Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10283/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Determination Promulgated**
On 26th June 2018	**On 15th August 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

AMINULLAH [K]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss R Evans (Solicitor)
For the Respondent: Mr C Bates (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge G. R. J. Robson, promulgated on 19th December 2017, following a hearing at Manchester Piccadilly on 13th November 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Afghanistan who was born on 15th September 1993. He appealed against the decision of the Respondent dated 12th September 2017, rejecting the Appellant's claim for asylum and for humanitarian protection. A feature of this appeal is that the Appellant has been in a relationship with a [RR], a Lithuanian subject, born on 26th August 1988, with whom he has a child, [MK], who was born in Manchester on 17th December 2014, and is certified as a daughter of the Appellant and of [RR].

The Judge's Findings

3. The judge applied the Rule in **Devaseelan**, in that there had been a previous immigration decision by Judge Irvine, who had found the Appellant not to be a credible witness, in his claim that he feared the Taliban in Afghanistan because his father and brother had worked for the Taliban, and his brother joined the Taliban after his father died, and subsequently tried to recruit the Appellant. However, Judge Robson, recorded that there were two additional matters now before the Tribunal, namely, "night letters" which had been sent by the Taliban and the Appellant's relationship with [RR]. In considering these two matters, the judge was satisfied that the Appellant could not discharge the burden of proof that was upon him and the appeal was dismissed.

Grounds of Application

4. The grounds of application state that the judge erred in his findings in relation to Article 8 by giving insufficient reasons for concluding that a bond did not exist between the Appellant and his 2 year old daughter, [MK]. This was because the uncontested position at the hearing was that the Appellant was the biological father of [MK]; he had lived with [MK] since she was born (though not more recently because the Appellant and his partner had split up); he played a daily role in the care and upbringing of his child, including being the primary carer, whilst her mother was working; and [MK] (as a Lithuanian national) resided lawfully in the United Kingdom with her Lithuanian mother.

5. On 25th January 2018, permission to appeal was granted.

6. On 22nd February 2018 a Rule 24 response was entered by the Respondent Secretary of State to the effect that the judge had applied the correct standard of proof and had at paragraphs 28 and 48 provided sufficient reasons for his findings. The grounds of application simply sought to express disagreement with the judge's findings.

Submissions

7. At the hearing before me on 26th June 2018, Miss Evans relied upon the grounds of application. First, that the judge did not follow the five stage process in applying the **Razgar** guidelines, and in particular lacks in any assessment of proportionality. Second, whereas the judge concludes that the best interests of the child, [MK], are to remain with her Lithuanian mother, there is no consideration as to whether it would

additionally further be in her best interests to continue to have her father in her life. Third, the judge was wrong (at paragraph 85) to say that there had been "insufficient demonstration of a bond that exists with the 2 year old child and the Appellant" in the light of the evidence before the Tribunal.

8. For his part, Mr Bates relied upon the Rule 24 response and stated that a particular feature of this appeal was that the child, [MK], was a "unqualifying child", such that the only issue was, whether in carrying out the proportionality exercise, it could be said that the consequences for her were "unjustifiably harsh", and this could not be the case because she was not being asked to leave with the Appellant to go to Afghanistan, and the judge had ruled that she could stay in the United Kingdom with her Lithuanian mother, as a Lithuanian national herself. Second, the Section 117(B) considerations required the judge to bear in mind the public interest in immigration control. Third, whilst it is the case that the judge sets out at paragraph 81 the "objective" evidence that goes to the relationship between the Appellant and the child, what he eventually decides at paragraph 85, is that the Appellant failed to produce sufficient evidence to show why it would be disproportionate to separate the Appellant from his daughter, and that was an approach that was entirely legitimate in the circumstances.

9. In reply, Miss Evans submitted that, even though it was the case that under Section 117(6)(b) the position was that a British child and any child who had lived in the UK for more than seven years, were entitled to remain in this country, [MK] was still a child who as an EU national had a legal right to be in this country, and that once the judge was able to be satisfied that there was a genuine and subsisting relationship between the father and the daughter, it could not properly be concluded that their separation was proportionate and in accordance with the law. Whereas there were cases where such separation had been endorsed by the law, they were invariably those involving criminality or deportation proceedings against the Appellant. That was not a consideration here.

Error of Law

10. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. In what is a clear and comprehensive determination, the judge applied the legal principles correctly (paragraph 70) and made findings of fact which cannot be criticised. For example, the judge approached the issue of asylum methodically, bearing in mind that there had been a previous decision by Judge Irvine (paragraph 61), before going on to consider the latest further developments (paragraph 63). The judge gave specific attention to the Appellant's relationship with his ex-partner, [RR], a Lithuanian citizen (paragraph 75), and concluded that the intention to marry the Appellant could not have been a plausible one given that nine days later they split up. The judge then considered the position of the child, [MK], and observed that the child was not a British citizen, had not lived continuously in the UK for seven years, and the Appellant did not have sole responsibility for her upbringing (paragraph 78). Consideration was given to Section 55 of the BCIA 2009 in equal measure (paragraph 79).

11. However, where the judge fell into error is in concluding that there had been "insufficient demonstration of a bond that exists with the 2 year old child and the Appellant and that such a bond would be breached and adversely affect the development of the child, were the Appellant to be removed" (paragraph 85). This conclusion is not sustainable in the light of the fact that the judge had earlier set out (at paragraph 81) third party evidence that suggested the contrary. For example, a letter from Tiddlywinks Nursery dated 20th October 2017 (see paragraph 81B) was to the effect that, "the father of [MK] brings [MK] to nursery every day and collects [MK] from nursery. There is an excellent bond between [MK] and her father". A further letter from the same institution dated 2nd November 2017 was to the effect that, "Amin is interested in [MK]'s development and spends time every day to look at parent zone which is an app informing parents of what their child has been doing at nursery" (paragraph 81C). In these circumstances the judge's conclusion (at paragraph 85) was not borne out by the objective evidence that had been referred to, and which had not been rejected or called into question. That evidence in turn had a direct bearing on the way in which the "**Razgar**" principles applied (see paragraph 82).

Notice of Decision

12. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal, other than Judge G. R. J. Robson, under practice statement 7.2(a) to be heard again on the issue of the Appellant's relationship with his child.

13. No anonymity direction is made.

Signed
Deputy Upper Tribunal Judge Juss

Date
3rd August 2018