



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Numbers: HU/24694/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre

Decision & Reasons Promulgated

On the 31st May 2018

On the 4th July 2018

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

AKLIMA [A]

(No anonymity order made)

Claimant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant in the Upper Tribunal

Representation:

For the Claimant: Mr Holt (Counsel)

For the Respondent: Mrs Aboni (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Secretary of State appeal against the decision of First-tier Tribunal Judge O'Neill promulgated on the 6th September 2017, in which she allowed the Appellant's

appeal on human rights grounds.

2. The Judge found that although the Appellant had supplied a false English-language certificate, it was unreasonable to expect her two qualifying British citizen children to leave the United Kingdom in circumstances where the Appellant had profound learning difficulties and was not the instigator of the fraud, but simply doing what she was told and had acquiesced in the production of a fraudulent certificate.
3. It is argued within the Grounds of Appeal on behalf of the Secretary of State that the Judge's proportionality assessment was inadequate, in the fact that the Applicant would prefer to conduct his or her family life in the member state is insufficient and it must be shown that the removal would cause difficulty or hardship as stated by Mr Justice Hodge in the case of VW and MO (Uganda) v Secretary of State for the Home Department [2008] UKAIT 00021. It was argued there was nothing to prevent the Applicant returning to Bangladesh in order to apply for the correct entry clearance and that any separation would be temporary and proportionate in the interest of an effective immigration control. It was said although the Judge stated there would be little point in that, as the Appellant would be unable to pass the English test, it is argued that the rules provide an exemption for those who have a physical or mental condition that prevents them from meeting the requirement and it is open to the Applicant to submit such evidence with her Entry Clearance application to satisfy the ECO the exemption applies. It is argued the fact that her involvement was minor and that she was naive as found by the Judge did not excuse her actions and that it was not an innocent mistake and given the Judge's finding on deception, that it was proportionate and in the public interest to require the Appellant to make an application for Entry Clearance submitting such evidence as it may be specified by the ECO regarding the exemptions for the English language requirement.
4. Permission to appeal has been granted by designated Judge Woodcraft on the 21st February 2018 and it was found it was arguable that the Judge did not give adequate reasons at [53 and 54] why the best interests of the children outweighed the public interest in the case and it was arguable that the Judge misunderstood the content of the

IDI records that had been shown.

5. Before the appeal Mr Holt submitted a skeleton argument and I gave time for Mrs Aboni to consider that skeleton argument before hearing the appeal. She did not seek an adjournment following her consideration of the skeleton argument was happy to proceed with the appeal hearing.
6. In her further oral submissions, Mrs Aboni on behalf of the Secretary of State argued the Judge had failed to waive the deception in the proportionality exercise and although conceded that was a matter for the Judge to make that assessment she argued that the Appellant should not benefit from her fraud and that she can make an application from abroad with the required evidence in respect of her English-language difficulties and her learning difficulties. She conceded the Home Office policy did not usually require British citizen children to relocate outside of the UK and argued that it is not disproportionate for the Applicant to be required to make a fresh application.
7. Mr Holt argued in his oral submissions, that the Judge had properly relied upon Section 117B (6) of the Nationality, Immigration and Asylum Act 2002, as amended, and the Secretary of State's own Immigration Directorate Instruction Family Migration Appendix FM Section 1.0B and that in circumstances where Section 117B (6), applied, and the person did have a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK, the public interest did not require the person's removal. He argued that under the Secretary of State's own immigration directorate instruction where a decision to refuse meant Appellant had to return to a country outside of the EU the case must always be assessed on the basis it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer, but it may be appropriate to refuse to grant leave where the conduct of the parent or primary carer gave rise to considerations of such weight as to justify separation if the child could otherwise stay with other another parent or alternative primary carer in the UK or EU. He argued that the circumstances envisaged could fall below the thresholds set out in paragraph 398 of the Immigration Rules, such as a very poor

immigration history, but the Judge had found that the conduct of the Appellant in this case was not of a character described as being as to justify refusal. He argued that the Judge was entitled to find that family life could not be carried on elsewhere and that British citizen children should not be denied the right to grow up in the UK and enjoy the benefits of British nationality. In circumstances the Appellant was guilty of deception but her role was minor and she was naïve in the process. The Judge was entitled to find that it was not reasonable to expect the British citizen children to leave the UK such that Section 117B (6) applied.

My Findings on Error of Law and Materiality

8. In considering the Article 8 case in this appeal, the First-tier Tribunal Judge quite properly directed himself to Section 117B (6) of the Nationality, Immigration and Asylum Act 2002 and also to the Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0B, which was in force at the time. He properly took account of those in that policy, as he was required to do as confirmed by the Upper Tribunal in the case of SF and Others (guidance, post 2014 at ACT) Albania [2017] UKUT 00120 (IAC) in which it was stated 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.
9. It was perfectly open to the First-tier Tribunal Judge to find that as the Appellant did have British citizen children, that she did have a genuine and subsisting parental relationship with a qualifying child. I further find that the Judge properly considered the extent of her capability in respect of her involvement in the fraud and found that she was not the instigator of the fraud, but simply did as she was told, but she knew that she required a competency qualification in English and must have known that her English was too poor to secure one but from fraud and thus acquiesced in production of the certificate.
10. The Judge quite properly found that the application was properly refused under the

Rules under Rule 322 (1A), fraud having been utilised.

11. However, when considering the Article 8 case, section 117B (6) makes clear in a case when a person present is not liable to deportation the public interest does not require that person's removal when the person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK. In this case, the First-tier Tribunal Judge also properly considered the criminality of the Appellant under the Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0B and it was open to the Judge, taking into account the level of criminality that he attributed to the Appellant herself, to find that the conduct of the Appellant in the circumstances in this case was not so severe as to justify removal on the ground of criminality.
12. In considering Section 55 of the Borders, Citizenship and Immigration Act, the Judge [48] found that it was in the interest of the children to remain with their mother and father and not to be separated from either parent. In such circumstance the judge found that it was not reasonable to expect the children to leave the UK, Section 117B (6) was engaged, and the public interest therefore did not require the Applicant's removal back to Bangladesh, despite the fraud. That was a find open to the Judge on the evidence before him in this case.
13. Section 117B (6) is not predicated upon there being nothing to prevent an Applicant returning to their home country to apply for entry clearance. Indeed, although the fact that a person can return back to their country to make an application is something that can and such properly be waived within the article 8 balancing exercise, in circumstances where there is a genuine and subsisting parental relationship with a qualifying child and it is not reasonable to expect the child to leave the UK, taking account of the criminality of the Appellant which the Judge has properly done following the case of MA (Pakistan) v The Secretary of State for the Home Department, the section itself specifies that in such circumstances where the section is met the public interest does not require the person's removal. The question as to whether or not they should or could go back to make an

application therefore does not trump the fact that they should not be removed in the circumstances where Section 117B (6) applies. In this case it was open for the Judge to find that it was not reasonable to expect the children to be separated from either parent, in circumstances where Section 117B (6) applies, it is not open for the Judge to say that notwithstanding that the section is met, a person should nevertheless return back to their home country to make an application.

14. Further, the House of Lords in the case of Chikwamba v Secretary of State for the Home Department [2008] UKHL 40 had previously made it clear in respect of the issue of "queue jumping" that it would be "comparatively rarely, certainly in family cases involving children" that an Article 8 case should be dismissed on the basis it would be proportionate and more appropriate for the Applicant to apply for leave from abroad,"

15. The decision of First-tier Tribunal Judge O'Neill therefore does not reveal any material errors of law and is maintained. The Secretary of State's appeal is dismissed.

Notice of Decision

The decision of First-tier Tribunal Judge O'Neill does not reveal any material errors of law and is maintained. The appeal of the Secretary of State is dismissed.

I make no anonymity direction in this case, none having been made by the First-tier Tribunal Judge nor sought before me.

Signed

RFMcGinty

Deputy Upper Tribunal Judge McGinty

Dated 31st May 2018