Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09698/2017

THE IMMIGRATION ACTS

Heard at: UTIAC Birmingham	**Decision& Reasons Promulgated**
On: 12 December 2018	**On 18 January 2019**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ELVIRA [L]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Kerr of Karis Solicitors
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Following a grant of permission to appeal against the decision of the First-tier Tribunal dismissing the appellant's appeal against the respondent's decision to refuse her human rights claim, it was found, at an error of law hearing on 19 October 2018, that the First-tier Tribunal had made errors of law in its decision. The decision was accordingly set aside with directions for it to be re-made at a resumed hearing.

2. The appellant is a citizen of Albania, born on 25 October 1974. She first came to the UK in 2001 with her husband [TM] and their daughter [E] (born on 7 January 1999). Their son [K] was born in the UK on 29 January 2004. In 2007 the family were returned to Albania. The appellant and her husband divorced in November 2007 and in 2009 her ex-husband returned to the UK on an EEA family permit, following his marriage to a Portuguese national in September 2008 and a successful appeal against a decision to refuse to issue him with such a permit. He was issued with a permanent residence card on 23 August 2014. In September 2013 the children came to the UK to join their father and were issued with residence cards valid until December 2018. The appellant then entered the UK illegally in November 2013 and on 22 December 2014 she applied for leave to remain on the basis of her family and private life. Her application was refused with no right of appeal on 18 March 2015.

3. On 8 June 2016 the appellant made a human rights claim for leave to remain on the basis of family life under the 10-year parent route in Appendix FM of the immigration rules. Her claim was refused on 16 August 2017. The respondent considered that the appellant could not meet the eligibility requirements in Appendix FM as her children were not British or settled in the UK and had not lived in the UK for over 7 years and that paragraph EX.1(a) did not apply. The respondent considered that she could not meet the requirements in paragraph 276ADE(1) on private life grounds and that there were no exceptional circumstances outside the immigration rules.

4. The appellant appealed against the respondent's decision and her appeal was heard in the First-tier Tribunal on 18 April 2018 by First-tier Tribunal Judge Butler. The evidence before the judge was that the children lived with the appellant during the week and with their father at weekends. The appellant's daughter was having surgery in the UK for a cleft palate and wanted her mother with her. The children's father lived close by and he would not be able to visit them in Albania as often as previously if they returned with their mother as he had started a new business and needed to spend time in the UK developing it. The judge did not believe the appellant's claim that she only came to the UK because she missed her children, but considered that she had always planned to join her children in the UK. He considered that the children's father would visit the children regularly if they returned to Albania. The judge considered that the children's best interests were to remain in the UK even if the appellant was removed. He considered that it would be proportionate to remove the appellant and he dismissed the appeal on Article 8 grounds.

5. Permission to appeal against that decision was sought, and granted, on the grounds that the judge had failed to give proper consideration to the best interests of the children and had failed to consider the argument made before him at the hearing in regard to Article 24(3) of the EU Charter of Fundamental Rights. Reliance was placed upon the case of Abdul (section 55 - Article 24(3) Charter : Nigeria) [2016] UKUT 106 in that regard.

6. At an error of law hearing before Upper Tribunal Judge Hanson, the respondent conceded the error based upon the Charter and Abdul. The judge made directions for the re-making of the decision at a resumed hearing.

Appeal hearing and submissions

7. The appeal then came before me on 12 December 2018. I was informed by Mrs Aboni that the appellant's son [K] had now been issued with an EEA permanent residence card.

8. There was no oral evidence. Both parties made submissions on the basis that [K] was now a "qualifying child". Mr Kerr submitted that the appellant now qualified under the parent route under Appendix FM, given that [K] was settled in the UK. He submitted that the appellant's removal would be disproportionate in any event pursuant to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 on the grounds that it was in [K]'s best interests to remain in the UK with both parents and it was unreasonable to expect him to leave the UK with the appellant. Mrs Aboni accepted that [K]'s best interests were to remain in the UK, but submitted that it was a matter of choice for the family whether he remained in the UK or not.

9. Following the hearing, and on further reflection, I considered that both parties were wrong in accepting that [K] was now a "qualifying child" as a result of becoming settled in the UK. In light of Mr s Aboni's concession at the hearing in that regard I issued directions to both parties to provide written representations clarifying their positions. Both parties made written submissions.

10. Mrs Aboni's submissions were as follows:

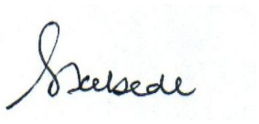
> "We write in response to Directions issued on 18 December 2018.
>
> The Respondent agrees with the Tribunal that although the appellant's son, [K] has now been issued with an EEA Permanent Residence Card, he is not a "qualifying child" for the purposes of Paragraph EX.1(a) of Appendix FM or Sec 117B(6) of the NIAA 2002.
>
> However, the Respondent accepts that [K]'s best interests are to remain in the UK to continue to enjoy family life with his father and sibling and pursue his studies. The Respondent accepts that the appellant does enjoy a genuine and subsisting relationship with [K] and that it would be disproportionate to require the appellant to leave the UK.
>
> The Tribunal is invited to allow the appeal on Article 8 grounds Outside the Rules."

11. Mr Kerr, in his submissions, accepted that the appellant could not meet the requirements of the immigration rules but asked that the appeal be allowed outside the rules.

12. In light of Mrs Aboni's submissions there is no need for me to make any detailed findings. I make the following summary findings. The appellant cannot meet the requirements of the immigration rules. However it is clearly in [K]'s best interests to remain in the UK and continue his studies. He is now settled in the UK and, since he has been living with the appellant for all his life apart from the two months after his departure from Albania and prior to her arrival in the UK in November 2013, it would be disproportionate to require her to leave the UK. It is necessary to consider the human rights of [K] as well as the appellant's and therefore, despite the appellant's adverse immigration history, the appropriate decision is that the appeal be allowed on human rights grounds outside the immigration rules.

DECISION

13. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside. I re-make the decision by allowing the appellant's appeal on Article 8 grounds outside the immigration rules.

Signed  Dated: 9 January 2019

Upper Tribunal Judge Kebede