



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

Appeal Number: HU/04509/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 4 July 2017**

**Decision & Reasons Promulgated
On 11 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MS R R
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Bramble, Home Office Presenting Officer
For the Respondent: Mr Shah, Taj Solicitors

DECISION AND REASONS

1. For convenience, I refer to the parties as they were in the First-tier Tribunal with the Secretary of State as the respondent.
2. The appellant is a citizen of Bangladesh born on 25 December 1967. She appealed against the decision of the respondent on 6 August 2015 to refuse her leave to remain on human rights grounds. Her appeal was allowed on human rights grounds by Judge of the First-tier Tribunal McIntosh (“the FTTJ”) in a decision promulgated on 23 November 2016.
3. The respondent sought permission to appeal. Judge of the First-tier Tribunal Robertson granted permission in the following terms:

“... The submission that the Judge did not factor the Appellant’s lack of credibility into the proportionality assessment lacks arguable merit because he clearly did at [32] – [33]. It is, however, arguable as submitted in the grounds, that although the Judge referred to the provisions of s117A-B [sic] of the Nationality, Immigration and Asylum Act, did not consider its provisions when assessing proportionality because there is no reference within the assessment to the ability of the Appellant to speak English or to whether financial independence was established **Dube (ss.117A-117D) [2015] UKUT 90 (IAC)**). He was aware that she did not speak English and that she was not working but did not state what weight, if any, he attached to these factors in the proportionality assessment. Technically, it is also arguable that the Appellant’s son, ..., should have been treated as a vulnerable adult rather than a child when his interests were being assessed, although it is unclear what, if any, difference this would have made to the outcome of the appeal.”

4. Thus the appeal came before me.

Submissions

5. Mr Bramble, for the respondent, submitted the FTTJ had made material misdirections of law. Having found the appellant’s case not to be credible, the FTTJ had failed to take that finding into account in her assessment of proportionality. This was compounded by the failure to address the factors in s117B, e.g. the appellant’s use of an interpreter at the hearing and the absence of any finding the appellant was financially independent. Whilst these were not a positive influence for the appellant, here they had a “negative pull on the case”. No heed had been paid to the oral evidence that the appellant had extended family in the UK or the ability of a family member to supplement care of the appellant’s son who was disabled. Mr Bramble submitted that the FTTJ had ignored the submissions of the presenting officer, as summarised at paragraphs 26 and 27, particularly the appellant’s poor immigration history, a public interest factor. Mr Bramble conceded that the FTTJ’s erroneous reference to s55 of the Borders, Citizenship and Immigration Act 2009 and the duty to assess the best interests of the child was a neutral point.
6. For the appellant, Mr Shah noted the FTTJ had referred at paragraph 27 to the public interest factors in s117B. The reference to s55 was not a material matter affecting the outcome of the appeal. The FTTJ had made favourable findings with regard to the appellant’s two sons and the circumstances in which she had come to the UK. It was accepted there were credibility issues with regard to her evidence but the FTTJ had not allowed the appeal under paragraph 27(6)(vi). The FTTJ considered that the appellant’s circumstances as a full-time carer for her eldest son amounted to exceptional circumstances requiring consideration outside the Rules. She identified a family life with her two sons. Even if the appellant did not speak English, this was not a negative issue but a factor to be taken into account. As regards her financial circumstances, these were set out at paragraph 20. Mr Shah conceded that the FTTJ should have “expanded on the reasoning section”. This was not, he submitted, a decision where the FTTJ had totally ignored the s117B provisions. She was, he said, aware of them “in the back of her mind” when looking at proportionality. He accepted that the appellant was not working and that she would not be able to work because she was a full-time carer for her autistic elder son. If she did work, Social Services would have to take over care. This was relevant to the application of s117B. He submitted that the deficiencies in the reasoning were not material.
7. Both Mr Bramble and Mr Shah agreed that there was no challenge from either side with regard to the decision to dismiss the appeal under the Immigration Rules, including Appendix

FM and paragraph 27ADE. The sole issue was the quality of the reasoning, outside the Rules, as regards the proportionality of the interference with appellant's protected Article 8 rights.

Discussion

8. There is no challenge by either party to the decision of the FTTJ to dismiss the appeal under the Immigration Rules. Nor is there any challenge as regards Article 3. The sole issue for the respondent is the FTTJ's decision pursuant to the Article 8 jurisprudence, outside the Immigration Rules.
9. It follows the FTTJ was obliged to take into account the public interest factors in s117A-117D of the 2002 Act. The FTTJ refers to "Section 117(b) of the Immigration Act 2014" in her summary of the respondent's case at paragraph 27. It finds it likely that the presenting officer referred to s117B of the 2002 Act since the FTTJ goes on to refer to some of the public interest factors in that Act in referring to the presenting officer's submissions. I do not accept Mr Shah's submission that, without more, the mere reference to s117(b) [sic] and some of the public interest factors can be taken to mean the FTTJ took them into account in reaching her decision. Paragraph 27 is no more than a summary of the respondent's case in the First-tier Tribunal.
10. The parties are in agreement that the FTTJ made no specific reference to the public interest factors in s117B in that section of her decision in which she made her findings of credibility and fact (paragraphs 31 – 39). There is, for example, no reference to the ability or otherwise of the appellant to speak English, despite the appellant having spoken through an interpreter at the hearing. It is also the case that the FTTJ made no finding as to the financial circumstances of the appellant. I was referred by Mr Shah to paragraph 20 but this merely sets out the appellant's claim as regards her family supporting her in the UK (as is clear from the heading to that section of the decision). In any event and crucially, at paragraph 33 the FTTJ states "I did not find any aspect of the appellant's case to be credible". By inference, the FTTJ did not accept the appellant's evidence that her family supported her in the UK.
11. In the absence of any reference either specifically or by inference to the public interest factors in s117B I find that the FTTJ misdirected herself in law: s117A required her to take those factors into account in her decision-making.
12. I turn to the issue of whether that omission is material to the outcome. The FTTJ found the appellant was not a credible witness. In the absence of any specific findings on the issue, it is not clear to what extent, if at all, the FTTJ accepted the appellant's evidence as to her financial circumstances. It cannot be inferred from the findings that the FTTJ accepted the appellant's claim that she was supported by family members in the UK. Such a finding is required in order to consider the public interest question of whether the appellant was financially independent pursuant to s117B(3).
13. As has been said earlier, the appellant gave oral evidence through an interpreter in Bengali. It can be inferred she does not speak English. This is a public interest factor yet the FTTJ has not taken it into account in her assessment of proportionality.
14. The adverse credibility findings are also relevant to the public interest in the maintenance of effective immigration control, given the existence of a false immigration stamp in the appellant's passport: the FTTJ did not accept the appellant's explanation for it. The use of deception in such a context is of relevance to the public interest in the maintenance of

effective immigration control (s117B(1)) yet there is no indication from the decision that the FTTJ considered this in that context.

15. For reasons which are unexplained in the decision, the FTTJ has relied on s55 to identify the best interests of the appellant's disabled son. Irrespective of whether that is an error of law (and it would not be material in any event), the FTTJ has not unreasonably identified that it is in the son's best interests for the appellant to remain in the UK to care for him full-time, as she does now. The error arises in her treating those interests as overriding, apparently to the exclusion of all else. In the absence of any consideration of the public interest factors, she has treated his interests as a trump card. The FTTJ has not carried out a holistic examination of the evidence, balancing the degree of interference with protected rights as against the public interest. Her assessment of proportionality is, as a result, flawed and amounts to an error of law which is material to the outcome of the appeal. Had she carried out an appropriate analysis of the evidence and made full findings of fact the outcome of the appeal might have been different.
16. The finding that the appellant does not meet the provisions of Appendix FM or Paragraph 276ADE is not challenged by either party and is therefore preserved.
17. The FTTJ's assessment of proportionality is flawed and must be set aside. The findings of fact are incomplete and, given the adverse credibility findings, it is not possible to extrapolate sufficient findings for the decision outside the Rules to be remade. I was told that fresh evidence would be submitted and, given that the appellant's son is disabled, I accept that updated evidence may be required. It is in the interests of fairness and justice that the appellant should be given the opportunity with her advisers to consider whether that is the case.
18. In the circumstances it is appropriate for a fresh hearing to take place in the First-tier Tribunal on the sole issue of whether or not the decision of the respondent is incompatible with the UK's obligations under Article 8, notwithstanding the appellant does not meet the criteria in the Immigration Rules with regard to her family and private life.
19. No anonymity direction was made in the First-tier Tribunal but, given the references to the disability of the appellant's eldest son, such a direction is appropriate.

Decision

20. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision to allow the appeal on human rights grounds is set aside.
21. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunal Courts and Enforcement Act 2007 and Practice Statement 7.2(v), before any judge aside from FTTJ McIntosh. The sole issue to be decided is whether the decision of the Secretary of State to refuse leave to remain is incompatible with the UK's obligations under Article 8.

A M Black

Deputy Upper Tribunal Judge

Dated: 10 July 2017

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

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 their 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.

A M Black

Deputy Upper Tribunal Judge

Dated: 10 July 2017