Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/39682/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 December 2014	**On 9 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RH
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Whitwell (Home Office Presenting Officer)
For the Respondent: Mr Harding (Counsel)

DECISION AND REASONS

1. The appellant ('the SSHD') appeals against a decision of First-tier Tribunal Judge Abebrese dated 18 August 2014 in which the respondent's appeal was allowed under Article 8 of the ECHR.

2. I have made an anonymity direction because this decision refers to confidential matters relevant to young children.

Background

3. The background to this case can be summarised for the purposes of this appeal. The respondent is a citizen of Afghanistan and entered the UK as a minor in 2009. He was granted discretionary leave until 16 April 2010. He applied to extend this a few days after but this was refused. He applied for further leave after this but the SSHD refused this and made a decision to remove him. It is this decision that he appealed to the First-tier Tribunal, who in turn allowed his appeal under Article 8.

Procedural history

4. The SSHD appealed against the Judge's finding that the relevant circumstances were such that to remove the respondent would constitute a breach of Article 8. When granting permission on 1 October 2014 Judge TRP Hollingworth observed that the Judge failed to consider the public interest question pursuant to the Immigration Act 2014 and also failed to take into account the respondent's illegal status when his relationship with his partner commenced.

5. The matter now comes before me to decide whether or not the determination contains an error of law.

Error of law

6. Mr Harding accepted that the decision contains an error of law. The Judge asserts that he has taken into '*consideration public interest factors which are laid out under section 117 of the Nationality, Immigration and Asylum Act 2002*'. Unfortunately the Judge has not directed himself to the public interest considerations applicable to all cases under section 117B. There is also no indication within the determination that the Judge has taken into account those specific considerations. In failing to do so I agree with both representatives that the Judge has erred in law.

Re-making the decision

7. Both parties invited me to re-make the decision by reference to the unappealed findings of fact within the decision. It was agreed that it was unnecessary to hear

any further evidence. The Tribunal made a number of positive findings of fact concerning the respondent, his partner and their children and regarded their evidence as credible [12]. The Judge specifically accepted that they were in a genuine and subsisting marriage and had been in a relationship since meeting in February 2011. The Judge acknowledged that they were unable to live together because of the respondent's immigration status but that they spent the majority of their time together as a family. The Judge regarded the relationship as strengthening with time notwithstanding the fact that the respondent's wife had been unfaithful. The Judge described the relationship as '*good, firm, solid*' [15]. The Judge accepted that the child born from that relationship is treated by the respondent as his own child [14]. That means that the family comprises of the respondent and his wife together with two young children – one is the respondent's natural child and the other is not his biological child but they have a close relationship akin to father-son.

Decision under the Rules

8. I begin by acknowledging that the respondent cannot meet the Immigration Rules. This was conceded before Judge Abebrese and before me.

Consideration of Article 8 outside the Rules

9. As the respondent cannot show that the immigration rules can be met this identifies and gives weight to the SSHD's case that he should be removed. This part of the rules cannot be described as a 'complete code' as in the case of deportation and in such circumstances I consider the five step **Razgar** [2014] UKHL 27, bearing in mind that the best interests of the respondent's British citizen child and step-child are a primary consideration and should form an integral part of the proportionality assessment under Article 8 – see **ZH Tanzania** [2011] UKSC 4, **Zoumbas** [2013] UKSC 74 and **EV (Philippines)** EWCA Civ 874.

10. I accept Mr Harding's submission that family life between the respondent and his partner and the respondent and both children will be interfered with if he is returned to Afghanistan. I accept that it would not be reasonable to expect that family life to be exercised in Afghanistan for the reasons identified by the Judge [15]. The children and their mother will be taken from a very close knit extended

family in Sunderland to the much more hostile environment of Afghanistan. Mr Harding provided me with a current travel advice issued by the UK government. This makes it clear that the Foreign and Commonwealth Office advises against all or all but essential travel to different parts of Afghanistan. I find that this is a case in which it would overwhelmingly not be in these British children's best interests to reside in Afghanistan. They and their mother will be uprooted from the only close knit community they know and required to face the high threat of terrorism and kidnapping in Afghanistan. The position of obvious Westerners such as the children's mother is particularly grave. The children's mother has obvious serious facial scarring and is particularly dependent upon her own family and community in Sunderland and her husband for emotional support.

11. I must balance the interference with family life against the relevant public interest considerations specifically those set out in section 117B of the Nationality Immigration and Asylum Act 2002. The maintenance of immigration control is in the public interest. The respondent speaks English but is not financially independent. He formed his relationship with his partner after his discretionary leave expired and when he was in the UK unlawfully.

12. Section 117B(6) states that the public interest, in a non-deportation case, does not require the person's removal where the person has a has a genuine and subsisting relationship with qualifying child and it would not be reasonable to expect the child to leave the UK. Judge Abebrese found and I agree that the respondent's relationship with his British citizen son (and therefore a qualifying child) is genuine and subsisting. For the reasons I have set out above it would not be reasonable to expect the child to leave the UK. It follows that the public interest does not require the respondent's removal. I must still go on to consider whether in light of all the section 117B considerations (referred to in paragraph 11) together with all the relevant circumstances of the case the respondent's removal would be proportionate.

13. The children's best interests overwhelmingly favour remaining in the UK and not relocating to Afghanistan, where they and their mother are likely to face insurmountable difficulties in coping with everyday life

and just keeping safe. The children's best interests also point very strongly in favour of their father remaining in the UK with them and their mother. I have considered with care the sensitive letters written by the respondent's wife. She has clearly explained why she and her children are particularly emotionally dependent on the respondent.

14. However the respondent has an adverse immigration history and the maintenance of immigration control is in the public interest. He is not financially independent and entered into his relationship when he was unlawfully present. I do not find that these public interest considerations tip the balance when it is very strongly in the children's best interests to remain in the UK with their father and the respondent meets the requirements of section 117B(6).

Decision

15. The decision of the First-tier Tribunal contains an error of law. I set it aside and I re-make the decision by allowing the respondent's appeal.

Signed:

Ms M. Plimmer
Deputy Judge of the Upper Tribunal

Date:
4 December 2014