Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00648/2016

THE IMMIGRATION ACTS

Heard at : (UT)IAC Birmingham	**Decision & Reasons Promulgated**
On : 19 June 2017	**On : 27 June 2017**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MANJIT KAUR

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Ms A Bhachu, instructed by Kenneth Jones Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Ms Kaur's appeal against the respondent's decision to refuse her human rights claim.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Ms Kaur as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of India born on [ ] 1981. She entered the United Kingdom on 23 December 2006 with entry clearance as a religious worker valid until 30 May 2007 and was granted further leave to remain on the same basis until 8 November 2008. Her daughter, [R], was born on 8 August 2008. On 26 October 2008 the appellant applied for an EEA residence card which was refused on 29 October 2009. On 28 September 2012 she applied for leave to remain outside the immigration rules and that application was refused on 7 October 2013.

4. On 17 September 2015 the appellant made an application for leave to remain on human rights grounds, on the basis of her family and private life in the UK, with reference in particular to her relationship with an Indian national, [CS], who had discretionary leave to remain in the UK until 25 February 2018, and the child of that relationship, [R], who had resided in the UK for more than seven years. Reference was made to the fact that her partner had three sons from his first marriage and had regular contact with and parental responsibility for those children. The appellant claimed that her relationship with her partner began in early 2008 and that they had started living together in June 2015.

5. The appellant's application was refused on 15 December 2015. The respondent did not accept that the appellant met the definition of "partner" for the purposes of GEN.1.2 of Appendix FM, as she was not married to [CS] and had only resided with him for three months, and therefore did not meet the requirements of paragraph EX.1(b) of Appendix FM. It was not accepted that the appellant met the requirements of paragraph EX.1(a) as a parent as it was considered reasonable to expect her daughter to leave the UK. The respondent considered that the appellant could not meet the criteria in paragraph 276ADE(1) on the basis of her private life and that there were no exceptional circumstances justifying a grant of leave outside the immigration rules. The respondent noted that the appellant had provided no evidence to show that [CS] played an active role in [R]'s life and no evidence to show that he had contact with his three children from his previous relationship. It was therefore not accepted that [R] had formed significant ties with her step-siblings.

6. The appellant appealed against that decision. Her appeal was heard by First-tier Tribunal Judge Hawden-Beal on 28 September 2016 and was allowed in a decision promulgated on 13 October 2016. The judge heard from the appellant and her partner. The evidence from the appellant was that her partner's three sons came to their home every Friday night until Sunday night and she would take the eldest son to school on Monday morning. The boys called her "small mum" and had a good relationship with their half-sister [R]. The boys' mother suffered from mental health problems. When she was ill or in hospital the boys would come to stay with her and she took care of them. Her daughter would be affected by separation from her half-brothers. Her partner walked their daughter to school when he was on a late start at work. The appellant's partner's evidence was that his eldest son, Jack, now lived with him and the appellant all the time and had come to live with them three weeks ago. He had been in the UK for 16 years and was intending to apply for indefinite leave to remain, as his leave expired in 2018. He told his estranged wife about his

daughter two years ago which is when they separated and he moved in with the appellant. Judge Hawden-Beal found that it would not be reasonable to expect the appellant's daughter to go to India and therefore concluded that the requirements in EX.1(a) and paragraph 276ADE(1) had been met and that the appellant also succeeded under section 117B(6) of the Nationality, Immigration and Asylum Act 2002 on the same basis. She allowed the appeal under the immigration rules.

7. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had erred in her consideration of whether it was reasonable to expect the appellant's daughter to leave the UK, having focussed only on the effects on the child without considering the appellant's immigration history and circumstances.

8. Permission to appeal was granted on 12 January 2016.

Appeal Hearing

9. Mr Wilding submitted that the judge had erred by finding that the appellant could succeed under EX.1(a) as a parent, as she could not meet the eligibility requirements in ECPT.2.3 as the child's father was not her partner and was not British or settled in the UK. Further, the judge's assessment of reasonableness was one dimensional and did not take any account of the public interest, as required in MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705. The judge's proportionality assessment was wholly inadequate.

10. Ms Bhachu submitted that any error in regard to EX.1(a) had not been raised in the grounds of appeal but in any event was immaterial as the judge had properly considered the question of reasonableness and had taken all relevant matters into account. This case differed from MA (Pakistan) as there was the question of a family split and the outcome would therefore have to be the same in any event.

Consideration and Findings

11. I agree with Mr Wilding that the judge's assessment of reasonableness was entirely one dimensional, focussing only on the circumstance of the child and taking no account of the public interest, as required in MA. There were various considerations which required a full and proper assessment and relevant findings, namely the appellant's adverse immigration history, the strength of the relationships between the appellant's partner and his children from both relationships and the appellant's partner's immigration status. As Mr Wilding submitted, the appellant's partner's status was an unusual feature in that it was not clear what was the basis of his leave to remain and whether it was related to his previous marriage or his relationship with his children. None of these matters appear to have been properly considered by the judge and there were certainly no findings in that regard. Accordingly I would agree with the respondent that the judge had erred in law by failing to undertake a full

assessment of all relevant matters and by failing to give adequate reasons for finding that it would be unreasonable to expect the appellant's daughter [R] to leave the UK. Although I agree with Ms Bhachu that the appellant's case perhaps differs from that in MA in so far as the family relationships are more complex and raise the possibility of a family split, I do not accept that the outcome would inevitably have to be the same even if the public interest was taken into account and I consider that the judge's errors were therefore material.

12. Accordingly I find that the respondent's grounds have been made out. The judge's decision contains material errors of law and cannot stand.

13. It seems to me that, in the absence of any proper assessment or findings in regard to the family relationships, this is a matter where oral evidence would need to be given and findings of fact made, so that it would be appropriate for the matter to be remitted to the First-tier Tribunal to be heard *de novo*. In so concluding I also bear in mind the reference made by Ms Bhachu to the recent case of MK (A Child By Her Litigation Friend CAE), R (On the Application Of) v The Secretary of State for the Home Department [2017] EWHC 1365 raising the issue of statelessness and which Mr Wilding properly submitted may require further evidence as to the possibility of registering [R] as an Indian national. Again that would be a matter best dealt with through further evidence and fact-finding which was more appropriate for the First-tier Tribunal. Accordingly the case will be remitted to the First-tier Tribunal to be heard and considered afresh, with no findings preserved.

DECISION

14. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The Secretary of State's appeal is allowed. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Hawden-Beal.

Signed:

Upper Tribunal Judge Kebede Dated: 22 June 2017