



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04390/2018

THE IMMIGRATION ACTS

Heard at Manchester
On 30th April 2019

Decision & Reasons Promulgated
On 7th August 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

TAZAYIAN [S]
(ANONYMITY NOT DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. K Wood, IAS Manchester

For the Respondent: Mr. C Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan. She arrived in the UK in October 2008 with entry clearance as a student. Her son ("A") was born in the UK on 14th September 2009. In October 2016, the appellant made an application (*FLR(FP)*) for leave to remain in the UK on human rights grounds. The application was refused for the reasons set out in a decision made by the respondent dated 29th January 2018. That refusal gave rise to a right of appeal and the appeal was heard by F/T Judge Dearden

on 5th December 2018. The appeal was dismissed for the reasons set out in a decision promulgated on 2nd January 2019.

2. The evidence received by the FfT Judge is set out at paragraphs [6] to [14] of the decision. The Judge's findings and conclusions are set out at paragraphs [25] to [30] of the decision.

The decision of FfT Judge Dearden

3. At paragraph [27] of his decision, the FfT sets out his findings. Insofar as the appellant's son is concerned, the FfT Judge found:
 - a. 'A' was born in the United Kingdom and has been here for a period in excess of seven years. He lives with his mother and accepts the former neighbours, as his grandparents. [27(1)]
 - b. 'A's father last had contact with 'A' when 'A' was just six months old in 2010; [27(2)]. 'A's father continues to be absent from his life; [27(1)] and has no involvement in his life; [27(2)]
 - c. 'A' has visited Pakistan on two occasions in 2010 and 2011, on each occasion for 12 weeks. In view of his age, 'A' would have no recollection at all, of those events in Pakistan; [27(3)]
 - d. 'A' understands Urdu even if he chooses not to speak the same; [27(4)]
 - e. 'A' has been in the United Kingdom for nine years and two months, and has only spent two periods of time out of the UK, which are inconsequential. The seven years residence in the UK is an important factor to be taken into account, and the FfT Judge acknowledges that weighty reasons are required to justify separating 'A' from a community in which he has grown up, and lived for most of his life; [27(10)]
 - f. The conduct of 'A's parent is relevant because that goes to 'A's situation and the wider public interest, and does not amount to blaming the child even if he might be prejudiced as a result; [27(10)]

4. Insofar as the appellant is concerned, the FfT Judge found:
 - a. The appellant's claim that when she visited Pakistan in 2010 and 2011 to conduct field research she communicated very infrequently with her mother and older sister, is not credible; [27(5)]
 - b. The appellant is a highly talented and intelligent individual who obtained a degree in Pakistan before obtaining further degrees in the United Kingdom, including a Doctorate; [27(6)]
 - c. Notwithstanding the claim by the appellant that she owes a University in Pakistan the equivalent of £70,000 (*which does not appear to be accepted*), the appellant may be able to secure employment in the private sector. It would not be completely impossible for the appellant to gain employment in the public sector in Pakistan. The appellant could relocate to a larger city in Pakistan such as Karachi, in just the same way as she has built her life in the United Kingdom; [27(6)]
 - d. The appellant was not telling the truth as to how she has sustained herself in the UK, particularly since 2015; [27(7)]
 - e. During the time that the appellant has been in the UK, she has used her time exceedingly usefully. The appellant and her son have contributed well to the fabric of society in the time that they have been here, but it is impossible to conclude that the contributions they have made, will result in an irreplaceable loss to the community. [27(8)]
 - f. There is a gap in the appellant's lawful presence in the United Kingdom between 12th August 2013 and 3rd February 2015. Throughout her 11 year history in United Kingdom, the appellant's immigration status has always been precarious and on at least one occasion, it was illegal because she was in the UK without permission; [27(9)]
5. Having considered the evidence, and made the findings that I have set out above, the FfT Judge concluded, at [27(10)] as follows:

“I reflect that the boy has spent little or no time in Pakistan. In my view he does speak some Urdu and under sub section 1(4) it would be a culture shock to take him away from his school, his choir and his friends and football in Liverpool. Whilst nine years in the United Kingdom is a significant period the boy is still of an adaptable age and is not at a critical period of his education. In my conclusion he can go back to school and play football in Pakistan and make school friends as he (*sic*) done in the United Kingdom.

I overall conclude that whilst seven years in the United Kingdom particularly from the age of four is significant, it is not necessarily a trump card which overwhelms all other considerations.”

6. The FfT Judge referred to the public interest considerations set out at s117B of the 2002 Act, at paragraph [11] of his decision. The Judge notes that he has rejected the appellant’s claim as to how the appellant supports herself and her son, and notes that little weight should be given to a private and family life which is formed at a time when the person is in the UK unlawfully or when their immigration status is precarious. The Judge notes that “..Section 117B(6) deals with what is reasonable in just the same manner as paragraph 276ADE.”. The Judge concludes, at [29], as follows:

“If I had been deciding this appeal under the rules I would have found that this appellant did not satisfy any immigration rules and this in itself is a powerful factor in considering where the Article 8 balance lies. Whilst the appellant has been of good behaviour whilst in the United Kingdom and not committed any criminal offences the fact is that the British government are entitled to exercise a legitimate and orderly system of immigration control. The status of the appellant and of her son has always been precarious or illegal and, together with the statutory considerations in section 117B, I am driven to the conclusion that the balance comes down against the appellant and her son and in favour of the Secretary of State.”

The appeal before me

7. In the grounds of appeal, the appellant claims that the FfT Judge erred in his assessment of the best interests of the child and in taking into account the conduct of the appellant as relevant to the situation of the child. It is said that in reaching his decision, the FfT Judge failed to have regard to the decision of the Supreme Court in KO (Nigeria) -v- SSHD [2018] UKSC 53 that supports the claim that the enquiry as to what is ‘reasonable’ is directed at the circumstances of the child and the child cannot be punished for the conduct of their parent.

8. Permission to appeal was granted by Upper Tribunal Judge Smith on 11th March 2018. In granting permission, Upper Tribunal Judge Smith noted that at paragraph [26] of the decision, the FfT Judge refers to paragraph EX.1 of Appendix FM insofar as it relates to family life with a partner and not a parental relationship, where the issue is whether it would be reasonable to expect the child to leave the UK. She noted that it is arguable that in assessing the reasonableness of expecting the child to leave, the FfT Judge has wrongly weighed in the balance, wider public interest considerations contrary to the decision of the Supreme Court in KO (Nigeria). The matter comes before me to consider whether the decision of the FfT Judge involved the making of a material error of law, and if the decision is set aside, to re-make the decision.
9. The respondent has filed a rule 24 response dated 5th April 2017. The respondent states in the Rule 24 response that the appeal is opposed and that the FfT Judge made findings that were properly open to him. The respondent claims that the grounds amount to an opportunistic attempt to challenge the decision based upon a minor mistake in the determination, but the minor error, does not undermine the careful assessment of the appellant's Article 8 claim made by the Judge.
10. Mr Wood submits that the FfT Judge clearly misdirected himself as to the relevant exception set out in EX.1 of Appendix FM. He submits that there was no doubt that the appellant has a genuine and subsisting parental relationship with her son who is under the age of 18 years, is in the UK, and has lived in the UK continuously for at least 7 years immediately preceding the date of the application. He submits that the question for the Tribunal was whether, taking into account the best interests of the appellant's son as a primary consideration, it would be reasonable to expect the child to leave the UK. He submits that a similar consideration applies to the assessment of the claim by the appellant's son under paragraph 276ADE(1)(iv) of the Immigration Rules.
11. Mr Wood submits the Judge accepted, at [27(1)], that the appellant's son was born in the UK and has been in the UK for a period in excess of 7 years. However, in considering whether it would be reasonable to expect the child to leave the UK, the

Judge erred in a number of respects. First, at paragraph [27(10)] of the decision, the Judge acknowledged that 7 years residence in the UK is an important factor to be taken into account and that weighty reasons are required to justify separating a child from the community in which he or she has grown up and lived for most of their life. However, in that paragraph, the Judge then refers to the fact that from birth to the age of four, a child will be primarily focused on the care from parents and “..*There is therefore a period of five years and two months, which is less than seven years, which is going to have a greater impact on the well-being of the child.*”. Mr Wood submits that that is an irrelevant consideration, and not capable of amounting to the strong and weighty reasons required to justify separating the appellant’s son a child from the community in which he has grown up. Second, the Judge refers, at paragraph [27(10)] to AM Pakistan [2017] EWCA Civ 180 and appears to proceed upon the premise that the wider public interest considerations relating to immigration control could be taken into account when deciding whether or not it is unduly harsh to send an applicant back to his or her country. He submits the FtT Judge has erroneously conflated the question whether it would be unreasonable to expect the child to leave the UK, with whether it would be unduly harsh to expect the appellant and her son to return to Pakistan.

12. In reply, Mr Bates accepts that at paragraph [26] of the decision, the FtT Judge erroneously refers to test under the exceptions set out in paragraph EX.1 of Appendix FM. He accepts that the Judge was not required to assess whether there are insurmountable obstacles to family life continuing outside the United Kingdom, but applying the correct test, was required to consider whether, taking into account the best interests of the child as a primary consideration, it would be reasonable to expect the child to leave the UK. He submits that a careful reading of the decision establishes that the erroneous reference to the incorrect exception at paragraph [26] is immaterial, because it is clear from the decision that the Judge did in fact have the correct test in mind. Mr Bates submits that at paragraph [25], albeit by reference to the private life requirements set out in paragraph 276ADE of the immigration rules, the Judge properly notes that he is to assess whether it would be reasonable for someone under the age of 18 years, who has lived continuously in the UK for at least

seven years, to leave the UK. He submits that a careful reading of paragraph [27] of the decision establishes that the Judge was in fact addressing the correct test. The Judge accepts that 'A' is a qualifying child and that his period of residence in the UK in excess of seven years, is a relevant and weighty factor. He submits that when read as a whole, paragraph [27] of the decision demonstrates that the Judge had in mind the correct test, and made a number of relevant findings, that lead to the conclusion that was plainly open to the Judge on the evidence.

Discussion

13. It was uncontroversial that the appellant herself cannot succeed in an application for leave to remain in the UK under Appendix FM and paragraph 276ADE(1) of the immigration rules, unless the appellant can benefit from the exceptions to certain eligibility requirements for leave to remain as a parent, set out in section EX.1 of Appendix FM. The relevant exception here, is set out in section EX.1(a) and applies if the applicant has a genuine and subsisting parental relationship with a child who is under the age of 18 years, is in the UK, has lived in the UK continuously for at least the 7 years immediately preceding the date of application, and taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK. I accept, as was rightly conceded by Mr Bates, that at paragraph [26] the Judge erroneously refers to what is essentially the issue when a decision maker is considering whether the appellant can benefit from the exceptions to certain eligibility requirements for leave to remain as a partner.
14. I have carefully considered the decision of the FfT Judge and in my judgment, the error identified in paragraph [26] is immaterial as to the outcome of the appeal. It is plain when reading paragraphs [25] to [28] as a whole, that the FfT Judge was in fact addressing whether it would be reasonable to expect the child, as someone who has lived continuously in the UK for at least years, to leave the UK.
15. In KO (Nigeria) & Others -v- SSHD [2018] UKSC 53, Lord Carnwath, with whom Lord Kerr, Lord Wilson, Lord Reed and Lord Briggs agreed, referred to paragraphs 276ADE(1)(iv) of the Immigration Rules, and s117B(6) of the 2002 Act. Having

referred to the requirement that appears at paragraph 276ADE(1)(iv) of the rules, he stated, at [7]:

“It will be seen immediately that the substance of this provision, in particular the seven year criterion and the “reasonableness” tests, appears identical to that of section 117B(6), taken with the definition of “qualifying child”

At paragraphs [17] to [19], Lord Carnwath stated:

“17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is "reasonable" for the child. As Elias LJ said in *MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber) [2016] EWCA Civ 705, [2016] 1 WLR 5093, para 36*, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv).

18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department 2017 SLT 1245* :

"22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made ..."

19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) -v- Secretary of State for the Home Department [2014] EWCA Civ 874, para 58*:

"58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it

reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves.

16. Therefore, although the conduct of a parent is not directly relevant to the public interest consideration, the record of the parent may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if it would not be reasonable for a child to leave the UK that s117B(6) of the 2002 Act may give a parent a right to remain. Here, at paragraph [27(10)] of the decision, the FfT Judge was not blaming 'A' for the conduct of the appellant, but noted that the conduct of the appellant was relevant insofar as it went to 'A's own situation, and the wider public interest. The record of the appellant had become indirectly material, because it leads to her ceasing to have a right to remain in the UK, and having to leave, unless she could establish that it would be unreasonable to expect her son to leave the UK.
17. In my judgement, the FfT Judge carefully considered whether it is reasonable to expect 'A' to leave the UK. At paragraph [27(10)], the FfT Judge, having referred to the relevant authorities was addressing the proposition that a period of residence from birth to the age of four is likely to be less significant than long residence after the age of four. The Judge noted that A had been in the UK for five years and two months since he had attained the age of four. Although poorly set out, it is in my judgement apparent that the Judge had in mind the greater impact of the time that 'A' had been in the UK since the age of four, but that is not to say that the Judge proceeds upon the premise that A has only attained five years and two months residence in the UK. The Judge noted that the five years and two months spent in the UK after A had reached the age of four, was likely to have a greater impact on the well-being of A. The Judge was in my judgment, entitled to take that into account as a relevant factor in his assessment of whether it would be reasonable to expect A to leave the UK.

18. It is also plain in my judgement that at paragraph [27(10)] of his decision, the Judge was not imposing a test of whether it is 'unduly harsh' to return the appellant and her son to Pakistan. The reference to 'unduly harsh' in that paragraph is a reference to the decision of the Court of Appeal in AM (Pakistan) -v- SSHD [2017] EWCA Civ 180.
19. The core issue in the present appeal was whether, taking into account the best interests of 'A' as a primary consideration, it would be unreasonable to expect 'A' to leave the UK. The Judge concluded that whilst the length of 'A's presence in the UK, particularly from the age of four is significant, it is not necessarily a trump card that outweighs all other considerations. Having carefully consider factors that weigh in favour of and against the appellant, the FfT Judge found that it was reasonable to expect 'A' to leave the UK.
20. The only ground of appeal available to the appellant was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. The judgment of the Supreme Court in Agyarko -v- SSHD [2017] UKSC 11 confirms that the fact that the immigration rules cannot be met, does not absolve decision makers from carrying out an assessment outside the rules under Article 8, where the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the Rules. Although the appellant's ability to satisfy the Immigration Rules was not the question to be determined by the FfT Judge, it was capable of being a weighty, though not determinative factor, when deciding whether refusal is proportionate to the legitimate aim of enforcing immigration control. Whilst the appellant and her son might prefer to continue their life in the UK, that does not equate to a right to do so in law. It was in my judgement open to the FfT Judge to conclude, as he did at paragraph [29] of his decision, that in the end, the balance comes down against the appellant and her son, and in favor of the respondent.
21. It follows that in my judgement, the error identified at paragraph [26] of the decision of the FfT Judge was immaterial, and it was open to the Judge to dismiss the appeal for the reasons set out in his decision.

