IAC-AH-SC/DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07658/2015

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 25 April 2016	**On 11 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR NAEEM NOORMOHAMED UGHRADAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Faryl, Counsel instructed by M A Consultants (Blackburn)
For the Respondent: Mr Geoff Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Dickson sitting at Bradford on 6 August 2015) whereby he dismissed under the Rules and on human rights grounds (Article 8 ECHR) outside the Rules the appellant's appeal against the decision of the Secretary of State to remove him from

the United Kingdom under Section 10 of the Immigration and Asylum Act 1999 as an overstayer whose human rights claim had been refused. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant or his family require anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 5 January 2016 First-tier Tribunal Judge Osborne granted the appellant permission to appeal for the following reasons:

> 1. The grounds seek permission to appeal a Decision and reasons of First-tier Tribunal Judge N P Dickson who in a Decision and reasons promulgated 21 August 2015 dismissed the Appellant's appeal against the Respondent's Decision to refuse leave to remain on the basis of his family and private life pursuant to the Immigration Rules and Article 8, ECHR.
>
> 2. The grounds assert that the Judge erred in his consideration by failing to have any or any proper regard to Section 55, Borders, Citizenship and Immigration Act (BCIA) 2009 which amounts to a material error of law. What is determined to be in a child's best interests should customarily dictate the outcome of the appeal. The best interests of any child should have been addressed. Despite its having been raised at the hearing the Judge failed to have any or any proper regard to Section 55, 2009 Act. The best interests of the child were not addressed. The Judge failed to properly identify and evaluate the best interests of the child. The Judge found that it is reasonable to expect a child of this age to live with her parents if the Sponsor decides to join the Appellant in India. The Appellant's daughter is not referred to again in relation to the Article 8 claim. The Judge failed to consider the effect of the severance of the relationships between the Appellant's daughter and her extended family living in Britain in determining her best interests and failed to consider what accommodation and support will be available for the Appellant's daughter in India and how that might differ from her quality of living in the UK in determining her best interests. It is submitted that the best interests of the Appellant's daughter can only be served by her remaining in the UK with both her parents.
>
> 3. In an otherwise focused Decision and reasons it is nonetheless arguable that the Judge has arguably failed to specifically consider the best interests of the child. It is arguable that the Judge should not have done so and that not to have done so amounts to an arguable error of law.

Relevant Background Facts

3. The appellant is a national of India, whose date of birth 3 December 1988. He first entered the United Kingdom on 30 October 2008 with valid entry clearance as a working holidaymaker. His entry clearance in this capacity was valid until 8 October 2010. On 1 October 2010 he applied for leave to remain under Article 8. The application was refused on 8 November 2010, and his subsequent appeal was dismissed by Judge Ghaffar in a decision promulgated on 19 January 2011. Permission to appeal to the Upper Tribunal was refused by Upper Tribunal Judge Kekic on 9 February 2011.

4. The appellant did not leave the country after his appeal rights became exhausted, but entered into a relationship with Ms Feraz Atha, a British national whose date of birth is 27 August 1988. The appellant was encountered by Immigration Officers at Bolton Registry Office on 29 January 2014. He was arrested and served papers as an overstayer.

5. The appellant made a further application for leave to remain on human rights grounds. His appeal against the refusal was dismissed by First-tier Tribunal Judge Hawden-Beal in a decision promulgated on 13 May 2014. Leave to appeal to the Upper Tribunal was refused on 18 June 2014.

6. Notwithstanding the negative outcome of his two appeals, the appellant entered an Islamic marriage with Ms Atha in the summer of 2014 and subsequently entered into a civil marriage with her on 9 December 2014. From the time of their religious marriage, the appellant and Ms Atha cohabited, and on 27 May 2015 Ms Atha gave birth to a daughter, Khadija, who is a British citizen through her mother.

7. On 6 October 2014 the appellant submitted a further application for leave to remain on the basis of his family and private life in the United Kingdom, and this was refused by the respondent with no right of appeal on 4 December 2014. The appellant made further representations in the same month, and the respondent refused the application upon reconsideration on 5 February 2015. The appellant was given an in-country right of appeal.

The Hearing Before, and the Decision of, the First-tier Tribunal

8. Both parties were legally represented before Judge Dickson. Ms Alton of Counsel appeared on behalf of the appellant. The judge received oral evidence from the appellant and his wife.

9. The appellant's evidence was that while he was living in India he worked as a supervisor with Shital Developments. His family in India included his parents and two sisters.

10. The sponsor gave evidence that she worked as a teacher at the Daubhill Mosque where she taught young children. Her earnings were some £79 a week, and so she would not be able to demonstrate an income of the level required under the Rules. She was aware the appellant had come to the United Kingdom as a working holidaymaker, but she was not aware that he had lost his final appeal in Birmingham and she believed that an appeal was in progress. She had never lived in or visited India, and she only had limited knowledge of Gujarati. She had spoken to the appellant's parents on the telephone, but she claimed there were communication problems because of her lack of fluency in Gujarati.

11. In her closing submissions on behalf of the appellant, Ms Alton submitted that his relationship with the sponsor was genuine and subsisting and there were insurmountable obstacles to the family returning to India. She relied on the House of Lords judgment in **ZH (Tanzania)**. She submitted it was not in the child's interest for

her to live in India with her parents, citing **VW (Uganda) and Others [2009] EWCA Civ 5**.

12. In his subsequent decision, Judge Dickson found that the appellant was well-aware that he had no leave to remain in the United Kingdom after his appeal rights were extinguished in February 2011. The appellant originally said he would give evidence in English. However it soon became apparent that his English was not sufficient to answer questions from his Counsel, and the services of the court interpreter were used. He was not satisfied that the sponsor had limited knowledge of Gujarati. It was reasonable to assume that the sponsor would have needed to know Gujarati to speak to the appellant when they met. He was also not satisfied that the sponsor believed that the appellant's appeal was outstanding at the time they met, or at the time that they formed an intention to marry.

13. The sponsor had recently taken a masters degree, and had said that she had finished her training for counselling. The judge observed that the sponsor would have the support of her family in the United Kingdom, and he was not satisfied that in the future she would not be able to satisfy the financial requirements of Appendix FM by generating an income of the requisite amount through working.

14. The judge went on to give his reasons for finding that the appellant did not qualify for leave to remain under the Rules. There were not insurmountable obstacles to family life with the sponsor and their daughter continuing outside the United Kingdom. The appellant also could not succeed under paragraph 276ADE as he would have no difficulty in reintegrating into Indian society.

15. Having stated his conclusions under the Rules, the judge turned at paragraph [56] to consider an Article 8 claim outside the Rules. Paragraphs [55] to [57] of the judge's decision are set out below:

> "55. With regard to the claim under paragraph EX.1 and EX.2 it is reasonable to expect a child of this age to live with her parents if the Sponsor decides to join the Appellant in India. There are in my view no insurmountable obstacles to family life with the Sponsor and their daughter continuing outside the United Kingdom. The Sponsor will have the support of the Appellant and his family. There is no reason why she could not obtain employment in say a mosque in India as she does in the United Kingdom. She also has other qualifications which would be of assistance. As I have previously said, the Appellant's time in the United Kingdom and his ability to speak some English will assist him in obtaining employment in India again. While they would face some time to reacclimatise they would not face very significant difficulties or very serious hardship if they both decided to live in India.
>
> 56. With regard to the Article 8 claim I have taken into account the case law set out in this determination and the submissions of Ms Alton on behalf of the Appellant. I also take into account Section 117B and in particular the maintenance of effective immigration controls being in the public interest. The Appellant has an appalling immigration record. He has not established that he has received poor advice from his solicitors who made representations on his

behalf. The Appellant did in my view make a conscious effort not to attend the hearings. I accept that the Appellant does speak some English and his English would no doubt improve if he remained. I repeat that the Sponsor was well aware of the Appellant's immigration status when they started their relationship and indeed when they decided to marry. I therefore give little weight to this relationship and private life which was established at a time when the Appellant was in the United Kingdom unlawfully.

57. I accept that the Appellant's removal will interfere with his private and family life. I have balanced the various considerations that I have set out at length in this determination. I accept that the Appellant would prefer to remain in the United Kingdom with the Sponsor and his daughter. After taking all these matters into account and the submissions of Ms Alton on behalf of the Appellant, I have reached the conclusion that the Appellant's removal is both necessary and proportionate having regard to the circumstances of this particular case."

The Rule 24 Response

16. On 7 January 2016 Mr Esen Tufan of the Specialist Appeals Team settled the Rule 24 response opposing the appeal. In summary, he submitted that the Judge of the First-tier Tribunal had directed himself appropriately:

"3. In a comprehensive determination Judge Dickson considered all of the evidence submitted and made sustainable findings under the requirements of the Rules. The judge concluded at {55] that the requirements of EX.1 and EX.2 are not met and that it would be reasonable for the child to live in India with her parents. The child is only several months old. It is not clear from the grounds as to what other consideration the judge would materially have made as to the best interests of the child. It is trite law that the best interests of a child are served by being with his or her parents. In this particular caser it is clear that it is reasonable for the appellant's spouse to join him in India and that the child's best interests lie in being with them.

4. Furthermore it is clear from Section Gen of Appendix FM that a s. 55 considerations are embedded within the requirements. This section states thus with added emphasis:

Section GEN: General

Purpose

GEN.1.1. This route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British Citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection (and the applicant cannot seek leave to enter or remain in the UK as their family member under Part 11 of these rules). It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others (and in doing so also reflects the

> *relevant public interest considerations as set out in Part 5A of the Nationality, Immigration and Asylum Act 2002).* ***It also takes into account the need to safeguard and promote the welfare of children in the UK, in line with the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009.***"

The Hearing in the Upper Tribunal

17. At the hearing before me, Ms Faryl relied on the case of **Abdul [2016] UKUT 00106** in which the President of the Upper Tribunal emphasised the need for the decision maker to make clear findings on the duty arising under Section 55, balancing all relevant factors. She submitted that, as the Secretary of State's own internal guidance recognised, a British national child cannot be forced to leave the UK; and that, on a proper consideration of the child's best interests, the outcome of the proportionality assessment could have, and should have, yielded a different outcome.

18. While formally adhering to the Rule 24 response, Mr Harrison conceded that the judge had failed to engage directly with Section 55, and had not conducted a clear assessment of the child's best interests.

Reasons for Finding an Error of Law

19. I find that an error of law is made out for the reasons canvassed by the representatives on both sides. In short, the judge needed to show that he had conducted an adequate assessment of the affected child's best interests before reaching a conclusion on proportionality outside the Rules, and on the linked question of whether it was reasonable to expect a British national child to relocate with her parents to India.

The Re-Making of the Decision

20. The necessary starting point in re-making the decision is that there is no challenge by way of appeal to the judge's findings under the Rules. There are not insurmountable obstacles to married life between the appellant and the sponsor being carried on in India, and the appellant does not qualify for leave to remain on private life grounds under Rule 276ADE.

The Assessment of Best Interests

21. **EV (Philippines) v SSHD [2014] EWCA Civ 874** provides helpful guidance on the assessment of best interests and the related question of whether it is reasonable to expect a child to accompany a parent or parents to the latter's country of origin. Clarke LJ said:

> 34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.

35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hypothesi, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.

22. Lewison LJ said:

49. Second, as Christopher Clarke LJ points out, the evaluation of the best interests of children in immigration cases is problematic. In the real world, the appellant is almost always the parent who has no right to remain in the UK. The parent thus relies on the best interests of his or her children in order to piggyback on their rights. In the present case, as there is no doubt in many others, the Immigration Judge made two findings about the children's best interests:

    (a) the best interests of the children are obviously to remain with their parents; [29] and

    (b) it is in the best interests of the children that their education in the UK [is] not to be disrupted [53].

50. What, if any, assumptions are to be made about the immigration status of the parent? If one takes the facts as they are in reality, then the first of the Immigration Judge's findings about the best interests of the children point towards removal. If, on the other hand, one assumes that the parent has the right to remain, then one is assuming the answer to the very question the Tribunal has

> to decide. Or is there is a middle ground, in which one has to assess the best interests of the children without regard to the immigration status of the parent?

23. The judge went on to analyse **ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC** 4 in order to elicit an answer to this question. He reached the following conclusion:

> 58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis the facts are as they are in the real world. One parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

On the facts of **ZH** it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens. That was a long way from the facts of the case before them. No one in the family was a British citizen. None had the right to remain in the country. If the mother was removed, the father had no independent right to remain. With the parents removed, then it was entirely reasonable to expect the children to go with them:

> Although it is, of course a question of fact for the Tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world.

Jackson LJ agreed with both judgments.

The relationship between s117B(6) and the Rules

24. In **AM (S117B) Malawi [2015] UKUT 260 (IAC)** the Tribunal held that the duty of the First-tier Tribunal was quite clear. The First-tier Tribunal was required to have regard to considerations listed in Section 117B. It had no discretion to leave any of those considerations out of account, if it was a consideration that was raised on the evidence before it. The Tribunal continued in paragraph [13]:

> There is also in our judgment no requirement that the FtT should pose and answer the same question more than once, simply as a matter of form. Thus since both paragraph 276ADE(1)(iv) of the Immigration Rules, and S117B(6), both raise the same question in relation to a particular child, of whether or not it would be reasonable to expect that child to leave the UK: it is a question that need only be answered once.

The Article 8 Claim outside the Rules

22. As the question only needs to be answered once, I find it convenient to answer it in the context of an Article 8 Claim outside the Rules.

23. I answer questions 1 and 2 of the **Razgar** test in favour of the appellant, as the effect of proposed interference is to break up family life established in the United Kingdom (albeit that there are not insurmountable obstacles to such family life being reconstituted in India).

24. I answer questions 3 and 4 of the **Razgar** test in favour of the respondent.

25. On the crucial question of proportionality, the best interests of the child affected by the refusal decision are a primary consideration in the proportionality assessment. The child is a British national, and she is therefore a qualifying child for the purposes of Section 117B(6) of the 2002 Act.

26. The child's mother faces a reasonable choice. She can either choose to relocate to India with the child to enjoy family life with the appellant there, or she can remain here with the child for the time being with a view to supporting an application for entry clearance by the appellant once she has so arranged her affairs so as to earn a sufficient income as to enable the appellant to meet the financial requirements of Appendix FM, and the associated evidential requirements of Appendix FM-SE.

27. If the mother chooses the first option, this will be adverse to the child's best interests in that, for the foreseeable future, the child will be deprived of the benefits of British citizenship, and she will also be deprived of regular and direct contact with family members on her mother's side of the family. However, given her very young age, by far the most important consideration in the best interests assessment is the desirability of her remaining with both her parents wherever they happen to be, and there is no reason to suppose (in the light of the First-tier Tribunal Judge's findings of fact) that her welfare or wellbeing would be to any degree imperilled by her living with her parents in India as opposed to living with her parents in the UK. There are also counterbalancing advantages in her going with her parents to India in that the child will have the opportunity to enjoy regular and direct contact in India with family members on her father's side of the family, and she will be immersed in the social and cultural milieu from which her father springs. She will also be able to enjoy the benefits of being a citizen of India as well as being a citizen of the United Kingdom.

28. Conversely, if the mother chooses to stay here with a view to supporting an application for entry clearance by the father in due course, this will be adverse to the child's best interests in that for the foreseeable future she will not have day-to-day contact with her father. But there is no reason to suppose that as a result the child will have unmet needs, or that the child will not be adequately cared for by a devoted mother who can draw upon assistance from other members of the family in providing childcare when she is at work.

29. My conclusion is that it is in the best interests of the child to accompany her father and mother to India, and I consider it is reasonable to expect the mother to act in accordance with her child's best interests. She knew when she entered into a relationship with the appellant, and particularly when she married him, that he was

present in the country illegally and that their ability to enjoy family life with a child in the United Kingdom on a permanent basis was highly uncertain, given his illegal status. But if the child's mother chooses to remain here to bring up the child as a single parent for the time being, this will not be gravely inimical to the child's best interests.

30. Turning to wider proportionality considerations, I must have regard to Section 117B of the 2002 Act. The appellant is not fluent in English, and the appellant is not financially independent in that his wife's income falls far short of the income level required by Appendix FM. As found by the judge, the appellant has an appalling immigration history.

31. Accordingly, I find that the decision strikes a fair balance between, on the hand, the rights and interests of the appellant, the sponsor and their child, and, on the other hand, the wider interests of society. It is proportionate to the legitimate end sought to be achieved, namely the maintenance of firm and effective immigration controls.

The conclusion on the question of reasonableness

32. By the same token, I find that it is reasonable to expect the child to leave the UK pursuant to Section 117B(6). For the same reason, the appellant does not qualify for leave to remain under EX.1(a)(ii).

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, accordingly the decision is set aside and the following decision is substituted: the appellant's appeal against removal is dismissed under the Rules and also outside the Rules under Article 8 ECHR.

I make no anonymity direction.

Signed Date

Deputy Upper Tribunal Judge Monson