Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07421/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th August 2017	**On 20th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

AFTAB NAJMUDDIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Chohan (Counsel)
For the Respondent: Mr S Kotas (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Powell, promulgated on 16th November 2016, following a hearing at Newport on 9th November 2016. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of India, and was born on 2nd March 1968. He appealed against the decision of the Respondent dated 17th November 2015, refusing his application to remain as a spouse, who was present and settled in the UK, such an application having been made on 6th August 2015. It is a feature of this appeal that there was an earlier decision by Judge Coaster in February 2015, where he had found that there were no exceptional circumstances on which the Secretary of State could exercise her discretion to allow the Appellant leave to remain. Judge Coaster had also taken into account Section 55 of the BCIA 2009 and the Human Convention on the Rights of a Child.

The Judge's Findings

3. Judge Powell, who determined the appeal on the basis of submissions made to her without the calling of oral evidence, noted the submission on the part of the Appellant, namely, that there had been a significant change of circumstances in that the Appellant's 17 year old daughter had now completed seven years residence in the United Kingdom and his wife had also been made a British citizen (paragraph 14). Although there had been a previous decision by Judge Coaster, Judge Powell held that time had now moved on in that the Appellant's son was now at university and is no longer a child and that he was over 18 years of age. His daughter was 17 and she was also studying in the sixth form and doing very well and had an ambition of becoming a doctor. She had completed seven years' residence in this country (paragraph 20).

4. In terms of the proportionality of the Secretary of State's decision, the judge held that, given that the Appellant's wife had now acquired British citizenship status, their daughter could continue to live with the British citizen mother, whilst undertaking her A levels, and she would not be required to leave the United Kingdom if the Appellant's appeal was unsuccessful (paragraph 21). The judge further held that the Appellant's wife could also continue to remain in the United Kingdom even if her husband's appeal fails. She had expressed a fear that she would be unable to pay her mortgage or to continue with her relatively well paid job here or of being further still able to find suitable employment in a male dominated employment market in India were she to return there (paragraph 22). Taking all these matters into account, the judge held that although it was the case that the Appellant had lived with his children since March 2013, "there is no sufficient evidence to suggest that, if there is a further period of separation, the children's safety or welfare would be damaged" (paragraph 25).

5. Given the submission on the Appellant's part from his representative was that the Appellant was now able to meet the Immigration Rules, the judge held that in that event, the Appellant could return to India and make a fresh application under the Immigration Rules. It had been suggested on the Appellant's behalf that there were "insurmountable obstacles" to this course of action because of the impact on the Appellant's wife and

daughter and that this would be unreasonable. However, the judge rejected this contention on the basis that it did "not carry particular weight because neither his wife nor his daughter are required to leave if the Appellant's appeal fails" (paragraph 27).

6. The appeal was dismissed.

Grounds of Application

7. The grounds of application state that by the date of the hearing before Judge Powell, the Appellant's child had become a qualified child and his wife had also become a British citizen. It was in these circumstances that it fell upon the judge to determine whether it would be reasonable for the daughter to leave the UK or whether there were insurmountable obstacles that prevented the wife from leaving the UK, because otherwise there would be a separation between the Appellant and the rest of his family. It was in this respect that Article 8 had to be considered properly.

8. On 29th June 2017, the Upper Tribunal granted permission on the basis that when conducting the balancing exercise under Article 8 (at paragraph 24 onwards) the judge failed to attach significant weight to the child's residence of over seven years in this country pursuant to the guidance given in **MA (Pakistan) [2016] EWCA Civ 705**. The judge also failed to apply Section 117B(6) of the 2002 Act.

Submissions

9. At the hearing before me on 10th August 2017, the Appellant was represented by Mr Chohan and the Respondent was represented by Mr Kotas. Mr Chohan submitted that the Appellant would have made his application alongside that of the rest of his family were it not for the fact that the 2002 Rule changes came into effect and prevented him from doing so. However, by the date of the hearing before Judge Powell, he had clearly managed to comply with the new Rules. In those circumstances his appeal should have been allowed because he could demonstrate compliance and this meant that an adverse decision would be disproportionate to his Article 8 rights because such a decision would require his separation from the rest of his family.

10. Second, it was perverse to suggest that a child who had been in the UK for seven years, but had done so at the lower end of the age scale, would be able to demonstrate a lack of proportionality, if separation ensued between father and the rest of the family; but a child at the top end of the age group, who faced a similar separation, would not be able to so demonstrate.

11. This is because the Appellant's daughter was in the final year of her A levels, was planning to become a doctor, and was living with her father, and if she were to be separated from her father, the Appellant, then the impact of this separation will be far greater at her age, than it would be had she been 6 or 7 years of age. Her "best interests" and her welfare was far more closely intertwined with the presence of her father in the United Kingdom than would the case had she been much younger.

12. For his part, Mr Kotas submitted that even if what Mr Chohan submitted was correct, there was simply no expectation that the children of the Appellant would leave the UK, and if this was the case then Section 117B(6) would not bite, and this being so the Appellant's removal would not be disproportionate. This was a far cry from a case such as that of **MA (Pakistan)** where the family was facing removal. The expectation there was that the children would also have to leave. That was not the case here.

13. In reply, Mr Chohan submitted that there was an implication in the decision of Judge Coaster (at paragraph 6) that the Appellant risked becoming an overstayer, and this appears to have affected the way in which Judge Powell determined the appeal. This, however, was incorrect. The Appellant had Section 3C leave and never risked becoming an overstayer. In these circumstances, the bounds of considerations fell in his favour.

Error of Law

14. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

15. First, this is a case where permission was granted by the Upper Tribunal on the basis that the Tribunal failed to attach significant weight to the child's residence of over seven years in the UK. In fact, the determination fails to make a reference to **Azimi-Moayed [2013] UKUT 197**, which dealt with the "best interests" of the child. It was made clear in that case that the Upper Tribunal has identified a number of principles to assist in the determination of appeals where children are affected by the decisions (see paragraph 30). It was made clear that the starting point in the best interests of children has to be the principle that the children should be with both of their parents.

16. In circumstances where the Appellant's wife is now a British citizen, and is settled in this country, and there is no expectation that she will leave this country, the children face the dilemma of being separated from their father. The Upper Tribunal also made it clear that, "it is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong".

17. Plainly this is a case where the Appellant's daughter is undertaking A levels and is poised to go to university and education provision was a matter that was strongly emphasised before the Tribunal below. Indeed, Judge Powell stated that, "the Appellant's daughter's education is an important factor" (paragraph 25). The Tribunal also emphasised that "lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties" such that "it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary" such a residence.

18. It is a feature of this case that the Appellant has not been engaged in any illegality whatsoever. Indeed, he has had Section 3C leave and has always been lawfully present in this country. For the last four years, as Judge Powell recognised, the Appellant's daughter has been living with her father, and that has been from the age of 14, and it is doubtless the case that she will suffer the impact of his removal in a significant way.

19. Second, and no less importantly, however, are the IDIs on family migration: Appendix FM, which states at paragraph 11.2.4, that the longer a non-British citizen child has resided in the UK, the more the balance swings in favour of it being unreasonable to expect the child to leave the UK, and strong reasons are required to refuse a case where the child has accrued seven years' continuous residence. I have no doubt in coming to the conclusion that "strong reasons" were not shown by the Secretary of State to refuse this case where the child had accrued seven years' continuous residence at the top end of the age group before she reaches the age of majority. It is in these circumstances that the policy in Section 117B has to be applied. This brings me to the third point.

20. Thirdly, in **AM (s.117B) Malawi [2015] UKUT 260**, the Tribunal held that what is raised by Section 117B(6) is whether it would be reasonable to expect a child to leave the United Kingdom. The question of reasonableness was especially tackled in **MA (Pakistan) [2016] EWCA Civ 705**, which made it clear that the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the "unduly harsh" concept under Section 117.

21. In **EV (Philippines)** Clarke LJ (at paragraphs 34 to 37) stated that, "if it is overwhelmingly in the child's best interests to remain, the need to maintain immigration control may well not tip the balance" had the strictures in **Azimi-Moayed** and in the Home Office's own policy in the IDI on family migration, been taken into account by the judge below the Section 117B evaluation would have been quite different, not least because the judge would have been forced to consider the fact that the Secretary of State has to show "strong reasons" for not finding the balance of considerations fall in favour of the Appellant where the seven year residence has been completed. For all these reasons, the judge erred in law.

Re-Making the Decision

22. I have remade the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 19th September 2017

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have decided to make a fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 19th September 2017