Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09828/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 21 September 2020	**On 28 September 2020**
At a remote hearing via Skype	

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MU
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mrs Pettersen, Senior Home Office Presenting Officer
For the Respondent: Ms Meredith, Counsel

DECISION AND REASONS

Introduction

1. The appellant ('the SSHD') has appealed against a decision of the First-tier Tribunal ('FTT') Judge S Aziz, sent on 19 September 2019, allowing his appeal on Article 8, ECHR grounds.

Background

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2. The appellant is a citizen of Pakistan. His immigration status is not in dispute: although he arrived lawfully as a student in 2012, he was an overstayer when he made his human rights application on 15 January 2019. This turned upon his relationship with his child ('A'), who was born in January 2014. The following matters are no longer in dispute: A lives with her mother ('M'), the appellant's ex-wife, in the UK; A and M are Pakistani citizens without any right to reside in the UK; they do not have an outstanding application before the Home Office and there has been no removal action being taken against them; relations between the appellant and A have not been amicable; after family court proceedings were initiated in 2018 the appellant has been having regular contact with A pursuant to a court order; this includes overnight contact every other weekend and during the school holidays.

3. The FTT accepted that the appellant has a very strong and close bond with A, and accepted the evidence in support of this in an independent social worker's report. The FTT noted that the appellant was unable to meet the Immigration Rules but concluded that to remove him from the UK would be a disproportionate breach of his family life with A.

Appeal to the Upper Tribunal ('UT')

4. The SSHD applied for permission to appeal against the FTT's decision in succinct grounds of appeal. These make two key points:

   (i) When conducting the balancing exercise, the FTT failed to attach weight to the public interest as outlined at s. 117B of the Nationality, Immigration and Asylum Act 2002, particularly when the appellant, A and B were all in the UK unlawfully.

   (ii) The FTT failed to address whether it would be reasonable for A to leave the UK with her mother in order to live in Pakistan, where the appellant could also reside.

5. FTT Judge Pooler granted permission to appeal in a decision dated 2 April 2020.

6. At the beginning of the hearing before me Mrs Pettersen agreed with my summary of the grounds of appeal above and made brief oral submissions in support of these. I invited Ms Meredith to take me to the aspects of the decision that addressed the position in Pakistan, if the appellant was removed. She took me to the evidence accepted by the FTT without any exception.

7. After hearing from both representatives, I reserved my decision, which I now provide with reasons.

Legal framework

8. Section 117B of the 2002 Act provides:

"(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(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."

Error of law discussion

9. This is a straightforward case in many respects: a foreign national father with no leave to remain has been found to have a very strong genuine and subsisting parental relationship with his child, also a foreign national with no leave to remain; the child's mother is also a foreign national with no leave to remain. The child spends considerable time with her father but lives with her mother. Prima facie the family life between this father and child could be enjoyed in Pakistan.

10. Although the FTT accepted that the appellant had a genuine and subsisting parental relationship with A, she was clearly not a qualifying child. She is not a British citizen and has been resident in the UK for (just) under seven years. The FTT expressly directed itself

to the fact that A was not a qualifying child at [44] and [54], and the contrary submission in the grounds of appeal is without any merit. Similarly, the FTT was well aware of the undisputed immigration status of each family member: they were in the UK unlawfully. The FTT specifically addressed s. 117B at [49] and found the public interest factor to be engaged from [50] onwards. The appellant was unable to meet the Immigration Rules, primarily because all the family members were in the UK unlawfully – see [44] to [47].

11. The FTT nonetheless found that there were exceptional circumstances in the case and a refusal to grant the appellant leave would result in unjustifiably harsh consequences for A. The authorities make it clear that it is important for the Tribunal to consider the 'real life scenario'. That is precisely what the FTT did. The FTT noted that the appellant and M were not on amicable terms. He spent time with A pursuant to a court order. There was no indication that M was prepared to voluntarily return to Pakistan, far less reside in a part of Pakistan near to the appellant, far less agree to contact in Pakistan, beyond the reach of the court order. The real life scenario from the perspective of the child was this: although she could in principle reasonably be expected to leave the UK to live in Pakistan with her mother, there was no realistic prospect of M facilitating this. M has seemingly been in the UK unlawfully for some time. Her family are settled in the UK as British citizens. She is not facing any removal action. If removal directions are set, the practical reality is that these may well take place beyond January 2020, when A becomes a qualifying child. This would give M the potential to rely upon s. 117B(6) herself. Although the FTT may not have spelt these matters out, they are obvious from the recitation of the evidence and findings of fact.

12. When granting permission Judge Pooler consider it arguable that the FTT failed to assess or take into account whether A and M could or would return to Pakistan. The FTT was clearly aware of this as a possibility and could have particularised the reasons why this was not possible with greater care. However, when the decision is read as a whole I am satisfied that the FTT was of the clear and reasonable view that M would not return to Pakistan or facilitate contact there voluntarily. The fact that she could return did not affect the likelihood that she would not be willing to do so and was not being compelled to do so by the respondent. The FTT was clearly aware that the respondent needed to resolve the immigration status of A and M, and this was likely to take some time – see [58]. In all these circumstances the FTT was entitled to conclude that to remove the appellant "at this stage" would be contrary to A's best interests and a disproportionate breach of Article 8 in the light of the serious adverse hardship A would face if their current contact arrangements were disrupted. As Peter Jackson LJ pointed out at [154] to [159] of HA (Iraq) and others v SSHD [2020] EWCA Civ 1176, one must be careful to consider the circumstances of the child from her point of view and focus must be given to the reality of the child's actual situation

including the impact of emotional harm. This guidance was provided in the context of the children of foreign criminals caught by s. 117C of the 2002 Act but applies mutatis mutandis to other children.

13. When the decision is read as a whole, I accept Ms Meredith's submission that the FTT was fully aware of the practical reality – A was unlikely to return to Pakistan with her mother for the foreseeable future and even if she did, her mother would not be willing to facilitate contact. After all, the FTT accepted the appellant's evidence in its entirety. Those factual findings have not been the subject of any cross-appeal. Although the FTT did not say so expressly, I am satisfied that when the decision is read as a whole, the FTT accepted the appellant's case (as summarised at [9] - [10]) that the appellant's removal would mean that he lost contact with A. In the circumstances, the FTT was entitled to find that the practical reality for A engendered by her father's removal would be a separation between them for an uncertain but probably prolonged period of time, and given the strength of their relationship and her best interests, this would result in a disproportionate breach of Article 8.

Notice of decision

The FTT decision does not contain an error of law and I do not set it aside.

Direction regarding anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: UTJ Melanie Plimmer Dated:

Upper Tribunal Judge Plimmer 23 September 2020