



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

Appeal Number: IA/49976/2013

THE IMMIGRATION ACTS

**Heard at Birmingham
On 20 June 2014
Prepared 20 June 2014**

**Determination
Promulgated
On 9 July 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS HINA SIDDIQUI

Respondent

Representation:

For the Appellant: Mr D Hill, Senior Presenting Officer
For the Respondent: In person

DECISION AND DIRECTIONS

1. In this determination the Secretary of State is referred to as such and the Respondent is referred to as the claimant.

2. The claimant, a national of Pakistan, date of birth 6 November 1991, appealed against the Secretary of State's decision, dated 19 November 2013, to refuse to vary leave to remain in respect of an application made on 11 October 201 and to make removal directions. The combined decisions were properly made. It would appear although the determination (D&R), dated the 4 March 2014, of First tier Tribunal Judge Caskie (the judge) is less than clear, the effective decision made by the judge was to allow the appeal against the refusal of variation of leave. The consequence of that decision, although the judge did not state it, was to allow the appeal against removal directions.
3. Permission to appeal the judge's decision was given by First-tier Tribunal Judge Parkes on 14 April 2014.
4. The Secretary of States' grounds clearly set out the troubling aspects of the approach taken by the judge in deciding to determine an Article 8 ECHR claim.
5. It is clear the judge reached entirely the correct decision that the appeal failed under the Immigration Rules. Quite simply the claimant could not meet the relevant requirements under Appendix FM because she had leave to be in the United Kingdom as a visitor. Therefore she fell outside of the provisions of the Rules (D&R 4).
6. Nevertheless the judge then went on to consider a general Article 8 claim. As is evident from paragraphs 5 and 10 of the D&R the judge did not start with the question whether or not there was a good arguable case and if so were there compelling circumstances not otherwise provided for under the Rules. Instead the judge decided that the Article 8 ECHR claim succeeded and accordingly there was a good arguable case. In doing so the judge missed the point of the staged process demonstrated by the decision in *Gulshan* [2013] UKUT 640.
7. It is also clear in the reasoning that the judge had regard to the best interests of the child (dob 23 January 2012), the father of the child is

originally a Pakistan national who now has British nationality and may be a dual national, the Appellant is a Pakistan national and the child is of Pakistan parents, whose birth is registered in the United Kingdom, is a British national and may be entitled to dual nationality in Pakistan.

8. The fact of the matter was as is made plain in ZH (Tanzania) [2011] UKSC 4 is that the nationality of the child will be relevant in assessing the best interests of the child in the outcome of an appeal but it is not determinative and it is not a “trump card”.
9. However, on reading the determination at paragraph 8 it is plain that the child’s nationality is treated as being the determinative factor. There was in the exercise the judge purported to carry out, although without express reference to the cases of Razgar [2004] UKHL 27 and Huang [2007] UKHL 11, no consideration of the public interest or a balanced judgment for the purposes of assessing proportionality. It is either clear that he did not apply the appropriate test or there is a deficiency of reasoning or evidence to show how he reached the conclusion that such was the disruption and uncertainty that would be caused to the child, age 2 years, by the mother returning to Pakistan to apply for entry clearance as a spouse. The judge refers to Chikwamba [2008]UKHL 40 which does not assist in understanding the judge’s reasoning for the finding made on proportionality.
10. For these reasons I am satisfied the original Tribunal’s decision cannot stand.
11. At the hearing the Appellant started to indicate a general claim of threats while she, her husband and child were in Pakistan; those threats related to kidnapping and extortion, how her husband had sold up all his property, at reduced price, and they fled to the UK to avoid such threats. These threats were said also to come from her husband’s large family; who were involved in such activities. The claimed threats were not a matter that had ever previously been raised, given there was a paper determination of the appeal it is perhaps understandable, but remains unexplained.

Nevertheless in what are extensive grounds of appeal plainly tied in to this claimant and relating to the grounds before the First-tier Tribunal.

12. Apart from a stray reference to a fear of persecution in paragraph 10, the grounds are all directed at the issue of right to be in the United Kingdom and a violation of the children's rights rather than anything directed at a fear of ill-treatment, persecution or proscribed ill-treatment in Pakistan were she to return there let alone were they to return as a family. There was no evidence of delay in deciding new applications for leave to enter nor was there evidence of the likelihood of material harm to the child.
13. The original Tribunal's decision cannot stand

DIRECTIONS

1. The matter must be re-listed in the First-tier Tribunal for hearing. Not before First-tier Tribunal Judge Caskie.
2. Time estimate: two hours.
3. Urdu interpreter required.
4. List for PTR.
5. No findings of fact to stand other than in relation to the determination on the claim under the Immigration Rules. The sole issue therefore is whether or not in the light of the case law Article 8 falls to be considered and if so on what basis and whether there is sufficient grounds to show there is a good arguable case and whether there are compelling circumstances that militate in favour of her remaining.
6. No anonymity order was made previously but it will be for the judge re-making this case to consider whether one is appropriate or necessary.

Signed

Date 6 July 2014

Deputy Upper Tribunal Judge Davey