



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/26737/2016
HU/26745/2016

THE IMMIGRATION ACTS

Heard at Liverpool Employment Tribunal
On 5 June 2018

Decision and Reasons Promulgated
On 27 July 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ASARUN [B]
[F B]

(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hussain instructed by Whitfield solicitors Ltd.

For the Respondent: Mr Diwnycz Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge R D Taylor, promulgated on the 2 October 2017, in which the Judge dismissed the appellant's appeal on human rights grounds.

Background

2. The first appellant is a citizen of Bangladesh born on 23 March 1980. The second appellant, her daughter, is also a citizen of Bangladesh born in the UK on 13 July 2010.
3. The Judge notes at [1] that he considered whether the circumstances of the case required or warranted anonymity but finds that such was not suggested by the parties and that it did not appear there are circumstances or features that warranted an anonymity order in this case. This reflects the position before the Upper Tribunal too.
4. The first appellant entered the United Kingdom on 5 November 2006 with a visit Visa but overstayed. Previous leave to remain applications and claims for international protection have been made and refused. The application leading to the impugned decision was made on 16 March 2016.
5. Having considered the evidence the Judge sets out findings of fact from [9] of the decision under challenge which can be summarised in the following terms:
 - a. There are not any very significant obstacles to reintegration into Bangladesh. The first applicant is unable to succeed under 276ADE(1)(vi). The Judge also finds, considering the first appellant in isolation, that there could not be argument in her favour under article 8 given the first appellant has remained in the United Kingdom illegally for all bar the first few months as an over stayer warranting her private life being accorded little weight, she is not financially independent, her English is still very limited, and there is overall very little to set against the respondent's judgment of the interest of immigration control apart from consideration of the child, the second appellant [9].
 - b. The central issue is whether the second appellant should, on the basis of article 8 ECHR, effectively be required to return to Bangladesh with her mother. The Judge does not doubt the second appellant is a qualifying child and notes the real question is what the impact of that is upon the question of whether the appellant should be required to go to Bangladesh or allowed to stay in the United Kingdom [10].
 - c. In light of the decision in MA (Pakistan) the first issues to assess is the best interests of the child, in this case as a primary consideration, and, secondly, bearing in mind those best interests to consider whether it would be reasonable in light of that and other factors weighing on proportionality or otherwise of the decision and its impact on private and family life, to require the child to leave [11].
 - d. When considering the first appellant's submissions regarding the difficulties her daughter would face in Bangladesh for health reasons, the Judge finds "None of these GP comments, appointments, letters etc bear out the exaggerated description of health problems given by the appellant in her witness statement" [12].
 - e. The Judge found it very difficult to believe the second appellant only spoke English, in light of the fact the first appellant herself speaks very little English and that as the second appellant's sole parent, it was inconceivable that the child had not have learned at home to conversed with her mother in Bengali/Sylheti; since her mother would not been able to speak to her in English to any useful extent [13].
 - f. There was very little evidence in the bundle of any great attachment or involvement in the English way of life or putting down significant roots during the seven years the second appellant has been in the United Kingdom. The evidence of attending

school provided was considered. The second appellants wider family members in the United Kingdom are only her mother and friends and wider family members in Bangladesh include her grandparents [14].

- g. The Judge concludes by finding that despite the second appellant being in the United Kingdom for all her life to aged 7, she is still relatively young, medical issue seem to have been resolved and dealt with, and she does not appear to have major ongoing issues. The second appellant does not appear to have any particular strong ties with particular friends and still needs daily help with her English in school. The relatives in the United Kingdom are her mother and she has grandparents in Bangladesh. The Judge finds “on balance I find that the best interests lie in her going with her mother to Bangladesh where there are other relatives to assist in her upbringing and to think she can relate which may be particular importance given her only relative in this country is her mother” [15].
 - h. The Judge considers the question of whether it is reasonable to expect the second appellant to leave the United Kingdom concluding that it is reasonable to expect the child to leave. The Judge, in the alternative, finds that even if the best interests of the child were to be in favour of the child remain in the United Kingdom this still did not outweigh the respondent’s case in relation to the public interest and effective immigration control making it reasonable for the child to leave [16].
 - i. The Judge concludes at [17] “The decision in this case does not involve a disproportionate interference with the appellants rights to respect for family and private life or to be contrary to the best interests of the second appellant as a child and it is in any event reasonable to expect the second appellant to leave the United Kingdom with her mother and I consequently find that the decision does not involve a breach of article 8 and is not, on the basis of the evidence before me, unlawful under s.6 Human Rights Act 1998 or on any other basis”.
6. The applicant sought permission to appeal which was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:
4. It is complained Judge failed to apply properly s.117B(6) NIAA 2002 by treating the subsection as one of the cumulative series of criteria to be applied under the section rather than creating a discrete category of claimant.
 5. IT is arguable that the Judge did so fail, particularly at [16].
 6. Such error, if shown, would be material.

Grounds and submissions

7. On behalf the appellant Mr Hussain relied upon the grounds of appeal and the fact the child was born in the United Kingdom. It was argued the child is a qualifying child and that this case fell within that identified in the judgment of Elias LJ in MA (Pakistan) at [36] where he stated: “Looking at section 117B(6) free from authority, I would favour the argument of the appellants. The focus on paragraph (b) is solely on the child and I see no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest. I do not deny that this may result in some cases in undeserving applicants being allowed to remain, but that is not in my view a reason for distorting the language of the section. Moreover, in an appropriate case the

Secretary of State could render someone liable to deportation, and thereby render him ineligible to rely on this provision, by certifying that his or her presence would not be conducive to the public good."

8. Mr Hussain also submitted there was a strong expectation in the applicant's favour, placing reliance upon [49] of MA (Pakistan) where it is stated: *"Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."*
9. It is accepted the Judge noted the best interests of the child but argued the Judge failed to properly factor those into the proportionality assessment. It is argued that this occurred as a result of the error made by the Judge on the basis of MA (Pakistan). It was submitted there must be a proper assessment which has not been undertaken in this case as part of section 55 consideration.
10. In behalf of the respondent Mr Diwnycz noted there was no Presenting Officer to assist the Judge on the day and submitted the Judge reasonably considered the evidence provided. There was no evidence of examination in chief or anything from the Judge meaning the appellant's case must have been accepted it is highest.
11. It was submitted there is no legal error in the finding by the Judge regarding the use of English and the child's understanding of the language of Bangladesh which she must use to communicate with her mother.
12. Mr Diwnycz submitted the Judge referred to MA and balanced all relevant factors as well as the impact of removal on the decision.
13. Mr Hussain, in reply, submitted MA was a deportation appeal and this is a human rights appeal warranting consideration of different categories of interest. It was submitted this is not an attempt by the applicant to reargue the case and that the issue turns upon the detail of the decision. Mr Hussain submitted the Judge ignored the child's position and finds it relevant to the situation of the mother and made the decision on this basis. It was submitted the Judge had not correctly identified the facts of relevance and the matter should be remitted to the First-tier Tribunal.

Error of law

14. The Court of Appeal in *R (on the application of MA (Pakistan) and others) v Upper Tribunal (Immigration and Asylum Chamber and Another* [2016] EWCA Civ 705 held that when considering whether it is reasonable to remove a child from the UK under paragraph 276ADE(1)(iv) of the Immigration Rules and section 117B(6) of the Nationality, Immigration and Asylum Act 2002, a court or tribunal should not simply focus on the child but should have regard to the wider public interest considerations, including the conduct and immigration history of the parents. It was also confirmed, however, that if section 117B(6) applies then "there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions

specified in the subsection are satisfied, the public interest will not justify removal." It was additionally held, however, that the fact that a child has been in the UK for seven years should be given significant weight in the proportionality exercise because of its relevance to determining the nature and strength of the child's best interests and as it established as the starting point that leave should be granted unless there were powerful reasons to the contrary.

15. In the more recent case of MT and ET (child's best interests; extempore pilot) Nigeria [2018] UKUT 00088 it was held that a very young child, who had not started school or who has only recently done so, will have difficulty in establishing that her article 8 private and family life has a material element, which lies outside the need to live with her parent or parents, where ever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part. On the particular facts of a child who had been in the UK for 10 years from the age of four, that her mother had abuse the immigration laws by overstaying on a visit Visa and then making a false asylum claim and at some stage using a false document to obtain employment, was not such a bad immigration history as to constitute the kind of "powerful" reason that would render the child's removal to Nigeria reasonable.
16. There are, however, cases such as that of R (on the application of Osanwemwenze) v Secretary State the Home Department [2014] EWHC 1563 which, whilst not specifically concerned with section 117B, considered the question of reasonableness of the child leaving the United Kingdom. In that case the claimant's 14-year-old stepson from Nigeria had been in the UK for more than seven years and had leave to remain in his own right. It was held that this was an important but not an overriding consideration and it was reasonable to expect the claimant's family including the stepson to relocate to Nigeria where the parents had experienced life there as adults and would will be able to provide for the children and help them to reintegrate.
17. In AM (s117B) Malawi [2015] UKUT 260(IAC) the Tribunal held that when the question posed by s117B(6) is the same question posed in relation to the children by paragraph 276ADE(1)(iv), it must be posed and answered in the proper context of whether it was reasonable to expect the child to follow its parents to their country of origin.
18. The Judge clearly considered all relevant aspects of the case including what had occurred previously in relation to this family unit. The Judge considered both paragraph 276ADE and section 117B and the challenges to the interpretation of the statutory section when the decision under both should arguably be the same.
19. Whether a child's best interests require them to stay in the United Kingdom or whether it is reasonable for a child to return to their country of origin is a question of fact. In this case neither the first nor second appellant are British citizens, both being citizens of Bangladesh, and neither has a right to remain in the United Kingdom following a grant of leave to enter or remain. The first appellant is an over stayer. The Judge recognised that the second appellant's primary bond and connection within the family is to her mother, the first appellant. The Judge

recognised that the second appellant attends school in the United Kingdom and properly analyses the evidence relating to the connections the child has with the school and evidence of connections the child has to the United Kingdom generally, before concluding that there was little evidence that the child has put down significant roots in the seven years that the second appellant has been here. The Judge found that it had not been made out that the child's best interests require the child to stay in the United Kingdom on the basis of the material presented for consideration and the findings made.

20. The case law referred to above and that relied upon by Mr Hussain sets out principles to be considered by decision-makers dealing with cases of this nature, but does not say that a child who has been in the United Kingdom for at least seven years should automatically succeed with their claim. It is accepted that the case law indicates that significant weight should be given to the fact the child had been in the United Kingdom for this length of time as that recognises the fact a child will have formed strong bonds that it would be disproportionate to interfere with when considering the article 8 exercise, during this time.
21. Section 117B(6) provides that 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. The time element is not cast in absolute terms based upon duration of time in the United Kingdom but introduces the need to assess the reasonableness of the child's removal.
22. The Judge was clearly aware of this requirement which is recorded in the determination under challenge. No misunderstanding of the requisite test or legal misdirection is arguably made out.
23. The conclusion of the Judge that it had not been established that the child's best interests were to remain in the United Kingdom, on the basis of the facts of this case, has not been shown to be infected by arguable legal error.
24. The Judge factored into the assessment any connection the child may have to the language and culture of Bangladesh and family members within Bangladesh, concluding that the child spoke the local languages and had a grandparent in Bangladesh who could provide support and assistance on return.
25. The Judge answered the three questions he was asked to consider which are (i) is a genuine and subsisting parental relationship which the Judge accepted there was between the two appellants as mother and daughter, (ii) is the child a British citizen or a child who has lived in United Kingdom for a continuous period of at least seven years which the Judge accepted on the basis of the length of time the second appellant has been in the United Kingdom and (iii) whether it would be reasonable to expect the child to leave the United Kingdom which the Judge considered and concluded it was reasonable for the child to leave.
26. The Upper Tribunal cannot interfere in a decision unless it is established the First-tier Tribunal had made legal error in their decision material to the decision under challenge. The Judge has not been shown to have made such material error on the facts of the case known to the First-tier Tribunal and submissions made at the hearing and 17 September 2017.

- 27. Although Mr Hussain specifically submits this is not an attempt by the appellants to reargue their claim it may be seen by some that there is arguable merit in the submission made on the respondent's behalf that this is precisely what the appellant wishes to achieve. Whilst the appellant may wish to remain in the United Kingdom that is not the issue under consideration at this point in the proceedings.
- 28. The appellant fails to establish that the decision is outside the range of those reasonably open to the Judge on the evidence. Accordingly, this appeal is dismissed.

Decision

- 29. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

- 30. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 for the reasons set out above.

Signed.....
Upper Tribunal Judge Hanson

Dated the 20 July 2018