Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/28681/2014**
IA/28680/2014

THE IMMIGRATION ACTS

Heard at City Centre Tower Birmingham **Decision & Reasons Promulgated**
On the 13th July 2015 **On the 27th July 2015**

Before:

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MRS ASMA SHAKOOR
MISS FATIMA ZAHRA YAQOOB
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Hussain (Solicitor)
For the Respondent: Mr Smart (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Respondent's (the Secretary of State for the Home Department) appeal against the decision of First-tier Tribunal Judge Birk promulgated on the 4th December 2014. Although it is the Respondent's appeal, for the sake of clarity, throughout this decision, the parties will be referred to as they were referred at the

First-tier Tribunal hearing, such that Mrs Shakoor and Miss Yaqoob are referred to as the Appellants and the Secretary of State for the Home Department is referred to as the Respondent.

Background

2. The First Appellant Mrs Asma Shakoor was born on the 10th January 1985. The Second Appellant, Miss Fatima Zahra Yaqoob is her daughter and she was born on the 3rd April 2014. They are both nationals of Pakistan. Mrs Shakoor entered the United Kingdom on the 9th July 2008 with Entry Clearance as a student valid until the 30th June 2012. On the 10th September 2012, she was granted further leave to remain as a student, which was valid until the 14th November 2014. That leave was curtailed to the 16th April 2014, due to non-attendance. The Appellant then applied for leave to remain outside of the Immigration Rules on the 11th April 2014, which was refused by means of refusal notice dated the 26th June 2014. The First Appellant's daughter Fatima (the Second Appellant), was born in the UK on the 3rd April 2014. She also applied for leave to remain as a dependent of her mother and was refused in line with her mother's application.

3. The Appellants appealed to the First-tier Tribunal (Immigration and Asylum Chamber) and that appeal was heard by First-tier Tribunal Judge Birk on the 21st November 2014. His decision is dated the 1st December 2014. First-tier Tribunal Judge Birk found that it had not been argued that the Appellants met the requirements of paragraph 276 ADE in respect of their private lives or Appendix FM in respect of their family life, but he allowed the Appellants' appeal outside the Immigration Rules in respect of Article 8 based upon their family life.

4. The Respondent appealed against that decision to the Upper Tribunal on the 4th December 2014.

Our findings on error of law and materiality

5. It was argued by Mr Smart on behalf of the Respondent that the First-tier Tribunal Judge erred in law in his approach to section 117 A-D of the Nationality, Immigration and Asylum Act 2002, as amended by the Immigration Act 2014. It was argued that the First-tier Tribunal Judge failed to address the weight to be afforded to the maintenance of an effective immigration control under section 117B (1) and that the finding of the First-tier Tribunal Judge at paragraph 22 that "the Appellants have funds available to them" and is finding that "although the First Appellant gave her evidence through an interpreter it was clear that she had a certain level of understanding of English language because of the way that she was able to answer the question before it had been translated" were inadequate and amounted to a failure to give adequate reasons and that the First-tier Tribunal Judge had not specifically considered whether or not the First Appellant was able to speak English and had failed to consider whether or not the Appellants were actually financially independent for the purposes of section 117B.

6. We bear in mind following the decision of the Upper Tribunal in the case of Dube (sections 117A-117D) [2015] UKUT 90 (IAC) that Judges are statutorily required to take account of the enumerated considerations between section 117A-D and that sections 117A-D are not therefore an à la carte menu, which it is at the discretion of the Judge to apply or not to apply and that the Judge is duty-bound to have regard to the specified considerations. However, it was also stated by the Upper Tribunal in that case that "it is not an error of law to fail to refer to the sections 117A-D considerations, if a Judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form."

7. First-tier Tribunal Judge Birk at paragraph [22] of his decision made it clear specifically that he had had "regard to the statutory provisions relating to Article 8, as set out in sections 117 A—D. He found that the evidence in the form of bank

statements had not been challenged and showed that the Appellants had funds available to them. Although the First-Tier Tribunal Judge's findings in this regard could have been better expressed, we find that it is clear that the Judge has had consideration to the relevant statutory provisions relating to Article 8, as set out in sections 117 A-D of the Nationality, Immigration and Asylum Act 2002, and did make a finding that funds were available to them having considered the bank statements.

8. We also bear in mind the judgement of Baroness Hale of Richmond in the House of Lords case of Secretary of State for the Home Department v AH (Sudan) and others (2007) UKHL 49 at paragraph 30, when in talking about the Immigration and Asylum Tribunal she stated that :

"This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in the specialist field the tribunal have got it right: Cooke v Secretary of State for Social Security [2001] EWCA Civ 73. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard or read the evidence and arguments which they have heard or read. The decision should be respected unless it is quite clear that they have misdirected themselves in law. Appellate court should not rush to find such misdirection simply because they might have reached a different conclusion on the facts or expressed themselves differently."

9. Although we might have expressed ourselves differently, we do not consider that First-tier Tribunal Judge Birk has misdirected himself in law on this issue, as he clearly made reference to section 117 A-D, and his finding that funds were available to them shows that he did consider them to be financially independent, and he did state specifically that he had considered the bank statements of both the First Appellant and her husband in this regard, such that the basis of his finding

was explained adequately. Such a finding was open and available to him on the evidence and is sustainable.

10. In respect of the criticism that the First-Tier Tribunal Judge's finding that the First Appellant had "a certain level of English language certain level of understanding of English, because of the way that she was able to answer the question before it has been translated" lacked clarity and was inadequate, again, the we find that First-tier Tribunal Judge Birk clearly had in mind the requirements of section 117 A-D, and although again his findings in this regard could have been better phrased, we cannot assume that he misdirected himself having clearly indicated that he had considered both the requirements of section 117A-D and had clearly turned his mind to the First Appellant's English language capabilities, and thereby whether or not she was able to speak English. Section 117 B (2) does not require the Judge to make any specific findings as to an Appellant's precise level of English eligibility, as it is not a requirement for the purpose of section 117 B (2) for an English-language test to be provided, with a certain level of English being proved, before the Appellant's ability to speak English becomes relevant for the purposes of consideration of the public interest applicable in all Article 8 cases. We do not consider therefore that the First-tier Tribunal Judge has materially erred in this regard. We further bear in mind that the First Appellant had been in the UK as a student since 2008. The question as to whether or not the First Appellant therefore had sufficient English language ability to actually follow her proposed course would have already been assessed. We therefore find that the First-Tier Tribunal Judge's finding in that the Appellant did have "a certain level of understanding of the English language because of the way that she was able to answer the question before it had been translated," was an adequate and sufficient finding and does not disclose a material error of law.

11. Further we find that at paragraph [18], the First-tier Tribunal Judge did specifically accept that there is a legitimate aim in the sponsor maintaining an effective immigration control and that this fell under the aspect of "prevention of disorder or crime" and "the economic well-being of the country". The First-tier Tribunal

Judge has therefore properly considered that maintaining immigration control under Section 117B is in the public interest. We therefore find that there is no merit in the first ground of appeal.

12. The second ground of appeal contends that the First-tier Tribunal Judge has in effect used the best interests of the Second Appellant child as a "trump card" and that whilst it may be in the best interests of the child to have access to both parents, such access could be reasonably continued in Pakistan and that is a matter of choice for the family as to whether or not the Second Appellant's father remains in the UK for the remainder of his leave or it was open for the Appellant's to make an application for entry clearance as dependents from Pakistan.

13. It was quite properly conceded by Mr Smart on behalf of the Respondent that nowhere within his determination does First-tier Tribunal Judge Birk state that the best interests of the child were a "trump card". However, the First-tier Tribunal Judge was clearly duty-bound to consider the best interest of the child for the purposes of section 55 of the Borders, Citizenship and Immigration Act 2009, and to have regard to the best interests of the child as being a primary consideration in assessing proportionality, as he was statutorily obliged to do so. We therefore find that it was perfectly proper for the First-tier Tribunal Judge at paragraph [28] to state that he could take into account "the considerable weight that had been placed on the likely impact of any separation upon the Second Appellant". The Second Appellant as at the date of the hearing before First-tier Tribunal Judge Birk was only 7 months old, she having been born on the 3rd April 2014. The First-tier Tribunal Judge did consider as countervailing features the fact that any separation would only be for a limited period since Mr Yaqoob's leave expired in October 2016, that he did not have permanent residence residency in the UK and neither was he prevented from returning to Pakistan as a national of that country and further there was nothing to prevent him returning for periods of time for visits and that Mr Yaqoob could keep in touch with the Appellants by modern means of communication.

14. However, it was open to him to find and take into account, as he did at paragraph [28], that the "the age of the child means that she could not have any meaningful contact in the way that the First Appellant can have. Visits by her father will, in my assessment, be insufficient to assist with the bonding process and she cannot participate in any other means of communication or contact with him."

15. The First-tier Tribunal Judge went on to state at paragraph [30] that, "However, the prospective length and degree of family disruption is an important and relevant factor for consideration and I find that there will be a serious and detrimental disruption to the Second Appellant in terms of her monitoring and I have also make findings in paragraph [28] above about the serious and detrimental effect that separation would have upon the Second Appellant".

16. The First-tier Tribunal Judge was perfectly entitled to take account of what he considered to be the detrimental effect upon the Second Appellant if separated from her father, even for a short period of time, given her young age. His finding that regard is perfectly adequate and sufficient and is sustainable upon the evidence. We find, therefore, that the First-tier Tribunal Judge has properly considered and weighed the factors on both sides of the balancing exercise, when considering the issue of proportionality and has properly taken all of the relevant factors into account.

17. We have borne in mind, as was stated by Lord Hodge giving the lead judgment in the Supreme Court in case of Zoumbas v The Secretary for the Home Department [2013) UKSC 74 at paragraph 10, the best interests of a child are an integral part of the proportionality assessment under Article 8 of the ECHR and the best interests of the child must be a primary consideration, although not always the only primary consideration, but the child's best interest did not itself have the status of the paramount consideration. Lord Hodge found specifically that the best interests of the child can be outweighed by a cumulative effect of other considerations, but no consideration can be treated as inherently more significant. We do further bear

in mind in this case that although the First Appellant's leave was curtailed as a result of non-attendance, such non-attendance was simply as a result of her pregnancy, as was recognised in the Refusal Notice. There was no suggestion of any criminality or any deliberate or repeated flagrant breaches of the Immigration Rules.

18. In such circumstances the findings of the First-tier Tribunal Judge that the decision to refuse the Appellants' application was not proportionate and in breach of Article 8 was a decision that was open to him on the evidence, bearing in mind his perfectly adequate and sustainable findings as to the best interests of the child, which he has properly balanced against the countervailing factors. The First-tier Tribunal Judge not consider the best interest of the child simply being a "trump card", but did properly weigh the interest of the child in the balancing exercise. There was no material error in law in his consideration thereof.

19. In respect of the third ground of appeal that the First-tier Tribunal Judge misapplied Article 8 in that family life could reasonably be continued in Pakistan, we do bear in mind that Mr Yaqoob was validly in the United Kingdom as a Tier 4 student and was in the middle of his studies. In such circumstances when First-tier Tribunal Judge Birk found that it was in the best interest of the child to be with both parents if possible, it was open to him to find that it would be disproportionate for the Appellants to be removed from the UK when Mr Yacoob was still undertaking his studies and that it would be disproportionate for them to have to go back to Pakistan to make an application from abroad. This was a matter for the First-tier Tribunal Judge's discretion in considering Article 8, and there is no evidence to suggest that he has in fact misapplied Article 8 in this regard.

20. Although Mr Smart on behalf of the respondent argues that this case is more akin to the case of Hayat (Nature of the Chikwamba principle) Pakistan [2011] UKUT 00444 (IAC), than a straight Chikwamba case and that in such circumstances the

First-tier Tribunal Judge was wrong to rely upon the case of Chikwamba, the Upper Tribunal in Hayat stated that the significance of Chikwamba v SSHD [2008] UKHL 40 is to make it plain that, in appeals where the only matter weighing on the respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the immigration rules from abroad, that legitimate objective will usually be outweighed by factors resting on the appellant's side of the balance. The Chikwamba principle is not confined to cases where children are involved or where the person with whom the appellant is seeking to remain has settled status in the United Kingdom. The fact that Mr Yacoob therefore did not have settled status does not mean that the First-tier Tribunal Judge was wrong to consider the detrimental effect to the Second Appellant, of separation from her father even for even a relatively short period of time. The First-tier Tribunal Judge therefore did not err in law in considering this point, rather than simply finding that the family could theoretically return back to Pakistan as a family unit, when Mr Yacoob did have leave to remain as a student and was still in the middle of his studies.

21. Further, in the case of R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM-Chikwamba-Temporary Separation-Proportionality) [2015] UKUT 189, before Upper Tribunal Judge Gill, it was held that Appendix FM did not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the UK, and that there may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the UK, but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40.

22. We find that the First-tier Tribunal Judge has not simply relied upon Chikwamba, but has given clear reasons why temporary separation would interfere disproportionately with protected rights.

23. We consider that First-tier Tribunal Judge Birk has properly and fully considered all of the factors in respect of Article 8 and proportionality in this case, and that his findings in respect of proportionality were open to him and within the reasonable range of findings based upon the evidence. His reasons were also adequate and sufficient and it is clear from reading the decision as to why he reached the decision that he made. The decision therefore discloses no material error of law and simply amounts to a disagreement with the same. The appeal is therefore dismissed.

Notice of Decision

The decision of First-tier Tribunal Judge Birk does not contain any material errors of law and is maintained.

The First-Tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and no application for an anonymity order was made before us. No such order is made.

Signed Dated 17th July 2015

Rob McGinty

Deputy Upper Tribunal Judge McGinty