



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

Appeal Number: IA/01647/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
On 13 August 2015**

**Determination Promulgated
On 9 September 2015**

Before

UPPER TRIBUNAL JUDGE PITT

Between

MAZHAR FIAZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Smart, Senior Home Office Presenting Officer

For the Respondent: Mr Khan, instructed by Kabir Ahmed & Co Solicitors

DECISION AND REASONS

1. This is an appeal against the decision promulgated on 4 September 2014 of First-tier Tribunal Judge A Parker which allowed the appeal on Article 8 ECHR grounds.
2. The background to this matter is that the appellant, a citizen of India, entered the UK on 5 July 2012 with leave to enter as a visitor valid until 20 December 2012. On 26 November 2012 he married Safaa Nazir, a British national. On 19 December 2012 he applied for further leave to remain under Article 8 ECHR. The respondent refused that application on 11 December 2013.

3. Before the First-tier Tribunal it was common ground that the appellant could not meet the requirements of Appendix FM or paragraph 276ADE. It was conceded that he did not meet the English language or the financial requirements of Appendix FM.
4. The First-tier Tribunal therefore proceeded to conduct a second stage Article 8 assessment. The genuine nature of the relationship was not in dispute so at [14] Judge Parker accepted that family and private life in the UK had been established. There was the additional factor of the couple having a daughter by the time of the hearing before the First-tier Tribunal. That child is British.
5. At [15] to [17] Judge Parker set out that he did not accept that anything, including medical problems, prevented the appellant's wife from living in Pakistan; see [15], [16], [17], [25] and [26]. At [23] the Judge notes that the appellant's wife speaks a language used in Pakistan which would make it easier for her live there. It was found that the appellant could work in Pakistan; see [27].
6. Having set out section 117B of the Nationality, Immigration and Asylum Act 2002 at [18], Judge Parker appears to reference s. 117B(2) at [28] where he states "he cannot show that he will be integrated in this country as he has not been able to speak English". It is undisputed that the appellant did not speak English well, using an interpreter at the hearing.
7. At [19] and [21], s.117B(3) is weighed against the appellant as the couple were not financially independent.
8. At [20] the judge reminds himself that the Immigration Rules regarding finance were also not met.
9. Judge Parker also found at [23] that the couple knew the appellant did not have the correct immigration status to remain when they married so had no grounds of complaint when the appellant was not granted leave.
10. At [28], the judge notes that the appellant has been in the UK for a short time and that the factors identified thus far were "strong public policy considerations."
11. How is it then that Judge Parker allowed the second stage assessment? As set out above, he identified that the Immigration Rules were not met, a central and strong aspect weighing against the appellant; see Haleemudeen v SSHD [2014] EWCA Civ 558 at [40] and [41]. It was correctly pointed out that section 117B(2) and (3) weighed against the appellant where he did not speak English and was not financially independent. It was found entirely reasonable for his wife to go to Pakistan where the appellant could expect to be able

to work and that they should have anticipated this eventuality when they married.

12. The answer appears to me to be at [33] and [34] of the determination. At [33] the judge states:

“It is in the best interests of the child to be with both parents. It is unclear how the appellant can make a successful settlement application. Third party support is not possible and she is not working. The child is a little over three weeks old and needs her mother. The separation between the child and the mother and the appellant could be for several years. they (sic) do not wish to reside in India and as British citizens that is an important consideration.”

13. At [34] the judge identifies that following s.117B(6) he must assess whether it is reasonable for the appellant’s child to leave the UK. He states:

“These provisions (sic) provide an exception to the English and income requirements at 117(2) they (sic) recognise the existing (sic) case law on British Citizenship. As (sic) the appellant has no realistic prospect under the current rule of making a settlement application (sic) in the near future I find this is a case where (sic) the law should intervene and the appeal should be allowed under Article 8.”

14. In my view the judge takes a materially incorrect approach in paragraphs [33] and [34]. He appears to find that if it is unreasonable for the child to go to Pakistan this is an “exception” to the weight going against the appellant arising from the other s.117B factors. That is not correct. The reasonableness of the child going to Pakistan falls to be weighed with the other factors in s.117B and other factors. It is not a determinative factor that must outweigh other matters.

15. Further, the only reason I can discern for the finding that it was not reasonable for the child to go to India is the reference to the “case law on British Citizenship”. But, as the judge pointed out himself, that does not identify British nationality as a “trump card”, quite the opposite. Everything else here weighed in favour of the family being expected to go to Pakistan. Even the best interests assessment was for the child to remain with its parents, not for that to be in the UK.

16. Also, where the decision weighs the difficulty in making a successful entry clearance application in the appellant’s favour, as it appears to at [33] (and [24]) it is also in error. An inability to meet the Immigration Rules in the future is not something that can weigh in an appellant’s favour so as to remedy a current inability to do so.

17. For these reasons I found that the second stage Article 8 assessment disclosed an error on a point of law such that it should be set aside.

18. I proceeded to re-make the appeal. Nothing suggested that the assessment of the child’s best interests being with its parents should be substantially disturbed. I take that as a starting and primary factor.

19. The failure to meet the Immigration Rules is also to be weighed as a starting point in the Article 8 assessment and a mater attracting weight. The failure here is substantial, the English language requirement is not met and the couple cannot meet the finance requirements.
20. The provisions of s.117B weigh against the appellant. In addition to the public interest being served in his leaving the UK where he cannot meet the Immigration Rules, further weight goes against him in line with paragraphs 117B(2) and (3).
21. The appellant's private life was established only whilst he was here as a visitor and can properly be characterised as precarious in line with s.117B(4). It weighs little, therefore, and does not add substance to his side of the balance. As Judge Parker pointed out, he has been here for only a short time, in any event, having lived the remainder of his life in Pakistan.
22. To my mind there is simply nothing here other than the British nationality of the child and, the s.117B(6) issue, whether it is reasonable for her to go to Pakistan, that can assist the appellant. As above, the best interests of the child are to be with her parents. Even had it been identified that it was also in her best interests to be in the UK to be able to benefit from the healthcare and education here, I did not find that this could begin to outweigh the public interest here, a great deal weighing against him as set out in the previous paragraph. Without more than the factor of a British child, the current legislation does not readily allow for a visitor to come to the UK, marry and then remain in order to exercise a family life. That is so whether an assessment is carried out under the Immigration Rules or in a second stage Article 8 assessment.
23. I therefore did not find that the decision amounted to a disproportionate interference with the family or private life of the appellant and his family. It is proportionate to expect them to exercise their family and private lives in Pakistan.
24. I refuse the appeal under Article 8.

Decision:

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

I re-make the appeal, dismissing it under Article 8 ECHR.

Signed: 
Upper Tribunal Judge Pitt

9 September 2015