



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)**

APPEAL NUMBER: HU/17717/2016

THE IMMIGRATION ACTS

**Heard at: Field House
On: 6 February 2018**

**Decision and Reasons Promulgated
On: 2 March 2018**

Before

Deputy Upper Tribunal Judge Mailer

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**PARAMJIT [B]
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation

For the Appellant: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer

For the Respondent: Mr A Rehman, Mayfair Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the secretary of state and to the respondent as the claimant.

2. The secretary of state appeals with permission against the decision of the First-tier Tribunal Judge Povey who in a decision promulgated on 15 November 2017, allowed the claimant's appeal on human rights grounds.
3. The claimant is an Indian national born on [] 1979. She appealed against the secretary of state's decision dated 8 July 2016 to refuse her application for leave to remain in the UK. Her partner is a UK citizen.
4. Judge Povey found that the claimant entered the UK illegally in 2007 but did nothing to regularise her status in the UK until she submitted her current application on 22 May 2015 based on her relationship with her partner and her child. It was not in dispute that she was in a genuine and subsisting relationship with Mr [S], a British citizen. Nor was it an issue that Mr [S] has two other children in the UK from a previous relationship, with whom he has a parental relationship. Mr [S] and "the couple's child are both UK citizens" [17].
5. Judge Povey accordingly found that there was family life between the appellant, Mr [S] and their child.[18]
6. It was conceded at the outset of the hearing that but for the alleged deception which triggered a finding that the claimant failed the suitability requirements of Appendix FM to the Rules, her application would have met the Immigration Rules.
7. He found that given the existence of family life as he found, there are compelling circumstances for considering the appeal under Article 8 of the Human Rights Convention [23]. He found that the provisions of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 had been met, namely, that the claimant has a genuine and subsisting parental relationship with her child who is a qualifying child. It would not be reasonable for the child to leave the UK as conceded by the presenting officer '... in her acceptance that the Immigration Rules were met (save for the issue of suitability) [24].
8. It was submitted on behalf of the secretary of state at the First-tier Tribunal hearing that even though s.117B(6) was met, the public interest in effective immigration control generally and the claimant's removal specifically was not dislodged. Judge Povey stated that he was unable to agree. The public interest in not requiring the claimant's removal prevails over the public interest in the maintenance of effective immigration control. He stated at [26] that "... Where the conditions under s.117B(6) are met (as here) that is determinative of the proportionality assessment, the public interest does not justify removal and Article 8 has been infringed (per MA at [16] -[20]; Rhuppiah)".
9. He accordingly found that the secretary of state's decision was a disproportionate interference with the claimant's family life. He reached that conclusion "even if" the claimant did not sit and pass the English language test as alleged by the secretary of state. He referred to the decision of the Court of Appeal in MA (Pakistan) [2016] EWCA Civ 705 at [17].

10. On 18 December 2017 First-tier Tribunal Judge JM Holmes granted the secretary of state permission to appeal. It was arguable that the Judge was obliged to address the issue of whether a false language certificate was relied upon. If it was, that added weight to the public interest in refusal: the Chikwamba exception. Arguably as the grounds identify, the Judge failed to address this issue in the decision at all. All grounds were arguable.
11. Ms Brocklesby-Weller relied on the grounds of appeal. She noted that the claimant was refused leave to remain in the UK because the secretary of state was satisfied that she had obtained an English language certificate by deception.
12. She submitted that the Judge failed to make a clear finding as to whether he found the claimant to be credible or not. The proportionality assessment was inadequate as the Judge failed to view Article 8 through the lens of the Rules.
13. The Judge failed to consider that if the claimant has a fraudulently obtained English language certificate, she had a poor immigration history. Obtaining leave to remain by deception constitutes a criminal offence and is evidence of criminality, even if there is no conviction as yet. Accordingly there may be powerful reasons in this case to render it reasonable for family life to continue abroad.
14. It is further contended that the Judge gave inadequately reasoned findings in identifying compelling circumstances such as to justify consideration of a breach under Article 8.
15. Ms Brocklesby-Weller thus submitted that the Judge in effect ignored the deception points.
16. The approach that Lord Justice Elias favoured in MA was inconsistent with the decision of the Court of Appeal in MM (Uganda) v SSHD [2016] EWCA Civ 450. The Court of Appeal in MA did not think that they ought to depart from that decision [45]. It was accordingly held in MA that the fact that the child is a qualifying child must be given significant weight when carrying out the proportionality exercise. It is a factor of some weight in favour of leave to remain being granted.
17. Ms Brocklesby-Weller submitted that Judge Povey adopted a “child centric” approach. His failure to have regard to the public interest considerations constitutes a material error as the circumstances may not have been so compelling as to require a consideration of Article 8 outside the Rules.
18. She also contended that the Judge did not give 'reasoned findings' when identifying compelling circumstances 'rendering a breach of Article 8'. There is nothing to prevent the claimants' returning to India to apply for the appropriate entry clearance. Separation would be temporary and proportionate.

19. She submitted that the decision should accordingly be set aside and re-made after consideration of all the evidence.
20. On behalf of the claimants, Mr Rehman submitted that Judge Povey dealt with the issues. He referred to [19] where a concession was made that but for the alleged deception the application would have met the immigration rules.
21. He referred to MA (Pakistan) at [17], where Lord Justice Elias stated that s.117B(6) must be read as a self contained provision. Where the conditions are satisfied the public interest will not justify removal. I indicated to Mr Rehman however, that it was pointed out during argument in MA, that counsel on behalf of the secretary of state argued otherwise at [18]. Further, at [45] Lord Justice Elias acknowledged that the approach favoured was inconsistent with MM (Uganda).
22. Mr Rehman further submitted that the approach by Judge Povey at [20] was also informed by the Upper Tribunal decision in SF and Others (Guidance, Post 2014 Act) Albania [2017] UKUT 00120. He referred to the policy identified at paragraph 7 of SF. He acknowledged that the Judge made no findings in respect of the asserted deception. However, he submitted that the error is not material.
23. He referred to the decisions in Chikwamba and Beoku-Betts. In the latter decision the House of Lords decided that the effect on other family members and their right to respect for their family life had to be taken into account in an appeal to the Tribunal on human rights grounds.
24. In reply, Ms Brocklesby-Weller submitted that having regard to the conduct of the claimant the proportionality assessment is simply defective. The Judge ignored the public interest considerations in their entirety. It cannot simply be asserted that it would not be reasonable for the claimants' child to leave the UK and that "would be the end of the public interest."

Assessment

25. Judge Povey had regard to the decision of Lord Justice Elias at [17] in MA, supra. However, even though referring to that decision at [28], no consideration was given to the decision of the earlier decision by the Court of Appeal in MM (Uganda), supra. In MA the Court did not think that they would be able to depart from that decision - [45].
26. In MM the Court had held that while the public interest considerations must be taken into account in applying the "unduly harsh" criteria, that must be equally so with respect to the reasonableness criteria in s.117B(6). Lord Justice Elias noted that in applying the reasonableness test, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. He referred to the guidance in August 2015 and the IDIs in which it was expressly stated that once the seven years' residence requirement was satisfied there needs to be "strong reasons" for refusing leave.

27. First-tier Tribunal Judge Povey did not make any finding as to whether the claimant obtained the English language test by deception. He concluded that even if he had, the public interest in not removing the claimant must prevail [28]. He relied on the approach favoured by Lord Justice Elias in MA at [17] but did not consider MM which the Court of Appeal found applied.
28. The proportionality of the proposed removal was not properly considered. There has been no consideration of the fact that the appellant might have obtained leave to remain by deception. If that fact were established it might constitute a proper basis under s.117B(6) for rendering it reasonable for family life to continue abroad. This gives added weight to the public interest in refusal, notwithstanding the Chikwamba exception.
29. I have also had regard to Mr Rehman's submission as to the applicability of SF and Others, supra. However, the policy referred to at [17] in that case noted that it may indeed be appropriate to refuse to grant leave where the conduct of the parent gives rise to considerations of such weight as to justify separation if the child could otherwise stay with another parent in the UK or EU. The circumstances envisaged could cover another's criminality falling below the threshold set out in paragraph 398 of the Immigration Rules as well as a very poor immigration history such as where the person has repeatedly and deliberately breached the immigration rules.
30. I accordingly find that the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision which will have to be re-made.
31. I indicated to the parties during the hearing that in the event that I reached this conclusion the case should be remitted to the First-tier Tribunal for a fresh decision to be made. Neither representative made any submissions to the contrary.
32. I have had regard to the President's Practice Statement concerning the remitting of an appeal to the First-tier Tribunal for a fresh decision. I am satisfied that the extent of judicial fact finding which will be necessary in order for the decision to be re-made is extensive. I have had regard to the overriding objective and conclude that it would be just and fair to remit the case.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside.

The case is remitted to the First-tier Tribunal (Newport) for a fresh determination to be made.

Anonymity direction not made.

Signed

Date 23 February 2018

Deputy Upper Tribunal Judge C R Maller