



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/17012/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 5<sup>th</sup> April 2017

Decision & Reasons Promulgated  
On 5<sup>th</sup> May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DH  
(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Home Office Presenting Officer  
For the Respondent: Mr M Noor of Blackstone Solicitors

**DECISION AND REASONS**

1. Although this is an appeal by the Secretary of State I refer to the parties as they were before the First-tier Tribunal.
2. The Appellant, a citizen of Bangladesh, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 21<sup>st</sup> April 2015 to refuse his application for

leave to remain on the basis of his private and family life in the UK. First-tier Tribunal Judge Howard allowed the appeal in a decision promulgated on 10<sup>th</sup> October 2016. The Secretary of State now appeals with permission to this Tribunal.

3. The background to this appeal is that the Appellant entered the UK on 5<sup>th</sup> April 2009 with entry clearance as a working holidaymaker valid from 22<sup>nd</sup> March 2009 until 22<sup>nd</sup> March 2011. It appears that he did not apply for further leave to remain and overstayed that leave.
4. According to the papers the Appellant met his partner early in 2013 and they had an Islamic marriage on 3<sup>rd</sup> November 2014. The Appellant's partner, who is a British citizen, has a child from a previous relationship who is also a British citizen. The Appellant and his partner also had a daughter born on 1<sup>st</sup> August 2015. At the time of the hearing in the First-tier Tribunal the Appellant's partner was pregnant with the couple's second child.
5. In the Reasons for Refusal Letter the Secretary of State considered that the Appellant did not meet the requirements of Appendix FM under the partner route because the couple were not in a valid marriage and had not at that time been living together for at least two years prior to the date of the application. It was not considered that the Appellant met the definition of a parent in relation to his partner's child. The Secretary of State considered that the Appellant did not meet the requirements of paragraph 276ADE. The Secretary of State noted that the Appellant's partner was pregnant but said that the Appellant's partner was not expected to leave the UK and was entitled to a full range of care and support services as a British citizen in the UK.
6. The judge noted in his decision that the Secretary of State had concluded that the Appellant did not meet the requirements of Appendix FM or paragraph 276ADE. The judge set out the provisions of the guidance set out in **R v SSHD ex parte Razgar [2004] UKHL 27** and the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002.
7. The judge accepted that the Appellant has a genuine and subsisting relationship with his daughter, who is a qualifying child as a British citizen. In assessing proportionality at paragraph 23 the judge looked at the Secretary of State's published guidance as to when it would be reasonable to expect a British citizen child to leave the UK and noted that the Appellant has a poor immigration history but went on to consider wider circumstances. The judge noted that the Appellant's partner has suffered with schizophrenia since the age of 16 and is in receipt of prescribed medication and the assistance of a community psychiatric nurse to manage her condition. The judge took into account that, as a sufferer with a significant mental illness the Appellant's partner has responsibility for two, soon to be three, young children and that she receives very considerable support from the Appellant.
8. The judge said that given the Appellant's partner's circumstances with young children and schizophrenia, the prospect of her securing employment that will take her over the financial threshold of Appendix FM is remote as are the prospects of her

saving sufficient funds to be able to visit the Appellant in Bangladesh with their two young children. Therefore the judge concluded that the removal of the Appellant would separate a father from his two young children for the considerable foreseeable future. In those circumstances, even with the Appellant's poor immigration history, the judge considered that removal is not appropriate and the judge was not satisfied that the decision to remove is proportionate [23].

9. The Secretary of State contends in the Grounds of Appeal that the judge failed to address herself in line with the guidance in **SS (Congo) [2015] EWCA Civ 387** and to identify whether there is a compelling case for a grant of leave outside the Rules where the provisions of Appendix FM cannot be met. It is contended that it cannot be inferred that the mere fact of the Sponsor's medical condition constitutes compelling circumstances. It is contended that the First-tier Tribunal Judge's consideration of the statutory considerations under Section 117B of the 2002 Act was inadequate. It is contended that no recognition was given to the fact that little weight ought to have been given to the relationship which was formed when the Appellant had no leave to remain in the UK.
10. The Secretary of State contends that the reference by the First-tier Tribunal Judge to the decision in **Zambrano** is misconceived as if the Appellant is removed the British children could remain in the UK with the mother. They are not forced to leave the UK. It is contended that the assertion by the judge that an application for entry clearance would be unlikely to succeed should have weighed against the Appellant in any Article 8 analysis.
11. The second Ground of Appeal contends that the judge failed to articulate why in all the circumstances it would not be reasonable for the family to relocate to Bangladesh nor why it would not be reasonable to expect the children to leave the UK.
12. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 22<sup>nd</sup> February 2017 on the basis that the grounds of appeal are arguable as the Appellant is in a situation of his own making in which it was known that he was liable to removal and that children are not a bypass to the Immigration Rules nor are the medical needs of another person.
13. In the Rule 24 reply it is contended that, although the decision is short, the explanation and reasons given are sufficient and adequate. It is contended that matters of weight are for the individual judge. It is contended that the judge was entitled to attach as much weight as he saw fit to the evidence unless perversity was established. It is contended that the Appellant's partner's medical issues were significant and a factor which the judge took into account properly. Reference is made to the decision in **MA (Pakistan) & Ors v Upper Tribunal (Immigration and Asylum Chamber) [2016] EWCA Civ 705** at paragraph 35 where it was conceded on behalf of the Home Office that it would be relatively rare for it to be reasonable to expect a child who is a British citizen to leave the UK. It is contended that the Secretary of State has not identified strong reasons why it would be reasonable to expect three British children to relocate and leave the UK. Reliance is placed on the

Secretary of State's guidance entitled "Immigration Directorate Instruction, Family Migration: Appendix FM Section 1.0b, Family Life (as a Partner or Parent) and Private Life: 10-Year Routes", dated August 2015, at 11.2.3. It is contended that the facts of this case are such that the children would be forced to leave the UK if the Appellant left because their mother would not be able to care for them in his absence as he plays a pivotal role. Reliance is further placed on the decision in **Makhlouf v Secretary of State for the Home Department (Northern Ireland) [2016] UKSC 59** at paragraphs 46 and 47 where it states at paragraph 47 that children must be recognised as rights holders in their own right and not just as adjuncts to other people's rights. It is contended that no strong or powerful reasons are given to justify the removal of the children and their family.

14. At the hearing before me Ms Isherwood relied on the decisions in the cases of **MM (Lebanon) & Ors v SSHD [2017] UKSC 10** and the decision in **Agyarko v Secretary of State for the Home Department [2017] UKSC 11**. She submitted that there is a material error. She submitted that the judge failed to appreciate that there are two options for the Appellant, either his partner could go back to Bangladesh or she could stay in the UK but she is not being required to leave the UK nor are the children. She submitted that in this case the Appellant overstayed his visa. It could be inferred from his witness statement that he has been working in the UK and that he worked illegally. She submitted that the judge erroneously gave positive weight to the fact that the Appellant cannot meet the requirements of the Rules for entry clearance. She submitted that the judge made no assessment of Appendix FM or 276ADE nor did he make a full assessment of paragraph 117B.
15. Ms Isherwood submitted that the evidence shows that the Appellant's partner has not had an episode of schizophrenia since she was 16 and that since then she has had outpatient appointments and is undergoing successful treatment. She submitted that the judge failed to assess that evidence.
16. Ms Isherwood submitted that the judge gave insufficient consideration to the public interest and did not apply all of the criteria in Section 117B. There was no assessment given to the Appellant's ability to speak the English language, as to whether the Appellant is a burden on taxpayers, and no account taken of the fact that the relationship was formed when the Appellant was unlawfully in the UK. She submitted that there was no assessment of the best interests of the child.
17. Ms Isherwood referred to the case of **Agyarko**, noting that the Supreme Court reaffirmed that the balance needs to be struck between Article 8 and the public interest. She referred to paragraph 57, which states as follows:

"57. That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be

outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control."

18. Ms Isherwood submitted that the family life here is precarious therefore there must be very strong or compelling circumstances to outweigh the public interest in immigration control. In this case, she submitted, there was no full assessment of the public interest to show that a balance has been struck.
19. Mr Noor relied on his Rule 24 response, submitting that it is up to the judge to give weight to the whole evidence and that the judge has given sufficient reasons. He submitted that the judge was entitled to reach the conclusions he did in light of the whole documentary evidence and the decision was not perverse. He submitted that the judge had set out the **Razgar** test and Section 117B as well as the Home Office guidance at paragraph 23 and had considered all of the factors there.
20. He submitted that the judge had given adequate consideration to the factors as set out in **MA (Pakistan)**, considering the Appellant's stepdaughter and his own children. He submitted that the judge had considered the best interests of the children, the medical situation of the Appellant's partner and the family as a full unit.
21. In response Ms Isherwood submitted that Mr Noor had not shown the evidence relied upon. She relied on paragraph 54 of the decision of **Agyarko** noting that the European Court had stated that where there is precarious family life it is likely to be only in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8. It was her submission that the judge had not considered whether there were exceptional circumstances in this case. She submitted that it is insufficient to just set out the provisions of section 117B without considering the factors there. She submitted that this is an Appellant with no entitlement to remain in the UK and that he cannot choose where he wants to live.

### **Discussion**

22. I accept that in this decision the judge did not specifically address whether the Appellant met the requirements of Appendix FM or paragraph 276ADE. However, I note that at paragraphs 14 and 15 the judge said that those provisions had been considered in the Reasons for Refusal Letter. It does not appear that any submission was put forward that the Appellant could meet the requirements of these Rules.
23. In circumstances where there is a step-child, children of the Appellant and where his partner has mental health issues I therefore accept that it was appropriate for the

judge to go on to consider the Article 8 claim under the guidance and stages set out in the decision in Razgar. In so doing the judge was required to consider the public interest as set out in paragraph 117B of the 2002 Act.

24. Ultimately the judge was considering Section 117B(6) and he ultimately decided that the Appellant has a genuine and subsisting relationship with his daughter, who is a qualifying child. The judge then went on to consider whether it would be reasonable to expect the child to leave the UK. In considering reasonableness the judge took into account the Respondent's policy on Appendix FM in relation to family life at 11.2.3, which asks whether it would be unreasonable to expect a British citizen child to leave the UK. That policy states:

“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.”

25. The guidance goes on to say:

“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.

The circumstances envisaged could cover amongst others:

- criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
- a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation.”

26. It is clear that the judge applied this guidance in this case. The judge acknowledged that the Appellant here has a poor immigration history but recognised that there were wider circumstances which he had to consider in assessing proportionality.

One of the main factors he considered in this regard was the Appellant's wife's mental health, noting that she has a significant mental illness and responsibility for two young children and receiving very considerable support from the Appellant. The judge noted that the Appellant would have difficulty meeting the financial requirements of Appendix FM because of his wife's mental health condition.

27. The judge also noted that the prospects of the wife and children being able to visit the Appellant in Bangladesh were remote. The judge therefore concluded that the removal of the Appellant would separate the father from his two young children for the considerable foreseeable future. These were conclusions open to the judge on the basis that it could not be considered reasonable for the Appellant's wife and children to leave the UK and that these consequences would be foreseeable.
28. I accept Ms Isherwood's submission that the judge did not consider the best interests of the children separately. However, I consider it clear that the judge did consider the children's best interests from his conclusion that it would not be reasonable to expect the children to leave the UK, that the children's mother required the support of the Appellant to look after them and that it would not be in their interests to be separated from their father for a considerable period of time. I therefore accept that the best interests of the children were considered by the judge.
29. I have considered the guidance given by the Supreme Court in Agyarko, in particular at paragraph 57. The judge clearly gave weight to the Appellant's poor immigration history and therefore his immigration status when he entered into this relationship.
30. I note the guidance in **Kaur (children's best interests / public interest interface) [2017] UKUT 00014 (IAC)** where the President gave guidance on the application of section 117B (4) and (5) as summarised in the head note as follows:

*"(5) 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."*
31. Applying this guidance it is clear that the Appellant's poor immigration history and lack of status when he formed the relationship was not determinative of the public interest.
32. I have considered the guidance given in **MM (Lebanon)** and **SS (Congo)**. In my view it is clear from the judge's analysis that he found the Appellant's claim to be sufficiently strong or compelling to outweigh the public interest in immigration control.
33. I find that the conclusions reached by the judge were open to him on the basis of the evidence and on the basis of the interpretation of the legal principles and I am satisfied that the grounds disclose no error of law in the First-tier Tribunal Judge's decision.

**Notice of Decision**

There is no material error of law in the decision of the First-tier Tribunal Judge.  
The decision of the First-tier Tribunal Judge shall stand.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 3rd May 2017

Deputy Upper Tribunal Judge Grimes

**TO THE RESPONDENT**  
**FEE AWARD**

I maintain the fee award made by the First-tier Tribunal.

Signed

Date: 3<sup>rd</sup> May 2017

Deputy Upper Tribunal Judge Grimes