



IAC-YW-LM-V1

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

Appeal Number: IA/15002/2014

THE IMMIGRATION ACTS

Heard at Field House
On 10th August 2015
Prepared on 11th August 2015

Decision & Reasons Promulgated
On 20th August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MRS AYESHA MALIK
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Solomon of counsel

For the Respondent: Mr R Walker, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 4th of December 1984. She appealed against a decision of the Respondent to refuse her application to vary leave to remain in the United Kingdom. Her appeal was allowed at first instance by Judge of the First-Tier Tribunal Suffield-Thompson sitting at Newport on 16 of December 2014. The Respondent appealed that decision and following a hearing on 30 April 2015 in

the Upper Tribunal I set aside the decision of the First-Tier Tribunal by reason of a material error of law in the original determination. I directed that the appeal be reheard before me. Annexed to this determination is a copy of my reasons for finding an error of law in the first instance decision. Although the case initially came before me as an appeal by the Respondent, as I have set aside the decision at first instance (albeit retaining certain findings of fact) I shall continue to refer to the parties as they were referred to at first instance.

2. The Appellant arrived in the United Kingdom on 21 February 2011 with entry clearance as a spouse valid from 28th of January 2011 until 23 April 2013. At the time of entry she was married to a Mr Malik, the marriage having taken place on 31st August 2005. In February 2014 (3 years after the Appellant's entry into the United Kingdom) the Appellant and Mr Malik separated due to Mr Malik's infidelity and ill-treatment of the Appellant. The Appellant met her current husband Mr Ibala Hussein a United Kingdom citizen ("the Sponsor"). He ran the recruitment agency where she found work. She rented a room in the Sponsor's house from April 2014. They formed a relationship and married in the United Kingdom on 10th of September 2014. The Appellant lives in the same house where she initially rented the room and she shares this house with the Sponsor, her mother-in-law and the Sponsor's younger brother ("Y"). Both the Appellant and the Sponsor work full time. The Appellant earns £16,275 gross per annum working for Primark and the Sponsor earns £20,000 gross per annum making a total income of £36,275 well in excess of the financial requirements of Appendix FM to the immigration rules.
3. The Appellant argues that the refusal of her application to vary leave breaches this country's obligations under Article 8 of the Human Rights Convention (the right to respect for private and family life). The burden of proof of establishing this rests upon the Appellant and the standard of proof is the usual civil standard of balance of probabilities. The Appellant also claims to be entitled to succeed under the provisions of Appendix FM of the Immigration Rules but this point was not pursued with any force before me.

The Proceedings at First Instance

4. On 8th of February 2013 the Appellant applied for a variation of leave on the basis of her marriage to Mr Malik. The Respondent refused that application on 11 March 2014 and the Appellant lodged a notice of appeal on 26th of March 2014 against the Respondent's decision. However when the matter came before the First-Tier Tribunal on 16th of December 2014 the Appellant indicated that she was no longer proceeding with the application for leave to remain as the spouse of Mr Malik but rather as the spouse of the Sponsor. As I indicated in my error of law finding this development took the Respondent by surprise as the Respondent had not known about the change in the application until the date of hearing. Nevertheless at the hearing at first instance the presenting officer indicated that the matter could proceed there and then as the presenting officer was content to test the genuineness or otherwise of the Appellant's second marriage by way of cross-examination.
5. The Respondent argued that the appeal should be dismissed under the rules and the Appellant should return to Pakistan to make a fresh application for entry as a spouse

of the Sponsor. The Appellant's argument was that she had established a family and private life in the United Kingdom which would be disproportionately interfered with by her removal to Pakistan. The Sponsor had the care of his younger brother Y who at the date of the hearing was just 13 years old. Y lost his own father in 2006 when he was just 5 years old. After that Y's uncle the Sponsor treated Y as his own son. The Appellant stated that she had a close relationship with Y and although they are brother and sister-in-law their relationship was in effect that of stepmother and stepson. It was not possible for the Sponsor to travel to Pakistan with the Appellant while she made an application for entry clearance since Y could not be left on his own. It was not possible for her to go back to Pakistan even for a relatively short period to make an application for entry clearance from there because that too would disrupt their family life and interfere with the care of Y.

6. The Judge accepted that the Appellant and the Sponsor were in a genuine and subsisting relationship and did not hold it against the Appellant that the Respondent had only discovered the Appellant's second marriage at the date of hearing stating at paragraph 25 of the determination that the Appellant "did inform her solicitors of her change in circumstances believing that they would tell the appropriate authorities anything they needed to know. There is no legal obligation upon her to tell the Respondent of her change in personal circumstances and I find that she did all that could be reasonably expected of her bearing in mind the particular circumstances she found herself in". Those circumstances the Judge noted were that the Appellant had come to a foreign country with a man she loved and trusted, was left early on in her marriage and had to find a new home at short notice.
7. The Judge found that as the Appellant was married to a different Sponsor when she made her application to the Respondent for variation of leave she could not amend that application by substituting a different Sponsor. The result was that the Appellant could not succeed under the Immigration Rules and her application had to be assessed outside the Rules under the provisions of article 8 of the Human Rights Convention (the right to respect for private and family life). The Judge correctly directed herself that the principal issue in the case was the proportionality or otherwise of the interference with the private and family life established by the Appellant in this country caused by the Respondent's decision to remove. The concern which I had about the Judges treatment of the proportionality exercise at paragraphs 28 and 29 of the determination was that the Judge had not given due weight to the fact that the Appellant could not succeed under the rules, and appeared to overlook the provisions of section 117 B (1) of the Nationality, Immigration and Asylum Act 2002 that the public interest consideration applicable in all cases was that the maintenance of effective immigration control was in the public interest (notwithstanding that the Judge had specifically directed herself to that provision at paragraph 7 of the determination).

The Further Evidence

8. Given the weight which had to be accorded to the fact that this was an application for leave to remain outside the immigration rules some compelling reasons were required as to why the public interest would be outweighed in this case. See the Court of Appeal decision in **SS Congo [2015] EWCA Civ 387**. The findings made at

first instance that the Appellant and the Sponsor were in a genuine and subsisting marriage and that their joint earnings were considerably more than the financial requirements of Appendix FM were preserved. What was required to complete the proportionality exercise was a proper assessment of the best interests of the child Y who on the basis of the findings of the Judge at first instance would be affected by the decision to remove the Appellant and require her to apply for entry clearance from Pakistan. I directed at paragraph 6 of my finding of an error of law that the Appellant should make an up-to-date statement and provide evidence perhaps in the form of a letter from Y as to the relationship between the Appellant and Y.

9. This further evidence was duly supplied in the form of a further statement of the Appellant dated 3rd of August 2015 and a letter from Y of the same date. In her statement the Appellant said she had strongly connected to the Sponsor's family who were very accepting of her. She had built up strong relationship with her mother-in-law and with Y. She was very attached to Y who was a loving child and they had formed a relationship with ease. She detailed the family's everyday routine including what she did to get Y ready for school and what activities the family did together. They had informed Y that the Home Office had made a decision that the Appellant should leave the United Kingdom which it upset Y and caused him a great deal of worry. In his letter Y had described how he had a lot of fun with the Appellant who helped him with his homework and gave him good advice. He was sad and upset that the Respondent wanted to return the Appellant to Pakistan and this was having an effect on his schooling.

The Hearing Before Me

10. The Appellant attended and formally adopted her statement and indicated that she was also aware of the contents of Y's letter. She was not cross examined. In oral submissions the presenting officer relied on the refusal letter dated 11th of March 2014. This had refused the Appellant's application for indefinite leave to remain as the spouse of Mr Malik on the grounds that neither the Appellant nor Mr Malik had attended for interview to investigate the genuineness or otherwise of their relationship. Very limited information had been supplied regarding the Appellant and Mr Malik's finances. Dealing with the present claim for leave to remain outside the immigration rules because of the marriage to the Sponsor the presenting officer remarked that what had to be considered was the length of time the Appellant had been in the United Kingdom which was just over 4 years. She could return to Pakistan where she had lived the majority of her life and make an application from there for entry clearance as the spouse of her Sponsor. That would not be a **Chikwamba** type of case as there was no barrier to the Appellant returning to her country of origin.
11. In reply counsel for the Appellant relied on his skeleton argument which had quoted extensively from a large number of cases (although not **SS Congo**). In a case where removal is resisted in reliance on Article 8 the questions for the tribunal to ask were likely to be those as stated at paragraph 17 of **Razgar [2004] UKHL 27**. The Appellant had an established family and private life in this country which would be interfered with. Pursuant to the duty under section 55 of the Borders Citizenship and

Immigration act 2009, legislation and case law the interests of minor children affected by the Respondent's decision was a primary (although not the primary) consideration for the tribunal. It had to be considered first. Pursuant to section 117 B (6) of the 2002 Act the public interest did not require the Appellant's removal where as in this case: (a) she had a genuine and subsisting parental relationship with a qualifying child (Y is a UK citizen) and (b) it was unreasonable to expect Y to leave the United Kingdom.

12. According to the Respondent's immigration directorate instructions on the assessment of family life claims the phrase "genuine and subsisting parental relationship" went beyond the strict legal definition of a parent to encompass situations in which an applicant is playing a genuinely parental role in a child's life whether that was recognised as a matter of law or not. It would not be reasonable to expect this British citizen child Y to leave the United Kingdom. The best interests of a child were usually best served by being with both or at least one of their parents and continuity of residence was important. Residence of over 7 years and whether the child was well integrated into the educational system were indicators that the welfare of the child favoured regularisation of the status of mother and child.
13. Further, it was argued, it would rarely be proportionate to remove a spouse if there was a close and genuine bond with the other spouse and that other spouse could not reasonably be expected to follow the Appellant to the country of removal. In this case it was unreasonable to expect the Sponsor a British citizen of 29 years of age to relocate. He was born here and had home and work commitments including a mortgage and close family members who depended on him. The Appellant was able to speak English (she had an English-language certificate) and was financially independent. She was not in the United Kingdom unlawfully. She had had leave since February 2011. The issue of precariousness was not material. The Appellant had not been responsible for the breakdown of her previous marriage and she met the spirit of the rules. Only comparatively rarely in family cases involving children should an Article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave from abroad. There was no sensible reason why the Appellant should be required to make an entry clearance application given the disruption that this would cause.
14. In oral submissions counsel argued that the Appellant had an important role in the life of Y who treated her as a mother figure. The issue was the proportionality or otherwise of interference. The rules were not a complete code and the fact that the Appellant could not succeed under the rules was not determinative of the proportionality exercise. It was pertinent to note the provisions of section 117 B (6). The definition of a parent according to the immigration directorate instructions was certainly wide enough to cover the situation here where the Appellant had assumed a parental role for Y. The tribunal should not make a decision which would cause this family to split up. The test of whether the Sponsor could travel to Pakistan was not whether there were insurmountable obstacles but rather the reasonableness or otherwise of requiring him to do that. He could not go to live in Pakistan. He would lose his job. Had the Appellant's first marriage subsisted she would have qualified for indefinite leave to remain on that basis.

15. The Appellant could be distinguished from someone such as a tier 4 student who would have leave in this country in a category that would not lead to settlement. By contrast the Appellant had leave to remain in a category that was expected to lead to settlement. The removal of the Appellant would devastate the family and could not be made up by modern means of communication. It was not reasonable to expect the Appellant to return to Pakistan to apply for entry clearance from there as her absence would cause severe disruption. If the Appellant had had some responsibility for the breakdown of her first marriage it might be reasonable in those circumstances to argue that she could go back and apply for entry clearance. However she was innocent of any wrongdoing and as she otherwise met the requirements of Appendix FM (financial, relationship and the English language) the decision to remove her was disproportionate to the legitimate aim of immigration control.

Findings

16. It was not argued before me with any force that the Appellant could succeed within the immigration rules. The application she had made to the Respondent for indefinite leave to remain was on the basis of her marriage to Mr Malik and her current claim is therefore substantively different. It represents a fresh application which it is not possible for her to make whilst her first application was outstanding (see section 3C (4) of the Immigration Act 1971). The issue in this case was whether the Appellant could succeed outside the rules. That in turn came down to the issue of proportionality. The Appellant has established a family life here, it would be interfered with by removal and that interference would be in accordance with the legitimate aim of immigration control. In assessing proportionality I have to bear in mind that this is an application outside the rules and that the maintenance of immigration control is in the public interest. Some compelling reasons are therefore required as to why the public interest in maintaining immigration control should be outweighed in this case.
17. The evidence in this case shows that the Appellant has a quasi maternal relationship with Y and that that relationship would be interfered with by the Appellant's removal. I do not consider it reasonable to expect Y to travel to Pakistan a country to which he has never been. He is a British citizen and is well integrated into the educational system of this country. The disruption caused to his life by having to travel to Pakistan would not be in his best interests. His best interests are no doubt to remain in this country to be cared for by his uncle who is in loco parentis to him and by the Appellant. The uncertainty surrounding these proceedings has had an effect on the child. I do not consider that the Appellant's removal to Pakistan for the purposes of making an application for entry clearance from there would be in the child's best interests either. In my view that would be merely to heighten the uncertainty and increase the disruption to family life.
18. As the case law makes clear whilst the child's best interests are a primary consideration they are not paramount. The tribunal must make a decision on the weight to be ascribed to the relevant factors in this case. On one side of the equation is the fact that the Appellant cannot succeed under the immigration rules and therefore seeks leave outside the rules. On the other side of the scale is the deleterious effect removal will have on the child Y coupled with the

unreasonableness of expecting the Sponsor to give up his employment to travel to Pakistan. There is no public interest to be served in removing the Appellant who has a genuine parental relationship with Y where it is unreasonable to expect Y to leave the United Kingdom. That of itself is not determinative of the appeal as a whole but when taken with other factors such as that the Appellant can meet the other requirements of Appendix FM (language, income and genuineness of relationship) the balance comes down in favour of the Appellant remaining in this country. Notwithstanding therefore the considerable weight which must be ascribed to the public interest in maintaining immigration control, on balance the other factors in this case which I have set out above outweigh the public interest in the circumstances of this particular case. I accept the arguments put forward in this case on the Appellant's behalf that removal would disproportionately interfere with the family life enjoyed by all three members of the family. It would be a disproportionate interference with the Appellant's rights under article 8 to require her to return to Pakistan whether to relocate or to apply for entry clearance from there.

19. The Appellant has made a claim that the decision breaches her private life. In so far as this is a separate claim to her claim that removal breaches the right to a family life of herself the Sponsor and Y I would not accept that there was a breach of the Appellant's right to a private life in this country. Here it is relevant to note that she has only been in the United Kingdom some 4 years and has spent the majority of her life in Pakistan. She would not be able to succeed under the provisions of paragraph 276 ADE of the immigration rules. There are no factors in her claim to a private life that would outweigh the public interest in her removal. However as I have found that the Respondent's decision breaches the Appellant's right to a family life, the case does not get that far. I therefore allow the appeal under Article 8.

Decision

The decision of the First-Tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision by allowing the Appellants appeal against the Respondent's decision to refuse to vary leave.

Appellant's appeal allowed.

I make no anonymity order as there is no public policy reason for so doing.

Dated this 18th day of August 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

The First-Tier Tribunal Judge declined to make a fee award for the reasons given and I do not disturb that decision.

Dated this 18th day of August 2015

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Deputy Upper Tribunal Judge Woodcraft



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

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DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS AYESHA MALIK
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P. Nath, Home Office Presenting Officer

For the Respondent: Mr B. Singh of Counsel

REASONS FOR FINDING AN ERROR OF LAW

1. The Appellant is a citizen of Pakistan born on 4 December 1984. She appealed against a decision of the Respondent to refuse her application to vary leave to remain in the United Kingdom. The Appellant arrived in the United Kingdom on 21 February 2011 with entry clearance as a spouse valid from 28 January 2011 to 23 April 2013. At the time of entry she was married to a Mr Malik, the marriage having taken place on 31 August 2005. In February 2014 after the Appellant arrived in the

United Kingdom she and Mr Malik separated. She met her current husband Mr Ibala Hussian ("the Sponsor") and they married in the United Kingdom on 10 September 2014.

2. On 8 February 2013 the Appellant applied for a variation of leave on the basis of her marriage to Mr Malik. The Respondent refused that application on 11 March 2014 and the Appellant lodged a notice of appeal on 26 March 2014 against the Respondent's decision. However, when the matter came before the First-tier Tribunal on 16 December 2014 the Appellant indicated that she was no longer proceeding with the application for leave to remain as the spouse of Mr Malik but rather as the spouse of the Sponsor. The first the Respondent knew about this change in the application was on the date of hearing but I was told that at the hearing the Presenting Officer indicated that the matter could proceed there and then as the Presenting Officer would test by way of cross-examination the genuineness or otherwise of the Appellant's second marriage.
3. In the event the Judge found as a fact that the Appellant was in a genuine and subsisting marriage to the Sponsor but the case failed under the Rules because this was not the marriage under which the Appellant had originally applied. The Judge proceeded to consider the appeal outside the Immigration Rules under Article 8. The Judge found that the interference to the Appellant's relationship with the Sponsor would be disproportionately interfered with by requiring her to return to Pakistan and make application for entry clearance from there or by requiring her to return to relocate to Pakistan. The Respondent appealed that decision, arguing that the Judge had not carried out the proportionality exercise correctly and permission to appeal was granted by First-tier Tribunal Judge Fisher on the grounds that while the Judge had said she found exceptional circumstances meriting consideration outside the Rules she had failed to explain what they were and had failed to adequately reason why Section 117B(1) and (2) of the Nationality, Immigration and Asylum Act 2002 applied.
4. Counsel for the Appellant, who had appeared at first instance, argued that the Judge had not made a material error of law and the determination should stand. The Judge had had Section 117B in the forefront of her mind. The Judge's reference to there being exceptional circumstances which allowed the appeal to be considered outside the Rules was a higher test than required under Gulshan (which only required there to be an arguable case to look at Article 8 outside the Rules) but this did not affect the outcome of the decision. In reply the Presenting Officer argued that the Judge had not properly considered the reasonableness or otherwise of requiring the Appellant to return to obtain leave to enter given that she was in effect making a completely different application to the one originally submitted to the Respondent. At the end of submissions I indicated that I found a material error of law such that the determination of the First-tier should be set aside but with certain findings of fact preserved.
5. The Judge was considering the Appellant's application outside the Rules but it is not apparent from the determination that the Judge gave due weight to the fact that the

Appellant could not succeed under the Rules. Whilst the Respondent was prepared to continue with the hearing, in effect the Judge became the primary fact-finder and needed to weigh in the balance at the proportionality stage the relevant facts. The Judge found there to be family life between the Appellant and the Sponsor's younger brother and found that the Sponsor's mother would have to claim benefits if the Sponsor were to return to Pakistan with the Appellant. What is not clear, however, is what weight, if any, was given by the Judge to the fact that this case was being considered outside the Immigration Rules. At paragraph 28 the Judge said that there was no public interest in making the Appellant leave the United Kingdom, thereby ignoring Section 117B(1) which provides that the maintenance of effective immigration control is in the public interest. This omission was pointed out by the First-tier Tribunal Judge who granted permission to appeal.

6. As the proportionality exercise was not carried out correctly in accordance with statute and current jurisprudence, I indicated that I found an error of law. I did not consider that this was an appropriate case to remit back to the First-tier to be decided again as the fact-finding was substantially done by the First-tier. The findings made by the Judge that the Appellant and her second husband are in a genuine and subsisting marriage and that their earnings are considerably more than the financial requirements of Appendix FM are preserved. What is necessary is further information about the relationship between the Appellant and the Sponsor's younger brother and how that will impact in the balancing exercise. The Appellant should therefore be in a position to make an up-to-date statement and provide evidence, perhaps in the form of a letter, from the Sponsor's brother as to the relationship. Having found an error of law, I set the decision of the First-tier Tribunal aside and the decision will be remade by the Upper Tribunal on a date to be fixed when an Urdu interpreter should be present.

Signed this 2nd day of June 2015

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Deputy Upper Tribunal Judge Woodcraft