Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21037/2015

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision Promulgated**
On 20 June 2017	**On 21 June 2017**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SR
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Mr Ahmed, Counsel
For the respondent: Mr Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant.

1. I have made an anonymity order because this decision refers to the circumstances of the appellant's minor children.

Background

2. The appellant is a citizen of Pakistan. He entered the UK on 8 February 2011 as a student. His leave was extended to 27 October 2014. The appellant married a dual British / Pakistani citizen when he had leave to remain as a student in an Islamic ceremony on 18 February 2012. This marriage was registered on 5 November 2013. They have two British citizen children together and the appellant's wife is pregnant with their third child.

3. When applying for further leave as a student the appellant relied upon an English language test. In a decision dated 19 May 2015 the SSHD refused the appellant's application for leave, on the basis of his family life. The appellant was unable to meet the suitability criteria because the SSHD concluded that he had employed deception in relying upon an invalid English test.

4. In a succinct decision dated 25 April 2016, the First-tier Tribunal made a clear finding of fact that the appellant failed to provide an innocent explanation for the invalid English test and found that the SSHD had displaced the burden upon her that the appellant had used deception. The First-tier Tribunal went on to dismiss the appeal under the Immigration Rules and on human rights grounds.

5. In a decision dated 31 March 2017 Deputy Upper Tribunal Judge Chapman did not find the grounds addressing the deception finding to be arguable. She however considered it to be arguable applying the 'Robinson obvious' principle derived from R v SSHD ex p Robinson [1997] EWCA Civ 3090 that the First-tier Tribunal materially erred in law in its consideration of Article 8 because no consideration was given to the best interests of the children or section 117B of the Nationality, Immigration and Asylum Act 2002.

Hearing

6. At the beginning of the hearing Mr Harrison conceded that the First-tier Tribunal committed a material error of law in failing to address section 117B of the 2002 Act, in particular the reasonableness of expecting the children to reside in Pakistan – see section 117B(6). Mr Harrison was clearly correct to make this concession. Although the First-tier Tribunal touches upon the children and Article 8 at 3.8 of the decision, there is a complete failure to apply the factual findings to section 117B. Both representatives agreed that I could and should remake the Article 8 decision, but the First-tier Tribunal's factual findings are preserved.

7. Mr Ahmed invited me to adjourn the hearing to enable the appellant's solicitors to gather further evidence relevant to the best interests of

the children and the reasonableness question. I pointed out the presumption set out at (4) of the directions dated 3 May 2017 – in the event that the First-tier Tribunal decision is set aside as erroneous in law, the decision will be remade at the same hearing. This will be based upon the evidence before the First-tier Tribunal and any fresh evidence submitted in accordance with direction (5). The appellant's solicitors clearly anticipated that the matter would proceed to the giving of evidence and requested an Urdu interpreter for the hearing before me, who was duly provided. Mr Ahmed did not rely upon any specific matter, medical, educational or otherwise that necessitated obtaining further evidence. Given the children's young ages and apparent good health, this is unsurprising. This is a case in which all the relevant evidence could be set out in the form of witness statements. I refused the application to adjourn but permitted Mr Ahmed as much time as he needed to take witness statements from the appellant and his wife. I stood the matter down to enable Mr Ahmed to do this.

8. When the hearing recommenced Mr Ahmed called the appellant. He relied upon a joint witness statement signed by himself and his wife, prepared that morning with the assistance of Mr Ahmed. The appellant was cross-examined briefly by Mr Harrison. It was agreed that it was unnecessary to call his wife because Mr Harrison did not have any additional questions for her.

9. Mr Harrison invited me to dismiss the appeal for the reasons set out in the SSHD's decision letter

10. Mr Ahmed accepted that the appellant does not meet the requirements of the Immigration Rules. He also accepted that the only issue before me in any event is Article 8 'outside of the Rules'. Mr Ahmed contended that the best interests of the children are a very weighty factor, and that they outweigh the appellant's use of deception in the past. He invited me to find that it would be unreasonable to expect the children to leave the UK to reside in Pakistan.

11. After hearing submissions from both representatives I reserved my decision, which I now provide in writing.

Re-making the decision under Article 8

Best interests

12. I begin the Article 8 assessment by evaluating the primary consideration of the interests of the appellant's British citizen children. I accept that citizenship is a weighty factor. I also accept that they are likely to be better educated in the UK. On the other

hand, the appellant told me that the family are entirely reliant upon his father to financially support them. He said they do not claim benefits and neither parent is currently employed. I accept Mr Harrison's submission that given these circumstances the family may fare better economically in Pakistan, where the cost of living is such that whatever is provided by the appellant's father will go much further. I note that the children are very young, having been born in 2012 and 2015. The elder child is not due to start school until September 2017. The family function well as a self-contained family unit.

13. On balance, I conclude that the best interests of the two children would be best served by remaining in the UK, but only by a narrow margin. I find however that they are sufficiently young to be able to adapt to life in Pakistan, with the support of their parents, both of whom have substantial knowledge of and links to Pakistan.

Section 117B(6)

14. Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 states as follows:

> "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."

15. I accept that (a) is met. It is agreed that the real question for me is the reasonableness of expecting the children to leave the UK in accordance with (b). I must take all the relevant factors into account when assessing reasonableness and not just the impact upon the children – see MA Pakistan v SSHD [2016] EWCA Civ 705. Relevant countervailing factors are the appellant's immigration history and use of deception.

16. When considering reasonableness, it is also relevant to take into account the SSHD's policy. Mr Ahmed did not pursue any submissions regarding this but the policy relevant to the reasonableness issue has been addressed in MA (Pakistan). Paragraph 11.2.3. of the IDI on Family Migration provides the SSHD's decision makers with guidance on cases involving British children. The August 2015 version states that, 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. The decision would not force these children to leave the EU because they

can remain in the UK with their British citizen mother, for the reasons set out in detail in VM Jamaica v SSHD [2017] EWCA Civ 255.

17. However, the policy also states that:

> "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 be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer".

18. The SSHD's decision to refuse the application would require the appellant ('a parent') to return to a country outside of the EU, Pakistan. As such, the SSHD's own policy states that the case must be assessed on the basis that it would be unreasonable to expect the British citizen children to leave the EU with that parent. In such cases, the policy states it will usually be appropriate to grant leave, provided that there is evidence of a genuine and subsisting parental relationship. The policy then states:

> "It may be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative carer in the UK or in the EU. The circumstances envisaged could cover amongst others:
> Criminality…
> A very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules"

19. The policy clearly envisages that countervailing circumstances may mean that it is appropriate to refuse leave. The list provided is not an exhaustive one. The appellant has been found to have used deception. He did not admit to this when it was first alleged and took part in a Tribunal hearing maintaining an innocent explanation which was ultimately rejected. In my judgment this is a significant countervailing circumstance.

20. When the appellant's use of deception is considered in the round together with all the relevant circumstances including the best interests of the children and their citizenship, I am satisfied that it would be reasonable to expect them to leave the UK to be with their father in Pakistan. Their mother is a dual national. Although she has had difficulties with her own family as a result of a divorce, with the support of the appellant's family in Pakistan, this family will be able to establish themselves adequately in Pakistan.

21. In all the circumstances, it would be reasonable to expect the children to leave the UK and section 117B(6)(b) is not met.

Private life

22. The appellant and his family members undoubtedly have private lives in the UK. However, Mr Ahmed did not place reliance upon any community, employment, family or religious links between the them and the UK.

Balancing exercise

23. Proportionality is the "public interest question" within the meaning of Part 5A of the 2002 Act. By section 117A(2) thereof I am obliged to have regard to the considerations listed in section 117B. I consider that section 117B applies to this appeal in the following way:

> (a) The public interest in the maintenance of effective immigration controls is clearly engaged. Mr Ahmed accepted that the appellant has been unable to meet the requirements of the Immigration Rules in order to remain as a spouse. This is based upon his past use of deception as well as his inability to meet the financial requirements. I also regard it as a significant factor militating against the appellant that he has been found to have used deception.
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> (b) The appellant's solicitors requested an interpreter at the hearing before me but I am satisfied that the appellant could speak in basic English and as such I do not find an infringement of the "English speaking" public interest.
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> (c) The economic interest is engaged. The appellant and his wife are not employed. There was very little evidence to explain why the appellant's wife is no longer employed – she is only two months pregnant. Reliance upon the appellant's father is unlikely to be sustainable.
>
> (d) The private life established by the appellant during the entirety of his time in the UK qualifies for the attribution of little weight only.

24. In my judgment, when all of the above matters are considered in the round, the appellant's removal does not constitute a disproportionate breach of Article 8. Although the appellant's wife "*does not wish*" to return to Pakistan, she has not said that she will not do so. This is not a case in which the appellant's wife and children will be required to leave the UK. She can choose to remain in the UK with her children or return to Pakistan with her husband and children. The choice is hers. In all the circumstances, it would be reasonable to expect the children to live in Pakistan with both their parents.

25. Having applied the facts to section 117B of the 2002 Act and considered the general principles applicable in a case raising family and private life under Article 8 of the ECHR, I find that the appellant's removal from the UK would not constitute a disproportionate breach of Article 8.

Decision

26. The decision of the First-tier Tribunal contains an error of law and is set aside.

27. I remake the decision by dismissing the appellant's appeal pursuant to Article 8 of the ECHR.

Signed: Ms Melanie Plimmer Dated: 21 June 2017
Judge of the Upper Tribunal