



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/46425/2014

THE IMMIGRATION ACTS

Heard at Glasgow
on 11 January and 16 February 2016

Decision & Reasons Promulgated
On 23 February 2016

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ISHTIAQ SALMA

Appellant

and

IMMIGRATION OFFICER, Glasgow

Respondent

Representatives:

For the Appellant: Mr S Winter, Advocate, instructed by Ghafar & Co, Solicitors

For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan, born on 19 October 1986. She has not asked for an anonymity order.
2. The facts are straightforward. The appellant first came to the UK on an entry clearance visa as a spouse on 31 January 2011. Her husband is of Pakistani origin and nationality and now also a British citizen, living in Glasgow. They have two young daughters, also of dual nationality. The appellant has supplied minimal information about her family, saying in her witness statement in the FtT simply that

they are British citizens and that, "I would not be able to leave them and return to Pakistan. I wish to continue living in the UK with my family and enjoy my family life in the UK." The appellant obtained indefinite leave to remain on 4 December 2013, based on a certificate of knowledge of the English language and of life in the UK (an "ETS certificate") obtained at Burnley on 25 September 2013. On 28 October 2014 she arrived at Glasgow airport with her husband and family. The Immigration Officer found her unable to communicate in English. Her leave was cancelled, but temporary admission was granted. At this stage, she filed her appeal to the FtT.

3. After further investigations and in response to the appellant's grounds of appeal to the FtT, the respondent concluded in terms of a decision dated 21 January 2015 that the appellant obtained her ETS certificate through impersonation and deception, and confirmed the decision to cancel leave. With reference to Article 8 of the ECHR, the decision says:

"... the appellant may have established private and family life in the UK, but no information has been submitted to why she could not conduct such a life in her country of origin and how removal would constitute ... a breach. It is not unreasonable to suggest that if she wishes to maintain her family life, she can do this in Pakistan."

4. There were quite protracted proceedings in the FtT, where the appellant contended that she obtained her ETS certificate honestly. In her determination, promulgated on 15 July 2015, Judge Lea found that a proxy sitter had been used and that the appellant knew her certificate was not genuine. The appellant does not dispute those factual findings, nor the conclusion that she cannot meet the requirements of the Immigration Rules due to her use of deception.

5. In respect of Article 8, outside the Rules, the judge said.

"18. ... the decision would result in an interference with [the appellant's] family life with her husband and two children. I also accept given the terms of *Mirza* [2015] CSIH 28 that it is appropriate for me to conduct a case specific identification of the objective and the degree and nature of the interference with family life. I also note from *Khan* [2015] CSIH 29 that whether interference may be... proportionate... depends on an evaluation of the whole circumstances of the case. Although *Mirza* makes it clear that a British citizen cannot be expected to leave the UK, it is also pointed out in *Mirza* quoting from *AB (Jamaica)* that there is:

"... a world of difference between expecting the foreign national, albeit now settled here, to return with his family to his country of origin ... and expecting a British citizen who has lived all their life in the UK ... to find accommodation in a foreign country or to forfeit his marriage."

19. ... the appellant has used deception and it was her husband's father who organised for her to sit the fraudulent test. I do not accept that the appellant's husband would not also have knowledge of this. Although the appellant's children are both British citizens and their parents' deception is not their fault, they are both of a very young age and will not have formed much private life outwith the immediate family unit. The appellant's extended family are all in Pakistan and both the appellant and her partner are from Pakistan. It will not necessarily be the case that it would be in the

best interests of the children to remain in the UK. The best interests of the children in any event require to be balanced against the public interest in terms of section 117B [of the 2002 Act]. *AM* [2015] UKUT 260 shows that even a person with indefinite leave to remain may in some cases enjoy a status which is “precarious” as a result of their deception ... the appellant ... cannot viably claim that her status is other than precarious. The appellant has also not shown that she is able to speak good English in terms of section 117B(92)...

20. In the whole circumstances ... any interference with ... family life... is proportionate ... “

6. The essence of the appellant’s grounds of appeal to the UT is as follows:

“3. It was an error to balance the best interests of the children against the public interest, because s. 117B(6) states that where it is satisfied, the public interest considerations do not apply.

4. In the context of s. 117B(6) British children and a British parent can never reasonably be expected to relocate outside the UK, on the authority of *Ogundimu* [2013] Imm AR.

On the authority of *Mirza*, it was an error to assume that the family would move to Pakistan. The assessment of proportionality had to start from the assumption of separation from the British nationals.

It was contrary to *Zoumbas* [2014] UKSC 75 to reach a conclusion which separated young children from their parents.

5. If public interest considerations were relevant, there was (i) a lack of clear findings on what was in the best interests of the children (ii) lack of clarity over whether the appellant’s behaviour was treated as inherently more important than the best interests of the children and (iii) failure to ask the right questions in an orderly manner to avoid the risk of the best interests being undervalued.”

7. On 11 January 2016 Mr Winter said that *Treebhawon* [2015] UKUT 674, reported subsequently to the preparation of the grounds of appeal, supported the proposition at paragraph 3 of the grounds. He went on to amplify the grounds, including a submission that although the judge referred to *Mirza*, she did not go to the part of the judgement which bears on this case.

8. Mr Matthews said that there was a short and a long answer to the grounds.

9. The short answer was that the judge’s decision under s. 117B(6) was justified on such (scanty) information as was before her regarding the best interests of the children; that what was reasonable depended not only on those interests but on all the facts of the case; and there was no legal error in her answering the question posed by the sub-section as she did.

10. The longer answer involved an analysis that the authorities did not yield any rule that UK citizens might never reasonably be expected to leave the country, or any rule that proportionality assessments had always to be based on the assumption of separation of non-citizen from citizen family members; that if *Treebhawon* did hold

that public interest considerations were inapplicable, it was wrongly decided; and that the balancing exercise even in respect of s. 117B(6) was firstly to be tested by reference to the Immigration Rules.

11. An adjournment was agreed, to give both sides the chance further to refine their positions.
12. The gist of the further submissions for the respondent is as follows. The complaint over how the FtT resolved the question whether it is reasonable to expect the children to leave the UK is one of form not substance. The judge had decided that it was in the best interests of the children to be with their parents but that did not point to best interests being served by their remaining here, which was in line with *Zoumbas* and with *PW* [2015] CSIH 36. Further, the question of what was reasonable involved the best interests of the children as a primary consideration but went beyond that into public interest considerations. The best interests were to be balanced against the public interest in the proportionality assessment, as settled by *ZH (Tanzania)* [2011] UKSC 4 and by *Zoumbas*. S. 117B(6) did not change the law in that respect, its terms being identical to what appeared in the Immigration Rules before and since. *Treebhowan* was (a) wrongly decided (b) apt to be misunderstood and (c) not binding (although likely to be found persuasive in the UT). Its construction of s. 117B(6) went against other UT authority and was inconsistent with s. 117A(2). The matters in s. 117B(1) – (5) were all to be taken into account along with anything else relevant to the public interest, which must include the Rules about using fraud to cheat the system. In any event, *Treebhowan* even if correct held only that s. 117B(6) prevails over s. 117B(1) – (3). Other public interest matters such as suitability under the Rules remain relevant. *Ogundimu* and *Mirza* do not go as far as the appellant argues. The appellant made no substantive case about where her children’s interests would be best served.
13. The appellant counters along the lines that public interest considerations are irrelevant to s.117B(6); s. 117A(2) does not apply to s.117B(6); *Treebhowan* is not inconsistent with previous case law, which did not go to the same issue; s.117B(6) being statutory is the end point, and trumps the Rules; *Ogundimu* and *Mirza* are to the effect contended; and there was material relevant to the best interests of the children, “namely... to remain with both parents and this would be in the UK”. (It is not suggested that there was any other specification of those best interests; the point is offered as speaking for itself.)
14. In order to resolve these submissions, I think it is necessary to set out some of Part 5A of the 2002 Act and of the case law.
15. From the Act:
 - ‘PART 5A Article 8 of the ECHR: public interest considerations
 - 117A Application of this Part
 - (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

- (a) breaches a person's right to respect for private and family life under Article 8, and
 - (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
- (2) In considering the public interest question, the court or tribunal must (in particular) have regard –
- (a) in all cases, to the considerations listed in section 117B, and
 - (b) [*applies to deportation of foreign criminals only*].
- (3) In subsection (2), “the public interest question” means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
- (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
- (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
- (a) a private life, or
 - (b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.

...

117D Interpretation of this Part

(1) In this Part –

“Article 8” means Article 8 of the European Convention on Human Rights;

“qualifying child” means a person who is under the age of 18 and who –

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

“qualifying partner” means a partner who –

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 – see section 33(2A) of that Act).’

16. The line of authority on which the appellant relies goes back beyond *Ogundimu*, but enough of the earlier cases emerges from the following extract:

“108. In Sanade and others (British children - Zambrano - Dereci) [2012] UKUT 00048 (IAC) the Upper Tribunal [Blake P and UTJ Jordan] asked the following question of the Secretary of State (recorded at paragraph 93 of the decision):

“Does the respondent agree that in a case where a non-national parent is being removed and claims it is a violation of that person’s human rights to be separated from a child with whom he presently enjoys family life as an engaged parent, that a consequence of the CJEU’s judgment is that it is not open to the respondent to submit that an interference can be avoided because it is reasonable to expect the child (and presumably any other parent/carer who is not facing deportation/removal) to join the appellant in the country of origin? If not, why not?”

109. Mr Devereux, at that time the Assistant Director UKBA and Head of European Operation Policy, responded as follows:

“We do accept, however, that in a case where a third country national is unable to claim a right to reside on the basis set out above it will not logically be possible, when assessing the compatibility of their removal or deportation with the ECHR to argue that any interference with Article 8 rights could be avoided by the family unit moving to a country which is outside of the EU”.

110. Having considered the Secretary of State’s response the Tribunal concluded (paragraph 95):

“This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so...”

111. The Tribunal further clarified, when looking at the particulars facts of the case before it, that:

“... as British citizens, Mrs Sanade and her children are citizens of the European Union and as such entitled to reside in the Union. The respondent properly accepts that they cannot be required to leave the Union as a matter of law...”

112. In the case of Izuazu [2013] UKUT 00045 (IAC) the Secretary of State has confirmed that the response continues to apply, subject to a clarification that it only extends to the British citizen spouse or partner where there is in addition a British citizen child. This approach is consistent with the recent decisions of the Court of Appeal in DH (Jamaica) [2012] EWCA Civ 1736, and of the CJEU in O, S -v- Maahanmuuttovirasto [C -356/11 and 357/11: 6 December 2012].

113. Thus, in this appeal, TS cannot be required to leave the European Union to join the appellant in Africa. She needs her mother in order to exercise her residence rights in the Union. To require her mother to join the appellant in Nigeria (a country with which she has no ties of any sort and has never visited) is either to require the child to leave the European Union, or the mother to leave the child. In the latter eventuality there is no evidence of anyone else able to adequately care for the child and so the first issue would be reopened. It is certainly unreasonable to expect either TS or JD to relocate to Nigeria. In our judgment the obstacles to the mother relocating when she has to look after her young child in the United Kingdom are insurmountable, whatever the term means.”

17. The respondent seeks to distinguish the present case from *Ogundimu*, where the appellant’s partner and her child had no connection to Nigeria, and the child might have to leave the EU to be cared for by her mother. The respondent says that this is far from the present case, where all are nationals of Pakistan, and that country is familiar to both the appellant and her partner. The respondent seeks to justify the judge’s approach in this case by further reference to *Izuazu*:

“82. Whilst we did not find an error of law in the judge’s conclusions that it would not be reasonable for Mr Akinola to live in Nigeria, now we have found an error of law it is open to us to re-visit the question. We do not disturb the primary facts found but note that we now know that Mr Akinola is a dual national. He has retained his Nigerian nationality and has visited the country recently. We do not think that the indefinite separation of this couple is inevitable if she is removed to Nigeria. Even if Mr Akinola had understandable reasons to want to remain in the United Kingdom and relocation to Nigeria would be a hardship for him, we have seen nothing to suggest that he would not be able to follow his wife to Nigeria.

83. In the particular circumstances of this case, given the circumstances in which the relationship arose we conclude that it is not unreasonable for him to have to decide between retaining his residence in the United Kingdom and following his wife to Nigeria for the time being to continue family life there. In any event, the fact that it may not be reasonable to expect the other family members to relocate does not mean that in every case deportation or removal is disproportionate or not justified.

84. The facts are materially different from those of the case of the successful appellant in Sanade where it was not reasonable to expect the spouse to leave the EU as in that case the claimant had been granted indefinite leave to remain before committing the offence and requiring the mother to leave would also require the minor children to be compelled to do so. The UKBA continues to accept that EU law prevents the state requiring an EU law citizen from leaving the United Kingdom, although contends with good reason, that this is to be distinguished from a case where an

independent adult can chose between continued residence in the United Kingdom or continued cohabitation abroad.”

18. The respondent says that is an example closer to the present case, an instance of it being found reasonable for a dual national to continue family life in his country of origin.
19. Regarding the appellant’s proposition based on *Mirza*, the respondent says that is a case best described as confined to its facts, and cites the opinion of Lady Smith in *Butt* [2015] CSIH 72:

“44. Whilst some reliance was placed by the petitioner on the observations about the need, when considering the article 8 rights of an applicant’s spouse, to have regard to the rights that flow to a person by reason of their being a British citizen (and thus also imbued with the right to marry under article 12 ECHR), in the case of *Mirza v Secretary of State for the Home Department* [2015] CSIH 28, it was accepted that each case turns on its own facts. Reference was also made to the case of *Khan v Secretary of State for the Home Department* [2015] CSIH 29 but I consider that, in common with *Mirza*, it turned on its own facts too. In the present case, the facts had been considered by two immigration judges who took account of the British nationality of the petitioner’s wife and what she said relocation would mean for her. Both concluded that she could go to Pakistan and that there were no good reasons for her not to do so, albeit in circumstances where it would be for her to choose what to do but also in circumstances where she had not said that she would not go with the man she had chosen to marry. It was implicit in that approach and thus in the approach in the letter of 2 July 2013 that it was recognised that refusal of the petitioner’s application might result in the spouses being separated. However, in the particular circumstances of this case, it was concluded that the weight of the countervailing considerations relevant to legitimate aim of immigration control was such that there were no realistic prospects of persuading a new immigration judge to reach a different decision.”
20. The appellant replies that *Butt* did not disturb paragraph 20 of *Mirza*, that *Mirza* was not appealed, and that in *Butt* the respondent did not seek a bench of five to overturn *Mirza*. However, in light of all of the above, I am satisfied that the appellant goes too far in seeking to extract rules that UK citizens may never reasonably be expected to leave the UK, that all proportionality assessments must be on the basis that all UK citizens will remain here, and that it is always separation of family members which has to be justified.
21. I think it fortifies that conclusion that if there were such legal principles, the Immigration Rules, the respondent’s policy instructions and the whole decision making structure would stand in much simpler forms than they do, and appeals such as the present one need not arise. The Rules, the statute and the case law appear to me to leave it for decision makers to assess what is reasonable or proportionate in the circumstances of each case, whether involving UK citizen family members or not. If s. 117B(6) means what the appellant says, it takes an unnecessarily circular route, and there ought to be provisions which prescribe a result, not a question. I do not accept that it is a question with an automatic answer.

22. I am satisfied that there was an open question before the judge, namely whether it was reasonable to expect the children to leave the UK, not one to which either the *Ogundimu* or the *Mirza* train of case law dictated an inevitable answer. Mr Winter suggested towards the end of his submissions that there is a distinction between proportionality and reasonability, and that the use in s. 117B(6) of “reasonable” rather than “proportionate” might have significance. There are distinctions to be drawn, although there is a large overlap. In the absence of any developed submissions on either side I do not explore this point any further. The judge decided what she thought was reasonable, as the statute required her to do. Nor do I see anything in *Treebhowan* which suggests that the judge went wrong by deciding as she did. It is clear that she was swayed above all by finding nothing unreasonable in the prospect that this family might live in Pakistan. As said in *Treebhowan* at paragraph 23, “... all will depend on the facts as found by the tribunal”.
23. The appellant’s grounds at 5 (i) – (iii) amount to no more than the use of formulae drawn from case law to dispute the best interests assessment. There was no error therein. The appellant made no substantial case that her children’s best interests would be adversely affected by any move to Pakistan. She relied only on an unjustified assumption that to remain in the UK must routinely be found to be in the best interests of any child.
24. Absent any significant error of legal principle in her approach, I consider that the judge’s assessment of the outcome, in terms either of what is reasonable or of what is proportionate, is beyond sensible dispute.
25. The determination of the First-tier Tribunal shall stand.



Upper Tribunal Judge Macleman

17 February 2016