



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

Appeal Number: IA/11484/2015

THE IMMIGRATION ACTS

Heard at Field House

On 13 March 2017

**Decision &
Promulgated
On 2 May 2017**

Reasons

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

**E M
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Sharma, Counsel, Lee Valley solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant or her child sibling. Any failure to comply with this direction could give rise to contempt of court proceedings. This direction applies to, amongst others, all parties.

DECISION AND REASONS

1. In a decision promulgated on 24 March 2016 (Appendix A which is attached to this decision) I found an error of law in the decision of the FtT to dismiss the appellant's appeal and set aside the decision. I concluded that the FtT erred when assessing reasonableness in the context of EX.1. in respect of the appellant's son, E. I invited the parties to make written submissions within fourteen days of the promulgation of the error of law decision before proceeding to remake the decision. None have been received.
2. E is a British citizen. I agree with the conclusion of the panel that it would be in his best interests to remain with both his parents. The outcome of the decision will inevitably result in upheaval for the family as a whole or separation (as the appellant is E's primary carer, the decision will involve separation from his father and the interference with his rights to enjoy British citizenship). I would go further than the First-tier Tribunal and say that the child's best interests are not only to remain with his parents, but in addition to remain in the UK with both parents.
3. E would not be compelled to leave the UK, but it would not be reasonable to expect him to do so in the context of paragraph EX.1. of Appendix FM (or reasonable in the context of Section 117B, (6), following the approach to the interpretation of Part 5A of the 2002 Act to ensure compliance with Article 8 as explained by the Court of Appeal in NA (Pakistan) v SSHD [2016] EWCA Civ 662).
4. The maintenance of immigration control is in the public interest. Parliament has declared this to be the case (Part 5A of the 2002 Act). I have taken into account the overarching importance of the public interest. However, this is capable of being outweighed by other relevant considerations (Rhuppiah v SSHD [2016] EWCA Civ 803). Section 117B (6) says that regard should properly be had to all the circumstances and the wider public interest: R (MA) Pakistan v Upper Tribunal [2016] EWCA Civ 705. The appellant has a sound immigration history and has a particularly strong family life here. It is not disputed that her husband has strong ties here.
5. The appellant has been here lawfully, albeit on a temporary basis, and she has a good immigration history. The family is self-supporting. The fact that family life has been established by her in full knowledge of her temporary status here affects the weight to be attached to her family life in the balancing exercise but the significance of this is affected by other factors such as the individual having been granted leave to enter from outside the UK (see R (on the application of Agyarko) v SSHD [2017] UKSC 11 and Chikwamba v SSHD [2008] UKHL 40).
6. The appellant can meet the substantive requirements of the Immigration Rules at the date of the hearing before the FtT, but not the evidential

requirements. I have had regard to MM (Lebanon) and Ors v SSHD [2017] UKSC 10. It is not a matter of a near miss where there is a breach of the substantive Rules (for example where there are insufficient earnings so that there is a risk of becoming a financial burden on the state) where the public interest is clear. On the evidence before the First-tier Tribunal there was no financial burden on the state in this case. I have had particular regard to paragraph 76 in MM which reads as follows ...;

“The Tribunal is entitled to see a difference in principle between the underlying public interest considerations, as set by the Secretary of State with the approval of Parliament and the working out of that policy through the detailed machinery of the Rules and its application to individual cases ... Rules as to the quality of the evidence necessary to satisfy that test in a particular case are, as the committee acknowledged, matters of practicality rather than principle; and as such matters on which the Tribunal may more readily draw on its own experience and expertise.”

7. I have not received submissions from either party in relation to the policy that was before me at the error of law hearing (see paragraph 18 of Appendix A), but not before the First-tier Tribunal. On the face of it, it assists the appellant and I attach weight to it when considering reasonableness; however, it is not determinative.
8. Permission was not granted on the Chikwamba point, but the decision of the First-tier Tribunal has been set aside and it is a relevant consideration for me when remaking the decision. The appellant can meet the requirements of the substantive Rules at the date of the hearing. For one reason or another the applicant failed to include the correct documentation, but it is not in any way speculative to conclude that the appellant would be able to provide the necessary documentation if she were to make an out of country application. (See Agyarko and Chikwamba).
9. To summarise the appellant’s appeal succeeds under paragraph EX.1. of Appendix FM because it would not be reasonable to expect her son to leave the UK. Therefore, her appeal is allowed under the Rules. It would also succeed under Article 8 outside of the Rules if it were to come to considering the appeal on this basis (by virtue of Section 117B (6)).
10. The appeal is allowed.

Signed Joanna McWilliam

Date 28 April 2017

Upper Tribunal Judge McWilliam