Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/25871/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th June 2015	**On 10th July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANUELL
DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MR. JHONELLE MAQUILING

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. Jhonelle Maquiling, In person
For the Respondent: Ms Isherwood; Senior Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against a determination by First-tier Tribunal Judge O'Hagan promulgated on 6th March 2015, in which he dismissed appeals against decisions made on 29th April 2014 by the Secretary of State to refuse the appellant leave to remain in the United Kingdom and to give directions for his removal from the UK.

2. Permission to appeal was granted by Designated First-tier Tribunal Judge Shaerf on 1st April 2015. In granting permission to appeal it is said:

> "The judge noted at paragraph 4 of her decision that the Appellant's wife and child had been registered as British Citizens before the Respondent's decision under appeal. At paragraph 28(iii) she addressed ss.117A-117D of the 2002 Act but did not take into account that the appellant had a British Citizen child, which arguably would have required the Judge to consider the Appellant's position in the light of this under s117B(6). This is an arguable error of law…"

3. The matter comes before us to consider whether or not the determination by First-tier Tribunal Judge O'Hagan involved the making of a material error of law, and if so, to remake the decision.

Background

4. The material background is set out in the determination of First-tier Tribunal Judge O'Hagan as follows;

> "The Appellant was born on 12th February 1980 and is now aged 35. He is married to Rochel Dichoson Maquiling. The Appellant's wife was born on 14th April 1979 and is now also aged 35. They have a son, Jayden Kyle Maquiling born on 19th August 2010 and now aged four. The Appellant's son was registered as a British citizen on 3rd February 2014. His wife was registered as a British citizen just over a month later on 14th March 2014. The Appellant himself has not been registered as a British citizen and continues to be a citizen of the Philippines. [4]
>
> The Appellant first entered the United Kingdom on 6th November 2007 with entry clearance conferring leave for him to enter and remain until 15th December 2011. The Appellant's application for further leave to remain as a dependent of his wife, who was not then a British citizen but was a Tier 2 (General) Migrant, was refused on 2nd February 2012. The application was refused because, on 13th January 2012, the Appellant was convicted of an offence of sexual assault, specifically intentionally touching a female with no penetration. The offence had been committed on 12th December 2010. The Appellant was sentenced to 12 months imprisonment suspended for a period of 24 months. He was also ordered to participate in a sex offender program and was made subject to a sex offenders notice for a period of five years." [5]

5. First-tier Tribunal Judge O'Hagan considered whether the appellant was able to satisfy the requirements of the immigration rules. He considered paragraph 276ADE(1)(vi) and found that the appellant was aged 18 years or above and that he had lived continuously in the UK for less than 20 years. He noted that the issue in the appeal was whether there would be very significant obstacles to the appellant's integration in the Philippines, if he were required to leave the United Kingdom. To that end, he was not persuaded by the evidence that there would be very significant obstacles to the appellant's integration in the Philippines.

6. Having concluded that the provisions of paragraph 276ADE(1)(vi), could not be met, First-tier Tribunal Judge O'Hagan reminded himself that the appellant is part of a family with his wife and son, and he went on to consider the position under Appendix FM of the immigration rules. He found that the application falls for mandatory refusal under Appendix FM.

7. As to whether there are insurmountable obstacles to the family life continuing outside of the UK, First-tier Tribunal Judge O'Hagan found as follows;

> "On the facts of this case, I did not consider that there were insurmountable obstacles to the Appellant continuing with his family life outside of the United Kingdom. The Appellant retains family ties in the Philippines in the form his mother. For the reasons which I have already set out above, I do not consider that there would be very significant obstacles to his integration into the Philippines. Those points apply with equal force to the Appellant's wife. Indeed, in many ways, her position is, if anything, better than his since she has continued to work and will have gained experience by so doing which will assist in finding employment in the Philippines. She also does not have the burden of criminal conviction in this country and a former association with gang members in the Philippines."; [22]

8. Having satisfied himself that the appellant could not succeed under the rules, First-tier Tribunal Judge O'Hagan considered the article 8 rights to a family and private life by reference to the five steps set out in the well-known decision of the House of Lords in **Razgar**. First-tier Tribunal Judge O'Hagan, found that the Appellant enjoys family life in the UK with his wife and his son. He also found that the removal decision would interfere with that life, and that any interference clearly pursues the legitimate aim of maintaining proper and firm immigration control.

9. First-tier Tribunal Judge O'Hagan then turned to the question of proportionality and the needed to balance the public interest imperative of maintaining immigration control, with the private interests of the appellant. He concluded that the decisions made by the respondent in respect of the appellant were proportionate for the various reasons that are set out in paragraphs 28(i) to (v) of the determination.

The Ground of appeal

10. In his grounds of appeal, the appellant appears to have recognised that the issue at the heart of the appeal was the balance between the public interest and his own private interests. Insofar as the latter is concerned, he contends about he has meaningfully engaged with the programs undertaken and that there is now a low likelihood of reconviction for both sexual and violent offences. He contends that he is now a different person and that various people including his friends and family, and perhaps most importantly, his wife, have helped him to reach his goal to focus upon his family life. He states that he has made a mistake in his life but that insofar as the public interest or safety of others is concerned, he has been dealt with, and helped by professional people. He draws attention to the fact that is in the last five years since his conviction, he has never been involved in any further offending.

Discussion

11. In the grant of permission to appeal by Designated First-tier Tribunal Judge Shaerf, it is said that First-tier Tribunal Judge O'Hagan did not take into account that the appellant had a British Citizen child, which arguably would have required the Judge to consider the appellant's position in the light of this under s117B(6).

12. s117B Nationality, Immigration and Asylum Act 2002 sets out the application of the public interest requirements in Article 8 cases. It provides as follows;

> **117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) 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. It is right to note that the appellant is not liable to deportation and so a literal reading of s117(B)(6) might on the face of it, suggest that the public interest does not require the appellant's removal. However, s117B must be read in light of s117A which provides;

> **117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

14. The public interest provisions are now contained in primary legislation. s117A(2) requires that a court or tribunal must (in particular) have regard, in all cases, to the considerations listed in section 117B. That is not to say that there is a duty upon the court or tribunal to reach any specific conclusions or findings upon the factors set out. What is required is that the court or tribunal has regard, inter alia, to the factors set out in s177B, and where it applies, the additional factors set out in s117C.

15. In **Dube (ss.117A-117D) [2015] UKUT 90 (IAC)**, this Tribunal confirmed that whilst s117B is expressed in mandatory terms, the considerations specified in s117B are not expressed as being exhaustive. S117A(2) requires that in considering the public interest question, the court or tribunal must (in particular) have regard to the factors identified. The use of the words "in particular" in the statutory framework makes it plain, that the considerations are not exhaustive.

16. In **AM (s117B) Malawi [2015] UKUT 0260 (IAC)**, this Tribunal confirmed that the statutory duty to consider the matters set out in s117B of the 2002 Act is satisfied if the Tribunal's decision shows that it has had regard to such parts of it, as are relevant. When the question posed by s117B(6) is the same question posed in relation to children by paragraph 276ADE(l)(iv) it must be posed and answered in the proper context of whether it was reasonable to expect the child to follow its parents to their country of origin.

17. We have carefully read the determination of First-tier Tribunal Judge O'Hagan and it cannot be said that the judge failed to have regard to any material circumstance relating the child. The mere presence of the child in the UK, was not a "trump card" which his parents could deploy to demand immigration status for the whole family.

18. First-tier Tribunal Judge O'Hagan addressed the matter in the following way;

> "…I did not consider that the effect of the decision would be unduly harsh on his wife and son having had regard to all of the circumstances, including the nature and severity of the offence and the risk of

reoffending and also having had regard to the circumstances to which the family would be returning in the Philippines if his wife chose to go with the appellant and to take their son with her."; [28(iii)]

"I considered the impact of the decision on the child…. The question is the proportionality of expecting the child to leave the United Kingdom to continue family life with his father. There are weighty factors which would point towards it not been reasonable to expect the child to leave United Kingdom. In particular, he is a British citizen, he has lived in this country for the entirety of his life and he has not done anything wrong. There are, however, also significant countervailing factors. The child is of an age where the locus of his life will be with his parents. It is not in dispute that his best interests will be served by remaining with his parents. Similarly, their capacity and commitment to meet his needs is not in question. There is a functioning health and education system in the Philippines, albeit that payments have to be made for hospital care. If he were to go to the Phillippines with his parents, the child would be together with them as part of a family in a country where they are familiar with the language, culture and society and could meet his needs. His education would not be disrupted since he has not yet started formal education. He would not lose the benefit of his British citizenship and he could return to this country in the future, alone when he is old enough to do so or with his mother or, should circumstances change and his father is readmitted at some future point, with his mother and father. Whilst I recognise that relocating to the Philippines will not, initially, be easy, I consider his young age where the locus of his life is with his parents and, most importantly, the love and care of their parents will assist in that process. I have reminded myself that section 117B(6) requires me to consider whether it would not be reasonable to expect the child to leave the United Kingdom. Having had regard to all the circumstances of this case, I am not persuaded that it would be unreasonable to expect the child to leave United Kingdom. I do not consider his interests in remaining in the United Kingdom with his father sufficient to outweigh the other considerations in the Respondent's favour. [28(iv)]

"I finally move to consider the impact of an adverse decision on the Appellant's partner and son. They are, I recognise, entirely innocent of any wrongdoing in relation to the Appellant's actions. The situation which the Appellant's wife and son now find themselves is one for which the Appellant and not the United Kingdom must ultimately bear responsibility. It leaves the Appellant's wife with a stark choice to make for herself and their son: she may decide that the Appellant's actions and the consequences of them are too great to be borne, or she may decide that the strength of their relationship is such as to overcome those things. If the former, she may choose to remain in the United Kingdom as is her right. If the latter, she may choose to relocate to her country of origin, the Philippines, so that she can be with the Appellant. It is a sad and deeply regrettable situation that she has to make such choice, but it is one which is of the Appellant's making."; [28(v)]

19. It is clear from the extract of paragraph 28(iv) of the determination of First-tier Tribunal Judge O'Hagan that we have set out above, that the Judge did make specific reference to s117B(6). Whilst he did not set its provision out in full in the determination, it is plain from the terms of his

determination, that he did consider at some length the circumstances of the appellant's child and whether it would be reasonable to expect the child to leave the United Kingdom. and his ability to relocate to the Philippines. He did so, making express reference in the same paragraph to the fact that the appellant's son is a British Citizen.

20. That being so, it is clear to us that First-tier Tribunal Judge O'Hagan did take into account that the appellant had a British Citizen child, and considered the Appellant's position in the light of this, under s117B(6). It was open to First-tier Tribunal Judge O'Hagan to find that the appellant had not established that it would not be reasonable to expect the child to leave the United Kingdom and to dismiss the appeal for the reasons provided.

Decision:

21. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law capable of affecting the outcome of the decision. We find no error of law and the appeal is dismissed.

Signed: Date:

Deputy Upper Tribunal Judge Mandalia