Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/15626/2017**

THE IMMIGRATION ACTS

Heard at Newport
On 2 November 2018

Decision & Reasons Promulgated
On 16 November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Z F
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr M Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr M Paur (counsel) instructed by Sadozai solicitors

DECISION AND REASONS

1. To preserve the anonymity direction made by the First-tier Tribunal, I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal.

This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Frazer, promulgated on 20 April 2018 which allowed the Appellant's appeal on article 8 ECHR grounds.

Background

3. The Appellant was born on 5 May 1975 and is a national of Afghanistan. The appellant entered the UK as the spouse of a British Citizen on 20 October 2012. Further leave to remain was extended by the respondent until 22 January 2017. On 16 January 2017 the appellant applied for leave to remain as the spouse of a person settled in the UK. The respondent refused the appellant's application on 9 November 2017, believing that the appellant had (earlier) fraudulently obtained an English language test certificate. The respondent's decision relies on paragraph 322(5) of the immigration rules and S-LTR.1.6 of appendix FM of the immigration rules. The respondent considered paragraph EX.1 of the immigration rules but found that the were no insurmountable obstacles to the appellant and her partner continuing their family life outside the UK. The respondent acknowledged that the appellant's child is a British citizen but reached the decision believing that the respondent's conduct outweighed her right to family life with a British child because the appellant's partner would be able to care for the British citizen child if the appellant returned to Afghanistan and her husband decided to remain in the UK.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Frazer ("the Judge") allowed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 2 August 2018 Judge Baker gave permission to appeal stating inter alia

> "4. The Judge had found at [16] that the evidence before him was such so as to justify the decision under paragraph 322(5). He found at [36] that the appellant has a genuine and subsisting relationship with her husband and son who are both British citizens. He considered the best interests of the child at [18] and [19], having particular regard to SF and others (guidance, post-2014 act) [2017] UKUT 120
>
> 5. The Judge applied the guidance from the Home Office to the facts and concluded that as the child was a British citizen, the guidance did not indicate that a fraudulent misrepresentation such as the use of proxy to obtain English language test results would counter sufficient to separate a mother and child and he found that the conduct would have to be at a level of serious gravity to justify the decision.
>
> 6. There was no finding as to whether the conduct of the appellant's behalf could amount to "a very poor immigration history" as referred to in the guidance.
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> 7. Further the grounds are arguably further made out as the Judge did not consider the section 117B issues, other than section 117B(6) within the determination and which is a mandatory requirement as asserted in the grounds.
>
> 8. Permission is granted"

The Hearing

5. For the respondent, Mr Diwnycz moved the grounds of appeal. He told me that the Judge failed to consider section 117B of the Nationality, Immigration and Asylum Act 2002. He told me that the Judge found that the appellant employed deception to obtain an English language test certificate but did not go on to consider whether that conduct amounts to "a very poor immigration history". The absence of that finding demonstrates an inadequate consideration of the respondent's IDIs. He told me that the Judge did not properly apply the reasonableness test found in s.117B(6) and instead found Section 55 of the 2009 Act to be determinative of the appeal. He asked me to allow the appeal and set the decision aside.

6. For the appellant, Mr Paur adopted the terms of the skeleton argument for the appellant. He took me through the decision and told me that at [11] the Judge cites section 117B of the 2002 Act. The Judge then goes on to make findings in relation to section 117B, and, at [18] of the decision, specifically applies the reasonableness test. He told that at [20] the Judge adequately sets out the reasons for her findings. He urged me to dismiss the appeal and allow the decision to stand.

Analysis

7. It is an accepted fact that at the date of the First-tier Tribunal hearing the appellant had one child and was pregnant with her second child. The second child is now safely delivered. The appellant's husband is a British citizen. Both of their children are British citizens.

8. The respondent refused the appellant's application for leave to remain in the UK relying on paragraph 322(5) of the immigration rules. Paragraph 322(5) of the Immigration Rules is one of the "*general grounds for refusal*". It states that applications for leave to remain should normally be refused where it would be undesirable for a person to remain in the UK in light of their conduct, character or associations. The Judge finds at [16] (for the reasons adequately set out between [13] and [16]) that the appellant used a proxy test taker to obtain an English language test certificate.

9. The only competent ground of appeal against the respondent's decision is on article 8 ECHR grounds. At [17] the Judge commences consideration of the article 8 ECHR grounds of appeal. The Judge's findings are that the appellant cannot meet the immigration rules. When considering article 8, the Judge is obliged to take account of section 117B of the Nationality, Immigration and Asylum Act 2002.

10. At [11] of the decision the Judge makes a flawless self-direction, reminding herself of the need to consider section 117B of the 2002 Act. At [18] of the decision the Judge considers the best interests of the appellant's British citizen child and identifies the reasonableness test set out in section 117B(6) of the 2002 Act.

11. At [19] the Judge correctly takes guidance from SF and others (guidance post 2014 act) [2017] UKUT 120, and considers the terms of the respondent's own guidance.

12. In R (on the application MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was held that in light of the jurisprudence of the Supreme Court, courts and tribunals were not mandated to approach the proportionality exercise where the best interests of the child were in issue in any particular order such that it was an error of law for them to fail to do so:. Although it would usually be sensible to start with the child's best interests, ultimately it did not matter how the balancing exercise was conducted provided that the child's best interests were treated as a primary consideration (paras 49, 53–57 and 72). In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) it was held that the best interests assessment should normally be carried out at the beginning of the balancing exercise.

13. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) it was held that the "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

14. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was confirmed that if section 117B(6) applies then "*there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal.*"

15. The guidance given by the respondent in the IDIs on Family Migration (February 2018) is that the questions a decision maker should pose are:

> (i) is there a genuine and subsisting parental relationship?
> (ii) is the child a British citizen or have they lived in the UK for a continuous period of at least 7 years?
> (iii) will the consequence of the refusal of the application be that the child is required to leave the UK**?**
> (iv) would it be reasonable to expect the child to leave the UK. In many cases where one parent has a right to remain in the UK, the child would not leave?

16. The respondent's guidance suggests that the test is whether the child would be likely to leave rather than actually be required to leave. The Home Office now say in those circumstances EX.1 (a) and s.117B(6) would not apply but the impact on the child of the appellant's departure from the UK should be considered taking into account the best interests of the child as a primary consideration and if refusal would lead to unjustifiably harsh consequences, then leave can be granted on the basis of exceptional circumstances.

17. It does not follow that section 117B(6) should be interpreted in the same way as the SSHD interprets his immigration rules. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was held (see [19]) that when applying section 117B(6) only three questions needed to be asked as long as the applicant was not liable to deportation, and those questions are

> (i) is there a genuine and subsisting parental relationship?
> (ii) is the child a British citizen or have they lived in the UK for a continuous period of at least 7 years?
> (iv) would it be reasonable to expect the child to leave the UK?

18. The respondent's own IDIs say that it is not reasonable for a qualifying child to leave the UK. On the facts as the Judge found them to be s.117B(6) weighs in the appellant's favour. The Judge's interpretation of s.117B(6) of the 2002 Act (correctly) follows the guidance given in MA(Pakistan). There is no substance in the grounds of appeal. A fair reading of the Judge's decision makes it clear that the Judge considered the article 8 grounds of appeal properly. The Judge considered the appellant's child's best interest in accordance with s.55 of the 2009 Act, and applied the statutory test (reasonableness) required by s.117B(6) of the 2002 Act.

19. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

20. A fair reading of the decision demonstrates that the Judge applied the correct test in law. The Judge carried out a holistic assessment of all of the evidence. There is nothing wrong with the Judge's fact-finding exercise. In reality the respondent's appeal amounts to little more than a disagreement with the way the Judge has applied the facts as she found them to be. The respondent might not like the conclusion that the Judge arrived at, but that conclusion is the result of the correctly applied legal equation. The correct test in law has been applied. The decision does not contain a material error of law.

21. The decision does not contain a material error of law. The Judge's decision stands.

DECISION

22. The appeal is dismissed. The decision of the First-tier Tribunal, promulgated on 20 April 2018, stands.

Signed Date 9 November 2018

Deputy Upper Tribunal Judge Doyle