



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17823/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2 July 2018

Decision and Reasons Promulgated
On 4 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

NAZIK [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms D Revill (counsel) instructed by Sunrise solicitors

For the Respondent: Ms Willocks-Briscoe, 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 Fox promulgated on 12 January 2018, which dismissed the Appellant's appeal

against the respondent's decision to refuse to grant further leave to remain in the UK.

Background

3. The Appellant was born on 2 January 1984 and is a national of Sudan. On 8 July 2016 the respondent refused the appellant's application for further leave to remain in the UK.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Fox ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 15 May 2018 Judge Landes granted permission to appeal stating (*inter alia*)

It is arguable as set out at ground (i) that the Judge did not adequately consider the best interests of the children at [48] given that either the children who are at school in the UK would have to leave the UK even if only temporarily or the children would be separated from the mother was she returned to make an application for entry clearance. It is also arguable as set out at ground (ii) that if the Judge did consider section 17B(6) (which he did not refer to explicitly see [45]) he must have assumed that it did not come into play because the children would not in fact be leaving the UK or would only be leaving the UK temporarily (see [51]). Whilst the respondent's current policy takes this line, the policy at the time of the decision arguably did not and it is arguable (see the second part of ground (ii)) that the Judge should have taken account of the relevant policy is expressed in SF and others (although I note that he does not appear to have been referred to that case in the skeleton argument of counsel in representing the appellant).

The Hearing

5. Both Ms Revill and Ms Willocks-Briscoe joined in telling me that the decision contains a material error of law. The material error is that the Judge has not given adequate consideration to the best interests of the appellant's two children, who are British citizens. Ms Willocks-Briscoe concedes that there is a material error of law. I am asked (on joint motion) to find that there is a material error of law and to set the decision aside, and thereafter substitute my own decision.

6.(a) Ms Revill told me that this is a case which should succeed on article 8 ECHR grounds outside the immigration rules because of the terms of section 117B(6) of the 2002 Act. Ms Revill told me that the appellant does not meet the immigration rules because he entered the UK as a visitor, and so cannot meet the requirements of appendix FM. She relied on MA(Pakistan) and the respondent's IDIS.

(b) Ms Revill told me that the appellant has two British citizen children, aged eight and nine years. The two children have been in the UK for the last two years and have

been attending primary school in the UK. The appellant is Sudanese national, but the children have never lived in Sudan. They have only ever lived in Saudi Arabia and the UK. She told me that the appellant is financially independent and has passed an ESOL qualification.

(c) Ms Revill urged me to set the decision aside and to substitute my own decision allowing the appeal on article 8 ECHR grounds, because, she said, it is not reasonable for the British citizen children to leave the UK.

7. Ms Willocks-Briscoe asked me to dismiss the appellant's appeal against the respondent's decision dated 8 July 2016. She told me that the respondent's policy must be taken into account, but reminded me that the policy proceeds on the basis that there is no requirement for either of the appellants British citizen children to leave the UK. She told me that section 117B(6) is not the only factor taken into account in a proportionality assessment. She said that I must consider the wider public interest in immigration control. She urged me to substitute my own decision dismissing the appeal.

Analysis

8. The Judge's findings run from [28] to [56] of the decision. At [44] the Judge finds that article 8 family life exists. Between [45] and [51] the Judge refers to the appellant's children, but he does not consider either their nationality or the respondent's IDI's. The Judge gives inadequate consideration to the statutory test set out in section 117B(6) of the 2002 Act. The Judge does not consider the test of reasonableness.

9. The decision is tainted by material errors of law. Because the Judge has not made express findings about the best interests of the appellants children; because the Judge has not applied the test of reasonableness; because the Judge does not consider the nationality of the appellants children and because the Judge does not consider the respondent's policy, the proportionality exercise is inadequate.

10. I therefore set the decision aside, but I am able to substitute my own decision.

The Facts

11. The appellant is a Sudanese national, born on 2 January 1984. She is married to the sponsor, who is a British national. The appellant and the sponsor have two children, who are now aged 8 years and nine years. Both of the children are British nationals.

12. The appellant entered the UK on 19 December 2015. The appellant had been granted leave to enter the UK as a visitor from 10 November 2014 to 10 November 2019. On 12 April 2016 the appellant applied for leave to remain in the UK on article

8 ECHR grounds. The appellant cannot meet the eligibility requirement of R-LTRP 1.1(d)(i).

13. The appellant's husband and children have been in the UK for the last two years. Both of the appellant's children have been attending primary school in London for the last two years. The appellant's husband works as a political researcher for the UAE embassy in London. His income exceeds the financial eligibility threshold in appendix FM.

14. The appellant is qualified as a dentist in Saudi Arabia. She speaks English and has passed an ESOL qualification, the appellant and her husband are financially independent. The appellant's oldest child was born in Sudan but moved to United Arab Emirates when she was only one-month-old. Her youngest child was born in the United Arab Emirates. Because the children left the UAE 2 years ago, there is no guarantee that they will be able to re-enter the country.

15. The appellant, her husband and their children live together in rented accommodation in London. The appellants children are well settled in primary school where they are doing well.

The Immigration Rules

16. (a) E-LTRP.2.1. says

The applicant must not be in the UK-

(a) as a visitor; or

(b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings

(b) On the facts as I find them to be, the appellant submitted her application while she had extant leave as a visitor. Paragraph E-LTRP 2.1 therefore operates against her. The appellant cannot take arguments about paragraph EX.1 because the immigration rules are progressive. Because the appellant cannot get over the hurdle presented by Paragraph E-LTRP 2.1, consideration of appendix FM comes to an end. E-LTRP.2.1 is an eligibility requirement. Paragraph EX.1 of the rules provides exceptions to certain eligibility requirements, but not an exception to E-LRTP 2.1.

(c) Because the appellant did not want to overstay the limits of his visa, she cannot succeed under appendix FM.

Article 8 ECHR

17. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50

endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed..." In Agyarko [2017] UKSC 11, Lord Reed (when explaining how a court or tribunal should consider whether a refusal of leave to remain was compatible with Article 8) made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered.

18. I have to determine the following separate questions:

- (i) Does family life, private life, home or correspondence exist within the meaning of Article 8
- (ii) If so, has the right to respect for this been interfered with
- (iii) If so, was the interference in accordance with the law
- (iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and
- (v) If so, is the interference proportionate to the pursuit of the legitimate aim?

19. Section 117B of the 2002 Act tells me that immigration control is in the public interest. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

20. (a) The only part of appendix FM to the appellant cannot meet is E-LTRP.2.1, and that is because the appellant chose not to be an over stayer and submitted an application for leave to remain before her visit visa expired. E-LTRP.2.1 is an eligibility requirement.

(b) On the facts as I find them to be the appellant has a genuine and subsisting marriage to a British citizen. 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.

(c) 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. 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

(d) The guidance given by the respondent in the IDIs on Family Migration (February 2018) is that the questions a decision maker should 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?

(e) 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 in those circumstances EX.1 (a) would not apply but 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.

(f) 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?

(g) 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 primary school age children distress. It cannot be reasonable to separate the children from one of their parents.

(h) 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 relies solely on the public interest in effective immigration control.

21. The respondent's position is that the appellant can return to Sudan and make an application for leave to enter from there. In Chikwamba (FC) v SSHD 2008 UKHL 40, the House of Lords said that in deciding whether a general policy of requiring people such as the Appellant to return to apply for entry in accordance with the rules of this country was legitimate and proportionate in a particular case, it was necessary to consider what the benefits of the policy were. Whilst acknowledging the deterrent effect of the policy the House of Lords queried the underlying basis of the policy in other respects and made it clear that the policy should not be applied in a rigid, Kafka-esque manner. The House of Lords went on to say that it would be "*comparatively rarely, certainly in family cases involving children*" that an Article 8 case should be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave from abroad.

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. In this case the respondent's principal argument is that the appellant could make a successful application to return to the UK to join his 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.

25. The appellant's children are qualifying children. S.117B(6) of the 2002 Act says

(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.

26. 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 paternal relationship with qualifying children. It is Section 117B(6)(b) which is determinative of this case.

27. I have already found, when considering paragraph EX.1 of the rules, that it is not reasonable to expect the appellant's children to leave the UK. Applying exactly the same logic I find that the appellant succeeds under section 117B(6) of the 2002 Act. I adhere to the interpretation given to s.117B(6) in MA (Pakistan).

28. 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*".

29. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) in which it was held that the best interests assessment should normally be carried out at the beginning of the balancing exercise.

30. 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.*"

31. 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.

32. 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.

33. 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 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.

34. 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 primary school age children.

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

Decision

The decision of the First-tier Tribunal promulgated on 12 January 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 *Paul Doyle*
Deputy Upper Tribunal Judge Doyle

Date 3 July 2018