Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/23717/2018**

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 10 July 2019

Decision & Reasons Promulgated
On 22 July 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

HABIB-UR -REHMAN

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Aziz for Maidstone Solicitors

For the Respondent: Mr Tan

DECISION AND REASONS

Introduction

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 Anthony promulgated on 5 April 2019, which dismissed the Appellant's appeal against the refusal of leave to remain as the partner of a UK citizen and father of a UK citizen child on all grounds.

3. Grounds of appeal were lodged and on 21 May 2019 First tier Tribunal Judge Scott Baker gave permission to appeal on the basis that the Judge had failed to make any relevant findings in respect of s 117B 6 of the Nationality Immigration and Asylum Act 2002.

Discussion

4. Mr Tan conceded that there was a material error of law in respect of s 117B 6 because while he recognised at paragraph 38 that the Appellants child was a qualifying child the Judge failed to make any findings as to whether it was reasonable to require the child to leave the UK.

5. Mr Tan conceded that the Respondent would not seek to argue that it was reasonable for a British citizen child to leave the UK.

6. He accepted that the decision did not engage with JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) Rev 1.

7. He accepted that the as a consequence the Appellants appeal should succeed.

Finding on Material Error

8. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.

9. The Appellant was the father of a British citizen child. It was not in dispute that the Appellant did not meet the requirements of Appendix FM. In considering Article 8 outside the Rules the Judge was obliged to take into account the public interest considerations set out in s 117B6. He recognised that the Appellants child was a qualifying child for the purpose of s 117B6 and was required to make findings about whether, taking into account all of the circumstances including the child's best interests, it was reasonable for the child to be removed with his parents particularly given that he records that the HOPO confirmed that 'the respondent did not expect British Citizens to leave the UK.'. The Judge failed to make any findings on this issue of reasonableness. Indeed where he touches upon it at paragraph 45 he fails to take into account what was said in JG approaching the matter in a way that was clearly rejected by the Upper Tribunal in that decision.

10. The failure of the First-tier Tribunal to address and determine whether it was reasonable for the child to be removed constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.

11. I therefore found that errors of law have been established and that the Judge's determination cannot stand in respect of Article 8 and must be set aside and remade by me.

Re Making the Decision

12. I start by reminding myself of the wording of the provision that applies in this case. S 117B 6 provides

> *"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."*

13. It has never been in dispute that the Appellant has a genuine and subsisting relationship with a British citizen child and that it is in the best interests of the child to be brought up by both parents. Mr Tan made clear that the position of the Respondent in a case involving a British citizen child was that it would not be reasonable to expect that child to leave the UK and therefore in my view properly conceded that the plain meaning of the provision was that the public interest did not require his removal. Mr Tan was also implicitly accepting that the Respondent would not seek to argue that it would be reasonable to require the Appellant to return to Pakistan and re apply for entry clearance as such an application would be unlikely to succeed on suitability grounds given the unchallenged finding that he had obtained a language certificate by deception. While the Judge may well have been concerned about the merits of the Appellants case having found that he obtained a language certificate by deception the court in JG were faced with a similarly unmeritorious applicant but concluded at paragraph 41 of JG

> *"We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A of imposing greater consistency in decision-making in this area by courts and tribunals. The fact that section 117B(6) has such an aim was expressly recognised by Elias LJ at paragraph 44 of MA (Pakistan)."*

14. I therefore conclude that, on the facts of this case, it would not be reasonable to expect the Appellant's child to leave the United Kingdom, in the event of his removal. This means the Appellant's appeal succeeds. It does so because Parliament has stated, in terms, that the public interest does not require his removal, in these circumstances. It does so despite the fact that, absent section 117B(6), the Appellant's removal would be proportionate in terms of Article 8 of the ECHR.

Decision

15. **There was an error on a point of law in the decision of the First-tier Tribunal with regard to Article 8 such that the decision is set aside**

16. **I remake the appeal.**

17. **I allow the appeal under Article 8 of the ECHR.**

Signed Date 15.7.2019

Deputy Upper Tribunal Judge Birrell