Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01781/2016

THE IMMIGRATION ACTS

Heard at Bennett House Stoke	**Decision & Reasons Promulgated**
On 24th November 2017	**On 11th December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

FC
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Bedford of Counsel instructed by Whitefield Solicitors Limited
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appealed against a decision of Judge Dhaliwal of the First-tier Tribunal (the FtT) promulgated on 9th January 2017. The Appellant is a citizen of Pakistan. She has a dependent son born [ ] 2008.

2. In brief the Appellant's immigration history is that she arrived in the UK on 12th May 2009 with a Tier 1 dependant visa which expired on 10th November 2011. That visa was extended until 22nd November 2013. The Appellant made a further application for leave to remain which was

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refused on 12th June 2014 with no right of appeal. She failed to return to Pakistan. She then claimed asylum on 11th July 2014 which application was refused on 5th December 2014. That claim was based upon anti-Islamic activities of herself and her then husband. Her appeal against that refusal was heard on 16th April 2015, and dismissed in a decision promulgated on 6th May 2015.

3. The Appellant remained in the UK. She made a further asylum claim on 29th January 2016. This claim was refused on 9th February 2016 which caused the Appellant to appeal, and the appeal was heard by the FtT on 29th November 2016 and dismissed in a decision promulgated on 9th January 2017.

4. The appeal heard by the FtT on 29th November 2016 involved the Appellant's claim that she was part of a social group, being a lone female with a child. She claimed that she had been divorced by her husband and disowned by her family.

5. The FtT dismissed the appeal on all grounds finding that the Appellant would not be at risk if returned to Pakistan, and also finding that her removal from the UK would not breach Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

6. The Appellant applied for permission to appeal to the Upper Tribunal. There was no challenge to the findings made by the FtT in relation to risk on return. The single challenge to the FtT decision, was that the FtT had erred by failing to make any findings on, or have any regard to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

7. It was submitted that the Appellant's child had resided in the UK for in excess of seven years, and therefore the FtT should have considered whether it would not be reasonable to expect the child to leave the UK. The FtT had failed to consider the reasonableness test.

8. It was contended that the FtT had erred by failing to take into account the guidance given in MA (Pakistan) [2016] EWCA Civ 705, which indicates that if a child has seven years' continuous residence, leave to remain should be granted unless there are powerful reasons to the contrary.

9. Permission to appeal was granted.

Error of Law

10. On 2nd June 2017 I heard submissions from both parties in relation to error of law. The Respondent contended there was no material error. I found there was a material error of law disclosed in the FtT decision, as contended in the grounds seeking permission to appeal. I set aside the decision of the FtT in relation to consideration of section 117B(6) but preserved the findings which had not been challenged, in relation to risk on return.

11. Full details of the application for permission, the grant of permission, the submissions made by both parties, and my conclusions are contained in my decision dated 6th June 2017, promulgated on 15th June 2017. I set out below paragraphs 13-23 which contain my conclusions and reasons for setting aside the FtT decision;

    13. As indicated at the hearing, I find that the FtT materially erred in law as contended in the grounds seeking permission and therefore the decision must be set aside for the following reasons.

    14. The only challenge to the FtT decision related to section 117B(6) of the 2002 Act which for ease of reference I set out below;

        (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

            (a) the person has a genuine and subsisting parental relationship with a qualifying child, and

            (b) it would not be reasonable to expect the child to leave the United Kingdom.

    15. It was common ground before the FtT that the child arrived in the United Kingdom on 12th May 2009, and that the Appellant had a genuine and subsisting parental relationship with him. Therefore the child is a qualifying child as defined by section 117D.

    16. The best interests of a child must be considered as a primary consideration, and at paragraph 42 the FtT concluded that his best interests would be met by remaining with his mother, the Appellant.

    17. There is, however, no specific reference to section 117B(6) nor any reference to MA (Pakistan). This, without more, is not an error of law, provided the appropriate legal principles have been followed. In my view those principles have not been followed in this case as the FtT decision does not reveal any consideration of whether it would be reasonable to expect the child to return to Pakistan.

    18. The test in paragraph 45 is not a reasonableness test. The FtT in that paragraph makes reference to exceptional or compelling circumstances.

    19. I set out below in part, paragraph 49 of MA (Pakistan);

        However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.

    20. The guidance set out above has not been followed by the FtT.

21. The error of law is material and means that the decision of the FtT must be set aside. However there was no challenge to the FtT findings that the Appellant would not be at risk if returned to Pakistan and those findings are preserved.

22. When I announced at the hearing that the FtT decision was set aside, Mr Saini applied for an adjournment of eight weeks, as the Appellant wished to adduce further evidence in relation to her son, as last week he had been referred by his General Practitioner to a specialist, and the report was awaited.

23. I granted that application. Having considered paragraph 7 of the Senior President's Practice Statements, I decided that it was not appropriate to remit this appeal back to the FtT. There will be a further hearing before the Upper Tribunal. The issue to be decided relates to section 117B(6) of the 2002 Act, and whether it would not be reasonable to expect the child to leave the United Kingdom.

Re-making the Decision

12. The hearing was listed to be re-made on 7th August 2017 but on that date Counsel who represented the Appellant applied for an adjournment to obtain an independent Social Worker's report. That application was granted and a new hearing date of 24th November 2017 was allocated.

13. At the hearing on 24th November 2017 the Appellant attended. She required the assistance of an interpreter in Urdu. There were no difficulties in communication.

14. However Mr Bedford indicated that it was not proposed to call evidence. Both representatives agreed that there was a narrow issue to be decided, which related to section 117B(6). The Appellant's solicitors had submitted a supplementary bundle of documents containing 63 pages. This bundle includes an independent Social Worker report prepared by Charles Musendo dated 13th November 2017.

15. I firstly heard submissions on behalf of the Respondent. It was accepted that the child had resided in the UK for in excess of seven years. Mrs Aboni submitted that seven years from age four would be more significant that the first seven years of life.

16. It was submitted that the child is not at a critical stage in his education, and his life is predominantly focused upon his mother, the Appellant. It was submitted that there is a functioning education system in Pakistan. It was contended that the child spoke Urdu, it being noted that the Appellant at all Tribunal hearings, had not been able to communicate in English and required an interpreter in Urdu.

17. Mrs Aboni submitted that there was no evidence that the child required any special educational needs, and pointed out that the author of the report had accepted all that he had been told by the Appellant, which conflicted with the preserved findings made by the FtT. Mrs Aboni

submitted that this applied in particular to paragraphs 11 and 54 of the report.

18. With reference to paragraph 37, which refers to a teacher writing a letter dated 27th April 2017, commenting that the Appellant's child is suspected to have autism spectrum disorder, Mrs Aboni pointed out that the letter had not been produced, and there was no evidence to establish that the child suffered from autism.

19. With reference to paragraph 41 which referred to a transfer from school being disruptive, Mrs Aboni pointed out that if the child remained in the UK, there would in due course be a transfer to another school.

20. It was submitted that the best interests of the child would be to remain with his mother, and that it was reasonable for him to return with his mother to Pakistan.

21. Mr Bedford submitted that in considering a human rights appeal, the Tribunal needed to consider whether it would be disproportionate for the child to leave the UK, and the issue to be considered in this case related to reasonableness.

22. I was asked to place weight upon the Social Worker's report which concluded that the best interests of the child would be to remain in the UK. Mr Bedford submitted that the report disclosed that the child is possibly autistic, with special educational needs. It is relevant that he has been educated in English, and that he needs a routine in order to thrive. The report also made a relevant point in that there is no corporal punishment in schools in the UK, but corporal punishment exists in schools in Pakistan.

23. I was asked to find that the report disclosed that the child has friends and teachers upon whom he depends, and the Respondent had not shown that special educational needs could be catered for in Pakistan. The Secretary of State had not produced any evidence to dispute the conclusion that the child has special educational needs. It was submitted that in Pakistan the child would not have family support and as the Appellant has been twice divorced, this may mean that she would be without family support. Mr Bedford concluded by submitting that the Respondent had not produced any evidence to counter the conclusions reached by Mr Musendo, therefore the appeal should be allowed on the basis that it would not be in the best interests of the child to leave the UK.

24. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

25. The issue before me relates to section 117B(6) of the 2002 Act. It is appropriate that I set out at this stage the preserved findings of the FtT in relation to the Appellant's claim she would be at risk in Pakistan. The FtT did not accept that, and I set out below paragraphs 32 and 33 of the FtT decision in which the conclusions on risk on return are set out;

"32. Based on the evidence before me, I find that

(i) the Appellant is a single divorced female with an 8 year old child.

(ii) that if returned, the Appellant will not return as a single female, she has the support of her family including her mother, sister and brothers. She had been through a divorce previously and her family were not only able to take her back into their family home but found a new partner for her to get remarried. I see no difference in the family attitude simply because this is a second separation. Indeed, the Appellant on her statement dated 15th November 2016 accepts that she still has the support of her mother and sister. I further find that she has the support of at least one of her brothers, S, if not, the others. The Appellant has not been disowned.

(iii) Rumours may have been spread about the Appellant working as a prostitute but those rumours do not amount to persecution.

(iv) Whilst the Appellant may not be educated, she is a woman who can stand her own ground, she previously supported her husband who spoke publically against extreme Islamic figures. She decided to marry Mr C against the wishes of some male family members, she is not a woman that is timid in any way and is independent and resilient.

(v) That there is no risk of persecution or serious harm from Mr C or his family. To the contrary, Mr C is reasonably likely to go through the courts and follow the rules of the land, as has been shown by his conduct thus far to gain access to his child. I find that there is no real risk or reasonable likelihood of hostility from her former husband such as to raise a real risk of harm.

(vi) Even if I were incorrect on this there is no reason why this Appellant could not relocate to another part of Pakistan, should she wish to do so, whilst uneducated, she is able to stand on her own two feet and has family support in the background.

33. Considering these factors, I conclude that the core of the Appellant's claim is not reliable. The Appellant has not established that she has a well-founded fear of persecution and as such, her claim for asylum fails."

26. In considering Article 8 I adopt the balance sheet approach recommended by Lord Thomas at paragraph 83 of Hesham Ali [2016] UKSC 60, and in so doing have regard to the guidance as to the functions of this Tribunal given by Lord Reed at paragraphs 39 to 53.

27. The Appellant and her son live together in the UK. There is no contact with her former husband. The Appellant believes that he resides in Canada.

28. It is clear that the Appellant and her child have established family life together. They have also established private lives in the UK. The

Respondent's decision would not interfere with their family life, as it is not proposed to attempt to separate the Appellant from her son. They would either remain in the UK together, or travel to Pakistan together. The Respondent's decision would however interfere with the private lives that they have established in the UK, if the decision means that they have to travel to Pakistan.

29. When considering proportionality, my view is that it is for the Respondent to prove that the decision is proportionate. I have considered the guidance in Kaur [2017] UKUT 00014 (IAC). This confirms that the best interests of a child must be assessed in isolation from other factors, such as parental misconduct. The best interests assessment should normally be carried out at the beginning of the balancing exercise when considering proportionality.

30. I follow the guidance in EV (Philippines) [2014] EWCA Civ 874 and in particular paragraph 35 when considering the best interests of a child. Some of the factors to be taken into account include the age of the child, and length of residence in the UK, how long the child has been in education and what stage their education has reached, to what extent has the child been distanced from the country of proposed return and how renewable their connection with it may be. Consideration must also be given to any linguistic, medical or other difficulties that the child may have in adapting to life in that country, and to what extent removal would interfere with their family life or their rights, if they have any, as British citizens.

31. At paragraph 36 of EV (Philippines) it is stated that the Tribunal is concerned with how emphatic an answer falls to be given to the question, is it in the best interests of the child to remain? The longer the child has been here, the more advanced or critical the stage of education, the looser the ties with the country in question, and the more deleterious the consequences of return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests not to return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way) the result may be the opposite.

32. The Social Worker's report concludes that the best interests of the child would be to remain with his mother. That is clearly the case and not in dispute. I attach some weight to the Social Worker's report, but find that the conclusions are flawed to an extent, in that the author of the report has accepted all that he has been told by the Appellant. The author of the report may not have been made aware that there had been an appeal hearing in which findings were made, and those findings were preserved by the Upper Tribunal. I refer to the findings made by the FtT at paragraph 32 of its decision.

33. By way of example I refer to paragraphs 11 and 12 of the Social Worker's report, in which it is stated that the Appellant's life could be at risk because she is twice divorced and she risks being a victim of honour killing. I do not find any foundation for those conclusions reached by the author of the report, and I reject those conclusions. There are other examples within the report in a similar vein.

34. I make it clear I base my assessment of the best interests of the child in isolation from other factors, my conclusion is that the best interests of the child would be to remain in the UK. I do not find this to be overwhelmingly the case, but I do attach weight to the length of time that the child has resided in the UK, and that he has been educated in this country, and that he has made friends and established a private life for himself. I accept that the child would not have any memories of Pakistan, taking into account his very young age when he left that country.

35. I do not however accept that the child has been diagnosed with autism. I do not accept that the report confirms that he has special educational needs. There is reference at paragraph 37 to a teacher writing a letter stating that it was suspected that the child might have autism spectrum disorder. It is confirmed at paragraph 76 that there has been no assessment to confirm that the child suffers from autism.

36. The report prepared by the Social Worker does not specifically address the issue of reasonableness, but concentrates on the best interest of the child, concluding that those best interests would be served by remaining in the UK. As previously stated, I do not disagree with that overall conclusion, on balance.

37. That however does not mean that the appeal must succeed. The best interests of a child can be outweighed by the cumulative effect of other considerations. It was found in Kaur that the seventh of the principles in the Zoumbas code does not preclude an outcome whereby the best interests of a child must yield to the public interest. The seventh principle in Zoumbas [2013] UKSC 74 is that a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

38. When considering proportionality and the public interest I must have regard to the considerations listed in section 117B of the 2002 Act.

39. In considering whether it would be reasonable to expect the Appellant's child to leave the UK I take into account the guidance in MA (Pakistan) [2016] EWCA Civ 705. At paragraph 101 it is confirmed that when considering reasonableness the Tribunal must take into account the wider public interest and this includes the immigration history and behaviour of the parents of the child. Earlier in this decision, I have set out part of what is stated in paragraph 49 of MA (Pakistan), which confirms that significant weight must be given to the fact that a child has been in the UK for seven years or more.

40. In this case the Appellant's child has resided in the UK since May 2009, approximately eight and a half years. The starting point therefore is that leave should be granted unless there are powerful reasons to the contrary.

41. Sub-paragraph (1) of section 117B confirms that the maintenance of effective immigration controls is in the public interest. Sub-paragraph (2) confirms that it is in the public interest that people seeking to remain in the UK can speak English. The Appellant has not proved that she can speak English.

42. Sub-paragraph (3) confirms that it is in the public interest that people seeking to remain in the UK are financially independent. The Appellant has not proved that she is financially independent. She has had no leave to remain in the UK since November 2013.

43. Sub-paragraph (4) confirms that little weight should be given to a private life established by an individual who has been in the UK unlawfully, and sub-paragraph (5) confirms that little weight should be given to a private life established when a person has had a precarious immigration status. The Appellant's private life was initially established when she had a precarious immigration status in that she had limited leave to remain, and thereafter has been established whilst she has been in the UK without leave.

44. When considering the public interest, I take into account the Appellant was initially granted entry clearance as a dependant of a Tier 1 Migrant. Her leave was extended on that basis. She has deliberately remained in the UK without leave. She has made two asylum claims, both of which have been refused and gone to appeal. At both appeal hearings judges have made findings that the Appellant is not credible, and that her claims for international protection have no merit.

45. I find that notwithstanding the length of residence of the Appellant's child, it would be reasonable for him to leave the UK. I find that there are powerful reasons for reaching that conclusion, which relate to the very poor immigration history of the Appellant. It is also extremely significant that although I find it is overwhelmingly in the child's best interests to remain with his mother, it is not overwhelmingly in his best interests to remain in the UK. He is at a very early stage in his education. I do not accept that he is in any way at a critical stage in his education. I do not accept that it has been shown that he has special educational needs. I do not accept that he has been diagnosed with autism.

46. I do not accept that it has been shown that the Appellant's child would have any medical difficulties if he moved to Pakistan, nor has it been shown that he would have any language difficulties. I am satisfied that the Appellant's child can communicate in Urdu, and that he does so with his mother.

47. There is also the finding made by the FtT that not only would the child have the support of his mother, but there would be support from her family. The Appellant and her child would not be at risk in Pakistan.

48. There is a functioning education system in Pakistan. The child would have access to education. I do not find that evidence has been submitted to show that he would be at real risk of suffering corporal punishment. It is also relevant that the child is not a British citizen, but is a citizen of Pakistan. If the child returned to Pakistan it would be the case that he would have to leave the school that he currently attends. However in due course he would, if he remained in the UK, leave that school and move to another school. I have made the point that the Appellant's child would have no memory of Pakistan, and therefore he would be moving to a new country, but it is a country of which he is a citizen, where he speaks the language, and where he has family members and would have family support.

49. I find therefore that there are powerful reasons why leave to remain should not be granted to the Appellant who has attempted to use a variety of means to remain in the UK, and I find that in the circumstances it would be reasonable for the Appellant's child to return to Pakistan with her. I conclude that the weight that must be attached, in this case, to the public interest in maintaining effective immigration control, is greater than the weight that must be attached to the best interests of the child, and the wishes of the Appellant to remain in this country. The Respondent has proved that the decision to refuse the Appellant's human rights claim is proportionate, and there would be no breach of Article 8 of the 1950 Convention.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and was set aside. I substitute a fresh decision as follows.

The appeal is dismissed.

Anonymity

The First-tier Tribunal made an anonymity direction. This is continued pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No report of these proceedings shall directly or indirectly identify the Appellant or any member of her family. Failure to comply with this direction could lead to a contempt of court.

Signed   Date 4th December 2017

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

No fee has been paid or is payable. The appeal is dismissed. There is no fee award.

Signed Date 4th December 2017

Deputy Upper Tribunal Judge M A Hall