Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07559/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23rd February 2017 and 20 July 2017	**On 3rd August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

AU
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Chowdhury, instructed by KC Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Chohan made following a hearing at Bradford on 15th June 2016.

Background

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2. The appellant is a citizen of Bangladesh. He arrived in the UK on 1st March 2010 as a visitor and overstayed. He made a late asylum claim on 3rd March 2012 which was refused and the subsequent appeal was dismissed on 24th March 2015. On 7th July 2015 he applied for leave to remain in the UK on family life grounds which was refused on 30th September 2015. He appealed to an Immigration Judge.

3. Judge Chohan recorded that, although the previous judge who had dealt with the asylum appeal did not accept that the appellant was in a genuine and subsisting relationship with his partner, with whom he had had a religious marriage on 15th March 2012, it was now conceded by the Presenting Officer that there was no challenge to the relationship between the appellant and Mrs K.

4. Mrs K is of Bangladeshi origin but has not been back there for 22 years. This is her third marriage. The first was arranged by her family in 1993 and was abusive. The appellant's partner had a son, JA, born on 20th July 1994 from that relationship. She then married a Pakistani national, whom she divorced and he was deported to Pakistan. There are two children of that relationship, ZF born on 5th March 2006 and AF born on 21st July 2008.

5. All of the children are British nationals.

6. The judge considered that there were no insurmountable obstacles to Mrs K establishing herself in Bangladesh with the appellant. With respect to the children, he said that there was very little evidence before him in respect of the degree and substance of the parental relationship and he said that it was "not the strongest of relationships".

7. The judge concluded that the children could either stay in the UK with their mother but they were young enough to adapt to a life in Bangladesh, would have been exposed to Bangladeshi customs and culture and language and it was reasonable to expect them to go there although they were not required to do so.

8. On that basis he dismissed the appeal.

The Grounds of Application

9. The appellant sought permission to appeal on the grounds that once the judge had found there to be a genuine and subsisting relationship between the appellant and minor children it was irrelevant for him to assess the strength of it and the error had infected the proportionality assessment as well as the issue of whether it was reasonable for the children to relocate.

10. Second, the judge had failed to have regard to Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 and failed to have regard to MA (Pakistan) and Others R (on the application of) v UT (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705. In that case the respondent accepted that it would be relatively rare for it to be reasonable to expect a British child to leave the UK which was echoed in the

Immigration Directorate Instruction Family Migration, Appendix FM, Section 1.0b Family Life (as a partner or parent) and private life: 10 year route dated August 2015. Finally the judge had failed to have regard to the judgment in Zambrano.

11. Permission to appeal was initially refused but upon renewal granted by myself on 14th December 2016.

Submissions

12. Mr Kotas accepted that the judge had erred in seeking to go behind his finding that the appellant and Mrs K were in a genuine and subsisting relationship by making observations on the evidence in relation to the strength of that relationship. He also accepted that it was obvious that the appellant had stepped into the shoes of the children's father. He did seek to argue however that the error did not affect the judge's assessment of whether it was reasonable for the children to leave the UK which was a holistic question to be considered in the light of all of the evidence, including the appellant's immigration history and the fact that his spouse entered into the relationship knowing that he had no right to be in the UK.

Consideration of whether there is a material error of law.

13. I disagree with Mr Kotas' submission. It is quite apparent from the determination that the prism through which the judge was considering whether it would be reasonable for the children to leave the UK was the assessment that the relationship between them and their stepfather was not of the strongest. It is clear from the judge's reasoning that it was his view that there was no requirement for them to leave the UK and they could perfectly well stay here with their mother.

14. The fact is however that the youngest child has lived with the appellant since she was 3 years old and her brother since he was 5. It is not disputed that they have never had any relationship with their natural father. Moreover there are a number of other factors to be taken into account. The children's half brother lives with them and is attending an HND Business Management course studying full-time at the London School of Science and Technology.

15. In MA the Court of Appeal held, at paragraph 19, per Elias LJ:

> "19. In my judgment, therefore, the only questions which courts and tribunals need to ask when applying Section 117B(6) are the following:
>
> (1) Is the applicant liable to deportation? If so, section 117B is inapplicable and instead the relevant code will usually be found in section 117C.
>
> (2) Does the applicant have a genuine and subsisting parental relationship with the child?

(3) Is the child a qualifying child as defined in section 117D?

(4) Is it unreasonable to expect the child to leave the United Kingdom?"

20. If the answer to the first question is no and to the other three questions is yes, the conclusion must be that Article 8 is infringed."

16. At paragraph 35 of the judgment the respondent's representative suggested that it would be relatively rare for it to be reasonable to expect a child who is a British citizen to leave the UK, and so the consequence of the appellant's approach would be to allow many applicant parents who have unjustifiably and unlawfully stayed in the UK to remain here by clinging to the coat tails of the child. Nevertheless the Court of Appeal chose to follow the argument of the appellants. Whilst the Court acknowledged that appellant's immigration history was poor, the children are not to be blamed for the fact that he overstayed his visa and their mother entered into a relationship with him knowing that he had no right to be in the UK.

17. The judge did not properly address himself to paragraph 117B(6). Had he done so, and concluded that the appellant had a genuine and subsisting relationship with the children he should then have moved straight on to the issue of whether it was reasonable to expect the children to leave the UK and not to seek to qualify the nature of the relationship.

18. The error in the judge's assessment of the quality of the parental relationship infected his approach to the question of proportionality and accordingly the decision has to be remade.

19. Initially it was hoped that the appeal could proceed straight away since the appellant was in court and available to give evidence. However there was no interpreter booked and none available. Mr Kotas indicated that he had a number of questions for the appellant, particularly in relation to the circumstances to which he would be returning in Bangladesh which were clearly relevant to the question of the reasonableness of the children's life there.

20. It emerged at the hearing that the appellant's wife is expecting his child, the baby being due on 18th April 2017. Since the appeal could not be concluded today it was agreed between all parties that the sensible course would be for the appellant's representative to file further evidence, by 15th May 2017, with the Presenting Officer's Unit following the birth of the child. That evidence will be considered by the respondent who will then be in a position to notify the Tribunal whether a further hearing is necessary.

Resumed Hearing

21. At the resumed hearing Mr Kotas indicated that he had no wish to challenge the evidence. The appeal hinged on whether it was reasonable to expect the appellant's two stepchildren and his own child to leave the UK. It was not contested that he had a genuine and subsisting parental relationship with them. In view of the ages of the children – they are 9 and 11 – the Secretary of State would need to show strong reasons why they would be required to leave the UK and the only argument which he could advance in her favour was the importance of immigration control and the lack of evidence of the appellant's means in the UK.

22. Mr Chowdhury submitted that the appeal ought to be allowed. It was plainly unreasonable for the British children to be required to go and live in Bangladesh. Their best interests should prevail.

Findings and Conclusions

23. Paragraph EX.1(a) states that this paragraph applies if

> "(a)
>
> (i) The applicant has a genuine and subsisting parental relationship with a child who –
>
> (aa) is under the age of 18 years or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
>
> (bb) is in the UK;
>
> (cc) is a British citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of application; and
>
> (ii) it would not be reasonable to expect the child to leave the UK."

EX.1(a) is mirrored by the provisions of Section 117B(6) of the 2002 Act which states that

> "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 UK."

24. In this case the two British national stepchildren have no connection with Bangladesh whatsoever. Their father, with whom they have no contact, is a Pakistani national. They themselves were born in the UK and have lived

here all their lives. They enjoy family life with their half-brother J, who is now 22 years of age but lives with them in the family home and is in full-time education.

25. As Mr Kotas realistically conceded, in order to make out her case the Secretary of State would have to show powerful reasons why it was reasonable to expect these children to go and live in Bangladesh. To do so would be to seriously disrupt their relationship with their half-brother, with whom they have lived all their life. Their best interests are clear. It is to remain in their country of nationality with their family.

26. The balance of this argument lies with the appellant. It would not be reasonable to expect these children to leave the UK and Mr Kotas did not seek to persuade me otherwise.

Decision

27. The original judge erred in law. The decision is set aside. The appellant's appeal is allowed under the Immigration Rules and on human rights grounds.

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.

Deborah Taylor

Signed Date 2 August 2017

Deputy Upper Tribunal Judge Taylor