Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10037/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 February 2019	**On 5 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

RAUL [Z}
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Fouladvard
For the Respondent: Mr N Bramble, HOPO

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge G Jones QC dismissing his appeal against his application for leave to remain in the UK on human rights grounds.

2. The appellant entered the UK on 10 September 2014 on a student visa valid from 1 September 2014 until 1 August 2015. His daughter was born on 27 October 2014, some six weeks after his entry to the UK.

3. On 26 July 2015 the appellant made an application for leave to remain in the UK, relying on human rights, on the basis that he has a wife who has dual Colombian and British nationality and a daughter, [S_g], who is a British citizen. The appellant's wife also has a son, who the appellant treats as his stepson.

4. The respondent refused the application on 21 October 2015. The appellant appealed and his appeal hearing came before First-tier Tribunal Judge Greasley on 20 December 2016. Judge Greasley dismissed the appeal.

5. By its decision promulgated on 6 November 2017, the Upper Tribunal allowed an appeal from the First-tier decision and remitted the appeal for rehearing on the basis that the findings made by First-tier Tribunal Judge Greasley in paragraphs 23, 24 and 26 of his decision were to stand. The preserved findings were as follows:

   (1) The appellant and his sponsor wife were in a genuine and subsisting marital relationship.

   (2) That the appellant is the biological father of his daughter, [S_g], born on 27 October 2014 and treats [S_b] as his stepson.

   (3) That the appellant participates in the upbringing of each of the children mentioned in (2) above.

   (4) The appellant and his wife share parental responsibility for the children and so there is no reason why the appellant cannot return to Colombia to make a proper and timely application for entry clearance.

   Judge Greasley recorded that the appellant had said in evidence that he would be able to do this, although would be reluctant to do so; for understandable reasons. He also found that if the appellant returned to Colombia to make such an application his parents and brother would provide him with accommodation and support.

6. The appellant gave evidence before Judge Jones by adopting his witness statement dated 20 December 2016 as his evidence-in-chief.

7. The judge recorded that when the appellant was cross-examined, he said that when he entered the UK on 10 September 2014 he then intended to depart before his student visa expired. He went on to say that he later changed his mind and did not do so because his wife was pregnant and after the baby was born she suffered with depression. The judge accepted that the appellant made the instant application prior to his student visa expiring.

8. The judge then went on to find as follows:

> *"8. However, I am entirely satisfied that his student visa was obtained by deception, notwithstanding the appellant's assertion that he held an intention to depart prior to it expiring. I arrive at that conclusion because I have no doubt that given the evidence about the appellant's wife's then income and reliance upon benefits, he had no prospect of obtaining entry clearance under the Immigration Rules, given that there was no prospect of him demonstrating that the financial requirements thereunder were met. It is entirely understandable that in circumstances where he knew that his*

wife was about to give birth, he would wish to procure entry into this country with a view to remaining permanently. Nonetheless, the facts dictate that this appellant chose not to apply for entry clearance (because he knew that any such application was doomed to fail) and instead determinedly set about deceiving the Entry Clearance Officer into granting a student visa so that he could procure entry into this country at a time when he had no intention whatsoever of departing (if he could possibly avoid it). It was a blatant piece of queue jumping and/or cynical manipulation of this country's immigration system. No doubt the appellant was working on the basis that possession is 9/10 of the law.

9. I should record that during cross-examination the appellant conceded that he had not made an application to join his wife in United Kingdom because he knew that the financial requirements could and would not be met. He also said that he has one other child in Colombia, who lives with his mother. So far as his stepson is concerned, he said that his biological father has no involvement in his life".

9. First-tier Tribunal Judge Holmes granted the appellant permission to appeal. He said as follows:

"3. It is arguable that the judge erred in taking against the appellant a new point, without notice, namely that he had employed deception in gaining entry clearance. The primary findings of fact necessary for such a finding do not appear to have been made – a finding that the appellant did not intend to return to Colombia at the end of the initial period of leave was arguably not of itself sufficient. In the circumstances any conclusion that there was an enhanced public interest in the appellant's removal was arguably flawed.

4. In any event it is arguable that the judge failed to approach the Article 8 appeal on the correct basis. The preserved findings meant that the appellant had established 'family life' with his wife and two children all of whom are British citizens. Arguably the judge misunderstood or misapplied the relevant jurisdiction concerning s117B(6)".

10. Mr Fouladvard submitted that although the judge erred in law in raising a new issue, this was not relevant to the consideration of the appellant's Article 8 claim. This was because the preserved findings tipped the balance in favour of the appellant, applying the principles in **Razgar**. He said no reasonable Tribunal will agree that the appellant should be removed from the United Kingdom.

11. Mr Bramble submitted that in the light of the evidence of the appellant recorded at paragraph 9, the judge was entitled to find that the appellant had no intention whatsoever of departing from the UK and had obtained his student visa by deception.

12. It well known that deception has a high threshold and that the burden is on the respondent to prove deception. I agree with Mr Fouladvard that the judge had not considered this at all. The fact that the appellant had not made an application to join his wife in the UK because he knew that the financial requirements could and would

not be met, did not displace his evidence that he intended to leave the UK at the end of his studies. The ECO was satisfied that he intended to leave the UK at the end of his studies and issued him with a student visa.

13. The appellant said in evidence that he later changed his mind and did not do so because his wife was pregnant and after the baby was born she suffered with depression. This evidence was not factored into the judge's findings at paragraph 8. It appears to me that the judge was making assumptions at paragraph 8 and those assumptions were not sufficient to lead to a finding that the appellant had obtained his student visa by deception.

14. I now turn to the judge's consideration of the appellant's Article 8 appeal.

15. The judge also heard evidence from the appellant's wife, Yudy Mideros. She adopted the content of her witness statement dated 20 December 2016 as her evidence-in-chief. Under cross-examination she said that she would not go to Colombia with her husband if the appeal was unsuccessful.

16. The judge said that unsurprisingly Mr Fouladvard majored upon Section 55 Borders, Citizenship and Immigration Act 2009. He said Mr Fouladvard did not specify which limb of EX.1 he relied on. He said that no allegedly insurmountable obstacles were identified or argued.

17. The judge cited the Supreme Court's decision in **KO (Nigeria) [2018] UKSC 53**. The judge said the Supreme Court has now settled the difference of opinion about the approach to be taken when the interests of children fall to be considered. He said the position has been put beyond doubt by paragraphs 18 and 19 of the judgment which lays to rest the myth that the interests of children are to be considered in some kind of artificial vacuum. The Supreme Court has pointed out that the test of "reasonableness" is to be considered in the real world in which the children find themselves, which includes the real world of one parent being required to leave the United Kingdom.

18. The judge found that the instant case does not fit precisely into **KO** because the children's mother and the children themselves are British citizens and so have a right to be in and to reside in the UK. Whether they go to live elsewhere entirely depends upon choices made by their parents.

19. The judge said whilst he acknowledged the interests of the children are better served if they live in a two-parent household, there would be nothing unreasonable in expecting them to remain resident within the nucleus of their family unit if that family unit chooses to locate in Colombia by reason of the appellant having no right to be in this country.

20. The judge then went on to say that he was heavily influenced in his approach by the fact that this appellant has cynically sought to abuse and flout the immigration laws of this country for his own advantage. He has used deception to obtain a visa at a time when he had no intention whatsoever of leaving when his student visa expired and quite probably, no intention of being a genuine student in any way whatsoever.

21. The judge said that so far as Article 8 is concerned, Mr Fouladvard did not advance any factors said to make this an unusual or compelling case for consideration under Article 8 simpliciter in circumstances where the appellant could not succeed under the Immigration Rules. Accordingly, he did not consider it necessary to go on to consider Article 8.

22. The judge said that if he had done so the appeal would have failed because he could not possibly conclude that it would be disproportionate for the UK authorities to require somebody to depart this country in circumstances where entry has been gained deceptively by somebody intent upon cynically manipulating its immigration laws.

23. I find that the judge's decision on the appellant's Article 8 claim was significantly influenced by his decision that the appellant had cynically manipulated the Immigration Rules to suit his circumstances. This was a wrong approach to the consideration of the appellant's Article 8 claim. I agree with Judge Holmes that the preserved findings meant that the appellant had established family life with his wife and two children, all of whom are British citizens. In finding that the appellant's Article 8 claim could not succeed under the Immigration Rules, the judge had failed to consider the relevant jurisprudence concerning Section 117B(6) of the Nationality, Immigration and Asylum Act 2002. The preserved findings should have formed the basis of the judge's consideration of the appellant's Article 8 appeal but the judge appears not to have had those findings in mind when he decided the appellant's Article 8 appeal.

24. I find accordingly that the judge's decision on the appellant's Article 8 claim was materially flawed. I set it aside in order to re-make it.

25. Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 states as follows:

> *"(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".*

26. I rely on the Upper Tribunal's decision in **SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 00334 (IAC)** which was promulgated on 5 September 2018. This decision is in the public domain. **SR** states in its head note (2) as follows:

> *"(2) The question of whether it would be reasonable to expect a child to leave the United Kingdom ('UK') in Section 117B(6) of the 2002 Act does not necessarily require a consideration of whether the child will in fact or practice leave the UK. Rather, it poses a straightforward question: would it be reasonable 'to expect' the child to leave the UK?"*

27. The judge's findings on this issue were not based on the facts of this case but based on what he considered to be the appellant's cynical manipulation of this country's immigration laws.

28. I take into account the preserved findings. The appellant and his wife are in a genuine and subsisting marital relationship. The appellant is the biological father of his daughter [S_g], who was born on 27 October 2014, and treats [S_b] as his stepson. The appellant's wife and two children are British citizens. It has also been found that the appellant participates in the upbringing of each of the children, namely his stepson and [S_g], his daughter.

29. Mr Fouladvard submitted that the appellant's stepson has special needs. The appellant's wife has been in the UK for over seventeen years.

30. I find that the appellant entered the UK lawfully and made his application to remain under Article 8 when he still had valid leave to remain in the UK. I accept the argument in the grounds that the children, although young, have every right to remain in the safety of the UK with the support of the appellant as opposed to being faced with a choice of going to Colombia with the appellant in order to maintain a relationship with the appellant. I find on the facts that it would be unreasonable to expect the two children, in particular, the stepson who has special needs, to go to a country to which they have no ties.

31. In **SR** paragraph 54 the Upper Tribunal held that having considered all the relevant circumstances and weighed the public interest in expecting child A to leave the UK in order to enjoy family life with SR (because SR cannot meet the requirements of the Rules), the Upper Tribunal was satisfied that to use the wording of Section 117B(6) the public interest does not require SR's removal because it would not be reasonable to expect A to leave the UK.

32. **SR** went on to say at paragraph 55 that the proper application of Section 117B(6) when resolved in an individual's favour is determinative of the issue of proportionality.

33. Accordingly, having found that it would not be reasonable to expect the British children to leave the UK, and relying on **SR,** I find that the appellant's removal from the UK would be a disproportionate interference with the established family life.

34. The appellant's appeal is allowed on Article 8 grounds.

No anonymity direction is made.

Signed Date: 1 March 2019

Deputy Upper Tribunal Judge Eshun