



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01531/2015

THE IMMIGRATION ACTS

Heard at Field House
On 14 May 2018

Decision & Reasons Promulgated
On 7 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MOHAMMAD [U]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Slatter, counsel instructed by Makka Solicitors Limited

For the Respondent: Miss J Isherwood, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Bangladesh, date of birth 25 December 1979, appealed against the Respondent's decision made on 23 June 2015 to refuse an application for leave to remain on the basis of his private and family life.
2. The appeal came before First-tier Tribunal Judge L Rahman (the Judge) who dismissed the appeal against that decision. Permission to appeal that decision was given and on

11 April 2018 I found for reasons given in the decision dated 20 February 2018 that the original Tribunal decision could not stand and that matter would have to be remade in the Upper Tribunal. Directions were given.

3. At the resumed hearing on 14 May 2018 evidence was provided concerning from the Appellant and his wife [SC], a British national date of birth 20 August 1988. The Appellant's wife had come to the United Kingdom aged about 17 years and had lived here since about 2005, getting indefinite leave to remain in 2007. She is the mother of their child [Z], date of birth 18 May 2015. [Z] is a British national. The Appellant claimed that his removal would be a breach of Article 8 ECHR rights in that it would interfere with his private and family life of which the care of his daughter [Z] plays a significant part and in which he has an active role.
4. For the avoidance of doubt, the Appellant's wife has a good immigration history. So far as the Appellant is concerned, the Appellant lawfully entered the United Kingdom with a valid student visa on 12 August 2009 which by various extensions was granted until 27 June 2014. On 26 June 2014 the Appellant made an application for a further extension as a student but was refused with a right of appeal on 31 December 2014. The Appellant appealed that decision.
5. The Appellant married his wife in or on 7 January 2015 and they have been together ever since. Following the marriage on 12 February 2015 the Appellant's previous representatives (Simon Noble solicitors) submitted a further leave to remain on the basis of marriage. Subsequently the representatives withdrew the pending appeal mentioned above whereas they should have withdrawn the appeal prior to making the FLR application.
6. In consequence on 15 April 2015 the Respondent wrote to the former representatives returning the FLR application on the basis that it had been submitted while an appeal was pending. On 30 April 2015 the Appellant's representatives then submitted a fresh application for leave to remain in which the Respondent was also informed that the Appellant's wife was pregnant and due to give birth on 4 July 2015. The child was born slightly prematurely on 18 May 2015 and the child's birth has been registered

with the Appellant and his wife as the parents. The birth certificate and other relevant information has been sent to the Respondent.

7. There is thus a period following the withdrawal of the appeal when the Appellant was an overstayer because of the original failure of his representatives to make the application after the withdrawal of the extant appeal. The complexities of the law on this point are really not apparent to the average person and the legal representatives are plainly at fault. Whilst they have not been directly challenged in the sense of a claim the position is that there really is no other explanation that can sensibly prevail which shows that it was the fault of the Appellant.
8. The witness statement of the Appellant contained within the supplementary bundle sets out briefly his dealings with Simon Noble solicitors and his change to new solicitors who have properly pursued the correct course. The position therefore is that the application the subject of this appeal was made more than 30 days after his leave to remain had come to an end and to that extent he is accepted to be an overstayer. But it is simply said it is not through his fault but rather the actions of others and he had no intention to overstay or act in breach of UK immigration controls. His signed statement of 22 February 2018 sets out his future plans in the UK and his involvement in the care of his child as well as the practical difficulties of removing her back to Bangladesh in terms of qualitatively the medical care and education she can receive there. It is not said that the Appellant's daughter cannot go to Bangladesh with her parents, but rather the benefits of her UK nationality are there for her to enjoy and neither her mother's or her or indeed her father's conduct is such as to militate against remaining.
9. In addition, evidence confirming that the child [Z] has a congenital hypothyroid which was diagnosed soon after birth and will require lifetime medication in addition the child has certain premature development delays associated with her metabolism problems, but it is not said that for example the need for physiotherapy and assistance in walking properly, that is in a correct gait, cannot be addressed in Bangladesh but rather the regime is in place in the UK and she is being cared for under the NHS as is her entitlement. She will be able to start mainstream nursery school in September 2018.

The Appellant has relied upon statements made by himself and his wife before the First-tier Tribunal, but his later one really adds nothing to the matter and his wife has simply repeated, in effect, in her second statement.

10. The case of SF [2017] UKUT 00120 was cited to me as illustrating at the time of the Respondent's decision the IDI – Family Migration – Guidance, and in particular in a section headed: "... Would it be reasonable to expect a British citizen child to leave the UK" various points are recited but included within it at the time

"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 alternatively primary carer in the UK ... The circumstances envisaged could cover amongst others:

- Criminality falling below the threshold set out in paragraph 298 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 ..."

11. It is perhaps unsurprising that the Secretary of State's current guidance is not materially different in the version published on 22 February 2018. No issue was taken before me as to whether or not there was a genuine parental relationship between the

Appellant with his child. No issue was taken as to the fact it was subsisting, and was likely to continue to be a shared role with his wife as the child goes to school and develops. It was intended that both should work but adjust their working hours around the child's needs. There was no issue that the child and the mother of the child are British nationals. There was no issue that the child's best interests lie in remaining in the UK able to enjoy the benefits of British nationality. It was not said the child could not go to Bangladesh but it was said the consequences of that were unfair, unreasonable and a denial of the evident intentions of the Secretary of State, to require a British national child to leave the United Kingdom.

12. The child clearly has a relationship with her mother's parents and their family in the UK. She has yet to develop any relationship with the Bangladesh arm of the Appellant's family. The child has not been to Bangladesh and has no particular connections as such although the Bengali language is the language of the household, but clearly as the child develops English will become part of her language skills.
13. The Appellant's wife originates from Bangladesh. She came as a teenager, and has evidently adapted to life in the United Kingdom. The child as yet has no meaningful cultural ties with Bangladesh albeit obviously her parents do. In the current advice on a situation where a child is a British national the guidance states

“where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the Applicant parent or primary carer facing removal. Accordingly, where this means the child will have to leave the UK because in practice the child will not or is not likely to continue to live in the United Kingdom with another parent or primary carer EX1.(a) is likely to apply.”

i.e. her removal is not reasonable.

“In particular circumstances it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK, or who has or is being granted leave to

remain. The circumstances envisaged include those in which the grant to grant leave could undermine our immigration controls, for example the Applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules." (My emphasis)

14. I have considered the best interests of the child and of course have applied Section 55 of the BCIA 2009 and the relevant case law of *ZH (Tanzania)* [2011] UKSC 4, *MA (Pakistan)* [2016] EWCA Civ 705 and *AM (Pakistan) and Others* [2017] EWCA Civ 180. I have also taken into account the decision of *MT and ET (Child's Best Interests) (Nigeria)* [2018] UKUT 00088 IAC in which the point is well made that as identified in *MA (Pakistan)* there need to be powerful reasons why a child who has been in the UK for a period of ten years should remove notwithstanding her best interests lie in remaining. That situation factually does not engage with the present circumstances but in the circumstances I conclude that it is not reasonable to expect the child to leave the United Kingdom in order to maintain, with his mother, that family relationship. More importantly, the continued participation of the Appellant in the life of the child and in its upbringing at this delicate time is obviously the right course to be followed. I have considered the Appellant's immigration history but as set out above it does not seem to me in the light of *AM (Pakistan)* that this is a case where his conduct shows that it is reasonable to require the child to leave with his parents, who evidently wish to maintain their relationship together.
15. Therefore having regard to the human rights claim and Article 8 outside of the Rules, I find in the light of the cases of *Hesham Ali* [2016] UKSC 60, *Agyarko* [2017] UKSC 11, *MF (Nigeria)* [2013] EWCA Civ 1192 that this is an appropriate case to look at Article 8. I conclude in the circumstances that the Respondent's decision interferes with the rights to a family/private life addressed by Article 8(1) of the ECHR. I find the Respondent's decision is lawful in accordance with the objectives of Article 8(2) but I find having regard to paragraph 117B(6) NIAA 2002 that there is a subsisting parental relationship between the Appellant and child a qualifying child. I find,

notwithstanding the Respondent's view is not reasonable for the child to relocate to Bangladesh. I also find the fact that the child could remain with his mother is no answer because it would confound the importance of a genuine and subsisting relationship and the benefits that follow. It follows from that that if it is not reasonable for the child to do so then it cannot be in the public interest and proportionate for the same to follow.

16. If I was wrong in that respect, I would for the same reasons conclude that the Secretary of State's decision does not respect the private and human rights to life and leads to the conclusion that the Respondent's decision is not proportionate.

DECISION

The appeal is allowed under Article 8 ECHR.

No anonymity order was sought nor is one required.

TO THE RESPONDENT

FEE AWARD

The appeal has succeeded on the strength of the information provided addressing the appeal rather than that which was originally before the Secretary of State. Accordingly, whilst I am satisfied as at the date of the hearing that the Appellant has discharged the burden of proof, Article 8 rights are engaged, and the Respondent's decision is disproportionate I do not find it appropriate to make a fee award.

Signed

Date 4 June 2018

Deputy Upper Tribunal Judge Davey