Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14880/2017

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 2nd October 2018	**On 26th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MS MUSSARAT NAVEED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Hussain (Solicitor)
For the Respondent: Mr D Mills (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge E.M.M. Smith, promulgated on 2nd July 2018, following a hearing at Birmingham Priory Court on 19th June 2018. 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 citizen of Pakistan, was born on 5th September 1986, and is a female. She appeals against the decision of the Respondent dated 1st November 2017, refusing her application to remain in the UK on the basis of her Article 8 rights. The applicable Immigration Rules are Appendix FM and paragraph 276ADE.

The Appellant's Claim

3. The essence of the Appellant's claim is that in 2008, she married a Mr Muhammad Tahir Mahmood, in an arranged marriage in Pakistan. He had subsequently then gone on to arrive in the UK as a student "but for reasons unknown to the Appellant his visa was cancelled" (see paragraph 7 of the determination). The Appellant now claims that if she were to be returned back to Pakistan, she would face difficulty. This is on account of the fact that she has two children. The eldest, it was wrongly stated in the determination, was born on 10th November 2011. The youngest, it was stated in the determination was born on 27th April 2013. The judge concluded that neither child is a British citizen (paragraph 10).

4. Another issue raised on behalf of the Appellant was that she feared that if she were to be returned back to Pakistan "I would be subject to honour killing as I married without consent" (see paragraph 25). When she raised this particular issue, she was asked if she wished to make a protection claim. She said that she did. She was then invited for an asylum interview. She failed to attend. That claim then effectively petered out after her failure to attend for an asylum interview on 19th September 2017.

5. However, in what was yet another aspect of the claim, this was a matter where the Appellant had sat a TOEIC test in 2012 and the issue was whether she had fraudulently obtained this certificate. It was concluded that, through the use of an ETS TOEIC test centre look-up tool, that the documents supported the fact that the tests taken on 18th July 2012 by the Appellant, were invalid. It was asserted that the Appellant made use of a proxy who undertook the tests (see paragraph 26).

The Judge's Determination

6. At the hearing before Judge Smith on 19th June 2018, there was a renewed application for an adjournment. A previous one had been made on the papers, determined by Assistant Resident Judge Chohan, who had refused the adjournment request. At the hearing, the judge expressly states that,

> "I explained to the Appellant the background and read to her the reasons why Judge Chohan refused to adjourn the appeal. The Appellant simply relied upon the unavailability of a lawyer to seek another adjournment. I asked the Appellant whether she knew if her solicitors had tried to seek another member of staff, Counsel or engaged an agent to represent her, but she did not know" (paragraph 16).

7. The Appellant, accordingly, was unrepresented on the day of the hearing. She gave evidence in English, without the assistance of an interpreter, and without a lawyer on her behalf. It would appear that the lawyer who was instructed to attend on that

day, had an examination to sit, and had sent instructions with the Appellant, to say that he would be willing to attend at some other point in time but not on this particular day.

8. The judge then went on to consider the substance of the appeal. He considered the case law in relation to the ETS TOEIC test centre look-up tool's conclusions that the Appellant had put forward a test such that was invalid, by the judge relying upon cases such as **Nawaz [2017] UKUT 00288** and **Abbas [2017] EWHC 78**, as well as the older case of **Flynn [2008] EWCA Crim 98**.

9. The judge concluded that the Appellant asserted in a witness statement that she took the test over two days, and sets out in some detail what occurred. The judge observes that "within the documents she has produced are details of her own studies in Pakistan" and the judge set these out. The judge considered whether, in accordance with established practice, the Appellant was able to raise "an innocent explanation for the allegation of fraud" (paragraph 32). He observed the Appellant's account that the husband of the Appellant had travelled to the test centre and paid a fee (AB at page 1, paragraph 4), and on the first test she travelled with her husband to the centre "but panicked because she did not know how far from the bus station the centre was and she only had half an hour before the test". The judge said that her husband knew where the test centre was and therefore there would have been no need to panic. This appears to have been an additional piece of information that was used "to bolster her account of events that day" (paragraph 32).

10. However, in concluding that the Appellant had not raised an innocent explanation to discharge the burden that then full upon her, after a prima facie claim had been raised by the Respondent Secretary of State, the judge concluded that,

> "… taking together the Appellant's history and the lie she told in her application form and in particular her evidence of the events surrounding her tests, including the fact that it was her husband who made all the arrangements, I do not accept the Appellant has raised an innocent explanation that is plausible" (paragraph 32).

11. Thereafter, the judge went on to consider the position in relation to whether it was the case that there were exceptional circumstances which justified a consideration of the Appellant's situation outside Article 8, and bearing in mind the Section 55 BCIA 2009 requirement to look at the "best interests" of the children as a primary consideration. The judge referred to **Agyarko [2017] UKSC 11**.

12. However, the judge wrongly then stated that "the children now aged 7 and 5" (paragraph 36). This is because at the time the eldest child was not aged 7. At the time the eldest child was aged just over 6 years. His date of birth was not, in fact, on 10th November 2011 but in October. The judge then analysed the position (at paragraphs 36 and 37) citing case law, and referring to the facts, before concluding (at paragraph 38) that there was no basis for saying that there are exceptional circumstances such as would justify a grant of leave outside the Immigration Rules.

13. The appeal was dismissed.

Grounds of Application

14. The grounds of application state that the judge erred in law for a number of reasons. First, that an adjournment had been sought and had been wrongly refused, in the absence of the Appellant not being able to get legal assistance on the day in question. Second, the judge failed to look at the explanations given by the Appellant about her taking the test in question, and given that she was unrepresented, if there were any ambiguities in the evidence, they ought to have been expressly put to the Appellant. In particular, it was not clear why, if the Appellant said that she had panicked on the day of the test, because there was only half an hour to go before the test started, that this would not be believed by the judge. It was difficult to see why this should be taken as something to have bolstered her claim. Third, it was said that the Appellant had two children and one was aged 7 years and the other was 5 and the elder child "was a qualified child" and that it was a matter of settled law that one had to look at the position on this basis (see paragraph 10 of the grounds).

15. On 5th September 2018, permission to appeal was granted the Tribunal on the basis that it was arguable that the judge failed to give proper account of all the evidence, and "did not consider all relevant factors in assessing the qualifying child's best interests and whether it was reasonable for the qualifying child to leave the UK" (see paragraph 3). Moreover, there had been a letter explaining why there could not be attendance by the Appellant's lawyer and the judge failed to heed this on the day in question.

16. Further, it was said that the judge wrongly did not consider the guidance in **MA (Pakistan) [2016] EWCA Civ 705**, which deals with the position that where there is a qualifying child, there have to be very strong reasons for why removal should follow of a parent.

Submissions

17. At the hearing before me on 2nd October 2018, Mr Hussain relied upon the grounds of application. He stated that more should have been done given that the eldest child was 7 years old. The children were going to school. They have friends here. It was necessary to consider whether it was "reasonable" for the children to relocate now to Pakistan. He submitted that the "reasonableness" test must be considered in the context of the public interest, and the Home Office's own guidance stated that there have to be "strong reasons" for why the removal should follow. The judge, instead, appears to have concentrated on the false certificate, in relation to determining where the public interest lay. That was a focus in the determination which was difficult to justify.

18. For his part, Mr Mills submitted that it was not correct that the eldest of the two children was 7 years of age. This is because the eldest child was born later. Indeed, the refusal letter (at page 3 of 8) recognises that "your children are not British and have not resided in the UK continuously for seven years". Therefore, submitted Mr Mills, the requirement to view the matter in the context of whether it was "reasonable" or "unreasonable" to expect the children to relocate to Pakistan, did not apply. The eldest child was simply not a qualifying child. The grounds of

application were incorrect, and this lack of accuracy had then led to the grant of the permission by the judge. This was nothing more than an "outside the Rules" Article 8 case. That being so, the following matters fell to be considered.

19. First, as far as the adjournment request was concerned (see paragraph 6 of the grounds), this was simply an attempt to re-argue the application before the judge, after it had been refused by Assistant Resident Judge Chohan. The judge was, in fact, concerned to know what additional reasons there were, after expressly reading the reasons of Judge Chohan out to the Appellant, for why an adjournment should now be granted. All that the Appellant did then was simply to say that her lawyer was unavailable, which is precisely the issue that Judge Chohan had already considered. The judge wanted to know why the Appellant would not have sought another member of staff from the same firm, or have an agent instructed, and there was no adequate explanation given to this. As against this, the Respondent was not prepared to proceed with the adjournment request and the Presenting Officer on the day had said that there was no additional information since Judge Chohan had refused the adjournment request, to justify the grant of adjournment now.

20. Second, insofar as the ETS test was concerned, for which the judge gave reasons (at paragraph 32), the case law had moved on significantly since the earlier cases of **SM and Qadir**, and the judge sets out this case law (at paragraph 27 to 28), before concluding that the Appellant had failed to raise an innocent explanation which satisfies the minimum level of plausibility (at paragraph 31). In fact there had been a more recent case of **Ahsan [2017] EWCA Civ 209**, where Underhill LJ had taken a consolidated view of the case law that had developed to date, and concluded that it was simply not enough to turn up and say that one spoke English and that one had attended a building where the tests took place, and to say that this was an "innocent explanation", because much more had to be shown. It was this failure to show much more that the judge was concerned about, at paragraph 32, and when he had considered all of the evidence as a whole, he had concluded that the Appellant had failed to provide an innocent explanation for this test. This was particularly given that the judge observed that the entire arrangements for the test had been made by her husband.

21. Ultimately, submitted Mr Mills, what this boiled down to was that it was difficult to see how the public interest in favour of immigration control, would be displaced by the Appellant, given the finding of deceit and fraudulent behaviour on her part, on the basis of a child in the UK who had been here for only six and a half years. The judge's conclusion was absolutely correct, in the light of his findings of fact, and the citation of the case law (at paragraph 34 to 37). There was no error of law.

22. In his reply, Mr Hussain submitted that the latest decision of **Ahsan [2017] EWCA Civ 2009**, was actually won in favour of the Appellant. It was by no means the case that a person accused of fraud cannot come to court and offer an innocent explanation. The judge had failed to show why the Appellant's explanation should be rejected as not being innocent. He made findings of fact (at paragraphs 25 to 32) that did not put his concerns directly to the Appellant. If the Appellant said that she

had panicked, it was difficult to see why this should be held against the Appellant. The judge had found a lack of consistency without putting this to the Appellant.

No Error of Law

23. I am satisfied that the making of the decision by the judge did not involve 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. First, there is the background to this appeal. It involves a case where the Appellant's own husband had previously arrived in the UK as a student, but for reasons unknown to the Appellant it was now said that his visa was cancelled (see paragraph 7 of the determination). There was then in the light of that, a claim that the Appellant feared ill-treatment in Pakistan by being subjected to an honour killing because, "I married without consent", only to then relent from that claim.

24. What was significant in terms of the findings to be made by this particular judge, was the Appellant's TOEIC test. The judge is absolutely correct in recording that the burden initially fell upon the Respondent, and in this case there was an ETS TOEIC test look-up tool that was deployed to show that the tests taken on 18th July 2012, which was the date that the Appellant took her own test, are invalid. The judge then not only set out the case law (at paragraphs 27 to 28), but referred to the expert report of Professor Peter French. Not only this, the judge appeared to give the Appellant the benefit of the doubt, by saying that, "the point remains that whilst voice analysis is a tool to be used, it is to be used with caution" (paragraph 30).

25. What the Appellant has quibbled with, however, is the way in which the findings of fact have been made. Reliance was placed upon the judge's conclusions at paragraph 32, and his statement that there was no reason for the Appellant to have panicked if on arrival, having been dropped off at the bus station, she did not know exactly where the test centre was, and with half an hour to go, she panicked. There is in fact nothing to this point. It does not matter whether the Appellant panicked or did not.

26. The plain fact is that the judge considered it to be the case that, given that it was the Appellant's husband who had made all the arrangements, the innocent explanation provided was not sufficient. It was the Appellant's husband who had previously driven to the test centre and paid the fee (see the Appellant's bundle at page 1). It was the Appellant's husband who had then taken the Appellant to the test centre himself. Her husband actually knew where the test centre was. The Appellant presumably did not.

27. Insofar as the judge makes a finding that "this extra information about panic is to bolster her account of events that day", it is a finding that was open to the judge. However, this was not the end of the judge's analysis. This is because the judge actually states that,

> "… taking together the Appellant's history and the lie she told in her application form and in particular her evidence of the events surrounding her test, including the fact it was her husband who made all the arrangements, I do not accept the Appellant has raised an innocent explanation that is plausible" (paragraph 32).

That was a finding that was open to the judge.

28. Second, there is a question of the judge having refused the adjournment. It is not the case, contrary to what is said in the grounds of application, that the judge's failure to grant the adjournment offended the principle in **Nwaigwe (adjournment: fairness) [2014] UKUT 418**. This is because that case is authority for the proposition that the question is not whether the decision is one which could reasonably have been arrived at. Rather, the test to be applied is that of fairness. The question is whether there was any deprivation of the affected party's rights to a fair hearing. Put in this way, this was a case where there had already been a previous adjournment for a previous hearing on the basis of the Appellant having sustained an injury exactly on the day when the hearing was to take place, with medical evidence then being furnished, and adjournment then applied for, and been granted. On this particular day also, before Judge Smith, there was an adjournment request, but this time on the basis of, not the unavailability of the Appellant as previously, but on the basis of the Appellant's lawyer not being available, because he had to sit an exam.

29. That application went to Assistant Resident Judge Chohan only a few days previously. It was made in writing. Judge Chohan refused the application. The reasons are on the court file. Judge Smith read out the reasons that Judge Chohan gave to the Appellant. All that the Appellant did was to simply to repeat that because of the unavailability of a lawyer there had to be an adjournment. When the judge asked whether another member of staff could not attend the Appellant was unable to say. As Mr Mills quite properly stated, if the claim on behalf of the Appellant, put forward by her lawyers is this, that having been paid by the Appellant to attend on the first hearing on 24th May 2016, when the matter was listed as a float case, and the Appellant sustained the injury and did not come, they had decided, having attended themselves in person, to make the application for an adjournment, to undertake representation for the Appellant as a "gesture of goodwill".

30. However, what this is tantamount to saying, is simply that if the Appellant is unable to pay for legal representation, then there has to be an adjournment. Mr Mills had submitted that if that was the case some thirty percent of appeals arising in this jurisdiction would have to be adjourned. I accept that the Appellant had to demonstrate far more than simply repeat the lack of a legal representative, if an adjournment were to be secured. It has to be borne in mind that the overriding objective has to be taken into account.

31. Legal proceedings are expensive and involve considerable public expense and administrative effort, and if there had been a listing of the case on 19th June 2018, it is entirely right for the judge to have concluded that,

> "… her solicitors had ample time to arrange for another representative to attend but failed to do so. I am satisfied that there are no new facts that have arisen after the decision of Judge Chohan and justice would properly be done to the issues in this case and to both the Appellant and the Respondent" (paragraph 17).

32. Finally, there is the issue of the children. The fact that neither child had been in the UK for seven years at the date of the decision dramatically alters the manner in

which the position has to be valued. Some confusion was caused by the judge himself stating that "the children are now aged 7 and 5" (paragraph 36). It is clear that the eldest child was not aged 7. However, this error aside, I have to say that there is no material error by the judge in the way that the position of the children is then considered. Considerable care and sensitivity is shown. The judge observes that the Appellant had stated that both the children speak Urdu and English. The judge is clear that he had "considered the evidence of schooling in regard to both and I have noted from the photographs each appears to have integrated well in their education and with friends".

33. There was also no evidence of any illness "which would prevent them living in Pakistan" (paragraph 36). The judge then considered the case law (at paragraph 37), including **EV (Philippines) [2014] EWCA Civ 874** and **Azimi-Moayed [2013] UKUT 197**, before observing that, "as a family they could return to Pakistan". The judge observed that the public interest in the makings of immigration control was not outweighed by the presence of the children. It was observed how seven years from the age of 4 is likely to be more significant to a child than the first seven years of life (paragraph 37). The judge then went on to consider to reject outright the Appellant's fear of her husband or her husband's family. It was noted that "the Appellant has chosen not to pursue her asylum claim and it is therefore reasonable to assume that she has no fear of return" so that "there is no reason why as a family unit the Appellant and her two children cannot return to Pakistan" (paragraph 38).

34. The judge was clear that "having carried out a balancing exercise of the facts in favour of the Appellant with reference to the children the Appellant has remained illegally in the UK for seven years and has shown no inclination to return to Pakistan" (paragraph 38). In fact, the judge was concerned that there had been a response to a question from the Presenting Officer that the Appellant had "no intention of returning" come what may (see paragraph 38). In those circumstances, the judge's conclusion that there were no exceptional circumstances which justified a grant of leave to remain on the basis of Article 8, applying the **Razgar** and **Huang** principles, was one that was open to him (paragraph 39).

Notice of Decision

There is no material error of law in the original judge's decision. The determination shall stand.

This appeal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 22nd October 2018