



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/20046/2015

THE IMMIGRATION ACTS

Heard at Field House
On 09 March 2018

Decision & Reasons Promulgated
On 26 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

JAKER [H]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Aitken, of Counsel instructed by Novells Legal Practice

For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant, a citizen of Bangladesh, brings a challenge to the decision of First-tier Tribunal Judge E B Grant (“the judge”) promulgated on 24 November 2017 dismissing his appeal against the decision made by the respondent on 7 May 2015 refusing him leave to remain on human rights grounds. He relies on his family life and, in particular, the fact that he is the father of a British citizen child.

2. The issue in this appeal, concerns the judge's assessment of the appellant's circumstances under paragraph EX.1.(a)(cc) of Appendix FM of the Immigration Rules ("the Rules") and Article 8 of the ECHR outside the Rules.
3. Mr Duffy concedes that the judge's decision is legally flawed. Despite noting that the appellant has a British citizen child, the judge did not apply the guidance set out in **SF and Others (Guidance, post-2014 Act) Albania [2017] UKUT 120 (IAC)** and, wrongly concluded that it was reasonable to expect a British citizen child to leave the UK. The judge did seek to qualify this by adding that the child as an infant (of 10 months at the time) has no awareness of where she is (at [20]), but such qualification could not redeem the fact that the judge was reversing the established principle set out in guidance. The error may not have been of the judge's own making given that it is not clear whether the guidance was brought to her attention by the representatives then before her. Nevertheless, the failure to consider the guidance is an error all the same.
4. The judge's error in this regard suffices as a reason for me to set aside her decision.
5. The representatives agreed that no further evidence is required and as this appeal has been decided by the First-tier Tribunal on two previous occasions, I consider that I should and am in a position to re-make the decision without further ado.

Re-making of the Decision

6. The factual background is not in dispute. The material facts are as follows. The appellant has been living in the UK since his arrival as a visitor on 24 April 2008. He has been residing here without leave to remain since 15 September 2008. Since then he has established and enjoys a family life with his British born wife and baby daughter. His wife is expecting their second child. At the date of hearing before me she is on maternity leave with full pay earning £23,000. There is no dispute that the appellant has a genuine and subsisting relationship with his wife and child.
7. The appeal is not pursued before me on the basis of the appellant's genuine and subsisting relationship with his wife under paragraph EX.1.(b) of Appendix FM of the Rules. The representatives confined their submissions to the applicability of paragraph EX.1.(a) of the Rules and the respondent's guidance. No other matters were raised as being in issue under the Rules. Also, of relevance, is whether the appellant is entitled to succeed under s.117B (6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The wording of that provision is essentially in the same form to that of paragraph EX.1(a) and does not require separate consideration.
8. It is not disputed that, as a British citizen, the appellant's child is a "qualifying child", but what is in dispute is the question of reasonableness and whether "it would not be reasonable to expect the child to leave the United Kingdom".
9. In my consideration of the issues, Mr Duffy does not dispute that it would be right for me to apply the respondent's guidance but submits:
 - (i) That I must now apply the updated guidance dated 22 February 2018; and

- (ii) Consider whether it is proportionate to expect the appellant to leave and make an application to re-join his wife and child in the UK, this being a further issue that secured the appellant permission to appeal.

10. Mr Aitken did not dissent.
11. Mr Duffy submitted that this case fell into the category of cases where it would be reasonable to require the appellant to leave the UK, without the qualifying child, in light of his poor immigration history and make an application for entry clearance to re-join his wife and child in the UK. That submission requires some further elaboration with reference to the guidance and law.
12. The respondent's most recent guidance is set out in his policy document, "*Family Migration: Appendix FM Section 1.0b, Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*" (22 February 2018). Mr Duffy directed my attention to the consideration of reasonableness in the section headed "EX.1. (a) – Reasonable to expect" (page 35) which it is said applies equally to the position under Section 117B (6) of the 2002 Act. That reads as follows:

"First, the decision maker must assess whether refusal of the application will mean that the child will have to leave the UK or is likely to have to do so. Where the decision maker decides that the answer to this first stage is yes, then they must go on to consider secondly, whether, taking into account their best interests as a primary consideration, it is reasonable to expect the child to leave the UK..."

13. That interpretation of the provision whether it is reasonable to expect the child to leave also appears in the section of the guidance which is headed "Reasonable to expect a child to leave the UK?" (page 74 onwards). That begins with the following statement :

"If the effect of the refusal of the application would be, or is likely to be, that the child would have to leave the UK, the decision maker must go on to consider whether it would be reasonable to expect the child to leave the UK."

14. The guidance then goes on to say this ([p76]):

"Where the child is a British citizen

Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave to the UK because, in practice, the child will not, or is not likely to continue to live in the UK with another parent or primary carer, EX.1(a) is likely to apply.

In particular circumstances it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules."

15. The guidance accepts that the usual presumption where a British Citizen child's rights are at issue is that it is not reasonable to expect that child to leave and it is only where there are strong reasons of public interest for removal that a parent in a genuine and subsisting relationship with such a child should be removed. Again, this guidance is concerned with the relevant routes for a partner or parent under Appendix FM and not section 117B(6) of the 2002 Act specifically. It was, however, not suggested that it did not represent the respondent's policy in applying section 117B(6).
16. Starting then with the best interests of the child, she is a British citizen, born and raised in this country. I acknowledge that she is an infant and may well be capable of adapting to life in another country. There is little if any evidence from the appellant as to the child's best interests. There is no suggestion that she has any health issues or that there are other considerations which mean that her best interests are inevitably to remain in the UK.
17. The fact of her British citizenship is however a factor of some significance. The importance of British citizenship was underlined in the speech of Lady Hale (as she then was) in **ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4** in the following terms :-
 - “30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child ...
 31. ... all of these considerations apply to the children in this case. They are British children; they are British, not just through the "accident" of being born here, but by descent from a British parent; they have an unqualified right of abode here; they have lived here all their lives; they are being educated here; they have other social links with the community here; they have a good relationship with their father here. It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community ... But it is very different in the case of children who have lived here all their lives and are being expected to move to a country which they do not know and will be separated from a parent whom they also know well.
 32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. ...”
18. Based on her citizenship, and notwithstanding her young age, I am satisfied that it is in the best interests of the appellant's child to remain in the UK. The child lives with her pregnant mother and her father in a settled family unit and has ties to other close family members here. The child and has no direct connections to Bangladesh and has not visited that country. It is not in the child's best interests to forego the opportunity of growing up and being educated in the UK. The appellant has joint parental

responsibility for the child and he has lived with her since birth. It is accepted that the appellant has a genuine and subsisting relationship with his wife and child. I thus have no difficulty in finding that it is in the best interests of the child to continue to live with both parents in the UK.

19. The starting point for consideration whether it is reasonable to expect the appellant's child to leave the UK is therefore that it is in her best interests to remain in the UK living with both parents.
20. The question then arises whether there are strong reasons to refuse leave to a parent to whom paragraph EX.1 and section 117B (6) of the 2002 Act potentially applies.
21. Mr Aitken acknowledged that the appellant has an "unedifying" immigration history. Perhaps the appropriate characterisation of that history is "very poor". Although the appellant did enter the UK legally, he has since 2008 remained in the UK without leave and established a relationship with his wife while here unlawfully, which under section 117B of the 2002 Act attracts little weight. I have however borne in mind that the appellant who is of good character has sought to regularise his immigration status since 2011 following the inception of the relationship with his wife, and that, the child should not be punished for his breach of immigration laws. There are also other factors to consider. While the appellant speaks English, he is not financially independent, and this is an additional factor that weighs against him and in favour of the public interest.
22. Further, in my judgment, it is a material consideration to say that the case was not argued by Mr Duffy on the basis that the requirements for entry clearance would not be met. Rather it is said that it would be in the public interest for the appellant to leave and make an application for entry clearance given that he has established a relationship while here unlawfully.
23. I have considered the lawfulness of requiring the appellant to leave to make an application for entry clearance to re-join his wife and child in the UK. A factor of relevance is despite the appellant residing here unlawfully at a time when the relationship was formed the question is whether he would be permitted to reside here lawfully if an application were made from outside the UK (see, for example, **Chikwamba v Secretary of State for the Home Department [2008] UKHL 40** and **Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60**).
24. The principle enunciated in **Chikwamba** only has application if a notional entry clearance application would be certain to be granted (see *Agyarko* [2017] UKSC 11). In *Chen*, Upper Tribunal Judge Gill stated (at [39]), "In my judgement, if it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced."
25. Mr Duffy does not contest the financial circumstances of the appellant's wife who is earning above the income threshold and nor was it suggested that the Rules would

not be satisfied. In view of how the case has argued before me I am satisfied that the appellant's case does therefore fall within the parameters of the **Chikwamba** principle. To expect him to leave behind his wife and child in view of my finding in relation to the child's best interests would be a disproportionate interference with family life at a time when the appellant plays a significant role in the child's life, and indeed that of his wife who is expecting their second child.

26. I take into account all the above factors. However, particularly strong reasons are required to refuse leave when the best interests of a British Citizen child are for her to remain living with both parents in the UK. In this case, the countervailing reasons are not sufficiently strong to outweigh those best interests. They are not, as the respondent's guidance puts it "public interest considerations of such weight as to justify [the claimant's] removal".

Decision

For the above reasons, I conclude that the First-tier Tribunal materially erred in law. I set aside the decision and remake it allowing the appellant's appeal under paragraph EX.1.(a) and Art 8 of the ECHR.

Anonymity

The First-tier Tribunal made no anonymity order, and none has been applied for. I make no order on this occasion.

Fee Award Note: this is not part of the Decision.

In the light of my decision to allow the appeal, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals. I have decided to make a full fee award because I have remade the decision on the evidence before the respondent. In the circumstances I see no reason in this case why the fee should not follow the event.

Signed

Date: 6 June 2018

Deputy Upper Tribunal Judge Bagral