



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12267/2016

THE IMMIGRATION ACTS

Heard at Field House
On 5th March 2018

Decision Promulgated
On 15th June 2018

Before

DEPUTY JUDGE FARRELLY OF THE UPPER TRIBUNAL

Between

MRS HAFSA BIBI
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Nicholson, Counsel, instructed by JJ Law Chambers

For the respondent: Mr Avery, Home Office Presenting Officer.

DETERMINATION AND REASONS

Introduction

1. The appellant is a national of Pakistan born on the 10th February 1984. She came to the United Kingdom on 21 April 2009 to join her husband, hereinafter referred to as her sponsor. They were married in Pakistan in 2002. He is originally from Pakistan and became a naturalised British citizen in January 2015. He is a director of a plumbing company.

2. She obtained various leaves. On 13 February 2010 she gave birth to their first child in the United Kingdom. On the 9 April 2011 she gave birth to their second child. On 22 October 2014 she gave birth to their third child.
3. On 9th February 2016 she submitted an application for leave to remain on the basis of family and private life. This was refused on 27 April 2016.
4. Her application was considered under appendix FM of the immigration rules and refused on suitability grounds. This was in relation to an ETS result she had submitted as part of her application for leave to remain as a spouse on 12 March 2013. The respondent believed the test was taken by somebody else. In relation to this issue she had been interviewed on 9 September 2015 and was unable to participate as she had no ability to converse in English. The papers contain a record of the interview, which had to be abandoned because of this. Her application was also refused on eligibility ground because she had not shown a valid English language test.
5. The grounds of appeal focused on her three children who are British nationals.

The First Tier Tribunal

6. Her appeal was heard by Judge of the First Tier Tribunal Suffield -Thompson on 25 May 2017 who, in a determination promulgated on 30 May 2017, dismissed it.
7. The appellant gave evidence using an interpreter. She said she has her parents, four brothers, and three sisters in Pakistan and visited them in 2015. Her sponsor gave evidence and said he had no other relatives in the United Kingdom to care for the children when he was at work.
8. The presenting officer submitted that the appellant still could not demonstrate any ability in English, two years after she apparently was able to pass the test. She referred to the interview with the respondent which had to be cancelled because of her inability to converse. The presenting officer indicated it would take about 90 days for the processing of a Visa application in Pakistan and submitted it would be appropriate for the appellant to return to Pakistan and apply from there for entry clearance. Her representative submitted that she did take and pass the test. To expect her to return to Pakistan and reapply would cause real disruption for the family.
9. The judge found that she had obtained the certificate by fraudulent means. The judge referred to the decision of SM and Quadir -v- SSHD (ETS -Evidence - burden of proof) UKUT 00229 and that the initial burden of proof was on the respondent to prove reasonable grounds for suspicion. If this was established the appellant then had to show she met the immigration rules on the balance of probabilities. The judge relied on the generic evidence produced and the screen-print look up tool. The latter stated that the test was declared invalid. The judge referred to the appellant's evidence as being most significant. The judge found her account of the test vague; even allowing for the fact it was five years ago.

Moreover, she continued to display a total lack of ability in English. There was also reference to her inability to converse in the interview arranged in September 2015. The judge found it perfectly apparent at the hearing that she had no English at all despite having then lived in the United Kingdom six years.

10. The judge went on to consider article 8, noting the length of time she had been here and that her husband has a business here. Her husband is British as are their three children. At that stage they were aged eight, seven and under three.
11. The judge made general reference to the case law about the best interests of the children and concluded it would be totally contrary to the children's best interests for them to leave the United Kingdom and to live in Pakistan.
12. The judge referred to section 117 B as being to the forefront in consideration of the appeal. The judge commented that the appellant did not speak English and had not integrated, despite having been here six years. The judge acknowledged that she was not a burden on the taxpayer because her husband was working and supported his family.
13. The judge took the view that the appellant could go back and make a spousal application to return. The judge referred to the close family she had in Pakistan with whom she could stay. Her youngest child was not at school yet and could go with her. The judge referred to the short time it would take to process an entry clearance application. The judge also found that the older children would not be damaged by the separation and that the sponsor could pay for childcare so he could continue at work.

The Upper Tribunal

14. Permission to appeal was granted, by coincidence, by me. The grounds were settled by Mr Nicholson, who appeared at the Upper Tribunal. I have also been provided with written submissions for which I am obliged.
15. At hearing, Mr Nicholson realistically did not seek to challenge the finding that the appellant engaged in deception in obtaining her English-language certificate. Rather, he relied upon the aspects of the submissions dealing with the children.
16. Mr Avery, Home Office Presenting Officer, referred to the public interest in countering the widespread fraud which had been perpetrated by proxy test takers. He referred to the various leaves the appellant had obtained. He acknowledged that the judge found the children should not be expected to leave.
17. In the course of the hearing I was referred to the wording of section 117 B (6) `...the public interest does not require the person's removal where-(a) that the 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'. I was referred to the decision of R (on the application of MA(Pakistan) (and others)) [2016] 1 WLR 5093.

Consideration.

18. Much of the decision of First tier Judge Suffield –Thompson was taken up with the proxy testing issue. It is only at the end the focus turned upon article 8 and the children. In considering how the judge dealt with this I start with the now well-established principal a child must not be blamed for matters for which they are not responsible, such as the conduct of a parent (see the Supreme Court case of Zoumbas at para.10.7). The three children concerned are British. They have lived here all their lives.
19. The judge referred to the case law about the best interests of the children. It is not necessary for a First Tier Tribunal decision to go through in great detail the development of case but it is helpful if a brief overview is provided of the established principals. This was absent but it can be implied that the judge appreciated the case law which has developed around children affected by immigration decisions. Section 55 of the Borders, Citizenship and Immigration Act 2009 is not referred to but it is clear the judge has focused on the best interest of the children. The judge firmly concluded that their best interests, where to remain in the United Kingdom. This was a clear finding which the judge was entitled to make and which is not challenged. The judge pointed out that they are United Kingdom citizens and entitled all the benefits and rights that this status confers, echoing the comments of Lord Kerr in ZH Tanzania (FC) v SSHD [2100] UKSC 4 at para 47.
20. Although case law was not referred to by the judge it is undisputed jurisprudence that what is in the best interests of a child is not a trump card in an immigration appeal. Those interests can be outweighed by wider public interest considerations.
21. The judge indicated that section 117 B was a significant factor in deciding the appeal. A judge is obliged to have regard to these factors. The judge has already made a finding that the appellant had engaged in deception with regard to the English language test and bore this in mind in considering the article 8 proportionality assessment. At paragraph 34 the judge points out that the appellant does not speak a word of English, despite having lived here six years and had clearly not integrated into life in United Kingdom.
22. The judge did not specifically refer to section 117 B (6). It is not an error of law to fail to refer to ss.117B considerations; what matters is substance, not form (see Dube (ss.117A-117D) [2015] UKUT 00090 (IAC). In MA (Pakistan) [2016] EWCA Civ 705 the Court of Appeal, being bound by MM (Uganda) concluded, albeit with reservations, that section 117B (6) does not focus exclusively on the best interests of an affected child but embraces also the public interest.
23. I find para 35 could have been expressed better. It is clear however that the judge appreciated the primary consideration was to decide what was in the best interests of the children. The judge reached a decision which is unchallenged, namely, that the children's best interests are served by being in the United Kingdom. However,

whilst those interests as paramount they are not overriding. The judge clearly balanced their interests against the public interest in immigration control.

24. The judge referred to the deception undertaken by the appellant. This was a fundamental attack upon the respondent's efforts at promoting integration. The judge commented on the length of time the appellant had been in this country and the absence of any integration. The judge acknowledged that the family were not a financial burden on the State. The judge clearly evaluated the competing factors. At paragraph 36 the judge considered how the appellant would fare in Pakistan. It was pointed out she had family members there for support. She had been back relatively recently. The judge considered the effect of her separation from her children. The judge considered the possibility of making an entry clearance application. The presenting officer had indicated a relatively short turnaround time. The outcome of such an application could not be predicted but the judge envisaged a relatively short separation.
25. The judge did not see the children as being emotionally harmed in this situation. The judge was not saying that the youngest child would return to Pakistan but offered this as a possibility. This was because the child did not have school commitments. The children were not being forced to leave the United Kingdom as they could remain with their father. The judge made the valid point that their father could pay for childcare when he was at work.
26. The judge referred to the appellant having used fraudulent means to try and remain in the United Kingdom and concluded she should not be able to circumvent the rules as she has sought to do.
27. Whilst individual parts of the decision are open to criticism when looked at in the round the judge has, albeit succinctly, set out the competing factors. Having balanced these the judge reached a conclusion that was open to them. Consequently, I find no material error of law demonstrated. Given the restricted right of appeal the judge incorrectly refers to dismissing the appeal under the immigration rules. This however makes no material difference to the outcome.

Decision

No material error of law has been demonstrated in the decision of First Tier Judge Suffield -Thompson. Consequently, that decision dismissing the appellant's appeal shall stand.

Francis J Farrelly
Deputy Upper Tribunal Judge

Date: 11 May 2018