



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10961/2018

THE IMMIGRATION ACTS

Heard at North Shields
On 14 May 2019

Decision & Reasons Promulgated
On 30 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MRS D K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs M Cleghorn, Counsel.

For the Respondent: Mrs R Petterson, Home Office Presenting Officer.

DECISION AND REASONS

1. The Appellant is a citizen of Uzbekistan.
2. She initially entered the United Kingdom as a visitor and on 4 December 2017 applied for a variation of her leave to remain as the spouse of the Sponsor, a British citizen. That application was refused on 8 May 2018 and the Appellant appealed on Article 8 grounds against that decision.

3. Her appeal was initially heard by Judge of the First-tier Tribunal J M Holmes who, in a decision promulgated on 28 November 2018, dismissed it.
4. The Appellant sought permission to appeal against that decision. It was initially refused but a renewed application to the Upper Tribunal was granted on 28 February 2019 by Upper Tribunal Judge Rimington. Her reasons for so granting were: -

"It is unnecessary to hold an oral hearing of the application for permission to appeal because I consider that it can properly be dealt with on the papers.

Despite a carefully reasoned decision, it is arguable that the interests of the British citizen children and the application of Section 117(6) of the Nationality, Immigration and Asylum Act 2002 have not been fully explored when considering removal to the UAE or Uzbekistan.

Permission is granted on all grounds."
5. Thus, the appeal came before me today.
6. At the outset Mrs Petterson informed me that Respondent's position was that the Judge had materially erred and she invited me to remake the decision by allowing the appeal. She referred me to the authority of **JG (S117B (6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) 27**.
7. Perhaps not surprisingly Mrs Cleghorn did not seek to dissuade me from this course.
8. The brief facts are that the Appellant is a citizen of Uzbekistan who entered the United Kingdom on 21 June 2017 as a visitor, having declared an intention to visit the United Kingdom for 10 days to attend a family wedding. On 4 December 2017 she applied for a variation of her leave to remain as the spouse of the Sponsor, a British citizen. That application was refused on 8 May 2018. The Respondent's reason for the refusal was that the Appellant had entered as a visitor, and that she should return to Uzbekistan to make an application for entry clearance as a spouse. The Appellant appealed that decision on Article 8 grounds.
9. The Respondent's case was that the position is that the Appellant had demonstrated no good reason why she should not be expected to leave the United Kingdom and seek entry clearance as a spouse in the usual way. The Appellant's case was, in the First-tier Tribunal, also advanced by Mrs Cleghorn. She argued that albeit a British citizen child is not a "trump card", nevertheless since the Appellant's two children are British citizens, it is disproportionate given their ages, to expect the Appellant to leave the United Kingdom to make an entry clearance application, because to do so would separate her from them. The "best interests" of both children required that they should both live with both of their parents, without any interruption, and thus the Appellant should be permitted to remain in the United Kingdom indefinitely.
10. At paragraph 27 of JG an Upper Tribunal Presidential Panel found:-

"27. We do not consider that paragraphs 18 and 19 of KO (Nigeria) mandate or even lend support to the respondent's interpretation. In those paragraphs, the

point being made by Lord Carnwath and by the judges in the cases he cited is merely that, in determining whether it would be reasonable to expect the child to leave the United Kingdom, one must have regard to the fact that one or both of the child's parents will no longer be in the United Kingdom, because they will have been removed by the respondent under immigration powers. That, we find, is the extent of the "real world" envisaged by Lord Carnwath."

11. After consideration of the jurisprudence in **KO (Nigeria) & Ors v SSHD [2018] UKSC 53** and the guidance given at various times by the Secretary of State to its caseworkers, the Upper Tribunal concluded at paragraph 39 that section S.117B(6) when properly construed could result in "a person with parental responsibility who could not invoke section 117B(6) may, nevertheless, succeed in a human rights appeal". At paragraph 41 the Upper Tribunal stated:-

"41. We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A of imposing greater consistency in decision-making in this area by courts and tribunals. The fact that section 117B(6) has such an aim was expressly recognised by Elias LJ at paragraph 44 of MA (Pakistan)."

12. The Appellant's eldest child was born on 29 October 2011 in Uzbekistan and the youngest child was born on 22 September 2017 in the United Kingdom. Thus, the Appellant entered the United Kingdom on 21 June 2017 when about six months pregnant. It is not in dispute that family life exists between the Appellant, her husband and the children.
13. The decision under appeal interferes with the right to family life of the Appellant, her husband and their children. I am satisfied that the best interests of the children are to remain in the United Kingdom. The question is whether there are factors weighing against those interests such as that it would not be unreasonable to expect the children to relocate with their mother, even if it were on a temporary basis. That would of course separate them from their father. The only adverse criticism of the Appellant is that she arrived in the United Kingdom initially as a visitor and then sought leave to remain as the spouse of her Sponsor and husband.
14. The children are British citizens and I find that it is in their best interest to remain in the United Kingdom. There are no factors weighing against those interests such that it would not be unreasonable to expect them to relocate. It would be unreasonable to expect the children to follow their mother to Uzbekistan even on a temporary basis.
15. Consequently, even assuming the children remain with their mother (or indeed their father too) as a family unit outside the United Kingdom it would be disproportionate to any legitimate public objective, such as the maintenance of proper immigration control, to require them to leave the United Kingdom. To put it in another way, the public interest does not require the children's removal from the United Kingdom.

The removal of the Appellant would not be proportionate in terms of Article 8 of the European Convention: see paragraph 96 of JG.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside that decision.

I remake the decision in the appeal by allowing it.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.



Signed

Deputy Upper Tribunal Judge Appleyard

Date: 28 May 2019

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid, I have considered making a fee award and have decided to make a whole fee award of £140.00.



Signed

Deputy Upper Tribunal Judge Appleyard

Date: 28 May 2019