Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40474/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 3rd May 2016

Decision Promulgated
On: 26th May 2016

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

DMP
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr D. Ayodele, Goodfellow Solicitors
For the Respondent: Mr T. Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of India born on the 8th February 1974.

2. In a decision promulgated on the 1st June 2015 the First-tier Tribunal (Judge Nicholls) dismissed his appeal, on human rights grounds, against a decision to remove him from the United Kingdom. On the 20th August 2015 permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge PJM Hollingworth. The matter came before the Upper Tribunal on the 7th December 2015 and in a decision dated the same day I set the determination of the First-tier

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Tribunal aside. The 'error of law' decision is attached. In summary the errors of law were identified as follows:

i) The Appellant's case rested on the presence in the UK of his two children, in particular that of his son who was, by the date of the applications for leave to remain, a "qualifying child", that is to say a child who has spent seven years or more in the United Kingdom. That child had earlier succeeded in an appeal before the First-tier Tribunal and his case was being reconsidered by the Respondent. It was common ground that the outcome of that review was capable of being significant (if not determinative) for the Appellant's case. The First-tier Tribunal refused to adjourn the appeal. I found that to be, in the circumstances, procedurally unfair;

ii) The First-tier Tribunal had misdirected itself to the proper test. In assessing whether it was 'reasonable' for the Appellant's child to now leave the UK the Tribunal had treated that question as if it were a proportionality balancing exercise conducted 'outside of the rules'. The question of 'reasonableness' in paragraphs 276ADE(1)(i), EX.1 and section 117B(6) of the Nationality, Immigration and Asylum Act 2002 is <u>not</u> the same as whether removal is 'proportionate'.

3. The re-making of the decision was delayed pending promulgation of the decision in <u>PD and Others</u> (a Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 108 (IAC). This reported decision of a Presidential panel establishes the following principles to apply:

- In cases of conjoined family human rights claims the proper approach is to first consider the position of each individual under the Immigration Rules, and then move on to look at Article 8 'outside of the Rules'
- That does not mean that factors relevant to the family as a whole must be excluded from individual assessments
- The fact that a child's parents are without leave will be *a* relevant consideration to whether or not it is reasonable that he leave the UK; it cannot however be determinative of that question
- 'Reasonable' does not mean 'proportionate', or 'exceptional': it is self-evidently a less exacting and demanding threshold
- The first point of call in addressing reasonableness will be that made in accordance with s55 of the Borders, Citizenship and Immigration Act 2009 – the 'best interests' question
- The next material consideration is the Secretary of State's own policy, as expressed in the *Immigration Directorates'*

Instructions[1] and in particular the statement that "the longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK and strong reasons will be required in order to refuse a case with continuous UK residence of more than seven years."

- If it is ‘unreasonable’ for the child to leave the United Kingdom the position of his parents must be considered outside of the rules, assessing proportionality in light of s117B of the 2002 Act, and in particular s117B(6)
- Applying Treebhawon and others (section 117B(6)) [2015] UKUT 674 (IAC), a finding that it would not be reasonable for the child to leave would mean that it would not be in the public interest for his parents to be removed

4. By the time that the matter came back before me there had been two significant developments in the factual circumstances of the family. The eldest child had now become a British citizen: his passport was produced at the hearing. Due to the passage of time the second child of the family had, having been born in the UK in June 2009, accrued six years and eleven months’ residence.

My Findings

5. The Appellant’s children are not parties to this appeal. At the error of law hearing in December 2015 the Respondent had accepted (that day represented by SPO Ms Savage) that the existence of the children was nevertheless a material factor in the Appellant’s case. This must be so, by operation of s117B, and indeed the guidance in PD.

6. I begin by considering the best interests of the Appellant’s eldest child. That child is now a British national, and a citizen of the European Union. He was born in the UK and has never lived anywhere else. In common with the child in PD, this is a young man who attends school in the UK, who has established friendships here and who has developed an entrenched private life of great significance to his personal development. Mr Wilding was quite entitled to point to the paucity of evidence of this: there were for instance no letters from school friends, or sports awards, nor indeed certificates demonstrating academic excellence of the type produced by the child in PD. It is however uncontested fact that this child has spent his entire life in the UK, and for the reasons clearly expressed in the IDI (and indeed the numerous ministerial statements that preceded it) that in itself is a factor of great weight. Absent evidence that this child has been secluded from his peers it can be assumed that his private life could not be qualitatively distinguished from that of any other 10 year-old living in Surrey. It follows that his ties with his country of ethnic origin, India, are minimal: his parents are nationals; his sister is

[1] "Family Life (as a partner or parent) and Private Life: 10 Year Routes"

entitled to citizenship; that is his cultural heritage; he has never been there and is now a British, not Indian, national. I do not discount the possibility that he would be able to gain entry to India, and I find that supported by his parents he would be able to adjust to life in that country. He would be able to attend a different school and no doubt in time make friends. Having weighed all of those factors I am satisfied that his best interests lie in maintaining the status quo in the United Kingdom: the stability of his education, friendships and home-life point towards it being in his best interests to remain here.

7. I now turn to consider the Respondent's guidance. At 11.2.3 the IDI[2] asks the question "would it be unreasonable to expect a British Citizen child to leave the UK?", to which the answer is given:

> "Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano".

8. There is no suggestion that this family have the ability or entitlement to move anywhere else within the EU. I find that a decision to remove his parents to India would mean that this British child would have to move with them.

9. Taking into account my finding that it would be in this child's best interests to remain in the UK, and the Respondent's guidance, I find that it would not be 'reasonable' for the Appellant's child to leave the UK.

10. Now I must apply those findings to the Appellant's circumstances. Mr Ayodele did nothing more to prepare for the hearing than turn up and mention Treebhowan. He relied on the President's interpretation of section 117B(6) to the effect that it provides a 'trump' card. If a parent of a qualifying child can show that it would not be reasonable for the child to leave the UK, there is no public interest in the parent's removal, no matter how the scales were otherwise weighted in favour of that outcome. Ambiguity there is none. If Mr Ayodele, and the President, are correct, the Appellant must win his appeal.

11. Mr Wilding strongly objected to the application of Treebhowan. He pointed out that the Secretary of State has an entirely different interpretation of s117B of the 2002 Act but her case cannot at present be considered by the higher courts because Treebhowan remains an un-appealable decision, reported as it was as 'error of law' stage. The Secretary of State is therefore stuck with a decision that she does not like. With that in mind I have considered the matter in

[2] *supra*

the alternative, in light of Mr Wildings submissions. He pointed out that the adults in this family took a calculated decision to overstay their visas ten years ago. The First-tier Tribunal heard and rejected as untrue the reasons put forward for that. It found there to be "obviously deliberate breaches" of the Immigration Rules. The parents have not demonstrated that they are able to speak English, or that they are financially independent. Their statements are silent on how they might have been surviving since their arrival in the United Kingdom and it can be assumed that one or both parents is working illegally. The relationship between the Appellant and his wife was established when both had precarious immigration status. I have considered all of those matters, and the First-tier Tribunal's finding, with which I agree, that it would be possible for the family to readjust to live in India, albeit with some difficulties. I have weighed all of those factors in the balance, attaching great weight to the public interest in maintaining immigration control. However in this case I find that the best interests of the child, taken with the clear statement in the Respondent's guidance in respect of British children, dictates that removal of this family would be a disproportionate interference with their Article 8 private lives, established as they are in the UK.

12. The decision of the First-tier Tribunal is set aside.

13. I remake the decision in the appeal by allowing it on human rights (Article 8) grounds.

14. The Appellant is an overstayer and on the facts pertaining to his case, has no right to anonymity. His identification would however lead to the identification of his minor children so for that reason I am prepared to make a direction for anonymity in the following terms:

> "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 his 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".

Upper Tribunal Judge Bruce
22nd May 2016

APPENDIX A: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40474/2014

THE IMMIGRATION ACTS

Heard at: Field House **Decision Promulgated**
On: 7th December 2015

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Before

UPPER TRIBUNAL JUDGE BRUCE

Between

DMP
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Ayodele. Goodfellow Solicitors
For the Respondent: Ms Savage , Senior Home Office Presenting Officer

DECISION ON 'ERROR OF LAW'

1. The Appellant is a national of India born on the [ ] 1974. He appeals with permission[3] the decision of the First-tier Tribunal (Judge Nicholls)[4] to dismiss his appeal against a decision to remove him from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999[5]. That decision followed the rejection of the Appellant's application for leave to remain on

[3] Permission granted on the 20th August 2015 by First-tier Tribunal Judge PJM Hollingworth
[4] Determination promulgated 1st June 2015
[5] Decision dated 22nd January 2014

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Article 8 grounds.

2. The Appellant came to the United Kingdom in 2001 as a visitor. He stayed with an elderly aunt in London. He overstayed. In 2005 he was introduced by relatives to [SP]. She was also an Indian national who had overstayed her visit visa. They were married in Ganesh Temple in Thornton Heath on the [ ] 2005. They have had two children, a boy born on the [ ] 2005 and a girl born on the [ ] 2009. The Appellant avers that his father in India did not approve of the marriage to [SP] and disowned him. This rift with the family caused the Appellant, his wife and children to be thrown out of his aunt's house. The Appellant further stated that he had not wanted to return to India because he had substantial debts there and no means of paying them. He has been supporting his family in the UK by working illegally.

3. On the 3rd December 2012 the whole family, mother, father and two children made applications for leave to remain on Article 8 grounds: these were based on the adults' long residence in the UK, and the fact that his children had been born and grown up here. They did not know anything of life in India and he wanted them to stay in the United Kingdom and pursue their educations. On the 12th December 2012 a separate application was made, in similar terms, for the Appellant's son.

4. In response to the Appellant's application the Respondent considered the application under "Appendix FM". Since Ms Patel was not lawfully settled in the UK the Appellant could not succeed under the 'partner' route. His children were not British and nor had they, at the date of application, lived in the UK for seven years. Furthermore it would be reasonable to expect them to return to India. The Appellant had not lived in the UK long enough, and was too old, to qualify under any of the alternative 'long residence' provisions in 276ADE. He had lived in India until he was 27 years old and could not demonstrate that there were significant obstacles to his reintegration there. The Respondent could find no exceptional circumstances to warrant a grant of leave outside of the Rules.

5. In a separate decision, the Respondent also refused the application made on behalf of the Appellant's son. An appeal was lodged against that decision with the First-tier Tribunal, which inexplicably refused a request for the appeals of the whole family to be linked together. So it was that the son's appeal was heard in isolation on the 9th March 2015. The First-tier Tribunal allowed his appeal to the limited extent that the matter was purportedly 'remitted' to the Secretary of State so that consideration could be given to s55 of the Borders, Citizenship and Immigration Act 2009.

6. Prior to the Appellant’s appeal hearing his representative applied in writing for the matter to be adjourned pending the Respondent’s decision in the review of his son’s case. That application was refused. The matter was listed, the appeal heard and the negative decision promulgated on the 1st June 2015.

Error of Law

7. I am satisfied that this determination must be set aside for the following reasons.

8. First, both determination and grounds of appeal appear to have proceeded on the basis that paragraph EX.1 of Appendix FM was somehow applicable to the Appellant. The determination devotes a full two pages to considering whether it was ‘reasonable’ that the Appellant’s child leaves the United Kingdom in this context, and the grounds of appeal challenge the factual underpinnings of that analysis. This entire exercise was a waste of time since the Respondent had already conclusively demonstrated, in her refusal letter of 22nd January 2014, that EX.1 had no application to the Appellant. He had neither managed to satisfy the eligibility criteria as a ‘partner’ nor ‘parent’. EX.1 is not a freestanding provision. It can only be considered if the applicant has shown himself ‘eligible’ under Appendix FM: see Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 63 (IAC). This had not been done and the only possible ground of appeal open to *this* Appellant was Article 8 outside of the Rules.

9. The assessment of Article 8 outside of the Rules called for a holistic assessment of the Appellant’s circumstances, and following Beoku-Betts [2008] UKHL 39, that included an analysis of the impact of removal on his family members. Relevant to that consideration then, was the position of the Appellant’s son. If the Appellant’s son could show that it was not reasonable to expect him to leave the United Kingdom now, that would be a decisive consideration in the Appellant’s own case: see section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

10. A central matter to be decided was whether the Appellant’s son met the requirements of the Rules. That was the very matter that the Respondent was actively considering at the date of the hearing. Mr Ayodele argues that in these circumstances the proper approach should have been to wait until the outcome of the Respondent’s review was known. I agree that it was arguably procedurally unfair for the First-tier Tribunal to supplant its own assessment of a matter which another Tribunal had specifically directed the Respondent to decide, a matter which went to the heart of the Appellant’s appeal. I am further satisfied that in so

doing the First-tier Tribunal made a discrete error of law in that it appears to have conflated the test of 'reasonableness' with 'proportionality' in the sense that it would be analysed outside of the Rules; see for instance paragraph 23 where the factors in Part 5 of the Nationality Immigration and Asylum Act 2002 are weighed in the balance.

Decisions

11. The determination of the First-tier Tribunal contains an error of law and it is set aside.

12. The matter will be re-made before me at a later date. The re-making is adjourned pending forthcoming Presidential guidance on paragraph 117B(6) and 'reasonable' within the context of 276ADE(1)(iv).

13. I was not asked to make any direction for anonymity, and on the facts I see no reason to do so. If either party would like such a direction, an application should be made at the remaking.

Upper Tribunal Judge Bruce
7th December 2015