



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/35496/2014

THE IMMIGRATION ACTS

Heard at Field House, London

Decision and Reasons

On 16 November 2015

Promulgated :

On 16 December 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

**AZIZ IMAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Lay, instructed by Alexander Shaw Solicitors

For the Respondent: Mr Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a Pakistani national born on 9 February 1979. The Appellant applied for further leave to remain on 22 January 2014 on the basis that his removal would be a breach of his human rights. The Respondent refused his application in a letter dated 26 August 2014 on the basis that his removal would not breach his right to respect for family and private life under Article 8 of the European Convention on Human Rights (ECHR) both under the Immigration Rules and outside the Rules on the basis of

exceptional circumstances. The Respondent made a decision to remove him as an illegal entrant under section 10 of the Immigration and Asylum Act 1999.

2. The Appellant appealed against that decision. His appeal was heard and dismissed by First-tier Tribunal Judge Fox in a decision promulgated on 12 June 2015. Permission to appeal against that decision was granted by First-tier Tribunal Judge Fisher on 16 September 2015. He granted permission on the basis that the Judge arguably erred in law in his assessment of Section EX.1 of Appendix FM of the Immigration Rules when he concluded that citizenship was not material in his assessment of proportionality. He also considered it arguable that this error had infected his conclusions on Article 8 under the ECHR and those under section 117B of the Nationality, Immigration and Asylum Act 2002. He found that all grounds were arguable as they were closely linked.

The Grounds

3. Ground 1 argues that the First-tier Tribunal concluded that the Appellant's children's status as British Citizens did not materially affect the assessment of whether it was reasonable to expect them to return to Pakistan with their parents and that this was an error of law. It is asserted that the First-tier Tribunal failed to ascribe appropriate weight to the issue of their British citizenship. It is submitted that British Citizenship is a relevant, weighty and often determinative consideration.
4. Ground 2 argues that the failure to consider the children's British citizenship as having any weight at all also rendered the proportionality assessment flawed. The Respondent who was unrepresented at the appeal never submitted that it would be reasonable for the children to return if they were British. Whilst the refusal letter said it would be reasonable this was on the basis that they were not British. The First-tier Tribunal therefore should have grappled with the issue of whether, if the children could not reasonably be expected to leave, the separation from the Appellant was nevertheless proportionate. It is submitted that this further meant that the children's best interests, in the eventuality of separation, were also not considered in a lawful way.
5. Ground 3 contends that the First-tier Tribunal failed to apply the mandatory public interest considerations under section 117 of the 2002 Act. There was no indication that the determination had regard to those considerations. If the First-tier Tribunal deemed it unnecessary because he had already found (in the context of EX.1) that it would be reasonable to expect the children to leave the UK, then that position was tainted for the reasons given.

The Rule 24 Response

6. The Respondent argues that the First-tier Tribunal Judge directed himself appropriately, that he was aware that the children were British Citizens

and that both were nationals of Pakistan, the mother having obtained indefinite leave to remain. The Judge listed and applied the relevant case law. The Judge had assessed the best interests of the children and asked himself whether it would be reasonable to expect the children to return to Pakistan with their parents. The Judge had made clear findings on the age of the children and that having acquired British status did not prevent them living abroad. The Judge found that they were of an age where their focus would be on their parents, the eldest being 7 years old. The Judge had accepted that the family would be inconvenienced when they repatriated.

The Hearing

7. Mr Lay submitted that the critical issue was giving no weight to the fact that the children were British citizens. It was a material issue which had to go into the mix. It was not only a clear error but one that was material. If I were to find that it was a material error it would be necessary to remit so that a First-tier Judge could hear the evidence as updated. British citizenship was not a trump card but it was something of importance. This was not a criminal case and could succeed notwithstanding findings of deception. The refusal letter was written before the children were British citizens and now the Appellant's wife was also a British citizen. Her passport was dated 1 July 2015.
8. Another reading of the First-tier Tribunal's decision was that he did not conduct an Article 8 assessment. It was like the reasoning of an **E-A (Article 8 - best interests of child) Nigeria [2011] UKUT 00315** case. This was never that kind of case. Remittal was important. The successful career prospects were relevant as were the public interest considerations.
9. Mr Melvin submitted that he stood by the fact that the Judge had made findings that the children would be able to go to Pakistan. British citizen children could accompany their non-citizen children back. There was no material error of law. If there were a material error of law it would be best to remit it to the First-tier Tribunal.
10. I indicated that I considered that there was a material error of law in the decision of the First-tier Tribunal and that the matter should be remitted for a de novo hearing before a different judge with no findings preserved.

Discussion and Findings

11. The Appellant's appeal fell to be considered under section EX.1 (a) of Appendix FM of the Immigration Rules. The First-tier Tribunal Judge does not explicitly state which Rules he is considering in his assessment from paragraphs 23 to 38 of the decision. In those paragraphs the Judge considers the reasonableness of expecting the children to leave the UK and acknowledges that they are British citizens.

12. It is clear that section EX.1 (a) applied in this case because the Appellant had a genuine and subsisting relationship with British Citizen children. I also conclude from the language of the decision that the First-tier Tribunal was considering the requirements of section EX.1 (a) in respect of the children and EX.1 (b) in respect of the Appellant's wife at paragraphs 32 to 38. He concluded that it would not be unreasonable for the children to leave the UK and that there were no insurmountable obstacles to family life with his wife continuing in Pakistan. He did not consider Article 8 outside the rules because he found at paragraph 40 that there were no exceptional circumstances which would permit the Appellant to succeed outside the Immigration Rules.
13. The First-tier Tribunal Judge directs himself at paragraph 25 in the following terms:
14. I confined myself to the assessment of whether it is reasonable to expect the children to return to Pakistan with their parents and whether insurmountable obstacles exist for the appellant's wife. The children's status as British citizens does not materially effect this assessment.
15. The Appellant's children are both British Citizens. It is unclear from the papers exactly when they were granted citizenship but their passports are dated 15 December 2014. In **ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4** Lady Hale said at paragraph [30] that:

"Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child".

She also concluded the view that the intrinsic importance of citizenship should not be played down and continued at paragraph [32]:

"As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults".
16. Lord Kerr said at paragraph [47] that:

"The significance of a child's nationality must be considered in two aspects. The first of these is in its role as a contributor to the debate as to where the child's best interests lie. It seems to me self-evident that to diminish a child's right to assert his or her nationality will not normally be in his or her best interests. That consideration must therefore feature in the determination of where the best interests lie. It was also accepted by the respondent, however, (and I think rightly so) that if a child is a British citizen, this has an independent value, freestanding of the debate in relation to best interests, and this must weigh in the balance in any decision that may affect where a child will live. As Lady Hale has said, this is not an inevitably decisive factor but the benefits that British citizenship brings, as so aptly described by Lord Hope and Lady Hale, must not readily be discounted".

17. The First-tier Tribunal Judge properly directed himself in relation to the relevant case law at paragraphs 8 to 11 of the decision. However, in the light of these passages from the judgement of the Supreme Court I consider that the First-tier Tribunal Judge misdirected himself in holding that the children's status as British citizens did not materially affect the assessment of whether it was reasonable for them to return to Pakistan. The First-tier Tribunal Judge did not demonstrate in his reasoning that he give weight to the intrinsic importance of British citizenship or consider the loss of benefits that British citizenship brings and did not weigh this in the balance. This was a material error of law as it affected the assessment of the reasonableness of expecting the children to leave the UK.
18. I consider that the extent of judicial fact finding is such that this matter should be remitted to the First-tier Tribunal for complete rehearing.
19. In **MK (section 55 - Tribunal options) Sierra Leone [2015] UKUT 00223** the Upper Tribunal held that where the Tribunal finds that there has been a breach of either of the section 55 duties, one of the options available is remittal to the Secretary of State for reconsideration and fresh decision. The grounds of appeal did not argue that the Respondent had not properly considered her duties imposed by s55 of the Borders, Citizenship and Immigration Act 2009 and I have made no such finding. Therefore remittal to the Secretary of State is not an option open to me. However, it may be that in the light of the fact that since the Respondent drafted her Refusal Letter both children have become British citizens the Respondent may wish to make a fresh decision.

Notice of Decision

In those circumstances I conclude that there was a material error of law in the determination. The extent of judicial fact finding is such that this matter should be remitted to the First-tier Tribunal for complete rehearing.

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

The First-tier Tribunal did not make an anonymity direction. None is sought and no need for such a direction arises on the facts of this of case.

Signed

Date

Deputy Upper Tribunal Judge L J Murray