



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12099/2016

THE IMMIGRATION ACTS

Heard at Field House
On 15 August 2018

Decision and Reasons Promulgated
On 19 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MUHAMMAD [I]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Iqbal OISC representative of Iqbal Law Chambers
For the Respondent: Mr Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal came before the Upper Tribunal on 24 May 2018, when the decision was reserved. In a decision and reasons dated 15 June 2018, an error of law was found in the decision and reasons of First tier Tribunal Judge

Housego and the appeal was adjourned for a resumed hearing in respect of Article 8 only. A copy of the decision and reasons is appended.

Hearing

2. At the resumed hearing, the Appellant gave evidence and sought to rely on his witness statement prepared for the First tier Tribunal hearing. He stated that his partner had given birth the previous day at Peterborough City Hospital. Unfortunately she had a post partum haemorrhage needing a blood transfusion and she and the baby were in receipt of antibiotics. He provided a letter from the delivery suite at the hospital in support of his evidence and to explain his partner's absence. Mr Iqbal had no questions for the Appellant. Mr Tarlow stated that there was little in dispute on the facts and so he did not need to cross examine the Appellant or his partner.

3. Mr Iqbal informed the Upper Tribunal that the Appellant wished to go ahead with the hearing. He said that the Appellant's children were being looked after by his partner's sister. He sought to rely on further updating evidence in the form of utility bills and letters from the HMRC to show his ongoing relationship and cohabitation, which was not disputed by Mr Tarlow.

4. In his submissions, Mr Tarlow sought to rely on the refusal letter. He submitted that the key point is that the Appellant was found not to meet the suitability requirements due to the circumstances around his TOEIC test and that this finding has been upheld and goes to the heart of the matter. He acknowledged that the Appellant has British citizen children: two stepchildren and two biological children.

5. In his submissions, Mr Iqbal asserted that the suitability requirements do not go to the heart of Article 8. He stated that there has been no criminal conviction or caution or anything further nor has the Appellant been charged and there was no criminality threshold that applies. He submitted that there are matters where a person has been subject to criminal conviction but still succeeded and that in any event, the failure to meet the suitability requirements due to the use of a proxy test taker, this fell below the paragraph 398 threshold.

6. Mr Iqbal submitted that this does not give rise to considerations of such weight so as to justify separation from his partner and children. He stated that, prior to giving birth, the Appellant's partner was working in an office as a cleaner and that she was no longer working at Spices and that she had started the cleaning job 4-5 months ago.

7. He further sought to rely on the skeleton argument submitted and section 55 of the BCIA 2009 and the Home Office guidance dated February 2018 which makes reference to the need for very strong reasons being required

when there are British children. He submitted with regard to section 117B(6) of the NIAA 2002 that it was not reasonable to expect the children to leave the UK. He further sought to rely on the Court of Appeal judgment in MA (Pakistan) [2016] EWCA Civ 705 at [19], [20] and [46]. He submitted that the Appellant's case clearly falls within the exceptional circumstances for consideration outside the Rules and submitted that the appeal should be allowed.

8. I reserved my decision, which I now give with my reasons.

Findings and reasons

9. The sole issue for determination is whether removal of the Appellant to Pakistan would be proportionate in light of his established family life in the United Kingdom. I find that there are exceptional circumstances meriting consideration of Article 8 outside the Immigration Rules, given that the Appellant has four children, two of whom are British citizens whose best interests are at stake in his appeal.

10. The Appellant met his partner in May 2014 and they had an Islamic marriage in August 2014 and started living together on 10 August 2014. His partner entered the United Kingdom lawfully as the spouse of her former deceased husband and has resided with ILR, along with her two children from that marriage, since 15 February 2013. The Appellant's two stepsons were born on 24 April 2005 and 6 October 2010 and are thus 13 and 7 years old. Due to the fact that their father died on 24 March 2012, the Appellant has taken an active parental role in his stepsons' lives and asserts in his witness statement that they are physically and emotionally dependent upon him and that he is responsible for dropping them off and picking them up from school. They have Indefinite Leave to Remain in the United Kingdom.

11. The Appellant's partner gave birth to a daughter on 16 May 2016 and to a further child on 14 August 2018. Both these children are British citizens due to the fact that their mother has settled status in the United Kingdom. Prior to her maternity leave the Appellant's partner was working as a cleaner earning The family's income is supplemented by Working Tax credit, Child Tax credit and Child Benefit. It was neither contended nor found that the Appellant's presence in the United Kingdom created any additional recourse to public funds.

12. There are weighty factors in favour of removal, in particular the fact that the Appellant is unable to meet the suitability requirements of the Immigration Rules.

13. Having regard to the public interest considerations set out in section 117B of the NIAA 2002, I find that the Appellant speaks English and that, although

not financially independent, he is supported by his partner and benefits to which she and her children are entitled. He formed his relationship with his partner at a time when his immigration status was precarious and that having entered lawfully pursuant to entry clearance as a student granted on 4 January 2011, that leave was curtailed on 24 July 2012 and he has remained since pursuant to a number of applications made to the Respondent, none of which were granted.

14. The Appellant seeks to rely on section 117B(6) ie. that the public interest does not require his removal where he has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. I find that the Appellant's stepsons are not qualifying children albeit they have resided lawfully in the United Kingdom with settled status for the last 5 and a half years. The Appellant's two young children were both born British and are qualifying children.

15. I consider the best interests of all four children and find that it would be in their best interests to continue to be brought up by both their parents. The Appellant's stepsons are both at school but I was not given any evidence as to any particular aspects of their private lives upon which they wished to rely, nor is there any evidence as to their health, so I proceed on the basis that they have established private lives whilst lawfully present in the United Kingdom for the last 5 and a half years.

16. The question I am required to determine is whether it is reasonable to expect the two youngest qualifying children to leave the United Kingdom. Realistically, this would require the entire family to relocate. It is clear from the Court of Appeal judgment of Lord Justice Elias in MA (Pakistan) [2016] EWCA Civ 705 at [45] that the conduct of the Appellant and other matters material to the public interest should be considered as part of this assessment and at [49] that: "*leave should be granted unless there are powerful reasons to the contrary*" where a child is British or has 7 years residence, a principle that is reflected in the Home Office guidance *Family Life (as a partner or parent) and private life: 10 year routes*" dated 22 February 2018.

17. The two matters I pay particular regard to are: (i) the fact that the Appellant is unable to meet the suitability requirements due to the use of a proxy test taker and (ii) that he has remained without leave since 24 July 2012. The question is whether these matters constitute the type of powerful reasons that would indicate leave should not be granted. The current version of the Home Office guidance provides in this respect at page 76:

"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.”

18. I find in light of the guidance and on the particular facts of this case that the Appellant’s conduct is not so egregious as to constitute powerful reasons for refusing leave. Consequently, it would not be reasonable to expect the Appellant’s children to leave the United Kingdom. This finding applies both to his stepsons and to his British citizen children

19. In light of my findings, removal of the Appellant would represent a disproportionate interference with his established family life with his partner and children, contrary to Article 8.

Decision

20. The appeal is allowed on human rights grounds.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

15 September 2018