Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10618/2016
PA/10616/2016

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly
On 24 November 2017

Decision Promulgated
On 05 December 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

ASBK
SFII
(ANONYMITY DIRECTIONS MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: unrepresented

For the Respondent: Mr A Mc Vitie Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. An anonymity direction was made previously in respect of these Appellants and shall continue.

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2. The first Appellant (A1) was born on 8 April 1972 and is the husband of the second Appellant A2 who was born on 22 May 1990.There are three dependent children: child 1 (C1) born 19 June 2008 in Iraq, child 2 (C2) born 6 September 2009 in the UK and child 3 (C3) born in the UK on 19 February 2013. The children are now respectively 9, 8 and 4 years old. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
3. This was a resumed hearing. On 10 August 2017 at an error of law hearing I set aside the decision of First-tier Tribunal Judge Austin in so far as it related to the human rights aspect of this appeal in particular to the Article 8 best interests of the children given that two of the children were qualifying children for the purpose of section 117B6 of the Nationality Immigration and Asylum Act 2002.
4. At the hearing I heard submissions from Mr McVitie on behalf of the Respondent that :
   (a) He acknowledged that the Appellants had produced a comprehensive bundle based largely on the Respondents own background material.
   (b) The issue for the Tribunal was whether, given that two of the children were qualifying children, it was reasonable for the children to be removed from the UK and in relation to that assessment he conceded that security issues in Iraq, were relevant.
   (c) He noted that one of the children was 18 months away from entitlement to British citizenship.

5. The Appellants submitted that :

   (a) They relied on the bundles of documents they had prepared for the Tribunal.

   (b) They confirmed that only their eldest child had ever been to Iraq and that was in 2012 and the situation was very different now and had deteriorated significantly.

   (c) There was no safe place for them to take their children now.

   (d) He pointed out that the refusal letter appeared to think they were Kurds and could live there but this was not correct: they were Arabs A1 had at one time worked in the Kurdish area. They were also Sunni Arabs.

Legal Framework

7. The burden of proof in this case is upon the Appellants and the standard of proof is upon the balance of probability.

8. Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases in particular to the considerations listed in section117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that the 'public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

9. The S117B considerations are as follows:

> *"(1) The maintenance of effective immigration controls is in the public interest.*
>
> *(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—*
>
> *(a) are less of a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—*
>
> *(a) are not a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*
>
> *(4) Little weight should be given to—*
>
> *(a) a private life, or*

(b) a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(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."

Section 117B6

10. The definition of "qualifying child" is found in section 117D:

"qualifying child" means a person who is under the age of 18 and who-

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;"

11. I have taken into account the guidance given in R (on the application of MA (Pakistan) and Others) v UT (IAC) & Anor [2016] EWCA Civ 705 in relation to the issue of reasonableness in section 117B 6 of the 2002 Act at paragraph 46

"46.Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view, they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That

may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.

47.Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child's best interests are in favour of remaining. I reject Mr Gill's submission that the best interest's assessment automatically resolves the reasonableness question. If Parliament had wanted the child's best interests to dictate the outcome of the leave application, it would have said so."

Findings

12. I am required to look at all the evidence in the round before reaching any findings. I have done so. Although, for convenience, I have compartmentalised my findings in some respects below, I must emphasise the findings have only been made having taken account of the evidence as a whole.

13. The Appellants appealed the decision of the Respondent on the basis that the decision was unlawful under section 6 of the Human Rights Act 1998.I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27

Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?

14. I am satisfied that the Appellants and their three children have a family life in the United Kingdom and given the length of residence in the UK they have a strong private life.

If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

15. I am satisfied that removal would have consequences of such gravity as potentially to engage the operation of Article 8.

If so, is such interference in accordance with the law?

16. I am satisfied that there is in place legislative framework for the decision giving rise to the interference with Article 8 rights which is precise and accessible enough for the Appellants to regulate their conduct by reference to it.

If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?

17. The interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic well being of the country through the maintenance of the requirements of a policy of immigration control. The state has the right to control the entry of non nationals into its territory and Article 8 does not mean that an individual can choose where she wishes to enjoy their private and family life.

If so, is such interference proportionate to the legitimate public end sought to be achieved?

18. In making the assessment of the best interests of the children I have also taken into account ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 where Lady Hale noted Article 3(1) of the UNCRC which states that *“in all actions concerning children, whether undertaken by … courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

19. Article 3 is now reflected in section 55 of the Borders, Citizenship and Immigration Act 2009 which provides that, in relation, among other things, to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions *"are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".* Lady Hale stated that *“any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8(2)”.* Although she noted that national authorities were expected to treat the best

interests of a child as "*a primary consideration",* she added *“Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration".*

20. The Appellants produced a very comprehensive bundle with documentary evidence relating to both the personal circumstances of the family, in particular the children, and the current security situation in Iraq. The findings I make below are all underpinned by this documentary evidence.

21. I note first of all that two of the children have accumulated over 7 years residence in the UK and that the other, while only 4 years old, was born in the UK and are well integrated into UK society. They clearly speak English as indeed do both of their parents. I give significant weight to it being in the best interests of children to maintain continuity in their social and cultural environment.

22. I accept that the children are all settled in their schools and are doing well academically benefiting from an English education. If they were returning to a country at peace where the infrastructure, including the provision of education, were stable then I accept that with the assistance of well-educated parents there may be nothing to suggest that it would be contrary to their best interests to return to that country with their parents. However that is not the case here. The March 2017 COIS Iraq: Security and humanitarian situation at 8.10 states:

‘*The OCHA, in December 2016, noted that 3.5 million children were in need of education support.41 In April 2016 the OCHA noted that there were 2 million children (out of 10 million) out of school.42*

8.10.2 In a report dated December 2016, the OCHA stated: ‘Schools in the governorates impacted by ISIL [Daesh] are forced to convene three sequential sessions to cope with the increased number of students. Nearly 3.5 million school-aged Iraqi children attend school irregularly, or not all.’

23. The Appellants produced a bundle before me that ‘up dated’ the information in their ‘old bundle’ in relation to the security situation and I have also taken into account the March 2017 COIS as stated above. I accept that it would not be in their best interests to return to a country where the challenges raised by an

extremely volatile security situation may be something that an adult could cope with but would not, even with parental support, be something that young children who have only ever lived in the UK should be expected to cope with. The family originate from Mosul and Mr Mc Vitie did not seek to argue that they could live there, they could not live in the IKR and were they to relocate to Baghdad as Sunni Arabs they would be in a minority group and have no family support there.

24. I therefore conclude that in relation to the best interests of the children both in terms of their security, their education and social continuity it is overwhelmingly in the best interests of the children to remain in the UK.

25. I now turn to the wider proportionality assessment. Consideration of the issue of proportionality is 'consideration of "the public interest question" as defined by section 117A(3) of the 2002 Act. I am therefore required by section 117A(2)(a) to have regard to the considerations listed in section 117B.

<u>Qualifying Children</u>

26. A1 and A2 are qualifying children having accumulated over 7 years residence in the UK. The issue is therefore whether it would be reasonable to expect them to leave the UK taking into account all of their circumstances in the UK, their best interests and the circumstances of their parents.

27. I have found that in terms of their education, private life generally and security it is overwhelmingly in their best interest to remain in the UK and not to return to Iraq where they would inevitably be IDPs in a country that has undergone a period of extended insecurity and strife. In relation to the reasonableness of return I note that only one of the children has visited Iraq and that was in 2012. The other two have never lived or visited their country of nationality. While they are of course entitled to the benefits of their Iraqi citizenship those benefits are currently severely curtailed by the country situation. I am told they do not speak Arabic and while I hesitate in accepting that this is likely to be entirely accurate I am satisfied that they have grown up in an English speaking society and with English speaking parents and therefore would lack the fluency in Arabic to be able to integrate easily back into Iraqi life. While the Appellants do have family in Iraq A1 was clear that they were focused on leaving as they are themselves non Kurdish IDPs in the IKR and

therefore the family would be socially isolated on their return without any close family in a position to support them in reintegrating.

28. The Home Offices own policy and caselaw recognises that the longer a child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years.

29. The assessment of the reasonableness of return must not focus on the position of the children alone as this is not determinative and this has been made clear in MA referred to above and more recently in AM (Pakistan) [2017] EWCA Civ 180. There is however nothing however about the conduct of the parents that amounts in my view to a countervailing factor. While their asylum applications were refused they pursued the process promptly and have to that extent complied with the requirements of the immigration system. They have been in the UK at all times lawfully originally with A1 pursuing an academic career and latterly pursuing an application for refugee status. They were initially self-supporting and given A1s qualifications I am confident the family would not be in future a burden on society. The parents both speak English very well.

30. Having considered all of the evidence carefully and in the round and giving due weight to the requirements of immigration control I have come to the conclusion that on balance it is not reasonable for the purposes of section 117B6 to require the children to leave the United Kingdom.

DECISION

31. **I allow the appeals under Article 8 of the ECHR.**

32. **Under Rule 14(1) the Tribunal Procedure (Upper Tribunal) rules 2008 9as amended) the Appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order for anonymity was made in the First-tier and shall continue.**

Signed Date 3.12.2017

Deputy Upper Tribunal Judge Birrell