Neutral Citation No: [2018] EWCA Civ 3069

Case No: C5/2016/4302

IN THE COURT OF APPEAL (CIVIL) DIVISION
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION ANS ASYLUM CHAMBER)

The Royal Courts of Justice
Strand, London WC2A 2LL

Tuesday, 11 December 2018

Before

LORD JUSTICE McCOMBE
LORD JUSTICE HAMBLEN
LORD JUSTICE HENDERSON

Between:

SC (BANGLADESH)

Applicant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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The Applicant appeared in Person
Mr R Dunlop (instructed by Government Legal Department) appeared on behalf of the **Respondent**

Judgment
(Approved)

LORD JUSTICE HAMBLEN: There will be a transcript of this judgment which will be provided to the appellant in due course.

Introduction

1. This is an appeal brought by SC ("the appellant") in respect of a decision of the Upper Tribunal ("UT") of 6 September 2016, whereby the appellant's appeal against the decision of the First-tier Tribunal ("FTT") of 27 April 2016 was dismissed.

2. The appeal concerns the FTT's dismissal of the appellant's appeal on Article 8 grounds. It is submitted that the FTT's approach to Article 8 and the considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") was legally flawed and the UT accordingly erred in law in upholding the FTT's decision.

3. The appellant appeared in person at the appeal hearing assisted by an interpreter. At the outset of the hearing he renewed an application for adjournment of the hearing, an application which was refused on the papers by McCombe LJ a couple of weeks ago.

4. The relevant chronology is as follows. The appellant's notice was issued as long ago as 17 November 2016. At that time the appellant was represented by Malik Law Chambers Solicitors ("MLC") who also provided a skeleton argument in support of the appeal. MLC were closed down earlier this year. The appeal had been due to be heard in May 2018. In view of the fact MLC had been closed down the appellant sought an adjournment of the appeal hearing so that he could seek alternative legal representation. That application was not opposed and the appeal hearing was adjourned to today's' date.

5. Despite what he has described to the court as repeated efforts, the appellant has been unable to obtain legal representation. A couple of weeks ago he applied in writing for an adjournment so as to give him further time to find a lawyer. That application was

opposed by the respondent ("SSHD") on the grounds that the appeal process has already gone on too long and the appellant has had enough time to find a lawyer. McCombe LJ agreed with the SSHD and refused the application.

6. The appellant renewed his application orally before the court today but is unable to say that anything material has changed since his application was refused on the papers. In those circumstances the renewed application must be refused.

7. There has been no change in circumstances which would justify reconsideration of the decision. In any event the appellant has been afforded ample time to find representation and there is no reason to suppose that affording him yet further time will make any difference. As was made clear at the hearing, the renewed application for adjournment is accordingly refused.

The Factual and Procedural Background

8. The appellant was born on 5 October 1973 and is a citizen of Bangladesh. At some point (the precise date being in dispute) the appellant arrived in the UK by clandestine means. On 3 April 2010 the appellant applied for indefinite leave to remain. The SSHD refused the application and rejected the appellant's account of when he first arrived in the UK.

9. Ms "K", who later married the appellant, arrived in the UK on 30 June 2012 with leave to enter as a student expiring in October 2013. She did not complete her course or gain any qualifications. On 5 November 2012 she had an Islamic marriage with the appellant. The appellant and his wife had a child born on 7 August 2013. From October 2013 onwards the appellant's wife became an overstayer, with no right to reside in the UK.

10. On 6 February 2015 the appellant was encountered working illegally as a chef and was

arrested. He claimed asylum on 25 February 2016. On 31 May 2015 the appellant's second child was born. In a letter dated 19 June 2015 the appellant's application for asylum was refused and a decision was made to remove him as an illegal entrant. The appellant appealed against this decision on 14 July 2015.

11. In a decision dated 27 April 2016 the FTT dismissed the appellant's appeal. The FTT rejected the asylum claim and found that neither the appellant nor his wife had told the truth. The FTT's conclusion on the asylum claim was as follows:

> "52. I note that the Appellant and Ms [K] are married with two children. All of them are citizens of Bangladesh, and none of them has any immigration status in the UK.
>
> 53. I am not satisfied that either the Appellant or Ms [K] has told the truth about the attitude of her parents to their marriage. Whilst a possible risk of harm at their hands was adverted to by the Appellant at his asylum interview, this was a matter of so little consequence to them that neither referred to it when making their witness statements of 5 April 2016, and Mr Mahmud made no reference to it when setting out the different limbs of the appeal at the opening of the hearing. It is in my judgment overwhelmingly likely that Ms [K] came to the UK for the purpose of forming a relationship with the Appellant, and that she was never a genuine student.
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> 54. In all the circumstances of this case I reject the claims that the Appellant or Ms [K], or their children, face any risk of harm from any member of their extended families. On the contrary I am satisfied that neither has told the truth about the attitudes of their families to them, and in my judgement both have the ability to secure shelter and support from their families upon return to Bangladesh. Both children will no doubt benefit from being able to form and enjoy a relationship with their grandparents and extended family in Bangladesh.
>
> 55. I reject the suggestion that either the Appellant or Ms [K] meet the requirements of the Immigration Rules for a grant of leave to remain of any length, whether by reference to paragraph 276ADE or any other provision."

The FTT also rejected the Article 8 claim finding as follows:

> "56. I am satisfied that the Article 8 rights of the Appellant, Ms [K] and the

children are all engaged by the decision under appeal to the extent that they do enjoy a 'private life' in the UK which they will not be able to pursue in Bangladesh, but I am not satisfied that the decision affects their ability to enjoy 'family life' together for the purposes of Article 8. Plainly they can do so in Bangladesh. Whilst I am not satisfied that the Appellant had told the truth about this relationship with his two sisters in the UK, the evidence does not establish (and he does not suggest) that his relationship with them or the members of their own families is such as to establish 'family life'.

57. There is little evidence of what the 'private life' of the Appellant, Ms [K] and the children consist of. Neither girl is old enough for school; both are infants. Their best interests are plainly served by remaining with and being brought up by their parents, but there is no reason why that should not occur to their benefit in Bangladesh. After all on her own account their mother was able to secure tertiary education in Bangladesh and pursue a career as a secure tertiary education in Bangladesh and pursue a career as a teacher, and both Ms [K's] parents and the Appellant's parents are said to live in Sylhet where there are both educational and employment opportunities available for both the children and their parents.

58. I note that the maintenance of immigration controls is in the public interest, s117B(1), and that the appellant's position in the UK has always been unlawful. Ms [K's] position was initially precarious but latterly since October 2013 it too has been unlawful.

59. I note that neither the appellant nor Ms [K] speak English fluently. Indeed they appear to have very little fluency in English. On the evidence before me they are not financially independent. It is plain from the evidence that they have accessed medical facilities for Ms [K] pregnancies without making any attempt to pay for them and without any entitlement to them; s117B(2)(3).
60. I note the guidance to be found in AM (s117B) Malawi [2015] UKUT 260 and Forman (s117A-C considerations) [2015] UKUT 412.

61. I am satisfied that on the facts of this case it is both reasonable and proportionate to expect the Appellant and his family to remove to Bangladesh where they can live together in safety, with the support of their extended families.

62. Accordingly I am not satisfied that there are compelling and compassionate reasons disclosed by the evidence as to why the decision under appeal is disproportionate. Looking at the evidence in the round I dismiss the Article 8 appeal."

12. The appellant sought permission to appeal on the basis that the FTT should have treated, as positive factors, the considerations in section 117B(2) and (3) NIAA 2002, ie his

fluency in English and financial independence. The appellant relied on the fact that there were conflicting UT authorities on whether section 117B(2) and (3) could count in favour of a person seeking to resist removal - see AM (s117B) Malawi) [2015] UKUT 216 IAC; 2015 IAR 1019 and R (Luma Sh Khairdin) v Secretary of State for the Home Department (NIAA 2002 - Part 5A) (IJR) [2014] UKUT 566 (IAC). The appellant did not allege any error in the FTT's treatment of the children's best interest. On 24 May 2016 the appellant was granted permission to appeal.

13. At the hearing before the UT on 1 August 2016, counsel for the appellant accepted that it would be proper to follow the decision in AM (Malawi), which held that section 117B(2) and (3) factors (fluency and financial independence) could not count in an immigrant's favour. As the FTT had followed that decision this meant that no error of law had been made and the appeal was accordingly dismissed, as set out in the UT's decision of 8 September 2016. The UT refused permission to appeal.

14. The appellant appealed contending that the FTT had erred in law in its consideration of best interests of the children and of section 117B NIAA 2002. In particular it was said that the FTT erred by failing to apply the principles in the later case of Kaur (Children's Best Interests: Public Interest Interface) [2017] UKUT 00014(IAC); [2017] UKUT 14 IAC 814.

15. On 16 May 2017 Sir Alan Wilkie granted permission to appeal on the basis that the FTT's decision might be wrong by reason of Kaur. He also made reference to the possibility of the case resolving the conflict between AM (Malawi) and Khairdin.

The Statutory Framework

16. Sections 117A-D NIAA 2002 materially provide as follows:

"**117A Application of this Part**

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts-
(a) breaches a person's right to respect for private and family life under Article 8, and
(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard-

(a) in all cases, to the considerations listed in section 117B, and

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)

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.

117D Interpretation of this Part
(1) In this Part-
...
'qualifying child' means a person who is under the age of 18 and who-
(a) is British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more."

The Grounds of Appeal

17. In grounds of appeal settled by MLC it is contended that the FTT failed to apply the principles set down in Kaur in that.

(1) The FTT did not consider the best interests of the children in isolation from misconduct of their parents;

(2) The FTT did not consider the best interests of the children first;

(3) The FTT's approach to section 117B was inappropriately "absolute" and/or "rigid".

The Appellant's Submissions

18. The appellant's skeleton argument prepared by MLC contends that Kaur provides the following relevant general guidance:

(1) In the proportionality balancing exercise, the best interests of a child must be assessed in isolation from other factors, such as parental misconduct.

(2) The best interests assessment should normally be carried out at the beginning of the balancing exercise;

(3) The "little weight" provisions in part 5A NIAA 2002 do not entail an absolute, rigid measurement or concept: "little weight" entails a spectrum which will "result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case";

(4) "In every balancing exercise, the scales must be properly prepared by the judge, followed by all necessary findings and conclusions, buttressed by adequate reasoning."

19. In light of this guidance it is contended that the FTT erred in law in its decision on Article 8 in that:

(1) The "best interests of the children were not considered in isolation from other factors such as parental misconduct";

(2) The FTT did not consider the best interests of the concern "at the beginning of the balancing exercise";

(3) The FTT's approach to the consideration and the section 117B NIAA 2002 was "absolute" and amounted to a "rigid measurement" and there was a failure to appreciate that "little weight" involved "a spectrum".

20. The appellant was invited at the hearing today to say whatever he wished to supplement the grounds and arguments advanced in writing. He explained that he had children who go to school in this country, that he wants to stay here and that he would have problems if he returns to Bangladesh. In all the circumstances, he asked us to find a way for him to stay here, but said that he will accept our decision.

The SSHD's Submissions

21. The SSHD contends that the FTT made no error of law. The FTT gave due consideration to the best interests of the appellant's children.

22. Further, if any error existed, it would have been immaterial. The FTT judge rightly found that the appellant's children were too young to have built up any significant private life in the UK and that their best interests would not be compromised by returning to Bangladesh. Nothing in the appellant's family situation outweighed the public interest in enforcing immigration control.

23. I shall consider each of the grounds of appeal in turn.

Ground (1) Failure to consider the best interests of the children in isolation from their parents' misconduct.

24. It is apparent from the FTT decision that the best interests of the children were considered in isolation from their parents' misconduct. This is made clear by paragraph 57 of the FTT decision which sets out where the best interests of the children lie, concluding that "their bests interest are plainly served by remaining with and being brought up by their parents" and that there was no reason why that "should not occur to their benefit in Bangladesh", where the FTT observed they would have access to education and employment opportunities and the support of grandparents.

Ground (2) Failure to consider the best interests of the children first

25. As is made clear by the Supreme Court decision in Zoumbas v SSHD [2013] UKSC 74; [2013] 1 WLR 3690, whilst the best interests of children is a primary consideration and should be addressed in an orderly fashion, that does not mean or require that it should be considered first before considering other factors relevant to the proportionality exercise under Article 8 - see the judgment of Lord Hodge at paragraphs 10 and 19.

26. The FTT not only treated it as a primary consideration in the proportionality exercise but did in fact consider it first. As set out in paragraph 57 of the decision the FTT starts

its analysis with the consideration of the best interests of the appellant's children.

Ground (3) The FTT approach to section 117B was too "absolute" and/or "rigid"

27. The argument is that the FTT erred by failing to treat the phrase "little weight" in section 117B(4) and (5) as covering the spectrum of possibilities from moderate weight to almost no weight.

28. The FTT's decision, however, makes no reference to the phrase "little weight". The decision balanced public interest in the maintenance of effective immigration control against the family and private life of the appellant and his children and concluded that removal was reasonable and proportionate. In that analysis, no reference was made to section 117B(4) or (5) or the phrase "light weight". The alleged error of law does not accordingly arise.

29. In Rhuppiah v SSHD [2018] UKSC 58; [2018] 1 WLR 5536, Lord Wilson in giving the judgment of the Supreme Court explained as follows at paragraph 49:

> "... the effect of section 117A(2)(a) is clear. It recognises that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under article 8 inconsistently with the article itself. Inbuilt into the concept of 'little weight' itself is a small degree of flexibility; but it is in particular section 117A(2)(a) which provides the limited degree of flexibility recognised to be necessary in para 36 above. Although this court today defines a precarious immigration status for the purpose of section 117B(5) with a width from which most applicants who rely on their private life under article 8 will be unable to escape, section 117A(2)(a) necessarily enables their applications occasionally to succeed. It is impossible to improve on how, in inevitably general terms, Sales LJ in his judgment described the effect of section 117A(2)(a) as follows:
>
> '53. … Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in [the specified] circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by

particularly strong features of the private life in question …'"

30. The FTT's approach was consistent with that guidance. On the FTT's findings this was a case which fell within the "generalised normative guidance" and raised no exceptional or particularly strong private life features. In such circumstances, it was appropriate for the FTT to give little weight to the private life the appellant and his family had built up in the UK by reason of his breaches of immigration law.

AM (Malawi) and Khairdin

31. This issue was raised by Sir Alan Wilkie when he granted permission to appeal, but is not seemingly pursued. It does not arise on the facts since the FTT found at paragraph 59 of his decision that the appellant and his wife were not fluent in English or financially independent.

32. In any event in Rhuppiah the Supreme Court endorsed the approach in AM (Malawi) and it is now established that section 117B(2) and (3) do not require the Tribunal to take into account fluency in English and financial independence as factors in Article 8 appellant's favour.

33. As stated in Rhuppiah at paragraph 57:

> "The further submission on Ms Rhuppiah's behalf is and has been that the effect of section 117B(2) and (3) is to cast her ability to speak English and her financial independence as factors which positively weigh in her favour in the inquiry under article 8. But the further submission is based on a misreading of the two subsections and was rightly rejected by Judge Blundell upheld by the Court of Appeal, just as an analogous submission was rejected in para 18 of the decision in the *AM* case, cited at para 38 above. The subsections do not say that it is in the public interest that those who are able to speak English and are financially independent should remain in the UK. They say only that it is in the public interest that those who seek to remain in

> the UK should speak English and be financially independent; and the effect of the subsections is that, if claimants under article 8 do not speak English and/or are not financially independent, there is, for the two reasons given in almost identical terms in the subsections, a public interest which may help to justify the interference with their right to respect for their private or family life in the UK."

Immateriality

34. I accept the SSHD's submission that even if there were errors in the decision of the FTT, and hence that of the UT, those errors were not material. The FTT reached the only decision on Article 8 that was properly open to it on the evidence. At the time of the hearing the appellant's children were infants with only Bangladeshi nationality. There was no evidence of their having any private life in the UK outside their relationship with their parents. There was no reason why their best interests would better served by living in the UK. As the FTT pointed out, the children would have the support of all four grandparents on return to Bangladesh, their mother would be able to take up her former profession and they would have educational and employment opportunities. There was nothing in the balance on their side capable of outweighing the public interest in taking action against the appellant and his wife for their flouting of immigration law.

Conclusion

35. Having carefully considered all the documentary material and the written and oral arguments presented on behalf of the appellant for the reasons outlined above I conclude that the appeal must be dismissed.

LORD JUSTICE HENDERSON:

36. I agree.

LORD JUSTICE McCOMBE:

37. I also agree and have nothing to add.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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