



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16772/2016**

THE IMMIGRATION ACTS

Heard at Field House
Promulgated
On 14 March 2018

Decision and Reasons
On 16 March 2018

Before

UPPER TRIBUNAL JUDGE PITT

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PELLUMB [M]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr Alim of Stepstones Visas Limited

DETERMINATION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Geraint Jones Q.C. dated 14 November 2017. The decision allowed the appeal, finding that paragraph EX.1. of Appendix FM to the Immigration Rules was met as regards the respondent's two British children.
2. For the purposes of this decision, I refer to Mr [M] as the appellant and to the Secretary of State for the Home Department as the respondent, reflecting their positions before the First-tier Tribunal.

Background

3. The appellant is a national of Albania, born on [] 1984. In August 2008 he met [AC], originally from Kosovo, but now a British citizen, when she went to Albania on holiday with her family. They stayed in touch and in order to be with [AC], the appellant entered the UK illegally on 13 November 2008. He has remained here illegally since then. The couple began to cohabit in 2012. The couple have two children, a son born on [] 2014 and a daughter born on [] 2016. It is undisputed that they are due to have a third child in [] 2018.
4. On 22 January 2016, the appellant applied for leave to remain in order to be with his partner and children. The respondent refused the application on 24 June 2016. The appellant's appeal against that decision came before First-tier Tribunal Judge Oliver on 8 November 2017.
5. The core of the appellant's case before the First-tier Tribunal was that the appellant met paragraph EX.1. of Appendix FM to the Immigration Rules as he had a genuine subsisting relationship with his British children and it was not reasonable to expect the children to leave the United Kingdom.
6. It was not disputed that the appellant's relationship with his children (or his partner) was genuine and subsisting. Much of the decision concerns the very adverse findings that the First-tier Tribunal made against the appellant concerning his immigration history, the appellant "playing the system", illegal working, failure to declare income to HMRC, his partner claiming benefits when he was working and the appellant and his partner being untruthful in their evidence about the appellant's work history; see [2]-[4], [8]-[9], [13]-[17], for example.
7. Notwithstanding those adverse findings, the First-tier Tribunal concluded that the appeal had to be allowed under the Immigration Rules as case law required a finding that it was not reasonable for the British children to be expected to leave the UK. At [15]-[17] the judge said this:

"15. EX1 comes to the rescue of the appellant because the Upper Tribunal and the higher courts have proceeded on the basis that it will almost always be unreasonable to expect a British citizen child to have to leave the United Kingdom to reside in a foreign country (almost regardless of the identity of that other country and whether it offers a way of life culturally, materially and economically superior to that available in the United Kingdom). It is a rather precarious position to take, but nonetheless, one that has been taken. It might be an understandable position to take in the context of Albania.

16. I would find it difficult to conclude that it would be reasonable to expect the appellant's British citizen children to leave the United Kingdom for Albania. That is sufficient for the appellant hold himself out as a shining example of how to go about abusing the immigration laws of this country by coming here and ensuring that he parents a child, not just any child, a child who is a British citizen.

17. Unfortunately, I have to conclude that this utterly un-meritorious appeal must succeed. That is the consequence of the preciousness shown by the higher courts towards the concept of British citizenship and the concept of a British citizen child residing in some other country. It is also the consequence of the appellant playing the system with practised skill and ability.”

Error of Law

8. As argued by the respondent in the grounds of appeal, I am satisfied that these paragraphs contain a material misdirection of law as to the correct approach to be taken in the EX.1. assessment of whether it was reasonable for the children to leave the UK. The First-tier Tribunal does not identify which cases are supposed to set down the principle which prevented the adverse factors that were found from being included in the reasonableness assessment. I am not aware of case law expressing such a principle.

9. In MA (Pakistan) v SSHD [2016] EWCA Civ 705 the Court of Appeal considered the correct approach to the “reasonableness” test. At [41]-[42] the Court of Appeal identifies that including adverse aspects of a parent’s conduct does not offend the correct approach to the children’s best interests:

“41. The appellants advanced an additional reason why the Secretary of State's approach to the test would be inconsistent with principle. They submit that if the misconduct of the parents is taken into account when considering the position of the child, the consequence is that the child is being blamed for the moral failing of the parents, something which Lord Hodge emphasised in *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690 was not permissible: see principle seven of the seven principles summarized in para.10 (discussed further in para.52 below) reflecting what Lady Hale had said in *EM (Lebanon) v Secretary of State for the Home Office* [2009] AC 198 para.49.

42. I do not believe that this principle does undermine the Secretary of State's argument. As Lord Justice Laws pointed out in *In the matter of LC, CB (a child) and JB (a child)* [2014] EWCA Civ 1693 para.15, it is not blaming the child to say that the conduct of the parents should weigh in the scales when the general public interest in effective immigration control is under consideration. The principle that the sins of the fathers should not be visited upon the children is not intended to lessen the importance of immigration control or to restrict what the court can consider when having regard to that matter. So if the wider construction relied upon by the Secretary of State is otherwise justified, this principle does not in my view undermine it.

10. The Court went on at [45] to confirm that “the conduct of the applicant and any other matters relevant to the public interest” should be assessed “when considering the question of reasonableness under section 117B(6)”. The test in EX.1. is the same as that in section 117B(6) and the same principle should have been followed by the First-tier Tribunal but was not.

11. Upper Tribunal case law also confirms in the head note of Kaur (children's best interests /public interest interface) [2017] UKUT 00014 (IAC) that that neither legislation nor case law acts to "preclude an outcome whereby the best interests of a child must yield to the public interest." It is perhaps worth mentioning that I am unable to identify a best interests assessment in the First-tier Tribunal so it is not clear that their best interests had been identified as remaining in the UK.
12. Had the First-tier Tribunal taken a correct approach in the "reasonableness" assessment and included the appellant's immigration history and other matters relevant to the public interest, it is entirely possible that the outcome of the appeal would have been different. I am satisfied that these matters amount to a material error on a point of law such that the decision must be set aside to be re-made.

Re-Making

13. The direction issued with the grant of permission to appeal indicated to the parties that that there was a presumption that if an error of law was found, the re-making would take place at the same hearing on the basis of the evidence that had been before the First-tier Tribunal. No application was made under Rule 15(2A) for further material to be adduced. Mr Alim initially confirmed that there was no further evidence and that the re-making could proceed on the basis of submissions.
14. During submissions Mr Alim asked for time to take instructions on, raising a concern about the partner having family in the UK. He took instructions but it was agreed that this matter was covered in the partner's witness statement dated 2 November 2017 that had been before the First-tier Tribunal. Mr Alim nevertheless applied for oral evidence to be adduced but, other than the issue of the wife's family being in the UK, did not identify anything else that could assist in the re-making of the appeal. I therefore did not find it necessary to hear oral evidence
15. The first issue in considering whether paragraph EX.1. is met is to assess the best interests of the children. Mr Clarke conceded that these lay in the children remaining in the UK with both parents, the children having been born here, lived here all their lives and the older child attending nursery. I therefore took that best interests assessment into consideration as a primary factor when assessing the reasonableness of the children leaving the UK.
16. As above, there was no cross-appeal against the serious adverse findings made against the appellant by the First-tier Tribunal. The appellant deliberately entered the UK illegally in order to join [AC], remained illegally, worked illegally, did not pay tax, the family still claiming benefits. The appellant fails to meet the provisions of section 117B(3) concerning financial independence. The public interest factor in section 117B(2) is neutral as, although he used an interpreter at the hearing, the appellant appeared to speak relatively good English.

17. It was also my view that the evidence here indicated that it was reasonable for [AC] to be expected to go to Albania with the appellant and the children. She came to the UK at the age of 10 and has been here most of her life but her family history is in Kosovo, she speaks Albanian and, indeed, met the appellant whilst on a family holiday to Albania. Her evidence is that her family are in the UK but is also that they are estranged because of her relationship with the appellant. Her family being in the UK cannot act as a strong factor showing that she should not be expected to go to Albania, therefore. That is additionally so where the appellant has immediate family who can offer support to her and the children.
18. It is therefore my conclusion, even weighing the best interests of the children as a primary factor and taking into account the appellant's wife only having visited Kosovo and having lived most of her life in the UK, that the particularly adverse factors weighing strongly in support of the public interest here make it reasonable for the children to be expected to leave the UK and live in Albania with their parents. Paragraph Ex.1. is not met and the appeal under the Immigration Rules must fail.
19. The appeal cannot not succeed on any other basis where the conclusion is that it is reasonable for the children to go to Albania. As above, I have found that it is reasonable for the appellant's partner to go to Albania with him and the children. There would not be insurmountable obstacles to her exercising family life there. There were no other factors beyond those considered in the EX.1. assessment that could begin to outweigh the public interest in a proportionality assessment outside the Immigration Rules. The appellant's private life and relationship with his wife weigh little in such a proportionality assessment given his illegal status at all times.

Decision

20. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside.
21. The appeal is remade as refused under and outside the Immigration Rules.

Signed: 
Upper Tribunal Judge Pitt

Dated: 14 March 2018