



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04155/2018

THE IMMIGRATION ACTS

Heard at Field House
On 18th July 2018

Decision and Reasons Promulgated
On 09th August 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

FATIMA QURESHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Lay, instructed by Abbott Solicitors.

For the Respondent: Ms N Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Pakistan national with three children and a settled husband in the United Kingdom. The children were born on 29 December 2009, 20th of May 2013 and 11 November 2017. The eldest child has lived in the United Kingdom since he was born.
2. The appellant seeks to challenge the determination of First Tier Tribunal Judge Bristow, (determined on the papers) promulgated on 12 April 2018 which refused the appellant's appeal against the refusal of her human rights claim and under article 8.

3. The judge made the following findings

- (i) the appellant arrived in the United Kingdom 25 October 2008 pursuant to a visa valid from 30 September 2008
- (ii) her eldest son (M) was born in the United Kingdom, he had lived continuously in the UK for seven years
- (iii) her application for further leave to remain was rejected on 26 April 2011
- (iv) she was granted a further leave to remain on 25 June 2013 to 5 August 2016
- (v) that leave was curtailed to expire on 18 July 2015
- (vi) she was given further to leave to remain as a dependent partner on 17 July 2015 to 14 May 2017
- (vii) on 11 May 2017 she applied for further leave to remain pursuant to appendix FM
- (viii) during her leave in the United Kingdom three children were born as detailed above
- (ix) the judge found the application did not fall for refusal on the grounds of suitability
- (x) the appellant had not applied under the partner route in appendix FM
- (xi) it was an issue whether the appellant met the eligibility requirements and whether the appellant met paragraph E-LTR PT 2.3
- (xii) it was not agreed that EX.1 applied because the judge was not satisfied that the appellant had adduced sufficient evidence to prove she could meet E - LTR PT 2.2. She had not adduced evidence that the children were British citizens.
- (xiii) the appellant had not adduced evidence to prove why it would not be reasonable to expect M to leave the UK. He was eight years old and of an age where "he could adapt".
- (xiv) The appellant had not adduced evidence that there would be insurmountable obstacles to family life with her husband continue outside the UK
- (xv) the appellant had not adduced evidence to prove it would not be reasonable to expect M to leave the UK
- (xvi) the key question was whether the refusal was a disproportionate interference with the appellant's right to respect her for family life
- (xvii) the judge set out the "cons" and found that M could not meet the requirements under paragraph 276 ADE
- (xviii) the judge applied Section 117B finding the appellant had not adduced evidence she could speak English, or she was financially independent
- (xix) the appellant could not rely on section 117B (6) because she had not adduced evidence to prove that it would not be reasonable to expect M to leave the UK

- (xx) the “pros” whether that even on the limited evidence available she had a long-standing family life husband and children. She was lawfully in the United Kingdom when her relationship and private life performed. Any move from the UK would cause difficulty to the family and best interests of the children would be to remain in the UK with both parents.
 - (xxi) The judge found balanced cell against the appellant she had not “proved to the required standard that there are very compelling circumstances which make any interference with respect for her private and family life disproportionate”
4. Permission to appeal was granted by first-tier Tribunal Judge Parker on the following grounds
- (i) the judge’s failure to exercise discretion regarding the service of the evidence
 - (ii) failure to consider the best interests of the children
 - (iii) insufficiency of reasons regarding paragraph 276 ADE (vi)
 - (iv) no reference to relevant case law in particular **MA (Pakistan)** [2016] EWCA Civ 705

The Hearing

5. At the hearing, Mr Lay emphasised that the judge had ignored the guidance in **MA (Pakistan)**. The husband had Indefinite Leave to Remain (ILR) but this had not been specifically referred to by the judge. Further the judge had failed to give significant weight to the fact that the eldest child had lived in the United Kingdom for seven years. The appellant could succeed under appendix FM EX.1. She had a genuine and subsisting parental relationship with the child who had lived in the United Kingdom continuously for at least seven years immediately preceding the date of the application and it would not be reasonable to expect the child to leave the United Kingdom. At the hearing Mr Lay relied on **MA (Pakistan)** and **TZ (Pakistan)** [2018] EWCA Civ 1109. The judge had not factored all relevant points into his checklist. Further the judge had failed to acknowledge and address the best interests of all three children. Mr Lay submitted that the appellant fulfilled both the key points in EX.1 and the appeal should have been allowed.
6. Miss Willocks-Briscoe whilst not conceding the appeal, with candid fairness, drew my attention to the Home Office guidelines on Family Migration: Appendix FM section 1.0 B family life (as a partner or parent) and private life: 10 year routes published on 22 February 2018. She acknowledged that all three children had been granted British citizenship

Conclusions

7. The judge in my view had indeed failed to approach the appeal in line with **MA (Pakistan)** which explained as follows

[49] "However, 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."

8. Nothing in the form of 'powerful reasons' was set out by the judge, bearing in mind he acknowledged that the eldest child had been in the UK for 7 years. Nor did the judge, as Ms Willocks-Briscoe acknowledged, refer to the other two very young children. With regards the eldest child the judge merely stated that 'he could remain with his father'. The question of separation of the mother was not addressed. Those errors were material.

9. I therefore find an error of law and remake the decision. On remaking the decision, I set aside the findings of the judge set out from (xii) above. It was accepted by the judge that the appellant met the Rules on suitability. There was no question that the appellant had entered the UK illegally or had been involved in any form of deception or criminality. Subsequent to the hearing there was confirmation that the father had been granted ILR and the three children granted British citizenship. Mr Lay argued that had the immigration rule under EX.1 had been met and that would have been determinative of the proportionality assessment under Article 8 (the basis on which this appeal was being decided).

10. All three children have lived in the UK all their lives and were born in the UK. The eldest is at school here. Their father has ILR and is settled and working. There is no doubt that the children's best interests are to remain in the UK with both parents. As Elias LJ stated in **MA (Pakistan)** at paragraph 46

'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'.

11. Evidence was produced to show the children are now British citizens and the Guidance cited above in relation to Family Migration clearly spells out that

'where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child will have to leave the UK because, in practice, the child will not, was not likely to, continue to live in the UK with another parent or primary carer, EX.1 (a) is likely to apply'.

12. It would not be in the best interests of these young children to be separated from their mother even on a temporary basis. She is the primary carer and has cared for them since birth. There was a witness statement from the eldest child confirming his dependence on his mother. I accept that. The upshot of removing the mother would inevitably entail an expectation that the children would leave the UK. There was no suggestion that there was anyone else able to care for the children.
13. It was argued that E-LTR PT 2.3 could not be fulfilled but even if that were the case, (the father and mother live together), with respect to article 8, Section 117B must still be applied in an article 8 assessment on proportionality. In this instance, the appellant has lived in the UK for nearly 10 years, was admitted lawfully, has formed her relationship when here lawfully (albeit there appears to have been some break during her leave) and she must have some knowledge of English. Even if she were not financially independent, the interests of the three British citizen children, although not a trump card, are a primary consideration and would outweigh those considerations. That said, as identified, Section 117(6) applies; the appellant has a genuine and subsisting relationship with her children of whom the evidence demonstrated she was the primary carer, and it would not be reasonable to expect the children to leave which they would do if the appellant were removed. There are no powerful reasons to remove this appellant. As Ms Briscoe submitted the Home Office Guidance, quoted above, gives the answer. In my view the refusal was a disproportionate interference with the rights of the appellant and with the rights of her children and husband. The appeal is therefore allowed.
14. The judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12 (2) (a) of the Tribunal's Courts and Enforcement Act 2007 and remake the decision under Section 12 (2) (b) (ii) of the TCE 2007.

Order

Mrs Qureshi's appeal is allowed on human rights grounds.

Signed

Date 18th July 2018

Helen Rimington

Upper Tribunal Judge Rimington