IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23368/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 March 2015	**On 12 March 2015**

Before

UPPER TRIBUNAL JUDGE SOUTHERN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS ZAILA HUMA RAFIQ

Respondent

Representation:
For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Ms M Dogra, Counsel instructed by Bukhari Chambers Solicitors

DECISION AND REASONS
(Given orally at the hearing)

1. The Secretary of State for the Home Department has been granted permission to appeal against the decision of First-tier Tribunal Judge Pirotta who, by a determination promulgated on 1 October 2014, allowed the appellant's appeal against a decision to refuse to grant her leave to remain. The judge allowed the appeal both under the Immigration Rules and on human rights grounds finding that there would be an impermissible infringement of rights permitted by Article 8 of the ECHR if the appeal were not to be allowed.

2. For the sake of convenience I will refer to the appellant before the First-tier Tribunal, Mrs Rafiq, as the claimant and the Secretary of State for the Home Department as the Secretary of State.

3. The claimant, who was born on 15 January 1984, is a citizen of Pakistan. She has been unlawfully present in the United Kingdom since approximately 2005. She has entered into an Islamic marriage with the sponsor, Mr Nasimi, who is a person who at the time had temporary leave to remain under the points-based system. They have had two children each of whom was born in the United Kingdom, one in 2012 and one in 2013. The First-tier Tribunal Judge noted in her determination that the claimant had entered the United Kingdom using a false passport so that she could join relatives who were already living here.

4. The Secretary of State refused the application for reasons that are summarised in the judge's determination. For present purposes I can summarise them as follows. The appellant did not qualify under the Rules because her spouse was not a British citizen or settled in the United Kingdom and because her children were not British citizens and therefore they could not meet the requirements of E-LTRP.1.2 to 1.7 nor the criteria of EX.1.

5. The application could not succeed under 276ADE because the claimant had not lived in the United Kingdom for the required period of time. The Secretary of State did not accept that it had been demonstrated that she had no longer any strong ties in Pakistan, that being a country where she had spent the majority of her time. The Secretary of State looked at her obligation under Section 55 of the Borders, Citizenship and Immigration Act 2009 and concluded, unsurprisingly, that the children's best interests were served by remaining with their parents but went on to conclude that there was no reason why the parents could not relocate to their country of nationality. Finally, the Secretary of State concluded that there were no compelling or compassionate circumstances to justify the grant of leave outside the Immigration Rules.

6. After the date of the decision under challenge and before the appeal hearing circumstances had changed in that the sponsor had been granted indefinite leave to remain, this being a change of circumstances which the judge considered to be of particular significance. She accepted, as does not appear to be in dispute, that there was a genuine and subsisting relationship between the claimant and the sponsor and, at paragraph 17 of the determination, the judge noted that the grant of indefinite leave to the sponsor meant that the children were entitled to apply to be registered as British citizens under Section 1(3) of the British Nationality Act 1981, although the judge also recorded that no such application had in fact been made.

7. The judge went on to say at paragraph 18 of her determination that this meant that the appellant's case must now be considered on the basis that she would meet the criteria of E-LTRP because her spouse is settled in the United Kingdom. She might not yet meet E-LTRPT though her children should be considered to be settled in the United Kingdom.

8. For the claimant, Ms Dogra today realistically and properly concedes that the judge was wrong in that respect. The obligation was to consider the matter as it was at the date of the hearing and not as it might be depending upon the outcome of applications that might or might not be made.

9. The judge, however, went on to make findings at paragraph 23 as follows:

> "Now that the Secretary of State has granted the sponsor indefinite leave to remain his children become entitled to apply for British citizenship under Section 1(3) of the British Nationality Act 1981 and their interests are more firmly centred in the United Kingdom, so that their removal would be disproportionate and contrary to their interests as British citizens. Had they remained entitled only to Pakistani citizenship, they could have returned to Pakistan with their parents, where their interests would have been sufficiently protected by their parents."

10. I am satisfied that the judge made a series of errors of law that were material to the outcome of the appeal. First, as I have mentioned, it has been conceded quite properly and realistically that it was an error of law for the judge to allow the appeal under the Immigration Rules because plainly, by any view, the claimant did not meet the requirements of the Rules.

11. Secondly it was an error of law for the judge to determine the appeal on the basis that because the children had a right to apply to be registered as British citizens the appeal should be determined on the basis that they had a right of residence despite the fact of the findings made and set out in the determination that otherwise it would not have been unreasonable to expect the whole family unit to return to Pakistan.

12. Thirdly it was an error of law to fail to have regard when determining the Article 8 question to the issues set out in Section 117B of the 2002 Act as amended. That is material because in this case there were issues that were relevant to that consideration including the aim of maintenance of effective immigration control in the public interest implicitly in line with the Immigration Rules. Secondly the fact that it is in the public interest that those seeking to enter or remain in the United Kingdom are able to speak English because, at the hearing, the claimant gave evidence to the First-tier Tribunal Judge with the assistance of an interpreter. Thirdly the relationship with the sponsor was formed whilst the claimant was present unlawfully. Fourthly, as the judge had found that absent a right of residence it could not be said to be unreasonable to expect the children to return to Pakistan with their parents, that is something that should have

been factored into the Article 8 assessment, and fifthly, no matter how carefully one looks at the determination it is clear that there was no attempt at all to carry out a balancing exercise in striking a balance between the competing interests in play, there being no attempt to identify the public interest side of that balancing exercise.

13. Finally, at paragraph 19 it is plain that in saying:

> "I consider that the rights of the children to remain and live in the United Kingdom cannot be overridden except in the most exceptional circumstances, which have not been demonstrated in this case",

it is plain that the judge has applied the wrong legal test.

14. For all those reasons I am satisfied that this determination cannot stand because the appeal has been assessed on entirely the wrong basis and therefore the decision of Judge Pirotta will be set aside.

15. There has been no challenge to her findings of fact some of which I think might be relied upon by both sides in this litigation to some extent and so subject to any submissions that I now receive my proposal is to say that those findings of fact should stand. (No such submissions were in fact advanced).

17. The appeal to the Upper Tribunal is allowed to the extent that the determination of the judge is set aside and the appeal is remitted to the First-tier Tribunal to be determined afresh by a judge other than Judge Pirotta.

Signed  Date 5 March 2015

Upper Tribunal Judge Southern