Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04176/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 July 2017	**On 7 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

ASADUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss S Anzani, of Counsel, instructed by Farid Javid Taylor Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the Appellant's appeal against the decision of Judge of the First-tier Tribunal Mill ("FtTJ"), who in a decision promulgated on 31 May 2017, dismissed the Appellant's appeal against a decision of the Secretary of State to refuse leave to remain on human rights grounds.

2. The Appellant is a citizen of Bangladesh born 15 January 1982. He entered the UK on 10 July 2006 with entry clearance as a work permit holder valid until 27 June 2007. Following the expiration of that leave he made successive attempts to regularise his status on human rights grounds outside of the Immigration Rules ("the Rules") on the basis of his relationship with his wife – a British citizen.

3. The Respondent refused the application on the basis that the Appellant could not meet the requirements of the Rules and nor was he entitled to remain on human rights grounds. Moreover, the Appellant could not fulfil the requirements of paragraph 276ADE of the Rules and there were no grounds to warrant a grant of leave on exceptional grounds. Essentially, while there was no dispute the Appellant and his wife were in a genuine and subsisting relationship, the Respondent was of the view that family life could reasonably continue overseas.

4. After the refusal a child was born to the couple on [ ] 2016.

5. The FtTJ heard evidence from the Appellant and his wife. He noted the only claim that was before him was Article 8 outside of the Rules. The FtTJ made primary findings of fact at [22]. He found, inter alia, that the Appellant had a genuine and subsisting relationship with his wife and a parental relationship with his daughter. He noted the wife had lived in the UK since she was 4 years old and that both wife and daughter were British citizens.

6. The FtTJ found that the Appellant's wife gave up her employment to care for her elderly parents who had significant health difficulties – her father had dementia and ischaemic heart disease and her mother Alzheimer's and osteoporosis. The FtTJ accepted the Appellant's wife was the primary carer for her parents, her mother required 24-hour care and it was unlikely that the wife could continue to meet her care needs in the longer term. While the FtTJ accepted the Appellant had a relationship with and cared for his daughter, he found the mother was her primary carer. The FtTJ took into account that the wife is a British citizen and had lived in the UK for most of her life, but noted that she was born in Bangladesh, retained ties with that country and was familiar with the language, traditions and customs of that country. Similarly, the Appellant was familiar with his country of origin where he worked as a teacher prior to his arrival in the UK. The FtTJ referred to his immigration history and to the fact that he had no intention of leaving the UK.

7. Without expressly saying so, the FtTJ clearly accepted that the Appellant had established a family life in the UK, but found for the purposes of Article 8 at [29], *"I am not convinced that there are compelling reasons to consider such a claim outwith the Immigration Rules which comprise protection otherwise for the Appellant if applicable."*

8. Nevertheless, the FtTJ conducted a proportionality exercise and found at [29] that it was not *"unduly harsh for the Appellant to be removed from*

the United Kingdom. There are no matters which weigh in favour of the Appellant which cancel out the need for immigration control which is the subject of clear rules." The FtTJ noted that *"little weight"* could be attached to the Appellant's family life as the relationship was established and a child was born whilst his status was precarious. It was not unreasonable to expect the Appellant, his wife and child to live in Bangladesh where his wife had ties. The FtTJ found that it was in the best interests of the child to remain residing with her mother either in the UK or Bangladesh. The child was young and could adapt to life in Bangladesh with her parents should her parents decide that she should leave the UK. The FtTJ did not consider at [32] *"that the provisions and protection which could be afforded to the Appellant in terms of Section 117B(6) are fulfilled."*

9. The FtTJ thus concluded the proportionality exercise in favour of the Respondent and dismissed the appeal.

10. The grounds of appeal in summary criticise the FtTJ for failing to give reasons, reaching unreasonable conclusions and failing to direct himself appropriately in law.

11. In granting permission to appeal First-tier Tribunal Judge Holmes observed the grounds were not well drafted, but nonetheless found it arguable that the FtTJ failed to properly engage with the appeal before him. Judge Holmes identified a number of arguable errors, albeit, his observation that *"there is no reference in the decision to s117B (6)"* is incorrect.

12. The Respondent in a short Rule 24 response opposed the appeal stating that the FtTJ directed himself appropriately and made findings that were open to him.

13. At the hearing Miss Anzani applied to amend the grounds without objection. I permitted the amendment given that the original grounds were poorly drafted and Mr Clarke indicated that the Respondent was not prejudiced in consequence.

14. Miss Anzani relied on the grounds and referred to the Immigration Directorate Instructions family migration: Appendix FM Section 1.0(b) of August 2015 ("the policy") and the Tribunal's decision in SF and Others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC). Miss Anzani referred to the factual matrix. She submitted there was no dispute about the existence of family life. The FtTJ was in clear error in his self-direction at [29] and at [30]. Miss Anzani referred to [32] and stated the FtTJ's application of section 117B(6) was unclear. She submitted the evidence before the FtTJ was that the Appellant assisted his wife to care for his father-in-law and daughter. She submitted that the FtTJ had no regard to SF or to the policy which indicated that cases should be assessed on the basis that it would unreasonable to expect a British citizen child to leave the EU, and that, it would be appropriate to grant leave to a parent to enable them to remain in the UK with the child unless there was

criminality or a very poor immigration history. She thus submitted that the FtTJ's finding at [31] was incompatible with the policy.

15. Mr Clarke acknowledged that the FtTJ's direction at [29] was unclear, but he argued the Decision was sufficiently reasoned at [31]. Mr Clarke submitted that at [30] the FtTJ was referring to the wife and not the child. He submitted that the FtTJ clearly indicated that it was a matter for the Appellant and his wife as to whether she and the child should accompany the Appellant to Bangladesh. He referred to the Appellant's immigration history; he had no leave since 2007 and made repeated applications for a period of ten years. The FtTJ noted the Appellant had no intention of leaving the UK and created a family life knowing he had no leave to remain in the UK. Mr Clarke submitted that these were all matters of weight which was for the FtTJ and that he had made findings consistent with the policy.

16. In reply Miss Anzani submitted that the FtTJ's conclusions did not accord with the policy and that the FtTJ failed to take account of all relevant factors.

Discussion

17. I have considered the submissions made by the representatives at the hearing. While Mr Clarke made a valiant attempt to defend the Decision, I consider that the central submissions made on behalf of the Appellant are correct, and that this is a case in which it has been demonstrated that the FtTJ erred in law such that his Decision must be set aside.

18. First, I accept Mr Clarke's submission that the FtTJ was likely to be referring to the relationship and not the child in stating *"little weight can be attached to the Appellant's family life"* at [30] because the FtTJ was concerned here with the marital relationship being established while the Appellant's status in the UK was precarious. While the phraseology used could have been clearer, I am not satisfied that the FtTJ misdirected himself accordingly. However, I am satisfied that the FtTJ's Decision is founded upon a clear misdirection in law at [29]. The direction is confused and unclear and the application of an *"unduly harsh"* criterion and the need for factors that weigh in favour of the Appellant to *"cancel out the need for immigration control"* is plainly an erroneous self-direction. This alone I find stands to vitiate the FtTJ's Decision.

19. Second, I agree with Judge Holmes' view in the grant of permission that the FtTJ's starting point should have been the health and immigration status of all family members most of whom are British citizens. Miss Anzani identified by reference to written testimony that the Appellant's evidence was that he assisted in caring for his father-in law's intimate care needs and food preparation, and his wife's evidence referred to the strength of the relationship between the Appellant and his daughter and the dire consequences his absence would have on the family unit. I agree with Miss Anzani that the Decision does not properly reflect these matters or that they have been adequately factored into the assessment.

20. Third, I also consider that Miss Anzani's complaint that the FtTJ's conclusion at [31] that it would not be unreasonable to expect the Appellant, his wife and child to reside together in Bangladesh is incompatible with the policy. The issue that the FtTJ should have regard to the policy is confirmed by the Upper Tribunal's decision in SF. In view of the terms of the policy, it is difficult to see how the FtTJ's conclusion that the provisions of section 117B(6) could not be "fulfilled" can stand.

21. I therefore set aside the Decision of the FtTJ.

22. Both representatives were content for the Decision to be remade on the evidence before the Tribunal. Miss Anzani relied on her earlier submissions and Mr Clarke helpfully submitted that the issue boiled down to whether the Appellant's immigration history was sufficient to outweigh the best interests of the child.

23. I must approach the issue of whether a breach of Art 8 has been established in a structured way applying the five-stage test in R (Razgar) v SSHD [2004] UKHL 27. I also must consider the rights of the whole family including the Appellant's child (see Beoku-Betts v SSHD [2008] UKHL 39).

24. The FtTJ made primary findings of fact at [22]. There is no dispute about the facts as found. The Appellant has an established family life in the UK. He lives with his wife, child and in-laws who both have health difficulties. In respect of the mother-in-law the difficulties are considerable and she requires 24-hour care. While the Appellant's wife is the primary carer for her parents and child, the evidence shows that the Appellant plays an integral role towards the functioning of this family unit both in relation to the assistance he provides caring for his father-in-law and the responsibilities he fulfils towards his daughter.

25. I am satisfied that Art 8.1 is engaged as the Appellant's removal will seriously interfere with the family and private life of the Appellant, his wife and child and that of his in-laws if he is removed from the family unit. I accept that the decision is in accordance with the law. It was not suggested before me that the Appellant could succeed under the Rules. Further, the Appellant's removal will be for the legitimate aim of effective immigration control.

26. The crucial issue is that of proportionality. That issue 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]). I must take into account the "best interests" of the child as a primary, but it is not a determinative consideration (see ZH (Tanzania) v SSHD [2011] UKSC 4 and Zoumbas v SSHD [2013] UKSC 74 at [10]). In carrying out that balancing exercise and reaching a finding on proportionality, the Tribunal must "have regard" to the considerations set out in s.117B of the NIA Act 2002.

27. The public interest in this appeal, including that reflected in the fact that the Appellant cannot meet the requirements of the Rules, is entitled to "considerable weight" (see MM and others at [75]; and also Hesham Ali v SSHD [2016] UKSC 60 at [46] *et seq* and R (Agyarko and another) v SSHD at [46]-[48]). The search is for "sufficiently compelling" circumstances to outweigh the public interest.

28. First, the public interest in effective immigration control is engaged (s.117B(1)).

29. Second, I was not expressly addressed on the issue of whether the Appellant speaks English, but I am content to assume that he is likely to do so; he is a teacher by profession and entered the UK with a work permit in 2006. I find that the public interest in s.117B (2) is not engaged, but this does not provide a positive right to leave and is, at best, a neutral factor (see Rhuppiah v SSHD [2016] EWCA Civ 803 at [59]- [61]).

30. Third, I take into account that he is not financially independent for the purpose of s.117B (3).

31. Fourth, I accept that the Appellant's private life has developed whilst he has either been in the UK unlawfully or whilst his presence was precarious and so is entitled to "little weight" (s.117B(4) and (5)). However, the way the Appellant's claim was put was on the basis of his family life rather than his private life in the UK.

32. As regards section 117B(6), two propositions follow from the Court of Appeal's decision in MA (Pakistan). Firstly, if the Appellant falls within the terms of s.117B(6) then his removal is not in the public interest and, as a result, his appeal under Art 8 would succeed. Secondly, in determining whether it would "not be reasonable to expect" the child to leave the United Kingdom, not only her circumstances must be taken into account, but also the public interest must be factored in.

33. It was accepted by Judge Mill that the Appellant has a "genuine and subsisting parental relationship" with his daughter who is a British citizen, and so is a "qualifying child" by virtue of s.117D(1) of the NIA Act 2002.

34. I find that it would not be reasonable to expect this child to leave the UK. I consider that that is self-evident given that should this child leave the UK her mother would not be able to follow and the child, who is British, would not be able to benefit from her British nationality and would be separated from her main carer. The term "reasonable" is a term that qualifies the expectation that the child could leave the United Kingdom. It is not a term that qualifies the issue of the removal or the expectation that the non-British parent should leave. I acknowledge that the Appellant has had no leave since 2007, but this does not in my view outweigh the child's best interests nor does it conclusively dispose of the public interest considerations applicable in this appeal.

35. I am fortified in my conclusion when I consider the terms of the policy and, in particular, Section 11.2.3. That Section is set out in the decision in SF. It

is clear from the policy as indeed interpreted by the Tribunal in that case that where there is a British citizen child the person exercising a genuine and subsisting parental relationship is someone for whom the public interest does not require their removal. That is the case here. The public interest does not require the removal of the Appellant and it follows from that that this appeal should be allowed.

Decision

The First-tier Tribunal's decision to dismiss the Appellant's appeal under Art 8 involved the making of an error of law. That decision is set aside.

I remake the decision allowing the Appellant's appeal under Art 8.
No anonymity direction is made.

Signed Date 25 October 2017

Deputy Upper Tribunal Judge Bagral

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal I have considered making a fee award. I have decided to make no fee award of any fee that is paid or is payable: this appeal has been allowed on the basis of post-decision events and evidence not before the Respondent at the date of refusal.

Signed

Deputy Upper Tribunal Judge Bagral Dated 25 October 2017