Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05726/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 April 2016	**On 19 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

BACHANA SHURGAIA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr J Heybroek, instructed by Geeta Patel & Co Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. By my decision promulgated on 17 March 2016 (appended to this decision), I set aside the decision of the First-tier Tribunal ("FtT"). I hereby remake the decision of the FtT.

2. The basic facts relevant to this appeal are not controversial and are as follows:

   a. The appellant is a Georgian citizen born on 25 December 1989.

b. On 12 August 2012 he married in Georgia. The woman he married was, at the time, a Georgian national who had lived most of her life in the UK and who subsequently, on 23 April 2014, became a British citizen.

c. The appellant and his wife have a daughter, who is a British citizen born on 4 June 2013.

d. The appellant's wife returned to the UK from Georgia without her husband whilst she was pregnant.

e. The appellant applied to enter the UK as a visitor before his daughter was born. His application was refused but allowed following an appeal and on 21 May 2014 the appellant was granted leave to enter the UK as a family visitor valid until 21 November 2014.

f. On 20 November 2014 the appellant applied for leave to remain on the basis of his family and private life.

The Respondent's Decision

3. By way of a decision dated 22 January 2015, the respondent refused the appellant's application for leave to remain on the basis that he was unable to satisfy the Immigration Rules and that there were no exceptional circumstances to warrant a grant of leave outside the Rules.

4. In respect of the Immigration Rules, the respondent first considered whether the appellant was able to satisfy the partner route under Appendix FM. It found that he could not because, at the time he made the application, he was a visitor and under sub paragraph E-LTRP 2.1 a person in the UK as a visitor is not eligible for leave to remain via this route. Similarly, the respondent found that the appellant was not able to satisfy the eligibility requirements of the parent route under Appendix FM. The respondent's decision also briefly considered whether the appellant should be granted leave on the basis of his private life pursuant to paragraph 276ADE(1) and found that, having lived only 5 months in the UK at the time of the application, he could not meet the requirements therein.

5. Under the heading "Decision on Exceptional Circumstances", the respondent considered whether leave should be granted outside the Rules under Article 8 ECHR. In finding that no such leave should be granted, the respondent stated that:

a. There appeared to have been a deliberate attempt by the appellant to circumvent the Immigration Rules by entering as a visitor and thereafter seeking to switch to a different category. It was noted that in order for the appellant to be granted entry clearance as a visitor he would have had to have stated that his true intention was to return to Georgia.

b. He could return to Georgia for the correct entry clearance and his child could remain the UK whilst he did so. To the extent that his wife

relied on him to provide child care she could access childcare or help from family members during his absence.

Factual Findings

6. I heard oral evidence from the appellant (through an interpreter) and his wife (in English). Both adopted their witness statements and both were cross examined by Mr Melvin. Having considered their evidence (written and oral) along with all of the evidence that was before me and the FtT, I make the following findings of fact:

   a. The appellant and his wife (who became a British citizen in 2014) first met through the internet in December 2009 and after several visits to Georgia by the appellant's wife they married in August 2012.

   b. After the marriage, when about three months pregnant, the appellant's wife returned to the UK without the appellant.

   c. The appellant's wife gave birth to a daughter (who is a British citizen) in the UK.

   d. The appellant's wife has no intention of moving to Georgia and wishes to raise her child in the UK. If the appellant is removed to Georgia his wife and daughter will not follow him.

   e. Before the child was born, the appellant applied to visit his wife in the UK but was only given leave to enter following an appeal, and therefore was unable to travel to the UK until around the time of his daughter's first birthday.

   f. The appellant claims that his intention, when making an application to enter the UK as a visitor, was to return to Georgia (where he had a good job) and that it was only after arriving in the UK, because of the attachment he felt to his daughter, that he changed his mind and decided to stay. I do not accept this is the case. Having heard oral evidence from the appellant and his spouse, I think it more likely (and therefore find on the balance of probabilities) that the appellant always intended to remain in the UK in order to continue his life with his wife and daughter, his wife having decided she no longer wished to live in Georgia and he at that time being unable to satisfy the requirements in the Rules to gain leave to enter the UK as a spouse.

   g. The appellant's wife works in two different jobs and supports the family financially. Her income is, or will shortly be, sufficient to satisfy the Immigration Rules if the appellant were to make an application from Georgia.

   h. The appellant has a genuine attachment to his child and is her primary carer (whilst his wife works).

   i. If the appellant were not able to look after the child, his wife would have to reduce her workload with a consequent reduction in income due to child care costs.

Consideration and decision

7. It was common ground that the appellant is unable to satisfy the Immigration Rules for the reasons identified by the respondent and as set out in paragraph [4] above and therefore that the appeal falls to be determined outside the Rules under Article 8 ECHR.

8. The appellant lives with his wife and child and is the primary day to day carer for his child. As such, it is clear that removing him from the UK – and thereby separating him from his wife and child (who would not move with him to Georgia) - would constitute an interference with his (and their) family life of sufficient gravity to potentially engage the operation of Article 8.

9. Accordingly, the issue for me to resolve, and upon which I heard submissions, is whether removal of the appellant is a proportionate interference with his right to private and family life under Article 8.

10. In assessing proportionality, it is necessary to consider Section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") which sets out a series of mandatory considerations. Section 117B provides as follows:

> *"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."

11. Section 117B(6) of the 2002 Act was considered recently by the Upper Tribunal in Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC) where, at [20] – [21], the following was stated (emphasis added):

"In section 117B(6), Parliament has prescribed three conditions, namely:

(a) the person concerned is not liable to deportation;

(b) such person has a genuine and subsisting parental relationship with a qualifying child, namely a person who is under the age of 18 and is a British citizen or has lived in the United Kingdom for a continuous period of seven years or more; and

(c) it would not be reasonable to expect the qualifying child to leave the United Kingdom.

Within this discrete regime, ***the statute proclaims unequivocally that where these three conditions are satisfied the public interest does not require the removal of the parent from the United Kingdom. Ambiguity there is none****.*

Giving effect to the analysis above, in our judgment the underlying Parliamentary intention is that where the three aforementioned conditions are satisfied the public interests identified in section 117B(1) – (3) do not apply."

12. There is no dispute as to whether the first two of the three conditions of Section 117B(6) are satisfied. The appellant is not liable to deportation and he has a genuine and subsisting relationship with his daughter who is a British citizen.

13. The third condition requires that it would not be reasonable to expect the appellant's daughter to leave the UK. The Home Office's Immigration Directorate Instruction Family Migration dated August 2015 ("the IDI") sets out at section 11.2.3 the circumstances in which it would reasonable to expect a British Citizen child to leave the UK. It states:

"Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer."

14. The appellant's daughter is a British citizen. Her mother, also a British citizen, wishes and intends to raise her in the UK. Having regard to the IDI, it is clear that it would not be reasonable to expect her to leave the UK with her father.

15. Mr Melvin sought to persuade me that Treebhawon was wrongly decided and that I should rely on, or at least adopt the logic of, an unpublished decision that took a contrary view. I am not persuaded to do so. The reasoning in Treebhawon is clear and cogent and I am not persuaded to depart from it.

16. I recognise that the public interest considerations at sections 117B(1) – (3) of the 2002 Act strongly favour the appellant being removed from the UK. Subsection (1) states that maintenance of effective immigration controls is in the public interest. The appellant has entered the UK as a visitor with the intention to remain permanently and as such this is a case where the public interest in immigration control is brought into sharp focus and warrants being given considerable weight. With respect to sub-paragraphs (2) and (3), the appellant does not speak English and is not financially independent.

17. However, the consequence of having found that the three conditions of Section 117B(6) are satisfied is that the public interest does not require the appellant's removal. This is the clear and unambiguous language of the 2002 Act, the interpretation of which has been confirmed by the Upper Tribunal in Treebhawon. Accordingly, the public interest considerations identified in sections 117B(1) – (3) do not apply however strong they might otherwise have been.

18. As the public interest does not require the appellant's removal, it follows that the balancing of the public interest against his Article 8 rights can only be decided in his favour and for this reason his appeal is allowed.

DECISION

19. I remake the decision of the FtT by allowing the appellant's appeal outwith the framework of the Immigration Rules under Article 8 ECHR.

Signed

Deputy Upper Tribunal Judge Sheridan

Dated: 17 April 2016