



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12693/2016

THE IMMIGRATION ACTS

Heard at Glasgow
On 30 August 2018

Decision & Reasons Promulgated
On 10 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

TAMARA BEN HORESH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Irvine, advocate, instructed by Drummond Miller, solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Mozolowski promulgated on 16 January 2018, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 29 April 1970 and is a national of Israel. On 03 May 2016 the Secretary of State refused the Appellant's application for leave to remain in the UK.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Mozolowski ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 15 May 2018 Judge Pedro gave permission to appeal stating

"1. The appellant is a citizen of Israel born on 29 April 1970 and seeks permission to appeal, in time, against a decision of First-tier Tribunal Judge Mozolowski promulgated on 16 January 2018 to dismiss her appeal against a decision of the respondent dated 3 May 2016 to refuse her human rights claim.

2. The grounds are rather rambling but in essence and inter alia challenge the Judge's assessment of the proportionality of the respondent's decision under article 8 outside the immigration rules as amounting to an error of law in failing to give clear and adequate consideration to the best interests of the two children of the appellant. It is asserted, and does not appear to be in issue, that the two children are British citizens and therefore qualifying children for the purpose of section 117B(6) of the 2002 Act. It is of concern that the Judge makes no specific reference to section 117B(6) and the reasonableness of expecting the children to leave the United Kingdom within the framework of that statutory provision and relevant case law.

3. The grounds disclose an arguable error of law capable of affecting the outcome."

The Hearing

5. (a) Ms Irvine, for the appellant, moved the grounds of appeal. She told me that the Judge failed to take account of the guidance given in SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC) and failed to apply the respondent's own family migration IDIs. She told me that the Judge failed to consider section 117B(6) of the 2002 Act and did not apply the test of reasonableness. It is not disputed that the appellant is the mother of two British citizen children who live with her. The appellant's youngest child is 16 months old. Her oldest child is seven years old & is now at primary school. Ms Irvine reminded me that the appellant's application was for leave to remain outside the Immigration Rules, and the respondent's refusal carries an acknowledgement that the appellant's oldest child is a British citizen.

(b) Ms Irvine told me that, because the appellant's children are British citizens, if the Judge had applied SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC), and if the Judge had properly considered the respondent's family migration IDIs, the only conclusion that the Judge could have come to is that the

appeal should be allowed. She told me that the Judge does not refer to section 117B(6) of the 2002 Act nor to the respondent's family migration IDI anywhere in the decision.

(c) Ms Irvine moved to the second ground of appeal and told me that the Judge's article 8 proportionality assessment is defective because the Judge does not apply the test of reasonableness required by section 117B(6) of the 2002 Act. At [23] the Judge reminds herself of section 117B, but does not consider the relevant subsection (Subsection 6). The Judge does not make any reference to the fact that the appellants children are qualifying children, nor does she refer to the test of reasonableness. The word "reasonable" does not feature anywhere in the Judge's decision.

(d) Ms Irvine told me that the Judge has applied the wrong test in law. She urged me to set the decision aside and to substitute my own decision allowing the appellant's appeal.

6 (a) Mr Govan, for the respondent, told me that the decision does not contain errors of law, material or otherwise. He told me that the starting point is that the appellant cannot succeed under the Immigration Rules. He took me to [26] of the decision and relied on the case of Dube (ss.117A-117D) [2015] UKUT 00090 (IAC). Mr Govan told me that the fact that the Judge does not mention section 117B(6) is irrelevant. He told me that a careful reading of the decision discloses that the Judge applied the correct test in law. He said that the appellant's case is different to that of the appellant in SF (Albania). He took me through the decision in detail and told me that the Judge has considered all relevant factors before applying the correct test.

(b) Mr Govan asked me to remember that the appellant cannot meet the immigration rules; that the Judge found that the appellant had not been entirely honest in her reasons for coming to the UK; and that the Judge was not satisfied that the appellant can meet the financial eligibility requirements of appendix FM. He urged me to dismiss the appeal and allow the decision to stand.

Analysis.

7. Between [9] and [33] of the decision the Judge analyses the evidence and sets out her findings of fact. The Judge finds that the appellant has two young children who are present in the UK, and that the appellant came to the UK as a visitor and cannot meet the requirements of the Immigration Rules. Although the Judge does not make a specific finding that the appellant's children are British citizens, in the decision letter the respondent accepts that the appellant's oldest child is a British citizen. It is not disputed that her youngest child is a British citizen.

8. A child who is British is a qualifying child for the purposes of the 2002 Act. Section 117 B(6) of the 2002 act says

(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.

9. The test to consider in this case is set out in statute. The question the Judge should have asked is whether it is reasonable to expect the appellant's British citizen children to leave the UK. The Judge did not ask that question. As counsel for the appellant points out, the word "reasonable" does not feature anywhere in the decision.

10. The Judge failed to apply the test set out in statute. That is a material error of law. I set the decision aside.

11. Even though I set the decision aside there is enough material to enable me to substitute my own decision.

The Facts

12. The appellant is an Israeli national. She entered the UK as a visitor on 6 August 2015 with a child who is now seven years of age. She has two children, both of whom are British citizens. She lives with her partner and their British citizen children in Scotland. The appellant's older British citizen child is now seven years old and attends primary school. The appellant's partner is a self-employed joiner. The appellant's partner is a British citizen. The appellant submitted an application after she had been in the UK for five months and while she still held leave to enter the UK as a visitor.

13. The appellant cannot meet the requirements of appendix FM because she had leave to enter the UK as a visitor when she submitted her application for leave to remain on article 8 grounds.

The Immigration Rules

14. (a) E-LTRP.2.1. says

The applicant must not be in the UK-

- (a) as a visitor; or
- (b) with valid leave granted for a period of 6 months or less, unless that leave is as a fiancé(e) or proposed civil partner, or was granted pending the outcome of family court or divorce proceedings

(b) On the facts as I find them to be, the appellant submitted her application while she had extant leave as a visitor. Paragraph E-LTRP 2.1 therefore operates against her. The appellant cannot take arguments about paragraph EX.1 because the immigration rules are progressive. Because the appellant cannot get over the hurdle presented by Paragraph E-LTRP 2.1, consideration of appendix FM comes to an end. E-LTRP.2.1 is an eligibility requirement. Paragraph EX.1 of the rules provides exceptions to certain eligibility requirements, but not an exception to E-LRTP 2.1.

(c) Because the appellant did not want to overstay the limits of her visa, she cannot succeed under appendix FM.

ARTICLE 8 ECHR

15. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deportation case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed..." In Agyarko [2017] UKSC 11, Lord Reed (when explaining how a court or tribunal should consider whether a refusal of leave to remain was compatible with Article 8) made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered.

16. I have to determine the following separate questions:

- (i) Does family life, private life, home or correspondence exist within the meaning of Article 8
- (ii) If so, has the right to respect for this been interfered with
- (iii) If so, was the interference in accordance with the law
- (iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and
- (v) If so, is the interference proportionate to the pursuit of the legitimate aim?

17. Section 117B of the 2002 Act tells me that immigration control is in the public interest. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

18. (a) The only part of appendix FM to the appellant cannot meet is E-LTRP.2.1, and that is because the appellant chose not to be an over stayer and submitted an application for leave to remain before her visit visa expired. E-LTRP.2.1 is an eligibility requirement.

(b) On the facts as I find them to be the appellant has a genuine and subsisting relationship with a British citizen. The unchallenged evidence is that the appellant's

husband and children are British citizens present in the UK, with whom the appellant normally lives. Article 8 family life exists for the appellant.

(c) The respondent's IDIs on Family Migration (Paragraph 11.2.3) deals with British children. The August 2015 version (The appellant's application was submitted on 5 February 2016. The decision under appeal is dated 3 May 2016) 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. However, it 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". The section goes on to address the grant of leave to the parent indicating that it may not be appropriate if there is no satisfactory evidence of a genuine and subsisting parental relationship or where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation but none of that gets round the unequivocal statement that it would always be unreasonable to expect a British child to leave the EU. The Upper Tribunal in SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC) held, considering this guidance that even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal

(d) The guidance given by the respondent in the IDIs on Family Migration (February 2018) is that the questions a decision maker should now pose are:

- (i) is there a genuine and subsisting parental relationship?
- (ii) is the child a British citizen or have they lived in the UK for a continuous period of at least 7 years?
- (iii) will the consequence of the refusal of the application be that the child is required to leave the UK?
- (iv) would it be reasonable to expect the child to leave the UK. In many cases where one parent has a right to remain in the UK, the child would not leave?

(e) The respondent's guidance suggests that the test is whether the child would be likely to leave rather than actually be required to leave. The Home Office now say in those circumstances EX.1 (a) would not apply but the impact on the child of the appellant's departure from the UK should be considered taking into account the best interests of the child as a primary consideration and if refusal would lead to unjustifiably harsh consequences, then leave can be granted on the basis of exceptional circumstances.

(f) It does not follow that section 117(6) should be interpreted in the same way as the SSHD interprets his immigration rules. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016]

EWCA Civ 705 it was held (see [19]) that when applying section 117B(6) only three questions needed to be asked as long as the applicant was not liable to deportation, and those questions are

- (i) is there a genuine and subsisting parental relationship?
- (ii) is the child a British citizen or have they lived in the UK for a continuous period of at least 7 years?
- (iv) would it be reasonable to expect the child to leave the UK?

(g) The appellant's unchallenged evidence is that the appellant's husband and children are British citizens. The weight of reliable evidence indicates that the children would be distressed if their parents are separated. Caselaw tells me that it is in a child's best interests to live in a family with both of their parents. It cannot be reasonable to cause primary school age children distress. It cannot be reasonable to separate the children from one of their parents.

(h) On the facts as I find them to be, family life exists. The respondent's decision is an interference with that family life. The burden therefore shifts to the respondent to show that the interference was justified. The respondent relies solely on the public interest in effective immigration control.

19. The respondent says that the appellant can return to Israel and make an application for leave to enter from there. In Chikwamba (FC) v SSHD 2008 UKHL 40, the House of Lords said that in deciding whether a general policy of requiring people such as the Appellant to return to apply for entry in accordance with the rules of this country was legitimate and proportionate in a particular case, it was necessary to consider what the benefits of the policy were. Whilst acknowledging the deterrent effect of the policy the House of Lords queried the underlying basis of the policy in other respects and made it clear that the policy should not be applied in a rigid, Kafka-esque manner. The House of Lords went on to say that it would be "*comparatively rarely, certainly in family cases involving children*" that an Article 8 case should be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave from abroad.

20. In R (on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC) it was held that (i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40. (ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only

“comparatively rarely” be proportionate in a case involving children. However, where a failure to comply in a particular capacity is the only issue so far as the Rules are concerned, that may well be an insufficient reason for refusing the case under Article 8 outside the rules.

21. In Agyarko [2017] UKSC 10 Lord Reed said again that if an applicant, even if residing in the UK unlawfully, was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal and that point was illustrated by Chikwamba.

22. In this case the respondent says that the appellant could make a successful application to return to the UK to join her husband and children. Caselaw tells me that the refusal of leave to remain must therefore be a disproportionate breach of the right to respect for family life.

23. The appellant’s children are qualifying children. The focus in this case is on sub-section (6) of Section 117B. Section 117B(6) is in two parts which are conjunctive. Section 117B(6)(a) weighs in favour of the appellant because she has a genuine and subsisting parental relationship with qualifying children. It is Section 117B(6)(b) which is determinative of this case.

24. I have already found that it is not reasonable to expect the appellant’s children to leave the UK. Adhering to the interpretation given to s.117B(6) in MA (Pakistan) I find that the appellant succeeds under section 117B(6) of the 2002 Act.

25. I remind myself of Section 55 of the Borders, Citizenship and Immigration Act 2009. In ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 Lady Hale said that “*Although nationality is not a “trump card” it is of particular importance in assessing the best interests of any child*”.

26. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was confirmed that if section 117B(6) applies then “*there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal.*”

27. Because the simple wording of section 117B(6) of the 2002 Act, endorsed in MA (Pakistan), weighs in the appellant’s favour, I find that the public interest does not justify removal. That finding leads me to the conclusion that the respondent’s decision is a disproportionate interference with the right to respect for article 8 family life.

28. The respondent’s guidance says that it is unreasonable to expect the appellant’s children to leave the UK. Family life exists between the appellant, her husband and their children. The respondent’s decision interferes with article 8 family life. The respondent’s own guidance indicates that the interference is disproportionate.

29. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) it was held that the "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

30. Even when I give little weight to the relationship between the appellant, her husband and their children, the relationship still carries sufficient weight because the article 8 family life that is established is not limited to the relationship between the appellant and her husband. The article 8 family life established encompasses the interests of two British children.

31. I find that this appeal succeeds on article 8 ECHR (family life) grounds.

Decision

The decision of the First-tier Tribunal promulgated on 16 January 2018 is tainted by material errors of law and is set aside.

I substitute my own decision

The appeal is allowed on article 8 ECHR grounds.

A handwritten signature in grey ink, appearing to read "Paul Doyle". The signature is written in a cursive, flowing style.

Signed

Date 5 September 2018

Deputy Upper Tribunal Judge Doyle