IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000336

First-tier Tribunal No: HU/58386/2022
LH/04782/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 20 June 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Georgia Cambel Plain
(NO ANONYMITY DIRECTION MADE)

Applicant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr D. Krushner, Counsel
For the Respondent: Mr P. Lawson, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 11 June 2024

DECISION AND REASONS

1. By a decision dated 28 November 2023, First-tier Tribunal Judge J. Robertson ("the judge") dismissed an appeal brought by the appellant, a citizen of Australia, against the decision of the Secretary of State dated 1 November 2022 to refuse her human rights claim made in the form of an application for leave to remain. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. The appellant now appeals against the decision of the judge with the partial permission to appeal of First-tier Tribunal Judge Moon.

© CROWN COPYRIGHT 2024

3. At the hearing, Mr Lawson very fairly conceded that the judge had made an error of law in relation to the application of section 117B(6) of the 2002 Act. I agreed, and set the decision of the judge aside, remaking it by allowing the appeal, with full reasons reserved, which I now give.

Factual background

4. The appellant is married to a British citizen. They had been living in Hong Kong, with their three British children (born in 2007, 2009 and 2010) for several years. They decided to relocate to the United Kingdom, and moved here in the summer of 2022. The children are now well established school here in the UK, and the family have bought a home which is intended to be their base. The appellant's husband continues to split his time between the United Kingdom and Hong Kong, but the family's plans are to remain firmly established in this country.

5. The appellant entered the United Kingdom on a visitor's visa, expecting to be able to apply for a spousal visa from within the country. She did not know that that would not be possible. The application was refused on the basis that, amongst other matters, she could not meet the immigration status requirement contained in Appendix FM of the Immigration Rules (para. E-LTRP.2.1. to 2.2.).

6. The refusal of the appellant's application was treated as the refusal of a human rights claim and the appellant appealed to the First-tier Tribunal.

7. The judge dismissed the appeal on the basis that had no legitimate expectation of being able to remain in the United Kingdom, having entered as a visitor. She could return to Hong Kong alone, or the family would face a choice as to whether they would accompany her there. Her removal would be proportionate.

8. For present purposes, it will not be necessary to outline the judge's findings in depth, other than to highlight the following findings, at para. 17:

> "As British Citizens the children are entitled to enjoy their rights to education in the UK and I have heard that they have settled well in their new school. They are all of an age when a continuity in their education is important, particularly with GCSEs on the horizon. I have heard that all of the children are interested in sports and engage in after school activities. This results in the two children that are boarders staying at home several nights a week as well as in the holidays. Clearly it is in all their best interests to remain together as a family unit with one or both of their parents. **They would not be obliged to leave the UK with their mother, that would be a question of choice but in any event, I find that it would be unreasonable and unnecessary to expect them to do so**." (Emphasis added)

Issues on appeal to the Upper Tribunal

9. There is a single issue before the Upper Tribunal, namely that the judge failed to have regard to section 117B(6) of the 2002 Act, and that had the judge done so, the only outcome would have been for the appeal to have been allowed, in the light of the findings at para. 17.

10. Section 117B(6) of the 2002 Act 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.”

No proper consideration of section 117B(6)

11. I respectfully consider that the judge failed to address the import of section 117B(6) of the 2002 Act. In fairness to the judge, it may be that neither party drew the judge’s attention to the possible relevance of the provision, although it is not entirely clear what was advanced in oral submissions. All three children meet the criteria to be a “qualifying child” since they are British (see section 117D(1)), meaning that the central question was whether it would be “reasonable” to expect each child to leave the United Kingdom.

12. The judge addressed precisely that question at para. 17, quoted above, finding that it would *not* be reasonable for any of the children to be expected to leave the United Kingdom. On the material before me, in the circumstances of this case it is difficult to see how any other conclusion could have been reached. Indeed, there has been no challenge to that conclusion by the Secretary of State. All three children have moved to the UK from Hong Kong, to their country of nationality, and are now well settled in school. They will no doubt have done so expecting to be able to remain here. The oldest child is approaching a crucial stage in her education. The middle child will be taking GSCE exams (or their equivalent) shortly. The youngest will have chosen her GSCE subjects and will start GSCE studies (or their equivalent) in the next year or so. Their father is British, and spends considerable periods of time here. The family have their family home in this country. The best interests of the children are plainly to remain in the UK, in the care of their mother, in the family home.

13. Against that background, the judge’s findings at para. 17 militated in favour of only one conclusion, when viewed through the lens of section 117B(6): the appeal had to be allowed. The judge expressly addressed the question of reasonableness that lies at the heart of that subsection, finding that it would *not* be reasonable for the children to be expected to leave the United Kingdom. That conclusion admitted of only one outcome, namely that the appeal should be allowed.

14. I therefore set the decision of the judge aside on the basis that the judge made a material misdirection of law in relation to section 117B(6) of the 2002 Act, preserving all findings of fact reached by the judge.

15. I re-make the decision, allowing the appeal, acting under section 12 (2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Conclusion

16. This appeal is allowed on human rights grounds. In light of section 117B(6) of the 2002 Act, on the findings reached by the judge, it would be disproportionate for the appellant to be removed from the United Kingdom, or otherwise required

to leave, in light of the fact it would not be reasonable to expect her children to leave the United Kingdom.

Notice of Decision

The decision of First-tier Tribunal Judge J. Robertson involved the making of an error of law and is set aside.

I remake the decision, allowing the appeal.

The appeal is allowed on human rights grounds.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 June 2024