



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11150/2018

THE IMMIGRATION ACTS

Heard at Field House
On 29 January 2019

Decision & Reasons Promulgated
On 7 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

MERVE COKGEZER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Sowersby, instructed by Russell Wise, solicitors
For the Respondent: Ms S Cunah, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Greasley promulgated on 04 December 2018, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 2 December 1993 and is a national of Turkey. On 9 May 2018 the Secretary of State refused the Appellant's application for indefinite leave to remain in the UK.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Greasley ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 28 December 2018 Judge J Grant-Hutchison granted permission to appeal stating inter alia

...It is arguable that the Judge has misdirected himself by the lack of consideration of the appellant's private and family life both within and outside the immigration rules when considering that the appellant has two British children (one is 3½ years old and the other one-year-old) and the best interests of the children under section 55 of the Borders Citizenship and Immigration Act 2009.

The Hearing

5. On 17 January 2019 the respondent served a rule 24 response which says inter alia

2. The respondent does not oppose the appellant's application for permission to appeal. It is accepted that the appellant has two British children and the FTIJ materially erred by failing to consider section 55 or 117B(6). The Tribunal is therefore respectfully invited to set aside the FTT determination.

3. It is accepted in light of the Supreme Court decision of KO and the Secretary of State's policy guidance confirming that British children are not expected to leave the EU, the children cannot be expected to return to Turkey with the appellant. The Tribunal is therefore invited to remake the FTT determination, allowing the appellant's appeal.

4. The Secretary of State respectfully invites the Tribunal to set aside and remake the FTT determination allowing the appeal.

6. Ms Cunah told me that the appeal is no longer resisted. Of consent, she asked me to set the decision aside, although preserving the Judge's finding that the appellant cannot meet the suitability requirements of appendix FM, and to substitute my own decision allowing the appeal on article 8 ECHR grounds because the appellant is the mother of two British citizen children.

Analysis

7. The respondent's decision dwells on paragraph 322(1A) of the immigration rules. The respondent insists that the appellant relies on a fraudulently obtained English language test in an earlier application. The Judge's findings of fact lie between [18] and [23] of the decision. There, the Judge draws entirely on the English language test and whether or not false representations made. At [21] the Judge finds that the appellant does not meet the suitability requirements of appendix FM.

8. At [22] the Judge finds that the appellant can return to Turkey and make an application for entry clearance from there. At [23] the Judge says that the appellant's two children can accompany her to Turkey.

9. The Judge's article 8 analysis is both incomplete and inadequate. The Judge does not properly take account of the fact that the appellant is the mother of two British citizen children. The Judge does not consider section 117B(6) of the 2002 Act. That is a material error of law. I set the decision aside. I am invited to substitute my own decision.

The Facts

10. The appellant is a Turkish national, born on 2 December 1993. The appellant entered the UK on 2 February 2014 with leave to remain in the UK until 31 March 2016. The respondent extended leave until 17 May 2018. On 15 January 2018 the appellant applied for indefinite leave to remain as the spouse of a settled person.

11. The appellant's husband is a British citizen. The appellant and her husband have two children both under the age of five years. Both of the children are British citizens. The appellant lives with her husband and their two children in the UK.

12. On 30 November 2017 the appellant's attempt to sit a Life in the UK exam was abruptly halted when an invigilator believed that the appellant was using a Bluetooth communication device to cheat in the test. The appellant subsequently re-sat the test and passed it.

The immigration rules

13. On the respondent's unopposed motion, I am asked to preserve the Judge's findings that the appellant does not meet the suitability requirements of appendix FM. On the facts as I find them to be, the appellant's first attempt to life in the UK test was terminated. The appellant does not meet the suitability requirements of appendix FM, but the focus in this case is on article 8 ECHR grounds of appeal.

Article 8 ECHR

14. What is beyond dispute is that the appellant is the mother of two British citizen children. On the facts as I find them to be, the appellant has a genuine and subsisting relationship with two British citizens. The unchallenged evidence is that the appellant's husband and children are British citizens present in the UK, with whom the appellant normally lives. Article 8 family life exists for the appellant.

15. The respondent's IDIs on Family Migration (Paragraph 11.2.3) deals with British children. The August 2015 version states that, 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. However, it also states that "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". The section goes on to address the grant of leave to the parent indicating that it may not be appropriate if there is no satisfactory evidence of a genuine and subsisting parental relationship or where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation but none of that gets round the unequivocal statement that it would always be unreasonable to expect a British child to leave the EU.

16. The Upper Tribunal in SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC) held, considering this guidance that even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal

17. The guidance given by the respondent in the IDIs on Family Migration (February 2018) is that the questions a decision maker should now pose are:

- (i) is there a genuine and subsisting parental relationship?
- (ii) is the child a British citizen or have they lived in the UK for a continuous period of at least 7 years?
- (iii) will the consequence of the refusal of the application be that the child is required to leave the UK?
- (iv) would it be reasonable to expect the child to leave the UK. In many cases where one parent has a right to remain in the UK, the child would not leave?

18. The respondent's guidance suggests that the test is whether the child would be likely to leave rather than actually be required to leave. The Home Office now say the impact on the child of the appellant's departure from the UK should be considered taking into account the best interests of the child as a primary consideration and if refusal would lead to unjustifiably harsh consequences, then leave can be granted on the basis of exceptional circumstances.

19. It does not follow that section 117(6) should be interpreted in the same way as the SSHD interprets his immigration rules. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was held (see [19]) that when applying section 117B(6) only three questions needed to be asked as long as the applicant was not liable to deportation, and those questions are

- (i) is there a genuine and subsisting parental relationship?
- (ii) is the child a British citizen or have they lived in the UK for a continuous period of at least 7 years?
- (iv) would it be reasonable to expect the child to leave the UK?

20. The respondent's rule 24 response accepts that the appellant's children cannot be expected to go to Turkey. The appellant's unchallenged evidence is that the appellant's husband and children are British citizens. The weight of reliable evidence indicates that the children would be distressed if their parents are separated. Caselaw tells me that it is in a child's best interests to live in a family with both of their parents. It cannot be reasonable to cause young children distress. It cannot be reasonable to separate the children from one of their parents.

21. On the facts as I find them to be, family life exists. The respondent's decision is an interference with that family life. The burden therefore shifts to the respondent to show that the interference was justified. The respondent relied solely on the public interest in effective immigration control, but now concedes that this appeal should be allowed on article 8 ECHR grounds because it is in the best interests of the appellant's children that they (and the appellant) should remain in the UK, and because it is not reasonable to expect the children to leave the UK.

22. In R (on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC) it was held that (i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40. (ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a case involving children. However, where a failure to comply in a particular capacity is the only issue so far as the Rules are concerned, that may well be an insufficient reason for refusing the case under Article 8 outside the rules.

23. In Agyarko [2017] UKSC 10 Lord Reed said again that if an applicant, even if residing in the UK unlawfully, was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal and that point was illustrated by Chikwamba.

24. When the respondent's decision was made, the respondent said that the appellant could make a successful application to return to the UK to join her husband and children. Caselaw tells me that the refusal of leave to remain must therefore be a disproportionate breach of the right to respect for family life. The respondent now concedes that the interference with the appellant's article 8 rights is disproportionate.

25. The appellant's children are British. The focus in this case is on sub-section (6) of Section 117B. Section 117B(6) is in two parts which are conjunctive. Section 117B(6)(a) weighs in favour of the appellant because she has a genuine and subsisting parental relationship with qualifying children. It is Section 117B(6)(b) which is determinative of this case.

26. I have already found that it is not reasonable to expect the appellant's children to leave the UK. Adhering to the interpretation given to s.117B(6) in MA (Pakistan) I find that the appellant succeeds under section 117B(6) of the 2002 Act.

27. I remind myself of Section 55 of the Borders, Citizenship and Immigration Act 2009. In ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 Lady Hale said that "*Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child*".

28. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was confirmed 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 sub-section are satisfied, the public interest will not justify removal.*"

29. Because the simple wording of section 117B(6) of the 2002 Act, endorsed in MA (Pakistan), weighs in the appellant's favour, I find that the public interest does not justify removal. That finding leads me to the conclusion that the respondent's decision is a disproportionate interference with the right to respect for article 8 family life.

30. The respondent's guidance says that it is unreasonable to expect the appellant's children to leave the UK. Family life exists between the appellant, her husband and their children. The respondent's decision interferes with article 8 family life. The respondent's own guidance indicates that the interference is disproportionate.

31. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) it was held that the "little weight" provisions in Part 5A of the 2002 Act do not



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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.

32. Even when I give little weight to the relationship between the appellant, her husband and their children, the relationship still carries sufficient weight because the article 8 family life that is established is not limited to the relationship between the appellant and her husband. The article 8 family life established encompasses the interests of two British children.

33. I find that this appeal succeeds on article 8 ECHR (family life) grounds.

Decision

The decision of the First-tier Tribunal promulgated on 4 December 2018 is tainted by material errors of law and is set aside.

I substitute my own decision

The appeal is allowed on article 8 ECHR grounds.

Signed
Deputy Upper Tribunal Judge Doyle

Date 4 February 2019