IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01011/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 March 2016	**On 31 March 2016**
Oral judgment	

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AQEEL SHAHZAD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr S Jaisri, Counsel instructed by Crown & Mehria Solicitors

DECISION AND REASONS

1. This is a challenge by the Secretary of State to a determination of Judge O'Garro of the First-tier Tribunal, promulgated on 7 September 2015, in which he allowed the appellant's appeal outside the Immigration Rules on

the basis the decision to remove the appellant was disproportionate on the facts.

2. The case history is to be found at paragraphs 13 to 18 of the determination. The judge sets out the chronology showing the appellant was involved in a relationship with his partner who he met in 2014. They have lived together since 1 May 2014. His partner has two children who at the time were aged 6 and 3. The judge refers to issues relating to the children's welfare and the connection the appellant has with the children. The judge refers in paragraph 17 to the fact the children were very unsettled and unhappy, as a result of matters that had arisen within their immediate parental family. The children have no contact with their father. In paragraph 18 the judge states that the appellant has become a father figure to the children.

3. The judge considered the correct legal provisions in relation to the Immigration Rules and found that the appellant could not succeed under paragraph 276ADE because the appellant could not show he had lived continuously in the United Kingdom for twenty years. I refer to an element of carelessness at paragraph 36 of the decision where the judge seems to suggest that the failure was the appellant not showing that he had lived in the United Kingdom for less than twenty years where it clearly was the case that he had lived here for less than twenty years. It was not found there were very significant obstacles to integration into the country to which the appellant would have to go if required to leave the United Kingdom. The appellant is a national of Pakistan whose partner is a national of India.

4. The judge thereafter went on to consider the matter outside the Rules by reference to **MM (Lebanon) and Others [2014] EWCA Civ 985** and found in paragraph 38 that as Appendix FM and 276ADE had not been found to be a complete code the judge must proceed to consider Article 8 ECHR and went on to do so. Although not raised by Mr Tarlow in the grounds, as discussed with Mr Tufan this morning whether that is an accurate statement of law is debatable in light of the decision of the Court of Appeal in **Singh and Khalid [2015] EWCA Civ 74** in which the Court of Appeal confirm that paragraph 30 of the decision of Sales J in **Nagre** was a correct statement of the law, namely that it was only if there was a reason that required consideration outside the Immigration Rules by way of a freestanding Article 8 assessment, was it necessary so to do.

5. In this case the judge did consider that it was a case in which matters had to be considered as a freestanding Article 8 assessment and I do not find that amounts to an error of law material to the decision that was eventually made. In fact this is a case in which it was found that although the appellant was unable to succeed under the Immigration Rules he was able to succeed, having applied the statutory provisions set out in part 5 of the 2002 Act which include the Secretary of State's own interpretation

on how weight should be placed in relation to an Article 8 balancing exercise.

6. The judge went through the questions set out in the case of **Razgar** [2004] UKHL 27 and found that there was family and private life between the appellant and his partner and children. The judge considered Section 55 at paragraph 48 of the determination and thereafter moved on at paragraph 51 to consider, as the judge was required to do, the provisions of 117B of the Nationality, Immigration and Asylum Act 2002. The judge made the following specific finding [51]. I will read it out as it is written:

> "I bear in mind 117B(6) of the Nationality, Immigration and Asylum Act 2002 which states that in the case of a person who is not liable to deportation, the public interest does not require the person's removal where the person has a genuine and subsisting parental relationship with a qualifying child, and it would not be reasonable to expect the child to leave the United Kingdom. The appellant's partner's children are British and therefore qualifying children and I accept that the appellant has a genuine and subsisting relationship with these children. I also accept that it would not be reasonable for the children to move to Pakistan with the appellant."

In paragraph 53 the judge goes on:

> "In undertaking my balancing exercise, I have considered all the matters set out in Section 117B cumulatively, such as the fact the appellant can speak English, his partner works and he himself will be able to work which means that he is financially independent and will not be a burden on taxpayers. The fact that he is easily able to integrate into society having lived in the United Kingdom since 2011 and can speak English. The fact that he formed a relationship when he was in the United Kingdom lawfully and has always complied with the immigration laws and most importantly is in a genuine and subsisting parental relationship with qualifying child/children who cannot leave the United Kingdom to relocate with the appellant."

7. Two pieces of case law are specifically relevant to the decision of the judge. The judge found the appellant is not the biological father of the children and the children do not have contact with their natural father. The evidence before the judge suggests a step parent relationship. Whether this can satisfy the definition of a 'parental relationship' under the Rules was specifically considered by this Tribunal when exercising its judicial review jurisdiction in the case of **R (on the application of) RK (Section 117B(6) – parental relationship) IJR [2016] UKUT 31** in which the Tribunal found it:

> "(i) It is not necessary for an individual to have parental responsibility in law for there to exist a parental relationship;

(ii) whether a person who is not a biological parent is in a parental relationship with a child for the purposes of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 depends on the individual circumstances and whether the role that individual plays establishes that he or she has stepped into the shoes of a parent through applying that approach, apart from the situation of split families where relationships between parents are broken down and an actual or de facto step parent exists, it would be unusual but not impossible for more than two individuals to have a parental relationship with a child. However, the relationships between a child and professional or voluntary carers or family friends are not parental relationships."

8. The Tribunal therefore examined the reality of many cases where marriages break down and others within a family assume a parental role. It was accepted by the Tribunal that a step parent who has a proper involvement with the lives of step children can satisfy the definition of a person with a parental relationship as defined in Section 117B(6). That was the finding of the judge in this case and it has not been made out on the basis of the evidence that was available to the judge, which I have looked at in some considerable detail, that that decision was outside the range of permitted decisions the judge was entitled to make on the evidence.

9. Having found that the requirements of 117B(6) were satisfied it was necessary for the judge to consider what impact that had upon the proportionality of the decision under challenge. The Tribunal considered that issue in the case of **Treebhawon and Others (Section 117B(6)) [2015] UKUT 674** in which it was held that:

"(i) Section 117B(6) is a reflection of the distinction which Parliament has chosen to make between persons who are, and who are not liable to deportation. In any case where the conditions enshrined in Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 are satisfied, the Section 117B(6) public interest prevails over the public interests identified in Section 117B(1)-(3);

(ii) Section 117B(4) and (5) are not parliamentary prescriptions of the public interest. Rather, they operate as instructions to courts and Tribunal to be applied in cases where the balancing exercise is being conducted in order to determine proportionality under Article 8 ECHR, in cases where either of the factors which they identify arises."

10. What we therefore have in relation to 117B(6) is what was classed in **Treebhawon and Others** as a parliamentary prescription of the public interest i.e. if the requirements of Section 117B(6) are met, it will, according to Parliament, not be proportionate to remove the person with a

subsisting parental relationship from the United Kingdom. That is the finding of the judge which on the facts of this matter is a finding that was properly open to the judge that has not been shown to be susceptible to challenge on the basis of arguable legal error.

11. Moving on to deal with grounds on which permission was granted, this relates to paragraph 52 of the determination where the judge makes the following finding:

> "I have noted what the Tribunal said in **R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM – *Chikwamba* – temporary separation – proportionality) IJR [2015] UKUT 001** which said that it will be for the individual to provide evidence that such temporary separation will interfere disproportionately with protected rights."

12. As the judge found in the prior paragraph that the requirements of 117B(6) of the 2002 Act could be met, which is a sustainable finding supporting the decision to allow the appeal, if the judge has legally erred in relation to the reference to **Chen** it is not a material factor. It is not acceptable to quote paragraphs from case law without establishing in the body of the determination, either expressly or by inference, how they apply to the case in question. Had this been a case where Section 117B(6) was not satisfied and therefore the position under Article 8 was one based upon the relationship that existed and no more, and the issue was the removal from the United Kingdom for the appellant to make a formal application to return lawfully, I would have found in favour of the Secretary of State that the finding in paragraph 52 was inadequate as the judge did not go on to set out what the factors were that had been identified and the impact of the temporary separation upon the individuals such as to show that it was a disproportionate decision. However, any such error is not material because the decision to dismiss the appeal based upon parliamentary prescription and the nature of the relationship the appellant has with his partner and children is clearly one that justified the finding that was made. For that reason I dismiss the appeal.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date: 16 March 2016

Upper Tribunal Judge Hanson