



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/21236/2016

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast
On 2 October 2019

Decision & Reasons Promulgated
On 17 October 2019

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

N S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Simon Barr, Simon Barr Immigration Law

For the Respondent: Ms Petterson, Senior Presenting Officer

DECISION AND REASONS

1. As this appeal concerns a minor, I make an order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 whereby any matter leading to the identification of the child in these proceedings or the parents is prohibited. Any breach of this order may lead to contempt proceedings.
2. The appellant is a citizen of Pakistan, born in 1991. She has been granted permission to appeal the decision of First-tier Tribunal Judge Fox who dismissed her appeal for reasons given in his decision dated 22 February 2019 against the Secretary of State's

decision dated 19 August 2016, refusing the appellant's application made on Form (FLR)(FP) dated 30 March 2016, following her arrival in the United Kingdom on 12 February 2015 on a visit and subsequent extension of leave for medical treatment. According to a letter accompanying the application the appellant's spouse and their child are British citizens and they all live together. The letter sets out the family history *in extenso*. The relevant matters are that the appellant married SD a British national in January 2013 in Pakistan. They lived abroad in Dubai. They arrived in the UK together in February 2015 for a short holiday but have remained here since. The appellant's leave to remain expired on 2 April 2016. Their child was born in Newry in December 2015. It is the appellant's case that she is unable to live in Pakistan.

3. The Secretary of State refused the application under the ten year partner route. Although accepting the genuineness of the subsisting relationship with her British partner certain eligibility requirements of the Rules had not been met. In particular, it was not accepted that the appellant and her partner intended to live together permanently in the United Kingdom or that they intended to do so in the future. This was because they had previously resided in Dubai and it had also been stated on the covering letter with the application that they wished to move freely between the United Kingdom and the Republic of Ireland as a family for the purposes of living, working and doing business. A further eligibility requirement which the appellant did not meet was the length of her last grant of leave. This was as a visitor for private medical treatment, for which she had stated she would leave the United Kingdom at the end of that treatment.
4. Appendix EX.1. of Appendix FM was considered by the Secretary of State but no evidence had been seen indicating that there were insurmountable obstacles in accordance with paragraph EX.2. of that provision. Furthermore, the Secretary of State did not accept that the appellant met the private life provisions in paragraph 276ADE or that there were exceptional circumstances with particular reference to the difficulties the appellant would encounter with long haul travel due to medical complications with her ear.
5. Judge Fox noted that the appellant's last grant of leave as a visitor was for private medical treatment for a period of six months and he also referred to the appellant having previously entered the United Kingdom as a visitor for a period of five weeks to visit relatives. He was satisfied on the evidence that the appellant had failed to demonstrate there were any insurmountable obstacles or exceptional circumstances with regard to her reintegration into Pakistan, if required to leave.
6. In respect of Article 8 the judge explained at [27]:
 - "27. I have taken into account all relevant factors, not just limited to those above but also the following. There is a child born to this relationship between the Appellant and her husband. The child acquires British citizenship because of her British husband. I must consider the best interests of child as the primary consideration. There is no suggestion that the child, and her husband would be compelled to leave the United Kingdom with the Appellant. The Appellant submits that her husband was entirely capable

of looking after the child but has not demonstrated, to any meaningful degree that this would be so. He clearly has [sic] an educated man, competent, erudite, talented and resource full [sic]. He also claims to have family, as they both do, in the United Kingdom generally the [sic] could provide support and assistance. The child is of tender years and it would be reasonable, if I were to accept the husband's inability to look after his child, for the child to remain with its mother. The expectation, as recorded above was that the [sic] was never any probability or guarantee that the Appellant would be allowed to live in the United Kingdom on a permanent basis. She only ever had temporary Leave to Remain. It appears that no backup plan was ever developed no safety net had been put in place. The child is in a state of robust good health. I'm satisfied that it would not be unreasonable to expect a child to travel with its mother back to Pakistan if that was the choice of the parents."

7. And as to the appellant's medical circumstances, the judge explained at [28]:

"28. The Appellant herself claims to be in a state of poor health. However, it would appear that her medical condition involve a build-up of earwax and a blood the [sic] condition. Regrettably, however, there is no clinical evidence on the papers before me today that would assist in determining how dangerous either of these of these conditions may or could be. I suspect, from reading her narrative, that the blood condition is well treated as is the build-up of her earwax. He complains that the earwax condition would prevent her from taking long-haul flights but does not suggest that short haul flights are impossible to undertake."

8. After considering the private lives of the appellant and her husband, the judge came to the following conclusions at [36] to [40] in his decision:

"36. On the evidence before me today I am satisfied that such interference is 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. I am satisfied such interference is proportionate to the legitimate public end sought to be achieved.

37. I am satisfied on the evidence before me today that the Appellant is not entitled to Leave to Remain and such Leave to Remain should not be issued to the Appellant as confirmation of her right to reside in the United Kingdom.

38. I have considered the Appellant's claim under the Human Rights Act 1998, Article 8. I find that the UK Government, in its exercise of a fair and firm immigration policy has acted proportionately by refusing to grant Leave to Remain. There has been family life that has been interfered with but in an entirely proportionate manner. The Appellant does not identify any interference with private life.

39. On 11 June 2012 the Government announced changes to the Immigration Rules to unify consideration under the Rules and Article 8 of the European Convention on Human Rights. The Immigration Rules set out the

requirements for those seeking Leave to Enter or Remain on the basis of their right to respect for private or family life by defining the criteria that a person is expected to fulfil in order to qualify this right to remain in the United Kingdom. These criteria are set out in Appendix FM and Paragraph 276ADE of the Immigration Rules. As a consequence, because the Appellant has applied under these provisions a full consideration of their Article 8 ECHR rights has been undertaken by the Respondent and by myself today.

40. On the totality of the evidence before me today, I find the Appellant has not discharged the burden of proof and reasons given by the Respondent justify the refusal. Therefore, the Respondent's decision is in accordance with the law and the applicable Immigration Rules."
9. The grounds of challenge refer to the appellant not having been professionally represented at the hearing. It is argued that the Secretary of State had not carried out any substantial review on the best interests of the child and the judge had made no reference to *MK (Section 55 – tribunal options) Sierra Leone* [2015] UKUT 00223 (IAC) and the judge had made no reference at all to the section 55 duty. It is also argued that the decision by the judge was not one which was open to him. The judge had failed to specifically determine the point under appeal.
10. In granting permission to appeal First-tier Tribunal Judge Neville considered that [27] of the decision arguably contained insufficient reasoning to demonstrate the judge had approached section 117B(6) in the light of *JG (s117B(6)): "reasonable to leave" UK) Turkey* [2019] UKUT 72 (IAC).
11. Ms Peterson acknowledged at the outset of the hearing that the First-tier Tribunal did not have proper regard to the child's best interests and conceded that the decision was infected by error of law and should be set aside. In my judgment she was correct to make that concession having regard to the approach by the judge to the issue of the child and the impact on the child in these proceedings and in particular the guidance given by the Upper Tribunal in *JG* with regard to the assessment of the impact on a child without reference to the parents' immigration history following the decision of the Supreme Court in *KO*.
12. The appellant has lodged with the Upper Tribunal an extensive bundle of material although Mr Barr has explained that not all is specifically relied on. Included in that material is medical evidence from a Consultant Psychiatrist regarding SD. The report by Dr Bell is dated 23 September 2019 in which he carries out a comprehensive review of SD's medical history and provides a diagnosis of anxiety and depression. He explains in his concluding paragraph and I quote:
- "Dr Graham in her letter has pointed out the relationship between SD's ill health and the health issues which his wife and daughter have had recently. These health issues have exacerbated his symptoms of stress which have been due to the ongoing issues around his wife's UK visa to reside, to the point now where he is suffering from a depressive disorder with anxiety. In view of the serious risk of suicide which was present when he last suffered from anxiety and depression in 1999, I would consider him to be at serious risk of self harm and I would strongly recommend that he contact

his own NHS GP in order to be referred to local psychiatry services in order to prevent a recurrence of the serious overdose which took place in 1999.”

13. A report has also been provided by Dr Graham, a General Practitioner dated 31 May 2019 in terms that the appellant has not recovered fully from a stressful pregnancy and that her ongoing health issues together with the worry about her daughter’s health has an effect on her husband and their family.
14. There is no dispute in this case that the appellant was able to demonstrate that she met the eligibility requirements under the rules including the financial requirements but for those identified in the decision letter. Ms Peterson sensibly agreed that this is an appeal that should be allowed based on the evidence that is now before the tribunal specifically in respect of the evidence regarding the child, the child’s best interests and whether it would be reasonable for the child, a British citizen, to be expected to relocate to Pakistan. Furthermore, she accepted that in the light of the continued presence of the appellant and her family in the United Kingdom since 2015 there was less in the Secretary of State’ point regarding the intentions of the parties as to where they would live.
15. The decision of the First-tier Tribunal Judge is set aside for error of law. The decision is re-made in the Upper Tribunal and the appeal is allowed on article 8 grounds.

Signed

Date 14 October 2019

UTJ Dawson

Upper Tribunal Judge Dawson