Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/00277/2016**

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 19 September 2017	**On 11 October 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Senior Home Office Presenting Officer
For the Respondent: Mr O James instructed by Duncan Lewis Solicitors

DECISION AND REASONS

1. This appeal is subject to an anonymity order made in my decision dated 30 May 2017 preventing whether directly or indirectly the identification of the respondent (KA).

2. Although this is an appeal by the Secretary of State for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Azerbaijan who was born on 2 September 1982. She entered the United Kingdom with her son ("A") in November 2009 and claimed asylum on 22 November 2009. She was subsequently

granted temporary admission. Her claims were refused on 11 March 2010 and her subsequent appeal was dismissed and she became appeal rights exhausted on 25 July 2010.

4. In 2011, the appellant married a British citizen ("JA") who had previously been granted asylum. He originates from Iraq and he became a British citizen in 2009.

5. Further representations were made on behalf of the appellant in August 2011 and May 2012 which were refused on 25 November 2011 and 16 May 2012 respectively.

6. On 15 December 2014 and 25 February 2015, further representations were again made. On 7 April 2015, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR but, that decision was withdrawn on 3 October 2015 and the decision to refuse leave was again made on 3 February 2016.

The Appeal

7. The appellant appealed to the First-tier Tribunal. In a decision promulgated on 21 November 2016, Judge Povey dismissed the appellant's appeal on international protection grounds but allowed the appeal under Art 8 of the ECHR.

8. The Secretary of State sought permission to appeal to the Upper Tribunal. On 6 January 2017, the First-tier Tribunal (Judge E B Grant) granted the Secretary of State permission to appeal.

9. That appeal was heard by me on 16 May 2017. In a decision promulgated on 6 June 2017, I allowed the Secretary of State's appeal to the Upper Tribunal and set aside the First-tier Tribunal's decision to allow the appeal under Art 8. I directed that the appeal be relisted in the Upper Tribunal in order that the decision can be remade in respect of the appellant's Art 8 claim outside the Rules.

The Hearing

10. At the resumed hearing, the appellant and her husband, JA both gave oral evidence before me. Both adopted their earlier statements and their statements prepared for these proceedings dated 7 September 2017. In addition, although the appellant's son, A did not give oral evidence, a letter from him was submitted in evidence.

The Submissions

11. On behalf of the appellant, Mr James accepted that the appellant's claim was under Art 8 outside the Rules. He submitted that the key issue was whether it was reasonable for "A" to relocate to Azerbaijan. He placed reliance upon s.117B(6) of the Nationality, Immigration and Asylum Act

2002 (the "NIA Act 2002") and submitted that, applying the terms of that provision, the public interest did not require the appellant's removal because she had a genuine and subsisting parental relationship with A who was a qualifying child (having lived in the UK for over seven years) and it would not be reasonable to expect him to leave the UK.

12. Mr James relied upon the fact that A had spent his formative years in the UK between the ages of 7 and 15 when he was at school. He submitted that the First-tier Tribunal had, in effect, accepted that A was doing well both academically and socially in school. He submitted that relocation would affect A, because he spoke little Azeri, he had not had any contact with the culture or society in Azerbaijan since he was 7. Studies would be conducted in Azeri. He would have difficulties obtaining work and he would be returning to Azerbaijan without a father figure, namely JA whose evidence was he would not leave the UK.

13. Mr James referred to the medical evidence from Dr Caglar concerning the appellant's mental health. He accepted that this was now over three years old when it stated that the appellant suffered from PTSD and severe depression. Mr James submitted that her mental health was managed by her being with her husband and son. He submitted that their return to Azerbaijan was likely to affect A and it would be unreasonable to expect him to do so. In relation to her husband, Mr James relied on the fact that he is a British citizen and had family life both with the appellant and A. He submitted that it had not been questioned it was a genuine marriage or that he was other than a father figure to A. It would be unreasonable to expect A to leave the UK and in those circumstances the public interest did not require the appellant's removal applying s.117B(6).

14. On behalf of the respondent, Mr Richards submitted that the appellant's removal was proportionate despite the evidence of private and family life in the UK. He submitted that, applying s.117B(1), maintenance of effective immigration control was in the public interest. He submitted that the Secretary of State had been attempting over a number of years to remove the appellant but had been frustrated doing so by a number of court cases brought by the appellant. He pointed out that the appellant's private and family life in the UK (and there was little evidence of the latter) had been established at a time when the appellant's position had been precarious. He submitted that the evidence of both the appellant and JA was that they were aware that their marriage had been entered into at a time when she had no expectation of remaining in the UK. Mr Richards submitted that he was entitled to little weight.

15. Mr Richards accepted that JA's evidence was that he had no intention of joining the appellant in Azerbaijan. However, Mr Richards submitted that he had given no reason why he could not live there and, if he did not return with the appellant that would be his choice.

16. In relation to A, Mr Richards accepted that he had been in the UK for over seven years, nevertheless it would be reasonable to expect him to return with his mother and it was clearly in his best interests to remain with his

mother. Mr Richards pointed out that he had clearly adapted well to life in the UK and, although he no longer had command of the Azeri language, he would be able to quickly pick it up on return.

17. In relation to the appellant's mental health, Mr Richards submitted that there was no up-to-date evidence and little or no weight could be placed on evidence that was nearly three years old.

18. Mr Richards submitted that when the rights of the individuals were balanced against the public interest, the removal of the appellant was proportionate.

Discussion

19. As regards Art 8, I apply the five-stage test in R (Razgar) v SSHD [2004] UKHL 27 [20].

20. As regards Art 8.1, I accept that it is engaged. Mr Richards did not challenge the evidence that there was a genuine relationship between the appellant and her husband and between the appellant's husband and A. Further, I accept that the appellant has established a private life in the UK but, more significantly, A has done so not least through his education and attendance at school between the ages of 7 and 15 since he arrived in the UK in 2009. I accept that the appellant's removal (together with A) will interfere with both her and A's private and family life sufficiently seriously to engage Art 8.1. Mr Richards did not seek to make any submissions to the contrary.

21. As regards Art 8.2, the Secretary of State's decision is clearly in accordance with the law, namely the Immigration Rules. Judge Povey found that the appellant could not meet the requirements of the Rules whether in Appendix FM or para 276ADE and that finding was not challenged by the appellant in these proceedings.

22. Further, I accept that the appellant's removal is in pursuance of a legitimate aim, namely effective immigration control as spelt out in s.117B(1) of the NIA Act 2002.

23. The crucial issue in this appeal is that of proportionality. Both representatives' submissions focussed exclusively upon that issue.

24. The issue of proportionality requires a fair balance to be struck between the public interest and the rights and interests of the appellant and others protected by Art 8.1 (see Razgar at [20]). Not only the rights of the appellant, but also the rights of JA and A protected under Art 8.1 must be considered (Beoku-Betts v SSHD [2008] UKHL 39).

25. In R (MM) (Lebanon) and Others v SSHD [2017] UKSC 10 at [42] the Supreme Court reminded us that the central issue was:

> "whether a fair balance has been struck between the personal interests of all the members of the family in maintaining their family life... and the public interest in controlling immigration".

26. In carrying out that balancing exercise and reaching a finding on proportionality, I must "have regard" to the consideration set out in s.117B of the NIA Act 2002.

27. The public interest, including that reflected in the fact that the appellant cannot meet the requirements of the Rules, is entitled to "considerable weight" (see MM at [75]; and also Hesham Ali v SSHD [2016] UKSC 6 at [46] *et seq* and R (Agyarko and Another) v SSHD [2017] UKSC 11 at [46] – [48]). The search is for "sufficiently compelling" circumstances to outweigh the public interest because the refusal of leave would result in "unjustifiably harsh consequences" (see Agyarko at [48]).

28. In determining proportionality, the best interests of A are a primary, though not determinative, factor (see ZH (Tanzania) v SSHD [2011] UKSC 4 and Zoumbas v SSHD [2013] UKSC 74). A child's best interests may be outweighed by the cumulative effect of other considerations (see, for example Zoumbas at [10(3)]).

29. I accept the genuineness of the relationship between the appellant and her husband and between the appellant's husband and A whom he treats as his own son. He has known A since A was 8 years of age. I accept JA's evidence that he does not intend to leave the UK and live in Azerbaijan with the appellant and JA if the appellant is removed. However, that will be his choice although I acknowledge that he is a British citizen. Nevertheless, the dilemma of whether to live in Azerbaijan with the appellant and A remains a factor that I must take into account (see VW (Uganda) v SSHD [2009] EWCA Civ 5). Further, Judge Povey found that there were no "insurmountable obstacles" to the appellant and JA continuing their family life in Azerbaijan and that finding is now unchallenged.

30. It was the evidence of both the appellant and JA that when they entered into their relationship they were well aware that the appellant had no right or expectation to remain in the UK. I accept that evidence and, as Mr Richards submitted, in those circumstances both the private and family life of the appellant is entitled to be given "little weight" (see s.117B(4) and (5) of the NIA Act 2002 and Jeunesse v Netherlands [2015] 60 EHRR 17 and Rajendran (s.117B – family life) [2016] UKUT 138 (IAC).

31. No submissions were made in respect of the appellant's ability to speak English or her financial independence for the purposes of applying s.117B(2) and (3). The appellant, however, gave evidence in English without an interpreter and I accept that the public interest recognised in s.117B(2) does not apply. I am unable, on the matters to which I was referred able to conclude, one way or another, whether the appellant is "financially independent". This was not a point taken by Mr Richards before me and it does not seem to have been taken before Judge Povey. I am content, therefore, in those circumstances to determine the appeal on the basis that the Secretary of State does not seek to rely upon the public interest in s.117B(3).

32. I was not taken to the evidence of Dr Caglar concerning the appellant's mental health. That was dealt with in some detail by Judge Povey at paras 39 – 44 of his decision. I, of course, accept that the evidence dates back to 9 December 2014. There is no up-to-date evidence. Judge Povey, dealing with the appeal in November 2016, accepted that the appellant had "significant mental health issues" although he did not accept that she was at risk of committing suicide (and that was not suggested before me by Mr James) and, as regards Dr Caglar's opinion that the appellant suffered from PTSD and severe depression and anxiety, Judge Povey remarked that he had "a number of reservations regarding the weight to be attached" to that report.

33. As I have indicated, no specific submissions were made in relation to this evidence other than by Mr Richards to point out that it should be given little or no weight because of its age and Mr James simply submitted that the appellant's condition was managed by the fact that she lived with her husband and son. In the light of this, I am unable to place any significant weight upon Dr Caglar's evidence which should, if it was to be relied upon, have been supplemented by up-to-date evidence and supported by positive submissions as to its implications for the appellant. Neither was the case before me.

34. If this appeal turns simply upon the proportionality of removing the appellant and the impact upon her private and family life with her husband, I would have no doubt that the public interest would outweigh her circumstances. She cannot succeed under the Immigration Rules and there are no "compelling circumstances" (seen from her perspective) to outweigh the public interest. However, that, as I understood both representatives' submissions, was not the crucial aspect of this appeal. Rather, it is the application of s.117B(6) and whether it would be reasonable to expect A, aged 15 to leave the UK. Mr James submitted that it was not given A's time in the UK between 7 and 15 years of age, doing well at school, who spoke little Azeri and had not been involved with the culture and society in Azerbaijan since he was 7. He would also, at least potentially, be returning without the father figure of JA.

35. In determining the issue of "reasonableness", I must first consider A's best interests. Then, in determining the issue of reasonableness I must not only look at the impact upon A but I must also balance against that the public interest (albeit that it focuses upon the appellant's position) (see R (MA) (Pakistan) and Others v UTIAC and Others [2016] EWCA Civ 705). As the Court of Appeal identified in MA (Pakistan), there must be "strong" or "powerful" reason to justify a finding that the "qualifying child" (namely one who is a British citizen or who has lived in the UK for seven years) could reasonably be expected to leave the UK.

36. Turning first to A's best interests, in one sense it is in his "best interests" to remain with his mother whether she is in the UK or Azerbaijan. It would not, for example, be in his best interests to remain in the UK if she is removed to Azerbaijan. That, however, is not a sufficient consideration of his "best interests". There is clear material before me in the bundle

supporting the integration of A for the last eight years since he came to the UK aged 7. He has attended school during that time and I accept on the material, indeed it was not suggested otherwise by Mr Richards, that he has been successful and flourished in his school endeavours.

37. I accept the evidence that at present he speaks little Azeri but, when he came to the UK in 2009, he did not speak English but only Azeri. He could, no doubt, re-learn his first language. However, that will undoubtedly present difficulties in the short or, even perhaps, the medium term. What will undoubtedly occur is that he will be uprooted from the continuous schooling he has enjoyed in the UK since the age of 7. He is now, of course, because of his age at a time in his schooling when he is studying for, and due to take, public examinations.

38. Taking all those matters into account, I find that it would be in his best interests to remain in the UK at least until he has completed those studies.

39. However, that finding is not determinative of the "reasonableness" of requiring him to leave. Viewed, not through the lens of the approach set out in MA (Pakistan), his removal would, for the very same reasons, be unreasonable. However, in determining that issue appropriately under s.117B(6) I must balance against the impact upon him the public interest. The appellant had never had leave to remain in the UK and it a failed asylum seeker. The public interest in the maintenance of immigration control, set out in s.117B(1) of the NIA Act 2002, applies. Whilst I accept that attempts have been made by the Secretary of State to remove the appellant, those have been unsuccessful because the appellant has sought to bring legal challenges before the courts. That, of course, was her right. There is no other public interest engaged in this case. There is no suggestion of any misconduct or criminality on the appellant's part. Of course, A has never had any leave to remain in the UK but he is a child and it is difficult, if not impossible, to regard that as a significant factor when considering the weight to be given to his private life in the UK.

40. In my judgment, there are neither "strong" nor "powerful" reasons sufficient to outweigh the impact upon A and the thwarting of his best interests by the removal of the appellant. He will, of course, inevitably follow her. There is at least a serious possibility that JA will not accompany them to Azerbaijan. There is, therefore, a serious possibility that he will lose the "father figure" whom the appellant's husband represents. His formative years have been in the UK and are significant factors in assessing the reasonableness of his removal (see on the importance of this stage in A's life: Azimi-Moayed (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)).

41. Carrying out the balancing exercise mandated by MA (Pakistan), I find that the public interest does not outweigh the impact upon A such that it is not reasonable to expect him to leave the UK and s.117B(6) of the NIA Act 2002 applies. In those circumstances, the public interest does not require the removal of the appellant. Consequently, her removal from the UK would be disproportionate and a breach of Art 8 of the ECHR.

42. For those reasons, I allow the appellant's appeal under Art 8 outside the Rules.

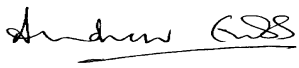
Decision

43. The decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 of the ECHR involved the making of an error of law and was set aside in my decision promulgated on 6 June 2017.

44. I remake the decision allowing the appellant's appeal under Art 8.

45. The First-tier Tribunal's decision to dismiss the appellant's appeal on asylum and humanitarian protection grounds and under Art 3 of the ECHR was not challenged by the appellant and stands.

Signed



A Grubb
Judge of the Upper Tribunal

11 October 2017