Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13315/2014

THE IMMIGRATION ACTS

Heard at Field House
On 4 February 2015

Decision & Reasons Promulgated
On 29 May 2015

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR S C
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Shilliday
For the Respondent: Mr Miah

DECISION AND REASONS

1. Mr S C is a citizen of Tunisia born in 1988.

2. He appealed against a decision of the Secretary of State made on 28 January 2014 to refuse to grant leave to remain for settlement as a spouse under Appendix FM of the Immigration Rules.

3. Although in proceedings before me the Secretary of State is the Appellant, for convenience I retain the designations as they were before

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the First-tier Tribunal, thus Mr S C is the Appellant and the Secretary of State the Respondent.

4. The basis of the claim is that the Appellant should be granted leave to remain as he has a wife, six stepchildren and a UK born daughter. Removal would amount to a disproportionate interference with his private and family life.

5. The history, in brief, is that he began a relationship with his partner 'online' as she had been attempting to learn Arabic from his sister and he took over the online lessons. She visited Tunisia where she married the Appellant in November 2010. She gave birth to their child in the UK in August 2011. The Appellant remained in Tunisia until 2012 when he left the country and travelled to Germany. He attempted to have the German authorities gain permission for him to enter the UK but this failed. He decided to enter the UK clandestinely but was intercepted on arrival on 2 September 2013. At that point he claimed asylum. This application was refused because he had earlier made an application in Germany and they had accepted responsibility for consideration of the claim.

6. The Respondent refused the application. She was not satisfied that he and his spouse were lawfully married. Further, the Appellant did not meet the eligibility requirements for leave to remain as a partner under the Immigration Rules, in particular, that he was not in the UK with valid leave and he had not completed a continuous period of limited leave of the required length.

7. Also, paragraph EX.1. did not apply. Nor were the requirements of paragraph 276ADE met.

8. It was considered that the Appellant could keep in touch with his family by modern means of communication from Germany. His spouse could visit as she had done to Tunisia until such time as he made an application to join them.

9. Having considered the best interests of the children it was concluded that they could carry on their normal routine with the support of their mother and grandparents as they did before the illegal arrival of the Appellant. Although his departure to Germany might create disruption for a short time it should not do so long term.

10. He appealed.

11. Following a hearing at Hatton Cross on 13 October 2014 Judge of the First-tier Maxwell dismissed the appeal under the Immigration Rules but allowed it on human rights grounds.

12. His findings are at paragraphs [12] to [20]. He found (at [14]) that the Appellant had failed to prove that he was married as claimed. However, he accepted that they are in a *'relationship akin to marriage'.*

13. He also found that '*there is a parental relationship between the Appellant and his daughter*' and that he, his partner and her six children from other relationships all live together in a single family unit [14].

14. He further found, however, that it had not been shown that he has a parental relationship with his partner's other children, noting in that regard that several of these children continue to have relationships with their natural fathers. Also, the '*relatively short in duration of any relationship as between the children and the Appellant*' [14].

15. The judge noted that it was accepted that the Appellant cannot meet the financial requirements of Appendix FM; indeed that his partner admitted that he entered the UK illegally because she does not earn enough. Also that he has never had leave.

16. Moreover, that given the age of his daughter he could not meet the requirements of paragraph EX.1. Further, that he could not to succeed under paragraph 276ADE [15].

17. The judge went on to note that the Respondent considered s55 of the Borders, Citizenship and Immigration Act 2009 and that he himself was required to consider s117 of the Nationality, Immigration and Asylum Act 2002.

18. He noted s117B(6) and found that the Appellant '*has a genuine and subsisting parental relationship with his daughter who, by virtue of s117D(1)(a) is a "qualifying child"*.' [17].

19. He went on: '*It has never been suggested by the Respondent, that it would be appropriate for the Appellant's spouse and her children to remove themselves to Tunisia to live with the Appellant. I find it would be inappropriate to expect them to do so. It is unduly harsh and wholly unreasonable in the circumstances of this case to expect a family to be uprooted in this fashion and therefore it would not be reasonable to expect the Appellant's child to leave the United Kingdom with him*' [18].

20. Thus, he concluded, (at [19]) removal would be disproportionate to the public interest.

21. He emphasised that his decision was '*based solely on the relationship between the Appellant and his daughter. His spouse has a very poor record in relationships and whilst I am satisfied that this relationship between her and the Appellant is genuine and subsisting at present this is little guarantee that it will continue to subsist in the future …*'.

22. The Respondent sought permission to appeal which was granted on 16 December 2014.

23. At the error of law hearing before me Mr Shilliday said it was clear that the case failed under the Immigration Rules. The issue was Article 8. It was clear, contrary to the written grounds, that the Appellant's child is a

'*qualifying child'* under s117D. Also, it was not challenged that it would not be reasonable for the Appellant's partner and children to remove themselves to Tunisia. However, the judge's conclusion that where, as in this case, the Appellant has a genuine and subsisting relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK, was not, as the judge had found, determinative. Whilst the public interest in such a situation does not require removal, such does not mean that the public interest is defeated. In other words, it does not overrule all the other considerations to which regard had to be given under s117. Mr Shilliday asked me on the facts found to set aside the decision and remake it by dismissing it.

24. In reply Mr Miah did not dispute that the case could not succeed under the Rules. However, he submitted that the analysis under Article 8 was sound, in particular that a strict reading of s117B(6) suggested that it was determinative. Even if it was not the judge had looked at the facts and taken all the evidence as to the family situation into account and reached a decision on the evidence he was entitled to reach. He invited me to uphold the decision.

25. In considering this matter there is no dispute that the Appellant cannot satisfy the Rules for leave as a partner not least because he has never had leave and cannot meet the financial requirements of Appendix FM.

26. As for Article 8, whilst the judge did make reference to s117, in my view he erred, having found that the Appellant has a genuine and subsisting parental relationship with a qualifying child and that it would not be reasonable to expect the child to leave the UK, in concluding that such was determinative in the consideration of the proportionality exercise.

27. The relevant part of the Immigration Act 2014 reads '*Section 19 Article 8 of the ECHR: public interest considerations. After Part 5 of the Nationality, Immigration and Asylum Act 2002 insert - Part 5A Article 8 of the ECHR: Public Interest Considerations'.*

28. It continues:

'*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…’* [my emphasis]

____

(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’****…* [my emphasis]

29. There follow six sub-sections which relate necessary considerations in respect of the public interest. The sixth, s117B(6) states:

‘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.’

30. In this case it is accepted that the Appellant’s child, a British citizen, is a ‘*qualifying child’,* there is a genuine and subsisting parental relationship and that it would not be reasonable to expect the child to leave the UK.

31. It is clear that there is a tension between s117B(6) ‘*the public interest does not require* …’ and 117A(2(a) ‘*the tribunal must (in particular) have regard (a)* ***in all cases****, to the considerations listed in section 117B’.*

32. In my judgment even though s117B(6) states that the public interest does not require the Appellant to be removed, that provision, like the best interests of the children, is not a ‘trump card’. It does not of itself determine the outcome of this appeal. It is not, as drafted, an exception to the other factors in s117B which requires the public interest to be had regard to ‘*in all cases’* but the plain words must be taken to be what they say and they are a statement of the public interest by Parliament in the situation set out there. It is drafted differently from sub-sections (1)-(5) of 117B and what it says is that where the person has a genuine and subsisting relationship with a qualifying child and it is not reasonable to expect the child to leave the UK it is not in the public interest for the Appellant to be removed. Whilst it is expressed in stronger terms in respect of the public interest, a proper reading of the whole of s117 means it nonetheless can be outweighed by other factors. It is however a factor, one of considerable weight, to be weighed in the balance.

33. The judge in treating s117B(6) as determinative and giving no consideration to the other s117 factors, indeed, from my reading of the

determination, to any other matters in considering proportionality misapplied the law and in doing so materially erred. The determination is set aside to be remade. There is no challenge to the facts found and it was agreed there was no need for a further hearing. No further submissions were made.

34. There is clearly family life between the Appellant and his partner and child. It was not argued for the reasons given by the previous Tribunal that the step children are of relevance he being found not to have a parental relationship with them. Removal would interfere with respect for that family life such that the seriousness threshold is met and Article 8(1) is engaged. Any interference is in accordance with the law and is necessary in a democratic society, in the interests of the economic wellbeing of the country. The question is whether such interference is proportionate to the legitimate public end sought to be achieved.

35. The main issue is proportionality. A couple cannot choose the country in which they wish to live. As indicated the Appellant cannot satisfy the Immigration Rules in respect of leave to remain as a partner, not least because he has never had leave having entered the country illegally and he cannot meet the financial requirements. His failure to meet the Rules must weigh significantly against the Appellant in the balancing exercise.

36. Further, I find it to be a very weighty factor against the Appellant that he deliberately sought to evade immigration control because he could not satisfy the Rules. Such shows a blatant disregard for the laws of this country.

37. Turning to s117 to which I must have regard, as indicated, I give considerable weight in favour of the Appellant in respect of s117B(6).

38. I must consider the best interests of the Appellant’s child as a primary consideration. Their child is a British citizen and it is accepted that it would not be reasonable to expect the child to live in another country. She cannot be blamed for the Appellant’s blatant disregard for the laws of this country and that when family life with her was created nothing had been put in place to ensure that the Appellant could be part of it. Nonetheless she is very young. Her mother was clearly the primary carer from her birth until the Appellant’s arrival more than two years later. It may well be that in an ideal world her best interests would be for her to be brought up in her country of origin with both her parents. However, many young children are successfully brought up by one parent, often the mother. There is no suggestion that the wellbeing of the child has been adversely affected by the physical absence of the Appellant for most of her young life. In my judgement if the presence of her father is in the best interests of the child, it is outweighed by countervailing factors including the need to maintain firm and fair immigration control and his dreadful immigration history committed with the knowledge of his partner (s117B(1) ‘*The maintenance of effective immigration controls is in the public interest*’).

39. In this case as the Appellant's partner and child are not required to leave the UK I do not see why they cannot carry on their normal routine much as they did before his unlawful arrival in September 2013. I cannot see from any of the material before me that by removal to Germany, who have accepted responsibility for his asylum claim, such would result in a long term adverse effect on their wellbeing and prospects. There is nothing to indicate that the child's welfare would suffer.

40. I see no reason why she and their child cannot keep in touch by visits to him. In that regard she visited him in Tunisia. Also, the three can keep in touch by modern means of communication pending the resolution of his claim. There is nothing to stop him reapplying for entry should he gain refugee status or otherwise satisfy the Immigration Rules.

41. The other aspects of s117 need to be considered and other relevant factors. It is not evident that the Appellant is able to speak English (s117B(2)). Also his partner is not working and on benefits, thus reliant on the State. She is not financially independent nor would he be (s117B(3)).

42. Whilst his relationship with his qualifying partner was established, it seems, online most of it has been played out while, as they were both aware, he has been here unlawfully. In such circumstances I accord it less weight than had his conduct been lawful.

43. Looking at the circumstances in the round in conducting the balancing exercise I conclude that any interference is proportionate to the legitimate end of immigration control. The appeal fails.

Decision

The decision of the First-tier Tribunal shows an error of law. That decision is set aside and remade as follows:

The appeal is dismissed under the Immigration Rules and on human rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Conway