



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08133/2016

THE IMMIGRATION ACTS

Heard at Manchester
On 22nd August 2018

Decision & Reasons Promulgated
On 31st August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MR MUSTAQUE ISMAIL PATEL
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Howard, Counsel, instructed by Fountain Solicitors
For the respondent: Mr A Tan, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant states he came with his wife in 2000 to the United Kingdom. Both are nationals of India. He had permission to be here on the work permit scheme until 12 November 2004. Thereafter, he and his wife overstayed. His wife gave birth to their two children whilst here, AMP born on 20 February 2006 and an infant born on 5 January 2016.
2. On 22 February 2013 he made an application for leave to remain for himself and his family based upon their human rights. This was refused on 13 June 2013. The refusal was reconsidered on 12 January 2016 and in a decision dated 4 March 2016 the refusal was maintained.

3. His appeal was heard by First-tier Tribunal Judge Brewer on the papers and was dismissed in a decision promulgated on 19 September 2017. There was no suggestion he met the immigration rules. When the application was made the appellant's eldest child was not British but by the time of hearing she had become British. The judge had regard to section 117 B 6 of the 2002 Act stating that if it applied then the public interest considerations would not be served by the appellant's removal. This in turn affected the article 8 assessment. The judge concluded that it was in the children's best interest to be with their parents and the family could move back to India. The reason advanced was that British nationality was not to be seen as a trump card and as she was about to change school no particular barriers were seen to this occurring in India.

The Upper Tribunal

4. Application for permission to appeal was made on the basis the judge failed to properly consider the best interests of the children and in particular the fact the eldest child was now British. Reference was made to paragraph 46 of the decision in MA (Pakistan) & Or's, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705. That decision stated that the fact the child has been here seven years must be given significant weight in the proportionality exercise and there had to be strong reasons for refusing leave. It was contended that the judge failed to give weight to the length the appellant's eldest child had been United Kingdom when carrying out the proportionality exercise.
5. The application was granted by a judge of the Upper Tribunal on 23 May 2018 on the basis that the eldest child's British citizenship was highly relevant under section 117 B. The application had originally been dealt with by a First-tier Tribunal judge who had refused leave.
6. The respondent in a letter dated 16 July 2018 confirmed that the application for permission to appeal was not being opposed. As permission had already been granted. At that stage I can only assume the letter writer meant to say that the appeal was not being opposed. This was the position adopted by Mr Tan at hearing.
7. I have received an updated bundle on behalf of the appellant further to rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 with a covering letter dated 17 August 2018. There appeared to be a number of mistakes in the appellant's statement because he is described as a Pakistani national and that his eldest daughter was born on 28 February 2018. He refers to the stress the uncertainty of their positions is causing the family and points out he has been now living in the United Kingdom for 18 years.
8. I have also received a skeleton argument on behalf of the appellant. This emphasises the fact his eldest daughter is now a British citizen and reliance is placed upon section 117 B(6).

9. In MA (Pakistan) & Or's, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705 and AM (Pakistan) & Or's Lord Justice Elias said it was inherent in the reasonableness test in section 117B(6) that the court should have regard to wider public interest considerations and in particular the need for effective immigration control. There is also an updated IDI of 22 February 2018 which required caseworkers to consider if they would be unjustifiably harsh consequences outside of 117 B(6). This would include consideration of the best interests of the child and the impact of any separation. The skeleton argument also refers to the decision of MT and ET(Child's best interests; ex-tempore pilot Nigeria [2018] UKUT 00088 at, paragraph 33, of which refers to the need for powerful reasons as to why a child who has lived in the United Kingdom for 10 years should be removed.

10. I have regard to the fact the respondent is not opposing the appeal. The appellant has been here a long time, albeit most of it when he had no leave. In that time his children have set down roots, particularly his eldest. I bear in mind what was said of the statutory provision of section 117 B6. There is no suggestion of any criminality or antisocial behaviour on the part of the appellant. Essentially, his family have settled into the United Kingdom and are seeking to make their lives here. It seems likely that if he and his wife could not remain here then their children from a practical point of view would have to leave with them. His eldest daughter has British citizenship and is doing well at school. I do not see any factors of sufficient weight in relation to immigration control to counterbalance the interests of the family in the circumstance. Consequently, I remake the decision allowing the appeal on article 8 grounds.

Decision

The decision of First-tier Judge First-tier Tribunal Judge Brewer materially errs in law and has been set aside. I remake the decision allowing the appeal on article 8 grounds.

Francis J Farrelly
Deputy Upper Tribunal Judge