IAC-AH-PC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33986/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 April 2015	**On 1 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AKHYAR AHMAD KHAN DURRANI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Fijiwala of the Specialist Appeals Team
For the Respondent: Mr O Manley of Counsel instructed by AMR Solicitors

DECISION AND REASONS

The Respondent

1. The Respondent to whom I shall refer as the Applicant is a citizen of Pakistan whose date of birth is given as 25 December 1988. On 22 April 2011 he entered the United Kingdom with leave as a Tier 4 (General) Student Migrant. He obtained further leave in the same capacity, expiring on 14 August 2014. On 13 August 2014 (in time) he applied for further

leave to remain on the basis of his private and family life in the United Kingdom.

2. On 15 March 2013 at a friend's wedding he had met Aksa Akram a British citizen born on 10 June 1975. She has two children by her previous marriage born in 2005 and 2009. The children are UK citizens. She and the Applicant entered into a religious marriage on 13 July 2014. They attempted to enter into a civil marriage on 19 August 2014 but the Applicant was arrested. He was subsequently released and they married according to English law on 14 November 2014.

The Respondent's Decision

3. On 20 August 2014 the Respondent refused the Applicant's application in respect of his family life by way of reference to paragraph 284 and Appendix FM of the Immigration Rules and with regard to his private life under paragraph 276ADE(1) of the Immigration Rules. The Respondent considered there were no exceptional circumstances which warranted consideration of the Applicant's claim under Article 8 of the European Convention outside the Immigration Rules.

4. On 1 September 2014 the Applicant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are brief. They assert the SSHD having acknowledged that the Applicant had a genuine and subsisting parental relationship with his two step-children had failed to give adequate consideration to the negative impact his removal would have on his wife and step-children, had failed to consider that his circumstances satisfied the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules and had failed to consider the best interests of his step-children as required under Section 55 of the Borders, Citizenship and Immigration Act 2009. Finally, there was no evidence to show it was reasonable for the family of the Applicant's wife to look after her and her children in the event of the Applicant's removal to Pakistan.

The First-tier Tribunal Decision

5. By a determination promulgated on 2 January 2015 Judge of the First-tier Tribunal C Sweeney allowed the appeal of the Applicant by way of reference to Article 8 outside the Rules. The SSHD sought permission to appeal on the grounds that the Judge had failed to take into account the public interest considerations contained in Sections 117A-117D of the 2002 Act and on two other grounds which in the event were not pursued as Ms Fijiwala properly conceded they were of little relevance since the Respondent had in her decision accepted that the Applicant was in a genuine and subsisting marriage and parental relationship with his wife's children.

6. On 16 January 2015 Judge of the First-tier Tribunal Scott-Baker granted permission to appeal on the basis that it was arguable the Judge had failed to have regard to Sections 117A-117D of the 2002 Act.

7. The Applicant filed a response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended.

The Hearing in the Upper Tribunal

8. The Applicant and his wife were not present at the start of the hearing and in fact arrived after submissions had been made and I was about to give my decision whether the decision of the First-tier Tribunal contained a material error of law. Before so doing, I explained what had happened to the Applicant and noted that he had sufficient English to understand me which he confirmed and which neither representative sought to gainsay.

9. Addressing the error of law issue, Ms Fijiwala for the SSHD submitted the decision contained no reference to Section 117B of the 2002 Act and did not consider either in substance or in form the factors outlined in the Section which the Tribunal was required to take into account. In particular, the Judge had made no finding whether the Applicant was financially self-supporting. The Judge had not considered the private life of the Applicant and that he had temporary leave so that it might be said that his status in the United Kingdom was precarious. In his consideration of the factors referred to in Section 117B(6) he had failed to take into account that the SSHD would not be seeking to remove the Applicant's stepchildren. She concluded that this amounted to a material error of law.

10. In response Mr Manley for the Applicant relied on his skeleton argument which, unsurprisingly, was very similar to the Rule 24 response which he had also drafted. He accepted, rightly, that the Judge had failed expressly to refer to Sections 117A-117D or any part of them. He referred me to the decision in *Dube (ss.117A-117D) [2015] UKUT 00090 (IAC)*. The Judge had dealt with the various factors identified in the Sections at paragraph 60 of his decision when he had referred to the public interest being the key issue in the appeal. The Judge had had in mind the factors of financial independence and ability to speak English. The English requirement the Applicant had effectively satisfied because he had fulfilled it in order to obtain leave as a student. At the time of the application leading to the decision under appeal the Applicant had limited leave to remain. This might be temporary leave but it was not precarious.

11. The Judge had extensively considered the position of the children in his decision and found it would be unreasonable for them to leave the United Kingdom. He had considered at length in his decision the likely impact on them in the event the Applicant had to leave which were matters required to be considered in Section 117B(6). Consequently to show the Judge had not considered the factors listed in Sections 117A-117D it was incumbent on the SSHD to show that his treatment of these factors was irrational or perverse.

12. Mr Manley also sought to rely on the unreported decision in *SSHD v Asamoah & Obeng* promulgated in the Upper Tribunal on 10 December 2014 in which Upper Tribunal Judge Martin had found at paragraph 10 that :-

> … In conducting the balancing exercise therefore, when the public interest is removed from the SSHD's side of the balance there is nothing left … in short his unchallenged finding that it would be unreasonable to expect the children to return to Ghana inevitably led to his allowing the appeal.

13. In response Ms Fijiwala re-iterated the SSHD's view that the Judge had failed to look at all the factors listed in Section 117B of the 2002 Act and had not considered the financial circumstances of the Applicant. There were no documents which gave details of these. Further, the Judge had failed to take into account the Applicant's temporary immigration status in his assessment of the proportionality of the decision to the legitimate public objectives described in Article 8(2) of the European Convention.

Findings and Consideration

14. The sole issue arising on the question whether there is a material error of law in the Judge's decision is whether he has adequately taken into account the factors outlined in Section 117B of the 2002 Act as representing the Secretary of State's view of the public interest. He mentioned public interest generically at paragraph 60 of his decision which disposes of the requirement of sub-paragraph (i) of Section 117B. Sub-paragraph (ii) is the English language requirement. Mr Manley has pointed out that the Applicant would have satisfied the student requirement for facility in English language. He has now appeared and he and I have had brief conversation. While I might not be prepared to say he was completely fluently I am satisfied that he has sufficient grasp that he can probably manage in most situations and I accept that being in the Tribunal is a very anxiety making situation.

15. Financial independence is referred to in sub-paragraph (iii) the Judge noted that the family was effectively dependent on the wife's income and dealt with this at paragraph 62 and elsewhere to be found in his Record of Proceedings. Sub-paragraph (iv) is not applicable. Sub-paragraph (v) addresses a private life formed when status is precarious. The issue here is actually family life and it is accepted that throughout the relevant period the Appellant had temporary status. Precarious status has not yet been judicially defined. It is not defined in the legislation. I heard no argument about how having temporary leave should be construed as precarious status because, for instance it showed features which were the same as or comparable to those to be found in the case of a person whose leave, for instance, has been extended by virtue of Section 3C of the 1971 Act which were more relevant than any features it shared with indefinite or other forms of leave. For the purposes of this appeal, I do not equate temporary

status with precarious status. The Judge dealt with this at paragraphs 58 and 59 of the decision.

16. In respect of the final sub-paragraph (vi) the Respondent conceded the Appellant had a parental relationship with his wife's children and the Judge extensively dealt with it in his decision that it was not reasonable for the children to go to Pakistan and indeed there are factors which were not considered but which were not essentially relevant to the decision, such as that the children are UK citizens and they could not be forced to go outside the EU. I accept that with the benefit of hindsight the Judge's decision has weak elements. It would have been better if the Judge had specifically addressed the section 117B factors in order. Nevertheless the decision's treatment of the section 117B factors is adequate in the light of *Dube. A*lthough the Secretary of State has not pleaded it, the approach to the Article 8 assessment is also weak. There is no reference to *R (Razgar) v SSHD [2004] UKHL 27* or even an attempt to go through the five steps described in *Razgar*.

17. If there is any error of law I do not find it sufficiently material to justify setting aside this decision. Therefore the decision of Judge Sweeney shall stand.

Anonymity

18. There was no request for an anonymity direction and having heard the appeal I find none is warranted.

NOTICE OF DECISION

The decision of the First-tier Tribunal did not contain a material error of law sufficient that it should be set aside and it shall therefore stand. The effect is that the appeal of the Applicant against refusal of further leave is allowed.

No anonymity direction is made.

Signed/Official Crest Date 28. iv. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal