



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/14234/2016

THE IMMIGRATION ACTS

Heard at Field House
On 29 August 2018

Decision & Reasons Promulgated
On 13 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

MR SHOJOL AHMED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M K Mustafa of Kalam Solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 30 December 1977. He is appealing against the decision of Judge of the First-tier Tribunal Beg promulgated on 15

November 2017 whereby his appeal against the decision of the respondent dated 23 May 2016 to refuse his application for leave to remain based upon his family and private life was dismissed.

2. The Secretary of State refused the appellant's application on the basis that Educational Testing Services (ETS) had informed him that the appellant had used deception in respect of an English language test by use of a proxy test taker. As a consequence of the finding that the appellant had engaged in fraud, it was found that he did not meet the suitability requirements under Appendix FM of the Immigration Rules and that his removal would not be a disproportionate interference with his right to respect for private and family life under Article 8 ECHR.
3. The appellant appealed and his appeal came before Judge of the First-tier Tribunal Beg, who dismissed the appeal. The judge found that the appellant had engaged in fraud. She then proceeded to consider in light of the finding in respect of fraud whether removal of the appellant would be contrary to Article 8 ECHR and concluded that it would not as the interference with his and his family's Article 8 rights would be proportionate. The judge reached this conclusion notwithstanding that the appellant is married to a British citizen and has a British child, born on 10 November 2015.
4. The judge found at paragraph 32 of the decision that the appellant's child is young enough to adapt to life in Bangladesh with his parents and that if the appellant's wife decided to remain in the UK she could do so with the child. The judge stated:

"I find that if the appellant's wife decides to remain in this country with her child he will continue to be cared for by his mother who is his primary carer. He will be able to visit his father in Bangladesh with his mother and retain contact by telephone".
5. At paragraph 34 the judge set out the relevant provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The judge then, at paragraph 35, stated:

"I find that the appellant established a private life in the United Kingdom in the full knowledge that he had no right to live in this country having employed deception in the past. I take into account the English language certificate from Trinity College, London, which is dated 8 March 2016 and shows that the appellant was awarded grade 2 in spoken English at CEFR level A1. However I find for the reasons that I have already given, that the appellant's reliance upon a fraudulently obtained TOEIC certificate is highly relevant when considering the public interest. I accept that the appellant is self-employed and that there is no reliance upon public funds. I also accept that his wife is working. However in taking the evidence as a whole on a balance of probabilities, I find that any interference in the appellant's Article 8 rights will be proportionate. I find that immigration control is in the public interest".
6. The appellant appealed on two grounds. The first ground argued that the judge erred by failing to have proper regard to Section 117B(6) of the Nationality, Immigration and Asylum Act 2002. The second ground argued that the judge's assessment of whether the ETS TOEIC certificate was fraudulently obtained

contained errors of law. Permission to appeal was granted only in respect of the first ground of the appeal.

7. At the error of law hearing I heard submissions from Mr Mustafa on behalf of the appellant and Mr Bramble on behalf of the respondent.
8. The argument advanced by Mr Mustafa is that the judge was required to have regard to Section 117B(6) of the 2002 Act but failed to do so. Mr Bramble accepted that the decision does not contain a direct evaluation of Section 117B(6) of the 2002 Act but argued that this was not material as the judge's analysis properly construed dealt with the issues relevant to Section 117B(6). In particular, he argued that the judge had found - and it was not disputed - that the child would be able to remain in the UK with his mother and therefore the consequence of the removal of the appellant would not be that the appellant's child would be expected to leave the UK.

Error of Law Decision

9. In assessing the proportionality of the appellant's removal from the UK, the judge was required to have regard to 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 United Kingdom".

10. It was not in dispute that the appellant's child is a "qualifying child", that the appellant has a genuine and subsisting relationship with him, and that the appellant is not liable to deportation. Therefore, the only issue under Section 117B(6) for the judge to resolve was whether it would "not be reasonable to expect" the appellant's son to leave the UK.
11. The judge has considered the "best interests" of the appellant's child, finding that it would be in his best interest to remain with his parents, but absent from the decision is any consideration of the issue of whether it would be reasonable for the appellant's son to leave the UK. "Reasonableness to be expected to leave the UK" and "best interests" are not the same and I do not agree with Mr Bramble that an inference as to reasonableness can be made from the judge's evaluation of the child's best interests. The decision therefore contains a material error of law and is set aside.

Re-Made Decision

12. It is not in dispute that the appellant, who is married to a British citizen and has a son born on 10 November 2015 who is a British citizen, has a family life in the UK that engages the operation of Article 8 ECHR. The issue in dispute is whether removal of the appellant from the UK would be a disproportionate interference with his (and his family's) right to respect for their family life.

13. It is clear from the evidence (and I find as a fact) that if the appellant were to be removed his wife and his son would remain in the UK without him. This, therefore, is not a case where removal of an appellant will result in a British citizen child having to leave the UK. Rather, it is a case where the consequence of removal is that a British citizen child will be separated from his father (but continue to live with his mother in the UK).
14. Where the proportionality of a person's removal is under consideration it is necessary to have regard to the factors enumerated in Part 5A of the 2002 Act. Section 117B(6) of the 2002 Act stipulates that where, as here, a person is not liable to deportation the public interest does not require his 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.
15. In this case, it is not in dispute that the appellant has a genuine and subsisting parental relationship with a qualifying child. The question to be addressed is whether it is reasonable to expect his child to leave the United Kingdom.
16. It has been made clear by the Court of Appeal in *MA (Pakistan)* [2016] EWCA Civ 705 at paras. 19-20 that if the criteria of section 117B(6) are satisfied the public interest would not require the appellant's removal. However, the question of reasonableness is a broad one which must encompass amongst other things consideration of the conduct and immigration history of the appellant. The central issue in this appeal, therefore, is whether it would be reasonable to expect the appellant's son to leave the UK, with "reasonableness" being given a broad interpretation as set out in *MA (Pakistan)*.
17. My starting point to address whether it would be reasonable to expect the appellant's child to leave the UK is the respondent's guidance published on 22 February 2018 titled Family Migration: Appendix FM Section 1.0b – Family Life (as a Partner or Parent) and Private Life: 10- Year Routes. This guidance sets out at pages 76 and 77 when it would be reasonable to expect a child to leave the UK. In respect of children who are British citizens the guidance distinguishes between when the child would have to leave the UK and would not have to leave the UK. It states that where a child would have to leave the UK:

"It will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave the UK because, in practice, the child will not, or is not likely to, continue to live in the UK with another parent or primary carer, EX.1(a) is likely to apply".
18. The guidance then goes on to consider the reasonableness of expecting an appellant to leave the UK where the consequence would be separation between the appellant and his child. The guidance relevant to these circumstances states:

“In particular circumstances it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules”.

19. The appellant has deliberately committed a very serious breach of the Immigration Rules by using deception to obtain an English language certificate. Mr Bramble argued that this act is of sufficient gravity to place the appellant within the category of applicant envisaged by the guidance as being someone who should be refused a grant of leave, notwithstanding that he has a British citizen child. Mr Mustafa argued that although the conduct of the appellant in using fraud is a serious matter, it does not rise to the level contemplated by the policy. I agree with Mr Mustafa. The guidance refers to the commission of significant or persistent criminal offences. Although the appellant committed a crime, he is not a persistent criminal and notwithstanding the significance of what he has done it does not constitute a significant crime. The guidance also refers to someone who has “repeatedly **and** deliberately breached the Immigration Rules”. The appellant deliberately breached the Rules, but only on one occasion. Accordingly, I am satisfied that removal of appellant is not consistent with the respondent’s own guidance. As explained in *SF and others* (Guidance, post-2014 Act) Albania [2017] UKUT 00120(IAC) at paragraph 12:

On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance. But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it.

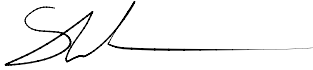
20. Applying the respondent’s guidance, this is a case where it would be unreasonable to expect the appellant’s son to leave the United Kingdom and therefore, under section 117B(6), the public interest does not require the appellant’s removal. As the public interest does not require the appellant’s removal, his removal would be a disproportionate interference with his, and his family’s, right to respect for their family life under Article 8 ECHR. I therefore set aside the decision of the First-tier Tribunal and substitute a decision allowing the appeal.

Decision

- (a) The decision of the First-tier Tribunal contains a material error of law and is set aside.

(b) I re-make the decision by allowing the appellant's appeal.

Signed

A handwritten signature in black ink, appearing to be 'SH', followed by a long horizontal line extending to the right.

Deputy Upper Tribunal Judge Sheridan

Dated: 11 September 2018