Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30716/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 18 August 2015	**On 5 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

MUHAMMED KALEEM
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Appiah of Vine Court Chambers (Direct Access)
For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DECISION ON ERROR OF LAW

1 The Appellant appeals against the decision of First tier Tribunal Judge Majid dated 31st March 2015 in which he dismissed the Appellant's appeal against the Respondent's decision of 9 July 2014 refusing the Appellant leave to remain in the United Kingdom in making a decision to remove him administratively under s.10 Immigration and Asylum Act 1999.

2 The Appellant is a national of Pakistan born on 22 July 1968. He entered the United Kingdom on 3 December 2006 in possession of entry clearance for multiple entry as a visitor valid from 25 October 2005 to 25 October 2010. (Clearly, entry would have been for only 6 months at a time). The Appellant's wife and three children also entered as visitors on 8 February 2007. They departed at some point, presumed to be in either 2007 or 2008, whilst the Appellant and his son 'AK', born 14 November 2002, remained in the UK. They have remained here ever since, being supported by relatives and friends. AK has attended school in the UK.

3 On 12 March 2014 the Appellant made an application through his representatives for leave to remain on form FLTR(FP) ("Application for leave to remain in the UK on the basis of your family life as a partner or parent or on the basis of your private life in the UK") on the basis, set out in representations of that date ([D8] of the Respondent's bundle) of 7 years residence of a child. (AK had been present in the UK for 7 years by 8 February 2014.) The application was accompanied by various documents including a letter and a report from AK's school. The representations argued that it would not be reasonable or in his best interests for AK to leave the UK, with reference to Immigration Rules para 276ADE and Section EX 1 in Appendix FM.

4 This application was refused with no right of appeal. However, following a pre-action protocol letter for judicial review dated 7 May 2014 [D3-D7], the Respondent agreed to reconsider the application. Following further representations dated 13 June 2014 [D1-D2] the Respondent issued to the Appellant on 9 July 2014:

(i) an IS151A notice to a person liable to removal, giving the Appellant notice that he was an overstayer;

(ii) an IS151B notice of immigration decision under s.82 NIAA 2002 giving notice that the Appellant had made a human rights claim; that that claim had been refused; giving notice of a decision to remove him under s.10 1999 Act, and that he had an in country right of appeal against that decision;

(iii) a reasons for refusal letter addressed to the Appellant with AK named as his dependent, which stated:

(a) in relation to the Appellant's leave to remain under Appendix FM - leave to remain as a parent under E-LTRPT - that it was accepted that AK had resided in the UK continuously for 7 year prior to the application; the Appellant had sole responsibility for his son; he was taking an active role in AK's upbringing, and therefore that the E-LTRPT.2.3 to 2.4 were satisfied, but finding that under Section Ex1, it would not be unreasonable to expect AK to leave the UK, for reasons set out t paras 17-21 of the refusal letter;

(b) in relation to the Appellant's private life under para 276ADE of the immigration rules, neither the Appellant or his son qualified

for leave to remain under that paragraph (para 27) on the basis that the Appellant had retained ties with Pakistan (para 25), and that although AK had resided in the UK for 7 years prior to the application, it was not unreasonable for him to leave the UK (para 26);

(c) in relation to leave to remain outside the rules, there were no exceptional circumstances warranting such a decision (para 29-31).

5 The Appellant gave notice of appeal to the FtT on form IAFT-1.

6 I have set out the way in which the Respondent dealt with the application in some detail above, to provide a proper understanding as to the issues that were before the Judge, and which required proper determination by him.

7 There is a further procedural matter that I should mention. It appears that a notice of appeal may also have been filed in respect of AK. The Appellant's grounds of appeal name AK as a second appellant, and the Judge named AK on the face of his decision as second appellant.

8 However, when the Appellant later applied for permission to appeal to the Upper Tribunal, Judge of the First tier Tribunal Brunnen, granting permission, explains in his decision that when notice of appeal was filed for AK, the Duty Judge requested that a copy of the relevant immigration decision taken in respect of AK be filed with the Tribunal. A copy of an IS151A in respect of AK (which I have not seen) was sent to the Tribunal, but this was held (correctly) not to amount to a valid immigration decision, and a note was issued stating that no further action would be taken in respect of the attempted appeal by AK. Judge Brunnen opined, and again, I agree, that Judge Majid had been in error in considering and dismissing an appeal in AK's name, there being no appeal before the Judge.

9 The final point to note about these events is that before me, the parties produced a copy of an IS151B s.10 1999 Act removal decision for AK dated 14 October 2014, and a letter from the Appellant's representatives dated 22 October 2014, addressed to the First tier Tribunal, Leicester, pointing out that the Respondent had now clarified AK's position by issuing the IS151B notice of decision of 14 October, however, "as suggested by the Home Office, since the son is a dependent in his father Muhammad Kaleem's application there is no need to lodge a separate appeal for the son." Hence, although the Appellant and his representatives could have filed a notice of appeal for AK at that point, they elected not to.

10 In immigration and asylum appeals, there is sometimes a lack of clarity as to whether minor children are treated as appellants in their own right, or dependents of the principal appellant. There is in fact no provision of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 making provision for dependents of appeals. Parties should be astute to ensure that all persons who need to be appellants are appellants.

11 However I find, as will become apparent below, that whether AK is treated as a dependent of the Appellant's appeal, or whether he had been an appellant in his own right, would make little difference to the outcome of the appeal, as the same ultimate factual and legal issue, whether AK's removal is 'reasonable', is central to the Appellant's own appeal.

The Judge's decision

12 At the hearing on 27 March 2015, the Judge heard oral evidence from the Appellant. In deciding the appeal, he purported to bear every provision of the immigration rules in mind meticulously [3]; he did not find it necessary to give reasons for every finding of fact made, relying on the dictum in ex parte Gondolia [1991] Imm AR 519 at [6] and [9]; held that the Appellant did not merit the protection of the ECHR [10]; observed that one cannot overlook the fact that the immigrations controls 'cannot' be relaxed [10]; the Appellant seemed to be 'playing the system' [13]; it was significant that the Appellant placed his child in school knowing that they were then illegal immigrants [13]; British parliament has a say in assessing the best interests of children, otherwise one may find giving the benefit of ECHR to migrants, and immigration control will no more be in the hands of the British authorities [14]; it was to be noted that the Appellant's wife did not take AK back to Pakistan with her [15]; it would not be correct to allow people like the Appellant to use the system to their benefit if they increase their prosects by violating the Immigration Rules; the Appellant was an overstayer [16]; he was not persuaded that the Appellant can benefit from the present applicable immigration law [17]. The appeal was dismissed.

13 In grounds of appeal dated 31 March 2015, the Appellant avers that the Judge errs in law in:

(i) failing to consider relevant immigration rules (including Appendix FM) and failing to make relevant findings of fact in relation to the Appellant's satisfaction of the rules;

(ii) failing to make adequate findings of fact in relation to the Appellant's rights under Article 8 ECHR, and, in assessing the same, failing to adopt a structured approach, as per the 5 step approach advocated in Razgar [2004] UKHL 27; and failing to have regard to s.117B(6) NIAA 2002 in assessing the proportionality of the Appellant's proposed removal; ie:

> "(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."

(iii) conducting an inadequate assessment of the evidence, stating only that he agreed with the Respondent, and noting that the Appellant's

child was in school; failing to make relevant findings of fact as per EV Philippines [2014] EWCA Civ 874, para 35.

14 Permission to appeal was granted by Judge Brunnen on those grounds, save that it was noted that AK did not have an appeal in his own right.

15 In the hearing before me, I did not require Ms Appiah to address me on the substance of her grounds of appeal; only to shed more light on the history of AK's appeal, as set out at [7]-[9] above. Mr Avery for the Respondent sought to rely on a Rule 24 reply which sought to argue that the Judge had directed himself in law appropriately and had come to a decision which was open to him on the facts of the case.

Discussion

16 I agree with the Appellant's grounds in every respect.

17 Given that AK is not an appellant, then para 276ADE(1)(iv) of the Rules ("... is under the age of 18 years and has lived continuously in the UK for at least 7 years ... and it would not be reasonable to expect the applicant to leave the UK") is not directly applicable to the appeal brought by his father, the Appellant. However, the same question, ie whether it is reasonable for AK to leave the United Kingdom, is directly relevant to the determination of the Appellant's appeal:

(i) under the Immigration rules; given that the Respondent accepted that the Appellant met all the other requirements for leave to remain as a parents under E-LTRPT 2.2 - 2.4, the only issue left for determination being whether, under E-LTRPT.2.2(d), paragraph EX.1 also applied, which raises the question, at EX.1.(a)(ii), whether it would not be reasonable to expect the child to leave the UK;

(ii) outside the rules, when assessing, under s.117B(6) NIAA 2002, whether the public interest did not require the Appellant's removal, on the grounds that (a) he 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.

18 However, the Judge misdirects himself in law in failing to acknowledge that the Appellant was advancing a case under the Immigration Rules at all. The application, form, the Appellant's representations, and the issues identified in the Respondent's decision letter all made it clear that the application was to be considered first under immigration rules. The reader of the decision can have little confidence that the Judge was directing his mind to the relevant issues in the appeal. His assertion at [3] that he had borne every provision of the immigration rules in mind meticulously is not supported by the content of his decision.

19 Further, even in relation to the findings that were made (having attempted to summarise those findings at [12] above), they are inadequate. The

Judge relies on the authority of Gondolia[1], apparently in support for the paucity of his fact finding. In that case, a Claimant for judicial review sought to challenge a decision of the former Immigration Appeal Tribunal refusing permission to appeal against a decision of an Adjudicator that the Claimant's application for entry clearance on marriage grounds should be refused. One challenge was on the grounds that the Adjudicator had erred in failing to take into account two facts, said to be material to the outcome of the appeal. Henry J, dismissing the application for judicial review, held:

> "Secondly, it is said, and again correctly, that there is no mention in the adjudicator's determination and reasons that the initiative for the first introduction of the husband to wife in this arranged marriage came from the wife's family and not from the husband's. There is no reference to these matters in the adjudicator's decision. The first question is: can it be assumed from that that the adjudicator had not taken them into account? In my judgment, it clearly cannot because Mr Weiniger, who appeared then and who has appeared before me, makes it plain to me that they were matters that he relied on before the adjudicator as he relied on them before me. They were there before the adjudicator. They are plain points that would not be overlooked or misunderstood.
>
> The fact they are not referred to is the next point that I deal with. Can it be said that the adjudicator has not given sufficient reasons for his decision? It seems to me that he has given ample reason of his finding and the reasons for it. The reasons for his finding, when finally analyzed, are, first, the lack of credibility so far as the applicant and the sponsor and her father are concerned allied with the economic incentive. In reaching that conclusion, he would have had regard to these points made and it cannot be assumed against him that he gave no regard to them.
>
> When faced with that argument, Mr Weiniger for the applicant said that the vice of it lay in that as the adjudicator had not himself referred to them, so they might not have come to the attention of the Appeal Tribunal. But when one looks at the procedure rules, one sees that the Appeal Tribunal gets the full case papers.
>
> The points were raised in the notice of appeal lodged with that Tribunal. Therefore, they would have had those points before them and would have been able to take them into account. In short, there is nothing here that shows that there is any error of law either relating to the decision of the adjudicator or relating to the decision of the Immigration Appeal Tribunal in refusing leave to appeal."

20 It can therefore be seen that Henry J held that in the particular circumstances of that case, there was no error of law in the way that the judge referred to the evidence, or set out his reasoning.

21 Gondolia is therefore clearly not an authority in support of the proposition advanced by the Judge that it "advises junior judges not to give reasons for every finding of fact and waste paper in detailing obvious reasons".

1

22 Rather more recent guidance on the extent of reasons necessary to support a decision is provided by the President in MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC): Headnote:

> "(1) It is axiomatic that a determination discloses clearly the reasons for a tribunal's decision.
>
> (2) If a tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons."

and at para [7}:

> "Given that an asserted failure to provide any or adequate reasons for decisions of the First-tier Tribunal or important aspects thereof features with some frequency in applications for permission to appeal to this Tribunal, it may be timely to reflect on the doctrinal considerations and principles in play. In an immigration case decided some 30 years ago, *R – v - Immigration Appeal Tribunal ex parte Khan* [1983] QB 790, Lord Lane CJ said (at page 794):
>
> > "The important matter which must be borne in mind by Tribunals in the present type of circumstances is that it must be apparent from what they state by way of reasons first of all that they have considered the point which is at issue between the parties and they should indicate the evidence on which they have come to their conclusions. Where one gets a decision of a Tribunal which either fails to set out the issue which the Tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis on which it has reached its determination on that issue, then that is a matter which will be very closely regarded by this Court and in normal circumstances would result in the decision of the Tribunal being quashed. The reason is this. A party appearing before a Tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the Tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the Tribunal; in other cases it may not. Second, the Appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in others it may not."

23 The Judge in the present case has fallen far short of meeting his duty to take the relevant evidence into account and make adequate findings upon it.

24 In particular, in assessing the best interests of AK , which are capable of affecting the assessment (either inside the rules, or under s.117B(6) NIAA 2002) of whether it is reasonable for him to leave the UK, the guidance in EV (Philippines) indicates the range of considerations that should be taken into account:

> "A decision as to what is in the best interests of children will depend on a number of factors such as
>
> (a) their age;
>
> (b) the length of time that they have been here;
>
> (c) how long they have been in education;
>
> (c)[2] what stage their education has reached;
>
> (d) to what extent they have become distanced from the country to which it is proposed that they return;
>
> (e) how renewable their connection with it may be;
>
> (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and
>
> (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens."

25 I also find that the Judge has failed, when purporting to identify AK's best interests, to apply the guidance provided by the President in JO and Others (section 55 duty) Nigeria [2014] UKUT 517 (IAC): Headnote:

> "(1) The duty imposed by section 55 of the Borders Citizenship and Immigration Act 2009 requires the decision-maker to be properly informed of the position of a child affected by the discharge of an immigration etc function. Thus equipped, the decision maker must conduct a careful examination of all relevant information and factors.
>
> (2) Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations.
>
> (3) The question whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the court or tribunal considering this question will frequently be confined to the application or submission made to Secretary of State and the ultimate letter of decision."

and see also

> "9. More detailed prescription of the correct approach to section 55 and its interaction with Article 8 ECHR has followed. In *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690, the Supreme Court recently considered the interplay between the best interests of the child and Article 8 ECHR, rehearsing what might be termed a code devised by Lord Hodge comprising seven principles:
>
> (1) The best interests of a child are an integral part of the proportionality assessment under Article 8 ECHR;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

2This repeated numbering is within the original

> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
>
> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
>
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
>
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment; and
>
> (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

26 I find that the lack of adequate findings of fact and adequate consideration of AK's best interests are such that the decision should be set aside. There is nothing in the decision which is capable of being preserved.

27 In re-making the decision, I find, applying para 7.2(b) of the Practice Statement of the Immigration and Asylum Chambers of the First tier Tribunal and the Upper Tribunal, that the extent of the fact finding which is necessary to be performed is such that the appeal should be remitted to the First tier. Although the Appellant's reasons for overstaying his original leave are unclear, and the outcome of the remitted hearing is uncertain for him, remittal is the appropriate outcome.

28 The First tier should proceed on the basis of the matters accepted by the Respondent, and on the basis that the Appellant relies on ELTRPT and Ex 1, and on s.117B(6) NIAA.

Decision

29 (i) The making of the decision by the First tier Tribunal involved the making of a material error of law.

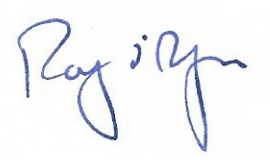
(ii) The decision of the First tier Tribunal is set aside.

(iii) The appeal is remitted to the First tier Tribunal under s.12(2)(b)(i) Tribunals, Courts and Enforcement Act 2007.

(iv) The appeal shall be heard by a Judge other than Judge Majid.

30 The Tribunal regrets the time taken to produce the present decision.

Signed: Date: 2.2.16



Deputy Upper Tribunal Judge O’Ryan