



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05488/2017

THE IMMIGRATION ACTS

Heard at Field House
On 3 July 2018

Decision Promulgated
On 10 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

JOSEPH MUVAWALA KATEREGGA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Adetoye of DPD Legal Services
For the Respondent: Mr D Mills, 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 Onoufriou promulgated on 19 December 2017, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 17 February 1971 and is a national of Uganda. On 29 June 2016 the Secretary of State refused the Appellant's protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Onoufriou ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 13 April 2018 Upper Tribunal Judge Blum gave permission to appeal stating *inter alia*

2. The Judge appears to accept that the appellant has a genuine and subsisting parental relationship with his 13-year-old daughter [42]. At [43] the Judge states

Section 117 B(6) does not apply as there is clearly no issue that his child has to leave the United Kingdom.

3. It is arguable that the Judge has seriously misconstrued the test in section 117B(6) and has erred in law by misapplying it even if there is no likelihood that the child would leave the UK. This arguable legal error is "Robinson obvious"

The Hearing

5. On 4 May 2018 the respondent sent a rule 24 response conceding that the decision contains an error of law and asking for reconsideration of the article 8 ECHR grounds of appeal. Both Mr Ateyonde and Mr Mills asked me to set the decision aside, preserving the Judge's findings of fact and substituting my own decision on the article 8 ECHR appeal only. The appellant effectively abandoned his appeals in relation to asylum and humanitarian protection.

6. (a) Mr Mills took me straight to the respondent's own IDIs, issued on February 2018. He told me that it is accepted that the appellant has a genuine parental relationship with his British citizen daughter. He reminded me the appellant has not lived with his daughter, but exercises contact to her. He explained that the respondent's IDIs of February 2018 are designed to "clarify" the reasonableness test found in s.117B(6) of the 2002 Act.

(b) Mr Mills told me that it is never reasonable for a British citizen child to leave the UK, but in this case the British citizen child will not be required to UK. He told me that the correct approach is found by asking an intermediate question which (he says) is implied in section 117B(6) of the 2002 Act. Before applying the reasonableness test, it is necessary to ask whether the child would be *expected* to leave the UK. If the answers that is no, the enquiry is at the end and there is no need to move on to determine whether it is reasonable for the child to leave.

(c) Mr Mills very fairly conceded that if section 117B cannot be interpreted in the way the respondent wants it to be interpreted, then this appeal succeeds.

7 (a) Mr Adetoye urged me to allow the appeal on article 8 ECHR grounds outside the rules. He told me that the appellant meets the requirements of appendix FM, and that that is an indicator that the balance of proportionality weighs in the appellant's favour. He asked me to take a more restrictive interpretation of section 117B of the 2002 Act, and reminded me that the appellant's child is a qualifying child.

(b) Mr Adetoye provided a 15-page written argument, which he adopted.

Analysis

8. In the rule 24 response, dated 4 May 2018, the respondent responsibly conceded that the decision contains a material error of law. On Joint motion I set the decision aside, preserving the Judge's findings of fact, and substitute my own decision on article 8 ECHR grounds of appeal only.

9. The error of law is at [43] of the decision, where the Judge misconstrued the test set out in section 117B(6) of the 2002 Act. That is a material error of law. I set the decision aside.

10. Although I set the decision aside, I preserve the Judge's findings of fact.

The Material Facts

11. The determinative facts in this case are that the appellant has a 13-year-old daughter in the UK. His daughter is a British citizen. He is separated from his daughter's mother and his daughter lives with her mother, but the appellant has generous contact to his daughter. There is a genuine and subsisting parental relationship between the appellant and his daughter. The appellant intends to contribute to his daughter's upbringing and to continue to pursue his parental relationship with his daughter. The appellant's daughter would be distressed if the appellant leaves the UK.

The Immigration Rules

12. Between paragraphs 56 and 60 the reasons for refusal letter the respondent considers the appellant's claim under appendix FM of the immigration rules. The only reason for refusing the appellant's application is set out at paragraph 59 of the reasons for refusal letter. There, the respondent says that the appellant fails to meet E-LTRPT 2.4 of the rules because the respondent does not accept that the appellant intends to continue to take an active role in his daughter's upbringing.

13. In this hearing the respondent departs from that position. I preserve the Judge's findings of fact because both parties agents asked me to do so. The first sentence of [42] of the Judge's decision says

I accept that the appellant has a 13-year-old daughter with whom he has a continuing relationship.

The Judge goes on to find that the appellant intends to continue to take an active role in his daughter's upbringing.

14. Those findings of fact tell me that the appellant meets the requirements of E-LTRPT 2.4, so that the only reason for refusing the appellant's application under the rules is completely undermined.

15. EX.1 says

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;

16. The test of reasonableness in EX.1 is the same test to be considered in the article 8 assessment outside the rules, applying section 117B (6) of the 2002 act.

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) On the facts as the Judge found them to be, the appellant meets the requirements of appendix FM. The appellant has a genuine and subsisting parental relationship with his British citizen daughter. The unchallenged evidence is that the appellant's daughter is a British citizen present in the UK, with whom the appellant enjoys contact. The appellant contributes to his daughter's upbringing. Article 8 family life exists for the appellant.

(b) 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

(c) 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?

(d) 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.

(e) 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?

(f) The appellant's unchallenged evidence is that his child is a British citizen. The weight of reliable evidence indicates that the child would be distressed if her father is sent from the UK. Caselaw tells me that it is in the child's best interests to have contact with both of her parents. Mr Mills fairly conceded that if I follow the interpretation of s.117B(6) set out in MA(Pakistan), then this appeal succeeds.

(g) It cannot be reasonable to cause a school age child distress. It cannot be reasonable to separate the child from one of its parents. I therefore find that the appellant meets the requirements of paragraph EX.1 because it is not reasonable to expect his British citizen daughter to leave the UK.

21. The appellant's daughter is a qualifying child. 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.

22. I have already found, when considering paragraph EX.1 of the rules, that it is not reasonable to expect the appellant's daughter to leave the UK. Applying exactly the same logic, and relying on the clarity of wording of s.117B(6) discussed in MA(Pakistan), I find that the appellant succeeds under section 117B(6) of the 2002 Act.

23. 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.

24. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) the Tribunal held that the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

25. 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.*"

26. Because the appellant meets the requirements of paragraph EX.1 of the immigration rules and because section 117B(6) of the 2002 Act 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.

Decision on the Human Rights Appeal

27. In the light of the above conclusions, I find that the Decision appealed against would cause the United Kingdom to be in breach of the law or its obligations under the 1950 Convention.

Decision

28. The decision of the First-tier Tribunal promulgated on 19 December 2017 is tainted by material errors of law and is set aside.

29. I substitute my own decision

30. The appeal is allowed on article 8 ECHR grounds.

Signed

Date 9 July 2018



Deputy Upper Tribunal Judge Doyle