



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11457/2015

THE IMMIGRATION ACTS

Heard at Field House
On 7 November 2017

Decision & Reasons Promulgated
On 21 November 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MR SYED NAZMUL ISLAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. J. Collins, Counsel
For the Respondent: Mr. S. Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh who entered the United Kingdom on 15 February 2009 with leave as a student. That leave was subsequently extended but ultimately a further application dated 24 July 2013 was refused. He appealed and thereafter made application for asylum which was subsequently withdrawn. He was served with notice as an overstayer but on 27 August 2015 he submitted another application for leave to remain based on his marriage to a British citizen. This application was also refused and the appellant appealed.

2. Following a hearing at Hatton Cross Judge of the First-tier Tribunal N M K Lawrence, in a decision promulgated on 20 February 2017, dismissed the appellant's appeal.
3. The appellant sought permission to appeal which was granted by Judge of the First-tier Tribunal Saffer who in a decision dated 4 September 2017 gave his reasons for so doing. They are:-
 - "1. The appellant seeks permission to appeal against the decision of First-tier Tribunal Judge Lawrence promulgated on 20 February 2017 whereby the appeal against the decision to refuse to grant leave to remain was dismissed.
 2. I am satisfied that the application is in time as it was filed on 3 March 2017.
 3. As it was recorded [5] that the respondent accepted that the suitability and eligibility requirements of the Rules were met, it is arguable that the judge may have materially erred in going on to consider EX1 which is an exception that enables consideration of certain matters where the eligibility grounds are not met. All grounds may be argued."
4. Thus, the appeal came before me today.
5. At the outset both representatives urged me to accept that the judge had materially erred by failing to consider Section 117B(6) which is found in part 5A of the 2002 Nationality, Immigration and Asylum Act. I share their analysis. The judge has materially erred as they submit.
6. I was handed up the authorities of **MA (Pakistan) and Others, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) and Anor** [2016] EWCA Civ 705 and **SF and others (Guidance, post-2014 Act) Albania** [2017] UKUT 00120 (IAC). Also, the Immigration Directorate Instruction Family Migration of August 2015.
7. Having found a material error of law I proceeded to listen to submissions from both representatives as to how this appeal should be disposed of given the findings of fact made by the judge which are unchallenged.
8. Mr Collins argued that the Immigration Directorate Instruction Family Migration of August 2015 remains in force and that there is no dispute that there is a genuine and subsisting parental relationship between the appellant and child. This is a case where criminality is not a factor nor is any serious breach of Immigration Rules. It is also not disputed that the appellant's wife was born in London. The authority of **SF** gives effect to the "IDIs". They are not, contrary to Mr Kotas's submission simply about "**Zambrano**" situations. It would not be reasonable to expect the appellant's child to leave the United Kingdom and the appeal should be allowed.

9. Mr Kotas urged me to accept that **SF** had been decided on quite different facts and that unlike the child in "**MA**" this was a very young child born some two days prior to hearing who was yet to establish a private life and there is nothing unreasonable in all the circumstances, and no significant obstacles, preventing this appellant returning to his country of origin.
10. The first thing to say is I reject Mr Kotas's submission that the IDIs are simply about the "**Zambrano**" situation. Amongst other things, paragraph 11, as stated in paragraph 11.1, they are a policy statement as to the factors to be considered when assessing a child's best interests under the family and private life Immigration Rules with particular reference to instructing how to assess whether it would be reasonable to expect a child to leave the United Kingdom when considering paragraph EX.1 of Appendix FM and paragraph 276ADE(1) of part 7.
11. The guidance goes on to detail factors to consider. In this appeal there was a genuine and subsisting parental relationship. The child is a British citizen. In looking at whether it would be unreasonable to expect a British citizen to leave the United Kingdom the guidance states at paragraph 11.2.3:-

"Where a decision to refuse the application would require a parent or primary carer to return to a country **outside the EU**, the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship."

On the facts of this appeal there is no criminality falling below the threshold set out in paragraph 398 of the Immigration Rules or a very poor immigration history where it can be said that the appellant has repeatedly and deliberately breached the Immigration Rules.

12. Any decision as to the best interests of a child will depend on a number of factors, including those referred to in **EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA Civ 874**. Mr Kotas submitted that the child in this particular appeal is not yet 7 years which of course I accept. It is though not the only factor to be taken into account. I am guided by Section 55 of the Borders, Citizenship and Immigration Act 2009. The best interests of a child are and in total part of the proportionality assessment under Article 8 of the ECHR and must be a primary consideration, although not always the only primary consideration. Whilst the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant. Mr Collins urges me to accept that considerable weight must be given to the IDIs. He referred me to paragraph 9 of **SF** which state: -

"9. It appears to us inevitable that if the guidance to which Mr Wilding has drawn our attention had been applied to the present family, at any time after it was published, and on the basis that the youngest child is a British

citizen, the conclusion would have been that the appellants should have been granted a period of leave in order to enable the British citizen child to remain in the United Kingdom with them. The question is then whether the guidance as guidance has any impact on the First-tier Tribunal or on us".

13. I find in considering all the above, including the respondent's own IDI and the individual facts of this appeal the public interest does not require this appellant's removal as he has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect that child to leave the United Kingdom.

Notice of Decision

14. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
15. I set aside that decision.
16. The appeal is allowed.
17. No anonymity direction but the fee award is given on the basis that the appeal is allowed.

Signed

Date 20 November 2017.

Deputy Upper Tribunal Judge Appleyard