Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05672/2016**

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Decision & Reasons Promulgated**
On 27 April 2018	**On 3 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

ASMA RASHID
(ANONYMITY NOT DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr S A Canter, Counsel instructed by B S Singh & Co
For the Respondent: Mr K Hibbs, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Rolt in which he dismissed the appeal of the Appellant, a citizen of Pakistan, against the Secretary of State's decision to refuse leave to remain as the partner and parent of British Nationals on human rights (Article 8) grounds.

2. The application under appeal was refused on 8 February 2016. The Appellant exercised her right of appeal to the First-tier Tribunal. This is the appeal which came before Judge Rolt on 5

July 2017 and was dismissed. The Appellant applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Grant on 14 December 2017 in the following terms

> The grounds submit the judge fell into error at the outset by beginning his article 8 assessment with the outdated authority of Gulshan [2013] UKUT 640 (IAC) which should not be followed, and fell into error a second time with regard to the proper balancing exercise on proportionality.
>
> The findings of the Judge on proportionality have arguably been infected by the wrong test as can be seen at paragraph 55 and accordingly the grounds may be argued.

3. At the hearing before me Mr Canter applied to amend the grounds of appeal saying that the interpreter at the First-tier Tribunal hearing was of poor quality. The Appellant's eldest daughter sat through the evidence of the Appellant and noted that the interpreter did not properly translate the questions put to her or her answers. The Appellant's daughter raised her hand to attract the attention of the Judge, but he did not take notice. She raised the issue with her parents after the hearing, but no further action was taken. Mr Canter said that he heard this the first time today. I refused the application to amend. This was being raised for the first time almost a year after the hearing with no supporting statement. Mr Canter accepted that it would be impossible to go back and ascertain which questions and which answers were incorrectly translated. The Judge could not be criticised for failing to take note of a raised hand from the back of the courtroom.

Background

4. The history of this appeal is detailed above. The facts, not challenged, are that the Appellant is a citizen of Pakistan born on 2 January 1972. Her husband is a British citizen and her three children, aged 13, 15 and 16 at the date of application are British citizens. The Appellant and her family were living in Pakistan until 15 June 2015 when they entered the UK together and the Appellant was granted leave to enter as a visitor. She had travelled to the United Kingdom as a visitor on a number of previous occasions. On this occasion the family decided that they wished to settle in the United Kingdom and on 27 November 2015 the Appellant applied for leave to remain.

5. The Respondent refused the application because the Appellant did not meet the eligibility requirements under the partner or parent route because she was in the UK as a visitor and further did not meet the English language requirements of the

immigration rules. It was accepted that she had a genuine spousal and parental relationship as claimed but the Respondent decided that there were no exceptional circumstances consistent with the right to respect for private and family life warranting the grant of leave to remain. In particular it was suggested that her in-country application was a deliberate attempt to circumvent the immigration rules.

6. At the hearing on 5 July 2017 the Judge dismissed the appeal finding that the Appellant did not meet the requirements of the immigration rules and that there was nothing exceptional in the circumstances of the appeal and no compelling circumstances that rendered the Appellant's removal disproportionate to the need for effective immigration control.

Submissions

7. On behalf of the Appellant Mr Canter referred to the grounds of appeal and said that there were two points in particular. Firstly the Judge wrongly refers to the authority of Gulshan at paragraph 44 suggesting that there is a preliminary barrier to overcome before an assessment of Article 8 could be made. At paragraph 56 he compounds the error by saying that there are no compelling circumstances to allow the appeal on human rights grounds. Although the Judge appears to have considered Article 8 nevertheless he clearly did so through the prism of Gulshan. It was a token gesture. The Judge believed that there was an initial test to be met. Secondly whereas the Judge refers to section 117A(2) and section 117B he does not consider section 117B(6). The children are qualifying children and it is not reasonable for them to leave the United Kingdom. Mr Canter referred to the Secretary of State's guidance, the starting point of which is that it will always be unreasonable to expect British citizen children to relocate. Whereas paragraph 53 of the decision purports to be a best interests assessment there is no focus on reasonableness.

8. For the Respondent Mr Hibbs agreed that the reference to Gulshan was erroneous but said that the mere mention does not amount to material error. The reference to exceptional circumstances at the bottom of paragraph 55 is the correct test. Reasonableness is dealt with in paragraphs 53 and 54, although the word 'reasonableness' is not used it is clear that this is a consideration of reasonableness. The failure to mention the word may be poor drafting but it is not legal error. Section 117B(6) is not determinative. Any error is not material.

9. Responding Mr Canter said that paragraph 53 of the decision is generalised. There is no specific consideration of reasonableness and he repeated that Home Office guidance

refers to a starting point of always being unreasonable. He also referred to the decision in SF and others arguing that Home Office guidance should be taken into account. It should be in the Judge's mind. Mr Canter pointed out, and Mr Hibbs accepted, that whereas the Judge mentions section 117B(4) and section 117B(5) at paragraphs 18 and 19 of his decision he fails to mention section 117B(6) which, argued Mr Canter, is the most pertinent.

10. I reserved my decision.

Decision

11. The argument put forward on behalf of the Appellant is a simple one. It is suggested that the Judge referred to "old" law (Gulshan) and failed to refer to current law (s.117B(6)) and guidance and that the combined effect was that he misdirected himself as to the correct test. In my judgement this argument has merit.

12. The decision in Gulshan has effectively been undermined by a number of subsequent decisions and Mr Hibbs did not seek to argue otherwise. The Appellant did not meet the requirements of the immigration rules and the Judge's decision in this respect is not challenged. At paragraph 44 and 45 of the decision the Judge quotes Gulshan and its reference to R (on the application of) Nagre v SSHD [2013] EWHC 720 (admin) and goes on to note the Presenting Officer's submission that there were no compelling circumstances that warranted consideration of Article 8.

13. Although the Judge does not comment on the correctness of the submission and goes on to consider Article 8 his findings at paragraphs 55 and 56 give the impression that he is looking for compelling or exceptional circumstances. In the circumstances of this appeal that was the wrong test. This is where s.117B(6) is important. At paragraphs 17 to 19 of his decision the Judge correctly self directs to s.117B specifically highlighting ss.117B(4) and 117B(5). He fails to mention s.117B(6), if he had done so he would have noted that it 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".

It is common ground that the Appellant has three children who are British citizens and are therefore qualifying children. The

test therefore is whether it is reasonable for those children to leave the United Kingdom.

14. In his submissions Mr Canter raised the Home Office guidance in this respect and the authority of SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120(IAC). It was held in this case that the Tribunal should take the Secretary of State's guidance into account if it points clearly to a particular outcome. The guidance in question in both SF and others and the case before me is the Immigration Directorate Instruction – Family Migration – Appendix FM, section 1.0 (B) of August 2015. This guidance provides that except in cases involving criminality a decision should not be taken in relation to a parent the effect of which would be to force a British child to leave the EU.

15. There can be no doubt that taken together s.117B(6) and the Home Office guidance required the Judge to consider whether it was reasonable to expect the children to leave the United Kingdom and that the starting point of such consideration should, in the normal course of events, be that a British child should not be forced to leave. Mr Hibbs suggests that paragraph 53 of the decision, a consideration of the best interests of the children was to all intents and purposes a consideration of reasonableness. I cannot agree. The failure to mention either s.117B(6) or the word 'reasonable' taken together with the reference to Gulshan and the concluding remarks about compelling and exceptional circumstances show that a different, and wrong, test was being applied.

16. My conclusion can only be that the Judge erred in law and that his error was material to his decision to dismiss this appeal. The appeal is therefore allowed and the decision of the First-tier Tribunal is set aside. I have considered whether, in the circumstances, I am able to remake the decision on the basis of the evidence before me. I find that I cannot for two reasons. Firstly the Judge makes a number of adverse credibility findings in respect of the Appellant. Although it is the reasonableness of the children's departure from the United Kingdom that is in question it is possible that the Appellant's evidence in this respect may be pertinent. Secondly the question of reasonableness is one that neither party was called upon to address at the previous hearing and to which, in fairness, both must be able to contribute.

Summary

17. The decision of the First-tier Tribunal involved the making of an error of law material to the decision to dismiss the appeal. I allow the Appellant's appeal and direct that the matter be remitted to the First-tier Tribunal so that evidence can be called

from the Appellant, her three British citizen children and, if so advised, her husband.

Signed: **Date: 30 April 2018**

J F W Phillips
Deputy Judge of the Upper Tribunal