Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11635/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 December 2017	**On 18 January 2018**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

MRS SAIRA BIBI
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr Nath

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born in 1986. She appeals against a decision of the respondent made on 10 November 2015 to refuse her claim for leave to remain based on her private and family life. She had arrived in the UK in January 2010 with entry clearance as a Tier 4 Student with leave until 30 December 2011. She was granted further leave under Tier 1 (Post Study) until 1 March 2014. An application for leave on compassionate grounds on 27 February 2014 was refused. The current application was made on 19 August 2015.

2. The application was refused under the partner route, it being considered that having provided an Islamic Sharia law marriage certificate which is not recognised under UK law, she did not meet the definition of a partner as defined in GEN.1.2 of Appendix FM of the Rules.

3. The respondent also considered that it had not been shown there were insurmountable obstacles to the appellant and her partner continuing family life together in Pakistan.

4. The application also failed under the private life route.

5. She appealed.

First tier hearing

6. Following a hearing at Hatton Cross on 3 February 2017 Judge of the First-tier Quinn dismissed the appeal. His findings are at paragraph 23ff. He noted that the appellant has been unlawfully in the UK since February 2014.

7. He found that she had not shown that there would be insurmountable obstacles to her returning to Pakistan. She had spent most of her life there, spoke the language and was integrated there. Indeed, she would be in a better position than previously because she had completed a course of education in the UK.

8. Further, her partner had family in Pakistan and they owned a property where they could live. Her partner had visited there.

9. There is now a child born in 2016, a British citizen. The judge found that it was open to the appellant to leave her child with her partner and return to Pakistan and seek entry clearance or to take her child to Pakistan and build her life there. Her partner could visit or keep in touch by modern means of communication.

10. The judge noted, further, the appellant's disregard for immigration control and that she had got married when she should not have been in the UK.

11. Turning to the child the judge considered that it would not be unreasonable to expect him to return to Pakistan with his mother. He is young and has not put down roots here. He has a British passport and could thus choose to return to the UK in due course if he wished.

12. She sought permission to appeal which was granted by a judge on 6 September 2017. He stated:

...' 2. The judge found that the appellant could be expected to return to Pakistan with her child and to apply for re entry from there. The judge did not address the claimed danger that the appellant said she would face from family members who disapproved of the union.

3. The grounds argue that the judge failed to consider article 8 given that the appellant is the mother of a British citizen child.

*4. There is no reference to the case of **SF** which deals with the guidance that applies in circumstances where it is proposed to remove the parent of a British citizen child.'*

...

Error of law hearing

13. At the error of law hearing before me the appellant did not seek to argue that the judge did not address the danger that she might face from family members who disapproved of the union.

14. Her submission was that the judge failed to give adequate consideration to the fact that the child is a British citizen. It would not be good for her to go to live in Pakistan. Also, her partner is settled here and has work. It would be hard for him to support his family in Pakistan.

15. Mr Nath's position was that the judge's findings and conclusions were open to him for the reasons he gave.

Consideration

16. In considering this matter in its assessment of proportionality the Tribunal was bound by terms of statute, namely, section 117B(6) of the Nationality, Immigration and Asylum Act 2002:-

> (6) *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.*

17. By virtue of s117D of the same Act, a British child is a 'qualifying' child in the context of s117B(6). It is accepted that the appellant's child is British.

18. There is no challenge to the Tribunal's assessment that there are no insurmountable obstacles to the partner moving to Pakistan (his country of origin) or in the family life being re-established there.

19. There is no dispute that there is a genuine and subsisting parental relationship. The only remaining question was therefore whether it is reasonable to expect the child to leave the UK. In such cases, the Tribunal is required to weigh the public interest into its consideration of whether the child might reasonably be expected to leave the country with the parent who is facing removal. This is in effect the approach that the Tribunal has taken in this case.

20. The respondent has published policy on this matter. At Section 11.2.3 of the Immigration Directorate Instruction *'Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10 Year Routes'* (August 2015) under the heading 'Would it be unreasonable to expect a British citizen child to leave the UK?' the following answers are given to caseworkers:

    'Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.

    Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the UK with that parent or primary carer.

    In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided there is satisfactory evidence of a genuine and subsisting parental relationship.'

    (emphasis added)

21. It should be noted that the terms 'parent' and 'primary carer' are distinguished and separated by an 'or'. The clear impact of that policy statement is that where *a* parent of a British citizen child is being required to leave the EU, the case *must always be assessed* on the basis that it would be unreasonable to expect the British citizen child to leave the EU with that parent.

22. It is unclear whether that policy statement was brought to the Tribunal's attention. If it was not, that is an unfortunate omission: ***UB (Sri Lanka)*** [2017] EWCA Civ 85. I am nevertheless satisfied that it is a matter of which the Tribunal might reasonably be expected to be aware, given that

it is guidance that has been expressly adopted and endorsed on a number of occasions by the Court of Appeal (see for instance ***MA (Pakistan)*** [2016] EWCA Civ 705) and Upper Tribunal (***PD and Others*** [2016] UKUT 108. This section in particular has recently received some attention from the Vice President in ***SF and Others (Guidance, post-2014 Act)*** Albania [2017] UKUT 00120.

23. It follows that the Tribunal erred in its approach to the significance of the child's British nationality.

24. What is the significance of that guidance? This case involves the family life of the appellant, her partner and their very young child. It would plainly be contrary to the best interests of the child - and absent any criminality disproportionate – to separate that family unit. Realistically, there are therefore only two options; expect father and child to go to Pakistan with the appellant, or allow her to remain in accordance with the principles in s117B(6). Applying the terms of the policy, which I take to represent the respondent's case on where the balance should be struck, I find that it would not be reasonable to expect this child to leave this country. There is accordingly no public interest in the appellant's removal and her appeal must be allowed.

Decision

The making of the decision of the First-tier Tribunal involved a material error in approach. It is set aside.

The decision is remade as follows: the appeal is allowed.

No anonymity order made.

Signed Date : 16 January 2018

Upper Tribunal Judge Conway