



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Number: HU/04574/2016**

**THE IMMIGRATION ACTS**

**Heard at Manchester Piccadilly  
On 16 June 2017**

**Decision & Reasons Promulgated  
on 22 June 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BIRRELL**

**Between**

**HASSAN RAZA**

**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr H B Samesa Janneh instructed by Sovereign Solicitors

For the Respondent: Mr A Mc Vitie Senior Home Office Presenting Officer.

**DECISION AND REASONS**

Introduction

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. The Appellant was born on 16 July 1985 and is a national of Pakistan.

3. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
4. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge O'Donnell promulgated on 22 September 2016 which allowed the Appellant's appeal against the decision of the Respondent dated 4 February 2016 to refuse the Appellants application for leave to remain as a spouse of a person present and settled in the UK.
5. The refusal letter gave a number of reasons which were in essence that it was not accepted that the marriage was genuine and subsisting and that the Appellant had not established by the evidence required under Appendix FM-SE that the Appellant met the financial requirements of the Rules. The refusal letter stated that the Appellant had a right of appeal because the Secretary of State decided to refuse a human rights claim.

#### The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge O'Donnell ("the Judge") allowed the appeal against the Respondent's decision under the Immigration Rules finding that the marriage was genuine and subsisting and that at the date of the decision the Appellant met the financial requirements of the Rules.
7. Grounds of appeal were lodged arguing: that the Judge was wrong to take into account specified evidence arising after the date of application as Appendix FM-SE required that evidence to relate to a period prior to the date of application.
8. On 29 December 2016 First-tier Tribunal Judge OGarro gave permission to appeal.
9. At the hearing I heard submissions from Mr Mc Vitie on behalf of the Respondent that :
  - (a) The Judge allowed the appeal under the Rules when there was no power to do so as this was the refusal of a human rights claim: there is no appeal against the refusal under the Rules.

(b) Had the Judge considered the matter on the correct basis he should have considered s 117B of the Nationality Immigration and Asylum Act 2002.

10. On behalf of the Appellant Mr Janneh conceded that there was a material error and asked me to set aside the decision and remake it on the basis of the material before me.

### **Finding on Material Error**

11. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.

12. The Appellant in this case made an application for leave to remain under the Rules on the basis of his marriage to a UK citizen. Both Mr Senneh and Mr Mc Vitie accepted, as they must, that there was no appeal against the refusal decision under the Immigration Rules only on human rights grounds. Therefore the Judge's decision in allowing the appeal under the Rules was underpinned by a fundamental error of law. While a consideration of the human rights appeal may have entitled the Judge to consider whether the Appellant had met the requirements of the Rules, as that was relevant to the issue of proportionality, again I am satisfied that the mandatory requirements of Appendix FM SE, that evidence of income must predate the date of application, was overlooked by the Judge and the Appellant did not at the date of application meet the requirements of Appendix FM by reference to Appendix FM SE.

13. It was also accepted that had the appeal been considered on the correct basis, as a human rights appeal, the Judge would have been obliged to consider the provisions of paragraph 117B as there was a British Citizen child. Therefore the error made was material to the outcome of the decision.

14. The failure of the First-tier Tribunal to address and determine this appeal on the correct legal basis constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.

## Remaking the decision

### The Law

15. The Appellant's appeal is pursuant to Section 82(1) (b) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') which provides that a person may appeal to the Tribunal where the Secretary of State has decided to refuse a human rights claim. S84 of the Act provides that an appeal under s82(1)(b) must be brought on the ground that a decision is unlawful under section 6 of the Human Rights Act 1998.

16. Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that the 'public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

17. The S117B considerations are as follows:

*"(1) The maintenance of effective immigration controls is in the public interest.*

*(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—*

*(a) are less of a burden on taxpayers, and*

*(b) are better able to integrate into society.*

*(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek*

*to enter or remain in the United Kingdom are financially independent, because such persons—*

*(a) are not a burden on taxpayers, and*

*(b) are better able to integrate into society.*

*(4) Little weight should be given to—*

*(a) a private life, or*

*(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.*

*(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.*

*(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—*

*(a) the person has a genuine and subsisting parental relationship with a qualifying child, and*

*(b) it would not be reasonable to expect the child to leave the United Kingdom.”*

#### Section 117B6

18. The definition of “qualifying child” is found in section 117D:

*“qualifying child” means a person who is under the age of 18 and who-*

*(a) is a British citizen, or*

*(b) has lived in the United Kingdom for a continuous period of seven years or more;”*

#### **Findings**

19. I am required to look at all the evidence in the round before reaching any findings. I have done so. Although, for convenience, I have compartmentalised

my findings in some respects below, I must emphasise the findings have only been made having taken account of the evidence as a whole.

20. The Appellant is a 31 old citizen of Pakistan who was refused leave to remain in the United Kingdom on the basis of his family and private life.
21. The Appellant appeals the decision of the Respondent on the basis that the decision is unlawful under section 6 of the Human Rights Act 1998.
22. I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27

***Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?***

23. I am satisfied that the Appellant and Jasmeen Ellahi, a British citizen, have a family life in the United Kingdom. The Appellant and Ms Ellahi married on 11 October 2015 in an Islamic ceremony and on 9 December 2015 they married in a civil ceremony. On 27 July 2016 they had a son and as at the date of hearing before me I accept that she is pregnant again.

***If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?***

24. I am satisfied that removal would have consequences of such gravity as potentially to engage the operation of Article 8.

***If so, is such interference in accordance with the law?***

25. I am satisfied that there is in place the legislative framework for the decision giving rise to the interference with Article 8 rights which is precise and accessible enough for the Appellant to regulate his conduct by reference to it.

***If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?***

26. The interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic well being of the country through the maintenance of the requirements of a policy of

immigration control. The state has the right to control the entry of non nationals into its territory and Article 8 does not mean that an individual can choose where she wishes to enjoy their private and family life.

***If so, is such interference proportionate to the legitimate public end sought to be achieved?***

27. In making the assessment of the best interests of the children I have also taken into account ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 where Lady Hale noted Article 3(1) of the UNCRC which states that *"in all actions concerning children, whether undertaken by ... courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*
28. Article 3 is now reflected in section 55 of the Borders, Citizenship and Immigration Act 2009 which provides that, in relation, among other things, to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions *"are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom"*. Lady Hale stated that *"any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8(2)"*. Although she noted that national authorities were expected to treat the best interests of a child as *"a primary consideration"*, she added *"Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration"*.
29. In relation to the Appellant's child I accept that the starting point is that it is in his best interests to be brought up by both parents together.
30. Consideration of the issue of proportionality is 'consideration of "the public interest question" as defined by section 117A(3) of the 2002 Act. I am therefore required by section 117A(2)(a) to have regard to the considerations listed in section 117B.
31. I am satisfied that the Appellants child by his wife is a qualifying child under section 117B6 as he is a British citizen. I am required to consider therefore

whether it would be reasonable to expect the child to leave the United Kingdom because if I do not find it is reasonable then the public interest does not require the Appellants removal. Mr Mc Vitie conceded that by reference to the Secretary of State published guidance taking into account that there was no adverse immigration history and no criminality it was not reasonable to expect the child to leave the United Kingdom. Therefore in relation to the issue of proportionality the public interest does not require the Appellant to be removed.

32. I have considered the issue of anonymity in the present instance. Neither party has sought a direction. The Appellant is an adult and not a vulnerable person. I see no reason to make any direction in this regard.

### **CONCLUSION**

- 33. I therefore found that errors of law have been established and that the Judge's determination be set aside.**

### **Decision**

- 34. There was an error on a point of law in the decision of the First-tier Tribunal such that the decision is set aside**

- 35. I remake the appeal.**

- 36. I allow the appeal on human rights grounds.**

Signed

Date 22 June 2017

Deputy Upper Tribunal Judge Birrell