Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33493/2015

THE IMMIGRATION ACTS

Heard at Stoke **Decision & Reasons Promulgated**

On 27 November 2017 **On 21 December 2017**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MUHAMMAD [G]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms V Brankovic of Counsel instructed by Bhavsar Patel Solicitors
For the Respondent: Mr Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 1st June 1985 and is a citizen of Pakistan. On 24th February 2015 he submitted an application for leave to remain in the United Kingdom on the basis of his family and private life. On 13th October 2015 the respondent, in a decision, refused to give such leave. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Goya on 9th December 2016. In a determination promulgated on 26th January 2017 that appeal was dismissed.

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2. The appellant sought to appeal against that decision and permission to do so to the Upper Tribunal was granted on 20th September 2017 in these terms:-

 > "It is arguable that the First-tier Tribunal erred in law in failing to address whether the appellant's stepchild is a qualifying child (it is asserted he is a British citizen) and if so whether Section 117B(6) of the NIAA 2002 applies.
 >
 > It is arguable that the approach to Article 8 is confused and fails to take into account Section 117B(6)."

3. In those circumstances the matter comes before me to determine whether or not the decision was in error.

4. The appellant entered the United Kingdom on 14th October 2010 with entry clearance as a Tier 4 Student valid on 8th September 2010 until 19th January 2012. On 8th January 2013 he was refused further leave to remain as a student and has been an overstayer in the United Kingdom since that time.

5. In the decision of 13th October 2015 it is said that the appellant exercised deception in undertaking a TOEIC test that had been taken on 18th October 2011 in support of an application of 19th January 2012.

6. In considering his application for private and family life that deception is very much born in mind, as is his overstaying in the United Kingdom. The Respondent considered that he did not meet the Immigration Rules nor that there were any exceptional circumstances in his case to render removal disproportionate. It was noted that at the time he was the biological father of a British child aged 1 month and had a parental relationship with another British child namely his stepdaughter who was then age 7. It was considered that the conduct outweighed his right to private and family life.

7. At the hearing before Judge Goya the allegation of obtaining the TOEIC certificate by deception was analysed in considerable detail. The appellant contended that he had indeed taken the test and was found credible by the Judge as to that contention. Thus it was that the accusation of deception fell away.

8. In terms of the appellant's private and family life that was noted by the Judge in the detailed determination. The appellant's wife was a British citizen born on 18th January 1982 and they entered into an Islamic marriage on 13th January 2014.

9. The appellant's wife has a daughter from a previous relationship named [Al]. That child has not known her natural father. The two children are born by the relationship namely [H] born [ ] 2015 and [As] born [ ] 2016.

10. Being an overstayer posed a significant difficulty for the appellant in showing that he met the suitability requirements under the Immigration Rules. The Judge concluded that EX.1. did not fall to benefit the appellant and that in any event even on applying paragraph 276ADE there were no very significant obstacles to integration into Pakistan. The Judge considered the public interest at paragraphs 80 and 81 of the determination and found overall it is proportionate for the appellant to return, the best interests of the children being viewed through the lens of **EV (Philippines) [2014] EWCA Civ 874**.

11. Although the Judge cited Section 117B(1), (2) and (6) little reference was made to the fact of the children being British citizens and are qualified children for the purposes of 117B(6). It provides:-

    "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 is in 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."

12. At the hearing I was provided with a further bundle from the appellant setting out the general background to family and private life, confirming that all the children are British citizens and showing copies of their passports.

13. At the outset of the hearing Mr Bates most fairly conceded that Section 117B(6) presented significant difficulties to the respondent in upholding the decision of the Upper Tribunal Judge.

14. There were no clear findings as to the fact that the children were qualified children and as such the reasonableness of their return fell to be considered.

15. In that connection my attention was drawn to the decision of **SF and others (Guidance, post-2014 Act) (Albania) [2017] UKUT 00120 (IAC)**. This was a decision of the Upper Tribunal, the factual matrix not being unduly different from that which presents itself in this appeal. The appellant was an overstayer but married with British children.

16. The Tribunal's attention was drawn to the Immigration Directorate Instruction – Family Migration – Appendix FM, Section 1.0(B): and to 11.2.23.of the policy guidance of August 2015.

    "Family Life as a Partner or Parent, Private Life: 10-year Routes."

> "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 Judge judgment in **Zambrano**.
>
> 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.
>
> In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, providing that there is satisfactory evidence of a genuine and subsisting parental relationship.
>
> It may, however, 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 primary carer in the UK or in the EU."

17. In terms of the conduct that would be considered to fall within that guidance such would be criminality falling below the threshold set out in paragraph 398 of the Immigration Rules or a very poor immigration history with persons repeatedly and deliberately breach the Immigration Rules. Mr Bates most fairly concedes that simply overstaying, particularly where efforts have been made to regularise stay, would not be such conduct as to fall within the guidelines.

18. The Tribunal in **SF** concluded:-

> "But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it."

Mr Bates most fairly conceded that apart from the fact of overstaying, there is nothing to be held to the detriment of the appellant and that that policy was in existence at the time of the decision the First-tier Tribunal Judge ought to have borne it well in mind.

19. Although two of the children are very young and clearly their best interest lies with being with their parents wherever that might be one child has

developed a significant private life in the United Kingdom and was aged 8. Consideration as to her best interest should have been made.

20. It seems to me that the Judge has failed conspicuously to engage with the obvious matters raised in Section 117B or with the respondent's own policy in that connection. That is clearly an obvious and serious error of law and as such I set aside the decision to be remade focusing upon that issue.

21. Mr Bates fairly indicates that there is little of detriment now remaining against the appellant other than his overstaying, the Judge having resolved the deception in his favour. Mr Bates is unable to point to any other significant factor which would weigh in the balance in assessing proportionality. Mr Bates does not contend that I should investigate in any detail the best interests of the children, particularly of the stepdaughter, bearing in mind the terms of the policy make it clear that in terms of British children it would generally be unreasonable in the absence of any other factor for them to leave the United Kingdom. In those circumstances Mr Bates indicates that the respondent is not seeking to go behind the policy and contend that in this particular case it would be reasonable for the children to return. The fact that the appellant is in a parental relationship with the children is not an issue. In the circumstances, the statute is of particular significance in this case and he does not resist the appeal.

22. In all the circumstances although the appellant as an overstayer does not meet the requirements of the Immigration Rules, it is right to note that Section 117(B)(6) has direct application to his situation and circumstances so as to reduce the public interest in his removal.

23. In all the circumstances therefore the appeal in respect of human rights and Article 8 ECHR in particular is allowed.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge King TD