



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

Appeal Number: IA/45177/2014

THE IMMIGRATION ACTS

**Heard at Bennett House, Stoke
On 4th July 2016**

**Decision & Reasons Promulgated
On 12th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

**NUSRAT SHAHAZ
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Timson, of Counsel, instructed by Ashwood Solicitors Ltd
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

Background

1. On 11th May 2016 Judge of the First-tier Tribunal Page gave permission to the appellant to appeal against the decision of Judge of the First-tier Tribunal Heynes in which he dismissed the appeal against the decision of the respondent to refuse leave to remain on the basis of family and private life applying the provisions of Appendix FM and paragraph 276ADE of the Immigration Rules.
2. In granting permission Judge Page noted that the grounds took issue with the judge's consideration of Article 8 issues. That is because the judge found that there were no

compelling circumstances requiring an assessment of Article 8 outside the Immigration Rules but did not have regard to the best interests of the appellant's two British citizen children. This meant that judge also did not consider the public interest in removal on the basis set out in Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended).

3. Although not referred to by Judge Page, the grounds had also contended that the judge wrongly concluded that the appellant's partner earned £400 per month when the evidence actually showed it to be £400 *per week*.
4. Judge Page granted permission on the basis that the judge had arguably made no findings at all as to the best interests of the two children.

Submissions

5. For the respondent, Mr Bates relied upon the response of 20th May 2016 in which it was argued that the First-tier Judge had directed himself appropriately, bearing in mind that the appellant had conceded that she was unable to meet the requirements of the Immigration Rules which covered the appellant's circumstances both as a parent and a partner. It was also submitted that the judge had considered the best interests of the children on the basis that their mother should regulate their status and the children would not be forced to leave the United Kingdom. Reference was made to paragraphs 27, 29 and 32 of the decision in this respect, on the basis that it was a matter for the parents to decide whether the children should go with the appellant.
6. Mr Bates conceded that the judge had failed to consider Section 117B even though consideration had been given to the best interests of the children from paragraph 27 onwards where the option of temporary separation was examined. He also agreed that medical and educational information had not been considered in relation to the children. He contended that the judge's error in relation to the amount claimed to have been earned by the sponsor was not material as the judge had eliminated consideration of income from his decision.
7. Mr Timson relied upon the grounds. He emphasised that the judge had wrongly decided (paragraphs 25 and 26) that there were no compelling circumstances warranting a grant of leave, when clearly there were because of the judge's consideration of the best interests of the children and other factors particularly having regard to the decision of the Court of Appeal in *MF (Nigeria)* [2013] EWCA Civ 1192 and in *Sanade and Ors (British children – Zambrano – Dereci) India* [2012] UKUT 48 (IAC). If the judge had considered Section 117B then the issue of whether or not it would have been reasonable to expect the British citizen children to leave the country would have been relevant. He also emphasised that he considered the mistake as to earnings to be relevant. Additionally the judge had not engaged with the evidence produced as to the circumstances of the children. He requested that the decision should be set aside and the appeal remitted to the First-tier Tribunal for hearing afresh.

Conclusions

8. The decision of the First-tier Judge is inadequate because of its failure to give proper consideration to the best interests of the two British citizen children involved. The conclusion in paragraph 26 of the decision, that consideration of Article 8 issues outside the Rules is not justified because there were no compelling circumstances identified (paragraph 25), conflicts with the subsequent paragraphs of the decision in which the judge does give limited consideration to the best interests of the children. On the basis that compelling circumstances relating to the children were identified the judge should have gone on to consider Section 117B of the 2002 Act, which would then have triggered consideration of sub-Section (6) on the basis that the appellant had a genuine and subsisting parental relationship with qualifying children and it would not be reasonable to expect those children to leave the United Kingdom. It cannot be said that the judge's analysis of the best interests issue from paragraph 27 onwards analyses the test in Section 117B(6). Indeed, the conclusions reached by the judge in paragraph 29 suggest that the judge thought that the best interests issue was open to the parents to decide rather than it being an objective test.
9. I also regard the judge's error in relation to evidence of income for the sponsor to be material. Although it is argued that the judge has effectively put the issue to one side, the mis-statement as to the amount of income available is significant in relation to the issue which the judge identifies, namely, that the sponsor claimed to be able to maintain the appellant and his children.
10. For the reasons given above, I have identified material errors on points of law in the First-tier decision such that it should be set aside. As the error relates both to law and evidence it is appropriate that the appeal should be heard afresh by the First-tier Tribunal. This accords with the principles set out in paragraph 7.2(b) of the Practice Statements for the Tribunal issued by the Senior President of Tribunals on 25th September 2012.

Anonymity

An anonymity direction was not made by the First-tier Tribunal nor was it requested before the Upper Tribunal.

DIRECTIONS

11. The decision of the First-tier Tribunal contains material errors on points of law and is set aside. The appeal is remitted to the First-tier Tribunal for hearing afresh at the Manchester Hearing Centre but not before Judge Heynes.
12. The appeal will be reheard on a date to be specified by the Resident Judge.
13. The time estimate is two hours.
14. A Bengali interpreter will be required for the hearing.

Signed

Date: 12th July 2016

Deputy Upper Tribunal Judge Garratt