



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33668/2014

THE IMMIGRATION ACTS

Heard at Field House
On 21st April 2016
Prepared 3rd May 2016

Decision & Reasons Promulgated
On 16th May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MS NUDRAT JABEEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Alam of Counsel
For the Respondent: Mr S. Kotas, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 1st January 1975. She appeals against the decision of First-tier Tribunal Judge Kanagaratnam sitting at Hatton Cross on 12th August 2015 in which he dismissed the Appellant's appeal against a decision of the Respondent dated 11th July 2014. That decision was to refuse the Appellant's application for leave to remain in the United Kingdom on the basis of Article 8 of the European Convention on Human Rights.

2. The Appellant arrived in the United Kingdom on 7th October 2000 as a visitor and thereafter stayed on as her sister, Mrs Mirza, who she had come to visit was unwell and there were domestic problems to deal with. The Appellant resided with her sister in London and assisted with the family as the Appellant's sister was pregnant (giving birth to a child Z on 1st January 2001). The sister had medical problems after Z's birth and the Appellant took care of household duties. Z is now at school and the Appellant's case was that she was assisting largely in bringing Z up. Her sister's other child Uzma was 13 when she came to the United Kingdom and was at a vulnerable age. Uzma was herself now a mother having given birth to a child H on 1st August 2012. The Appellant assisted Uzma in looking after this child. The Appellant felt she could not return to Pakistan as the children had become emotionally attached to her. In Pakistan her father was 74 years old residing with the Appellant's younger sister but the Appellant could not live in the same house as them. As a single woman she would have difficulties in Pakistan.

The Explanation for Refusal

3. The Respondent made reference to the fact that the Appellant had lived for 25 years in Pakistan before coming to the United Kingdom and she still had ties to Pakistan despite her absence. The Appellant had not lived in the United Kingdom for at least twenty years and there were no factors that would lead the application to be allowed outside the Immigration Rules.

The Decision at First Instance

4. The Judge attached no credence to the Appellant's claim that it was not possible for her to live in Pakistan as a single woman. It had been conceded in evidence that there was no difficulty for the Appellant to be supported by her sister and brother-in-law Mr and Mrs Mirza. The Judge considered whether the appeal could be allowed outside the Rules under Article 8 and directed himself in accordance with the step-by-step approach required by the case of **Razgar [2004] UKHL 27**.
5. At paragraph 18 he considered the duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 in the following terms:-

“The Appellant states that she has got attached to her nephews one of whom is said to be overactive. She has also developed a relationship with the children in the extended family. Her nephew who gave evidence at the hearing is 14 years of age and is able to go to school independently. There is no evidence that any of the other children in the family are without their parents so as to persuade me to find that the welfare of the child would be adversely affected by the Appellant's refusal. This is a family that has used the services of an aunt who stayed in the United Kingdom in contravention of the Immigration Rules and now seeks to be regularised. I find that her removal would not cause the children to be adversely affected.”

6. The Judge found that there were no insurmountable obstacles for the Appellant to return to Pakistan and live there. Any requirement for assistance which the

Appellant's sister or niece required might be obtained by using the services available in the United Kingdom. The Judge dismissed the appeal.

The Onward Appeal

7. In her grounds of onward appeal it was argued that the Judge had failed to make clear findings on the credibility of the witnesses and had not had regard to the welfare or best interests of the minor children in the case. The real question in the case was whether there were very significant obstacles to the Appellant returning to Pakistan rather than whether or not she had ties there. There were no findings as to what private life there was or how strong that private life was. The test was not whether there were insurmountable obstacles for her to live in Pakistan but whether it was reasonable to expect her to relocate.
8. The application for permission to appeal came before First-tier Tribunal Judge Nicholson on the papers on 2nd February 2016. He found that contrary to the grounds the Judge had taken into account the evidence of the witnesses when reaching findings. When the decision was read as a whole it was sufficiently clear as to what the Judge made of the witness's evidence on the salient issues. The Judge had specifically considered the best interests of the children at paragraph 18 (see above). He did not state that there was no family life between the Appellant and her family members here. On the contrary he referred to family life. His point was that the children would not be adversely affected by the removal of the Appellant. It was clear why the Judge had reached the conclusions he had and that was all that was required.
9. In considering whether there were significant obstacles to integration into another country the Judge was entitled to take into account whether a person had ties there. The Judge had taken the view there were no obstacles whatsoever to the Appellant living in Pakistan. The Judge was clearly aware of the nature and extent of the Appellant's private life that the Appellant had been here illegally for many years and was bound by Section 117B of the Nationality, Immigration and Asylum Act 2002 to afford little weight to the Appellant's private life. In paragraph 8 of the decision to refuse permission Judge Nicholson dealt with the insurmountable obstacle test versus reasonableness test stating that "the reasonableness test referred to in the grounds applies in the context of a family member from the United Kingdom enjoying family life outside of this country".
10. The Appellant renewed the application for permission to appeal to the Upper Tribunal in longer grounds. Referring to the argument that the best interests of the children had not been considered the grounds argued that those interests were to be determined by reference to the children alone and not any adverse immigration history of the parents or other family members. It was contradictory for the Judge to find that there was family life between the children and the Appellant but at the same time say that the Appellant was providing a service to the family. The Judge failed to give due weight to the evidence of the children that the Appellant was like a mother to them. In **Bossadi [2015] UKUT 00042** and **YM (Uganda) [2014] EWCA Civ 1292** it was said that the test was not as stringent as significant obstacles as adopted

by the Judge. Both objective and subjective considerations had to be taken into account to determine whether an Appellant had no ties. There were inadequate reasons for the findings under Article 8.

11. The renewed application for permission to appeal came on the papers before Upper Tribunal Judge Finch on 26th February 2016. In granting permission to appeal she wrote that the removal of the Appellant would breach the Appellant's Article 8 private life. However she was "an illegal entrant" [in fact an overstayer] who had never had leave to remain here [once her leave had expired]. The key question was whether the Appellant's removal would be proportionate. The Appellant could not rely on the children treating her as a mother although she had formed bonds with the children in the extended family setting. Nevertheless she did not have a genuine and subsisting parental relationship with them for the purposes of Section 117B(6) of the 2002 Act.
12. The reason why Upper Tribunal Judge Finch granted permission to appeal became clear in the next paragraph where she wrote:

"However the best interests of the children in the extended family were a primary consideration to be taken into account. The consideration of the children's best interests in paragraph 8 of the decision appears to have been partly lifted from another case and does not give sufficient consideration to the facts of this particular case and the views and needs of the individual children. As a consequence I find that the First-tier Tribunal Judge did make arguable errors of law."
13. The Respondent replied to the grant for permission by letter dated 7th March 2016 stating that the Appellant's complaint that the Judge had failed to apply the correct "ties" test under paragraph 276ADE was without merit. The appeal was determined on 9th September 2015 and Paragraphs 3.4 and 4.7 of the Statement of Changes required the Tribunal to apply the Rules at the date of his hearing. The Appellant's interpretation of YM was wholly flawed. Immigration Rules are a statement by the Respondent of how she will exercise her powers of control over immigration. Thus in the absence of any statement to the contrary the most natural reading of the Rules was that they applied to decisions taken by the Respondent until such time as she promulgated new Rules after which she would decide according to the new Rules.
14. The Tribunal had had regard to the claimed relationship between the Appellant and the children but found that the children would not be adversely affected by the Appellant's removal as the children had parents living in the same household as the children. The existence of family life was not determinative of this appeal. Whilst Section 55 was a primary consideration it must still be weighed against other cumulative factors. The Appellant had failed to identify the evidence of an adverse effect on the children that the Judge had failed to take in to account. The Judge's findings were open to him on the evidence.

The Preliminary Issue

15. When the case was called on for hearing before me on the morning of 21st April 2016 there was no attendance by the Appellant's legal representative Mr Alam who had represented the Appellant in the first instance and settled the onward grounds of appeal. Mrs Uzma Mirza the Appellant's niece stated that the family were expecting their representative to attend. Meanwhile the Tribunal received an e-mail during the morning which stated that Mr Alam was extremely unwell to attend having suffered a very severe temperature and flu the previous night and was hoping to get better in the morning having taken some tablets. Unfortunately he was said to have only become worse in the morning with the addition of stomach ach to the bad flu he already had the previous night. The letter requested an adjournment.
16. I indicated to the Appellant that it was very unsatisfactory that there was no one to replace Mr Alam to enable the hearing to go ahead or otherwise make an application to the Tribunal for an adjournment. I put the matter back until 2pm for the Appellant and her family to contact their legal representatives Shehzad Law Chambers to see what was happening.
17. When the case re-convened in the afternoon Mr Alam himself was present although indicating that he was still feeling under the weather. He further requested an adjournment as he had a very runny nose and had suffered from a high fever and a bad throat. Whilst the Tribunal inevitably had sympathy for a representative who was not well, it was apparent that Mr Alam was more than capable of presenting his client's case which he was fully familiar with. The issues in the case were whether there was or was not an error of law in the First Tier decision. It was not proposed that in the event of an error of law being found there would be a re-hearing of the evidence (see the Tribunal's letter to Shehzad Law Chambers of 13th April 2016).
18. In considering the request for an adjournment I directed myself that the test is one of fairness alone. Could the Appellant have a fair hearing if the case proceeded? As Mr Alam was fully briefed and despite his recent illness was fully able to present his client's case and make all of the relevant arguments, (as in fact it became apparent during the course of the hearing) I considered that it was not in the interest of fairness that this case should be adjourned further for another day. The case therefore proceeded.

The Error of Law Hearing

19. Mr Alam submitted that there were two issues which arose out of paragraph 18 of the determination. The first part of paragraph 18 appeared to refer to a different case altogether when it spoke about the Appellant's relationship with "his grandchildren in the United Kingdom" and a very recent relationship with "their grandfather". The Respondent's guidance to case workers issued in November 2005 cited by the Judge at paragraph 18 was too restrictive. The Judge had formed the view that because the children's parents were here there would be no impact on the children if the Appellant were removed. That was not an adequate consideration of the children's best interests. The Judge had before him witness statements of the children including the nephew who gave evidence at the hearing. He had said that

the Appellant was like his second mother and talked about the role she had played. He was 14 at the date of hearing. Further there was evidence from the niece who had spoken of the role of the Appellant in the life of the children at paragraph 10 onwards. The bundle was available at the time of the hearing. The question was whether Section 55 had been considered and Counsel read from paragraph 18 of the determination. The Judge had based his conclusion on whether the children would be without their parents but the consideration of the best interests of the children was not limited to such a restrictive interpretation. One had to be scrupulous in the assessment of the best interests of the children.

20. In reply the Presenting Officer stated that if one looked at page 7 of the Appellant's bundle (which was the statement of the Appellant's brother-in-law Mr Mirza) he had referred at paragraph 6 of his statement to "the Appellant also takes care of my grandchildren as my daughter works full-time and her son is under the care of [the Appellant]. My grandson is very attached to her and whenever he is away from her he becomes distressed". Thus nothing turned on the point that the Judge appeared to be talking about the wrong case. The Appellant was an aunt who had been here to look after a relative's children. The Judge had found it proportionate that she should leave the country. The grounds were a disagreement with the outcome and there was no material error of law in the determination.
21. In conclusion Counsel responded to the Presenting Officer that the objection to paragraph 18 of the determination was that it related to different circumstances. The Appellant did have a relationship with grandchildren but the paragraph referred to in Mr Mirza's statement showed that the relationship with the grandchildren had been for sometime whereas paragraph 18 of the Judge's determination spoke about the Appellant having developed "a very recent relationship with their grandfather". That was clearly wrong.
22. The grounds referred to the question of insurmountable obstacles when considering the requirements of paragraph 276ADE. These obstacles could be seen from the Appellant's bundle which had background material from the Country of Origin Information Reports and referred to the difficulties women faced in Pakistan. Section 2.4.1 referred to single women living alone and their lack of economic independence. This evidence, counsel argued, had been available to the Judge but not considered. The Appellant's family were there but his father was dependent on his sister-in-law in Pakistan and he would not be able to support the Appellant.

Findings

23. The issue in this case is whether the Judge made any material error of law such that his determination should be set aside and the decision re-made. I would agree with the submission of the Respondent that in essence both sets of grounds of appeal are no more than a disagreement with the outcome of the case. The Appellant was an overstayer and any private life which she may have formed whilst here would in the proportionality exercise (outwith the Rules) only be afforded little weight. The Appellant could not succeed under the Immigration Rules, having no leave to be

here but something of an irrelevant argument arose as to the correct test to be applied on whether the Appellant could be expected to relocate to Pakistan.

24. Paragraph 276ADE(1)(vi) states that one of the requirements for leave to remain on the grounds of private life is that “there would be very significant obstacles to the applicant’s integration into the country to which they would have to go if required to leave the UK”. What the Judge referred to at paragraph 19 was that on the facts of the case there would not be any insurmountable obstacle for the Appellant described as a healthy woman to live in Pakistan “as she has done for several years”. In looking at the determination as a whole it is clear that the Judge means that there are no very significant obstacles to the Appellant’s return to Pakistan. He did not accept the Appellant’s argument that she would face difficulties as a single woman (see paragraph 15 of the determination). He found that there would be no difficulty in her being supported by Mr and Mrs Mirza upon return (ibid). The Judge was mindful of the fact that the Appellant had lived the first 25 years of her life in Pakistan.
25. As Judge Nicholson correctly pointed out, at paragraph 6 of his decision to refuse permission to appeal, the Judge was entitled to take into account whether a person had ties to the country to which they would be returned when considering whether there were very significant obstacles to integration. I would agree with Judge Nicholson’s characterisation that at paragraph 15 of the determination the Judge had taken the view that there were no obstacles whatsoever to the Appellant living in Pakistan. In any event when considering the private life claim of the Appellant it has to be borne in mind that she has no leave to be in this country. Her private life has been formed during the brief period her status here was precarious because she had leave as a visitor but for most of the time while she was here unlawfully as an overstayer. Very little weight could therefore be attached to that private life when considering the proportionality exercise. The argument therefore as to whether the Appellant had ties to Pakistan or whether there were significant obstacles to her return is something of a red herring.
26. The second argument made in this case is whether the Judge has dealt adequately with the best interests of the children. As Upper Tribunal Judge Finch noted the best interests of the children were a primary consideration to be taken into account. Although some confusion arose at the beginning of the paragraph 18 with the reference to a very recent relationship with grandchildren when it appears from the evidence before the Judge that this relationship had been going on for sometime, the Judge did make it clear at paragraph 18 he was aware of what the claim was in relation to the children. The Appellant had become attached to her nephews and had developed a relationship with them. However the plain fact of the matter was that the children were being looked after by their respective parents. The expression used by the Judge at paragraph 18 that this was a family that had used the “services” of an aunt did not indicate that the Judge felt there was no family life but rather that the relationship which the aunt had to the rest of the family was that she was helping the rest of the family with the care of the children. Nevertheless if household assistance was still required once the Appellant had returned to Pakistan that could be obtained from outside sources as the Judge pointed out.

27. It is clear from a fair reading of the determination as a whole that the Judge was fully aware of the best interests of the children and of the weight to be ascribed to those best interests in the proportionality exercise which he had to conduct when considering the Article 8 appeal outside the Immigration Rules. The Appellant could not succeed under Appendix FM as she did not have a genuine and subsisting parental relationship with the children. On the basis of the facts as found by the Judge there were no compelling circumstances to allow this appeal outside the Rules. The determination of the Judge did not disclose any error of law in the treatment either of the Appellant’s claim to a private life under Article 8 or in relation to the claim to family life with the children and the extended family.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the appeal.

The Appellant’s appeal is dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 9th day of May 2016

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As no fee was payable and the appeal has been dismissed there can be no fee award.

Signed this 9th day of May 2016

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Deputy Upper Tribunal Judge Woodcraft