



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/20410/2015

THE IMMIGRATION ACTS

Heard at Field House
On 28 June 2018

Decision & Reasons Promulgated
On 2 July 2018

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

MOHAMED ASHIKEEN ABDUL MAJEED
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Heybroek, Counsel instructed by Kothala and Co. Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Sri Lanka national born on 14 March 1989. He entered the UK as a Tier 4 migrant in November 2010 but overstayed when his leave expired on 3 February 2013. In November 2014 he sought to regularise his stay and made a family/private life application to remain, relying upon his relationship with A, a British national who converted to Islam (whom he met vi Facebook), and their son (born June 2013). They have since had a further son (born in February 2016). Both the children are British nationals. The application was refused on 14 May 2015 and the appeal against that decision was heard by First-tier Tribunal Judge I F Taylor at Nottingham on 17 May 2017.
2. The judge identified the issues as being: (1) whether the appellant had a genuine and subsisting relationship with his partner and their children and (2) if so, whether it was reasonable to expect them to leave the UK and travel to

Sri Lanka with him. He noted that despite two adjournments for a medical report on A's mental health, this was not forthcoming. He also noted that the appellant had failed to respond to the Secretary of State's request for further documentary evidence to show cohabitation with his partner and child (there was only one at that stage). He noted inconsistencies between the oral and documentary evidence as to cohabitation (at 31-33). He considered the inadequacies in the social worker's report (at 25-28), the unremarkable medical history of A as evidenced by the GP's medical notes and the lack of any evidence to show that Citalopram or a similar anti-depressant was not available in Sri Lanka (at 24). Whilst the judge was not satisfied that the appellant and A had been living together for two years prior to the application or that the appellant had sole parental responsibility for the children, which meant the requirements of the rules could not be met, he found that given the fact that they had two children, there was a genuine and subsisting relationship, albeit one that was 'on and off' (at 33). He also considered the appellant's private life but found that the requirements of 276ADE had not been met (at 35-37). He then proceeded to consider the matter on article 8 grounds acknowledging the importance of the British nationality of A and the children (at 38-39, 41-42 and 47). He noted that the best interests of the children were a primary consideration and must not be tainted by the poor immigration history of a parent (at 40) and he applied s. 117B(6) (at 41). He then assessed the circumstances of the children (at 42). He considered EV (Philippines) [2014] EWCA Civ 874 taking from it that the ultimate question was whether it would be reasonable to expect the child to follow the parent, with no right to remain, to the country of origin (at 42). He considered the appellant's immigration history and the public interest (at 44-45), the appellant's partner's circumstances, her health and the ability for them to continue family life in Sri Lanka (at 46), concluding that there were no insurmountable obstacles to the continuation of family life outside the UK and that removal would not breach article 8 (at 47). Accordingly, the appeal was dismissed and the determination was promulgated on 3 July 2017.

3. On 3 January 2018 First-tier Tribunal Judge Chamberlain refused the appellant's application for permission to appeal. The appellant renewed his application to the Upper Tribunal and on 3 May 2018 Deputy Upper Tribunal Judge Storey granted permission on just one of the 8 grounds put forward. Ground 5 argued that the judge had misdirected himself by considering EV (Philippines) because that dealt with non-British children and the judge had applied the test without consideration of the position of the children as British citizens. It is also argued that as part of the same ground that the position of British children had been considered in SF and others (guidance, post-2014 Act) Albania [2017] UKUT 00120.
4. On 20 June 2018 the respondent in a Rule 24 response indicated that he "*did not oppose the appellant's application for permission to appeal on the sole ground on which permission has been granted*".

5. The matter then came before me on 28 June 2018.

The hearing

6. The appellant was present at the hearing. I heard submissions from both sides after indicating that I did not necessarily agree with the respondent's position in the Rule 24 notice as the judge had plainly assessed the claim in the context of the appellant's partner and children being British citizens.
7. Ms Heybroek submitted that the judge had not relied on MA (Pakistan) [2016] EWCA Civ 705 although it was established that it had not been referred to or produced by Counsel at the hearing. She submitted that whilst nationality was not a trump card, it was a very important and weighty factor. She submitted that absent serious criminality on the part of an appellant, it was not reasonable to expect a British national to leave the country and there was no public interest in that particularly once the relationship had been accepted.
8. Mr Tufan submitted that there was no obligation on the children to relocate and no requirement that they had to leave. It was up to the family to decide. The findings in MA were clarified by AM [2017] EWCA Civ 180 and a bad immigration history fell into the category of poor conduct justifying removal. The appellant had shown a blatant disregard for the rules by overstaying for many years. Mr Tufan also pointed to the respondent's guidance and submitted that removal of the appellant did not mean that the children would be left without a parent. Their mother would be here with them. No evidence had been put to the Tribunal as to why the family could not in principle accompany the appellant to Sri Lanka. The appellant also had the option of seeking entry clearance. It was for the appellant to explain why it would be disproportionate for him to do so (following Chen). There had been no material error.
9. Ms Heybroek submitted that there was a difference between British and non-British children. the cases relied on by the respondent pertained to families with the latter. That was an important distinction. The children could not make the decision to stay or leave; it was up to their parents. It was not reasonable for them to leave. In MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088(IAC) where the appellant used a false document, the best interests of the child to stay with the parent were not displaced. There had to be a compelling factor. Whilst overstaying was not to be condoned, it was at the lower end of the scale of misbehaviour. Chen was a judicial review case only looking at evidence before the respondent at the date of the decision. here further documentary evidence could be considered and there was an explanation for why the evidence from the NHS had not been available for the hearing. The judge had erred because he did not take into account the circumstances necessary to displace the best interests of the child.

10. That completed submissions. At the conclusion of the hearing, I reserved my determination which I now give with reasons.

Discussion and Conclusions

11. I have considered the submissions, the determination and all the evidence. I do not take account of the fresh material adduced as, for whatever reason, that was not before the judge at the time of his decision and cannot be used to undermine it. The alleged error in this case, as put by Ms Heybroek in her submissions, is that the judge failed to consider the countervailing reasons of considerable force which displaced the best interests of the children and made it reasonable to expect them to leave the UK. That is, in effect, the substance of ground 2 on which permission was refused. The only ground on which permission was granted was that the judge failed to have consideration to the fact that the children were British nationals when assessing whether it was reasonable for them to leave the UK and I focus solely on that matter.

12. The relevant statutory provisions are found in section 117B of the Nationality, Immigration and Asylum Act 2002. This is found in part 5A of the Act as inserted by the Immigration Act 2014. Subsection (6) is critical to this appeal. It provides 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.”

13. A qualifying child is then defined in s 117D as a child under 18 who is either a British citizen or *“has lived in the UK for a continuous period of seven years or more”*.

14. The courts have provided guidance on the application of s.117B(6) and there is guidance from the respondent to which I was referred.

15. The guidance in operation at the date of the decision is set out in SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC). At 11.2.3: *Would it be unreasonable to expect a British Citizen Child to leave the UK?* It provides:

“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 Justice 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, provided 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.

The circumstances envisaged could cover amongst others:

- *criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;*
- ***a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.***

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision" (added emphasis).

16. **SF** was a case where no other parent or primary carer would have been available for the British child in the UK if their mother was removed as their father was in prison (two other children were co-appellants as they were Albanian nationals). Although the child obtained British nationality by virtue of its father's naturalisation which it transpired was obtained by deception, that is not a relevant matter in our case. The guidance had not been taken into account and it was held by the panel that it should be.
17. The current guidance from the respondent (version 1.0 of 22 February 2018) is that:

"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 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 would 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” (added emphasis).

18. Reliance was also placed on MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088(IAC) but that gave guidance in respect of the procedure in the Proof of Concept for Extempore Judgment Pilot 2017 rather than on article 8 issues in general and is, therefore, of limited assistance. I note, however, that the panel took account of ET's age (14 years), that she had been in the UK over ten years and was preparing for her GCSE exams. In her case, too, there was no mention of another parent in the UK with whom she could have remained.
19. In MA (Pakistan) [2016] EWCA Civ 705 relied on by Ms Heybroek, the court in dealing with cases involving non British children held that *“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”* (at paragraph 49). It noted that seven years or more of residence meant that a child *“would 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”* (at 46: added emphasis).
20. In AM (Pakistan) [2017] EWCA Civ 180, the court upheld the decision of the First-tier Tribunal Judge who found that notwithstanding that the children's best interests were to remain in the UK, it was reasonable for them to leave because their parents had shown a blatant disregard for the laws of this country by overstaying and remaining after their applications to regularize their stay had been refused.
21. Before considering the judge's findings and conclusions, it is also important to look at the grounds on which permission was *not* granted. Ground 1 argued that the judge had failed to consider the best interests of the children separately from the appellant's immigration history. Ground 2 argued that he failed to identify countervailing reasons of considerable force to displace the best interests of the children remaining in the UK and had not undertaken a clear balancing exercise. Ground 3 is that the judge fails to give reasons for not considering the fact that the appellant's partner would not accompany him to Sri Lanka when assessing the best interests of the children and whether it was reasonable to expect them to follow the appellant without their mother. Ground 6 complains that the judge misdirected himself on the issue of

cohabitation when considering whether they had lived together for two years prior to the date of the application. Ground 7 argues that the judge was wrong to find that the appellant and his partner had not been cohabiting for at least two years and imposed his own expectations on how a couple might conduct their relationship. Ground 8 argues that the judge failed to assess whether a fair balance had been struck. Plainly, Judge Storey was satisfied that none of these alleged errors had occurred.

22. The only ground on which permission was granted was that by his citation of EV (Philippines) (at paragraph 43), the judge had erred in that he did not consider the position of the children as British citizens.
23. It is also relevant to note that the appeal had originally been listed for hearing in May 2016 but was adjourned on that date after Counsel requested time to adduce medical evidence in respect of the appellant's partner's anxiety. The matter was re-listed in December 2016 but was again adjourned at the hearing for the same reason. When it was eventually heard on 17 May 2017, a year after the original hearing date, there was still no medical report. On 14 June 2018 the appellant's representatives sought to adduce a report from the appellant's partner's GP dated 12 July 2017. It was maintained that this was not available for the hearing before the First-tier Tribunal because of the WannaCry cyber attack on the NHS on 12 May 2017.
24. As stated above, I decline to admit the GP's report. This is because there is no explanation for why a cyberattack in May 2017 should have prevented the report being obtained after two hearings were adjourned in May 2016 and December 2016. Nor is it explained why, when the hearing was listed for 17 May 2017, a report that should have been prepared well before that date, was left so late that it was hit by a virus attack just three days before the hearing. I also note that the judge had before him the GP's notes covering the period January 2013-June 2016 and hospital correspondence which were taken into account.
25. I turn now to the determination of Judge Taylor in order to consider the submissions and to assess the ground on which permission was granted.
26. The judge took account of the fact that the appellant had two sons. Although the eldest has just turned five and the youngest is just over two, they were, of course, a year younger at the date of the hearing and would have been even younger had the first hearing gone ahead as planned. Both are British through their mother. There is no dispute that both are qualifying children. The appellant and his partner are not legally married. The partner's evidence was that she had converted to Islam four years before the hearing and that was before she met the appellant.
27. The judge considered the medical records and noted that the first reference to any depression/stress/anxiety was in August 2014 and then July 2015. She

had been prescribed Citalopram at 20 mg reduced to 10 mg. She had been referred for CBT but failed to attend follow up sessions. The judge noted that there was no evidence to show that the drug or a similar anti-depressant was not available in Sri Lanka (at 24). No complaint is raised about any of these findings.

28. The judge took account of a report conducted by an independent social worker but found it unsatisfactory in many ways (at 14,25-28). There is no complaint about any findings in this regard.
29. The judge noted that there were inconsistencies between the evidence of the appellant and the GP's notes which suggested that the appellant and his partner lived apart (at 31-32). He noted that the appellant's evidence was that he lived in Luton and came to stay with his wife twice a week (at 31). He found that although they had an "up and down" relationship, it was on balance genuine and subsisting (at 33).
30. As the judge recognised (at 40), he was required by section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the best interests of the children. He acknowledged that the children were British at paragraphs 38, 39, and 42 and there are previous references to their nationality too. He properly observed that the 'best interests' assessment must not be tainted by the appellant's poor immigration history or the appellant's partner's knowledge of it (at 40). When assessing their best interests, he plainly had in mind their ages and the form of life they had here (at 42). As both were very young, he was entitled to find that they were mostly or completely focused on their parents and had not yet established any other ties. The eldest had not yet started school. He properly found that although the children were entitled to the benefits of their nationality, this was not a trump card. He acknowledged that the children were not required to leave the UK and that this was a decision to be made by their parents (at 42).
31. Whilst Ms Heybroek criticised the judgments relied on by the respondent as only dealing with non-British children, her own choice of judgments did the same. The principle to be drawn from these cases, nevertheless, is that weight must be given to the time the children have spent in the UK and that this increased the more advanced or critical the stage of their education. It is of course also the case, as shown by the respondent's guidance that there must be strong reasons why a British child should be expected to leave.
32. Of course, in this case, there is no such requirement. The children have another parent, their British mother, who is their primary carer and the appellant's removal would not affect that. There was no evidence before the judge to show that the appellant's removal would impact on his partner's health to the extent that she would be unable to care for her children. It is of

note that she has a large family here and that her parents are actively involved in assisting with childcare. She herself does not work and is on benefits so there is no issue over having to find child care whilst at work. Also relevant is the fact that the appellant does not appear to live with his partner and children most of the week and the assertions of his involvement in their care are unparticularized in the sense that no examples are provided and there is no independent evidence from any source.

33. The judge also took note of s.117B in applying the reasonableness test and made further findings on the appellant's partner's state of health in respect of the N threshold. He had regard to the appellant's disregard for the laws of the UK in that he had spent just over two years here with leave and over five years without leave. I cannot see that any explanation has been provided.
34. The judge recognised that significant weight should be given to the fact that the children were British but nonetheless, given their very young ages and all the other circumstances of the case, he found that it would be reasonable to expect them to leave the UK. Alternatively, it is open to them to remain with their mother. That would meet the respondent's guidelines both as they were and as they are now. The appellant also has the option of seeking entry clearance to return.
35. In conclusion, therefore, I do not find any material error in the complaint that the judge's findings were invalidated by his citation of EV Philippines; indeed, the author of the grounds, himself relies on EV in ground 1 (at paragraph 9). Nor is it apparent, when the determination is read as a whole, that the contention that the judge did not have regard for the position of the children as British nationals is made out. It may be that another judge would have taken a different view and it may be that another judge would have expressed himself/herself differently, but that is not the test. The judge considered all the matters put forward, assessed the best interests of the children and their position as British nationals and reached a sustainable decision.

Decision

36. The First-tier Tribunal did not make errors of law and the decision to dismiss the appeal is upheld.

Anonymity

37. I was not asked to make an anonymity order.

Signed

A handwritten signature in black ink, appearing to read "R. K. K. E." with a period at the end. The letters are cursive and somewhat stylized.

Upper Tribunal Judge

Date: 29 June 2018