



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15321/2016

THE IMMIGRATION ACTS

Heard at Field House
Oral determination given following hearing
On 29 August 2018

Decision & Reasons Promulgated
On 20 September 2018

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DURGA [P]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondent: Mr K I M Manzur-e-Mawla instructed by Morgan Hall Solicitors

DECISION AND REASONS

1. The appellant (Ms [P]) is a national of Nepal. She was successful in her appeal against the respondent's decision to refuse to grant her entry clearance on Article 8 grounds but the respondent appealed against that decision. Following an error of law hearing before me on 26 February 2018 I found that there had been a material error of law in the First-tier Tribunal Judge's decision such that the decision would have to be re-made and I gave further directions. I retained this appeal before the Upper Tribunal.

Accordingly because the appellant is now in a position again where she has to prove her case, I shall throughout this decision refer to the parties as they were originally, that is to Miss [P] as “the appellant” and to the Secretary of State as “the respondent”.

2. Because of the facts were set out in my error of law decision much of what is contained within this decision will repeat what was said within that decision.
3. The appellant, who was born in August 1983, first entered this country in October 2009 with entry clearance as a Tier 4 Student, which leave was subsequently extended. While in this country she met Mr [G], who had been a national of Pakistan and had been in this country lawfully for some considerable period. They had a child, [F], who was born on 27 September 2015. Prior to the birth of that child Mr [G] would have been entitled to indefinite leave to remain but for the fact that he had received a non-custodial sentence in respect of an offence within the previous 24 months which prevented him from obtaining indefinite leave to remain at that time.
4. In March 2016 the appellant applied for further leave to remain on the basis of this relationship and on the basis of the rights of all the family but this claim was refused by the respondent in a decision dated 2 June 2016. It was in respect of this decision that the appellant appealed to the First-tier Tribunal, which appeal was allowed by First-tier Tribunal Judge Morgan whose decision was as already noted appealed by the respondent. I gave detailed reasons within the error of law decision as to why I was obliged to set aside Judge Morgan’s decision and it is not necessary to repeat these reasons here in any detail. Essentially the weakness of the decision which had been made by the First-tier Tribunal was as I noted summarised in the reasons given by First-tier Tribunal Judge J M Holmes when granting the respondent permission to appeal, as follows:

“3. It is arguable, as set out in the grounds, that the judge’s approach to this Article 8 appeal was flawed. Whilst Article 8 was undoubtedly engaged by the decision under appeal, the judge’s approach was to constitute the appellant’s 2 year old girl a trump card whose very existence meant the appeal had to be allowed. On the contrary, neither the appellant nor her daughter qualified for leave to remain under the Immigration Rules, and the sponsor partner/father could live in Nepal in safety. That should have been the judge’s starting point, and arguably it was demonstrably not. Moreover Section 117B(6) did not apply because the child was not a ‘qualifying child’; Section 117D(1) 2002 Act.

...

5. ... The ability to speak English to some unspecified degree, or the ability to support themselves without recourse to public benefits, were not positive matters that weighed in favour of the grant of the appeal. There was as a result of their decision to absent themselves from the hearing no evidence that in either respect the requirements of the Immigration Rules for entry

clearance as a partner/parent were met; accordingly that added weight to the public interest in refusal/removal, rather than detracting from it”.

5. Essentially although the decision would have been different had their child been a British citizen, because the child was not a British citizen the appellant was not entitled to rely on the provisions set out within Section 117B(6) of the 2002 Act.
6. However, as I noted within the error of law decision, circumstances had moved on following the decision which had been made because there had been two significant changes. The first is that Mr [G] had subsequently been granted indefinite leave to remain and the second was that the appellant was now some five months pregnant.
7. I set out within my earlier Decision the relevant parts of the British Nationality Act 1981 which provides at Part 1 first that the older child would now be entitled to British citizenship, and secondly that once the child with whom the appellant was pregnant was born he or she (in the event it is a she) would be a British citizen because that child would be born to a person who was settled in the United Kingdom as Mr [G], the father, has now been granted indefinite leave to remain.
8. The respondent not having sought to argue at the error of law hearing (or at this hearing) that the Tribunal should not take account of the subsequent events to which I have referred, it is appropriate, when considering the appellant’s Article 8 position, to consider the position as it now is. I must accordingly have regard to the new Part VA of the Nationality, Immigration and Asylum Act 2002 which (as per 117A(1)):

“applies where a court or Tribunal is required to determine whether a decision made under the Immigration Acts –

 - (a) breaches a person’s right to respect for private and family life under Article 8, and
 - (b) as a result would be unlawful under Section 6 of the Human Rights Act 1998”.
9. It was for this reason that I considered it sensible to adjourn the proceedings for a period of time to enable an application to be made on behalf of the older child for British citizenship and also to await the birth of the child with whom the appellant was at the time pregnant. Given that as a matter of practice the respondent would not remove from the jurisdiction a lady in the advanced stages of pregnancy who had a 2 year old child, it did not seem sensible to rehear this appeal while matters were clearly about to change because it would have been a waste of court resources to do so and then be faced with a fresh application when this decision could await these developments. Accordingly I directed that the hearing was to be re-listed before me on the first available date after 26 August 2018 (today, the 29 August 2018 being the first available date) for a Case Management conference. I had in mind that the respondent might well reconsider the application of the appellant by that date in light of any further developments and in particular whether or not she by that time had any British citizen children.

10. The child with whom the appellant was pregnant has subsequently been born, a young girl born on 1 July 2018, and I was handed her birth certificate and passport. The passport was issued on 21 August only eight days ago and so it was not possible to inform the respondent before today's hearing in time for any further decision to be made in respect of her application. Also, on behalf of the respondent, Mr Melvin informed the Tribunal that it was not the respondent's policy to reconsider applications of this kind and his submission was that the appeal should go ahead to a hearing. So far as the elder child is concerned, although that elder child is now entitled to British nationality an application has not yet been made on her behalf and Mr Mawla on behalf of the appellant informed the Tribunal that that was probably because of the cost involved which is I was told over £1,000.
11. Be that as it may, the current position is that the appellant and her husband are now the parents of a British national child and accordingly (absent a submission from Mr Melvyn that I should disregard the later events) the Tribunal must now have regard to what is provided at Section 117B(6) of the 2002 Act, which provides as follows:
 - “(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”.
12. In the circumstances of this case I invited submissions on behalf of the respondent as to why I should not proceed today to deal with the appeal and to allow it without hearing further evidence. On behalf of the respondent, Mr Melvin submitted that because the British citizen child had two parents there was no good reason why the father could not look after both children and the wife then return to Nepal to make a proper application to remain. Further, there may be suitability issues he said because there had been a previous conviction of the appellant. So far as the latter point is concerned, I do not understand it to be the respondent's case that the appellant has a previous conviction; it was her husband who had received a non-custodial sentence but in any event that does not appear to be a relevant factor so far as Section 117B(6) is concerned.
13. As I am now considering the present position I have to have regard to Section 117B(6). The appellant who has both a family and private life in this country clearly has a genuine and subsisting parental relationship with a qualifying child because she is the mother of the British citizen baby and so the public interest does not require her removal (because she is not liable to deportation) in circumstances where it would not be reasonable to expect the child to leave the United Kingdom.
14. With regard to Mr Melvin's first submission that there was no reason why the child could not be looked after by her father while the appellant returned to Nepal to make an application from there, there is a reason and the reason is that this is not what is

provided by statute. If Parliament had decided it was appropriate to state that the public interest should require a person's removal where a child could be looked after by the other parent, then Parliament could have said so but that is not what Parliament has said. It is clear from Section 117B(6) that where it would not be reasonable to expect a child to leave the United Kingdom then it is not in the public interest to require either of the parents who have a genuine and subsisting parental relationship with that child to be removed.

15. It is not suggested on behalf of the respondent that it would be reasonable to expect this baby who is a British citizen to leave the United Kingdom, and indeed it is not suggested that it is ever reasonable to expect a British citizen child to leave the United Kingdom; rather, it is suggested that the appellant could leave without her daughter. In these circumstances the public interest does not require the appellant's removal because she has a subsisting parental relationship with her 6 week old daughter and it would not be reasonable to expect that child to leave the United Kingdom.
16. It follows that her appeal must be allowed under Article 8 and I so order.

Decision

I set aside the decision of First-tier Tribunal Judge Morgan as containing a material error of law and substitute the following decision:

The appellant's appeal is allowed, on human rights grounds, Article 8.

No anonymity direction is made.

Signed:

A handwritten signature in black ink, appearing to read 'Ken Craig', is written over a light blue circular stamp.

Upper Tribunal Judge Craig

Date: 14 September 2018