IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41838/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th December 2015	**On 5th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAKILA JAVED
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Miss A Fijiwala, Senior Home Office Presenting Officer
For the Respondent: Mr S Ahmed of Counsel, instructed by Law Lane Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appealed against a decision of Judge Carroll of the First-tier Tribunal (the FTT) promulgated on 14th May 2015.

2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal. I will refer to her as the Claimant.

3. The Claimant is a female citizen of Pakistan born 25th October 1969 who on 25th October 2010 was granted a visa entitling her to visit the United Kingdom until 25th October 2020.

4. On 16th October 2014 the Claimant was refused leave to enter the United Kingdom following an interview, and was served with a Notice of Immigration Decision refusing her leave to enter pursuant to paragraph 321A of the Immigration Rules, on the basis that there had been such a change of circumstances since her initial leave was granted, that the leave should be cancelled.

5. The Secretary of State contended that the Claimant's visa had been issued on the basis of a six week visit to the United Kingdom to accompany her children who study here. However since her initial arrival in the United Kingdom on 15th February 2011, the Claimant had spent ten months in the UK in 2011, ten months in the UK in 2012, nine months in the UK in 2013, and to date had spent a further six months in the UK in 2014. This meant that in the past three years and ten months the Appellant had only spent ten months in total in Pakistan, and a total of 35 months in the UK. It was also noted that the Claimant had been refused two Tier 1 (Entrepreneur) visas, the latest refusal being on 13th October 2014. It was contended that this demonstrated that the Claimant intended to reside in the UK on a long-term basis, and the Secretary of State cancelled her continuing leave, which had the effect of cancelling her entry clearance.

6. The appeal was heard by the FTT on 29th April 2015 and allowed with reference to the Immigration Rules. The conclusions of the FTT are contained in paragraphs 9 and 10 which are reproduced below;

> "9. The Appellant's husband remains in Pakistan where he has a business. The evidence does not support the Respondent's assertion that the immigration history of the Appellant shows her intention to reside in the United Kingdom on a long-term basis.
>
> 10. In light of all of the evidence, I am not satisfied as to the basis of the refusal by reference to paragraph 321A of HC 395."

7. The Secretary of State applied for and was granted permission to appeal to the Upper Tribunal on the basis that the FTT had failed to give reasons or any adequate reasons for findings on a material matter. It was noted that the FTT had concluded that the evidence did not support the assertion that the Claimant's immigration history showed an intention to reside in the UK on a long-term basis, but the Secretary of State submitted that on the face of it, two applications for leave to remain as a Tier 1 (Entrepreneur) Migrant did suggest an intention to reside in the United Kingdom on a long-term basis.

Error of Law

8. The error of law hearing took place on 13th October 2015. Full details of the application and submissions made are set out in my decision promulgated on 20th

October 2015 and I set out below my conclusions and reasons for setting aside the decision of the FTT;

> "17. In my view the judge erred in the first paragraph of the decision by finding that the burden of proof is on the Claimant. It is generally correct to state that in immigration appeals the burden of proof is on an Appellant, but in a case such as this, where the Secretary of State relies upon paragraph 321A, the burden of proof is on the Secretary of State to prove there has been such a change of circumstances since the leave was given, that it should be cancelled. This however is not a material error, as the judge allowed the Claimant's appeal.
>
> 18. The issue before me relates to adequacy of reasons. I set out below for ease of reference the head note to Budhathoki (reasons for decision) [2014] UKUT 00341 (IAC) which provides guidance on adequacy of reasoning;
>
> > 'It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in the case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost.'
>
> 19. I conclude that the judge has not engaged with the evidence provided by the Secretary of State, which is set out in the Explanatory Statement and the attached appendices. This evidence included interviews both with the Claimant and her husband, and an acceptance by the Claimant of the length of time that she had spent in the United Kingdom, and that she had made two applications for Tier 1 visas, which prima facie indicated a wish to remain in the United Kingdom long-term.
>
> 20. The judge sets out the Claimant's case in paragraph 8, and makes conclusions and findings in paragraphs 9 and 10 which are set out above.
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> 21. The judge concludes that the evidence does not support the Secretary of State's assertion that the Claimant's immigration history shows her intention to reside in the United Kingdom on a long-term basis, but does not give adequate reasons for reaching that conclusion. The losing party, in this case the Secretary of State, reading paragraphs 9 and 10, would not understand why the evidence presented has not been analysed, and reasons given for accepting or rejecting it. The judge observes in paragraph 8 that there is no reason in law why the Claimant should not have made applications as a Tier 1 (Entrepreneur) but in my view this misses the point made by the Secretary of State, which is that there has been a change of circumstances since entry clearance as a visitor was initially granted. That is the issue that should have been analysed, considered, and findings made thereon."

9. The decision of the FTT was set aside and the hearing adjourned so that the decision could be re-made by the Upper Tribunal, after hearing further evidence from the Claimant.

Re-making the Decision

Preliminary Issues

10. The resumed hearing took place on 11th December 2015. The Claimant attended the hearing. It was confirmed that there was no need for an interpreter.

11. I ascertained that I had all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed. I had received the Claimant's bundle comprising 60 pages, and the Secretary of State's bundle with appendices A – I. I had also received Mostafa [2015] UKUT 00112 (IAC) from Mr Ahmed.

12. Mr Ahmed clarified that the Claimant's case was that this appeal should succeed under the Immigration Rules, on the basis that the Secretary of State could not discharge the burden of proof in relation to paragraph 321A. If that was not the case, reliance was placed upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention). No reliance was placed upon Appendix FM or paragraph 276ADE of the Immigration Rules.

13. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

Oral Evidence

14. The Claimant gave evidence adopting her witness statement dated 22nd April 2015 the contents of which may be summarised as follows.

15. The Claimant is married to Tahir Javed and she and her husband have two children, a daughter born in September 1999 who is 16 years of age at the date of hearing, and a son born in October 2001 who is 14 years of age at the date of hearing.

16. The children have been studying in the UK as Tier 4 (Child Students) since 2011. Both attend boarding school.

17. The Claimant applied for and was granted a multiple visit visa. This was valid between 25th October 2010 and 25th October 2020. The Claimant accepts that since that visa was issued she has spent the majority of her time in the UK rather than in Pakistan.

18. On 16th October 2014 she was seeking leave to enter the UK when she was refused leave to enter following an interview, and her leave subsequently cancelled.

19. The Claimant applied in July 2013 and July 2014 for a Tier 1 (Entrepreneur) visa because she intended to invest in a hotel in the UK. The second application was refused on the grounds of deception which means that if the decision stands, she will not be able to enter the United Kingdom for a ten year period. She has applied for a judicial review of that decision.

20. The Claimant has been visiting the UK since 2003. Since her multiple visa was issued in October 2010 she has not stayed in the UK in excess of six months in any visit.

21. The Claimant and her husband pay a substantial amount of money to fund the education of their children. They also own a property in the UK. In Pakistan the Claimant and her husband have a medical college and the Claimant is responsible for running a hostel for the students.

22. In answering questions put by Mr Ahmed the Claimant estimated that the cost of educating each of her children in the United Kingdom is between £45,000 and £50,000 per year.

23. The Claimant's husband has a visa to visit the UK, and has visited on five or six occasions since October 2014 when the Claimant was refused leave to enter.

24. If the Claimant had to leave the UK and was not allowed to visit, she said that she would also take the children out of school and educate them in Pakistan or in some other country.

25. The Claimant was cross-examined. She stated that she and her husband bought their property in the UK in 2005 or 2006. She confirmed that her frequent visits to the UK were because she did not wish to leave her children. That is why she spent most of her time in the UK.

26. When she initially applied for a visit visa she said that she had not intended to spend most of her time in the UK. When asked what had changed, she said that the children were very attached to her.

27. The Claimant said that between 2011 and 2014 her son, who had not settled well, only spent one week a month as a boarder and spent the rest of the time living with her at the family home in the UK. The son now spent three weeks a month as a boarder at school.

28. When asked whether the Claimant applied for her visa in 2010 to accompany the children to the UK, it was intended that her son spend his time at school as a boarder, the Claimant said that it was but because he did not settle he remained at home with her.

29. The Claimant confirmed that she had applied for Tier 1 (Entrepreneur) visas because her children were in the UK.

30. The Claimant was asked about a comment she made in interview in answer to question 26, when she said that if she was granted a Tier 1 visa she would start to wind up her business in Pakistan. She said that this was not the case and did not know why she said that. She stated that she was suffering with anxiety in the interview, and is still suffering from anxiety and high blood pressure.

31. The Claimant confirmed that she had in her possession in October 2014 a list of dates that she had remained in the United Kingdom and she confirmed the list was accurate.

32. In answer to some questions that I put, the Claimant stated that both her children returned to Pakistan in school holidays but this does not apply to half-term. She explained that her daughter boards full-time but returns to her at the family home every weekend.

33. In answer to a further question put by Miss Fijiwala the Claimant was asked where her son would stay if she was not in the UK, and she said she was not sure, her brother lived here, but her son was not used to staying with anybody else.

34. In answer to a further question put by Mr Ahmed the Claimant said that her son would stay with her brother if she was successful with her appeal and she was in Pakistan. She explained that when her son boards for a period of three weeks, she does not see him at weekends at home.

The Secretary of State's Submissions

35. Miss Fijiwala relied upon the decision dated 16th October 2014 refusing the Claimant leave to enter the UK and the Explanatory Statement dated 28th March 2015.

36. I was asked to find that there had been a clear change of circumstances since the Claimant was initially granted the visit visa in October 2010, as that visa was granted on the basis of a six week visit to accompany her children to the UK.

37. It was submitted that there had been a change of circumstances, and I was asked to note that the Claimant accepted in oral evidence that between 2011 and 2014 her son had lived with her in the family home in the UK during term-time. I was asked to note the total amount of time that the Claimant had spent in the UK, and while it was accepted that she had not overstayed, in that she had not remained in the UK for more than six months at any one time, it was clear that she was in fact residing in the UK rather than visiting.

38. I was asked to take into account that the Claimant had made two applications for leave to remain as a Tier 1 (Entrepreneur) and she had explained that she made these applications so she could stay in the UK long-term to take care of her children. I was also asked to note that she had indicated in interview that she was willing to wind up her business in Pakistan and have a manager run it.

39. In relation to the ten year ban on re-entry that had been referred to, I was asked to note that that did not relate to this issue, but related to a finding of deception in the latest application for a Tier 1 (Entrepreneur) visa. I was asked to dismiss the appeal with reference to the Immigration Rules

40. In relation to Article 8 it was accepted that family life had been established and I was asked to take into account section 117B(1) of the Nationality, Immigration and

Asylum Act 2002, in that the maintenance of immigration controls is in the public interest. It was submitted that in this case, by relying upon Article 8, the Claimant was trying to circumvent the Immigration Rules. I was asked to dismiss the appeal with reference to Article 8 on the basis that the Secretary of State's decision is in accordance with the law, necessary and proportionate.

The Claimant's Submissions

41. Mr Ahmed submitted that the burden of proof of proving a change of circumstances had not been discharged and pointed out that the Secretary of State had not provided the Tribunal with the application form submitted by the Claimant when she applied for her visa in October 2010.

42. Mr Ahmed submitted that it was not sufficient for the Secretary of State to contend in the refusal decision dated 16th October 2014 that the visa had been issued on the basis of a six week visit to the United Kingdom, to enable the Claimant to accompany her children. I was asked to note that a multiple visa had been issued, which entitled the Claimant to remain for periods of up to 180 days at a time. The Claimant had not overstayed.

43. Mr Ahmed submitted that as there was no evidence that the visa was initially issued for a six week visit, and there was no evidence that the Claimant had breached any of the conditions of the visa, there was no change of circumstances.

44. The Claimant was entitled to make applications for a Tier 1 visa. These applications did not amount to a change of circumstances. The Claimant's position was that she intended to remain in the UK for a substantial period only if she was granted a Tier 1 visa. Mr Ahmed confirmed that there was a judicial review application in relation to the refusal on the grounds of deception, as the Claimant did not accept that she had used deception in her application.

45. I was asked to note that the Claimant was spending very substantial sums of money in educating her children in the UK. The property that had been purchased was purchased prior to the visa being issued in October 2010 and so could not amount to a change of circumstances.

46. In the alternative, if I found that there was a change of circumstances I was asked to allow the appeal pursuant to Article 8 of the 1950 Convention outside the Immigration Rules. I was asked to take into account that the ten year ban that would currently apply, would have a huge impact upon the Claimant and her family.

47. I was referred to paragraphs 16 onwards of Mostafa. The Claimant had confirmed that her children intended to be studying in the UK for a considerable period of time, as they intended to go to university.

48. I was asked to consider the best interests of the children, which would not be served by the Claimant being excluded from this country. In relation to section 117B of the 2002 Act, Mr Ahmed pointed out that the Claimant speaks English and is financially

independent. I was also asked to note that her husband was still allowed to travel to the UK, and had done so on five or six occasions since the Claimant was refused entry in October 2014.

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

My Conclusions and Reasons

50. I have taken into account all the evidence, both oral and documentary, placed before me, and the submissions made by both representatives. I have considered the evidence in the round, and taken into account the circumstances as at the date of hearing.

51. The first issue that I have to decide relates to paragraph 321A(1) and whether there has been such a change in the circumstances of the Claimant's case since her leave was given, that it should be cancelled.

52. The issue therefore is whether there has been a change of circumstances since the Claimant's visa was issued in October 2010. The burden of proof is on the Secretary of State on a balance of probabilities.

53. Because the Claimant's visa was issued in October 2010, at that time the Secretary of State accepted that the Claimant satisfied the requirements of paragraph 41(i) in that the Claimant was genuinely seeking entry as a visitor for a limited period not exceeding six months, and (ii) intended to leave the United Kingdom at the end of the period of the visit. I therefore have to decide whether the Secretary of State has proved that the Claimant is no longer a genuine visitor who intends to leave the UK at the conclusion of her visit.

54. It is common ground that the Claimant's children have been granted visas enabling them to study at boarding school in the UK. It is also common ground that the Claimant's husband has a visa enabling him to visit his children.

55. I accept the Claimant's circumstances in Pakistan, in that she and her husband run a college and a hostel. I also accept that substantial sums of money are being paid to educate the children in the UK. I further accept that the Claimant and her husband own a property in the UK in which she is currently living, and that this property was purchased prior to the Claimant being granted a visa in October 2010.

56. It is relevant to consider the purpose for which the Claimant applied for a visit visa in October 2010. It is correct that the Secretary of State has not produced the visa application. However the Secretary of State contended in the decision refusing leave to enter dated 16th October 2014, that the visa was issued on the basis of a six week visit to the United Kingdom to enable the Claimant to accompany her children. The Claimant did not dispute that in her evidence. Mr Ahmed did not ask the Claimant why the visa had initially been issued. When cross-examined the Claimant confirmed that when she was granted her visit visa she did not intend to spend most of her time in the UK. She explained that there had been a change, and that she had

spent most of her time in the UK because her children were very attached to her. I set out below the dates during which the Appellant has remained in the UK since her visa was issued. These dates were prepared by the Claimant and confirmed by her as accurate;

'15/2/11 - 3/8/11

11/8/11 - 11/12/11

27/12/11 - 18/3/12

22/3/12 - 26/7/12

28/8/12 - 21/10/12

4/11/12 - 25/12/12

1/1/13 - 16/2/13

23/2/13 - 10/7/13

5/9/13 - 22/10/13

27/10/13 - 26/12/13

11/1/14 - 6/7/14.'

57. The Claimant calculated that she had spent 153 weeks in the UK between 15th February 2011 and 6th July 2014, and in that period spent 22 weeks four days in Pakistan.

58. It is common ground that the Claimant did make two applications for leave to remain as a Tier 1 (Entrepreneur) and that she in fact left the UK in July 2013 and again in July 2014 to make those applications in Pakistan.

59. The Appellant's husband confirmed when he was interviewed, (question 8) that in the last ten years the Claimant had spent most of the time in the UK because their children were studying. In answer to question 17 of his interview, the Claimant's husband stated that the Claimant was trying to legalise her long stay in the UK. He went on to say that if the Claimant did not obtain a Tier 1 visa she would return to Pakistan.

60. The Claimant in her interview in answer to question 30 stated that her son had not settled which was why she was spending more of her time in the UK. In her oral evidence the Claimant confirmed that she spent most of her time in the UK because of her children and that between 2011 and 2014 her son had only spent one week a month as a boarder in school, and had spent the rest of the time living with the Claimant in the family home in the UK. The Claimant confirmed that it had been intended that her son would board at school, but because he did not settle, he had to stay with her.

61. I was not referred by either representative to any legal authority, with the exception of Mr Ahmed referring me to Mostafa in relation to Article 8, but I have considered Sawmynaden (Family visitor-considerations) [2012] UKUT 00161 (IAC). This case is

not directly relevant to paragraph 321A, but is relevant in that guidance is given as to the considerations that should be taken into account when deciding whether an individual is a genuine visitor. That is relevant in this case, as the Secretary of State's case is that the visa was issued to the Claimant on the basis that she was a genuine visitor, but her length of stay in the UK, and her applications for Tier 1 visas, indicate that she is no longer a genuine visitor.

62. In brief summary the Upper Tribunal in Sawmynaden confirmed that there is no restriction on the number of visits a person may make to the UK nor any requirement that a specified time must elapse between successive visits. The periods of time spent in the UK and the country of residence will always be important. The express purpose of the visit and what an individual has done in the past and intends to do in future is material, together with the length of time that has elapsed since previous visits.

63. The links that the individual retains with the initial country of residence is a material consideration and the presence of other family members also a material consideration. The Tribunal is required to ascertain what is the reality of the arrangement entered into between the visitor, and the host (in this case the children) in the UK. Is the reality that the visitor is resident in the UK and intends to be for the foreseeable future?

64. Guidance is given that the issue may be approached by considering whether the reality is that the visitor is now no more than a visitor in her country of residence, as the purpose of the return home is confined to using her presence there solely as a means of gaining readmission to the UK, although this does not preclude her from remaining in the country of residence for the least amount of time sufficient to maintain her status as a genuine visitor.

65. There may be comparisons with a person who owns home in two different countries. Is he resident in both or a visitor to one of them?

66. Considering the period of time spent in the UK it is clear that the Claimant accepts that she has spent far more time in the UK than in Pakistan. It is also clear, using the Claimant's own Schedule, that there have been a number of occasions when she has spent substantial periods of time in the UK, and then returned to Pakistan for very short periods of time before returning again to the UK.

67. In my view, when the visa was granted, it was granted on the basis that the Claimant would be visiting the UK for a period of six weeks to accompany her children. The Claimant has not denied this. It was not envisaged, when the visa was granted, that the Claimant would be spending 153 weeks in the UK, in a period between February 2011 and July 2014, and just over 22 weeks in that period in Pakistan.

68. I find that the Claimant has accepted that there has been a change of circumstances since the visa was granted. It was intended that both her children would board at school in the UK and return to Pakistan in the holidays. However her son did not settle, which meant that for the period between 2011 and 2014, as confirmed by the

Claimant in her oral evidence he only attended boarding school for approximately one week a month, and spent the rest of the time living with the Claimant at the family home in the UK.

69. I conclude that on this basis, the Secretary of State has proved that there has been a change of circumstances since the visit visa was granted. I find that the Appellant has been residing in the UK rather than visiting, and therefore the Secretary of State was entitled to refuse her leave to enter and to cancel her leave. The Claimant's appeal therefore must be dismissed under the Immigration Rules.

70. I now consider Article 8. Mr Ahmed confirmed that no reliance was placed upon Appendix FM or paragraph 276ADE of the Immigration Rules. I have considered the five stage approach advocated in Razgar [2004] UKHL 27, and I find that the Claimant has clearly established family life with both her children. I find that the Respondent's decision to refuse her leave to enter and cancel her leave does interfere with that family life in the UK, and therefore Article 8 is engaged. I find that the proposed interference is in accordance with the law, on the basis that the Immigration Rules are not satisfied, and I then have to decide whether the proposed interference is necessary and proportionate. I find that the burden is on the Secretary of State to prove that the decision is proportionate.

71. When considering proportionality, I must consider the best interests of the children as a primary consideration. This however is not the only consideration, and can be outweighed by other factors, depending upon the circumstances. Generally when considering the best interests of children, it can be said that their best interests are to live in a family unit with both parents. I see no reason why this is not the case here. The Claimant and her husband have however decided that the best interests of the children will be served by being educated at a boarding school in the United Kingdom.

72. There is no reason why that cannot continue, if that is thought to be in the best interests of the children by their parents. The children could return to Pakistan in the school holidays, and I note that the Claimant's husband still has a visa entitling him to visit. It may be that the Claimant would be issued with another visa enabling her to visit the UK, although a multiple visa would be extremely unlikely, given the length of time she has remained in the UK during the term of this visa. There is the issue of a possible ten year ban on entry clearance on the Claimant, but that is a separate issue and is being challenged by way of judicial review.

73. My primary finding, based on the limited evidence before me, is that it would be in the best interests of the children to reside with both their parents, and I do not accept that this would entail allowing the Claimant, to live with the children in the UK on a long-term basis. The children are citizens of Pakistan, and I do not find that it would be adverse to their best interests for them to return to Pakistan to live with their parents. Alternatively, they could remain in education in the UK and return home in the holidays.

74. In considering proportionality I have taken into account the considerations set out in section 117B of the 2002 Act. I place weight upon the fact that the maintenance of effective immigration controls is in the public interest. I accept that the Claimant can speak English and is financially independent, but as confirmed in AM Malawi [2015] UKUT 0260, the Claimant can obtain no positive right to a grant of leave to remain whatever the degree of fluency in English or strength of financial resources.

75. I have also taken into account the principles in Mostafa when deciding whether the Secretary of State's decision is proportionate to the legitimate aim of enforcing immigration control. I note the concluding sentence of paragraph 24 which is set out below;

> "... In a limited class of cases where Article 8(1) ECHR is engaged the refusal of entry clearance must be in accordance with the law and proportionate. If a person's circumstances do satisfy the Immigration Rules and they have not acted in a way that undermines the system of immigration control, a refusal of entry clearance is liable to infringe Article 8."

76. In this case, the Claimant has not satisfied the Immigration Rules, and has, in my view, acted in a way that undermines the system of immigration control by reason of the length of time spent in the UK. My conclusion is that in being asked to allow the appeal under Article 8 outside the Immigration Rules, I am being asked to circumvent the Immigration Rules, and allow the Claimant to reside in the UK while her children are studying, which may be for a substantial period of time.

77. I bear in mind what was stated in paragraph 57 of Patel and Others [2013] UKSC 72 that "it is important to remember that Article 8 is not a general dispensing power."

78. I conclude, for the reasons given above, that the Secretary of State's decision is in accordance with the law, necessary and proportionate, and does not breach Article 8 of the 1950 Convention.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision. The Claimant's appeal is dismissed under the Immigration Rules and on human rights grounds.

Anonymity

No anonymity direction was made by the First-tier Tribunal. There has been no request for anonymity made to the Upper Tribunal and no anonymity order is made.

Signed Date 15th December 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The Claimant's appeal is dismissed. There is no fee award.

Signed Date 15th December 2015

Deputy Upper Tribunal Judge M A Hall