Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06211/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 November 2018	**On 05 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

ASRAF [U]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Sharma of Counsel instructed by My Legal
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Clemes promulgated on 23 July 2018 in which the Appellant's appeal, against a decision of the Respondent dated 23 February 2018 refusing leave to remain in the UK, was dismissed on human rights grounds.

2. The Appellant is a citizen of Bangladesh born on 2 February 1986.

3. The early part of the Appellant's immigration history has been a matter of dispute: e.g. see paragraph 2 of the Decision of the First-tier Tribunal. He has variously claimed to have entered the United Kingdom in 2001 or

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2003, but this is seemingly inconsistent with apparent claims for asylum in Austria in 2005 and France in 2006.

4. Be that as it may, the first record that the Respondent acknowledges in respect of the Appellant's presence in the UK is an application for leave to remain outside the Immigration Rules made in March 2008. The application was refused on 9 January 2009. The Appellant was next encountered on 25 April 2014 working illegally in a restaurant. Following his arrest he made an application for asylum on 25 April 2014. His application was refused on 27 May 2014. The Appellant was again encountered working illegally on 8 November 2014; he was detained but released the following day. Notwithstanding that he had no basis to remain in the United Kingdom he did not leave, and made no further application to regularise his status until 16 November 2016 when he made an application for leave to remain on Article 8 grounds.

5. The application of 16 November 2016 was based on his relationship with Ms [SW] (d.o.b. [~] 1987), a British citizen. Ms [W] and the Appellant underwent a nikkah marriage ceremony on 19 April 2015. It was stated in the application form that this was the date from which they had cohabited. At this date Ms [W] was still in a civil marriage with another man, her divorce not being granted until 5 October 2015 (Respondent's bundle A19). It was stated in the application form that Ms [W] was expecting the couple's child (A30). This latter circumstance, and the fact that any child born would be a British citizen at birth, was given particular emphasis in a covering letter dated 16 November 2016 from the Appellant's then representatives (B1-B4).

6. The application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 23 February 2018.

7. In the first instance the Respondent gave consideration to the application under the so-called 'partner route' pursuant to Appendix FM of the Immigration Rules. It was considered that the Appellant did not meet the 'suitability' requirements "*because you have attempted deception in the information given in your application claiming you entered the UK as a child and have been present since 2001"*. The Respondent rejected this assertion – which was not supported by any evidence – on the basis that available information indicated claims for asylum had been made in Europe in 2005 and 2006. The application was also refused with reference to the 'eligibility' requirements: because the Appellant did not satisfy the definition of partner under GEN.1.2 - he was not legally married to Ms [W] and they had not been cohabiting for at least 2 years prior to the date of application; and because he was present in the UK in breach of immigration law.

8. Even though the Respondent considered that the Appellant did not satisfy either the 'suitability or 'eligibility' requirements, nonetheless consideration was given to paragraph EX.1 of Appendix FM. It was considered that EX.1.(a) did not apply because the Appellant had not

produced any evidence that he had a child in the UK. It would appear that the Respondent's decision-maker had seen no evidence to confirm the birth of the child indicated to be expected in the application; further, it is be noted that in the 'exceptional circumstances' paragraphs of the RFRL it is stated that if a child has been born there was in any event no evidence provided to demonstrate the Appellant had a genuine parental relationship with the child. (I pause to note that in support of the appeal the Appellant included in his appeal bundle a copy of a letter dated 31 October 2017 which was said to be a covering letter sent to the Respondent enclosing a copy of the child's birth certificate and British passport, together with proof of posting, and a letter from a caseworker for his MP indicating that the Respondent had confirmed on 10 January 2018 receipt of such evidence.)

9. The Respondent considered EX.1.(b) did not apply because it was not accepted that the Appellant was in a genuine and subsisting relationship with his partner; however no clear reasons for this conclusion are evident.

10. The Appellant's application was also refused in respect of private life with reference to paragraph 276ADE(1) of the Rules. Further, the Respondent did not consider that there were any exceptional circumstances to justify the grant of leave to remain outside the Rules

11. The Appellant appealed to the IAC.

12. Before the First-tier Tribunal, amongst other things, evidence was produced to show that Ms [W] was delivered of a son, 'M', on 2 February 2017, and that the Appellant and Ms [W] had undergone a civil marriage ceremony on 3 July 2018 (just under 2 weeks prior to the hearing).

13. The appeal was dismissed for the reasons set out in the Decision of First-tier Tribunal Judge Clemes.

14. The Judge found that the Appellant did not satisfy the 'suitability' requirements for substantially the same reasons relied upon by the Respondent (Decision at paragraph 19). In respect of paragraph EX.1 the Judge reached the following conclusions:

> "*I am satisfied that it is not unreasonable to expect [M] to leave the UK with his parents and also - based on Ms [W]' own evidence – that there would not be insurmountable obstacles to their family life continuing outside the UK.*" (paragraph 22)

15. The Judge essentially agreed with the Respondent's evaluation in respect of paragraph 276ADE(1) (paragraph 24). The Judge also gave a freestanding consideration to Article 8 outside the Rules, but concluded against Appellant (paragraphs 27-36).

16. The Appellant applied for permission to appeal which was granted by First-tier Tribunal Judge Pickup on 7 September 2018.

17. The Grounds of appeal set out three bases of challenge – which it may be seen overlap with each other to a considerable degree:

    (i) Ground I – the balancing exercise as to reasonableness of the Appellant's partner and child leaving the UK for the purposes of EX.1, and the balancing exercise on proportionality "*are wrong*". Little meaningful is further said by way of amplification or articulation of this ground of challenge in the written Grounds, and it appears to amount to no more than an assertion that because of the status of the Appellant's wife and child as British citizens "*it is expected from the Respondent to grant him leave to remain*".

    (ii) Ground II - the First-tier Tribunal failed to identify the best interests of the child. It is submitted that "*at no point in the determination did the judge identify where the children's [sic.] best interests lay*". Written submissions in the Grounds are developed to the effect that the child's best interests would involve remaining in the UK particularly given the nature of his citizenship, and that otherwise in general terms it is not reasonable to expect a British citizen child to leave.

    (iii) Ground III - the Tribunal failed to accord any weight to the child's British citizenship. This ground expressly repeats paragraphs from the other grounds, and has no additional paragraphs of its own.

18. The grant of permission to appeal, so far as it is material, is in these terms:

    "*It is submitted that the Judge erred in the balancing exercise between the reasonableness of expecting the appellant's partner and children [sic.] to leave the UK and the proportionality of the decision. It is also submitted that the Tribunal failed to identify the best interests of the appellant's British citizen child.*

    The first ground is a disagreement with the Judge's findings and conclusions. Cogent reasons are provided in the decision to show that the appellant could not meet the suitability requirements of Appendix FM. It follows that EX.1 does not apply. Reading the decision as a whole it is clear that the Judge has considered the best interests of the child, including at [21] of the decision.

    However, it is arguable that, contrary to the Judge's findings, it is not reasonable to expect a British citizen child to leave the UK, particularly given the respondent's current policy (February 2018)."

19. Perhaps in light of the observations in the grant of permission to appeal, but in any event, before me Mr Sharma expressly indicated that he did not seek to place any reliance upon Ground II. He acknowledged that 'best interests' had been addressed, noting in particular paragraph 34 of the Decision of the First-tier Tribunal. Accordingly, the focus was upon Grounds I and III.

20. In my judgement Ground III adds nothing of substance to Ground I. Not only does it do no more than repeat the earlier paragraphs in the Grounds of Appeal, in its drafting it is essentially a disagreement as to 'weight', and as such - absent a submission of perversity - does not constitute a pleading of an error of law.

21. In substance Mr Sharma's argument amounted to a submission that the Judge had failed to have regard to either **SF & others (Guidance, post 2014 Act) Albania [2017] UKUT 00120 (IAC)**, and the Respondent's guidance in respect of cases where removal might impact upon a British citizen child.

22. It seems to me that the first difficulty that this submission encounters is that it is not apparent that either the case of **SF and others**, or any relevant published guidance was brought to the attention of the First-tier Tribunal Judge.

23. Be that as it may, I note **SF & others** is a reported case for the following principle, as summarised in the headnote:

> "*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.*"

24. Further to this, the Grounds of Appeal cite various passages from the Respondent's guidance intended to reflect the decision of the European Court of Justice in **Zambrano** to the effect that a decision-maker should not take a decision in relation to a parent of a British citizen which would have the effect of forcing the British citizen to leave the EU.

25. I note that the instant case would not involve the *forcing* of a British citizen child to leave the EU - or the U.K. This is because there is an option of the child remaining with his British citizen mother. (cf. The concluding sentence at paragraph 34 – "*The respondent says that there is a choice (which is correct in real terms) for the mother to make*".)

26. More particularly, and in any event it is trite law that having a British citizen child is not a trump card in immigration law. It follows from this trite observation that the British citizen status of an applicant or appellant's child is not in itself determinative of the issue of reasonableness. Indeed this is consistent with the wording of both EX.1 and section 117B(6), wherein the relevant status of the child (either a British citizen or somebody who has lived in the UK continuously for at least 7 years) is only the precondition to a consideration of the question of reasonableness; necessarily therefore British citizenship is not an answer to the question of reasonableness.

27. In the instant case the Judge made a finding to the effect that there was nothing beyond the citizenship status of the child that established it would not be reasonable for him to leave in the company of his parents:

> "*I am satisfied that there is nothing about this family's circumstances which establish that it is not reasonable for him to leave, other than the fact that he can hold a UK passport*" (paragraph 34)
>
> (See similarly at paragraph 35 – "*The factors for the appellant are… all in the citizenship of Ms [W] and [M]*".)

28. In my judgement it is manifest that in exploring these issues and reaching his decision the Judge had regard to the 'real world' situation (cf. **KO (Nigeria) [2018] UKSC 53**). The possibility of the child having to leave the UK arose by reason of the Appellant having no basis to be here, against a background of what was described by the Respondent's Presenting Officer before the First-tier Tribunal – appropriately in my judgement – as a "*very poor*" immigration history (paragraph 14), and so accepted by the Judge (paragraph 29)). The Judge made well-reasoned and sustainable findings – which ultimately have not been impugned before me – that there were not very significant obstacles to integration into Bangladesh for the Appellant (paragraph 24), and that there would not be insurmountable obstacles to family life continuing outside the UK (paragraph 22).

29. In this latter regard this was a case that was somewhat unusual compared to many cases that come before the Tribunal in that the British citizen partner acknowledged that she could accompany the Appellant to Bangladesh: see paragraphs 12 and 22. The issue of the reasonableness of the child leaving the UK to go to Bangladesh with his parents needed to be considered in that context - and was by the First-tier Tribunal Judge.

30. The First-tier Tribunal Judge has in substance posed and answered the relevant question identified by Lewison LJ in the latter part of paragraph 58 of **EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874**, (and cited with approval in **KO (Nigeria)**):

> "*In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?*"

31. The Judge found in substance that it was reasonable to expect both Ms [W] and M to follow the Appellant to Bangladesh. In my judgement that was an evaluation open to the Judge on the available evidence, and I can identify

no material error in the approach taken to the evidence and the applicable law.

32. In particular, it was plain that the Judge was fully cognisant of M's status as a British citizen – indeed the Judge observed that ultimately it was the only factor of any substance. Plainly the Judge did not overlook this circumstance. The Judge was not bound to treat it as a 'trump card', and did not err in failing so to do, or otherwise.

33. In those circumstances I find that the Judge was entitled to conclude that section 117B(6) of the 2002 Act was not engaged.

34. The Judge thereafter went on to consider proportionality under Article 8 taking into account all of the circumstances of the case (paragraphs 35 and 36) and reached a conclusion open to him on the evidence.

35. For the avoidance of any doubt I note that in the course of submissions Mr Sharma suggested that the Judge was in error in stating that Ms [W] was "*fully conversant with the culture, society and religion in Bangladesh*", seemingly on the basis that she had previously been married to a man from Pakistan (paragraph 22). It is of course to be acknowledged that Pakistan and Bangladesh are no longer part of the same country, and have not been so since Bangladesh's independence in 1971. Nonetheless, they are not wholly dissimilar. More particularly, and in any event, the Judge's observations in this regard were pursuant to, and merely confirmatory of, Ms [W] own evidence to the effect that she considered she would be able to accompany the Appellant to Bangladesh. The Judge was entitled to conclude that Ms [W] had offered an honest and informed opinion in this context. Accordingly any error in this regard is not remotely material because it does not materially impact upon Ms [W]'s own evidence on the point.

36. Mr Sharma also sought to criticise the Judge for stating "*there is a paucity of evidence about [M's] 'wider' family in the UK*" (paragraph 34). In this context my attention was directed to passages in the witness statements of the Appellant (witness statement at paragraph 10, Appellant's bundle page 13), and Ms [W] (witness statement at paragraph 6, Appellant's bundle page 16). Those passages are in essentially the same terms: "*My wife has family in the UK. I therefore feel that I have strong family ties in the UK.*"; "*I have family in the UK. I therefore feel that I have strong family ties in the UK.*".

37. I note that in making the reference at paragraph 34 to a "*paucity of evidence*" the Judge stated that this was "*As I have set out above*". In context this was to recall his observation at paragraph 21 – "*I heard no detail at all about wider family involvement other than oblique references to "family in the UK" with little to expand on who and where they were. The person who might have been expected to supply that sort of account was Ms [W] but she did not.*" I can identify no error in this context or otherwise.

Notice of Decision

38. The decision of the First-tier Tribunal contained no error of law and stands accordingly.

39. The Appellant's appeal remains dismissed.

40. No anonymity direction is sought or made.

Signed: Date: **3 April 2019**

Deputy Upper Tribunal Judge I A Lewis