



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01686/2017

THE IMMIGRATION ACTS

Heard at Field House
On 18 September 2018

Decision & Reasons Promulgated
On 25 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

XIAOCHUAN [J]
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Lyndsay, Senior Home Office Presenting Officer
For the Respondent: Ms Ostadsaffar, Counsel, instructed by Lisa's Law Solicitors

DECISION AND REASONS

1. No anonymity order is made.
2. The respondent in these proceedings was the appellant before the First-tier Tribunal. From hereon I have referred to the parties as they were in the First-tier Tribunal so

that, for example, reference to the respondent is a reference to the Entry Clearance Officer.

3. The appellant is a national of China. The appellant entered the United Kingdom on January 27, 2010 with valid leave to enter. That leave was subsequently extended until October 22, 2015.
4. On October 24, 2012 the appellant married the sponsor and was granted leave to remain as a spouse until November 9, 2016.
5. On October 15, 2016 the appellant applied for settlement on the basis her sponsor had obtained British citizenship and their two children (aged 3 and 1½ years of age) were also British citizens.
6. The respondent refused her application in a decision dated January 10, 2017 as he concluded the appellant had previously used a proxy taker to take an exam.
7. The appellant lodged grounds of appeal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. His appeal came before Judge of the First-tier Tribunal Herbert OBE (hereinafter called "the Judge") on March 23, 2018 and in a decision promulgated on March 28, 2018 the Judge allowed her appeal on the basis article 8 ECHR was engaged and that requiring the appellant and sponsor to relocate to China would amount to a disproportionate interference in the sponsor's family and private life which outweighed the public interest in removal. Significant weight was attached to the fact the sponsor and two children were British citizens.
8. The respondent appealed this decision on April 6, 2018. The respondent argued that the Judge's decision was flawed because the Judge had attached no weight to the deception and simply allowed the appeal based on the fact the appellant had a British husband and two British children and case law suggested only one outcome.
9. Permission to appeal was granted by Judge of the First-tier Tribunal Hollingsworth on July 12, 2018 as he found it arguable the Judge had given inadequate reasons for allowing the appeal.

SUBMISSIONS

10. Mr Lyndsay referred to the grounds of appeal and submitted that any allegation of deception was serious and there were concerns in the way the Judge dealt with the issue. By adopting a stance that the appellant would win regardless of the deception the Judge erred by failing to conduct a full balancing act and the final outcome was unsafe because the Judge failed to give any weight to the public interest.
11. Ms Ostadsaffar submitted there was no material error. She submitted that whilst the decision was brief the Judge was clearly aware of the deception but ultimately concluded that having regard to section 117B(6) of the 2002 Act and the best interests of the children the appeal should be allowed. Section 117B(6) specifically states that public interest does not require the person's removal where the appellant has a

genuine and subsisting parental relationship with a child and it would not be reasonable to expect the child to leave.

12. Mr Lyndsay accepted the respondent's policy was based on MA (Pakistan) and Others v Upper Tribunal (Immigration and Asylum Chambers) and Anor (2016) EWCA Civ 705 but he maintained the Judge had failed to carry out proper balancing act and this amounted to an error in law.

FINDINGS

13. The appellant had sought leave to remain in this country as a spouse and mother. The respondent accepted the appellant satisfied the eligibility requirements of section R-LTRP and section EX.1 of Appendix FM but refused the application under section S-LTR 1.6 of Appendix FM of the Immigration Rules.
14. The appeal came before the First-tier Tribunal and the Judge who heard the appeal was sufficiently concerned about the deception to make a specific reference to it in paragraph 7 of the decision. The Judge was clearly aware of the deception as he outlined the issue in paragraph 6 of the aforementioned decision.
15. The Judge reminded himself about section 117B(6) of the 2002 Act which makes it clear the public interest does not require a person's removal where the appellant has a genuine and subsisting parental relationship with the child and it would not be reasonable to expect the child to leave.
16. The Judge went on to consider proportionality and noted that both the children's father and the appellant were of Chinese origin but acknowledged the father had obtained British citizenship and more importantly both children were British citizens. The Judge clearly had regard to section 117B factors.
17. The criticism brought by Mr Lyndsay today is that the Judge in paragraph 9 should have balanced the deception alongside these other factors. Whilst there may be some merit to that argument this was not a case where the Judge was either unaware or oblivious to the deception. The Judge felt somewhat restricted by case law which followed the decision in MA (Pakistan) and the respondent's own policy reissued in February 2018 reiterated that it would be the exception that British children would be required to leave the United Kingdom. Circumstances that could lead to it being reasonable included where the appellant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules.
18. Taking into account the ages of the children, the youngest being one year of age, and the fact that they are British I am satisfied that firstly, the Judge had had regard to the deception and secondly, had concluded that the deception was insufficient to go behind the stance adopted in current case law and repeated in the respondent's own guidance.

19. In the circumstances, the decision addressed the issues and I am satisfied that the outcome would have been no different even if the Judge had specifically mentioned the deception in paragraph 9 of his decision.

DECISION

20. The appeal is dismissed and I uphold the original decision.

Signed

Date 20/09/2018



Deputy Upper Tribunal Judge Alis

FEE AWARD
TO THE RESPONDENT

I make no alteration to the fee direction made by the First-tier Judge

Signed

Date 20/09/2018



Deputy Upper Tribunal Judge Alis