IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07404/2015

THE IMMIGRATION ACTS

Heard in North Shields	**Decision & Reasons Promulgated**
On 26 February 2016	**On 13 April 2016**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

[Y H]
~~(ANONYMITY DIRECTION MADE/NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss R Pickering, Counsel, instructed by Latif Solicitors
For the Respondent: Mr J Kingham, Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge S P J Buchanan, promulgated on 6 July 2015 whereby he dismissed the appeal against a decision of the Secretary of State made on

22 April 2015 to refuse to vary leave to remain and to remove the appellant from the United Kingdom.

2. The appellant is a citizen of Pakistan born on [ ] 1984. He has lived in the United Kingdom since 2008 with leave initially as a student. He claimed asylum on 6 April 2010 which was refused on 1 April 2011 and an appeal against this decision was dismissed. He was, however, granted Discretionary Leave to remain until 21 September 2012 owing to the illness of one of his children. That arose out of the decision of First-tier Tribunal Judge Duff on 16 May 2011 that in the interests of the child's welfare he would need to remain in the United Kingdom for a period of twelve months following an operation and that consequently the appellant and his wife should be given leave to remain with him to care for the chid. It is against the decision to extend that Discretionary Leave to remain that this current appeal was brought.

3. The judge dismissed the appellant's asylum claim. He then went on to consider the position with regard to the earlier grant of discretionary leave to remain and Article 8. The judge concluded that:-

(i) the transitional arrangements relating to those who had been granted Discretionary Leave under the Discretionary Leave policy prior to 9 July 2012 [7.4] did not apply to this appellant as the guidance said that there would normally be a grant of further leave to remain "if the circumstances remained the same" and that he was not satisfied that this was so [7.8] to [7.10];

(ii) the medical evidence indicated that the child had gone through his surgery, had been supervised post-operatively and that there were no immediate concerns from the doctor as to the child's welfare [7.12]; that there was no evidence presented that the follow-up care proposed for the child by his team would not be available in Pakistan and that there was no evidence from any medically qualified person that the child would be best to remain in the United Kingdom now that he had undergone his operation and had twelve months' post-operative follow-up [7.13];

(iii) the appellant and family had made a life for themselves in the UK in the knowledge that their period of leave was limited by the medical needs of their child [12.2] and, there being no medical reasons for concluding the child's removal from the United Kingdom, these were facts which weighed against the appellant in the balancing exercise in considering proportionality;

(iv) the scathing conclusions drawn in earlier appeals about the conduct of the appellant and his wife and their immigration history which was poor were factors to be weighed against the appellant in balancing the issue of proportionality [12.3]; the family were not likely to be separated on return to Pakistan as they would return as a family

unit; again a factor weighing against the appellant in the balancing exercise [12.4];

(v) removal would not amount to a disruption of family life and whilst there may be private life associations disruption with those would not be disproportionate in the circumstances; and, having had regard to Sections 117A-D of the 2002 Act the private life had been promoted at a time when the appellant knew that his leave was limited, the family were not self-sufficient and had been in receipt of benefits. Accordingly, removal would be proportionate.

4. The appellant sought permission to appeal on the grounds that the judge had erred; -

(i) In failing to have regard to the factors under Section 117B of the 2002 Act, having apparently directed himself only to Section 117C, and failing to demonstrate that he had had regard to all the factors set out in Section 117B, appearing not to take into account the fact the appellant speaks English and was thus less a burden on the tax payers;

(ii) in failing to take into account the delay on the part of the respondent in not making a decision on the application for an extension of discretionary leave between 21 September 2012 and 22 April 2015 which, given that children were involved, is relevant to the exercise of proportionality which should, Section 117B notwithstanding, have been considered in respect of proportionality;

(iii) in failing to consider the best interests of the appellant's son, the doctor having concluded he wished to see him in a year's time.

5. On 5 August 2015 First-tier Tribunal Judge Simpson granted permission on all grounds stating:

> "The judge has given adequate reasons for his conclusions which were not perverse or irrational. Although the considerations of Section 117A-D is terse, there is no suggestion that the judge has misdirected himself or that he has applied Section 117B incorrectly. Moreover, there is no indication within the decision that the judge was aware of the decision in **Dube** and it is also arguable that he has failed to consider the application of Section 55 of the BA as regards the best interests of a son."

Submissions

6. Miss Pickering also submitted that in reality the judge's decision would have been significantly different had he had regard to **Dube (ss.117A-117D)** [2015] UKUT 90 (IAC) and **AM (S 117B) Malawi** [2015] UKUT 260 (IAC). She submitted the judge ought to have found positive rights applicable in this case.

7. Miss Pickering submitted that the issue of delay had been properly put to the judge in this a case and that weight could have been attached thereto in this case given what was said in EB (Kosovo) and it was a matter which properly went into the proportionality analysis, the factors in Section B not being exhaustive. She accepted that what said at [12.6] was a proper self-direction as to Section 117A-B but it was clear from what the judge concluded that he had not taken into account delay and that he had not dealt with all of the factors set out in Section 117B.

8. Mr Kingham submitted that the sole issue in this case was whether this would have made a difference given what the judge had found at [12.3]. She submitted that it would not.

Discussion

9. There is no merit in the submission that the judge had directed himself to Section 117C. It is not at all clear from what the judge said other than observing that he had considered the application of Sections 117A to 117D as being relevant, that he had wrongly applied section 117C to this case. Miss Pickering was unable to identify any basis which was indicative of the judge having done so.

10. I am satisfied also from what the judge said at [12.6] that he had had regard to Section 117B of the 2002 Act. The self-direction is adequate.

11. Whilst **AM (Malawi)** was decided after **Dube**, it cannot be said that the approaches are inconsistent and I note from what was said at [33] in **Dube** about delay. It is also not properly arguable that the fact the appellant speaks English is a positive factor, nor indicative that he has been less of a burden.

12. It does not follow from **Dube** that a judge must consider expressly or explicitly all of the factors set out in Section 117B. It is to be borne in mind that the error in that case was a failure to apply Section 117A to 117D at all. I note what was said in Dube at [27]:-

> 27. Applying these observations to this appeal, it is clear that it was incumbent on the judge to apply ss.117A-117D considerations: although the claimant's application and the respondent's decision preceded this date, the FtTJ determined this case on 29 October 2014 and was therefore bound to apply its provisions. At the same time, there is no legal error in his decision simply because he failed to identify its provisions precisely and confused its provisions with ones found in the Immigration Rules. Legal error would only arise if he failed to apply relevant ss. 117A-117D provisions in substance. The Applicant was not a foreign criminal; hence the only considerations potentially relevant to her were those contained in s.117A, 117B and 117D.

13. Applying these principles to the facts of this case, it is sufficiently clear from his decision that the judge did have proper regard to the best interests of the appellant's child. It was open him to find that there was no health reasons as to why the child should need to remain in the United

Kingdom and it is clear, as he noted, that there was no evidence that what continuing care is required could not be provided in Pakistan. The evidence of continuing care was limited; the evidence was that the doctor needed to see the child in one year's time. No other basis is suggested other than health reasons that the child would not be best cared for by living with his parents as part of the family unit and returning to Pakistan.

14. There was adequate consideration of Section 55 of the 2009 Act by the judge and it is to be noted that the child was not a qualified child for the purposes of Section 117D.

15. With respect to delay, it cannot be said that this was a relevant factor which could or should have been taken into account. It is sufficiently clear that the judge was aware of this fact and it is not established that he did not take it into account. Bearing in mind the principles set out in **EB (Kosovo)** as referred to above in **Dube**, it cannot be argued that the delay caused any material disadvantage to the appellant. On the contrary, he was able to remain in the United Kingdom for a further period whilst his child will receive medical care and education.

16. Accordingly, for these reason, I am not satisfied that the decision of the First-tier Tribunal involved the making of an error of law. I therefore uphold the decision.

SUMMARY OF CONCLUSIONS.

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed Date: 1 April 2016

Upper Tribunal Judge Rintoul