



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

Appeal Number: HU/04546/2016

THE IMMIGRATION ACTS

**Heard at Manchester
On 8 November 2017**

**Decision & Reasons Promulgated
On 9 November 2017**

Before

Deputy Upper Tribunal Judge Pickup

Between

**AB
[Anonymity direction made]**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr C Bloomer, instructed by Knights Law Solicitors Ltd
For the respondent: Mr J Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Herwald promulgated 16.1.17, dismissing his appeal against the decision of the Secretary of State, dated 31.1.16, to refuse his human rights application. The Judge heard the appeal on 16.12.16.
2. First-tier Tribunal Judge Martins granted permission to appeal on 10.8.17.
3. Thus the matter came before me on 8.11.17 as an appeal in the Upper

Tribunal.

Error of Law

4. For the reasons set out below, I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision to be set aside and remade by allowing the appeal.
5. The grounds of application for permission to appeal assert that having directed himself to s117B(6) and having been referred to Treebhawon & Others (Section 117B(6)) [2105] UKUT 00674, the judge appears to have determined the case without reference to and assessment of the position under s117B(6). It is also submitted that the judge failed to make any proper assessment of the effect and presence in the UK of the qualifying child and the reasonableness of expectation of that child leaving the UK. Thus, it is argued, article 8 was not afforded any proper consideration.
6. In granting permission to appeal, Judge Martins found that the assertions in the grounds are evident on the face of the decision and thus an arguable error of law has been shown.

Background

7. The appellant underwent an arranged marriage to the sponsor, [NP], in 2013. In January 2014 he was issued with entry clearance as a spouse and arrived in the UK in February 2014, with leave valid to October 2016. That leave was subsequently curtailed to expire in September 2015. In November 2016 the appellant applied for LTR as a partner, on the basis of private and family life, applying on form FLR (FP), and indicating that his partner was pregnant with their child.
8. Although they had argued and separated, they had subsequently reconciled and recommenced living together. The Secretary of State conceded that the relationship was by the date of application and decision genuine and subsisting. However, it was contended that there are no insurmountable obstacles to continuing family life in India, and no very significant obstacles to integration, so that the appellant does not qualify under the Immigration Rules. Neither did the Secretary of State accept that there were exceptional or compelling circumstances to justify granting LTR outside the Rules.
9. At the time of application and decision the child had not been born, and was not due until May 2016. Further, at that time, the sponsor had ILR.
10. There was no representation on behalf of the Secretary of State at the appeal hearing.
11. By the date of hearing of the appeal before the First-tier Tribunal, the sponsoring spouse had obtained British citizenship by naturalisation and thus the child born in 2016 is also a British citizen.

12. For the appellant at the First-tier Tribunal, Mr Bloomer conceded that the appellant could not have met the requirements of the Rules as at the date of decision. He made the same concession before the Upper Tribunal.
13. The case turned on article 8 ECHR and on the circumstances prevailing at the date of hearing before the First-tier Tribunal. At that time the appellant was genuinely married in a subsisting relationship to a British citizen wife, and with a British citizen child.
14. Whilst the decision made reference at [24] to s117B of the 2002 it did so in only the briefest of terms and before considering whether the circumstances justified consideration outside the Rules on article 8 ECHR private and family life. Whilst the judge referred to s117B(6), there was no adequate assessment as to whether it was reasonable to expect a British citizen child to leave the UK, nor of the child's best interests under Section 55 of the Borders, Citizenship and Immigration Act 2009.
15. The appellant was admitted to the UK lawfully as a spouse. Whilst his status must by definition have been precarious, this was not the case of a person who entered unlawfully or whose leave on a different basis had expired. The appellant had a reasonable expectation that his probationary leave would have in due course led to ILR. It seems likely that had a 'friend' not advised the Home Office that the appellant's wife had returned to India, his leave would not have been curtailed.
16. It follows that the appellant became, with the consent of the Secretary of State the spouse of a person with ILR in the UK and who subsequently acquired British citizenship and gave birth to a British citizen child.
17. Whilst the judge referenced the Secretary of State's policy set out in the the IDI section 11.2.3, the judge failed to take adequate account of it. This policy provides guidance when considering the best interests of a child and how to assess whether it would be reasonable to expect a child to leave the UK. Whilst the appellant could not meet the requirements of the Rules at the date of application or decision, the situation as presented to the First-tier Tribunal meant that either under EX1(a) s117B(6), the Tribunal had to assess the reasonableness. Under section 11.2.3 it would be unreasonable to expect a British citizen child to leave the EU with the parent or primary carer. In this case, the child could have remained with the other parent. However, the policy also provides that it will unusually be appropriate to grant leave to the parent or primary carer to enable them to remain in the UK with the child, provided there is satisfactory evidence of a genuine and subsisting parental relationship, as there was in this case. "In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation." Reference is made to the best interests and welfare of the child. It is only where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, such as criminality or a very poor immigration history, that it may be appropriate to refuse to grant leave, if the child could otherwise stay with another parent or

alternative primary carer in the UK.

18. Whilst MA (Pakistan) [2016] EWCA Civ 705, held that the wider public interest requirements should be taken into account when assessing this reasonableness, there does not, in this case appear to be any compelling public interest factors against the appellant.
19. The decision of the First-tier Tribunal was devoid of any adequate consideration of the best interests of the child of the appellant and that it must be in the best interests of the child to be raised by both parents. It cannot be said that it would be in the best interests of a child to leave the UK with the benefits citizenship of the UK affords to that child. In the circumstances I am satisfied that the decision cannot stand and must be set aside. Mr Harrison did not resist the appeal.
20. On the facts of this case, there seems to be no purpose in remitting for a rehearing, or delaying the remaking of the decision. No evidence was required and the appeal turns on the prevailing circumstances, which are beyond dispute.
21. In all of those circumstances, it is clear, and I am so satisfied, that it would not be reasonable to expect the child to leave the UK, even taking full account of the public interest. The public interest in requiring the appellant to leave the UK in this case is slight, when it is clear that all things being equal he would have had every expectation of being able to settle in the UK with his wife and child and had entered the UK with leave for that very purpose. I am satisfied that in the circumstances prevailing at the date of the First-tier Tribunal appeal hearing, and still present, it would be unjustifiably harsh and disproportionate to the article 8 rights of the appellant and particularly his family members to require him to leave the UK, applying the Razgar stepped approach. In the circumstances, the appeal should be allowed.

Conclusion & Decision

22. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by allowing it.

A handwritten signature in black ink, appearing to be 'James', written in a cursive style.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. However, given the case involves a child I make an anonymity direction.

Direction Regarding Anonymity

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent.

Fee Award

Note: this is not part of the determination.

I make no fee award

Reasons: The circumstances now prevailing and on which the appeal has been allowed are different to those at the date of decision.



Signed

Deputy Upper Tribunal Judge Pickup

Dated