



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-003766
First-tier Tribunal Nos:
HU/50373/2020
IA/00842/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 July 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS ERUM AFZAAL
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer
For the Respondent: Mr S Mustafa, Counsel instructed by Briton Solicitors

Heard at Field House on 26 June 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, I will refer to the parties as they were designated in the First-tier Tribunal.
2. The appellant is a citizen of Pakistan born in 1987 who claims that removing her from the UK would violate Article 8 ECHR. Her application was refused on 27 August 2020. She appealed to the First-tier Tribunal where her appeal came before Judge of the First-tier Tribunal Freer (“the judge”). In a decision dated 13 May 2022 the judge allowed the appellant’s appeal. The respondent is now appealing against this decision.

Background

3. The appellant entered the UK as a spouse in 2018. She claims that she suffered abuse and the relationship broke down. In November 2019 her leave was curtailed to January 2020. She sought – unsuccessfully – to obtain leave on the basis of having suffered domestic violence.

4. The appellant claims to have commenced a new relationship with an EEA citizen, Mr Zulqarnain. The appellant and Mr Zulqarnain entered into an Islamic marriage in February 2020. Mr Zulqarnain has an EEA national child, who I will refer to as A. At the time of the hearing A was 7 years old and had lived in the UK for all of his life. A's mother lives in the UK but is said to have no contact with him.

Decision of the First-tier Tribunal

5. The judge found that there were inconsistencies in the evidence given by the appellant and Mr Zulqarnain and stated in paragraph 49 that there "was a memory problem with each witness". Despite this, the judge found the witnesses credible and accepted that they were in a genuine and subsisting relationship. The judge placed significant evidence on documentary evidence including the Islamic marriage certificate, which the judge described in paragraph 52 as evidence that was "proof of a relationship".
6. The judge observed that Mr Zulqarnain's evidence was that he would travel to Pakistan with the appellant but found that this was irrelevant.
7. The judge also found that the appellant faces a risk of violence in Pakistan.
8. The judge found that A does not have any contact with his biological mother and that since the appellant and Mr Zulqarnain began living together in February 2020 the appellant has been his primary carer. The judge placed significant weight on documentary evidence showing that the appellant is involved with A's education and health.
9. The judge found that the appellant has a parental relationship with A and that it would be unreasonable for A to leave the UK. The key findings on this are set out in paragraphs 56 and 57, where the judge stated:

"56. I will now draw conclusions from those facts. I find as follows. The Appellant plays a very active role in the child A's upbringing. She is the main carer. Father goes out to work. She has lived with both of them from the date of the marriage onwards. It has lasted more than two years and should satisfy the respondent today that there is a durable relationship, as well as a genuine and subsisting one.

57. Did EX.1 in Appendix FM apply? Yes. There is clearly a parental role. It is unreasonable to expect the child to leave the UK. His mother lives here. His father and he are on a track to settlement and then citizenship. The Appellant may be in danger in Pakistan. The best interests of the child require that he stays in the UK with his biological father and step-mother, the Appellant. He has started school and is being taught in English language medium, not in Urdu. The family unit for this child revolves mainly around the Appellant. It would be quite wrong to split them up or to deprive his father of the settlement rights almost now within his grasp".

10. The judge found in paragraph 65 that in the light of his findings of fact the conditions of section 117B(6) of the Nationality Immigration and Asylum Act 2002 were satisfied.

Grounds of Appeal

11. The respondent's grounds of appeal argue that the decision was deficient because of inadequate reasons, primarily in respect of the relationship between the appellant and Mr Zulqarnain. The respondent's submissions include the following:

- (a) The judge stated in paragraph 52 that he gave “weight to the marriage certificate as proof of a relationship” but the marriage certificate is not proof of a relationship.
- (b) The judge referred in paragraph 49 to the appellant having “memory problems” and this explaining multiple inconsistencies in the evidence but there was no evidence to support a conclusion that they had memory problems.
- (c) The appellant and Mr Zulqarnain were unable to recall the date of their religious marriage and the judge failed to explain why weight was not given to this in the assessment of credibility.
- (d) The judge appears to have treated, as a factor weighing in the appellant’s favour, a finding that there was an “obvious practical need for a second adult in the household”, which appears to suggest the need for childcare rather than that this was a genuine and subsisting relationship.
- (e) It was inconsistent for the judge to give weight to the presence of A’s biological mother in the UK as a factor making it unreasonable for A to relocate from the UK when he also found that A has no contact at all with his biological mother.
- (f) The judge made findings that the appellant would be in danger in Pakistan without explaining the basis of this finding.
- (g) Mr Zulqarnain’s evidence was that he would take the child to Pakistan but this was not factored into the assessment.

Submissions

- 12. Ms Willocks-Briscoe submitted that the judge erred, in essence, by not explaining why weight was not given to inconsistencies in the evidence. She reiterated the submissions made in the grounds and argued that the judge appears to have simply not engaged with the numerous points which on the face of it should have weighed against the appellant when assessing the credibility of the evidence. She submitted that this was a case where there were the numerous flaws in the decision which left the respondent unable to discern the reasons for the outcome.
- 13. Mr Mustafa accepted that there were deficiencies in the decision and that some of the criticisms advanced by the respondent had merit. He argued, however, that this was immaterial because the judge made sustainable findings which support the conclusion that the conditions of EX.1. of Appendix FM and paragraph 117B(6) of the Nationality, Immigration and Asylum Act 2002 were satisfied.

Analysis

- 14. I agree with Ms Willocks-Briscoe that there are significant flaws in the decision. In particular, the judge did not provide reasons explaining why he did not give weight to the stark inconsistencies in the evidence, did not explain why he considered an Islamic marriage certificate to be strong evidence of an ongoing relationship, and did not explain why he found that the appellant would face a danger on return to Pakistan. However, I am (just) persuaded by Mr Mustafa that the errors identified by the respondent are immaterial. This is because the judge

was entitled to find, for the reasons given, that the conditions of paragraph 117B(6) of the 2002 Act were satisfied.

15. Paragraph 117B(6) states:

“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”.

The term qualifying child is defined in Section 117D(1) as follows:

“‘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”.

16. It was common ground before the First-tier Tribunal that A had lived in the UK for a continuous period of over seven years. He is therefore a qualifying child.

17. Where the conditions of paragraph 117B(6) are satisfied the public interest question under Article 8 ECHR will necessarily be decided in the appellant’s favour. This is because Section 117B(6) stipulates that where its conditions are met “the public interest does not require the person’s removal”. The appellant therefore must succeed in her appeal if she can establish both that:

- (a) she has a genuine and subsisting parental relationship with A, and
- (b) it would not be reasonable to expect A to leave the UK.

18. As is made clear in *R (on the application of RK) v SSHD (s.117B(6); “parental relationship”)* IJR [2016] UKUT 00031 (IAC) a person does not need to be a biological parent to have a parental relationship and whether a parental relationship exists will depend on the individual circumstances and whether the role that the individual plays establishes that he or she has “stepped into the shoes” of a parent. In paragraphs 42–44 of *RK* it is stated:

42. Whether a person is in a “parental relationship” with a child must, necessarily, depend on the individual circumstances. Those circumstances will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have “parental responsibility” in law for there to exist a “parental relationship,” although whether or not that is the case will be a relevant factor. What is important is that the individual can establish that they have taken on the role that a “parent” usually plays in the life of their child.

43. I agree with Mr Mandalia’s formulation that, in effect, an individual must “step into the shoes of a parent” in order to establish a “parental relationship”. If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a “parental relationship” with the child. It is perhaps obvious to state that “carers” are not per se “parents.” A child may have carers who do not step into the

shoes of their parents but look after the child for specific periods of time (for example whilst the parents are at work) or even longer term (for example where the parents are travelling abroad for a holiday or family visit). Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a “parental relationship.”

44. If a non-biological parent (“third party”) caring for a child claims such a relationship, its existence will depend upon all the circumstances including whether or not there are others (usually the biological parents) who have such a relationship with the child also. It is unlikely, in my judgment, that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child’s life as the child’s parents as in a case such as the present where the children and parents continue to live and function together as a family. It will be difficult, if not impossible, to say that a third party has “stepped into the shoes” of a parent.

19. The judge found that A’s biological mother has no role in his life and that for at least two years the appellant had been his primary carer, residing with and caring for him on a day-to-day basis, as part of a family unit. As acknowledged by Mr Mustafa, there are clear deficiencies in the judge’s reasoning. However, I am satisfied that it was rationally open to the judge to reach this conclusion based on the evidence that was before him which included evidence from A’s school that the appellant is A’s second contact on their system and brings and collects him to school regularly, and a letter from the appellant’s GP confirming that consent has been given for her to bring A to appointments. Whilst this evidence is by no means determinative of the appellant having a parental relationship with A, it is nonetheless evidence that the judge, who had the benefit of hearing and considering all of the relevant evidence, was entitled to attach significant weight to. I am therefore satisfied that the judge has given adequate reasons to support his conclusion that the appellant has a genuine and subsisting parental relationship with A.
20. The next question to be determined is whether it would be reasonable to expect A to leave the UK. Mr Mustafa had to acknowledge that, here too, there were deficiencies in the judge’s reasoning. In particular, in paragraph 57 the judge appears, when assessing whether it would be reasonable for A to relocate to Pakistan, to have attached significant weight to a risk of harm faced by the appellant in Pakistan without explaining why he accepted that there would be such a risk and despite stating earlier in the decision (in paragraph 50) that this was irrelevant. However, I am satisfied that the error is immaterial because the judge was entitled to attach significant weight to the fact that A’s biological mother lives in the UK. Even though the appellant currently has no contact with his mother, as long as they both live in the UK there is a realistic prospect of contact being resumed. In contrast, if A moves to Pakistan the likelihood of a resumption of that relationship occurring is likely to be significantly diminished. In my view, this reason alone supports the conclusion that it would not be reasonable to expect A to leave the UK.
21. Accordingly, I agree with Mr Mustafa that the errors in the decision are immaterial because the judge gave sustainable reasons for finding that the conditions of paragraph 117B(6) of the 2002 Act were satisfied. Having so found, it followed that the public interest did not require the appellant’s removal and therefore that her removal would breach article 8 ECHR.

Notice of Decision

22. The decision of the First-tier Tribunal did not involve the making of a material error of law and therefore the decision stands.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

14.7.2023