Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/25887/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 November 2017	**On 28 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

M I C
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Shah, Taj Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a national of Bangladesh, born on 5 January 1992, who appealed to the First-tier Tribunal against a decision of the respondent dated 2 July 2015 to refuse the appellant leave to remain under Article 8 of the European Convention on Human Rights. In a decision promulgated on 19 December 2016 Judge of the First-tier Tribunal Haria dismissed the appellant's appeal under the Immigration Rules and on human rights grounds.

2. The appellant appeals with permission. The respondent in a Rule 24 notice dated 3 October 2017 confirmed that the respondent did not oppose the appellant's application for permission to appeal and invited the Tribunal to determine the appeal with a fresh oral (continuance) hearing to

consider whether the appellant should have the benefit of the policy outlined in **SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 120 (IAC)**.

3. That is the correct approach. The judge failed to adequately consider the status of the appellant's child as a British national and specifically the respondent's guidance in relation to the treatment of cases involving British children. That was an error of law.

4. It was not disputed by either party that I could remake the Article 8 decision in the Upper Tribunal or that the First-tier Tribunal's factual findings including regarding the genuineness of the relationships should be preserved.

Remaking the Decision under Article 8

5. Mr Jarvis made detailed submissions in relation to Appendix FM. It was not disputed that this was a ten year case under the partner route.

6. Appendix FM R-LTRP provides:

> "Requirements for limited leave to remain as a partner
>
> R-LTRP.1.1. The requirements to be met for limited leave to remain as a partner are:
>
> (a) the applicant and their partner must be in the UK;
>
> (b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either
>
> (c)
>
> (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
>
> (ii) the applicant meets all of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner; or
>
> (d)
>
> (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and
>
> (ii) the applicant meets the requirements of paragraphs E-LTRP.1.2. - 1.12. and E- LTRP.2.1.; and
>
> (iii) paragraph EX.1. applies."

7. It was not disputed by Mr Jarvis that the appellant met the requirements of Appendix FM R-LTRP.1.1.(d)(i) and (ii). In relation to (iii) Mr Jarvis submitted that paragraph EX.1. does not apply in a case such as the appellant's. Paragraph EX.1. provides as follows:

> "Exceptions to certain eligibility requirements for leave to remain as a partner or parent
>
> EX.1. This paragraph applies if
>
> (a)
>
> (i) the applicant has a genuine and subsisting parental relationship with a child who –
>
> (aa) is under the age of 18, was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of application; and
>
> (ii) it would not be reasonable to expect the child to leave the United Kingdom or
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> EX.2. For the purposes of paragraph EX.1.(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

8. It was Mr Jarvis' submission that the Secretary of State was not expecting the child to leave in this case and therefore the appellant could not qualify under EX.1. I do not agree with the argument that the appellant cannot succeed under EX.1. In assessing whether it would be reasonable for the appellant's child to leave the UK I must take into consideration that it is accepted that it is unreasonable by the respondent in the guidance. I must consider the best interests of the appellant's British citizen child. I accept that citizenship is a weighty factor. The appellant's child is still relatively young but there is evidence of her extended family in the UK

including her aunts and uncles and that she had a special bond with her family as the child was the first grandchild and nephew of the family. I am satisfied that the best interests of the child would be best served by remaining in the UK. Whilst she is sufficiently young to be able to adapt to life in Bangladesh with the support of her parents, given that the majority of the appellant's wife's family are living in the UK it is likely to be difficult to re-establish life in Bangladesh, particularly given the young age of the British citizen child.

9. When considering the reasonableness, whether it be under Appendix FM or, if I am wrong in relation to the appellant succeeding under Appendix FM, under Section 117B(6) of the Nationality, Immigration and Asylum Act 2002, the considerations are the same.

10. Section 117B(6) provides as follows:

> "(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

11. As already noted, it was not disputed that the appellant has a genuine and subsisting relationship with his British citizen child and therefore Section 117B(6)(a) is satisfied. I therefore must consider whether it is reasonable to expect the child to leave the UK in accordance with Section 117B(6)(b). I have taken into account all the relevant factors when assessing reasonableness and not just the impact upon the children, **MA (Pakistan) v SSHD [2016] EWCA Civ 705** applied. I must take into account, although not a factor in the best interests' assessment above, the appellant's immigration history as relied on by Mr Jarvis, including that he arrived in 2007 and remained in the UK without regularising his leave for some eight years. I did take this into account. However, I have also considered, as not disputed by Mr Jarvis, that the appellant was 15 years old and a minor when he first arrived in the UK and was brought by his mother.

12. I must take into account the respondent's policy and its relevance to the reasonable test, which was addressed in both **MA (Pakistan)** and **SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 120 (IAC)**. It was held in **SF and others** that the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome.

13. Paragraph 11.2.3 of the Immigration Directorate Instruction on "Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes, August 2015" (and Mr Jarvis confirmed that this policy was still in force and was not yet updated although it was likely to be updated in the near future) provides as follows:

> "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**.
>
> …
>
> 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."

14. I have taken into account that this policy envisages that countervailing circumstances may mean that it is appropriate to refuse leave and I have noted that the appellant has a poor immigration history; although, as also noted, this must be considered in the context that he was brought to the UK as a child, albeit unlawfully, in 2007 with the assistance of an agent.

15. I accept the appellant's evidence in his witness statement, which was not specifically disputed, that his family members from Bangladesh arranged his travel and he had no knowledge of anything and did not know any better as a child. Upon his arrival in the UK he lived with his uncle, who helped to financially maintain him. He subsequently met his wife, R B, in 2013, a British citizen, who has never been to Bangladesh. The genuineness of this relationship and the relationship with his child is not disputed. I have taken into account that there are mitigating factors for the appellant's behaviour including his young age and that he was relying on family relatives, albeit that he was an adult for some time in the UK prior to seeking to regularise his status.

16. I do take into account when considering reasonableness therefore the appellant's poor immigration history.

17. I have also considered that the appellant's wife is a British citizen and has never visited Bangladesh, let alone lived there. In all the circumstances therefore, even when the appellant's immigration history is taken into account, it would not be reasonable to expect the child to leave the UK and therefore paragraph EX.1. is met. In the alternative, if I am wrong I am satisfied that Section 117B(6)(b) applies and it would not be reasonable to expect the child to leave the UK.

18. Considering the appellant's appeal outside of the Immigration Rules, I have considered the public interest question. Under Section 117A(2) I must have regard to the considerations listed in Section 117B, which I have as follows:

    (a) Public interest in the maintenance of effective immigration control is engaged. (if I am wrong in relation to my consideration of Appendix FM, and EX.1).

    (b) It was not disputed before me that the appellant can speak English and therefore there is no infringement of the English-speaking public interest.

    (c) However, I am satisfied that the economic interest is engaged as it has not been demonstrated that the appellant is financially independent at this point.

    (d) I must attach little weight to the appellant's private life, which was established at a time when he was in the UK unlawfully.

19. However, having considered all the evidence in the round, together with the child's best interests which, I am satisfied, lie in remaining in the UK with both of his parents, the appellant's removal would be a disproportionate breach of Article 8.

Decision

The decision of the First-tier Tribunal contains an error of law and is set aside to the extent outlined above.

I remake the decision allowing the appellant's appeal under Appendix FM or, in the alternative, under Article 8 of the ECHR.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. I have made such an anonymity order as this decision involves the circumstances of the appellant's minor child.

Signed Date

Deputy Upper Tribunal Judge Hutchinson