Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05965/2014

THE IMMIGRATION ACTS

Heard at: Columbus House, Newport	**Decision and Reasons Promulgated**
On: 16 June 2015	**On 5 August 2015**

Before
UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KH
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms M Bayoumi, Counsel instructed by Hoole & Co

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge Cresswell in which he allowed the appeal of KH, a citizen of Afghanistan, against the Secretary of State's decision to refuse to vary his leave to remain and to remove him to Afghanistan. We shall refer to KH as the Applicant, although he was the Appellant in the proceedings below.

2. The application for variation of leave to remain was refused on 6 August 2014. The Applicant exercised his right of appeal to the First-tier Tribunal. This is the appeal which came before Judge Cresswell on 23 October 2014 and was dismissed on asylum and humanitarian protection grounds but allowed on human rights grounds by reference to Article 8 ECHR. The Secretary of State applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Chambers on 11 November 2014 in the following terms

> "The grounds seeking permission submit the Judge erred in law by failing to consider the public interest requirements of section 117B of the Nationality, Immigration and Asylum Act 2002.
>
> The Judge set out section 117B but failed to make findings.
>
> The ground is arguable. Permission is granted."

3. At the hearing before us Ms Bayoumi appeared for the Applicant and submitted a written skeleton argument. Mr Richards represented the Secretary of State and did not submit any additional documents.

Submissions

4. For the Secretary of State, Mr Richards said that the grounds are concise and the issue is narrow. Clearly the main focus for the Judge in allowing the appeal was the relationship between the Applicant and the child whose mother had no interest in caring for her along with a number other issues including the Applicant's relationship with Ms B. That relationship was established when the Applicant was in the United Kingdom with precarious status. There was no finding on the Applicant's ability to speak English and evidence was given with the use of an interpreter. There was no consideration of the fact that he is not financially independent. These considerations played no part in the Judge's decision. The Judge was required to have regard to such matters by section 117B of the Nationality, Immigration and Asylum Act 2002. Referred by us to section 117B (6) Mr Richards said that the child was not a qualified child because the Judge specifically made no finding as to whether the child was a British citizen. There was no birth certificate before the First-tier Tribunal.

5. For the Applicant, Ms Bayoumi referred to her skeleton argument and to the decision in Dube [2015] UKUT 90. It is plain that the Judge had the requirements of section 117B in mind. He refers to section 117D at paragraph 21(xv) and sets out the provisions of sections 117A-D at paragraph 32. At paragraph 39 he makes an assessment of the best interests of the child. Ms Bayoumi accepted that the interests of the Applicant's second child, unborn at the time of the First-tier Tribunal proceedings, could not then have properly been taken into account. The sections 117A-D considerations are not different to the Article 8 considerations; sections 117A-D are not exhaustive. The Judge was right to use them as a starting point.

6. We reserved our decision.

Discussion

7. The Applicant arrived in the United Kingdom on 3 December 2008 as an unaccompanied minor and claimed asylum. His application was refused on 19 March 2009 but he was granted discretionary leave to remain until 1 July 2011 in accordance with the Secretary of State's policy. On 30 June 2011 the Applicant made an in time application for further leave to remain and this is the application that was refused on asylum and human rights grounds on 6 August 2014. The Applicant does not challenge the dismissal of his appeal on asylum and humanitarian protection grounds so the only issue before us is the Secretary of State's appeal against the First-tier Tribunal's decision to allow the appeal on human rights grounds.

8. The Applicant's claim to remain on human rights grounds concerned a complicated factual matrix but one that is not challenged before us. The Applicant is 21 years old and has been living in the United Kingdom since he was 14. He has a child, A, born on 10 January 2014. The Applicant is no longer in a relationship with the mother of that child. The child is in foster care and at the time of the First-tier Tribunal hearing there were family proceedings before the Brighton County Court and the Applicant was being assessed as a potential long term carer for the child and a contact order had just been made. The Judge was unable to make a finding that the child is British and at the time of the hearing and before us there was no evidence put forward that would have enabled an assessment of the child's nationality. The Applicant has established a relationship with Ms B (the couple married on 2 July 2014) who is a Latvian national and has formed a family unit with Ms B and her infant son. At the time of the First-tier Tribunal hearing Ms B was pregnant with the Applicant's child and by the time of the hearing before us that child had been born. The Secretary of State does not doubt that the relationship between the Applicant and Ms B is subsisting and does not challenge the finding of the First-tier Tribunal Judge that it would be unreasonable to expect Ms B to relocate to Afghanistan with her infant son (and now with the couple's new born child) nor that there is no prospect of the Applicant's elder child A relocating to Afghanistan since he does not have sole custody.

9. The grounds of appeal assert that the Judge, having quoted sections 117A-D of the Nationality, Immigration and Asylum Act 2002 failed to have regard to the factors outlined in sections 117A-D in making his decision and as such misdirected himself when considering the proportionality assessment under Article 8. It must be implicit in these grounds that the Secretary of State also asserts that if the Judge had given due regard to the factors outlined in sections 117A-D he would have reached a different conclusion. The Secretary of State does not

suggest that the Judge was wrong to consider Article 8 outside the terms of the Immigration Rules nor that there is any fault by the Judge, other than the one outlined, in making his proportionality assessment.

Decision

10. In considering whether the Judge erred in law we are assisted by there being no dispute over any of the factual findings. We have outlined these above. In summary the Applicant is a 21 year old man in a subsisting relationship with an EEA national established at a time when he held lawful status in the United Kingdom and who now has two children and one step child in the United Kingdom none of whom are known to be British. The Applicant has been in the United Kingdom for seven years, completed his education here and is of good character. The Secretary of State accepts that he has established a private and family life in this country and that his family life cannot continue in Afghanistan (see paragraph 21 (xiv) of the decision).

11. In his decision the Judge made his factual findings (paragraph 21), he then went on to recite sections 117A-D of the 2002 Act (paragraph 32) immediately following his recital of Article 8. At paragraph 35 the Judge properly self-directed that his proportionality decision involved striking a fair balance between the rights of the individual and the interests of the community noting that decisions taken in pursuance of the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases identifiable only on a case by case basis. He went on to self-direct further by reference to a variety of authorities. Having made what can only be described as extensive and comprehensive self-direction the Judge began his application of the facts as found to the law as self-directed at paragraph 40. He did not specifically address each fact to the relevant legal principles just quoted and nor, in our judgment, was the Judge bound to do so. It is abundantly clear that he had in mind the self-direction referring first to the best interests of the children, then to Ms B seeking to rejoin the job market after the birth of their child, then to it being unreasonable to expect either Ms B or the children to move to Afghanistan. In paragraph 41 the Judge moved on to considering the public interest and the fact that the Applicant had no promise of an unlimited stay when making an unsustainable asylum claim.

12. Ms Bayoumi is correct in her submission that sections 117A-D are not an exhaustive list of requirements. If we examine what the Judge would have concluded on an individual basis if he had examined each fact against sections 117A-D the following is apparent. First of all he would have found that the maintenance of effective immigration control is in the public interest. Indeed he essentially made this specific finding at paragraphs 35 and 41. Secondly he would have found that the Applicant speaks English because despite giving his evidence through

an interpreter, as was his right, the supporting evidence from his school and his foster carer shows that having arrived in the United Kingdom at the age of 14 he had a 92% attendance record at school between March 2009 and June 2011 during which he studied for and took GCSEs in English, Maths, Science, Art, IT and Islam. There was no evidence given about his financial independence or otherwise. There is no evidence as to whether his partner is a qualifying partner for the purposes of the Act or whether his elder child is a qualifying child and indeed there is no evidence put forward to enable an assessment of whether his partner, who it is accepted is an EEA national, is exercising treaty rights. However his relationship with his partner was formed at a time when he was lawfully present in the United Kingdom (and so section 117B(4) does not apply) and his elder child, with whom he has a parental relationship, has no prospect of living outside the United Kingdom.

13. In our judgement there can be little doubt that making specific reference of the facts to sections 117A-D would have made no difference to the Judge's decision. This is the epitome of a case that falls to be decided on its specific and unusual facts. Put simply the Applicant has a private and family life in the United Kingdom and the family life aspects derive from two separate family units both involving very young infant children neither of which could be continued in Afghanistan. The removal of the Applicant would involve the destruction of his paternal role in both family units which would not be proportionate to the legitimate aim of immigration control. Having had regard to sections 117A-D there is no other possible conclusion. We are not satisfied that the Judge erred in law because we are satisfied that he did have regard to sections 117A-D and having had due regard made the inevitable decision to allow this appeal.

14. It is perhaps pertinent to note that where an appeal is allowed by reference to Article 8 the decision as to what period of leave to remain to grant as a result of the allowed appeal is left with the Secretary of State. The decision on appeal speaks for the situation pertaining as at the date of that decision. Where that situation is fluid this is a factor that the Secretary of State is entitled to take into account when deciding what period of leave to remain to grant to put into effect the decision to allow the appeal. In the case before us it is clear that the Applicant's paternal relationship with A is in its early stages with a contact order giving only limited contact in being at the time of the First-tier Tribunal's decision. The Applicant's partner was pregnant at the time of the First-tier Tribunal's decision and although that child has now been born and the married relationship with Ms B is accepted to be a continuing one the question of whether she is exercising treaty rights may become a factor that will be taken into account when the permanency of the Applicant's residence is later assessed.

Conclusion

15. The decision of the First-tier Tribunal did not involve the making of a material error of law. The Secretary of State's appeal is dismissed and the decision of the First-tier Tribunal to allow this appeal by virtue of Article 8 stands.

Signed: **Date:**

J F W Phillips
Deputy Judge of the Upper Tribunal