Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/23453/2015**

THE IMMIGRATION ACTS

Heard at Field House
9 April 2018

Decision & Reasons Promulgated
On 2 May 2018

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR SHOFIUL ALAM PARAZ
(anonymity direction not made)
Respondent

Representation:
For the appellant: Mr T Melvin, Senior Presenting Officer
For the respondent: Mr I Khan of Counsel

DECISION AND REASONS

1. The appellant in this appeal is the Secretary of State for the Home Department. She appeals against the decision of First-tier Tribunal Judge Rayner promulgated on 2 November 2016 allowing the appellant's appeal under Article 8 of the European Convention on Human Rights. However, for ease of reference, I will continue to refer to the Secretary of State as the respondent

and to Mr Paraz as the appellant which were the designations they had before the First-tier Tribunal.

2. Permission to appeal to the Secretary of State was granted by the Upper Tribunal. The appeal came before me on 19 June 2017 for an error of law hearing and I found that there is material error of law in the decision of the First-tier Tribunal Judge and I set it aside. I directed that the appeal be placed before the Upper Tribunal at the next available hearing date, to here submissions to determine whether requiring the appellant to return to Bangladesh to make an entry clearance applications is unreasonable under the circumstances of the appellant and his daughter's circumstances taking into account the jurisprudence on these issues.

3. The appeal came before me on 18 August 2017 and it was agreed between the parties that the matter be placed before the Secretary of State for her to revisit her decision in light of the new matter, which was the birth of the appellant's child who is a British citizen and therefore a qualifying child under the age of 18 pursuant to section 117D (1) of the 2002 Act.

4. At the hearing on 20 October 2017, the senior presenting officer stated that she had still not made a decision. It was further agreed by the representative of the Secretary of State that she will make a decision before 1 December 2017 and there was no objection from the appellant's representative.

5. I directed that the Secretary of State make a decision before 1 December 2017 or the appeal be listed for a hearing in the Upper Tribunal.

The renewed hearing

6. At the renewed hearing on 9 April 2018, the Secretary of State still had not made a decision. Mr Melvin suggested that the appellant make a fresh application because given the passage of time, the subsistence of the appellant's marriage was now an issue.

7. The respondent had not taken issue with the subsistence of the marriage in her reasons for refusal letter. I found it to be procedurally unfair for the respondent to raise an issue for the first time at the hearing before me. It is imperative that the appellant knows the case against him.

8. There is no evidence before me to suggest that the appellant and his wife are not in a subsisting marriage. The appellant's wife is present and settled in the United Kingdom having come from Bangladesh to the United Kingdom as a student. They both

attended the hearing before me. They married under Islamic law on the on 5 February 2014 and had a civil marriage ceremony on 11 October 2014. The appellant's daughter was born on 24 September 2015 and is a British citizen.

9. The respondent was aware when she made her decision that the appellant's wife was pregnant because she refers to her pregnancy in her reasons for refusal letter. The appellant's appeal was always made on the bases of his family life with his wife. I also find like the First-tier Tribunal Judge did that the birth of the appellant's child is new evidence rather than a new matter. Mr Khan stated at the hearing that the only issue in this appeal is Article 8 and accepts that the appellant does not meet the requirements of the immigration rules.

10. As I set aside the decision of the First-tier Tribunal, I remake the decision pursuant to Article 8 of the European Convention on Human Rights as the appellant has accepted that he cannot meet the requirements of the immigration rules. The issue for me now to decide is whether requiring the appellant to leave the country would interfere with his, his wife and British child's rights under Article 8 of the European Convention on Human Rights.

11. In determining whether the appellant's removal from the United Kingdom would constitute a disproportionate interference with her right to respect for private and family life under Article 8, I have considered each of the following issues, as laid down at paragraph 17 of the speech of Lord Bingham of Cornhill in **R v. Razgar**:

    (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for her private or family life?

    (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

    (3) If so, is such interference in accordance with the law?

    (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

    (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

12. The first four questions in Razgar are answered in the affirmative. The only question remains whether it is proportionate to require the appellant to leave the United Kingdom taking into

account all his circumstances.

13. The appellant has been in this country unlawfully for 14 years. Therefore, whatever private and family life he has established in this country has been done at the time when his immigration status was precarious and unlawful. Section 117B of the 2002 Act makes clear that a private life established whilst the applicant's immigration status is precarious is not worthy of respect. I therefore find that removing the appellant would not interfere with his right to a private life.

14. The appellant's child is a British citizen. Section 117B (6) of the 2002 Act states "in the case of a person who is not liable to deportation, the public interest does not require the person's removal where "the person 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. A Qualifying child includes a person who is under the age of 18 and who is a British citizen.

15. In respect of the appellant's family life with his wife I take into account the case of **WJ (China)) v Secretary of State for the Home Department [2011] EWCA Civ 183 a** Chinese failed asylum seeker submitted an application for leave to remain on the basis of a relationship she had entered into with a British citizen. The Court of Appeal said that, given the Claimant's prolonged, persistent and dubious history of deception in evading the United Kingdom's immigration controls, it was practically inconceivable that it could be found not to be proportionate to remove her.

16. The appellant cannot expect, by presenting the Home Office with a fait accompli by marrying a British citizen to escape the ordinary consequence of his appalling immigration history which is what this appellant is seeking to do. I therefore find that the respondent's decision in respect of the appellant's family life with his wife is proportionate. I now consider whether the appellant's qualifying child's best interests shifts the balance in my proportionality assessment in the appellant's favour.

17. I must consider the best interests of the appellant's child who is a British citizen. I have regard to the case of **ZH (Tanzania) v SSHD [2011] UKSC 4** which considered in what circumstances it was permissible to remove or deport a non-citizen parent where the effect would be that a child who is a citizen of the United Kingdom would also have to leave. The fact the children are British was a strong pointer to the fact that their future lies in the United Kingdom.

18. Baroness Hale pointed out that parents of a British citizenship

child does not hold a trump card, there rights weigh heavily in the balance. In **MA Pakistan and others [2016)) EWCA Civ 705** where the court proposed that even where the conditions in paragraph 117B (6) (a) are met, there could still be matters relating to the conduct of the appellant that weigh in the "reasonableness" test of 117 (B) (6) (b) and these include the public interest considerations and 117B (1)-(5). It was stated that the reasonableness test applies equally to children with British citizenship.

19. The case **C-34/09 Ruiz Zambrano** now makes clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so.

20. The appellant remained in this country unlawfully for 14 years and he married and had a child at a time when he knew that his immigration status was precarious and unlawful. I however do not take the appellant's conduct against his British citizen child. However, It is clear from the case of **MA**, that the fact that there is a qualified child is a relevant consideration and one that might be said to point to it being in the child interest to remain in the United Kingdom, but it is equally clear that the assessment of reasonableness must take account of the conduct of the appellant.

21. I cannot require the appellant's child to leave the country as she is a British citizen. The respondent's IDIs as at August 2015, state that it is never reasonable to expect a British citizen child to accompany a parent outside of the EU.

22. Therefore, the appellant will be separated from his wife and child temporarily as he makes an application for entry clearance from Bangladesh to return if he can meet the requirements of the immigration rules.

23. It may also be the case that the appellant does not succeed in his entry clearance application which could also mean that he would be permanently separated from his wife and child, unless they make a decision to join the appellant in Bangladesh and continue their family life in that country. It would be a decision for the appellant's wife to make the same way she made the decision to marry the appellant and have a child when he had no immigration status in the country.

24. I accept that the best interests of a child lie with living with both parents wherever they live. The removal of the appellant does not mean that his child and his wife would be required to

leave the United Kingdom thereby infringing the **Zambrano** principle. The appellant's child is not dependent on the appellant to exercise her union right of residence or deprive the child of the effective exercise of residence in the United Kingdom. The appellant's child will remain with her mother in the United Kingdom and therefore the child's right to remain in this country will not be infringed by the appellant's removal.

25. In the case of **Lee v SSHD [2011] EWCA Civ 348** it was stated that where the claimant's conduct is persistent and/or serious the interference with family life may be justified even it involves the separation of the claimant from his family who reasonably wishes to continue living in the United Kingdom. I find 14 years of non-lawful residence to justify his temporary or permanent separation from his family.

26. I find in this case it would be a proportionate response for the respondent to exclude the appellant from the United Kingdom. The respondent's interests must trump those of the appellant, his wife and his daughter given his unlawful stay in the United Kingdom for 14 years.

Decision

The appellant's appeal is dismissed both under the immigration rules and Article 8 of the European Convention on Human Rights. That concludes the matter.

Signed by,

Dated this 29th day of March 2018

A Deputy Judge of the Upper Tribunal

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Ms S Chana