



IAC-CH-AP-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/05002/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 16th July 2015**

**Decision & Reasons Promulgated
On 24th July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

**SAJID KAMRAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Latif, Counsel

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission a decision of the First-tier Tribunal dismissing the Appellant's appeal against the Entry Clearance Officer's decision to refuse entry clearance to the UK as the spouse of a settled person.
2. The grounds assert that the judge's Article 8 consideration is flawed. In elucidating the grounds with the Appellant's representative they break down into six discrete components set out at paragraph 9 of the grounds under sub-paragraphs (a) to (e)/(f).

3. Ground 1 is that the judge is in error when at paragraph 34 he states:
 - (i) "I am bound to take into account, as a factor in favour of the Respondent, the fact that the Appellant does not meet the Immigration Rules."
4. I find no error in that regard. The judge correctly self-directs that the public interest is in the maintenance of the Immigration Rules and accordingly in the context of an argument where the Respondent's case is asserted to be the public interest, the failure to meet the Rules is bound to count against the Appellant. The judge has not made the matter determinative but puts it in the scales on the Respondent's side and makes no material error of law in doing so.
5. Ground 2 challenges paragraph 45 where the judge writes:

"Whilst I accept that it is in the children's best interests for the Appellant to join them in the UK, his apparent lack of urgency in applying for entry does not suggest that it is overwhelmingly in their interests that he should come as quickly as possible."

The grounds argue that any delay in applying to join the children does not make it "not being in the children's best interests that their father should be granted entry clearance." With respect to the writer of the grounds this is not what the judge is saying. The judge is plainly commenting that the delay in making the application reveals that the Appellant himself did not find that the children's position was such that he needed to make his application as soon as he could. It is the evidence of Appellant's own assessment that is being considered.

6. The ground fails to read the decision as a whole which makes it perfectly clear that the judge did find that it was in the children's best interest to have their father living with them in the United Kingdom. The disagreement in the grounds is really with the assessment of the weight to be attached to the best interests of the children in the over all balancing exercise. In that context the history of separation was a factor that the judge was able to take into account, including the reasons for it.
7. Ground 3 is in similar vein to ground 2 above and asserts that the judge has held the delay in making an entry clearance "against the children" and in effect "blamed" the children for it. I find that that is a mischaracterisation of the inference drawn from the delay for the reasons that I have set out above.
8. Ground 4 asserts that Section 117B(3) of the Nationality, Immigration and Asylum Act 2002 has been wrongly applied because the provisions at 117B(6) are the more relevant.
9. I set out Section 117B in full as follows:

"117B Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.
- (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.”

10. Contrary to the grounds, Section 117B(6) does not restrict the operation of Section 117B(2) and (3) in the context of immigration decisions not involving removal. A plain reading of the provision makes it clear that subparagraph (6) concerns removal and has no application in this, an entry clearance case. There is no authority to suggest that the position should be automatically mirrored, by inference, to an out of country case. Parliament has restricted the position in 117B(6) to the in-country position. There is nothing untoward in that position. The differences in the character and quality of family life enjoyed in in-country and out of country cases has been marked in jurisprudence time and again. The Razgar principles adequately provide for a consideration of all relevant factors where Article 8 is engaged.

11. Ground 5 asserts that having concluded that the children would remain in the United Kingdom, and having concluded that it is in the best interests of

the children to have the Appellant living with them, the decision to dismiss the appeal runs contrary to Section 55 of the Borders, Citizenship and Immigration Act 2009 concerning the need to safeguard and promote the welfare of children who are in the United Kingdom.

12. The best interests of the children are a primary not determinative factor and the decision makes it clear that although, as a general proposition, children are usually better off living with both parents, the judge has not found anything in the children's circumstances that outweighs the public interest in the maintenance of effective immigration control. That position is clearly set out at paragraph 46:

"The fact that it is in the interests of the children that the Appellant should be afforded entry does not mean that the refusal of the application is necessarily disproportionate. Other factors might outweigh their interests."

In the same paragraph the judge refers to the fact that the Appellant does not meet the financial requirements of the Immigration Rules, the requirement that directly relates to the question of the economic wellbeing of the United Kingdom which is the legitimate aim to which the maintenance of effective immigration control is aimed in the context of the permissible derogation from Article 8 family and private life rights set out at Article 8. The judge however looks wider than the financial requirements of the Immigration Rule and reaches his own conclusion that the Appellant has not established on the balance of probabilities that the Appellant is "financially independent". The judge properly takes account of the fact that the Appellant is not currently supporting his wife and children in the United Kingdom and they are on benefits. The judge notes that the third party support on offer is not assisted by the vagueness of its terms and lack of enforceability. On the facts the brother is not supporting the Appellant's wife. The judge finds that in any event third party support is not consistent with the concept of financial independence.

13. The judge recognises that when balancing the Article 8 factors the particular weight to be given to the position of the children is not fixed. The judge has set out the ages of the children which vary between 11 and 20. He bears in mind that the children have effectively been without their father's presence for a number of years, all having been born here, none of whom have lived with their father beyond brief visits to Pakistan and the Appellant's single brief visit to the UK. The judge finds there is nothing particularly unusual in their position. The judge finds that there is no evidence that they have been adversely affected. The judge considers the evidence concerning the health of the Appellant's wife, bearing in mind her needs and how she is currently able to meet them, and concludes that the factor of the Appellant's non-availability to assist the Sponsor does not place any unreasonable burden on the children.
14. At paragraph 50 the judge concludes, consistently with jurisprudence, that there is nothing in the children's circumstances which operates to show that they are determinative of the proportionality exercise, nor that even

when taken into account with all the other factors, they are sufficient to draw the balance in favour of the Appellant.

15. In short the judge found that the Appellant failed to satisfy the burden on him to establish a factual matrix which supported a conclusion that the best interests of the children carried the weight argued for by Mr Latif.
16. Ground 6 asserts that the judge failed to take into account that as a result of the loss of the Appellant's appeal the Appellant's wife may choose to go to live with the Appellant in Pakistan and that her minor children would therefore in effect be forced to leave the United Kingdom to be with them so that the issue of removal at S117B(6) had a further relevance.
17. That ground reveals no error in the judge's decision. It was not a factor that was prayed in aid of the Appellant's case and in any event is not only speculative, but exceeds the evidence of the Appellant's wife that in the event of refusal she would not return to Pakistan to live with the Appellant.
18. Mr Tarlow's submission, to the point that the decision is well-balanced, reflecting positive as well as negative points, and paying due regard to the children's circumstances, including paying regard to their own wishes for the Appellant to join them, with a proper assessment of their best interests is well made.
19. In short I find no material error of law in the judge's decision dismissing the Appellant's appeal and it stands.
20. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Davidge