuant to Article 8 of the Human Rights Convention.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the appeal by allowing it on human rights grounds.

3. No anonymity direction is made.

Signed Date 9 January 2020

Upper Tribunal Judge Rintoul