Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28526/2015

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision and Reasons Promulgated**
On: 28 September 2017	**On: 29 September 2017**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SA
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: None
For the respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant.

1. I have made an anonymity order because this decision refers to the

circumstances of the appellant's young child.

Background

2. The appellant is a citizen of Pakistan. He entered the United Kingdom ('UK') as the spouse of his British citizen wife in 2011. They have a British citizen child (born in 2016) together.

3. On 17 July 2015 the SSHD refused the appellant further leave to remain as a spouse and found that he submitted a false English language certificate with his application for further leave dated 14 February 2014.

4. In a decision dated 8 December 2016, the First-tier Tribunal dismissed the appellant's appeal against the SSHD's decision, and found that he fraudulently attempted to deceive the SSHD by relying upon a false English language certificate and that it would be reasonable to expect the appellant's British citizen child and wife to live in Pakistan with the appellant.

5. In a decision dated 18 July 2017 Upper Tribunal Judge O'Connor did not find the grounds addressing the deception finding to be arguable. Judge O'Connor however considered it arguable that there was an error of law in failing to apply section 117B(6) of the Nationality, Immigration and Asylum Act 2002 and in failing to attach significant weight to the child's British citizenship.

6. In a rule 24 response dated 3 August 2017 the SSHD submitted that the First-tier Tribunal was well-aware of the child and applied the appropriate reasonableness test.

Hearing

7. There was no appearance from the appellant or his solicitors. In a letter dated 29 August 2017 the appellant's solicitors invited the Tribunal to determine the appeal on the papers.

8. I indicated a provisional view to Mr McVeety, with which he agreed. First, the First-tier Tribunal committed a material error of law in failing to attach weight to the child's British citizenship. As observed in MA Pakistan v SSHD [2016] EWCA Civ 705, where the child is a qualifying child either by reason of seven years residence or British citizenship, significant weight must be given to this when assessing reasonableness and conducting the proportionality exercise – see [45-6] and [102]. Second, I can remake the decision myself: when all the relevant considerations are taken into account including the best interests of the appellant's British citizen child and the finding of fraud

/ deception, the Article 8 appeal should be dismissed.

Error of law

9. Mr McVeety conceded that the First-tier Tribunal decision contains a material error of law and I so find for the reasons outlined above.

Re-making the decision under Article 8

Best interests

10. I begin the Article 8 assessment by evaluating the primary consideration of the interests of the appellant's British citizen child. He was born in May 2016 and is therefore very young. The evidence relating to the child is very limited. The appellant's solicitors have merely re-served the evidence available to the First-tier Tribunal. I accept that citizenship is a weighty factor and that the child and his British citizen mother are likely to have strong links to the UK. The mother came to the UK as a young child and her parents reside in the UK. She has regular employment and accesses medical treatment for pain in the UK.

11. On the other hand, the appellant's parents reside in Pakistan and are likely to be able to support their son and his family, whilst the family settle into Pakistan. The mother has a Pakistani background and has visited Pakistan.

12. On balance, I conclude that the best interests of the child would be best served by remaining in the UK, but only by a narrow margin. The child is very young and would be able to adapt to life in Pakistan, with the support of his parents, both of whom have substantial knowledge of and links to Pakistan.

Section 117B(6)

13. Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 states as follows:

> "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."

14. I accept that (a) is met. The real question for me is the

reasonableness of expecting the child to leave the UK in accordance with (b). I must take all the relevant factors into account, including the child's best interests, when assessing reasonableness – see MA Pakistan (supra). The relevant countervailing factor in this case is the appellant's use of deception.

15. When considering reasonableness, it is also relevant to take into account the SSHD's policy. Paragraph 11.2.3. of the IDI on Family Migration provides the SSHD's decision makers with guidance on cases involving British children. The August 2015 version states that, 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. The decision would not force the child to leave the EU because he can remain in the UK with his British citizen mother, for the reasons set out in detail in VM Jamaica v SSHD [2017] EWCA Civ 255.

16. However, the policy also states that:

> "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".

17. The SSHD's decision to refuse the application would require the appellant ('a parent') to return to a country outside of the EU, Pakistan. As such, the SSHD's own policy states that the case must be assessed on the basis that it would be unreasonable to expect the British citizen child to leave the EU with that parent. In such cases, the policy states it will usually be appropriate to grant leave, provided that there is evidence of a genuine and subsisting parental relationship. The policy then states:

> "It may 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 carer in the UK or in the EU. The circumstances envisaged could cover amongst others:
> Criminality…
> A very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules"

18. The policy clearly envisages that countervailing circumstances may mean that it is appropriate to refuse leave. The list provided is not an exhaustive one. The appellant has been found to have used deception. He did not admit to this when it was first alleged and took part in a Tribunal hearing maintaining an innocent explanation which

was ultimately rejected. In my judgment, this is a significant countervailing circumstance.

19. When the appellant's use of deception is considered in the round together with all the relevant circumstances including the best interests of the child and his British citizenship, together with the circumstances and citizenship of the mother which I have summarised above, I am satisfied that it would be reasonable to expect the child and his mother to leave the UK to be with his father in Pakistan. The mother will have the support of the appellant's family in Pakistan and this family will be able to establish themselves adequately in Pakistan.

20. In all the circumstances, it would be reasonable to expect the child to leave the UK and section 117B(6)(b) is not met.

Private life

21. The appellant and his family members undoubtedly have private lives in the UK. However, there is a dearth of any meaningful evidence relevant to the appellant.

Balancing exercise

22. Proportionality is the "public interest question" within the meaning of Part 5A of the 2002 Act. By section 117A(2) thereof I am obliged to have regard to the considerations listed in section 117B. I consider that section 117B applies to this appeal in the following way:

(a) The public interest in the maintenance of effective immigration controls is clearly engaged given the appellant's use of deception.

(b) The evidence on the appellant's English ability is contradictory but I am prepared to accept he can speak in basic English and as such I do not find an infringement of the "English speaking" public interest.

(c) The appellant's wife has employment in the UK and the economic interest does not appear to be engaged.

(d) The private life established by the appellant during the entirety of his time in the UK qualifies for the attribution of little weight only.

23. In my judgment, when all of the above matters are considered in the round, together with the child's best interests and the circumstances of his mother, and balanced against the public interest

in removal (particularly in light of the appellant's use of deception) the appellant's removal does not constitute a disproportionate breach of Article 8. Although the appellant's wife does not wish to reside in Pakistan, I have found that it will be reasonable to expect her to do so. This is not a case in which the appellant's wife and child will be required to leave the UK. She can choose to remain in the UK with her child or return to Pakistan with her husband and child. The choice is hers. In all the circumstances, it would be reasonable to expect the child to live in Pakistan with both his parents.

24. Having applied the facts to section 117B of the 2002 Act and considered the general principles applicable in a case raising family and private life under Article 8 of the ECHR, I find that the appellant's removal from the UK would not constitute a disproportionate breach of Article 8.

Decision

25. The decision of the First-tier Tribunal contains an error of law and is set aside.

26. I remake the decision by dismissing the appellant's appeal pursuant to Article 8 of the ECHR.

Signed: Ms Melanie Plimmer Dated: 28 September 2017
Judge of the Upper Tribunal