



**Upper Tier Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/03199/2015

THE IMMIGRATION ACTS

Heard at Manchester

On 3 July 2017

**Decision &
Promulgated
On 10 July 2017**

Reasons

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

and

Jane Conteh

[No anonymity direction made]

Appellant

Claimant

Representation:

For the claimant: Mr J Nicholson, instructed by CAB (Bolton)

For the appellant: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Durance promulgated 7.4.17, allowing on immigration grounds the claimant's appeal against the decision of the Secretary of State, dated 17.11.15, to refuse her application made on 5.8.15 for FLR on private and family life grounds.
2. The Judge heard the appeal on 30.3.17. The appeal of Edward Marvie was

dismissed.

3. First-tier Tribunal Judge Woodcraft granted permission to appeal on 4.5.17.
4. Thus the matter came before me on 3.7.17 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the decision of Judge Durance should be set aside.
6. The appellant made an asylum claim in 2010, to the effect that she would be subjected to FGM on return to Sierra Leone. She had come to the UK in 2006 and given birth to two children, in 2008 and 2010, the father of whom is Mr Marvie. Her appeal against the refusal of her protection claim was dismissed in the First-tier Tribunal, with Judge Hague concluding that the appellant was a dishonest witness giving a false story and that there was no risk on return. She was no longer in contact with the father of the children. The appellant was granted permission to appeal to the Upper Tribunal, but Judge Lever found no error of law and dismissed her appeal.
7. The appellant was subsequently granted a period of discretionary leave (DL), for a period of 30 months from 28.2.13. Within extant leave, she made an application for FLR on 5.8.15. She maintained she and her daughter were at risk of FGM on return to Sierra Leone. She also relied on private and family life outside the Rules pursuant to article 8 ECHR.
8. Judge Durance found no risk on return. The judge also found that the appellant was not in any genuine or subsisting relationship with Mr Marvie. However, the judge concluded that the appellant met the requirements of paragraph 276ADE, following MA (Pakistan) [2016] EWCA Civ 705, to find that she had a genuine and subsisting relationship with a qualifying child (P having lived in the UK for at least 7 years) and it is not reasonable to expect the child to leave the UK, and in the best interests of the children that the appellant remain with them in the UK as their principle carer.
9. The grounds complain that whilst the judge referenced MA (Pakistan), the decision failed to take account of the appellant's conduct and all relevant factors, including the 117B public interest considerations and wrongly gave credit for the appellant not claiming benefits but working, when the 117B factors are either neutral or negative, not positive. It is submitted that the judge failed to give any adequate consideration to the mandatory public interest factors.
10. In granting permission to appeal, Judge Woodcraft observed that although the grounds made complaint about s117B public interest considerations, those only applied when the matter is being considered outside the Rules, and it is clear that the judge allowed the appeal under the Rules. However,

Judge Woodcraft considered it arguable that in considering the reasonableness test, the judge failed to take account of the wider public interest, in accordance with MA (Pakistan), and that this may have affected the result.

11. I cannot see how the appeal could have been allowed under paragraph 276ADE at all. That the appellant has a genuine and subsisting relationship with a qualifying child is not the test for the appellant under 276ADE, which is a ground relating to private life, not a family life relationship with a child. The appellant is not under the age of 18 and thus the test of reasonableness under 276ADE(iv) does not arise. The judge has conflated the application by the appellant with the reasonableness test applicable to a child under the age of 18 who has lived in the UK for at least 7 years, and the s117B(6) reasonableness test outside the Rules. Mr Nicholson conceded that the appellant could not meet the Rules for leave to remain under either Appendix FM or paragraph 276ADE of the Immigration Rules. The appeal could only have been allowed outside the Rules.
12. However, from the findings of the First-tier Tribunal, I am satisfied that the appellant has a genuine and subsisting relationship with a qualifying child and thus consideration of s117B(6) outside the Rules would have been appropriate. In MA (Pakistan) the Court of Appeal held that in considering s117B(6) the court should have regard to the “conduct of the applicant and any other matters relevant to the public interest,” and that “the only significance of section 117B(6) is that where the seven year rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted.” However, it was acknowledged that a child seven years’ residence must be given significant weight in the article 8 proportionality balancing exercise:

“After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child’s best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.”

13. Relying on EV (Philippines) the Court of Appeal stated, “...the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child’s best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.” Reference was also made to the Secretary of State’s published guidance in August 2015 in the form of Immigration Directorate Instructions entitled “Family Life (as a partner or parent) and Private Life: 10 Year Routes” in which it is expressly stated that once the seven years’

residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). It was said that to require compelling reasons to refuse leave would be putting the threshold too high.

14. The judge concluded that despite the assertion to the contrary in the refusal decision, the appellant remains a single parent of two children. As Mr Nicholson put, her situation is no different to when she was granted DL in 2013. It is not the case that she and the children can continue family life in Sierra Leone with Mr Marvie.
15. The judge could have found that the child met the requirements of 276ADE for leave to remain, on the basis that it was not reasonable to expect the child to leave the UK, and in effect that is what the judge must have found, when the decision is read as a whole. The child is not to blame for the appellant's conduct and poor immigration history and the wider public interest considerations do not apply when the child is being considered under 276ADE.
16. It would then follow that in an article 8 ECHR proportionality assessment outside the Rules, the appellant would have met s117B(6), but that even without that, once the child meets the requirements for LTR, it cannot be proportionate to require the appellant to leave the UK. In essence, if the child succeeds, then so must the mother, as the sole and primary carer for that child. There can be no question of separating the family.
17. Thus whilst the decision should have been framed as allowing the appeal on article 8 ECHR grounds outside the Rules, the effect of the decision would have been the same as allowing it under the Rules. Neither Mr Nicholson nor Mr Bates could identify any advantage to remaking the decision to allow the appeal on human rights grounds, dismissing it on immigration grounds. In the circumstances, whilst there is an error of law, it is not one material to the outcome of the appeal.
18. I make clear that if the appeal had been set aside on grounds of error of law, I would have immediately remade it by allowing the appeal on human rights grounds, relying on the relevant findings of the First-tier Tribunal and on the basis that the even taking the wider public interests and the appellant's conduct into account, it would not be reasonable to expect the qualifying child P to leave the UK, particularly bearing in mind that that child would meet the requirements of paragraph 276ADE and the reasonableness test therein, even with the MA (Pakistan) wider considerations applied. In such an assessment, the child is not to be blamed for the conduct of the parent, or her poor immigration history, and there was ample evidence of the child's integration into the UK, where she was born some 9 years ago. The best interests of the child are to remain in the UK, which is a primary but not paramount consideration. The child has no knowledge of and has never lived in Sierra Leone. The child is now part-way through primary school education and it would be disruptive and traumatic to now remove the child from the UK. The second child is now also approaching the seven-year threshold. The parent and the children

were given DL in 2013 and there is in fact no material difference to their circumstances other than by the elapse of time they have acquired a greater degree of integration into life in the UK.

Decision

19. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such as to require it to should be set aside.

I do not set aside the decision.

The appeal remains allowed.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable

A handwritten signature in black ink, appearing to be 'James L. Pickup', written in a cursive style.

Signed

Deputy Upper Tribunal Judge Pickup

Dated