



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/17541/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Centre City Tower, Decision & Reasons
Birmingham Promulgated
On 21st July 2017 On 02nd August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**S S
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mohammed Khan, Non-Legal Representative
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against the decision of Judge Swinnerton of the First-tier Tribunal (the FTT) promulgated on 11th October 2016.
2. The Appellant is a female citizen of Pakistan born 18th April 1979. She entered the United Kingdom on 9th June 2002 with entry clearance as a spouse valid from 21st May 2002 until 21st May 2003. The marriage broke

down and she subsequently applied for indefinite leave to remain on 20th July 2006 which was refused on 20th November 2009.

3. The Appellant was subsequently granted discretionary leave to remain on 22nd November 2011 on the basis that she was a lone disabled female reliant upon her mother and sister in the UK, her leave was valid for a period of three years.
4. Prior to the expiry of her leave, the Appellant on 20th November 2014 applied for further leave to remain using form FLR(O). This application was refused on 21st April 2015, the Respondent finding that the Appellant could not satisfy the requirements of Appendix FM in relation to family life, or paragraph 276ADE in relation to private life. The Respondent considered whether there were exceptional circumstances outside the Immigration Rules, noting the Appellant's disability, and the fact that she has two young children. The Respondent noted that the Appellant, since being granted discretionary leave to remain, had formed a relationship with Mr K, who had no leave to remain in the UK, and took the view that it would be proportionate for the Appellant, Mr K, and their two children to return to Pakistan together.
5. The Appellant's appeal was heard by the FTT on 28th September 2016. The FTT heard evidence from the Appellant, her mother, and her sister. The FTT found that there had been a change of circumstances since the Appellant was granted discretionary leave to remain in 2011, and found that the Appellant's removal from the UK together with her children would be proportionate and would not breach Article 8.
6. The Appellant had been legally represented at the hearing before the FTT but was unrepresented when making an application for permission to appeal.
7. Permission to appeal was initially refused by Judge Kimnell, who found that the application for permission to appeal identified no error of law, describing the FTT decision as "an unassailable decision properly supported by reasons."
8. The application for permission was renewed to the Upper Tribunal, and Deputy Upper Tribunal Judge Chapman took into account that the Appellant was unrepresented in making such an application, and found a number of points within the FTT decision which gave rise to arguable errors of law, and accordingly granted permission to appeal. I will refer to the points made by Judge Chapman when I set out my conclusions and reasons.
9. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the FTT had erred in law, such that the decision should be set aside.

The Upper Tribunal Hearing

10. Mr K, who is the Appellant's husband, attended the hearing to represent the Appellant. There was no need for an interpreter.
11. I explained to Mr K the purpose of the hearing, which was to decide whether the FTT had made a mistake of law. Mr K confirmed that he had seen the grant of permission to appeal.
12. Mr K submitted that the FTT was mistaken in law in dismissing the appeal, and relied upon the reasons given in the grant of permission.
13. Mr K explained that although the FTT had referred to the fact that he had no leave to remain, which was correct at the date of the FTT decision, he had subsequently been granted leave to remain on 23rd February 2017. He described this as discretionary leave to remain valid until 25th February 2019. Mr K stated that this leave had been granted on the basis that he was needed to look after his children. In addition to the two children who were born on 23rd September 2012 and 6th April 2014, Mr K explained that he and the Appellant now have three children, their youngest having been born on 29th April 2017.
14. Mr K confirmed that he lives with his wife and children, and that he did not intend to return to Pakistan.
15. Mr Mills expressed disagreement with the points raised in the grant of permission. In brief summary Mr Mills submitted that the FTT had been correct to find that there had been a material change in the Appellant's circumstances since she was granted leave to remain. The FTT had been correct to find that the Appellant no longer lived with her mother and sister, but had formed her own family unit with her husband and children. Mr Mills had been unaware that Mr K had been granted leave to remain, but pointed out that at the date of the FTT hearing he had not been granted leave to remain.
16. Mr Mills submitted that the FTT had considered all aspects of the appeal. The best interests of the children were considered at paragraphs 33 - 36, 48 and 51. With reference to the point made by Judge Chapman as to the relationship between the children and grandmother, I was asked to note that the grandmother was not the primary carer of the children.
17. With reference to the Appellant's length of residence, Mr Mills submitted that the FTT was clearly aware of the length of residence, and contended that the grant of permission amounted to a disagreement with findings properly made by the FTT. I was asked to find no error of law, and therefore the decision of the FTT should stand.
18. I asked Mr K whether he wished to respond, and he reiterated his agreement with what was stated in the grant of permission, and contended the decision of the FTT should be set aside.
19. At the conclusion of submissions I reserved my decision.

My Conclusion and Reasons

20. I will address the points made in the grant of permission in the order in which they were made. Firstly it was found that the FTT had arguably failed to take into account material considerations, by failing to consider whether the Appellant had retained family life with her mother and sister as well as forming a new family unit with her husband and children. I do not find that the FTT erred on this point. The FTT correctly found that there had been a material change of circumstances since the Appellant was granted discretionary leave in 2011.
21. The change in circumstances was that the Appellant had married, no longer lived with her mother and sister, but had formed an independent family unit living with her husband, and they had two young children who at the date of the FTT hearing were 4 and 2 years of age. The FTT considered at paragraph 48 that the Appellant's mother would be deeply upset if the Appellant and her children were removed from the UK, and the Appellant and her children would lose the regular contact that they have with the Appellant's mother and sister. It was accepted at paragraph 49 that the close relationship that the Appellant had enjoyed with her mother and sister "would probably be affected as they would not live in close proximity and be able to see each other as they do now."
22. The FTT was entitled to find at paragraph 50 that the Appellant did not remain as dependant on her mother and sister both emotionally and because of her disability as she did in 2011, noting that the Appellant now had a partner, two young children, and had established her own family unit living independently of her mother and sister.
23. The FTT comprehensively considered the relationship between the Appellant and her mother and sister, made appropriate findings and gave sustainable and adequate reasons for those findings, and this point discloses no material error of law.
24. Secondly it was found arguable that in the absence of evidence from the Appellant's husband, it was speculative for the FTT to find that he would return to Pakistan with the Appellant and children. The FTT correctly found that the Appellant's husband did not have leave to remain in the UK. It was not speculative at paragraph 46 to find in view of the fact that he had no leave that he could return to Pakistan with his family. This point discloses no material error of law.
25. Thirdly it was found arguable that in considering the best interests of the children the FTT had applied an incorrect test at paragraph 54, or failed to take fully into account material considerations and had failed to consider the impact of separation on the children from their grandmother. The FTT did not err in considering the best interests of the children. At paragraph 33 there is reference to section 55 of the Borders, Citizenship and Immigration Act 2009, and the requirement upon the FTT to conduct "a scrupulous analysis to identify the child's best interests and then balance them with other material considerations."

26. At paragraph 34 the FTT records that the best interests of the two children are a primary consideration which must be considered first, although they can be outweighed by the cumulative effect of other circumstances. The grandmother is not the primary carer of the children. At paragraph 51 the FTT notes the young age of the children, they have not yet begun formal education, and if they left the UK with their parents, they would have continuity of care from their parents. Paragraph 54 is brief, the FTT simply recording that there is no credible evidence that the Appellant would be unable to maintain her children's welfare and safety in Pakistan. That paragraph does not contain the entirety of the FTT reasoning in relation to the best interests of the children. The FTT did not fail to consider the impact on the children of separation from their relatives in the UK, and did not err in law in concluding that their best interests would be served by living with their parents, taking into account their very young age, and the fact that they are citizens of Pakistan.
27. Fourthly it was found arguable in the grant of permission that although the Appellant had been an overstayer between 2004 and 2011 she had entered the UK lawfully in 2002 and had been residing lawfully in the UK since 2011, the FTT had failed to consider the Appellant's length of residence as part of the proportionality exercise. I cannot see any error of law disclosed here. The FTT at paragraph 11 described the Appellant as a national of Pakistan who had lived in the UK for twelve years, entering on 9th June 2002. At paragraph 37 it is reiterated that the Appellant arrived in the UK on 9th June 2002 lawfully with a valid visa as a spouse. It is recorded that she became an overstayer and was in the UK unlawfully between 2004 and 21st November 2011. The FTT was clearly aware of the length of residence, and which part of the residence was lawful and which part was unlawful. I do not find that it can be said that the FTT failed to consider the length of residence in the proportionality exercise.
28. For the reasons given above I find no material error of law disclosed in the FTT decision, and therefore the decision stands. I would say, as was mentioned at the Upper Tribunal hearing, that if Mr K now has discretionary leave to remain, and there has been a change of circumstances since the FTT decision was made, that it would be open to the Appellant to make a further application to the Respondent in relation to leave to remain.

Notice of Decision

The decision of the FTT does not disclose a material error of law. The decision is not set aside and the appeal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the Appellant or any member of her family. This direction applies both to the

Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings. This direction is made to continue the anonymity direction made by the FTT.

Signed

Date 28th July 2017

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

The appeal is dismissed. There is no fee award

Signed

Date 28th July 2017

Deputy Upper Tribunal Judge M A Hall