Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09897/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 March 2019	**On 8 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

SYED [K}
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Nadeem
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Grimmett dismissing his appeal against the decision of the respondent on 22 August 2017 to refuse him leave to remain in the UK under Article 8 as the husband of a British citizen and father of a British child.

2. The appellant is a citizen of Pakistan born on 1 January 1992. He entered the UK in October 2013 with valid leave to enter as a spouse until 20 June 2016. He and his

wife have a child who was 3 years old in April 2018 when the judge heard the appeal.

3. At the hearing before the judge the respondent's position was that the appellant did not meet the requirements of the Rules because his partner was not earning £18,600 per annum. It was accepted that he and his wife have a child but the child and his mother were both British citizens and the child could remain in the UK with his mother. The respondent was not satisfied that there were any exceptional circumstances.

4. The judge held as follows:

> *"6. Mr Authi accepted that the appellant did not meet the financial requirements but said that there were exceptional circumstances. The reason the appellant could not meet the requirements was that his wife had had a baby and the child suffered from acid reflux which meant that he was frequently vomiting and also had serious eczema which required frequent attention as a result of which his wife was not able to go back to work as soon as she had expected. Her current income was not sufficient to meet the requirements of the rules. The appellant had worked after they married in the United Kingdom and they then had an income sufficient for the family but as a result of the child's illness the rules were not met. The appellant's wife confirmed that she earned £15,200 per annum and also received child tax credit of £250 a month.*
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> *7. The best interest of the child are to remain with both his parents. Whether that is in the UK or Pakistan is not at this stage of his life important. It may be that education and healthcare are better in the UK than Pakistan but at present his parents provide all his practical and emotional needs in light of his age. His interests are not, however, paramount. I am not satisfied that the child's ill-health is an insurmountable obstacle to family life continuing outside the United Kingdom. The child is now going to nursery part-time and his illnesses are being treated. However, it is not reasonable to expect the child, who is British, to leave the United Kingdom with the appellant. The child is able to remain in the United Kingdom with his mother.*
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> *8. The problem for the appellant is that his wife does not earn the £18,600 per annum required under the immigration rules. Were she able to do so I would have been satisfied that the rules were met. They are not, however, and that will mean the family lives of the appellant his wife and child will be interfered with. As I can find no insurmountable obstacle to family life continuing outside the United Kingdom the appellant must either return to Pakistan with his family or return to seek entry clearance as a spouse. The fact that his wife does not currently earn sufficient to allow him to re-enter does not mean that the rules ca be overlooked. If the appellant's wife can obtain alternative employment or additional employment to increase her income there is currently nothing to suggest that an application for leave to enter as a spouse would not succeed. The interference with the family lives*

> *by the decision, should the appellant's wife and child remain in the UK, is proportionate to the legitimate aim of immigration control and the economic well-being of the UK. Those seeking leave to enter the United Kingdom to live are required to show a minimum level of financial report support which this appellant currently cannot do."*

5. Permission to appeal the judge's decision was granted by First-tier Tribunal Judge C A Parker. Judge Parker held that the judge did not apply the test in **Razgar** and made no reference to the public interest factors in S.117B of the 2002 NIA Act, in particular, Section 117B(6) which requires a consideration of whether it is reasonable for a qualifying child to leave or remain in the UK without one of his parents. The judge made no findings as to the child's best interests. The ability of an applicant to meet the requirements of the Immigration Rules is a relevant factor in the proportionality exercise but the judge referred only to the financial requirement in the Rules, which the appellant could not meet. There was no reference to **Agyarko [2017] UKSC 11** or to **MA (Pakistan) [2016] EWCA Civ 705**.

6. Mr Nadeem submitted that the judge failed to look at EX.1 which is an exception to the Rule. According to EX.1(a) if the appellant has a genuine parental relationship with a British child and it would be unreasonable for the child to leave the UK, the appeal can potentially be allowed. He further submitted that according to EX.1(b) if the appellant has a genuine and subsisting relationship with his partner then there would be an insurmountable obstacle to the partner leaving the UK and living abroad with the appellant.

7. Mr Nadeem submitted that Section 117A-D was relevant in particular Section 117(B)(6) because the appellant is not being deported. If he has a genuine parental relationship with a qualifying child, then it would not be reasonable for the appellant to be removed from the UK.

8. Mr Nadeem submitted that in the light of the findings made by the judge at paragraph 7, especially the judge's acceptance that the best interests of the child are to remain with both his parents, then the appeal ought to have been allowed. Furthermore, in the light of the same findings at paragraph 7, and since the appellant is not being deported, it would not be in the public interest for the appellant to be removed to Pakistan.

9. Mr Tufan relied **on JG (S.117B(6): "reasonable to leave" UK) Turkey (Rev 1) [2019] UKUT 72 (IAC)** (15 February 2019). Mr Tufan said that **JG** assists the appellant. He referred the court to paragraph 89 wherein it was held:

> *"89. Section 117B(6) concerns an assessment of the reasonableness of a child's leaving the United Kingdom. It does not expressly demand an assessment of reasonableness by reference to the length of time the child is expected to be outside the United Kingdom. In the light of paragraphs 18 and 19 of KO (Nigeria), the child's destination and future are to be assumed to be with a person who has been removed. In a case where the respondent's position is that the person who is being removed can be expected to make an entry*

clearance application, does this require the Tribunal's assessment to take this into account, in determining whether it would be reasonable for the child to leave? There may, obviously, be a good deal of difference between a child living outside the United Kingdom for a matter of months and facing an indefinite period abroad."

10. The tribunal went on to hold at paragraph 9:

> "92. *In any event, in determining whether it would be reasonable for children to leave in these circumstances, the likely temporary nature of the absence from the United Kingdom may well be said (as in the present case) to make it unreasonable to expect the child to leave. ..."*

11. In the light of the findings made by the judge at paragraph 7, Mr Tufan conceded that it would not be reasonable for the child to leave the UK.

12. In the light of the submissions made by Mr Tufan and Mr Nadeem and the judge's findings at paragraph 7 I find that the judge's decision dismissing the appellant's appeal cannot stand.

13. Accordingly I remake the decision.

14. The appellant's appeal is allowed given the findings made by the judge at paragraph 7 of her decision combined with the findings made in **JG** by the Upper Tribunal. I find that as the appellant has a genuine parental relationship with his British-born chid, it would be unreasonable for the child to leave the UK in order to maintain a relationship with the appellant. Equally, as the appellant has a genuine and subsisting relationship with his partner, there would be an insurmountable obstacle to the partner leaving the UK and living abroad with the appellant. Accordingly, I find that it would not be reasonable for the appellant to be removed from the UK.

15. The appellant's appeal is allowed.

No anonymity direction is made.

Signed Date: 3 April 2019

Deputy Upper Tribunal Judge Eshun