



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Number: **UI-2021-001979**

First-tier Tribunal No: HU/51010/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 5th of November 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

Mrs Marzia Imran Dalvi
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr G Hodgetts Counsel

For the Respondent: Mrs R Arif, Home Office Presenting Officer

Heard at Field House on 17 October 2024

DECISION AND REASONS

1. The appellant appeals against the decision of First-tier Tribunal C J Woolley, ('the judge'), promulgated on 4th August 2021 dismissing the appellant's appeal. The appellant had appealed on human rights grounds against the respondent's decision dated 24th November 2020 refusing her application of 2020 under Paragraph 276BTI of the Immigration Rules for leave to remain and on human rights grounds.
2. The appellant is an Indian national born on 29th March 1982. At the time of the appeal her children (not parties to the appeal) were aged 13 and 16 and had attended Wellington College, an independent fee paying school for nearly 7 years. The father is a businessman in the oil industry in Kuwait. The appellant entered the UK with her children in 2015 on a visit visa (in accordance with immigration rules at that point) and had subsequently been granted leave to remain as the parent of a student in the United Kingdom.

Grounds of Appeal

3. The grounds for permission to appeal were submitted on the following grounds as follows:
- (i) the judge at paragraph 42 made unlawful conclusions in relation to question 3 of Razgar [2004] HL 27. It was pleaded that the immigration rule and policy failed to take Section 55 properly into account and that rendered the decision not in accordance with the law. It was acknowledged that the First-tier Tribunal had no power to make a declaration of incompatibility but the question was whether the rule was not in accordance with the law and further whether the interference was justified. This the judge had not considered.
 - (ii) the judge misdirected himself when holding Patel [2013] UKSC applied. Patel was only concerned with whether educative studies in themselves engaged article 8 and not about the social relations that students built up with peers and wider social relations. In that case it was only the four years' education which contributed to private life. That was wholly distinguishable from this case where the judge found wider social relations built by both the mother who had an element of family life and the children who were socially integrated. The children had established strong private life within the wider community which engaged article 8 and to hold that the appellant's private/family life could not be distinguished was wrong.
 - (iii) there was a misdirection that little weight should be placed on family life owing to precarious position of the family members. The family life commenced from the moment of birth and neither Section 117B(4) nor (5) of the Nationality Immigration and Asylum Act 2022 applied. At all times the members of the family had lawful leave including the appellant. Although it is accepted that precariousness for the family leave as a whole was relevant, there was no general principle attaching less weight to situation where existing family life is developed whilst precarious.
 - (iv) there was a failure to take into account the appellant's misapprehension on her leave in relation to family life further to Agyarko [2017] UKSC 11 because the appellant had stated, as in her witness statement, that she thought she could continue to remain whilst the children were in education. The judge had not factored that into the assessment.
 - (v) the judge adopted the wrong approach on the facts to the public interest in relation to housing and medical costs. Apart from the Article 8 proportionality question, the rule itself required the appellant herself to have sufficient funds to establish and maintain her own home and it was wrong to place adverse weight on having 'access to housing'. A similar issue was raised in relation to weight on medical resources. In any event, the appellant had at all material time BUPA private medical insurance.
 - (vi) the judge failed take into account that the application was for limited leave to remain.

- (vii) there was a failure to take relevant factors into account when assessing paragraph 276ADE – the judge failed to consider the impact on the children of losing their family life, the children had never lived in India and did not speak Hindi.
 - (viii) there was a failure to apply the children’s best interests as a primary factor
4. Permission to appeal was granted by FtT judge Curtis on the basis that the judge found at paragraph 43 of the decision that the appellant had access to housing and medical resources whilst in the UK but it was arguable that that conclusion was irrational against the evidence that the appellant owned her own home and was covered by BUPA medical insurance which would reimburse 100% of the costs of medical care. That error of law, if established, arguably infected the judge's assessment of the proportionality of the interference with the appellants family life.

Hearing

5. At the hearing Mrs Arif offered that the Secretary of State was not opposing the application on the error of law, in particular ground 5. She accepted that the appellant owned a house and was wholly financially independent. Indeed, the evidence was that the family were financially independent and the husband worked in the oil industry.
6. Mrs Arif conceded on ground (v) that the judge erred when finding the appellant’s presence would be an economic burden on the UK. She invited me to remake the appeal in the Upper Tribunal and Mr Hodgetts agreed.
7. Mr Hodgetts relied on his skeleton argument and emphasised that the Appellant had access to housing and medical resources. When I pointed out that in fact the appellant’s medical insurance expired prior to the FtT hearing and was renewed post the FtT decision, Mr Hodgetts nonetheless confirmed that the appellant had produced evidence with her application in 2020 that she had BUPA cover until shortly before the hearing and which had been renewed post hearing. That evidence was in the bundle (which I accepted). Further Mr Hodgetts referred me to the appellant’s witness statement which confirmed the position on the medical health insurance. Further, the appellant had given evidence at the hearing orally that she had no access to the NHS in the intervening period. Although there may have been a gap in the documentation, the oral evidence was that she always had private medical evidence in place and there was written evidence in the appellant’s witness statement of 13th May 2021 at paragraph 6 and in the witness statement of 13th February 2020 and she had specifically stated that she had not accessed the NHS.

Conclusions

8. Bearing in mind the submissions made by Mrs Arif and Mr Hodgetts I accept that the judge erred at paragraph [48 (v)] when concluding that the appellant had accessed the NHS and housing and was an economic burden on the state. Even if the appellant’s insurance policy with BUPA had expired on 9th July 2020, as indicated above, it was renewed on 25th October 2021 and in the intervening period the appellant confirmed she had not accessed the NHS. This point was not disputed by the Secretary of State. If the judge had confined his error merely to consideration under step 3 of Razgar [2004] HL 27 and whether the decision was

in accordance with the law that may not have been a material error but unfortunately and notwithstanding the evidence before him, the judge translated the flawed finding on economic dependence into the overall assessment on proportionality at [49]-[50]. The judge stated that 'putting all the factors into the balance', i.e. including those on medical care, immigration control was not outweighed. The judge had failed to reason, in the face of the evidence, why he concluded that the appellant relied on the UK state for health care and how reliance was placed on the public in terms of housing. If the deduction was that owning a house deprived the housing stock and thus was an economic burden, that was not adequately reasoned. That was a material error and I remake the decision.

9. Mrs Arif conceded at the remaking that there was no public interest in removal/refusal of the appellant's application particularly in relation to Section 117B (6). The son was now over the age of 18 years and an adult but the daughter was born on 22nd March 2008 and was only 16 years old and attending sixth form. I accept that the appellant has family life in the UK and her relationship with her daughter was formed at the outset. This, therefore, is not a case where little weight should be attached to her relationship with her daughter under Section 117B - it is not merely the private life of the appellant which is being considered but her private life and family life.
10. Thus the appellant has family life with her daughter, who now has Indefinite Leave to Remain and has been in the UK for 7 years, and her removal would interfere with her family and private life.
11. Albeit on the face of it, paragraph 276BT1 suggests that the refusal is in accordance with the law, this is not borne out on close analysis. Mrs Arif accepted the appellant owned a house and funded her own medical care. I accept the appellant has ongoing health insurance with BUPA and Mrs Arif accepted the appellant owned a house and funded her own medical care. The judge found the best interests of the child was to retain the mother's presence in the UK. That finding was not challenged and is preserved from the previous FtT decision. Against the background of the Secretary of State's concession that there was now no public interest in the appellant's removal, there was in effect an acknowledgment that the removal would not be in pursuance of lawful immigration policy, and removal would not form part of a firm and orderly immigration policy by the government. In effect therefore removal would not now be in accordance with the law.
12. Even if that analysis was incorrect, Mrs Arif accepted that in the fifth question of Razgar any removal/refusal would be disproportionate. I also note the submission made that the appellant had been here for 10 years on continuous lawful residence; although one of those years was on a visit visa and thus does not count. As Mrs Arif had conceded there was no public interest in removing the appellant on the basis that one of the children is a qualifying and s117(b) (6) would apply, and I was invited to allow the appeal on human rights grounds, As such, I considered there was no need to explore the issue of the 10 years continuous residence further.
13. In the light of the Secretary of State concession in effect that removal/refusal of the application would be disproportionate, I allow the appeal on human rights grounds

Notice of Decision

14. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007 and allow the appeal of Mrs Dalvi.

Helen Rimington

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4th November 2024