Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09301/2017

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre	**Decision and Reasons Promulgated**
On: 9 April 2018	**On: 12th April 2018**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

MR
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr Moksud, International Immigration Advice
For the Respondent: Mr Bates, 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 the appellant has a child ('S'), in relation to whom extensive references are made in this decision. S was born in 2006 and shall be 12 in a few days' time.

Background facts

2. The appellant is a citizen of Bangladesh. He came to the UK in February 2010 as a student. His wife and S, who are also citizens of Bangladesh, joined him as his dependents on 5 August 2010 (when S was 4). On 27 April 2011, shortly before the expiry of his student visa, the appellant applied to remain in the UK on the basis of Article 8 of the ECHR. This application was refused and the appellant unsuccessfully appealed. He became appeals rights exhausted in November 2012, when he was served with notice that he was an overstayer. That same day he made an asylum application. This was unsuccessful, as were numerous further attempts to remain in the UK between 2014 and 2016.

Appeal proceedings

3. The appellant appealed a decision dated 15 August 2017 refusing a human rights claim, to the First-tier Tribunal. At the hearing before the First-tier Tribunal, S had been resident in the UK for seven years. The First-tier Tribunal made adverse credibility findings against the appellant and found that it would be reasonable to expect S to return to Bangladesh with his parents. The appeal was therefore dismissed on human rights grounds.

4. The appellant appealed against this decision, arguing inter alia, that the First-tier Tribunal failed to take into account S's lengthy residence during formative years of his life (3 to 13) when addressing the reasonableness test.

5. In a decision dated 28 December 2017, the First-tier Tribunal granted permission to appeal but on the basis that the First-tier Tribunal arguably failed to conduct a proportionality assessment for the purposes of Article 8. The First-tier Tribunal did not consider there to be an arguable error of law in the approach to the reasonableness test.

6. In a rule 24 notice the respondent submitted that the reasonableness test should be treated as the same test to be applied when addressing proportionality, i.e. the fifth stage as set out in Razgar, and as such there was no material error of law in failing to conduct a Razgar-based assessment. The respondent also submitted that the reasonableness test included a consideration of the best interests of the child and as such, the best interests of S must have been considered.

Hearing

7. At the hearing before me Mr Bates accepted that the First-tier Tribunal failed to attach significant weight to S's seven years

residence and failed to properly determine whether his best interests lay in going to Bangladesh with his parents or remaining in the UK. Both representatives agreed that the decision contains an error of law and must be set aside but that the decision can be remade by me. Having had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual agreement in this case, I decided that it was appropriate to remake the decision in the Upper Tribunal.

8. Both representatives also agreed it was unnecessary to hear oral evidence. Mr Moksud submitted S's school reports, which demonstrated he continues to do very well in school and is in year 7. After hearing brief submissions from both representatives, I reserved my decision.

Error of law discussion

9. As Mr Bates accepted, and contrary to the observations of the First-tier Tribunal when granting permission to appeal on another point, the First-tier Tribunal's approach to S's length of residence and the applicable reasonableness test contains an error of law.

10. I acknowledge that the First-tier Tribunal was well-aware of S's length of residence and links to the UK. However, as explained in MA (Pakistan) v SSHD [2016] EWCA Civ 705 at [49] and MT and ET v SSHD (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88 at [28] to [34], the decision-maker is obliged to attach significant weight to residence of at least seven years explain what "powerful reasons" support removal of such a child.

Remaking the decision

Best interests

11. I turn firstly to S's best interests, viewed through the lens of Article 8 private life.

12. I have applied the general principles when considering the interests of a child in the context of an Article 8 evaluation. These have recently been summarised by Kitchin LJ in TA (Sri Lanka) v SSHD [2018] EWCA Civ 260 at [22] as follows:

> "In particular, the respondent has an overriding obligation to have regard to the welfare of a child in the exercise of her various statutory functions. The best interests of a child are therefore an integral part of the proportionality assessment under Article 8. In carrying out that assessment it is important to have a clear idea of a child's circumstances and of what is in a child's best interests before determining whether those interests are outweighed by the force of other considerations. In carrying out that evaluation, the best interests of the child must be a primary consideration

> although not necessarily the only primary consideration. It necessarily follows that the best interests of a child can be outweighed by the cumulative effect of other considerations; but no consideration can be treated as inherently more significant than the child's best interests. Ultimately the decision maker must carry out a careful examination and evaluation of all relevant factors with these principles in mind. The question is whether, having regard to the foregoing, there are compelling circumstances which justify the grant of leave to remain outside the immigration rules."

13. Having considered all the relevant circumstances, I find that R's best interests are served by remaining in the UK, by a narrow margin. There are five factors:

    (i) He has spent over seven years in the UK.

    (ii) He came to the UK as a young child aged 4 and has spent some of his most formative years (4 to 11) and most of his life in the UK. He is a few days away from his 12th birthday.

    (iii) He has had a very short experience of education in Bangladesh a long time ago and has been involved in education in the UK over a lengthy period. He has transitioned from primary to secondary education in the UK.

    (iv) S has an identity based on British multi-cultural society, albeit he clearly has a mixed Bangladeshi and British cultural identity.

    (v) S will find it challenging to return to Bangladesh at this particular stage of his education and childhood, but will have the assistance of two loving parents if required to do so.

14. I am mindful that the best interests assessment is not determinative. As Elias LJ noted in MA (Pakistan) at [47] even where the child's best interests are to stay, for the purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'), it may still be not unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and Bangladesh, as well as any other relevant wider considerations – see [45] of MA (Pakistan) and EV (Philippines) v SSHD at [34-37].

Section 117B considerations

15. Proportionality is the "public interest question" within the meaning of Part 5A of the 2002 Act apply the public interest considerations at section 117B of the. These are as follows:

> "(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) 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."

16. By section 117A(2) I am obliged to have regard to the considerations listed in section 117B, and do so below.

17. The public interest in the maintenance of effective immigration controls is engaged. The appellant and his dependents are long standing unlawful overstayers. All their applications to remain in the UK after the expiry of the appellant's student visa in April 2011 have been unsuccessful. I also bear in mind that as at the date of application on 18 August 2016, S did not have seven-year residence, and as such 276ADE cannot be met.

18. There is an infringement of the "English speaking" public interest as the appellant and his wife required an interpreter in previous proceedings. S speaks fluent English.

19. The economic interest must be engaged because S has been, and will continue to be, educated at public expense and will have the capacity to access other publicly funded services and benefits. However, he is doing well at school and is ambitious. He has already integrated fully into UK society and there is every reason to believe that in the medium to long term he will not be a burden on taxpayers.

20. I have also had regard to the considerations at sections 117B(4) and (5) that little weight should be given to the appellant's private life at a time when his immigration status and those of his dependents was either precarious or unlawful.

Proportionality / balancing exercise

21. In my consideration of S's best interests above I have already highlighted the salient facts and factors. On the one hand, removal to Bangladesh would be distressing and disruptive for S, and would decimate the friendships, relationships and activities that form the core of his private life. It would also obstruct his education. Emotionally, it would undoubtedly be stressful and damaging.

22. In addition, significant weight must be given to R's residence of over seven years. In MA (Pakistan) Elias LJ said this:

> "46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.
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> ...
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> 49. ... However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting

> point that leave should be granted unless there are powerful reasons to the contrary."

23. This policy guidance was updated on 22 February 2018, but the terms remain similar for children who have resided in the UK for seven years (pg 75):

> "Significant weight must be given to such a period of continuous residence. The longer the child has resided in the UK, and the older the age at which they have done so, the more the balance will begin to shift towards it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more."

24. On the other hand, the observations of the First-tier Tribunal Judge at [30] and [31] remain pertinent. In particular, taking into account S's age and the support of a stable family unit in Bangladesh, he would, foreseeably, adapt over time. In addition, there is no suggestion that his health would be detrimentally affected and he can attend school in Bangladesh. The requirements of immigration control support his removal. The main countervailing factors are therefore that S and his family members have no legal right to remain in the UK and S has a stable family unit he can return with to Bangladesh.

25. I do not consider that there are any strong or powerful factors supporting the conclusion that it would be reasonable to expect S to leave the UK. It is undeniable that S would have the benefit of a loving and stable family unit in Bangladesh and that his parents have sought to flout immigration control. However, these parents might be described as more "run of the mill" immigration offenders (see [34] of MT and ET), and there are no strong reasons that would render his removal to Bangladesh reasonable, given the significant weight to be attached to his nearly eight years residence in the UK at a formative stage of his life.

26. Having considered all the relevant matters in the round, including the public interest considerations set out above, I am satisfied that the preponderance of factors in support of S remaining in the UK are not outweighed by the countervailing considerations, as outlined above.

27. I conclude that S's removal would be unreasonable for the purposes of section 117B(6) and also a disproportionate breach of Article 8. S cannot be expected to remain without his parents and similar Article 8 considerations therefore support them not being removed either. Accordingly, the appeal of the appellant and his dependents, succeed under Article 8.

Decision

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

29. I remake the decision by allowing the appeal on Article 8 of the ECHR grounds.

Signed: Ms Melanie Plimmer Dated: 9 April 2018
Judge of the Upper Tribunal