



**Upper Tribunal
(Immigration and Asylum Chamber)**
HU/05731/2015

Appeal Number:
HU/05735/2015
HU/05743/2015

THE IMMIGRATION ACTS

Heard at Field House
On 10 August 2017

Decision and Reasons Promulgated
On 14 August 2017

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

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(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Blundell, of Counsel, instructed by Caveat Solicitors
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

- 1.** The respondent challenges the decision of First-tier Tribunal Judge Rothwell to allow the appeal of the appellant and her two children

under the Immigration Rules and on article 8 grounds. For convenience, I continue to refer to the parties as they were before the First-tier Tribunal.

2. The appellants are all Pakistani nationals, born respectively on 5 July 1975, [] 2006 and [] 2009. The first appellant initially visited the UK in 2005 and the second appellant was born here the following year. According to the respondent, there was no evidence of entry or leave having been granted and her status here is unclear from the evidence. It is also not clear as to when the appellant left, possibly in 2007, but she re-entered in 2008 with her child and subsequently claimed asylum which was refused. An appeal against the decision was dismissed in June 2009. The appellant made further submissions in August 2010; these were rejected. In October 2013, she made an article 8 application which was refused and in March 2014 another article 8 application was made; its refusal has led to these proceedings.
3. The appeal came before Judge Rothwell at Hatton Cross on 17 September 2016. The respondent was not represented. Judge Rothwell found that the appellant was a victim of domestic violence both here and in Pakistan and that she was separated from her husband. She found that it would not be reasonable for the appellants to leave the UK and that it was in the best interests of both children to remain here.
4. The respondent sought and obtained permission to appeal on 26 May 2017 on the basis that the judge had arguably misdirected herself and misapplied MA (Pakistan) [2016] EWCA Civ 705 in assessing whether it would be reasonable for the minor appellants to leave the UK and had arguably erred in failing to take account of relevant public interest factors when considering s.117B. Those factors could have materially impacted upon the decision.

The hearing

5. At the hearing before me on 10 August 2017, Ms Willocks-Briscoe relied on the grounds for permission with regard to the misdirection of the judge on MA. She criticized the assessment by the judge and submitted that she had failed to have regard to a significant accumulation of adverse factors when undertaking the balancing exercise. She maintained that there could have materially impacted on the outcome of the appeal.
6. Mr Blundell in response conceded that the judge had misdirected herself at paragraph 29 and had inaccurately set out the law. He submitted, however, that she had subsequently undertaken a thorough assessment and that rescued the determination. He submitted that the judge had properly noted that strong and powerful

reasons were required to depart from the MA test and the facts of this case, all accepted by the judge, were so strong that even if the reasonableness test had been properly considered, there could be no other outcome. Mr Blundell relied on the sliding scale of conduct discussed in *Kaur* (children's best interests/public interest interface) [2017] UKUT 00014. He submitted that the countervailing factors did not outweigh the best interests of the children. He accepted that there would be cases where reliance on public funds pressed significantly against an appellant and others, such as the present case, where it did not. The countervailing factors in this case fell at the lowest end of the spectrum.

7. Ms Willocks-Briscoe submitted that there had been a reliance on public funds and resources. The appellant received funds and accommodation and had made use of the NHS and the education system. She pointed out this had been over a lengthy period of time and that it would continue in the future. She submitted that the appellant's immigration history should have been taken into account when the assessment was carried out, her unsuccessful attempt to claim asylum and her voluntary return to Pakistan. The judge had not been able to assess her knowledge of English as an interpreter had been used and there was no assessment of her ability to support herself and her children. A full assessment had not been carried out. The failed asylum claim should have been the judge's starting point. The absence of a presenting officer did not absolve a judge from undertaking a full and proper assessment
8. In response, Mr Blundell maintained that the asylum issue had not been raised in the grounds. The judge was not obliged to obtain a copy of the asylum determination. If the respondent had wanted to rely on it, she should have included it in her appeals bundle. Further, he added that there had been agreement reached at the Family Court for contact between the children and their father.
9. Ms Willocks-Briscoe submitted that the previous determination was an obvious starting point given the appellant's immigration history and was relevant for the s. 117 assessment.
10. At the conclusion of the hearing, I reserved my determination which I now give.
- 11. Conclusions**
12. Mr Blundell was plainly correct to concede that the judge's direction in paragraph 29 of the determination was a misrepresentation of the law as set out in MA (Pakistan). Whilst the court held that a parent's

conduct should not impact upon any assessment of the best interests of the children, it emphasised that it was a matter that must be included when the reasonableness of return is assessed. It is plain, then, that the judge erred in law and that her assessment was carried out using the wrong test.

- 13.** Mr Blundell submitted, however, that the determination could still be rescued because the judge had identified factors so strong and powerful that no other outcome would be possible and that she had taken account of the appellant's immigration history when considering s.117B. As always, Mr Blundell's submissions were ably made but, attractive as they were, I am unable to agree that the decision can be salvaged.
- 14.** The difficulty is that the judge commenced her assessment with a misdirection of law and that has infected the remainder of her findings as she has assessed the facts using the wrong lens and from the wrong starting point. The respondent's absence at the hearing was unhelpful however Ms Willocks-Briscoe is right to point out that that does not absolve a judge from undertaking a full and thorough assessment. Whilst I accept that the previous failed asylum claim was not specifically raised in the grounds for permission, it does form part of the appellant's immigration history and is a matter the judge should have explored. The judge did not consider the appellant's reliance on public funds and resources and indeed the only consideration of any public interest factors appears in the penultimate paragraph of the determination when the judge briefly alludes to the appellant overstaying her visit visa in 2008. There is no consideration of the previous visit and apparent overstay or all the other factors which have been identified above. Given the absence of a full assessment under s.117 with all the relevant factors for both sides being considered and the conceded misdirection in law, I am unable to conclude that the determination is sustainable. The judge erred in law such that the errors materially impact on the decision and I must therefore set aside the determination in its entirety except as a record of proceedings.
- 15.** Both parties referred to further relevant documentary evidence they wished to rely on in the event of a re-hearing. Directions will be issued by the First-tier Tribunal and will give the parties the opportunity to adduce any further evidence relevant to their case. I would mention here that it would be helpful to have information/evidence as to the immigration status of the father of the minor appellants. This may have to come from the respondent due to the fraught relationship between the appellant and her estranged husband.

16. Decision

17. The First-tier Tribunal made errors of law such that the decision is set aside. It shall be re-heard afresh by a different judge of that Tribunal at Hatton Cross at a date to be arranged.

18. Anonymity

19. Although the First-tier Tribunal did not make an anonymity order, I consider it appropriate to do so given that there are young children involved.

Signed

A handwritten signature in black ink, appearing to read "R. Keir". The signature is written in a cursive style with a small dot at the end.

Upper Tribunal Judge

Date: 11 August 2017