Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/24824/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 September 2017	**On 4 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MINAKSHI RANI CHOWDHURY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Chowdhury, Counsel, instructed by KC Solicitors
For the Respondent: Mr P Armstrong, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Robinson (the judge), promulgated on 25 November 2016, in which he dismissed her appeal on all grounds. That appeal followed from the Respondent's decision of 23 June 2016, refusing the Appellant's human rights claim. The claim had been based on Article 8, specifically in respect of the Appellant's relationship with a British citizen partner and their British citizen child.

The judge's decision

2. The Respondent was unrepresented at the hearing before the judge. Although it is somewhat unclear from the decision itself, the judge appears to have concluded that

the Appellant could not satisfy any of the provisions of the Article 8-related Immigration Rules. He then went on to assess the claim outside the context of those Rules. He makes reference to the best interests of the child and then to the question of whether it would be reasonable for the Appellant's child to leave the United Kingdom and go to Bangladesh. He sets out a number of factors which he concluded weighed in favour of a departure from this country, having regard to specific matters relating to the family's circumstances, and to factors arising out of section 117B of the Nationality, Immigration and Asylum Act 2002. Importantly, there is what amounts to a finding of fact that the Appellant's child is a British citizen (paragraph 32).

The grounds of appeal and grant of permission

3. The succinct grounds of appeal assert that the judge had failed to take any or any adequate cognisance of the child's British nationality when assessing best interests and/or the question of reasonableness. Despite some of the observations made by the judge in his decision, the grounds assert that EX.1 under Appendix FM was in fact a live issue at the hearing.

4. Permission to appeal was granted by First-tier Tribunal Judge Lambert on 10 July 2017.

The hearing before me

5. At the outset of the hearing I indicated to both representatives that in my view there was a material error of law in the judge's decision, namely a failure to substantively consider the child's British nationality when assessing both best interests and, importantly, whether it would be reasonable for that child to leave the United Kingdom. There was no opposition to this view from Mr Armstrong.

6. I conclude that there are indeed material errors of law. My reasons for this conclusion are as follows.

7. It is true that the judge has referred to the best interests of the child and then to the reasonableness question. It is true also that he has had regard to a number of factors which would be relevant to his assessment: for example, the nature of the ties of the Appellant to Bangladesh; the child's age; and the ability of one or both parents to find employment in Bangladesh.

8. However, the problem arises out of the consideration of the British nationality. In light not only of well-known case-law, but also the Respondent's guidance on Appendix FM (1.0b, August 2015, at paragraph 11.2.3), a child's British nationality is a highly significant factor in assessing not only best interests but also the reasonableness of them leaving the United Kingdom. With respect to the judge, he fails to engage with this factor in any meaningful way. The reference to nationality in paragraph 32 is simply a statement of his finding of fact: there is nothing more by

way of substantive consideration as part and parcel of the best interests and/or reasonableness assessment.

9. It may well be that the Respondent's guidance was not brought to the judge's attention at the hearing. It certainly does not appear in the reasons for refusal letter. Whilst I have sympathy for the judge in this respect, the guidance was nonetheless a relevant factor. I note that the same guidance was considered by the Upper Tribunal in SF and others (Guidance, post–2014 Act) Albania [2017] UKUT 00120 (IAC). As with the present case, the document had not been brought to the judge's attention, but the Tribunal deemed it to be material to the question of whether there was an error of law.

10. The error is clearly material and therefore I set aside the judge's decision.

Re-making the decision

11. Both representatives agreed that in light of my decision on the error of law, I could and should remake the decision based upon the evidence before me.

12. Mr Chowdhury asked me to consider the claim within the context of the Rules on the basis that the Appellant was and is the fiancée of her British citizen partner. If this were the case I could go on and consider the case under EX.1. In Mr Chowdhury's submission it would be unreasonable to expect the Appellant's child to leave the United Kingdom. If the Appellant could not rely upon the Rules, I was asked to consider the case at large, particularly in light of section 117B(6) of the 2002 Act. The child was a qualifying child and it would be unreasonable to expect him to leave this country.

13. Mr Armstrong sought to suggest that the Appellant could go back to Bangladesh and make an entry clearance application. I pointed out that I was unclear as to how this was relevant to the question of whether the Appellant's *child* could reasonably leave the United Kingdom. Mr Armstrong did not provide a response to this. He accepted that the child was British, having regard to what the judge had said together with pages 7 and 8 of the Appellant's bundle. I raised the issue of the Respondent's guidance (referred to above) and the decision in SF. Mr Armstrong did not seek to resile from the contents of that guidance. He asked me to consider the wider public interest considerations, and to dismiss the appeal.

14. In reply Mr Chowdhury asked me to note that the Appellant is now 8 months pregnant with her second child. He accepted that she could not meet the five-year route under Appendix FM.

Findings

15. I have had regard to the evidence contained in the Respondent's bundle, and the Appellant's bundle, indexed and paginated 1-53. There has been no challenge to the

credibility of any of the evidence before me, and indeed there does not seem to have been any factual disputes between the parties previously. I make the following findings of fact.

16. The Appellant came to the United Kingdom in 2013 with leave as a student until 9 May 2015. She then made an in-time application for further leave to remain which resulted in the Respondent's decision against which she now appeals. I find that the Appellant has been in a genuine and subsisting relationship with her British citizen partner, Mr G, since 2014, and that they began living together in March of that year. I find that the Appellant and Mr G converted to Islam on 1 March 2016. I find that on the same date they entered into an Islamic marriage. I find that the couple's son, C, was born in December 2015. I find that both Mr G and C are British citizens. I find that the Appellant has family ties back in Bangladesh. I find that she is an educated person, with a degree obtained in this country. I find that the child has no particular health problems. I find that the Appellant has at all material times been the fiancée of Mr G. On the evidence before me it is clear that they have been in a committed relationship for a significant period of time and have always held the intention of living together permanently and of entering into a civil marriage. The Islamic marriage, their cohabitation, the birth of their child, and the ongoing nature of the relationship all goes to show that this is the case. I find that although the minimum income threshold set out in Appendix FM cannot be met, the Appellant herself has been adequately maintained by her partner, with reference to the Income Support comparator.

Conclusions on the Article 8 claim within the context of the Rules

17. I conclude that the Appellant can rely on the provisions of Appendix FM in this case. Mr G is her "partner" within the meaning of GEN.1.2(iii) of the Appendix because he was at all material times her fiancée.

18. No suitability issues arise in this case.

19. It has been accepted by Mr Chowdhury that the financial requirements cannot be met, and so the Appellant would need to meet the requirements of EX.1 in order to succeed in her case.

20. The Appellant clearly has a genuine and subsisting relationship with her child. The child is under the age of 18 and is present in the United Kingdom. He is also a British citizen.

21. The question is then whether it would be reasonable to expect the child to leave the United Kingdom. In answering this question I direct myself to the cases of MA (Pakistan) [2016] EWCA Civ 705 and AM (Pakistan) [2017] EWCA Civ 180.

22. I then have regards to the following matters:

    i. the child's best interests are a primary consideration;

ii. it is in the child's best interests to be with his parents;

iii. the child's British nationality is a highly significant factor, bringing with it rights and privileges which he would not enjoy if he were to have to live in Bangladesh;

iv. in light of iii, the child's best interests also lie in remaining in his country of nationality;

v. the Respondent has a stated position on her view of the reasonableness of expecting a British child to leave the United Kingdom (the guidance referred to previously);

vi. the child is still of course very young;

vii. he was born at a time when his mother's status in this country was precarious (although she had never been here unlawfully);

viii. there are familial ties in Bangladesh;

ix. the Appellant is able to speak English to a reasonable level; there is no criminality in this case;

x. although the minimum income threshold cannot be met, I am satisfied that the family unit is financially independent having regard to an 'adequacy' test;

xi. there are no adverse health issues in this case;

xii. Mr G is British.

23. I place significant weight upon the position adopted by the Respondent herself in the Court of Appeal (see paragraph 35 of MA (Pakistan). I also place significant weight on the Respondent's own guidance at paragraph 11.2.3. The passage reads:

> "Would it be unreasonable to expect a British Citizen child to leave the UK?
>
> Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.
>
> The decision maker must consult the following guidance when assessing cases involving criminality:
> • Criminality Guidance in ECHR Cases (internal)
> • Criminality Guidance in ECHR Cases (external)

> Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.
>
> In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.
>
> It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU. The circumstances envisaged could cover amongst others:
> • criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
> • a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules."
>
> (underlining added)

24. This particular guidance was before the Upper Tribunal in SF. Mr Armstrong has not sought to suggest that the guidance does not apply in this case, or there are some other reasons as to why it should be ignored or otherwise deemed irrelevant. In my view the guidance represents the considered view of the Respondent, and whilst this is not a decisive matter, it is clearly something that I am entitled to attach significant weight to. It emanates from the very source which has established the framework for considering Article 8 cases within the context of the Rules, with such Rules being deemed consistent with Article 8 obligations. There is no criminality or other misconduct which would represent significant countervailing factors here.

25. I take full account of the importance of the powerful public interest in maintaining effective immigration control. In this case, however, this significant factor is outweighed by the matters I have set out previously.

26. In light of all the relevant factors in this case I conclude that it would not be reasonable for the British citizen child to leave the United Kingdom.

27. As I have concluded that it would be unreasonable for the Appellant's child to leave the United Kingdom, she satisfies the provisions of EX.1 under Appendix FM. In light of this, the Appellant herself succeeds on Article 8 grounds within the context of the Rules (there has been no suggestion that she need show anything over and above such satisfaction in order to succeed).

Conclusions on the alternative scenario

28. If I were wrong about Mr G being a partner within the meaning of GEN.1.2, I would nonetheless conclude that the Appellant could succeed in her appeal with reference

to section 117B(6) of the 2002 Act. The reasonableness test is the same under this provision as under EX.1. I would rely on all factors referred to above. The only additional matter would be the Appellant's inability to meet the requirements of the Rules. I would take this into account as weighing in the Respondent's favour. However, this would not be sufficient to outweigh the matters resting in the Appellant's side of the scales, in particular the Respondent's guidance. The Appellant would succeed on this alternative basis as well.

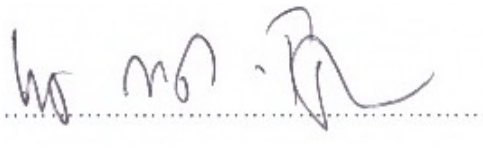
Notice of Decision

The decision of the First-tier Tribunal contains a material error of law.

I set aside that decision.

I remake the decision in this appeal by allowing the appeal on the basis that the Respondent's decision to refuse the Appellant's human rights claim was unlawful under section 6 of the Human Rights Act 1998.

No anonymity direction is made.

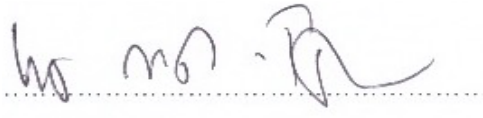
Signed  Date: 3 October 2017

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award. The Appellant has succeeded in her appeal on the basis upon which the original application was made. The Respondent has failed to have regard to her own guidance when assessing that application and resisting the appeal thereafter.

Signed  Date: 3 October 2017

Deputy Upper Tribunal Judge Norton-Taylor