



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001618
First-tier Tribunal No:
EA/04209/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 August 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Noreen Shoaib
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr O Sobawale, Counsel, instructed by Schaws Solicitors
For the Respondent: Mr C Williams, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 9 February 2023

DECISION AND REASONS

1. The appellant is a national of Pakistan. On 23 November 2020 the appellant applied for an EEA family permit as the parent of two children who are British citizens. The application was made and considered in accordance with Regulation 16(5) of the Immigration (European Economic Area) Regulations 2016. The appellant claimed to be the primary carer of the children and claimed the children (who currently live with her in Pakistan) are unable to reside in the United Kingdom without the appellant.
2. The respondent accepted the appellant and her children are related as claimed. The respondent also accepted that the appellant had provided sufficient evidence to demonstrate that she is the primary carer of the

children. The application was refused because the respondent was not satisfied that the appellant's children would be unable to reside in the United Kingdom without the appellant.

3. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Chohan for reasons set out in a decision promulgated on 12 December 2021. The appellant claims Judge Chohan proceeds upon the mistaken premise that the appellant's sponsor is her husband (i.e. the father of the British Citizen children), whereas the sponsors for the purposes of the application are in fact her the children who are British Citizens. Second, the Judge failed to give adequate reasons for his conclusion that the appellant's husband would be able to provide care for the children without any adequate assessment of the best interests of the children.
4. Permission to appeal was granted by First-tier Tribunal Judge Connal on 9 February 2022.
5. Before me, Mr Sobawale submits Judge Chohan treated the children's father as the sponsor and that was material to the outcome of the appeal since the judge focused upon the absence of evidence from the children's father. He submits there has been a breakdown in the relationship between the appellant and her husband and the lens through which the facts were considered by the judge, is tainted by the misunderstanding. He submits there was no evidence before the First-tier Tribunal that the children's father was supporting the children either financially or otherwise, and the judge assumed their father would be able to take up responsibility for the children.
6. The respondent has filed a rule 24 response dated 15 March 2022. The respondent concedes Judge Chohan mischaracterised the appellant's husband as the 'Sponsor', although that in itself is immaterial. The respondent claims the judge was plainly aware that the issue in the appeal was whether the children would be unable to reside in the UK if not accompanied by the appellant. The children's biological father is still married to the appellant (she is his second wife and he resides in the UK with his first wife) and there was evidence before the Tribunal that he remains involved in the children's lives.
7. The respondent concedes however that in Patel v SSHD [2019] UKSC 59, the Supreme Court considered the scope of the principle in Ruiz Zambrano v Office National de l'Emploi (ONEm) (C-34/09), 3 WLUK 264, under which a third-country national is entitled to a right of residence to avoid their Union citizen child, being deprived of the genuine enjoyment of their Union citizenship rights as a result of their being compelled, by the third-country national's departure, to leave Union territory. Lady Arden said, at [24] to [31] that the court is required to take account, "in the best interests of the child concerned", of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium". The Supreme Court held the test of

compulsion is thus a practical test to be applied to the actual facts. The respondent accepts that a more nuanced assessment was required rather than the broad consideration as to whether or not the children's father could, in theory, become their carer in the UK.

8. Before me, Mr Williams submits there was some evidence before the Tribunal of the appellant's husband having visited the children in Pakistan previously as referred to by the judge in paragraph [6] of his decision. The visits had been referred to in the application form. Mr Williams accepts however that there is a material error of law in the decision of the First-tier Tribunal for the reasons set out in the respondent's rule 24 response.

Decision

9. The respondent concedes the decision of Judge Chohan is vitiated by an error of law. On its own, I am not satisfied that the reference by Judge Chohan to the appellant's husband as the sponsor is material because reading the decision as a whole, I am satisfied Judge Chohan was aware that the issue here is whether the children (who currently live with the appellant in Pakistan) are unable to reside in the United Kingdom without the appellant. However I am satisfied that, as the respondent also accepts, Judge Chohan has failed to carry out the nuanced analysis that is required to determine whether the children are being deprived of the genuine enjoyment of their Union citizenship rights as a result of their being compelled, by the appellant's absence, to remain in Pakistan rather than in the United Kingdom. I do not therefore need to say anything further about the grounds of appeal.
10. It follows that I allow the appeal and set aside the decision of First-tier Tribunal Judge Chohan. As to disposal, I must then consider whether to remit the case to the FtT, or to re-make the decision in the Upper Tribunal. Both Mr Sobawale and Mr Williams submit that in light of the errors of law, and the fact sensitive assessment that will be required afresh, the appeal should be remitted to the First-tier Tribunal for hearing *de novo* with no findings preserved. Having considered the Senior President's Practice Statement at paragraph 7.2, I have decided to remit the appeal to be heard afresh by another judge of the FtT. The decision of Judge Chohan is short and the nature and extent of any judicial fact-finding necessary will be extensive. No findings can be preserved. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

11. The decision of First-tier Tribunal Judge Chohan is set aside.
12. The parties will be notified of a fresh hearing date in due course.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

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10 July 2023