



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/05617/2018
HU/05622/2018

THE IMMIGRATION ACTS

Heard at Field House
On 30 May 2019

Decision & Reasons Promulgated
On 12 June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MR AHMER SIDDIQUI (FIRST APPELLANT)
MRS ANILA AHMER (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Second Appellant: In person

For the Respondent: Mr E Tufan, Senior Presenting Officer

DECISION AND REASONS

- 1) The appellants are citizens of Pakistan. They both appealed against the respondent's decisions of 13 February 2018 refusing them leave to remain in the United Kingdom under paragraph 276 of the immigration rules and on human rights grounds.
- 2) The First-tier Tribunal Judge SLL Boyes dismissed the first appellants' appeal pursuant to the Immigration Rules and allowed his appeal under Article 8 of the

European Convention on Human Rights. The judge then dismissed the second appellant's appeal both under the immigration rules and Article 8 of the European Convention on Human Rights. Both parties have cross-appealed. The second appellant has appealed against the decision of S L L Boyes dismissing her appeal under Article 8 and the respondent has appealed against the decision of S L L Boyes to grant the first appellants' appeal under Article 8 of the European Convention on Human Rights. I shall however for the sake of convenience refer to the parties as they were referred to before the First-tier Tribunal.

- 3) The First-tier Tribunal Judge Boyes in a decision stated the following which I have summarised.
- 4) The first appellant's application under the long residence rule was dismissed by the First-tier Tribunal Judge on the basis that the first appellant was absent from the United Kingdom for a period exceeding six months during the relevant ten year period I found that he has not resided in the United Kingdom lawfully for a continuous ten year period, so therefore he cannot meet the requirements of paragraph 276 of the Immigration Rules. The judge stated that the discretion under paragraph 276B(i)(a) of the Immigration Rules is discretionary and he has no right to interfere with that discretion but he took the first appellant's explanation for why he could not return to the United Kingdom from Pakistan into account in his proportionality assessment under Article 8 of the European Convention on Human Rights.
- 5) The judge noted the evidence that the first appellant relied on which was medical evidence provided from medical practitioners in Pakistan that the first appellant was unwell and could not travel back to the United Kingdom. The Judge clearly found the first appellants reasons persuasive this but paragraph 57 of the decision that whilst the Tribunal cannot exercise a discretion as to the existence or otherwise of compelling or compassionate circumstances in determining whether or not the excess absence should be disregarded under the Immigration Rules, it is entitled to take the application of the respondent's policy into account when considering the appellant's Article 8 claim. The Judge stated that the nature of the first appellant's medical circumstances for why he could not return from Pakistan can quite properly inform the evaluation of proportionality pursuant to Article 8.
- 6) The respondent's grounds of appeal are that the Judge of the First-tier Tribunal appropriately found that the first appellant could not meet the requirements of the Immigration Rules but has failed to adequately consider the public interest under Section 117B which requires little weight to be attached to private life established by a person when that person's immigration status is precarious. The Judge it was further argued has failed to identify sufficiently compelling circumstances which would outweigh the public interest to give adequate reasons for finding that it would be disproportionate to expect the family to return to Pakistan together as a family.

Findings in respect of the first appellant as to whether there is an error of law in the decision of the First-tier Tribunal

- 7) The first appellant remained outside the country for a period of 244 days which is in excess of the period of time allowed under the immigration rules for 10 years continuous lawful residence. The judge considered the appellant's medical evidence from Pakistan when conducting the balancing exercise in respect of his proportionality assessment pursuant to Article 8. The judge took into account that the first appellant had good reason for why he could not return to the United Kingdom and this was because he became very unwell and has provided cogent medical evidence to demonstrate this.
- 8) The respondent states that the judge did not take into account the public interest as the appellant's immigration status has always been precarious. I do not accept that. The judge has considered the public interest and said that inbuilt into the concept of little weight in Section 117B(6) itself has a small degree of flexibility but in particular in Section 117A(2)(a) which provides a limited degree of flexibility recognised to be necessary in paragraph 36 above. Although this court today defines a precarious immigration for the purposes of 117B(5) with a risk from which most applicants rely on their private life under Article 8 who would be unable to escape, Section 117A(2)(a) necessarily enables the applications to occasionally succeed. It was open to the judge to find that this was one case where the appellant's application should succeed even though he does not meet the requirements of the immigration rules.
- 9) The respondent had also argued that the appellant does not meet the financial requirement threshold to meet the requirements of the Immigration Rules. The judge found that in paragraph 276B application there is no level of income which must be achieved on the grounds of ten years' continuous lawful residence. The judge took into account that the appellant has lived in this country for ten years and it was only his absence of 244 days from the United Kingdom which precluded the appellant from meeting the requirements of the immigration rules and clearly accepted the reasons advanced by the appellant for why he was away for those days.
- 10) As the grounds of appeal are limited to human rights clearly there can be no question of my entertaining an appeal on grounds alleging that the decision was not in accordance with the law or the immigration rules as these are not permissible grounds on the grounds of appeal only relate to Article 8 of the European Convention on Human Rights. However if the appellant can show that this would interfere with his private life or family life then it will be necessary to assess the evidence to see if the appellant meets the substance of the rules.
- 11) Therefore in respect of the first appellant I find that the judge was entitled consider the reasons why the appellant could not meet the requirements of the immigration rules and as he had no discretion to excuse the days in excess that the appellant has been out of the country because that discretion belongs to the respondent. However he was entitled to give the appellant's explanation for why he was out of the country for more than the period required under the immigration rules, appropriate weight

in his proportionality balance under Article 8 even though it may not be determinative. The ability to satisfy the rules illuminates the proportionality of the decision to refuse him entry clearance. The judge considered all the evidence and found that the first appellant's case came within the exceptionality rule where he should be allowed to remain under Article 8 even though he could not meet the requirements of the immigration rules.

- 12) I find there is no material error of law in the decision of the first-tier Tribunal Judge in respect of the first appellant and I dismiss the respondent's appeal of the decision of the First-tier Tribunal and the decision stands allowing the first appellant's appeal.
- 13) In respect of the second appellant, the second appellant is the wife of the first appellant. The First-tier Tribunal Judge dismissed her appeal under Article 8 of the European Convention on Human Rights and said that she can return to Pakistan with her children and the first appellant can choose whether to return with his wife and children or to live in the United Kingdom.
- 14) I find the decision made by Judge Boyes to be an unusual one. While giving the first appellant leave to remain under Article 8 and then requiring the appellant's wife and daughters to leave the country and go back to Pakistan on their own, the judge has granted permission to the first appellant to remain in this country but at the same time made it impossible for him to do so. The first appellant has this unenviable choice whether to remain in this country without his family or return to Pakistan with his family and forego his right to live in this country with all the advantages that entails and who has lived here for 10 years. I therefore find that there is a material error in the decision of the judge because his decision would lead to fragmenting this family.
- 15) I now remake the decision for the second appellant. I have considered the short submissions made by the second appellant and Mr Tufan. Mr Tufan argues that the appellant is not settled in the United Kingdom and has only been granted leave to remain under Article 8 and therefore the public interest requires that the second appellant leave the country with her daughters. I have considered the Article 8 rights of the appellant and her two children. Although they are not qualifying children, but nevertheless I must undertake the best interests of the children in any decision that I make in relation to them. I take into account that the second appellant's husband has been granted leave to remain under Article 8 of the European Convention on Human Rights and I have to evaluate where does family life for the second appellant and her children lie.
- 16) The second appellant's husband has lived in this country for ten years and the second appellant has lived in this country for seven years. The appellants' children's best interests lies by living with both parents in the family unit. The eldest child is 6½ years old but has not reached the age of 7 and therefore not a qualifying child but that is only six months away. I find that her best interest lies in living with both parents wherever they live.

- 17) In my evaluation I must consider the respondent's interests in an orderly and fair immigration control. I have a statutory duty to consider the matters set out in s 117B of the 2002 Act which I have done. The respondent's interest must guide and inform my decision.
- 18) I noted in respect of the first appellant his appeal was refused under the Immigration Rules on the basis that he had been absent from the country and the respondent refused to exercise his discretion in the first appellant's favour despite cogent medical evidence of his inability to travel back to the United Kingdom. I find that in this case the respondent's interests will not be compromised given the immigration history of the first appellant where he has lawfully lived in this country for 10 years minus the time that he was out of the country in Pakistan for medical reasons. The second appellant would have been granted leave to remain in line with the first appellant under the immigration rules had the first appellant not become so unwell and could not return to the United Kingdom.
- 19) I find that there are exceptional circumstances in this appeal where the second appellant's appeal should succeed. The first appellants' children and the second appellant should not be required to leave the United Kingdom for as long as the first appellant lives in this country to preserve the family life of this family.
- 20) I therefore remake the second appellant's appeal and allow it under Article 8 of the European Convention on Human Rights.
- 21) The upshot is that both appellants appeals are allowed under Article 8 of the European Convention on Human Rights.

Signed

Date 10 June 2019

Deputy Upper Tribunal Judge Chana

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award.

No anonymity direction is made

Signed

Date 10 June 2019

Deputy Upper Tribunal Judge Chana