



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

Appeal Numbers: OA/09471/2015
OA/09473/2015

THE IMMIGRATION ACTS

Heard at: Manchester

Decision

&

Reasons

Promulgated

On: 10 January 2018

On: 12 January 2018

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

**TZ
SK**

(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

For the appellants:

Ms Logan, Counsel

For the respondent:

Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellants.

1. I have made an anonymity order because this decision refers to the circumstances of the second appellant, a minor child born in 2009 ('A2') and her brother, a minor British citizen child ('B'), born in 2016. The first appellant is married to the sponsor, who has indefinite leave to remain in the UK. They are the parents of A2 and B.

Background

2. The appellants are citizens of Pakistan. They applied for entry clearance to join their husband / father on 4 March 2015. Their applications were refused on 25 May 2015. The respondent did not accept that the relationship between the first appellant and her husband was genuine and subsisting or that the financial requirements were met.
3. In a decision dated 20 March 2017 the First-tier Tribunal accepted the genuineness of the relationship between the first appellant and the sponsor, and accepted they had two children together, the second of whom was a British citizen as he was born after the sponsor became settled. As Mr McVeety conceded, the First-tier Tribunal also appears to have accepted that the sponsor was in employment at all material times and could meet the substantive financial requirements but was unable to meet the 'specified' requirements because a letter with all the required details on it from his employer was missing.
4. The First-tier Tribunal considered Article 8 briefly but found that the denial of entry clearance would not be disproportionate and a further application should be made.
5. In a decision dated 7 September 2017 Deputy Upper Tribunal Judge Alis did not consider the grounds of appeal challenging the finding on the financial requirements to be arguable but granted permission in relation to Article 8, in particular the failure to fully address the best interests of both children in light of MA and SM (Zambrano: EU children outside the EU) Iran [2013] UKUT 380.

Error of law

6. Mr McVeety conceded that the First-tier Tribunal committed a material error of law in failing to fully address the children's best interests and section 117B of the Nationality, Immigration and Asylum Act 2002. He was clearly correct to make this concession. Although the First-tier Tribunal touched upon the children's best interests it did not address the practical reality, particularly for B, the British citizen child. Both representatives agreed that I could and should remake the Article 8 decision.

Re-making the decision under Article 8

New matter?

7. At the beginning of the hearing I enquired whether the birth of B gave rise to a 'new matter' such that the respondent was required to give her consent for it to be considered. After taking instructions, Mr McVeety confirmed that this was not considered to be a new matter but that even if it was it was manifestly appropriate for me to address it and in so far as consent was necessary, it was given.

Best interests

8. I begin the Article 8 assessment by evaluating the primary consideration of the interests of A2 and B – see Mundeba (s. 55 and para 297(i)(f) [2013] UKUT 00088 (IAC).
9. I accept that B's citizenship is a weighty factor of intrinsic importance. The fact that he is also a citizen of Pakistan does not diminish his entitlement to the benefits of UK and wider European citizenship. Both parents regard it to be in the children's best interests to reside together in the UK with both their parents as a united family. Whilst the sponsor is able to live in Pakistan, he has been in stable employment in the UK where I accept the financial and future prospects for himself and his particular family are much better. I bear in mind that both children have always lived in Pakistan, where they have been cared for adequately by their mother, but am satisfied that given B's right to benefit from his British citizenship and the assessment of his parents as to what will be best for him and the family, it would be in the best interests of the children to reside in the UK.
10. On balance, I conclude that the best interests of the two children would be better served by being with both parents in the UK, albeit they could all reasonably live in Pakistan.

Zambrano principles

11. There is nothing to prevent B from taking advantage of his British and therefore European citizenship in order to live in the UK with his father. This means that he is not being deprived of the benefits of European citizenship. His position can be distinguished from the appellant AP in MA and SM (supra). AP's British citizen parent had mental health difficulties and it was necessary for the non-EEA citizen parent to accompany AP to the UK to prevent a deprivation of the rights enjoyed as a result of his status as an EU citizen. The circumstances in this case bear more similarity to the second appeal

in MA and SM for the reasons set out at [55] to [56], albeit significantly no child of this family is currently residing in the UK.

Article 8

12. The appellants have family life with B and the sponsor. The respondent's decision interferes with family life. There are cogent reasons why it would be difficult for family life to be exercised in Pakistan. Such interference would be of sufficient severity to engage Article 8.

Proportionality assessment

13. Both representatives agreed that the real question to be considered in this case, by reference to the circumstances appertaining at the date of hearing, is whether or not it is disproportionate to refuse entry clearance in the following circumstances of the case:

- (i) The children's best interests are better served by residing in the UK.
- (ii) Whilst it remains possible for the family to reside in Pakistan together, to do so would be difficult for the sponsor and the family as a whole given the absence of decent financial and employment prospects for the sponsor and the first appellant there.
- (iii) B's parents wish him to take advantage of his British citizenship but do not wish for him to be separated from his mother and sister in order to do so.
- (iv) The appellants meet all the requirements of the Immigration Rules save that they were unable to provide the relevant 'specified' financial evidence, albeit they can be maintained adequately without recourse to public funds.

14. Proportionality is the "public interest question" within the meaning of Part 5A of the 2002 Act. By section 117A(2) thereof I am obliged to have regard to the considerations listed in section 117B. I consider that section 117B applies to this appeal in the following way.

15. First, the public interest in the maintenance of effective immigration controls is engaged. The appellants have been unable to meet the requirements of the Immigration Rules in order to enter as a spouse. She meets the substantive financial requirements but was

unable to provide the relevant specified evidence. Such a failure remains important because the specified evidence aspects of the immigration rules implement public policy considerations and seek to ensure that applications are considered fairly.

16. Second, there was little evidence before me regarding the appellants' English ability but I note that this was not raised as an issue of concern when entry clearance was refused.
17. Third, the economic interest is unlikely to be engaged in substance because the sponsor has been and continues to be employed at all material times and the financial requirements are met in substance.
18. In my judgment, when all of the above matters are considered in the round, it is disproportionate to refuse to grant the appellants entry clearance. Mr McVeety was unable to point to any aspect of the public interest that strongly pointed against the appellants. The only public interest he could identify was economic but he accepted that in reality the family would be financially independent. He acknowledged that a further application in order to comply with the specified requirements would have the consequence of further delays in a case where there has already been delay, the original application having been made nearly three years ago.
19. Having applied the facts to section 117B of the 2002 Act and having considered the general principles applicable in a case raising family life under Article 8 of the ECHR where one child has British citizenship but remains outside the UK, I find that the refusal of entry clearance in the particular circumstances of this case, constitutes a disproportionate breach of Article 8.

Decision

20. The decision of the First-tier Tribunal contains an error of law and is set aside.
21. I remake the decision by allowing the appellants' appeal pursuant to Article 8 of the ECHR.

Signed: Ms Melanie Plimmer
2018

Dated: 11 January

Judge of the Upper Tribunal