



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

Appeal Number: IA/29731/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 16 May 2017**

**Decision 7 Reasons Promulgated
On 18 August 2017**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

MD FAZLUR RAHMAN KHAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Z. Malik
Counsel instructed by Haque & Hausman Solicitors
For the respondent: Mr S. Staunton
Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed against the respondent's decision to refuse a human rights claim. First-tier Tribunal Judge T. Jones ("the judge") dismissed the appeal in a decision promulgated on 07 September 2016.
2. The appellant appealed to the Upper Tribunal. In a decision promulgated on 19 May 2017 (annexed) I found no errors of law in the judge's findings

relating to the immigration rules. It was open to the judge to conclude that there was insufficient evidence to show that there would be 'insurmountable obstacles' to the appellant and his wife continuing their family life in Bangladesh. I also found that the appellant failed to show that there was an error of law in the judge's findings relating to the 'Suitability' requirements of the immigration rules and the ETS allegation made by the respondent. However, I concluded that the judge erred in his assessment of the best interests of the child. The factual findings were preserved and that part of the decision considering the balancing exercise under Article 8 outside the immigration rules was set aside. It was said that there had been developments in the appellant's family circumstances and that further evidence would be needed. As such, the hearing was adjourned for further evidence to be produced and for the decision to be remade at a resumed hearing.

3. Although the appellant and his wife both made witness statements in support of the appeal, and the appellant was called to give evidence, in fact, neither representative had any questions for the witness. I have taken into account the submissions made by both parties and the evidence before the Tribunal before coming to a decision in relation to the outstanding aspects of the appeal.

Decision and reasons

4. The appellant does not meet the requirements of Appendix FM of the immigration rules for leave to remain as a spouse or as a parent or the alternative requirements contained in Appendix FM, because he was refused leave to remain under the 'Suitability' requirements on the ground that his presence in the United Kingdom is not conducive to the public good. The respondent considered that his conduct, in submitting a false document in support of a previous application, meant that it was undesirable to allow him to remain in the UK. The First-tier Tribunal judge made findings against the appellant in relation to the 'ETS issue', which were not challenged successfully in the appeal to the Upper Tribunal.
5. I have gone on to consider whether the circumstances of this case might engage Article 8 outside the immigration rules. It is not disputed that the appellant has a wife and child in the UK who are both British citizens. It is reasonably foreseeable that a second child is likely to be born in September 2017. I concluded that removal of the appellant in consequence of the decision is likely to interfere with his family life in a sufficiently grave way to engage the operation of Article 8 (points (i) & (ii) of Lord Bingham's five stage approach in *Razgar v SSHD* [2004] INLR 349).
6. The state can lawfully interfere with an appellant's family life if it is pursuing a legitimate aim and it is necessary and proportionate in all the circumstances of the case. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in

maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see *Hesham Ali v SSHD* [2016] UKSC 60.

7. Section 117B of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") sets out a number of public interest considerations that a court or Tribunal must take into account in assessing whether an interference with a person's right to respect for private and family life is justified and proportionate.
8. The maintenance of an effective system of immigration control is in the public interest. The appellant entered the UK on 14 February 2009 with entry clearance as a student. His leave to remain was extended but was then curtailed because the college licence was revoked. The appellant made an in-time application for further leave to remain, which was granted until 28 February 2015. His leave to remain was curtailed a second time to end on 26 August 2014. He made an in-time application for leave to remain as a spouse. The application was refused in a decision dated 24 August 2015, which is the subject of this appeal. The appellant's immigration history shows that he remained in the UK lawfully throughout his period of residence.
9. On the evidence currently before the Tribunal the only aspect of the appellant's immigration history that gives weight to public interest issues is the allegation that the appellant used deception in an earlier application for leave to remain because he produced a fraudulent English language certificate. The First-tier Tribunal judge found that the appellant failed to give a sufficiently credible explanation in response to the allegation and that the respondent had discharged the burden of proof. He found the appellant's evidence about the nature of the testing to be vague and lacking in detail. He even went so far as to cast some doubt on whether the appellant had been a genuine student. These are negative findings that give significant weight to the public interest in removal.
10. The appellant speaks some English and there is evidence to show that his wife is working and that the family are likely to be financially independent. Although these are factors that section 117B(2)-(3) requires a Tribunal to take into account, the fact that the appellant is not an additional burden on public finances is a neutral factor that does not add weight to the individual circumstances of his claim to remain in the UK: see *AM (Section 117B) Malawi* [2015] UKUT 260.
11. The appellant entered a relationship and married his wife at a time when he had leave to remain as a student. Section 117B(4) requires little weight to be given to a relationship formed with a British partner at a time when a person was in the UK "unlawfully". Although the appellant would have

known that his immigration status was in a temporary category and was precarious, section 117B(4) only requires little weight to be given to the relationship if his leave was unlawful, which it was not. As such, I find that I can give some weight to the fact that the appellant has established a family life in the UK with a British partner. However, the First-tier Tribunal has already considered whether there would be 'insurmountable obstacles' to the couple continuing their family life in Bangladesh and concluded that there were none. Those findings were preserved. The fact that there are no insurmountable obstacles to the couple continuing their family life in Bangladesh does reduce the weight to be given to the assertion that it would be disproportionate to remove the appellant when there are no obstacles to them continuing their family life in Bangladesh.

12. The appellant has lived in the UK for a period of eight years. No meaningful evidence is produced to show that he has established any particularly strong ties in the UK. The appellant falls far short of the private life requirements contained in paragraph 276ADE of the immigration rules both in terms of his length of residence or in showing that there are likely to be 'very significant obstacles' to integration in Bangladesh, where he grew up and still has family and cultural connections. Any private life that he might have established in the UK was during a time when he was remaining in the UK in a temporary immigration category. The Tribunal is required by section 117B(5) to give little weight to any private life that is established at a time when a person's immigration status is precarious. For these reasons, I place little weight on any private life that the appellant might have established when considering where a fair balance should be struck.
13. I turn to consider the best interests of the appellant's three-year-old son. I also take into account the fact that it is reasonably foreseeable that the appellant's second child is about to be born. In assessing the best interests of the child I have taken into account the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55. In that guidance the UKBA acknowledges the importance of a number of international instruments relating to human rights including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: "*The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies.*" I take into account the fact that the UNCRC sets out rights including a child's right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.
14. I have also taken into account the decisions in *ZH (Tanzania) v SSHD* [2011] UKSC 4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and*

others v SSHD [2014] EWCA Civ 874. The best interests of the child are a primary consideration in this case but may be outweighed by the cumulative effect of other matters that weigh in the public interest. I take into account that the younger the child the more important the involvement of a parent is likely to be: see *Berrehab v Netherlands* (1988) 11 EHRR 322.

15. The fact that the appellant's son is a British citizen is a matter of intrinsic importance. The child had rights and advantages arising from his citizenship. However, at this stage he is still a young child. He is due to start nursery in September 2017, but is not yet in formal education. His life still revolves very much around his parents. As one might expect of a child of that age, there is no evidence to show that he has established any significant ties outside the family unit. There is no evidence to suggest that the child has any health issues. Although the appellant's wife states that the child has been receiving speech and language therapy no further information is provided and I have not been referred to any evidence to support this bare assertion.
16. The appellant and his wife were inconsistent in their evidence before the First-tier Tribunal as to what language the child speaks at home. The appellant said that the household language is Bengali whilst his wife said that the child only speaks or is spoken to in English. Given that the appellant and his wife were both born and brought up in Bangladesh it seems likely that Bengali is spoken in the family home. Even if the child predominantly speaks English, it is likely that he also understands some Bengali. He is of an age where he would be able to adapt to a new situation and learn a new language if necessary.
17. I accept that the child is likely to have access to higher standards of living, health and education if he remains in the UK. However, there is no evidence to show that the appellant and his wife could not earn a living and provide for their children in Bangladesh if they want to remain as a family unit. The appellant and his wife both have family members in Bangladesh who are likely to be able to assist them to re-establish themselves there. The appellant is an educated person. His wife also has work experience. There is nothing to suggest that they would be unable to give their children the love and care that they need, including access to education and healthcare. The First-tier Tribunal judge noted that the appellant referred to his father being a wealthy entrepreneur in an earlier application for entry clearance.
18. The evidence contained in the witness statements shows that the appellant's wife is reluctant to relocate to Bangladesh because she considers that the children will have a better education and lifestyle in the UK. It is a matter for her whether she chooses to remain in the UK or continues her family life with the appellant in Bangladesh. If she chooses to remain in the UK the appellant's removal would lead to the separation of the appellant from his wife and children. At the moment his wife is the

main bread winner and the appellant takes responsibility for a large part of the child care while she is at work. The separation of the appellant from his child would not be in the child's best interests. While it is not difficult to assume that the separation of the child from his father is likely to have an adverse impact on the child there is no evidence before me to show that there would be an unduly harsh impact on this particular child over and above what one might expect if a young child is separated from a parent.

19. For these reasons I conclude that the best interests of the child and any soon to be new-born are to remain in the UK with both parents where they will be able to access the benefits of citizenship, including what are likely to be higher attainable standards of living, health and education. Although I find that it is in the child's best interest to remain in the UK with both parents this is only marginally so because of the rights and advantages of his British citizenship. There is no evidence to suggest that there would be any significant welfare concerns if the child relocated to Bangladesh with both parents. At this stage, these findings would apply equally to any new-born child.
20. In assessing whether public interest considerations are sufficiently serious to outweigh the best interests of the child I have taken into account the statutory provisions contained in section 117B(6), which states that the public interest will not require the person's removal where he has a genuine and subsisting relationship with a 'qualifying child' and it would not be reasonable to expect the child to leave the United Kingdom.
21. As a British citizen the appellant's son is a 'qualifying child' for the purpose of section 117B(6). It is not disputed that the appellant has a genuine and subsisting parental relationship with the child. The crux of the appeal rests very much on whether it would be 'reasonable' to expect the child to leave the UK within the meaning of section 117B(6). In *MA (Pakistan) v SSHD* [2016] EWCA Civ 705 the Court of Appeal expressed some doubt as to whether the 'reasonableness' test should include consideration of public interest factors, but declined to depart from the earlier decision in *MM (Uganda) v SSHD* [2016] EWCA Civ 450, which concluded that it did. In *MA (Pakistan)* Lord Justice Elias emphasised that significant weight should still be given to the interests of a child, especially with reference to the respondent's published policy guidance: Immigration Directorate Instructions "Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10 Year Routes" (August 2015).
22. The guidance makes a distinction between qualifying children who have been continuously resident in the UK for a period of seven years and British children. This reflects the different rights that might arise from British citizenship in terms of immigration status, and in particular, under European law. The relevant section of the policy guidance relating to British children is as follows:

"11.2.3. Would it be unreasonable to expect a British Citizen child to leave the UK?"

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.

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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. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision."

23. The policy applies in circumstances where the effect of the decision is to force the parent or primary carer of the British child to leave the EU. In this case the appellant's wife and child are both British citizens. Neither of them can be removed. Contrary to Mr Malik's submissions, there is no evidence to suggest that the appellant's wife would be forced to leave the UK if he is removed. She may choose to do so if she wishes to continue their family life together, but she is not forced to do so. She made quite clear in her witness statement that she would want to remain in the UK where she considers her children would have access to better quality education and healthcare. Undoubtedly it would be more difficult for her to work and support the family without the appellant. At the moment, she is the main breadwinner of the family and the appellant looks after the child. No doubt it would be increasingly difficult for her to work full-time and look after two children in the absence of any other close relatives in the UK. It seems likely that the appellant's wife might become more dependent on public funds if she is less able to work due to childcare responsibilities. This is a factor that I have taken into account in assessing what weight should be placed on the public interest in removing the appellant from the UK.

24. The guidance goes on to recognise that, even if another parent would be able to remain in the UK with the child, weighty public interest considerations would be needed to justify the separation of a British child


from a parent. The circumstances outlined in the policy guidance are not exhaustive, but indicate that significant public interest considerations such as criminality or a very poor immigration history might be sufficient to justify a decision that would lead to a British child being separated from a parent.

25. Mr Malik asserts that the appellant does not have a poor immigration history, but the findings of the First-tier Tribunal do not support the assertion. It is the case that the appellant remained in the UK with leave to remain, but that is not the only measure of a person's immigration history. In this case a serious allegation was made by the respondent, which the First-tier Tribunal accepted.
26. The ETS allegation involves two serious matters. Firstly, ETS found that there was evidence to show that the appellant was likely to have obtained an English language certificate by using a proxy test taker. The use of a proxy test taker involved the use of fraud to obtain the certificate. The individual fraud formed part of a widespread organised fraud involving thousands of tests. It is clearly in the public interest to discourage such widespread fraud. Secondly, in relying on a fraudulent test certificate the appellant sought to deceive the respondent when he applied for further leave to remain as a student. The fact that he knowingly sought to use a fraudulent document to obtain leave to remain is a breach of immigration law at the serious end of the scale.
27. The appellant was granted leave to remain as a student but the First-tier Tribunal expressed doubts about the genuine nature of the appellant's studies in the UK given the vague evidence he gave at the hearing. Despite his claim to have studied in the UK since 2009 there is little evidence to show that the appellant made any progress in his studies or obtained any meaningful qualifications. This casts doubt on whether he was remaining in accordance with the conditions of his leave to remain. The appellant has not addressed any of the serious public policy issues in his most recent witness statement.
28. The allegation that the appellant obtained an English language certificate by fraud, and then sought to use it to deceive the respondent in an application for further leave to remain, is sufficiently serious to justify refusal of leave to remain under the 'Suitability' requirements of the immigration rules. The effect of the decision to refuse leave to remain under the 'Suitability' requirements is that the appellant does not meet the requirements of the immigration rules despite the fact that it is accepted that he is in a genuine relationship with a British citizen and has a British child. The respondent asserts that the rules strike a fair balance between the public interest and individual family and private life issues. Appropriate weight should be given to the respondent's policy as set out in the rules and relevant statutes.

29. There appear to be no particularly compelling or compassionate circumstances to take into account in an assessment outside the rules save for the appellant's understandable desire to remain in the UK with his family. I have found that the best interests of the appellant's child (and soon to be second child) are to remain in the UK with both parents where they are likely to have access to a better standard of living, health and education. However, I have found that the evidence only shows that it is marginally in the child's interests to remain in the UK because his status as a British citizen, there is no evidence to show that his needs would not be catered for if the family chose to relocate to Bangladesh in order to continue their family life. The fact that the child is a British citizen is a primary consideration but is not a 'trump card' that will outweigh the public interest in every case. The best interests of a child can be outweighed by the cumulative effect of countervailing considerations.
30. I have given significant weight to the interests of the appellant's child and the impact that it might have on him if he were to lose the advantages of citizenship by relocating to Bangladesh or if he was separated from his father if his mother chose to remain in the UK.
31. The appellant entered into marriage and began a family at a time when he knew his immigration status was precarious. Although he remained in the UK with leave to remain, in fact, he has a very poor immigration history involving serious abuse of the immigration system. It is not necessary to show repeated incidents of abuse. The allegations made against him of fraud and deceit go to the heart of maintaining an effective system of immigration control. The appellant does not meet the requirements of the immigration rules because his conduct makes it undesirable to allow him to remain in the UK. The consequence of this decision is that the family have to make a difficult decision whether to relocate to Bangladesh or suffer separation in order for the children to access the advantages of life in the UK. I have found that it is marginally in the child's best interest to remain in the UK with both parents, but there is nothing to suggest that his needs would not be adequately catered for if he relocated with his family to Bangladesh. Although it would not be in his best interest to be separated from his father, for the reasons given above, I conclude that his father's actions are sufficiently serious to outweigh the interests of the child in this particular case. Having given significant weight to the best interests of the child and weighed it against the public policy considerations I conclude that it would be 'reasonable' to expect the child to leave the UK within the theoretical meaning given to the phrase contained in section 117B(6). I conclude that removal in consequence of the decision strikes a fair balance between the weight to be given to the public interest and the impact on the individuals involved in this case (points (iv) & (v) of Lord Bingham's five stage approach in *Razgar*).
32. I conclude that the decision to refuse a human rights claim is not unlawful under section 6 of the Human Rights Act 1998.

Decision

The appeal is DISMISSED on human rights grounds

Signed 
Upper Tribunal Judge Canavan

Date 16 August 2017