Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08884/2018

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons promulgated**
on 26th of March 2019	**On 1st April 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

HABIBUR [R]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs A Chaudhry instructed by Maya Solicitors.
For the Respondent: Mr Diwnycz - Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Mark Davies promulgated on 27 December 2018 in which the Judge dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant, a citizen of Bangladesh, appealed the respondent's decision of 7 April 2018 refusing him leave to remain in the United Kingdom on human rights grounds. The Judge sets out findings of fact from [34] of the decision under challenge which can be summarised in the following terms:

   i. The appellant has a genuine and subsisting relationship with both his partner, who has ILR, and their British national son [34].

   ii. There was no expectation on behalf of either the appellant's partner or indeed the son that the appellant will be allowed to remain in the United Kingdom on a permanent basis [34].

   iii. Although it is accepted the appellant has established a family life in the United Kingdom and private life and that the respondent's decision interferes with that private life, it was not accepted the interference would have consequences of such gravity so as to potentially engage the operation of article 8 [35].

   iv. There was no evidence to suggest the appellant could not return to Bangladesh, no evidence of very significant difficulties for him in integrating into life in Bangladesh and no evidence as to why he could not return to Bangladesh and make an application to enter the United Kingdom under the Immigration Rules [36].

   v. There is no reason why the appellant's partner cannot return to Bangladesh with the appellant even taking into account the appellant has a 17 year old son living with her who will shortly be an adult albeit that he is in full-time education [37].

   vi. Even if the appellant's partner remains in the United Kingdom to support her son interference with the family life between the appellant, his partner and her partners son will not have consequences of such gravity as to potentially engage the operation of article 8 as they can be communication over the telephone and by other modern means of communication. It was not accepted the consequences to the appellants partner or British national son of the appellant returning to Bangladesh will be such that his welfare would in any way be damaged. It was not accepted the respondent did not properly consider his obligations under section 55 [38].

   vii. Even if article 8 is engaged, the respondent's decision is in accordance with the law and proportionate to the public interest of maintaining effective immigration control, particularly in light of the appellant's immigration history [39].

   viii. The appellant is not financially independent [43].

   ix. Little weight is given to the appellant's private life taking into account's his immigration history and little weight is given to the fact he has established his relationship with his partner and his partners child when he was in the UK unlawfully [44].

x. Although accepting the appellant has a genuine and subsisting parental relationship with the British citizen child and it would not be reasonable to expect that child to leave the United Kingdom, it is not a matter that assists the appellant for the reasons stated [45].

xi. The Judge finds the appellant, his partner and his partners child have been credible witnesses [46].

3. The appellant sought permission to appeal asserting the Judge erred in assessing the evidence of the appellant's case, in relation to the article 8 assessment with specific reference to section 55 best interests of the child.

4. Permission to appeal was granted by another judge of the First-Tier Tribunal who extended time and admitted the appeal. The operative part of the grant is in the following terms:

> "2. Much of the grounds appear to be argument with the weight the Judge gave to particular factors, which is a matter for him, and saying that the Judge did not consider s55 and EX1(a) (the reasonableness provision) when the Judge did consider the provisions, just reached a result contrary to that the appellant desired. Whilst it is arguable that the finding that Article 8 was not engaged may have been wrong, the Judge considered proportionality in the alternative.
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> 3. However I do consider it arguable (see para 4, ground 2) that the Judge erred in not expressly considering the best interests of the child with whom he found the appellant had a genuine and subsisting parental relationship and factoring those conclusions into the proportionality balance. Whilst not specifically raised by the appellant, I draw to the attention of the parties that it might be said the Judge did not explain in light of case law, his finding that although the appellant had a genuine and subsisting relationship with the British citizen child and it would not be reasonable to expect that child to leave the UK, that did not assist the appellant."

5. No Rule 24 Reply has been filed.

Error of law

6. Section 117B(6) of Nationality, Immigration and Asylum Act 2002 provides:

> (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.

7. The Supreme Court in *KO (Nigeria) [2018] UKSC 53* found the question of whether it is reasonable to expect a child to leave the UK is to be decided without considering the immigration history of the parents. The immigration history is relevant however to whether the parents will be leaving the UK. To that extent their record becomes indirectly material because it may lead to them having to leave the UK. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The reasonableness of the child leaving the UK is to be considered on the basis that the facts are as they are in the real world, so that if one parent has no right to remain, but the other does, or if both parents have no right to remain that is the background against which the best interest's assessment is conducted. The ultimate question is whether it is reasonable to expect the child to follow the parent with no right to remain to their country of origin.
8. In *JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC)* a Presidential panel found that Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 requires a court or tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so.
9. The Judge's own findings establish it would not be reasonable to expect the child to leave the United Kingdom.
10. In *KO (Nigeria)* it was reaffirmed section 117B(6) is a freestanding provision.
11. I find in light of the findings concerning the child, a qualifying child, together with all the other facts relating to this family unit, that it has not been established that it is reasonable to expect the child to leave the United Kingdom and that in the absence of any countervailing factors that the statutory provisions do not require the appellant's removal from the UK. This is the point relied upon by Mrs Choudhury which was accepted by Mr Diwnycz on behalf of the respondent.
12. Accordingly I find the Judge erred in law at [42] when finding the appellants claim did not engage Article 8 ECHR when it clearly did on both family and private life grounds, and in concluding as part of proportionality assessment that the interference in the appellants protected rights is proportionate. As noted in the grant of permission, the Judge failed to adequately explain how in light of prevailing case law the finding the appellant had a genuine and subsisting relationship with the British child and that it would not be reasonable to expect that child to leave the UK did not assist the appellant.
13. I set aside the decision of the Judge. I remake the decision allowing the appeal on human rights grounds, article 8 ECHR outside the Rules, on the basis of the statutory provisions, it not being reasonable to expect the child to leave the United Kingdom, the freestanding nature of section 117B(6) and lack of adequate countervailing factors to warrant a finding in the alternative.

Decision

14. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

15. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 27th March 2019