



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04961/2018

THE IMMIGRATION ACTS

Heard at Glasgow
On 3 May 2019

Decision & Reasons Promulgated
On 10 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Md ABDUL KAHER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Kennedy, advocate, instructed by KC, solicitors

For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge R E Barrowclough promulgated on 26 October 2018, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 18 May 1989 and is a national of Bangladesh. The appellant entered the UK as a student on 27 December 2009. The appellant submitted an application for further leave to remain in the UK on 31 January 2017. The respondent refused that application on 7 February 2018

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Barrowclough ("the Judge") dismissed his appeal against the Respondent's decision. Grounds of appeal were lodged and on 31 January 2019 Deputy Upper Tribunal Judge McGeachy granted permission to appeal stating inter alia

"The Judge appears to have found that the respondent had not discharged the burden of proof upon him to show that the appellant's TOEIC results were obtained fraudulently and therefore at the end of paragraph 25 he concluded that the appellant's suitability as a reason for refusal and exclusion was unjustified and illegitimate. It is possibly arguable that taking that into account together with the earnings of the appellant's wife and her savings and the fact that their child is British the Judge may have erred in his consideration of the proportionality of removal."

The Hearing

5. For the respondent, Mr Govan told me that the appeal is no longer resisted. He told me that he could not understand why the Judge dismissed the appellant's appeal after finding in the appellant's favour in relation to the English language test and finding that article 8 family life existed. Mr Govan reminded me that the appellant is the father is a citizen child, and agreed that the Judge has not applied the "reasonableness" test. Mr Govan agreed that the Judge does not even use the word "reasonable" when considering whether or not the appellant's British citizen child should leave the UK.

6. Mr Govan and Mr Kennedy (for the appellant) joined in asking me to set the decision aside and to substitute my own decision allowing the appellant's appeal.

Analysis

7. The Judge finds that the appellant's wife and child are British citizens. The Judge finds that article 8 family life exists. At [30] the Judge considers whether there are very significant obstacles to reintegration of the appellant's wife and child in Bangladesh. That is plainly wrong. Paragraph 276 ADE(1)(vi) requires consideration of very significant obstacles to the applicant's integration into the country to which

he would have to go if required to leave the UK. That same test does not apply to the appellant's wife and child.

8. The appellant's child is a qualifying child. The Judge should have considered S.117B(6) of the 2002 Act. In JG (S117B(6): "reasonable to leave the UK") Turkey (Rev 1) [2019] UKUT 72 (IAC) it was held that Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 requires a court or tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so.

9. In SSHD v AB (Jamaica) and Anor [2019] EWCA Civ 661, the Court of Appeal further considered the interpretation of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. The Court of Appeal agreed with the interpretation of s.117B(6)(b) given by the Upper Tribunal in both, JG v Secretary of State for the Home Department [2019] UKUT 00072 and SR (Subsisting Parental Relationship - s117B(6)) Pakistan [2018] UKUT 00334. The Court of Appeal made it clear that the

"... position has now been reached in which this Court is not only free to depart from the approach taken by Laws LJ in MM (Uganda) but indeed is required to do so in order to follow the binding decision of the Supreme Court in KO (Nigeria)."

10. The Judge applied the wrong test in considering the interests of the qualifying child. The single question that has to be answered in relation to the appellant's child is

"... is it reasonable to expect the children to leave the UK?"

11. The Judge neither asked nor answered that question. The Judge did not make findings driving at consideration of section 117B(6) of the 2002 Act. That is a material error of law. I set the decision aside. I am able to substitute my own decision.

The Facts

12. The appellant entered the UK as a student at 27 December 2009. The respondent extended the appellant's leave to remain as a student until his leave to remain was curtailed on 27 July 2014 (when the licence for the College at which he was enrolled was revoked).

13. On 9 October 2014 the appellant married a British citizen in a religious ceremony. The marriage was registered in the UK on 27 October 2014. The appellant and his wife have one child, born on 8 April 2017. The appellant, his wife and their child continue to live together. The appellant has a genuine and subsisting relationship with his wife and with his child.

14. In the final sentence of [25] the Judge (correctly) finds that the appellant meets the suitability requirements of the immigration rules and that the respondent fails to

establish that the appellant has cheated in an English language test. The Judge's findings of fact indicate that the Judge accepts that article 8 family life exists.

15. The appellant submitted an application for leave to remain in the UK as the spouse of his British citizen wife on the on 31 January 2017. The respondent refused that application on 7 February 2018. It is against that decision that the appellant appeals. The respondent's decision does not consider the appellant's article 8 rights and takes no account of the fact that the appellant's wife and child are British citizens.

The Immigration Rules

16. Because of the length of time the appellant has lived in the UK and his age, he cannot meet the requirements of paragraph 276ADE(1)(i) to (v) of the rules. There is no evidence to suggest that there are very significant obstacles to the appellant's re-integration in Bangladesh.

17. The appellant's leave as a tier 4 student ended on 27 July 2014. Paragraph 39E of the immigration rules do not apply to the appellant. 990 days passed between curtailment of the appellant's tier 4 student leave and submission of his application for leave to remain. The appellant cannot meet paragraph e-LTRP 2.2 of the immigration rules. The appellant does not produce evidence to show that he meets the financial requirements of the immigration rules. The result is that the appellant cannot meet the eligibility requirements of appendix FM.

18. The failure to meet the eligibility requirements is not the end of the matter. Paragraph EX.1 must be considered. Paragraph EX.1 says

'EX.1. This paragraph applies if

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee

leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) “insurmountable obstacles” means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.’

19. The appellant has a genuine and subsisting relationship with a British citizen child and with his British citizen wife. The focus in this case is clearly on the appellant’s British citizen child. The determinative question is whether or not it is reasonable to expect the child to leave the UK. The same test can be found in section 117B(6) of the 2002 Act, so that it doesn’t really matter whether article 8 is considered within the rules or outside the rules. The test remains the same.

Article 8 ECHR

20. What is beyond dispute is that the appellant’s wife and child are British citizens. On the facts as I find them to be, the appellant has a genuine and subsisting relationship with two British citizens. Article 8 family life exists for the appellant.

21. The respondent’s IDIs on Family Migration (Paragraph 11.2.3) deals with British children. The August 2015 version states that, 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. However, it also states that "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". The section goes on to address the grant of leave to the parent indicating that it may not be appropriate if there is no satisfactory evidence of a genuine and subsisting parental relationship or where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation but none of that gets round the unequivocal statement that it would always be unreasonable to expect a British child to leave the EU.

22. The Upper Tribunal in SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC) held, considering this guidance that even in the absence of a “not in accordance with the law” ground of appeal, the Tribunal ought to take the Secretary of State’s guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal

23. The respondent’s guidance February 2018 suggests that the test is whether the child would be likely to leave rather than actually be required to leave. In JG (S117B(6): “reasonable to leave the UK”) Turkey (Rev 1) [2019] UKUT 72 (IAC) it was held that Section 117B(6) of the Nationality, Immigration and Asylum Act 2002

requires a court or tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so.

24. It is now accepted by the Home Office that it is not reasonable to expect the appellant's child to leave the UK. The appellant therefore meets the requirements of EX.1, and so meets the requirements of the immigration rules. In addition the statutory test set out in section 117B of the 2002 Act is met.

25. On the facts as I find them to be, family life exists. The respondent's decision is an interference with that family life. The burden therefore shifts to the respondent to show that the interference was justified. The respondent relied solely on the public interest in effective immigration control, but now concedes that this appeal should be allowed on article 8 ECHR grounds because it is in the best interests of the appellant's child and the appellant's spouse that they (and the appellant) should remain in the UK, and because it is not reasonable to expect the child to leave the UK.

26. Section 117B(6)(a) weighs in favour of the appellant because he has a genuine and subsisting parental relationship with his qualifying child. It is Section 117B(6)(b) which is determinative of this case.

27. I have already found that it is not reasonable to expect the appellant's child to leave the UK. Adhering to the interpretation given to s.117B(6) in MA (Pakistan) and in JG (S117B(6): "reasonable to leave the UK") Turkey (Rev 1) [2019] UKUT 72 (IAC) I find that the appellant succeeds under section 117B(6) of the 2002 Act.

28. I remind myself of Section 55 of the Borders, Citizenship and Immigration Act 2009. In ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 Lady Hale said that "*Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child*".

29. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was confirmed that if section 117B(6) applies then "*there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal.*"

30. Because the simple wording of section 117B(6) of the 2002 Act, endorsed in MA (Pakistan), weighs in the appellant's favour, I find that the public interest does not justify removal. That finding leads me to the conclusion that the respondent's decision is a disproportionate interference with the right to respect for article 8 family life.

31. The respondent's guidance says that it is unreasonable to expect the appellant's child to leave the UK. Family life exists between the appellant, his wife and their



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child. The respondent's decision interferes with article 8 family life. The respondent's own guidance indicates that the interference is disproportionate.

32. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) it was held that the "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

33. Even when I give little weight to the relationship between the appellant, his wife and their child, the relationship still carries sufficient weight because the article 8 family life that is established is not limited to the relationship between the appellant and his wife. The article 8 family life established encompasses the interests of a young British child.

34. I find that this appeal succeeds on article 8 ECHR (family life) grounds.

Decision

The decision of the First-tier Tribunal promulgated on 26 October 2018 is tainted by material errors of law and is set aside.

I substitute my own decision

The appeal is allowed on article 8 ECHR grounds.

Signed
Deputy Upper Tribunal Judge Doyle

Date 8 May 2019