



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

Appeal Number: IA/01517/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 8 February 2018**

**Decision & Reasons
Promulgated
On 6 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

**AQ
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Awan, Counsel instructed by Mayfair Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant in this case is a citizen of Pakistan born on 13 April 1983. He appealed to the First-tier Tribunal against the decision of the respondent, dated 9 March 2016, refusing his application to remain in the United Kingdom on human rights grounds. In a decision promulgated on 5 April 2017, Judge of the First-tier Tribunal Kainth dismissed the appellant's appeal.

2. The appellant appeals to the Upper Tribunal, with permission from the Upper Tribunal, on the grounds that it was arguable that the judge did not make a finding in respect of the child's best interests and it followed that it was arguable that the proportionality assessment was flawed.

Error of Law - Discussion

3. It was Mr Awan's submission that the Tribunal incorrectly considered the child's best interests and that in line with relevant case law Mr Awan submitted that the judge's mind, at [24] of the decision and reasons, was not on Section 55 duty to safeguard the best interests of the child.
4. It was not in dispute before me that the Tribunal had a duty to take into consideration the best interests of the British child of the relationship. Mr Awan pointed to the seven principles outlined in **Zoumbas v Secretary of State for the Home Department [2013] UKSC 74**, namely:
 - “(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
 - (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
 - ((3) Although 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;
 - (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
 - (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
 - (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
 - (7) A child must not be blamed for matters for which he/she is not responsible, such as the conduct of a parent.”
5. Mr Awan drew my attention to the respondent's guidance in the Immigration Directorate Instructions, August 2015 in relation to whether it would be unreasonable to expect a British citizen child to leave the UK at 11.2.3. It was also Mr Awan's submission that the judge's findings, at [24] of the decision and reasons, that the appellant's best interests were served in remaining with her parents, were in contrast to the findings at [11]. At [11] of the decision and reasons the Tribunal found as follows:

- “11. It is also a fact that the immigration decision prevents the appellant and his wife living together in the UK against their wishes. Of itself, the failure to respect the couple’s wishes does not have the potential to engage Article 8. But there are other factors. It is far from obvious that his wife could be expected to relocate to Pakistan since she is a British citizen having been born in the United Kingdom. She has lived here all her life. Her centre of life is focused in the UK. They have a daughter from their relationship born on 15th August 2012. It is possible that the decision may have an impact on their child’s wellbeing because it could result in their daughter not having regular contact with her father.
12. In light of these factors, I am satisfied the decision refusing leave to remain may have consequences of such gravity as potentially to engage the operation of Article 8, thereby disposing of the second **Razgar** question.
13. In light of the evidence and these comments, I find that the appellant enjoys family life with his wife and daughter, thereby disposing of the first **Razgar** question.”

6. As I indicated at the hearing, it is evident that the judge’s findings at [12] were very much in the context of the **Razgar** questions and whether or not family life existed and whether the decision potentially impacted to the extent that Article 8 was potentially engaged. It is evident from the wording at [11] that the judge had not reached a conclusion in relation to those key factors including that issues were “far from obvious” and that “it is possible” in terms of the impact of the decision.
7. However, the Tribunal went on in its findings to consider first of all that it had not been established that there was a subsisting marriage between the appellant and his partner. That finding has not been challenged. The decision went on to find that the appellant was the father of a British child and accepted, at [19], that the appellant had established the relevant relationship requirement and therefore could rely on a provision of Section 117B(6) which reverses the justification for exclusion that arises from other provisions of Section 117B. It was not disputed that the Tribunal correctly directed itself as to the relevant test and the judge set out the case law relied on including **MA (Pakistan and Others) v SSHD and Another [2016] EWCA Civ 705, R (on the application of) Agyarko (appellant) v SSHD [2017] UKSC 11**. The judge went on, at [24], to find as follows:

“The appellant’s daughter is a qualifying child by virtue that she is a British citizen. I have made findings of fact that the appellant has a genuine and subsisting parental relationship with her. The second test poses the question of whether it would be reasonable to expect the child to leave the United Kingdom. The appellant lives with his daughter and wife. They have daily interaction. The second stage of the test is the question of reasonableness – would it be unreasonable to expect his daughter and wife to leave the UK. **AM (Pakistan) & Ors v Secretary of State for the Home Department [2017] EWCA Civ 180**, 22 March 2017 – in considering whether children who

had lived in the UK for over seven years could be removed, it was inherent in the reasonableness test in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 and paragraph 276ADE(1) of the Immigration Rules HC 395 (as amended) that the Court should have regard to wider public interest considerations, particularly the need for effective immigration control. Applying the guidance in **AM** it would be reasonable to expect the family as a whole to relocate. Their daughter is very young and she is reliant upon her parents. She is too young to have developed and formed her own associations with others. Her best interests are served with her remaining with her parents.”

8. The Tribunal went on to find, at [25], that the appellant’s spouse could relocate and I do not agree with Mr Awan’s submission that this contradicts his finding at [11] in determining whether **Razgar** was engaged that ‘it was far from obvious’ that she could relocate. The judge went on to consider all the factors including at [25] and [26] where the Tribunal was not satisfied that the settled spouse had shown that it would be more than inconvenient to relocate.
9. Mr Awan submitted that the appellant was not someone who was unlawfully in the UK and at the time of the appeal he had Section 3C leave. Although Mr Awan initially argued that as the appellant’s application was made before 5 February 2015 the old grounds of appeal under Section 84 of the Nationality, Immigration and Asylum Act 2002 prior to amendment applied and it was his argument that the Tribunal ought to have considered whether, for example, the decision was not in accordance with the law; he did not pursue that argument as he conceded that the only ground of appeal before the First-tier Tribunal was in relation to the provisions of Article 8 and it was not argued before the First-tier Tribunal that the appellant could meet the requirements of the Immigration Rules.
10. Although Mr Awan relied on paragraphs 51 and 52 of the Supreme Court decision in **Agyarko** including that it was relevant whether an applicant was in the UK lawfully and whether there might be any public interest in their removal, paragraphs 51 and 52 of the Supreme Court in **Agyarko**, whilst discussing the issue of precariousness, was considering the position of where an applicant might be certain to be granted leave to enter such as the circumstances outlined in **Chikwamba v Secretary of State for the Home Department [2008] UKHL 40**. That was not established to be the case in this appeal.
11. Mr Avery submitted that the decision of the First-tier Tribunal was sustainable and that the judge had correctly directed himself as to the appropriate case law. Whilst ideally the judge might have structured the approach to the best interests differently, [24] of the decision was clear in the conclusion as to the child’s best interests.
12. In relation to Section 117B(6) the appellant’s wife and British child are not being expected or forced to leave the United Kingdom and I considered

VM (Jamaica) [2017] EWCA Civ 255 including paragraph 60 and **FZ (China) v Secretary of State for the Home Department [2015] EWCA Civ 550**. The crucial question is whether there is an ‘entire dependency’ of the relevant child on the person who is refused residence. The approach in **Agyarko v Secretary of State for the Home Department [2017] UKSC 11** at paragraphs 61 to 67 is relevant in such cases. As was held in **VM (Jamaica)** and **FZ (China)** the possibility of children relocating does not violate the fundamental precepts of EU law. The child could alternatively remain in the UK with her mother. There is no ‘entire dependency’.

- 13.** It is difficult to see how the Tribunal erred in its assessment of best interests which I am satisfied were properly assessed in isolation from the wider concerns which the Tribunal then took into consideration and the judge was properly aware and made findings as to the child’s British citizenship but nevertheless found, for the sustainable reasons given, that it was reasonable for the child and her mother to accompany the appellant.

Conclusion

- 14.** The decision of the First-tier Tribunal does not disclose an error of law and shall stand.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Dated: 2 March 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT **FEE AWARD**

The appeal is dismissed. Therefore no fee award is made.

Signed

Dated: 2 March 2018

Deputy Upper Tribunal Judge Hutchinson

