



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/26137/2016

THE IMMIGRATION ACTS

Heard at Field House
On 1 August 2018

Decision & Reasons Promulgated
On 10 August 2018

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALI [A]
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer

For the Respondent: Ms S Iqbal, Counsel, instructed by Taj Solicitors

DECISION AND REASONS

1. This is an appeal against the decision issued on 17 May 2018 of First-tier Tribunal Judge P-J S White which allowed the appeal of Mr [A] against the refusal of leave to remain as the spouse of a British national.
2. The appellant is a national of Bangladesh, born on 15 January 1986. The background he came to the UK as a Tier 4 Migrant in 2010 with leave until 2015. In 2014 he obtained leave to remain as a spouse on the basis of his marriage to a British national, Ms [B]. He had leave in that capacity until 15 November 2016. He applied for

further leave to remain as a spouse on 14 November 2016 but this was refused in a decision dated 14 November 2016. This appeal followed.

3. At the heart of this appeal are the three children of the family. The oldest child, [L], was born on 22 June 2006. She is Ms [B]'s child from her previous marriage. The undisputed evidence is that she has not had contact with her biological father for a significant amount of time and that the appellant has become her stepfather in a serious and substantive manner. The appellant and Ms [B] have two further children, [I] born on 27 December 2015 and [Y] born on 26 May 2017.
4. There is no dispute here that the Immigration Rules could not be met. First-tier Tribunal White found against the appellant on the question of having cheated in an ETS TOIEC test; see paragraph 23. For that reason he did not meet the suitability requirements of the Immigration Rules and could not succeed under the spouse or parental provisions of Appendix FM or under paragraph 276ADE(1).
5. The First-tier Tribunal therefore went on to consider the claim under Article 8 ECHR outside the provisions of the Immigration Rules. The legal approach to that assessment is admirable. The judge sets out at paragraph 24 that a full Razgar proportionality assessment is not always necessary but correctly identifies in paragraph 25 that it was required here where there are British children and a genuine and subsisting relationship with a British partner and those children.
6. The First-tier Tribunal then, again quite correctly, went on in paragraphs 26 to 30 to assess the best interests of the children. The question of the two younger children going to Bangladesh was found to be of less significance where they were so young and could be expected to adapt. Clear and rational reasons were given for finding that [L] could not be expected to go to Bangladesh given that she had lived in the UK for her entire life until the age of 12. It followed that it was strongly in her best interests to remain in the UK with her mother and her two younger siblings; see paragraph 30.
7. Judge White then goes on to make further important legal self-directions in paragraph 31. Immediately after assessing the best interests of the children, he identifies that:

“The assessment of a child’s best interests forms part only of the broader assessment of proportionality. In assessing that I must have regard to the provisions of Section 117B of the 2002 Act. That reminds me that the maintenance of immigration control is in the public interest.

This indicates clearly that the First-tier Tribunal here had properly in mind that the best interests of the children were not determinative of the outcome of the proportionality assessment. This statement shows that the judge gave proper weight to the public interest where the Immigration Rules were not met. The final sentence of the same paragraph sets out that he was aware that the appellant had always been here precariously and had obtained by the use of deception.

8. In paragraph 32 the First-tier Tribunal then sets out, again correctly, that section 117B(6) of the Nationality and Immigration Act 2002 was central to this appeal, This section provides that that the public interest does not require the removal of someone where that 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 United Kingdom. It is undisputed that [L] is a qualifying child by virtue of being British. There was no dispute as to the appellant having a genuine and subsisting parental relationship with her and the other two children.

9. At the end of paragraph 32 Judge White sets out:

“I have set out my view of their best interests. Whether it is reasonable to expect a child to leave the United Kingdom is not, however, the same thing.”

The judge again clearly indicates that he did not take the best interests of the children as a “trump card” as suggested in the grounds but recognised that this was merely a primary factor and was not be determinative of the assessment of whether it was reasonable for [L] to leave the United Kingdom.

10. In paragraph 33 the judge went on to consider the applicable case law of the Court of Appeal on the correct approach to the assessment of the s.117B(6) test. The summary of R (MA Pakistan and Others) v Upper Tribunal and SSHD [2016] EWCA Civ 705 is succinct and accurate, ending:

“The assessment of reasonableness required consideration of the wider picture including public interest considerations. The court also noted that the fact that a child had been here for seven years would be a strong factor in favour of a grant of leave, as would the holding of British citizenship.”

11. This paragraph indicates again that the judge had properly in mind the importance of the public interest and of the child’s best interests and circumstances not necessarily being determinative of the outcome of the assessment of the reasonableness of the child leaving the UK.


12. The core reasoning is then set out in paragraph 34:

“In this case the appellant’s immigration history is bad, in that he has used deception on a previous occasion, but the position of all the rest of the family is impeccable. They are all British, and they are all entirely innocent of his wrongdoing. The position of [L] is particularly stark. She has lost her father but is in a stable family position, in the country of her nationality and where she has lived her entire life. Her mother has been here for 30 years, and is married to a man of his status and history she had no reason to be doubtful. I have no doubt that it would not be reasonable to expect [L] to leave the United Kingdom because of what her stepfather did in 2012. Nor would it be reasonable to expect the other children to leave if their elder half-sister is staying. Accordingly I find, notwithstanding the weakness of his personal position, that this appellant comes within the ambit of sub-Section (6), and thus that the public interest does not require his removal. That being so the decision is disproportionate and the appeal outside the Rules is entitled to succeed.”

13. The First-tier Tribunal judge sets out both at the beginning and at the end of that paragraph his appreciation of the appellant's "bad" and weak personal position. It is not arguable that he failed to properly take into account the appellant's poor immigration history and use of deception, therefore.
14. The respondent's challenge to this paragraph is one of rationality: was the weight afforded to the facts as found and conclusion reached not open to a reasonable decision maker? That judge took an impeccable legal approach to the weight due to the public interest, the appellant's "bad" history and the best interests of the children. Having done so, where there was a twelve-year-old British child who had lived only in the UK for all her life and given the other aspects of the British family's profile, it cannot be said that the judge took an irrational approach to the question of the reasonableness of [L] leaving the UK and to proportionality. The material here allowed the First-tier Tribunal to reach the conclusion that Section 117B(6) fell to be decided in the appellant's favour.
15. For these reasons it is my conclusion that the decision of the First-tier Tribunal does not disclose a material error on a point of law.

Notice of Decision

The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed 
Upper Tribunal Judge Pitt

Date: 7 August 2018