



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

Appeal Number: IA/31001/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 12th February 2018**

**Decision & Reasons
Promulgated
On 22nd February 2018**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

**RIZWAN ASLAM
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Sharma of Counsel instructed by Sky Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Pakistan born on 18th January 1986. He arrived in the UK in 2010 as a Tier 4 student migrant. He had leave in that capacity until 14th May 2015. On 4th June 2015 he applied for leave to remain outside of the Immigration Rules which was varied on 24th August 2015 to an application to remain as the partner of a British

citizen who had two British citizen children by a previous relationship, and thus it became an application on Article 8 ECHR grounds. This human rights application was refused by the respondent on 2nd September 2015. The appellant's appeal against the decision was dismissed on all grounds by First-tier Tribunal Judge A W Khan in a determination promulgated on the 17th February 2017. By this stage the appellant and his partner also had a further British citizen child of their own who was four months old at the date of hearing.

2. Permission to appeal was granted by Upper Tribunal Judge Southern on the 17th October 2017 on basis that it was arguable that the First-tier judge had erred in law in failing to apply s.117B(6) of the Nationality, Immigration and Asylum Act 2002, or to adequately reason the decision under this provision.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions - Error of Law and Remaking

4. Mr Sharma argued that the First-tier Tribunal had erred in law in not allowing the appeal on Article 8 ECHR grounds in accordance with s.117B(6) of the Nationality, Immigration and Asylum Act 2002 as at paragraph 28 of the decision there was a finding that it would not be reasonable to expect any of the children to go to Pakistan. It was unclear whether the First-tier Tribunal had decided that the appellant had a parental relationship with the two older step children, as the finding was that he had "a relationship" with them, see paragraph 21, but it was clearly accepted that he had a parental relationship with his own child. This should have meant that the appellant succeeded under paragraph s.117B(6) of the 2002 Act, however the First-tier Tribunal brought irrelevantly into consideration whether the appellant might succeed in a future entry clearance application, at paragraph 28 of the decision, asserting without evidence this would only take about three months to complete. This finding, regarding the period of processing of any application, was also in any case inconsistent with the finding at paragraph 24 of the decision that the appellant would not qualify for entry clearance to return at all as his partner was not currently earning sufficiently for him to meet the Immigration Rules. Mr Sharma therefore argued that I should remake the appeal allowing it as on the findings of the First-tier Tribunal which meant that this appellant was entitled to succeed in his Article 8 ECHR appeal, with reference to s.117B(6) of the 2002 Act, as there was no public interest in his removal.
5. Mr Bramble accepted that this outcome would be in accordance with what was set out in the respondent's own policy as recorded at paragraph 7 of SF and Others (Guidance, Post-2014 Act) Albania [2017] UKUT 120:

"Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice Judgment in Zambrano.

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.

It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU."

6. Mr Bramble accepted that the respondent had not pursued any issues of a poor immigration history with respect to this appellant and this was not a case where there was criminality, and thus given there was clearly a genuine and subsisting parental relationship between the appellant and his biological British citizen child the position of the respondent was that it would not be reasonable to expect the child to leave the UK. In these circumstances there was nothing more that he could add by way of submissions.

Conclusions - Error of Law and Remaking

7. For the reasons set out in Mr Sharma's submissions the First-tier Tribunal erred in the application of s.117B(6) of the 2002 Act. Once the First-tier Tribunal had found that the appellant had a genuine and subsisting parental relationship with a British citizen child and it was not reasonable to expect that child to leave the UK then the appeal should have been allowed on Article 8 ECHR grounds as there was no public interest in the appellant's removal.
8. I remake the appeal by allowing it for the following reasons. Both parties accept that the appellant has a genuine and subsisting parental relationship with his biological British citizen child. I apply the guidance as set out in the Court of Appeal decision in MA (Pakistan) v SSHD [2016] EWCA Civ 705 and the respondent's policy as set out in SF (Albania) whereby the reasonableness of requiring this qualifying child to leave does include all aspects of the public interest, albeit that generally that it will be unreasonable to require a British child to leave the UK absent criminality or other weighty considerations. I find that there are no substantial issues affecting the public interest in this case such as criminality, and it has not been argued by the respondent that the appellant has a poor immigration history nor is there any evidence before me that this is the case. The finding that it would not be

reasonable to expect this child to leave the UK made by the First-tier Tribunal at paragraph 28 is therefore correct, and leads to the conclusion that there is no public interest in the appellant's removal under s.117B(6) of the 2002 Act, and that the appeal should be allowed as the appellant's removal is a disproportionate interference with his right to respect to family life with his child.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal dismissing the appeal.
3. I re-make the decision in the appeal by allowing it on human rights grounds.

Signed: Fiona Lindsley

Date: 19th February 2018

Upper Tribunal Judge Lindsley