Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04420/2018

THE IMMIGRATION ACTS

Heard at Manchester
On 14th November 2018

Decision & Reasons Promulgated
On 3 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR Q M C
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the appellant: Mr. A McVeety, Home Office Presenting Officer
For the respondent: Mr S Ell, Counsel, instructed by V and T Solicitors

DECISION AND REASONS

Introduction

1. The Secretary of State is appealing the decision of First-tier Tribunal Judge JJ Maxwell who allowed the appeal at 1st instance. For convenience I will continue to refer hereinafter to the parties as they were in the First-tier Tribunal.

2. The appellant is a national of the People's Republic of China, born in May 1983. He unsuccessfully claimed protection. He claimed to have left his home country in 2004, arriving in the United Kingdom in 2007.

3. The following year he met another Chinese national who was seeking protection. She subsequently gave birth to a child who is not the appellants. She then moved to Manchester and the appellant maintained contact, joining her in 2009. It was at that point a relationship developed between them and in December 2009 she gave birth to their daughter and in February 2017 their son. The appellant said he treated all 3 children as his own. Their son was born with a cardiac condition requiring major surgery which was carried out days after birth. His condition is stable but he will require ongoing monitoring.

The First tier Tribunal

4. The judge did not find the claim for protection established. The judge then considered article 8 and allowed the appeal on this basis.

5. The appellant's partner had been granted indefinite leave to remain. The children are British nationals and reliance was placed upon section 117B(6) the Nationality, Immigration and Asylum Act 2002. It was argued it would not be reasonable to expect the children to leave.

6. The judge had regard to MA (Pakistan) and others [2016] EWCA Civ 705 where this provision was considered. The judge also referred to the case of MT and ET (child's best interests; extempore pilot) Nigeria [2018] UKUT 00088. There, a poor parental immigration history, including an unfounded asylum claim, was not considered a sufficiently powerful reason to justify refusal of leave because of the children.

7. First-tier Tribunal Judge Maxwell referred to the respondent's policy published in February 2018 which provides that it is not reasonable to expect British children to leave with the parent facing removal. Where the child does not have a remaining parent with whom they can live, EX 1 (a) was likely to apply. The policy goes on to state that it may be appropriate to refuse leave to a parent where their conduct gives rise to public interest considerations of such weight as to justify their removal and where the British child could remain with another parent or alternative carer. The considerations included an applicant who had committed significant or persistent criminal offences.

8. First-tier Tribunal Judge Maxwell at paragraph 46 referred to the health issues facing the youngest child and concluded it was not

reasonable to expect that child to leave the United Kingdom. The judge also considered it unreasonable to split the siblings.

9. An issue at hearing was whether there was a parental relationship between the appellant and the children. The judge noted that the appellant and his partner had lived apart for most of the claimed period of their relationship. The explanation given was that they could not live together because this would affect his partner's benefit. This consideration changed after 2016 when she was granted indefinite leave to remain and the appellant had lodged his claim for protection. Various references about the relationship were submitted.

10. The judge concluded that the relationship had existed over the years, albeit at some distance and that it was akin to marriage. The judge referred to the appellant having attended the birth of his youngest child and was satisfied he had a relationship with all of the children.

The Upper Tribunal

11. The respondent was granted permission to appeal to the Upper Tribunal on the basis it was arguable the article 8 assessment was flawed. It was submitted in the application that family life had not been established. It was contended the judge erred in finding a genuine parental relationship in the absence of birth certificates. It was suggested the children could remain here with their mother and she could support an application for entry clearance by the appellant or alternatively, the appellant can support them from China.

12. The grounds contend the judge did not had regard to the public interest factors set out in section 117B. It was argued that the judge had not taken into account the fact the appellant and his partner had lived separately for most of the period of their relationship. It was pointed out that the appellant's claim to have been supported by his partner and friends was rejected by the judge who found he came here as an economic migrant. It was contended that the judge focused only upon section 117B(6) and failed to address all the other factors in section 117B, including financial matters and the appellant's ability to speak English.

13. At hearing Mr. A McVeety acknowledge that on reflection the challenge was not the strongest, having regard to the specifics of the decision and the position of the children. Mr S Ell, Counsel, relied upon the rule 24 response.

14. I do not find the challenge well founded. The 1st ground is that the judge failed to have regard to the public interest factors outlined

in section 117B. In this regard reliance was placed upon Dube (ss117A-117D) [2015] 00090 which refers to the statutory obligation on judges to have regard to the provisions in the legislation. I fail to see how it can be suggested the judge did not have regard to the factors when reference is made at paragraph 41 and 46 of the decision. The judge, in the circumstance, correctly focused upon section 117B(6). I find no material error demonstrated in the judge's reasoning as to the application of this provision.

15. The respondent refers to the fact the appellant and his partner had been living separately and contends that the judge ignored this. This clearly is not the case because the judge goes into detail about the relationship at paragraph 48. The judge made the finding it was only in the post protection claim period that they lived together. They had given an explanation for this which the judge accepted. The judge expands upon the relationship between the appellant and his partner and the children and at paragraph 49 onwards evaluated the evidence. The judge did indicate awareness of the other statutory considerations. At paragraph 51 for instance, the judge records that the appellant has virtually no English.

16. I have the benefit now of the decision of the Supreme Court in KO (Nigeria) [2018] UKSC 53 which had not been promulgated at the time of the First-tier Tribunal. The judgement gives further guidance on section 117B(6) and the judge's decision is consistent with this. At paragraph 15 the Supreme Court said that the provisions are intended to be consistent with the general principles relating to the best interests of children, including the principle of the child must not be blamed for matters which they are not responsible, such of the conduct of their parent. The subsection is freestanding. At paragraph 18 the court made the point that the parents behaviour may become indirectly material if it leads to their ceasing to have a right to remain here.

17. In summary, the judge dealt with the relationship between the appellant and the children and his partner. The judge found it was not in the best interests of the children to leave. This was because of the youngest child's health and it was not reasonable to break up the children. The judge fond the existence of a genuine relationship within the family unit. In light of these clear findings the judge was correct to find the appellant was entitled to rely upon section 117B(6). I find no material error of law established in the decision. Rather the challenge really amounts to a disagreement with the findings. Those findings were open to the judge and have been adequately explained.

Decision

No material error of law has been established in the decision of First-tier Tribunal Judge JJ Maxwell. Consequently, that decision allowing the appeal on article 8 grounds shall stand. There has been no challenge to the dismissal of the asylum claim.

Francis J Farrelly *Date: 30 April 2019*
Deputy Upper Tribunal Judge