Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32987/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 10th June 2015	**On 26th June 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

AQIB MUNIR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Bramble, Counsel, instructed by S & S Immigration
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Jones made following a hearing at Hatton Cross on 14th January 2015.

Background

2. The appellant is a citizen of Pakistan born on 20th January 1988. His immigration history is a little uncertain. He initially entered the UK in July 2004 as a visitor with a five year visitor visa valid to 16th April 2009. He was subsequently issued with a further visit visa valid from September 2010 to September 2020 which permitted multiple entries to the UK for a maximum of six months at a time. He says that he last entered the UK in January 2011.

3. On 25th June 2013 he was served with notice as an overstayer and when interviewed said that had a British wife who was seven months pregnant with his child. He and his partner had entered into an Islamic marriage on 10th November 2010. The child was sadly still born on 2nd October 2013.

4. Following the refusal of his first application based on his marriage to a British citizen, on 16th April 2014 he submitted a further application for leave to remain on the basis of his private and family life in the UK, and it was this decision which was the subject of the appeal before the Immigration Judge.

5. The judge noted that the appellant's wife was visibly pregnant. He dismissed the appeal on the surprising basis that the appellant had no family life in the UK. Although he accepted that he had a private life, he assessed that to be modest to moderate, just sufficient to engage Article 8. He said that he could not conceive that it would be disproportionate to require the appellant to depart the UK, a conclusion he would have reached regardless of Sections 117B and 117C of the 2002 Act but he was fortified in the view that he originally took by reference to the statutory factors that he was bound to take into account.

6. The appellant appealed and, on 10th March 2015, permission was granted by Judge Hollingworth.

7. Although the respondent served a reply dated 23rd March 2015 defending the determination Mrs Pettersen at the hearing accepted that it could not stand.

8. There are a number of errors of law.

9. First, it was not open to the judge on the basis of the undisputed facts to find that the appellant had no family life in the UK. He had entered into an Islamic marriage almost three years before the date of the hearing. The couple had had a baby who died at birth and were now expecting their second child. Although Islamic marriages are not recognised as valid under UK law that does not mean that there is no family life between this couple.

10. It is right to say that the appellant, as at the date of decision, did not satisfy the conditions set out in GEN1.2 of Appendix FM because as at the date of application they had not been living together for two years. By the

date of the hearing, however, they had been doing so, which is a relevant consideration in deciding whether family life exists in this case.

11. Second, I assume that if this couple had a living child the judge would not have disputed that there was family life. It is difficult to see why the fact that their baby died changes that assessment.

12. Third, there was evidence before the judge, not referred to at all in this determination, that the appellants wife was being closely monitored through her pregnancy because of the death of their first child which was a reason put forward for her not being able to go to Pakistan, relevant to the consideration of whether there were insurmountable obstacles to the couple relocating there.

13. Fourth, the judge said in terms that he made up his mind on the case and only afterwards considered the statutory factors which he was bound to take into account and which fortuitously supported his initial conclusion. That is the wrong way round.

14. The decision is set aside.

Findings and Conclusions

15. Both sides agreed that this matter could be dealt with by way of submissions.

16. Since the date of the hearing the couple have a British child born on 13th April 2015.

17. Mrs Pettersen submitted that the reason originally put forward for the sponsor's inability to go to Pakistan no longer applied since, thankfully, the child has been safely born. It was proportionate for the appellant to make an application for entry clearance or for his family to accompany him to Pakistan. Although his wife was British she had visited Pakistan in 2005 and the relationship between the couple had developed whilst the appellant was in the UK unlawfully. The child was of an extremely young age and it would be reasonable to expect her to accompany her parents to Pakistan.

18. Mr Bramble relied on his skeleton argument and submitted that the best interests of the child were a primary consideration in this case. As a British citizen she was entitled to the benefits of her citizenship and to retain contact with the wider family members on her maternal side. He also submitted that it would not be reasonable to expect the appellant's wife, who was British since birth and who did not speak Urdu, to lose her rights and entitlements and relocate to Pakistan. He accepted that the appellant had been in the UK unlawfully but, so far as the statutory factors which I was bound to take into account were concerned, he spoke English and had not claimed benefits.

Conclusions

19. There is no reason to go behind Judge Jones's assessment that the appellant has been unclear about the amount of time he has spent in the UK and that much of the time was lawful. So much is clear from his witness statement when he simply says that he has been in the UK for several years. That is consistent with the claim that he last entered the UK in January 2011, although he spent time here before between 2004 and 2009, but in any event it is acknowledged that he overstayed his six month visa which would have expired in July 2011.

20. Under Section 117B Article 8 public interest considerations applicable in all cases, under Part 5A of the Immigration Act 2014 it states:

(i) The maintenance of effective immigration controls is in the public interest.

(ii) It is in the public interest and in particular in the interests of the economic wellbeing of the UK that persons who seek to enter or remain in the UK are able to speak English, because people who can speak English –

(a) Are less of a burden on tax payers and,

(b) are better able to integrate into society.

(iii) It is in the public interest and in particular in the interests of the economic wellbeing of the UK that person who seek to enter or remain in the UK are financially independent, because such persons –

(a) are not a burden on tax payers, and

(b) are better able to integrate into society.

(iv) 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 UK unlawfully.

(v) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(vi) 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 qualified child, and

(b) It would not be reasonable to expect the child to leave the UK."

21. 117B considerations were recently considered by the Upper Tribunal in AM (Section 117B) Malawi [2015] UKUT 0260 where the Upper Tribunal held that an Appellant can obtain no positive right to a grant of leave to remain from either Sections 117B(2) or (3), whatever the degree of his fluency in English to the strength of his financial resources. So far as Section 117B(6) is concerned, the question 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 (EV (Philippines)).

22. In this case, therefore, although it is said that the appellant can speak English and has not been a burden on the state, he derives no credit for that in relation to Section 117B.

23. It is equally clear that the appellant has spent a substantial amount of time in the UK unlawfully and accordingly little weight should be given to a relationship formed with a qualifying partner. The crux of this case therefore is the position of the appellant's British child.

24. In EV (Philippines) and Others v SSHD [2014] EWCA Civ 875 the Court of Appeal considered Section 55 of the Borders, Citizenship and Immigration Act 2009 and adopted the formulation of Lady Hale in ZH (Tanzania) v SSHD [2010] UKSC 4.

25. At paragraph 30 she said:

"30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8). In Wan, the Federal Court of Australia, pointed out at para 30 that, when considering the possibility of the children accompanying their father to China, the tribunal had not considered any of the following matters, which the Court clearly regarded as important:

(a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle'

(b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;

(c) the loss of educational opportunities available to the children in Australia; and

(d) their resultant isolation from the normal contacts of children with their mother and their mother's family."

26. In EV(Philippines), at paragraph 35 Christopher Clarke LJ said:

> "A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age, (b) the length of time they have been here, (c) how long they have been in education, (d) what stage their education has reached (e) to what extent they have become distanced from the country to which it is proposed that they return (f) how renewable their connection with it may be, (g) to what extent they will have linguistic medical or other difficulties in adapting to that country, and (h) the extent to which the course proposed will interfere with their family life or other rights (if they have any) as British citizens."

27. Lewison LJ said at paragraph 51:

> "To attempt to answer this question is it necessary to revisit the well-known case of ZH (Tanzania) v SSHD [2011] UKSC 4. It is necessary to put that decision into its factual context. The Appellant was the mother who is a national of Tanzania. She had two children who were aged 12 and 9 respectively. They were British citizens. Importantly so was their father. Accordingly there was no question of removing the father. Nor did the Secretary of State have any power to remove the children. The only power the Secretary of State had was that of removing the mother alone. If therefore the children were to stay in the UK they would be separated from their mother. On the other hand if they followed her to Tanzania they would be separated from their father, and deprived of the opportunity to grow up in the country of which they were citizens. That was the context in which the issues were discussed."

28. And at paragraph 58:

> "In my judgement therefore the assessment of the best interests of the children must be made on the basis that the facts are 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 the parent with no right to remain to the country of origin?"

29. In EV (Philippines) none of the family was a British citizen and none had the right to remain in the UK and the court concluded that it was entirely reasonable to expect the children to go with their parents.

30. In this case the child is extremely young, and although she will be beginning to develop relationships with her maternal family in the UK,

those relationships are inevitably nascent. She has developed no private life of her own at all. Her father has a poor immigration history in that he has clearly overstayed his visa and shown scant regard for the requirements of immigration control.

31. On the other hand as in ZH (Tanzania), if she followed her father to Pakistan she would be deprived of the right to grow up in the country of which she is a citizen. The Secretary of State has no power to remove her mother, as a British citizen, and she would therefore be potentially separated from her. Her mother not only has citizenship rights of her own in the UK, but this is the only country she has ever known, her family are here, and importantly, she has lost a child here and would lose the solace which she presently gains from visiting the child's grave.

32. In these circumstances the appellant meets the requirement of paragraph EX1(a) in that he has a genuine and subsisting relationship with a qualifying child and it would not be reasonable to expect her to leave the UK.

Notice of Decision

33. The original judge's decision is set aside. It is remade as follows. The appellant's appeal is allowed.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Taylor