Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01334/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons**
Oral determination given following hearing	**Promulgated**
On 19 September 2017	**On 10 October 2017**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MRS BUSHRA ARSHAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Jones, Counsel, instructed by Farani, Javid, Taylor, Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a national of Pakistan who arrived in this country on 1 August 2006 with leave to enter as a student which was renewed on a number of occasions. She has a husband who had leave to enter as a dependant and whilst in this country they have had three

children. The oldest is now 8, the second child a little over 2 and a third child was born in August 2016.

2. The appellant applied for further leave to remain on Article 8 grounds which decision was refused on 18 June 2016. At that time her husband had an outstanding appeal against a decision to refuse him further leave and in the course of the refusal decision in respect of her application the respondent notified the appellant that she should state any further reasons she might have for being allowed to remain pursuant to Section 120 of the Nationality, Immigration and Asylum Act 2002. At the time of the application her youngest child had not yet been born. Subsequently, the appellant's position changed in that in January 2016 her husband was given indefinite leave to remain following a successful appeal which he had brought against the respondent's decision to refuse his application for leave to remain. It was after this that the couple's third child was born and that child is a British citizen and has obtained a British passport. The reason why he is a British citizen is because at the time of his birth his father was settled here because as noted by that time he had indefinite leave to remain.

3. The appellant's appeal against the decision which had been made in June 2015 was heard at Hatton Cross before First-tier Tribunal Judge Plumptre on 3 October 2016 but in her Decision and Reasons promulgated on 10 November 2016 she dismissed the appeal. She did so even though the appellant's circumstances by this time had changed and in addition to having a child who is over 7 years old she was also the mother of a British citizen, that is the youngest child and both of these children were "qualifying children for the purposes of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 because within Section 117D a qualifying child is defined as a person who is under the age of 18, who is either a British citizen or who has lived in the UK for a continuous period of seven years or more.

4. Section 117B(6) of the 2002 Act provides as follows:

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

5. When this appeal was first before me on 18 July 2017, I noted that had the judge been able to take into consideration the new position of the appellant as at the date of the hearing the changes in her circumstances (that is that she was now the mother of a British child) were significant. I noted also that there was a potential difficulty in that by Section 85 of the 2002 Act which came into force in respect of applications made after April

2015 “The Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so”. I also gave my reasons for finding that the birth of the new baby was technically a “new matter” having regard to Section 85(6).

6. However, I also noted (because I had been referred to it) that the respondent’s guidance published to caseworkers and other employees set out the appropriate course which should be followed where an application of this sort (that is to be allowed to rely on new evidence) is made and according to this guidance the respondent should normally give permission for these new matters to be considered because otherwise a new application would inevitably be made which would lead to a considerable wasting of both the respondent’s time and ultimately the Tribunal’s time also.

7. Regrettably the judge did not in my judgment consider properly whether or not she had jurisdiction to consider new matters and if she did not to have made proper enquiry as to what guidance there was and whether it was appropriate to consider whether an adjournment should be granted so the matter could be properly canvassed before her (see paragraph 17 of my earlier decision). Accordingly, for this reason I found that Judge Plumptre’s decision had contained a material error of law such that it had to be remade. I was particularly concerned that the judge refused to draw the inference from the fact that the youngest child was a British citizen that the father had indefinite leave to remain which I regarded as inexplicable, because as was accepted on behalf of the respondent at the previous hearing before me, there was simply no other basis upon which the youngest child would or could have been entitled to British citizenship.

8. Subsequent to my giving this decision as to error of law (but before the decision was promulgated) the respondent notified the Tribunal that “In line with our guidance, it is appropriate to give consent to the new evidence to be considered by the Tribunal” and so at this hearing, in which I shall be remaking the decision, I am able to take account of all of the evidence, and in particular the fact that the appellant is the mother of a British citizen child.

9. The question therefore which this Tribunal has to consider in light of Section 117B(6) of the 2002 Act, it being the case that the appellant has a genuine and subsisting parental relationship with not only the older child who has been here for over seven years and is thus a qualifying child for these purposes but also the baby who is a British citizen, is whether “it would not be reasonable to expect the child to leave the United Kingdom”.

10. Having regard to the respondent’s policy in such circumstances, on behalf of the respondent, Mr Clarke properly concedes that he cannot argue that it would be reasonable to expect the British citizen child to leave the UK and therefore he does not oppose this appeal. There was an issue as to whether or not the appellant is entitled to indefinite leave to remain on the basis of ten years’ lawful residence, but in light of the fact that there was a

gap of some months in her lawful residence that aspect of the appeal is no longer pursued.

11. Accordingly, in light of the concession made on behalf of the respondent, which in the circumstances of this case was clearly rightly made, I have no hesitation in allowing this appeal on the basis that the public interest does not require this appellant's removal having regard to the provisions of Section 117B(6). I accordingly re-make the decision as follows:

Notice of Decision

I set aside the decision of First-tier Tribunal Judge Plumptre as containing a material error of law and substitute the following decision:

The appellant's appeal is allowed.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 9 October 2017