



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17553/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3 September 2018

Decision & Reasons Promulgated
25 January 2019

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE JACKSON

Between

M T
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Gunamal, Solicitor

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of the Secretary of State made on 4 July 2016 to refuse his human rights application. His appeal against that decision was heard on 14 August 2017 and, in a decision promulgated on 27 October 2017, was dismissed by First-tier Tribunal Judge Holder. That decision was set aside by the Upper Tribunal for the reasons given at a hearing on 19 July 2018 (a copy of which is annexed), the respondent accepting that the First-tier Tribunal had made an error of

law in that the judge failed to make findings with respect to the best interests of the appellant's British citizen child and his wife's daughter by a previous relationship.

2. This is a decision to which both members of the panel have contributed and takes into account the additional written submissions we requested from both parties after the hearing in consequence of the handing down of KO (Nigeria) v SSHD [2018] UKSC 53
3. The appellant is a citizen of Bangladesh who entered the United Kingdom as a visitor on 3 September 2009 and has overstayed since. An application made for leave to remain on the basis of private life made on 5 April 2010 was refused.
4. Despite that refusal the appellant remained in the United Kingdom, later meeting his now wife, [HN], whom he married in a religious ceremony on 24 May 2015. [HN] has a daughter, [SN], born in 2000. The appellant and his wife also have a son born on 5 February 2016 and they all live together as part of the same family unit.
5. [HN]'s first marriage was not a happy one and this led to her depression. She was divorced in 2012.
6. The respondent's case is that the requirements of Appendix FM of the Immigration Rules are not met for two reasons: on the basis that as at the date of application the appellant and his wife had not lived together long enough to constitute "partners" as defined; and, as the parent route does not apply where, as here, the parents of a child are still in a relationship together. The Secretary of State considered also that the requirements of paragraph 276ADE(1) of the Immigration Rules were not met, the appellant not having shown that there would be very significant obstacles to his integration into the country in which he has spent the greater part of his life.
7. The respondent considered also that the appellant was not playing an active role in the life of his British citizen child and thus that the impact of his departure on the child would be negligible, hence that there were no exceptional circumstances such that a refusal to grant leave outside the Rules would result in unjustifiably harsh consequences for him and his family.
8. As noted above, when the matter came before the First-tier Tribunal the judge found that there was a genuine and subsisting relationship between the appellant and his wife but considered that they did not meet the requirements of the Immigration Rules nor did he find, having had regard to the best interests, that removal would be disproportionate.

The Hearing on 3 September 2018

9. We heard evidence from the appellant, his wife and the elder daughter. We also heard submissions from both representatives. All three adopted their witness statements, the first two giving evidence with the assistance of an interpreter.

The Law

10. Where a Tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life

under Article 8, by virtue of section 117A of the Nationality, Immigration and Asylum Act 2002, it must have regard in all cases to the considerations in section 117B as follows:

“117B Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.
- (6) 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.”

11. In addition to the above statutory provisions we consider it important to consider also Appendix FM GEN 1.2:

“GEN 1.2

For the purposes of this Appendix “partner” means –

...

- (iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of the application, unless a different meaning of partner applies elsewhere in this Appendix.

...”

“EX.1. This paragraph applies if

(a)

- (i) the applicant has a genuine and subsisting parental relationship with a child who-
 - (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
 - (bb) is in the UK;
 - (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
- (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.”

12. Also of note is Section E-LTRPT: Eligibility for limited leave to remain as a parent. E-LTRPT 2.3, and GEN.3.2(2) which states that when the requirements of Appendix FM are not met: “The decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such a refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.”.
13. We bear in mind that in a complex situation involving a family unit where not all the members of the unit are related in the same way, there must be an overall evaluation of the different interests of those involved. All three witnesses were consistent in their testimony that the appellant’s wife’s first marriage had been unhappy and we note in particular the clear and compelling evidence of the daughter, first that her mother had not been happy in the marriage, that there had been constant fighting which affected her significantly when she was growing up, and that she had not had a proper father. We note also that her evidence confirms the evidence of [HN] that she had had to rely on friends and had suffered depression as a result. We consider, on the evidence before us, that there was little or no affection either between the former husband and his now ex-wife or with his daughter. It is also apparent that there is little contact between [SN] and her biological father.
14. We are satisfied on the evidence that the relationship between the appellant and his wife is genuine and subsisting. We accept also, again in light of the evidence of the daughter, that this has changed her mother’s life and that she is now happier which has in turn meant that she is able to act properly as a mother to her.

15. [SN] is, as is noted above, now over the age of 18. She does however continue to live as part of a family unit and we accept her evidence, which we again found to be articulately delivered and compelling, that she has a very good and strong emotional bond with the appellant. We accept that she has little or no contact with her father, whom she described as sending her a text from time to time “if he can be bothered”, and that having the appellant to live as part of a household made her realise first what a genuine marriage can be, the support that a husband can give to a wife and how a man should be with his children. We note also her evidence that led her to realise she had not had a proper paternal relationship, and as a result had undergone counselling. Equally, we accept the evidence that it would be extremely difficult for her to be separated from the appellant because of the emotional bond she has with him and their day-to-day contact. We accept also her evidence that there would be a significant effect on her mother which in light of the previous relationship is entirely understandable. We note also the concerns that the negative effect on the wife may make it difficult for her to care properly for the younger child and the understandable concern both of the daughter and mother that the younger child should not have the absence of a proper father from which [SN] also suffered when she was growing up.
16. We note, however, that there is little beyond this evidence to confirm the strength of the bonds between the family members, but equally there could be no better evidence of this, than the credible evidence of those involved. A report from a social worker would be of little assistance.
17. We do, however, have some doubts about the evidence from the appellant as to how he was able to survive without (which he denies) working illegally. Whilst there is consistent evidence from the appellant and his wife, supported by documentary evidence from his friend that he has been in receipt of £30 a week in expenses at least since 2016, as Mr Jarvis submitted this is not evidence that the money had been forthcoming for the quite significant period that the appellant spent prior to that in the United Kingdom and without obvious means of support.
18. Equally, we do not place reliance on the appellant’s unsupported evidence that he faced political problems in Bangladesh prior to his departure (the details of which are lacking) and there is insufficient evidence to show that this would now, even if true, create a real risk of persecution on return. Further, there was insufficient evidence to show that these would cause him any significant details in being able to reintegrate into Bangladesh.
19. Although [SN] is not a child as at the date of hearing she was clearly under 18 at the date of decision and at the hearing before the First-tier Tribunal. We are satisfied that she has a family life with both her mother and with the appellant. We accept also that in the light of the circumstances as set out in the evidence above that this bond is considerably stronger than one might expect there to be between a father and stepdaughter. That is because, as [SN] said, her biological father has not really been a father to her. Of further significance to this bond is the fact that it was only when she realised what the relationship should be that she realised that she had not had it in the past which resulted in significant difficulty for her and in her seeking

counselling. We accept in the circumstances that being separated from the appellant who is to all intents and purposes her father, would be a significant issue. We accept also that there exists a strong family life between [SN] and her stepfather considerably greater than one might expect. She is of course now an adult but that is only a recent development and she still forms part of what is now an integral nuclear family. We bear in mind also that the family unit, which formerly comprised the appellant's wife, his daughter and the ex-husband, was not a strong one and we accept that this led to suffering on the part of [SN] and [HN]. That situation has now changed considerably for the better.

20. [SN] is now 18 and is attending college. We accept that it is her intention to go on to university. We accept also that she has spent the entirety of her life in the United Kingdom, she has been brought up in the United Kingdom and is fully integrated into the culture of this country. The entirety of her education and social ties have been formed here and whilst we accept that she has previously visited Bangladesh with her mother, any ties with that country are considerably smaller than the numerous ties she has to the United Kingdom, the country of her birth. Were she still a child at the date of hearing, then we would undoubtedly have found that her best interests were to remain in the United Kingdom with her mother and stepfather. To leave the United Kingdom, she would have effectively had to cope with an entirely new form of life with all the attendant disruption that would be to her education and to all the ties she has developed.
21. With regard to the younger child, although he is a British citizen, he is under 3 years of age. It is inevitable that his best interests are currently to be with his parents upon whom he is dependent. We accept the evidence of the appellant and wife and the daughter that there is a very good relationship between the appellant and his son and that the son dotes on his father. His best interests are, we consider, to remain with both parents and those interests can be met either in the United Kingdom or in Bangladesh. However, on balance, it is marginally in the child's best interests to remain in the country of his birth to fully benefit from his British citizenship. Those interests are not, of course, as strong as those that would exist in the case of the older daughter and the contrast between what he experiences in the United Kingdom and what he would have in Bangladesh are inevitably less.
22. In assessing whether the appellant meets the requirements of the Immigration Rules, we found that the appellant cannot meet the definition of partner as he and his wife had not been living together, on their own evidence, for two years at the date of application, as is required by the Immigration Rules. We accept that they have now been living together for two years and that is a matter of which we take note. Nonetheless he cannot meet the requirements of Appendix FM as he is neither a partner nor does he meet the eligibility requirements as a parent, given that, as Mr Jarvis submitted, that route is designed to facilitate the entry or residence in the United Kingdom of the parent of a child where the relationship between the parents of the child have broken down. That is not the case here.
23. We do not accept that the appellant meets the requirements of paragraph 276ADE. The only relevant subparagraph is (vi) and there is simply no basis in the evidence

put before us to show that there are very significant obstacles to reintegration into Bangladesh. The appellant is after all a citizen of that country, has spent most of his life there, is fully cognizant of the language and there does not appear to be any basis on which he could not re-establish himself there. That is despite the fact that he may not have family there. That is not a sufficient basis, nor indeed is the absence of accommodation or job sufficient, either singularly or cumulatively, to amount in the facts of this case to very significant obstacles.

24. In considering whether removal would be proportionate, we consider that the family unit must be treated as a whole. We consider that removal in these circumstances would clearly engage Article 8 there being clear evidence of disruption. We consider that removal in this case would be in accordance with the law given that it is in accordance with the established principles which brings us to the issue of proportionality.
25. The starting point in this case is that there is a significant interest in removal. Great weight must be attached to the public interest in removing those who do not have the right to remain here and who do not meet the requirements of the Immigration Rules. We consider that in this case the public interest is to be accorded greater weight as the appellant has remained here without leave for many years, entered into a marriage with somebody, again when he knew what the consequences would be and, we accept, has at some time worked irregularly in the past. There is insufficient evidence to show that he was working once that had become a criminal offence. Overstaying is, however, a criminal offence albeit that there has been no prosecution in this case. All of these factors militate against the appellant.
26. The appellant does speak some English but he did require an interpreter in court. How advanced his English is we do not know and we have not been given any evidence of his qualifications. In the circumstances, the fact that he does not speak English to any particular degree is a matter which weighs against him as is the fact that in reality the family are not financially independent given the reliance for housing and the greater part of the income of the family being benefits.
27. Little weight could be attached to the relationship between the appellant and his wife given this was entered into long after his status in the United Kingdom became unlawful and where there was in reality no realistic prospect of him being able to regularise his status. Similarly, little weight can be attached to the appellant's private life as it was developed when had no right whatsoever to be here.
28. We do not accept the respondent's analysis of Section 117B(6)(b) as applying only when the child would in fact be required to leave the United Kingdom. That scenario could arise in the case of a British citizen only when there was no relative left in the United Kingdom to look after the child. We consider that a better interpretation of it is that it would not be reasonable to expect the child to leave the United Kingdom in order to maintain the parental relationship that exists. That answers the question posed by Lord Boyd in SA (Bangladesh) v Secretary of State for the Home Department [2017] SLT 1245 quoted by the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 as to why would the child be expected to leave the United Kingdom? In the present case, the child may be

expected to leave the United Kingdom to maintain the current parental relationship with his father who has no right to remain here. Any other reading of section 117B(6) would be to add a further requirement over and above reasonableness (which involves a consideration of a number of factors) to a situation where it would not be in a child's best interests for them to leave the United Kingdom.

29. In this case, were [SN] still a qualifying child, we would have no hesitation in concluding that it would be necessary to undertake an analysis of her position, balancing her very strong private life and ties to the United Kingdom, and the significant weight of her best interests to whether that would be outweighed such that it would be unreasonable to expect her to leave the United Kingdom.
30. The younger child is a qualifying child such that 117B(6) is potentially engaged which brings us onto consideration of the reasonableness of expecting him to leave the United Kingdom. The matters to take into account in that assessment have been confirmed by the Supreme Court in KO in which judgment was handed down after the oral hearing in the present appeal but upon which written submissions were received from both parties. The key findings in KO are as follows:

“16. It is natural to begin with a first in time, that is paragraph 276ADE(1)(iv). This paragraph is directed solely to the position of the child. Unlike its predecessor DB 5/96 it contains no requirement to consider the criminality or misconduct of a parent of the balancing factor. It is impossible my view to read it is importing such a requirement by implication.

17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I refer that it was intended have the same effect. The question again is what is “reasonable” for the child. As Eliza LJ said in *MA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 705, [2016] one WLR 5093, Paris 36, there is nothing in this subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to be wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv).

18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider whether parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to there ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245:

“22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, ‘Why would the child be expected to leave the United Kingdom?’ In a case such as this second only be one answer: ‘because the parents have

no right to remain in the UK'. To approach the question any other way strips away the context in which the assessment of reasonableness is being made ..."

19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 854, para 58:

"58. In my judgement, therefore, the assessment of the best interests of the children must be made on the basis of the facts as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow parent with no right to remain to the country of origin?"

To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves."

31. The ultimate question in this case is whether it is reasonable to expect the younger child to follow the appellant, the parent with no right to remain, to the country of origin? As above, his best interests are primarily to remain with both parents, and given his young age, that he has not yet started education, that he is in good health and it is only on balance that his best interests are to remain in the United Kingdom; we find that in all the circumstances it is reasonable to expect the younger child to leave the United Kingdom and as such the appellant does not benefit from section 117B(6).
32. Were we to be considering this at the date of decision, then in light of the very significant effect there would be on the interests of the older daughter being affected and the strength of her best interests in remaining in the United Kingdom, we would have been persuaded that notwithstanding the poor immigration history the effective severing of family life between her and the rest of the family or requiring her to go to live in Bangladesh in order to maintain family unity would be unreasonable taking into account all the relevant factors. The circumstances would, on the particular facts of this case, and given the only recent ability of the elder daughter to have a proper parental relationship with her step-father, that the consequences would be unjustifiably harsh as set out in GEN 3.2(2).
33. But we are not of course in that exact situation. It is of course established law that the nature and strength of relationships between children and parents varies as they develop their own private lives and that there are no bright lines to be drawn between somebody becoming a child to a child becoming an adult. The emphasis on "best interests" of a child is to give them autonomy as a person so far as is possible at their stage in life. As they grow older they have agency of their own and are less dependent on family. Here, on the particular factual matrix of this case, we consider that there continues to be a strong family life between [SN], her mother and

stepfather, and whilst that has diminished and there is no longer the statutory provision of 117B(6), we bear in mind also that Section 117B is not a complete list of those factors which must be taken into account. Just as it is difficult as the law establishes to suddenly consider that the minute that somebody turns 18 they cease to have a family life with their parents, it is equally difficult to see how the balancing exercise as set out above could dramatically shift in favour of removal because of what is simply chronological change in the daughter's age.

34. Bearing in mind the strength of the position of the daughter the damage that separation from her parents is likely to engender, given even at this age the strong bonds of love and affection she has arising in part from their absence as she was growing up, as such that notwithstanding a diminution in the strength of the case, we are still satisfied that on the particular facts of this case that the public interest in removal is nonetheless outweighed because of the effect on the family as a whole of removing the appellant. There is little prospect of him being able to return to the United Kingdom in the future with the result and disruption if not severing of the family relationship between the stepdaughter and him and either the severing of the relationships she has with her mother and brother or the severing of her mother's relationship with the father. Looking at these effects on the family as a whole, we are satisfied that removal would be disproportionate and accordingly we allow the appeal on that basis.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.
2. We remake the decision by allowing the appeal on human rights grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 24 January 2019



Upper Tribunal Judge Rintoul



Upper Tribunal Judge Jackson



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/17553/20016

THE IMMIGRATION ACTS

Heard at Field House
On 19 July 2018

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(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Gunamal, Orchid Solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DIRECTIONS

1. At the hearing it was accepted by the respondent that the decision of the First-tier Tribunal involved the making of an error of law as is averred in the grounds of appeal. I am satisfied that it was correct for the respondent to make such a concession, and I find, accordingly that the decision of the First-tier Tribunal involved the making of an error of law; and, for that reason, it is set aside to be

remade in the Upper Tribunal.

2. In the circumstances, it is unnecessary at this stage to provide full reasons for these findings, but it is necessary to give further directions as to how the matter will now proceed.

DIRECTIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. The appeal is listed to be heard on 3 September 2018 at Field House as was agreed by the appellant's solicitor.
3. The remaking will involve considering whether paragraph EX. 1 (a) of Appendix FM is applicable, it being clear that the appellant's child is a British Citizen from birth by operation of section 1 (1) (a) of the British Nationality Act 1981.
4. The Upper Tribunal will proceed to make findings as to the nature of the relationship between the appellant and his partner's older daughter, and it will also make findings as to the best interests of children, albeit that it is noted that the older daughter is now over 18.
5. Any party wishing to adduce evidence not before the First-tier Tribunal must serve it accompanied by a statement pursuant to rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 on or before 20 August 2018
6. It is for the appellant to decide whom to call as witnesses, but in any event a witness statement must be prepared and served in respect of any witness who is to give evidence before the Upper Tribunal. Any witness statement must be served on or before 20 August 2018

Signed

Date: 19 July 2018



Upper Tribunal Judge Rintoul