IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/32071/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 15th October 2015	**On 9th November 2015**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AIQ
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr N Smart (Home Office Senior Presenting Officer)
For the Respondent: In person

DECISION AND REASONS

1. I shall refer to the Appellant in this appeal to the Upper Tribunal as the Secretary of State. I shall refer to the Respondent as the Claimant. The Secretary of State has appealed, with permission, to the Upper Tribunal in respect of a decision of the First-tier Tribunal (Judge Jerromes) promulgated on 11th February 2015, allowing the Claimant's appeal against a decision of 30th July 2014 refusing to vary leave to remain and deciding to remove her from the UK by way of directions.

2. By way of background, the Claimant came to the UK as a student. Having done so she formed a relationship with a British citizen, whom I shall simply refer to as her partner, and the two have had a child together, (S),who was born on 5th November 2014 and who is, of course, British.

3. She and her partner married in the UK on 31st July 2013. There is no dispute about the fact that they have a genuine relationship.

4. In the circumstances the Claimant decided to apply to vary leave, on the basis of her marriage, with a view to settlement in the UK. The Secretary of State, though, concluded that the requirements of the Immigration Rules, including the requirements contained within EX.1 of Appendix FM were not met. Further, the Respondent considered that there were no exceptional circumstances such as to justify a grant of leave on the basis of Article 8 of the European Convention on Human Rights (ECHR) outside the Rules.

5. The Claimant's appeal was heard on 3rd February 2015. She gave evidence as did her partner. She represented herself and the Secretary of State was represented by Mr Smith, a Home Office Presenting Officer.

6. In the determination the First-tier Tribunal considered the reasons for refusal, the relevant Immigration Rules and Article 8 of the ECHR. It noted that, so far as the Rules were concerned, he was constrained to assess matters as at the date of application but said that, with respect to Article 8 outside the Rules, it should consider the circumstances as they were at the date of the hearing. Nobody has quibbled with that.

7. In dealing with Article 8 outside the Rules it said this;

> "22.1 In view of my conclusion that the Appellant does not meet the requirements of the Rules, I have gone on to consider Article 8. For these purposes I must consider the facts as they exist at the date of the hearing. Since the date of the Respondent's decision, there has been one very significant change in the Appellant's circumstances in that she has become a parent of a British citizen, [S], who is now 3 months old. In addition both [the partner] and the Appellant are now in regular employment. I must consider these factors as part of my consideration as to whether or not the Appellant's application raises or contain any circumstances which, consistent with the right to respect for private and family life contained in Article 8 ECHR, might warrant consideration of a grant of leave to remain in the UK outside the requirements of the Immigration Rules.
>
> 22.2 Adopting the five step approach in **Razgar**:
>
> (i) The decision interferes with the private and family life of the Appellant and of [the partner] and [S] as they wish to stay together as a family unit in the UK.
>
> (ii) That interference is more than technical or academic and Article 8 is engaged.

(iii) The decision is in accordance with the law being made under the terms of statute and Immigration Rules approved by parliament.

(iv) The decision is in pursuit of a legitimate aim: fair and consistent immigration control.

(v) Based on an overall consideration of the facts of the case as they stand at the date of the hearing, the decision is not proportionate to the legitimate aims pursued and interference in family and private life in this particular case is not necessary for effective immigration control even when regard is had to s117B (public interest). I have specifically considered the fact that the Appellant and [the partner] married and had a child at a time when the Appellant's immigration status was precarious and I have heeded Mr Smith's submission that in accordance with s117B(5) I should place little weight on this but on the other hand, a child should not be blamed for matters for which he or she is not responsible, such as the conduct of his parents.

I have also considered that [S] is only 3 months old, is obviously not in education and there are no potential medical or other difficulties that I have been made aware of which would make it difficult for him to adapt to life in Pakistan.

However, I am satisfied that despite these factors there are substantial grounds for believing that refusal of leave to remain would result in unjustifiably harsh consequences not just for the Appellant but also for [the partner] and particularly for [S] (both of whom are British citizens) taking into account the following:

(a) As a British citizen, [S] has rights which he will not be able to exercise if he moves to Pakistan; he will lose the advantages of growing up and being educated in Britain.

(b) It would be in [S's] best interests to be brought up by both his parents; it is not therefore in his best interests to disrupt his present circumstances by a forced relocation of his mother to Pakistan or by rupturing his relationship with his mother (or his father) as a result of separation. It would not be reasonable to expect [the partner] to relocate to Pakistan; he has been in the UK for twenty years, is a British citizen, is working full-time and has siblings in the UK who he sees on a regular basis.

(c) There was no indication how long an application for entry clearance might take if the Appellant were to return to Pakistan and seek entry clearance from there.

(d) Both the Appellant and [the partner] are now in regular work and the Appellant has ambitions to qualify as a lawyer which is consistent with her level of education; if she remains, it is likely that the couple will continue to be self-supporting in the short term and in the long term and the family is unlikely to be a burden on taxpayers.

(e) The Appellant is integrated in UK society and speaks good English.

(f) Whilst the Appellant may be able to fend for herself in Pakistan, it is far from clear that she would be able to find suitable employment to support herself and her family; I accept her evidence that her family disapprove of her marriage to [the husband] and cannot be relied on to give her support if she returns.

In all the circumstances, and in particular bearing in mind the best interests of [S] (whose best interests as a child and a British citizen are not outweighed by the cumulative effect of other considerations), removal would be disproportionate to the legitimate aim of maintaining immigration control in the particular case of the Appellant and her family. If it were not for [S's] interests, the balance in my decision would be different."

8. The Secretary of State applied for and obtained permission to appeal to the Upper Tribunal. Such was granted by a Designated Judge of the First-tier Tribunal in these terms:

"3. The First-tier Judge concluded that the Appellant did not meet the requirements of the Immigration Rules but went on to consider the appeal under Article 8 in accordance with the **Razgar** guidelines. The judge took into account the fact that the Appellant's child was obviously not in education and there were no potential medical or other difficulties which would make it difficult for him to adapt to life in Pakistan. However, the judge concluded that despite those factors there were substantial grounds for believing that the decision under appeal would result in unjustifiably harsh consequences, not just for the Appellant but also for her husband and their child.

4. Grounds submitted by the Respondent's representatives in support of an application for permission to appeal argue that the First-tier Judge made several material misdirections in law regarding Article 8. In the first place, it is submitted that the First-tier Judge had no regard to the public interest. The Appellant cannot satisfy the Immigration Rules (a fundamental basis of effective immigration control). The grounds assert that public interest requires the Appellant's removal by virtue of Section 117B(i) of the 2002 Act as amended. The First-tier Judge failed to acknowledge that citizenship is not a trump card and has focused entirely upon his parents rather than upon the child himself. It is pointed out that the First-tier Judge noted that if it were not for the child's best interests then the decision would be different. It is submitted that this elevates the child's interests to the primary consideration and, absent consideration of the public interest, the conclusion to allow the appeal must therefore flaw.

5. The grounds also argue that the fact that there is no evidence that the Appellant would be able to find suitable employment in Pakistan is irrelevant. It is the Appellant's case to establish that her family and comparable private life, could not be reasonably

enjoyed in Pakistan. The grounds submit there is no evidence to show that she would not have been able to obtain employment.

6. I am satisfied that the grounds have identified arguable, material errors of law in the First-tier Judge's reasoning with regard to the application of Article 8. Accordingly permission is granted and all the grounds may be argued."

9. There was a hearing before the Upper Tribunal and the initial purpose of that hearing was to consider whether or not the judge had erred in law such that his determination ought to be set aside. Mr Smart, for the Secretary of State, referred me to the cases of **AM (S 117B) Malawi [2015] UKUT 260 (IAC)**, **SS (Congo) [2015] EWCA Civ 387** and **Secretary of State for the Home Department v Hayat (Pakistan) [2012] EWCA Civ 10**. Having found that the requirements of the Immigration Rules were met the First-tier Tribunal, said Mr Smart, should have looked for compelling circumstances and, in their absence, should not have allowed the appeal. It had not had sufficient regard to the importance of the maintenance of effective immigration control and to the requirements contained in Section 117B of the Nationality, Immigration and Asylum Act 2002. It had further erred in using the child's citizenship as "a trump card". It had erred yet again in treating the Claimant's ability to maintain herself and to speak English as matters weighing in her favour. That was the wrong approach in light of the decision in **AM**. The Claimant argued that the First-tier Tribunal had made the correct decision on the facts. I indicated to the parties I would reserve my decision as to the error of law issue. Having considered matters I have concluded that the First-tier Tribunal did not err in law and that its decision shall, therefore, stand. I set out my reasoning below.

10. The First-tier Tribunal was cognizant with the requirement to take into account the public interest aspects of the case. It mentioned it on a number of occasions at paragraphs 7 and 22.2(iv), 22.2(v) and 22.2(v)(f) of the determination. It also referred, specifically, to Section 117B of the 2002 Act. It cannot be said, in general terms, therefore, that it had no regard to the public interest in the maintenance of an effective immigration control as the grounds contend.

11. Mr Smart took me to various provisions contained within 117A and 117B of the 2002 Act. In particular, he stressed that, following what is contained in those sections, the maintenance of effective immigration controls is in the public interest and that little weight should be given to a private life established by a person at a time when that person's immigration status is precarious. That latter point stems from the wording of Section 117B(5) which it is clear the First-tier Tribunal had in mind because it was expressly referred to when it summarised, at paragraph 19 of the determination, the submissions which have been made on behalf of the Secretary of State and was then referred to again when it was explaining the conclusions at paragraph 22.2(v). It expressly said that the submission made on behalf of the Secretary of State with respect to that

provision had been "heeded". So, it is right to say that it had weighed in the balance the importance of the interests of immigration control and the requirement to attach only little weight to the private life aspects bearing in mind that although the Claimant's residence in the UK was at all times lawful, it was precarious because she only ever had limited leave to remain.

12. The grounds contended, as did Mr Smart before me, that the First-tier Tribunal had wrongly treated the citizenship of the child as being a trump card and had elevated the question of the child's interests to being the primary consideration. However, it was appropriate for it to take into account in the context of the Article 8 assessment outside the Rules, the interests of the British citizen child. The judge had referred, in this context, to the judgments in **ZH (Tanzania) [2011] UKSC 4** and **Zoumbas [2013] UKSC 74** and had observed;

> "The best interests of a child form an integral part of the proportionality assessment under Article 8 and those best interests must be a primary consideration, although there will not always be the only primary consideration and do not themselves have the status of the paramount consideration. The best interests of the child may be outweighed by the cumulative effect of other considerations."

13. That does not seem to me to amount to the judge mistakenly directing himself to the effect that the interests of the child is the primary consideration and Mr Smart, when referred to that part of the determination, was not able to submit that those words, of themselves, amounted to any misdirection. He did, though, as again did the grounds, submit that the First-tier Tribunal had, nevertheless, effectively treated the child's interests as being the primary consideration and stressed that it had indicated, in the closing words of the determination, that if it had not been for the child's interests the decision would have been different. Certainly, it did say that at paragraph 22.2(v)(f).

14. The First-tier Tribunal, though, was not saying that the interests of the child were the paramount consideration or were the only primary consideration. What was being said, in effect, was that on the particular facts of this case the interests of the child were an important consideration which happened to tip the balance in favour of the Claimant. It seems to me that is it was saying and that it was entitled to say that. Other factors were clearly considered too because they were referred to in the part of the determination which I have set out above. No error of law is identified.

15. The grounds also contended that there was no evidence to show that the Claimant would not be able to obtain employment in Pakistan. The First-tier Tribunal had heard the Claimant's oral evidence on the point and had said that it was "far from clear" that she would be able to find suitable employment to support herself and her family. Having found her to be credible it was entitled to take that view and the grounds, it seems to me, represent no more than a disagreement with that.

16. Mr Smart sought to make an additional point, not referred to in the grounds, to the effect that the first-tier Tribunal had erred in positively weighing in the Claimant's favour her ability to financially support herself and her ability to speak English. I agree that in **AM**, it was decided that a Claimant can obtain no positive right to a grant of leave to remain on these bases whatever the degree of his or her fluency in English or the strength of his or her financial resources. However, it does not seem to me that it judge erred in that way. It did note that it was likely that the couple would continue to be self-supporting and unlikely to be a burden on taxpayers and that the Claimant was integrated into UK society and does speak good English. However, it did not say anything to indicate that those factors had been treated as positive ones weighing in favour of the Claimant as opposed to them being treated as matters which did not weigh against her.

17. Essentially, I consider that, whilst from some perspectives this decision might seem on the facts to be a somewhat generous one, the grounds represent no more than a disagreement with the outcome. I can quite see that a different First-tier Tribunal might have resolved matters against this Claimant but that does not mean an error of law was made by this one. I conclude, therefore, that the decision shall stand.

Conclusions

The making of the decision by the First-tier Tribunal did not involve the making of an error of law.

The decision shall stand.

Anonymity

The First-tier Tribunal did make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I am not wholly sure that such an order was necessary but, since nothing was said about it before me, I shall continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed Date

Upper Tribunal Judge Hemingway