



THE IMMIGRATION ACTS

Heard at Birmingham

Appeal Number: IA/17713/2014

**On 30 April 2015 and 5 August
2015**

**Decision and Reasons
Promulgated
On 13 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

**MRS ABDUL MALIK SAIMA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ahmed, Counsel

For the Respondent: Mr N Smart, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 31 January 1980. She appealed against First-tier Tribunal Judge Scott's decision dated 17 September 2014 from the decision of the respondent dated 1 April 2014. Permission to appeal was at first refused by First-tier Tribunal Judge Charlton Brown in a decision dated 30 October 2014. Upper Tribunal Judge Kebede granted the appellant permission to appeal on 20 February 2015 stating that it is arguable that the First-tier Tribunal

Judge failed to consider the position of the appellant's husband and whether or not there were insurmountable obstacles to family life continuing in Pakistan, having regard to his circumstances in the United Kingdom.

First-Tier Tribunal's Findings

2. The First-tier Tribunal's findings were as follows which I summarise. The appellant has been in this country since December 2003 and overstayed her visitor visa. Therefore, she is unable to satisfy the provisions of the Immigration Rules unless she can rely upon section EX1. She is married to Abdul Malik who has seven children. There is no evidence however of extensive or close bonds or ties between the appellant and her stepchildren. There are no letters of support and none of them attended the hearing to support her application. There is no evidence that the appellant was burnt by her family members in Pakistan by pouring paraffin over her. The appellant has now been in this country for almost 11 years and is aged 34 years. It is considered likely that she has friends or acquaintances remaining in Pakistan who would be able to provide support to her. It is not considered that the appellant would be unable to overcome such problems and therefore she is not able to rely on the provisions of EX1.
3. The amended sections of the Nationality, Immigration and Asylum Act 2014 and in particular section 117B states that little weight should be given to a relationship formed when the partner is in this country unlawfully. Therefore, regard must be had to her married state which however is not determinative. The appellant has not discharged the burden of proof pursuant to the Immigration Rules.
4. In respect of Article 8, it is not considered that the situation is so harsh in Pakistan that she cannot return to that country on her own. The appellant has attempted to embellish her claim by claiming that there is animosity with her family and they attacked her in Pakistan. The appellant has embellished her situation for her own purposes. As regards her situation in this country, the appellant is married but she does not have a close attachment and relationship with her stepchildren that would cause them notable upset and distress should she return to Pakistan to make a fresh application.
5. In respect of her private life, section 276 ADE of the Immigration Rules apply to her, in particular if she can establish there are very significant obstacles to her reintegrating into Pakistani society.
6. The public interest is set out in sections 117B of the 2014 Act has also been taken into consideration. The appellant's claim is rejected on the basis of her family life in this country. The appellant's private life has been created when she has been in this country unlawfully and

therefore in accordance with section 117B, little weight can be attached to its elements.

The Grounds of Appeal

7. The grounds of appeal state the following which I summarise. The Judge has not taken into account the Article 8 rights of the appellant's spouse who is a British citizen. The spouse has children and strong ties to the United Kingdom. This should have demonstrated that there are some notable obstacles to family life continuing outside the United Kingdom. The Judge in reaching contrary finding is not supported by the evidence and lacks proper reasoning on this material issue.

The hearing

8. At the hearing I heard submissions from both parties as to whether there is an error of law in the determination of the first-tier Tribunal Judge.

Discussion and findings as to whether there is an error of law

9. The complaint against the Judge is that the appellant's spouse is a British citizen and no consideration was given to his circumstances. It is stated that EX1 applies to the appellant because she is in a genuine and subsisting relationship with a British citizen settled in the United Kingdom and there are insurmountable obstacles to family life with her partner continuing outside the United Kingdom. Insurmountable obstacles have been defined as very significant difficulties which would be faced by the applicant or their partner in continuing the family life together outside the United Kingdom and which could not be overcome or would entail very serious hardship for the applicant or their partner.
10. The Judge having found that the appellant is in a subsisting relationship with a British citizen husband in the United Kingdom, did not consider his circumstances in this country. There was no reference in the determination to the evidence given by the appellant and her sponsor. The Judge fell into material error by failing to address whether the appellant's husband, who is a British citizen with whom, as accepted by the Judge, that the appellant has a genuine and subsisting relationship, will face insurmountable obstacles to his family life continuing with his wife outside the United Kingdom.
11. The Judge at paragraph 15 of the determination states that the appellant has friends and acquaintances remaining in Pakistan who could support her. The Judge did not take into account that the appellant will be a female returning to Pakistan on her own and the cultural implications of this.

12. The Judge's failure to take into account the appellant husband's circumstances, who has seven children living in this country, brought him into material error. I therefore set aside the determination of the First-tier Tribunal in its entirety.
13. Mr Ahmed requested that the appeal should be relisted in the Upper Tribunal in the event I was to find an error of law. I set aside the determination in its entirety and direct that the appeal be relisted in the Upper Tribunal, preferably before me, on the next available date.
14. The appeal came before me again on 5 August 2015.
15. I remake make the decision and allow the appellant's appeal for the following reasons.
16. There is no dispute between the parties that the appellant is married to a British citizen who lives in the United Kingdom. There is also no dispute that the appellant's spouse has seven children who live in this country. I therefore find that the appellant is in a genuine and subsisting relationship with a British citizen settled in the United Kingdom.
17. I accept that the appellant has lived in this country for the most part unlawfully. She came to this country in December 2003 and overstayed her visitor visa. Therefore, she is unable to satisfy the provisions of the Immigration Rules unless she can rely upon section EX1 which is set out below and which is relevant to the appellant.
18. EX.1. This paragraph applies if:
 - (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.
19. The question that I have to now answer is whether there are insurmountable obstacles to family life with that partner continuing outside the United Kingdom. Insurmountable obstacles have been defined as very significant difficulties which would be faced by the

applicant or their partner in continuing the family life together outside the United Kingdom and which could not be overcome or would entail very serious hardship for the applicant or their partner.

20. I take into account that the appellant's spouse is a British citizen and has seven children living in this country which demonstrates that he is deeply integrated into this country. The appellant spouse as a British citizen is entitled to live in this country and enjoy the benefits. I find that the appellant spouse's circumstances in this country amount to insurmountable obstacles and that it would be unduly harsh for him to relocate to Pakistan to be with his wife, leaving his seven children in this country with whom he has family connections.
21. I find that the appellant comes within one of the exceptions in EX 1 for leave to remain in this country, in that she is in a genuine and subsisting relationship with a British citizen and there are insurmountable obstacles to family life with her husband continuing outside the United Kingdom.

Decision

22. I remake the decision and allow the appellant's appeal under the Immigration Rules.

Even though I have allowed the appeal I make no fee order as none was requested.

I make no anonymity order.

Signed by

A Deputy Judge of the Upper Tribunal

Mrs S Chana

This 6th day of April 2016