



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06392/2015

THE IMMIGRATION ACTS

Heard at Field House
On 11 June 2018

Decision & Reasons Promulgated
On 21 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MAKESUDUR [R]
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer
For the Respondent: Mr M Hasan (counsel) Instructed by Kalam, solicitors

DECISION AND REASONS

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. The Secretary of State for the Home Department brings this appeal but to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an

appeal by the Secretary of State against a decision of First-tier Tribunal Judge Lucas, promulgated on 26 October 2017, which allowed the Appellant's appeal on article 8 ECHR grounds.

Background

3. The Appellant was born on 15 May 1983 and is a national of Bangladesh. On 11 September 2015 the Secretary of State refused the Appellant's application for leave to remain in the UK. The respondent believes that the appellant used a fraudulently obtained English language certificate to support an earlier application.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Lucas ("the Judge") allowed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 5 April 2018 Judge L Murray gave permission to appeal stating

1. The respondent seeks permission to appeal, in time, against a decision of First-tier Tribunal Judge Lucas who, in a decision and reasons promulgated on 26 October 2017, allowed his human rights appeal.
2. The First-tier Tribunal found that the appellant did not employ deception in obtaining an English-language certificate. The grounds assert that the Judge erred in misinterpreting the evidence; failing to find that the respondent's evidence discharged the evidential burden and in failing to give adequate reasons why the respondent had not met the legal burden in view of the fact that there was no innocent explanation. It is further argued that the First-tier Tribunal failed to give adequate reasons how the decision amounts to a disproportionate interference with the appellant's human rights.
3. The grounds are arguable. It is arguable that the First-tier Tribunal fails adequately to address why the respondent's evidence did not satisfy the evidential or the legal burden and failed to make any findings on the appellant's evidence. It is further arguable that the article 8 balancing exercise is inadequately reasoned.

The Hearing.

5. For the respondent, Mr Tarlow moved the grounds of appeal. He told me that the decision contains material errors of law because the Judge failed to give adequate reasons for his findings. He told me that the essential point is that there are insufficient reasons in the article 8 assessment and inadequate reasoning in relation to the welfare of the appellant's British citizen child. He took me to [22] of the decision where (he told me that) the Judge merely sets out the factual matrix of the effect of removal and gives no reasons for the conclusions reached. He urged me to set the decision aside.

6.(a) For the appellant, Mr Hassan told me that the decision does not contain errors of law. It may be a short decision, but it contains adequate reasoning. He relied on the detailed rule 24 response for the appellant. He took me to [12] of the decision where it is recorded that the respondent's generic evidence bundle was neither served not

produced. He told me that the Judge took correct guidance in law and applied the correct evidential burden. He told me that the Judge considered the appellant's innocent explanation, which is set out in the appellant's witness statement in detail. He took me to [10] of the decision and reminded me that the Home Office Presenting Officer (before the First-tier Tribunal) chose not to cross examine the appellant or his partner.

(b) Mr Hassan told me that the Judge's article 8 assessment is beyond criticism. He told me that the Judge took correct guidance in law and found that the fact that the appellant's wife and child are British citizens was determinative of the article 8 assessment. He told me that the Judge's findings make it clear that section 117B(6) of the 2002 Act is satisfied. He urged me to dismiss the appeal and allow the decision to stand.

Analysis

7. The Judge's findings are confined to [20] to [23] of the decision. The appellant's application was submitted on 16 April 2015. The only competent ground of appeal is on ECHR grounds.

8. At [20] the Judge summarily deals with the allegation that a fraudulently obtained English language certificate has been used. The Judge finds that the respondent does not discharge the burden of proof. That finding is safe because of what is contained at [10] of the decision. There the Judge records that the appellant and his wife adopted the terms of their witness statements and their evidence went without challenge. At [12] the Judge makes it clear that the respondent did not produce evidence in relation to the English language test.

9. As the respondent did not produce evidence about the English language test and as the appellant's innocent explanation contained in his witness statement goes without challenge the respondent cannot discharge the initial burden of proof.

10. What is wrong with the decision is that there is no meaningful article 8 analysis. The Judge makes it clear that the appellant's wife and child are British citizens (I am told that the appellant and his wife now have a second British citizen child), but no meaningful analysis is carried out. The Judge does not consider section 117B of the 2002 Act. At [22] the Judge torpidly says that requiring the appellant's wife and child to either remain in the UK while the appellant goes to Bangladesh, alternatively requiring the appellant's wife and child to accompany him to Bangladesh, is unreasonable and disproportionate. He does not say why.

11. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was 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 was unlikely to satisfy the requirement to give reasons.

12. The Judge races to conclusions and does not give his reasons. That is a material error of law. I set the Judge's decision aside. Although I set the Judge's decision aside there is sufficient material for me to substitute my own decision.

The Relevant Facts

13. The appellant entered the UK on 18 December 2010 as a student. He had leave to remain in the UK until 31 March 2014, but leave was curtailed on 27 April 2012 to expire on 26 June 2012.

14. The appellant was then granted leave to remain as a student from 16 December 2013 to 30 July 2014. He then applied for further leave to remain as a student in July 2014, but that application was refused on 23 September 2014. The respondent's decision of 23 September 2014 was not served on the appellant.

15. The appellant applied for leave to remain as a spouse on 16 April 2015. The respondent refused that application on 11 September 2015. It is against that decision that the appellant appeals. The respondent refused the application because the respondent believes that the appellant fraudulently obtained an English language certificate and used it in an earlier application for leave to remain submitted on 28 September 2012.

16. On 1 July 2014 the appellant married his wife in a religious ceremony. The ceremony was followed by a civil registration ceremony taking place on 12 August 2014. The appellant's wife is a British citizen. On 6 July 2015 their daughter was born. Their daughter is a British citizen. They now have a second child who is a British citizen.

17. The appellant's wife is in full-time employment. She is £19,000 per annum.

18. In March 2015 the appellant obtained GESE grade 5 qualification in the English language from Trinity College London. The Home Office carried out an investigation into the validity of the English language test certificate relied on by the appellant. Those investigations indicated that the appellant produced an English language certificate from Portsmouth international college & found that the test certificate is invalid.

19. The appellant has never claimed to have obtained an English language test certificate from Portsmouth international college. The appellant's position has always been that in addition to the certificate obtained from Trinity College London in March 2015 he undertook a TOEIC speaking test at Training Connect limited, Holloway, London.

20. At the hearing before the First-tier Tribunal on 20 October 2017, the respondent did not produce any evidence in relation to the English language test certificate relied on by the appellant nor did the respondent produce a copy of the application submitted by the appellant on 28 September 2012.

21. The appellant's wife has visited Bangladesh on holiday. She felt unsettled and unsafe there. The appellant's wife is a British citizen who is entirely immersed in British culture. The appellant's wife does not want to go to Bangladesh. She fears for her safety and the safety of their children in Bangladesh.

Conclusions

22. The only evidence the respondent produces to support the assertion that the appellant has fraudulently obtained an English language test certificate is contained within the respondent PF1 bundle. It is very difficult to make any sense of the documents at annexe F there. There is one document entitled "ETS invalid test analysis". That document contains the appellants details, including the date of his application in September 2012, and the date that he took an English language test.

23. The "ETS invalid test analysis" says that the appellant's English language test is invalid and that the test centre is Portsmouth International College. It has never been the appellant's case that he attended Portsmouth International College.

24. No other evidence (not even the usual generic bundle for ETS cases) is produced. All parties agree that the initial burden of proof rests with the respondent. The respondent cannot discharge the burden of proof by producing an analysis document linking the appellant to a test centre that he has never attended. Because of the paucity of evidence, the initial burden of proof is not discharged by the respondent, so that the allegation of obtaining an English-language certificate by using a proxy test taker is not established.

25. It is beyond dispute that the appellant's wife and two children are British citizens.

26. The respondent's IDIs on Family Migration deals with British children at Paragraph 11.2.3. The August 2015 version (The decision in this case was made in September 2015) states that, save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. However, it also states that "*where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer*".

27. The Upper Tribunal in SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC) held, considering this guidance, that even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary

of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal

28. E-LTRPT.2.2. says

The child of the applicant must be-

- (a) under the age of 18 years at the date of application, or where the child has turned 18 years of age since the applicant was first granted entry clearance or leave to remain as a parent under this Appendix, must not have formed an independent family unit or be leading an independent life;
- (b) living in the UK; and
- (c) a British Citizen or settled in the UK; or
- (d) has lived in the UK continuously for at least the 7 years immediately preceding the date of application and paragraph EX.1. applies.

29. E-LTRPT.2.4. says

- (a) The applicant must provide evidence that they have either-
 - (i) sole parental responsibility for the child, or that the child normally lives with them; or
 - (ii) direct access (in person) to the child, as agreed with the parent or carer with whom the child normally lives or as ordered by a court in the UK; and
- (b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

30. (a) In the reasons for refusal letter the respondent says that the appellant cannot meet the suitability requirements of R-LTRP1.1 because the respondent believes he fraudulently obtained an English Language certificate. On the facts as I find them to be, the appellant does meet the suitability requirements of the rules. It is beyond dispute that the appellant's wife and children are British citizens, so that EX.1 must be considered.

(b) EX.1 says

EX.1. 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 7 years immediately preceding the date of application; and

(ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK;

(b) The guidance given by the respondent in the IDIs on Family Migration (February 2018) is that the questions a decision maker should pose are:

(i) is there a genuine and subsisting parental relationship?

(ii) is the child a British citizen or have they lived in the UK for a continuous period of at least 7 years?

(iii) will the consequence of the refusal of the application be that the child is required to leave the UK?

(iv) would it be reasonable to expect the child to leave the UK. In many cases where one parent has a right to remain in the UK, the child would not leave?

(c) The respondent's guidance suggests that the test is whether the child would be likely to leave rather than actually be required to leave. The Home Office now say in those circumstances EX.1 (a) would not apply but the impact on the child of the appellant's departure from the UK should be considered taking into account the best interests of the child as a primary consideration and if refusal would lead to unjustifiably harsh consequences, then leave can be granted on the basis of exceptional circumstances.

(d) It does not follow that section 117(6) should be interpreted in the same way as the SSHD interprets his immigration rules. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was held (see [19]) that when applying section 117B(6) only three questions needed to be asked as long as the applicant was not liable to deportation, and those questions are

(i) is there a genuine and subsisting parental relationship?

(ii) is the child a British citizen or have they lived in the UK for a continuous period of at least 7 years?

(iv) would it be reasonable to expect the child to leave the UK?

(e) The appellant's unchallenged evidence is that his children are British citizens who do not have Bangladeshi nationality. The weight of reliable evidence indicates that the children would be distressed if their parents are separated. Caselaw tells me that it is in the child's best interests to live in a family with both of their parents.

(f) It cannot be reasonable to cause a primary school age child distress. It cannot be reasonable to separate a young child from one of its parents. It cannot be reasonable to expect a child to live as an illegal immigrant. It cannot be reasonable to deprive a British national of the benefits of British nationality.

(g) I therefore find that the appellant meets the requirements of paragraph EX.1 because it is not reasonable to expect his British citizen children to leave the UK.

31. Both of the appellant's children are British citizens, and they live with the appellant. That means that the appellant meets the requirements of both E-LTRPT 2.2 & E-LTRPT 2.4. The appellant therefore meets the requirements of the immigration rules.

Article 8 ECHR

32. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deport case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "*what has now become the established method of analysis can therefore continue to be followed...*"

33. I have to determine the following separate questions:

- (i) Does family life, private life, home or correspondence exist within the meaning of Article 8
- (ii) If so, has the right to respect for this been interfered with
- (iii) If so, was the interference in accordance with the law
- (iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and
- (v) If so, is the interference proportionate to the pursuit of the legitimate aim?

34. Section 117B of the 2002 Act tells me that immigration control is in the public interest. None of the factors set out in s.117B of the 2002 Act weigh against the appellant.

35. By virtue of section 117D a "qualifying child" means a person who is under the age of 18 and who – (a) is a British citizen, or (b) has lived in the United Kingdom for a continuous period of seven years or more. If a child is a qualifying child for the purposes of section 117B of the 2002 Act as amended, the issue is whether it is not reasonable for that child to return.

36. The appellant's children are qualifying children, because they are British citizens. The remaining question for me is whether or not it is reasonable to the appellant's children to leave the UK.

37. In R (on the application of Mansoor) v Secretary of State for the Home Department [2011] EWHC 832 (Admin) it was said that a national enjoyed the international human right as well as the domestic human right to live and remain in their own country (para 42).

38. I remind myself of Section 55 of the Borders, Citizenship and Immigration Act 2009. In ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department

(Respondent) [2011] UKSC 4 Lady Hale said that “*Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child*”.

39. In R(on the application MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was held that in light of the jurisprudence of the Supreme Court, courts and tribunals were not mandated to approach the proportionality exercise where the best interests of the child were in issue in any particular order such that it was an error of law for them to fail to do so. Although it would usually be sensible to start with the child’s best interests, ultimately it did not matter how the balancing exercise was conducted provided that the child’s best interests were treated as a primary consideration (paras 49, 53–57 and 72). In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) in which it was held that the best interests assessment should normally be carried out at the beginning of the balancing exercise.

40. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) it was held that the "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

41. In AA v Upper Tribunal (Asylum and Immigration Chamber) [2013] CSIH 88 it was held that there was no error where significant weight had been accorded to the Claimant child's British nationality. In Sanade and others (British children - Zambrano - Dereci) [2012] UKUT 00048 (IAC) the Tribunal held that Case C-34/09 Ruiz Zambrano , [2011] EUECJ C-34/09 "*now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so*".

42. The impact of the respondent’s decision is either that the appellant’s children will be separated from the appellant, or the appellant’s children will leave the UK. The weight of reliable evidence tells me that the appellant’s children will find separation from the appellant to be more than temporarily distressing. They will lose a parent. That cannot be in the best interests of a child.

43. The alternative is that the appellant’s children accompany the appellant to Bangladesh. If they do that, then two British citizen children will be required to leave the UK.

44. The respondent produces no evidence to explain why the removal of two British citizens is justified. It is arguable that they will all be returning to their father’s country of origin, but that argument ignores the respondent’s own decision to confer British Citizenship on the appellant’s children. That argument runs counter to the respondent’s own IDI’s.

45. As the impact of the respondent's decision would cause upheaval and distress to young British citizen children, and as on the facts as I find them to be it is not in the children's best interest to suffer such distress and upheaval, then it cannot be reasonable to expect the children to leave the UK. The appellant benefits from the terms of s.117B of the 2002 Act.

46. I therefore find that the public interest in immigration control is outweighed by the interests of the appellant's children. I therefore find that the respondent's decision is a disproportionate breach of the appellant's right to respect for family life.

47. On the facts as I find them to be, family life exists. The respondent's decision is an interference with that family life. The burden therefore shifts to the respondent to show that the interference was justified. The respondent relies solely on the public interest in effective immigration control. On the facts as I find them to be the appellant meets the requirements of EX.1 of the immigration rules.

48. The respondent's position is that the appellant can return to Bangladesh and make an application for leave to enter from there. In Chikwamba (FC) v SSHD 2008 UKHL 40, the House of Lords said that in deciding whether a general policy of requiring people such as the Appellant to return to apply for entry in accordance with the rules of this country was legitimate and proportionate in a particular case, it was necessary to consider what the benefits of the policy were. Whilst acknowledging the deterrent effect of the policy the House of Lords queried the underlying basis of the policy in other respects and made it clear that the policy should not be applied in a rigid, Kafkaesque manner. The House of Lords went on to say that it would be "*comparatively rarely, certainly in family cases involving children*" that an Article 8 case should be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave from abroad.

49. In R (on the application of Chen) v SSHD (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 00189 (IAC) it was held that (i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning Chikwamba v SSHD [2008] UKHL 40. (ii) Lord Brown was not laying down a legal test when he suggested in Chikwamba that requiring a claimant to make an application for entry clearance would only "*comparatively rarely*" be proportionate in a case involving children. However, where a failure to comply in a particular capacity is the only issue so far as the Rules are concerned, that may well be an insufficient reason for refusing the case under Article 8 outside the rules.

50. In Agyarko [2017] UKSC 10 Lord Reed said that if an applicant, even if residing in the UK unlawfully, was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal and that point was illustrated by Chikwamba.

51. Part of the respondent's argument is that the appellant could make a successful application to return to the UK to join his wife and children. Caselaw tells me that the refusal of leave to remain must therefore be a disproportionate breach of the right to respect for family life.

52. In Mostafa (Article 8 in entry clearance) [2015] UKUT 112 (IAC) the Tribunal held that the claimant's ability to satisfy the Immigration Rules is not the question to be determined by the Tribunal, but is capable of being a weighty, though not determinative, factor when deciding whether such refusal is proportionate to the legitimate aim of enforcing immigration control.

53. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was confirmed that if section 117B(6) applies then "*there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal.*"

54. Because the appellant meets the requirements of paragraph EX.1 of the immigration rules and because section 117B(6) of the 2002 Act weighs in the appellant's favour, I find that the public interest does not justify removal. That finding leads me to the conclusion that the respondent's decision is a disproportionate interference with the right to respect for article 8 family life.

CONCLUSION

55. The decision of the First-tier Tribunal promulgated on 26 October 2017 is tainted by a material error of law. I set it aside.

56. I substitute my own decision.

57. The appeal is allowed on article 8 ECHR grounds.

Signed *Paul Doyle*
Deputy Upper Tribunal Judge Doyle

Date 18 June 2018