Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18520/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 6 December 2019	**On 16 December 2019**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

FAIZA [L]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M [R], Sponsor
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Jackson promulgated 5 June 2019 dismissing her appeal against the decision of the Secretary of State dated 20 August 2018 to refuse her application made on 4 June 2018 for entry clearance as a partner of Muhammad [R], a person present and settled in the UK.

2. Mr [R] appeared in person. He told me he was not legally represented. He produced a short summary of his case notes and did not seek an adjournment.

3. First-tier Tribunal Judge Kelly granted permission to appeal on a single ground only, in relation to the issue of Section 55 of the Borders, Citizenship and Immigration Act 2009 and the best interests of the child of the appellant and the sponsor, who is a British citizen. Permission was refused on all other grounds. Apparently the application for permission was renewed to the Upper Tribunal but on that occasion Upper Tribunal Judge Frances refused permission on 4 November 2019, noting that the renewed grounds did not challenge the refusal of permission on the remaining grounds. It follows that the sole issue for the Upper Tribunal to consider relates to the First-tier Tribunal Judge's treatment of the best interests of the British citizen child who is and always has been since birth resident in Pakistan with the appellant.

4. Prior to the hearing, the Tribunal received a letter and bundle from Mr [R] seeking to adduce further evidence. The bundle contains 151 pages and includes updated witness statements from the appellant and the sponsor as well as other documentary materials. Those matters were considered by the Upper Tribunal on 22 November 2019 when Upper Tribunal Judge Perkins asked the appellant to be reminded that she can only rely on material that was not before the First-tier Tribunal with the Upper Tribunal's permission, and if she makes an application in accordance with Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. It is said "the judge deciding the appeal on 6 December 2019 will decide to what extent the appellant can rely on the bundle but it would be helpful that Mr [R] reads Rule 15(2A) and shows how his application complies with the Rule". Before me today there was no formal Rule 15(2A) application.

5. Mr [R] told me he did want to rely on the materials in his new bundle. However, I had to explain to him that the ambit of the Upper Tribunal at this stage is confined to determining whether there is an error of law in the decision of the First-tier Tribunal and it is further confined by the restriction of the permission to appeal to one ground only, namely the best interests of the British citizen child. I explained on a number of occasions to Mr [R] that to that extent the materials in his bundle seeking to re-argue the appeal are not relevant to the issue of an error of law and that I could not take them into account and would not be referring to them in my decision.

6. I have, however, taken account of Mr [R]'s single typed sheet of case notes in which he sets out that he believes that he and his wife are victims of injustice, that the refusal of their application was immoral, that there was no valid reason for the refusal, that no consideration or compassion had been shown towards them or their child, and that they were all suffering by this "ill-fated decision". He suggested that they are being punished for "being down-to-earth, truthful and law-abiding citizens". He states that it is now two years, three months and 27 days since their marriage, which has been ruined by the "cruel separation" imposed upon them. He said he would prefer to be dead rather than suffer from worry from pain to his wife and son by the separation imposed on them.

7. I have taken those matters into account as best I can but, in reality, they are a plea for compassion and reconsideration which is outside the ambit of what the Upper Tribunal has to decide in this case. As explained to Mr [R] I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that that decision should be set aside to be re-made. However, it remains the case that the sole issue for consideration is that of the judge's treatment of the best interests of the British citizen child.

8. The background to the case is unusual, as the sponsor in the UK obtained indefinite leave to remain in 2017 on the basis of a long term, same-sex relationship with a civil partner. That relationship has now terminated, but in what circumstances is not entirely clear. However, the marriage to the appellant took place on 10 August 2017, within a month of first meeting in July 2017, and apparently very shortly after the termination of the same-sex relationship. The First-tier Tribunal Judge took into account that sexual orientation may be fluid. The judge also rejected the respondent's concerns that the sponsor was already married or in a civil partnership and therefore not free to enter into a marriage.

9. At paragraph 37 of the decision, the judge noted that the appellant and the sponsor had a child who was a British citizen but stated, "the law does not require me to bear in mind the interests of the appellant's child, but I do so nonetheless". The first part of that statement is obviously based on the fact that Section 55 of the Borders, Citizenship and Immigration Act 2009 applies to a child in the UK. However, the judge confirmed that, in any event, that the best interests of the child were taken into account. It is worth noting that at the date of the application the child had not yet been born; it appears that the child was born a month after the decision of the Secretary of State in August 2018.

10. It is important to understand that the overall findings, in which context permission to appeal has twice been refused, were to the effect that the judge found the appellant had failed to discharge the civil burden of proof to demonstrate that there was a genuine relationship between herself in Pakistan and the sponsor in the UK. As I explained to Mr [R], that finding must stand, so the consideration of the outstanding issue of the best interests of the child must proceed on the basis that there is no family life

between the appellant and the sponsor sufficient to meet the Rules or to engage Article 8 ECHR outside the Rules. It follows that whatever the best interests of the child, whether to remain in Pakistan with the appellant or to come to the UK to join his father as he is entitled to by virtue of being a British citizen, there is no basis to grant leave to the appellant to come to the UK to join the sponsor, as they have no extant family life. At the present time, the child is in Pakistan with the appellant and all the appellant's family life is there, with that child, and not in the UK.

11. Of course, it is open to the sponsor to return to Pakistan to enjoy family life there. He has had no difficulty visiting them and he told me that he financially supported them but said he could not go to live in Pakistan with them because he had established employment in the UK, was settled here and could not go. He said it was not "practical" for him to live in Pakistan. The UK is not obliged to give effect to the sponsor's convenience. His reasoning for not going to join the appellant in Pakistan is long way from there being insurmountable obstacles to the claimed family being continued in Pakistan. As he has been to visit them on a number of occasions, and as he originates from Pakistan, there seems no valid reason why he could not, if he so chose, continue any claimed family life with the appellant and his child in Pakistan. However, he chooses not to do so.

12. It is also relevant that the child is still in Pakistan and has never been in the UK. It is the decision of the sponsor, Mr [R] and the appellant as to where the child lives. As he is a British citizen, the child cannot be prevented from coming to the UK. This Tribunal has to consider the situation in the real world, in which the child is in fact living with his mother in Pakistan. On that basis, I cannot see that the best interests of the child could be anything other than to continue to live with his primary carer in Pakistan, the country of his birth and ethnic background. At some stage he may be brought to the UK but at the present time he is far too young to make any decision himself and will not be conscious of being separated from the appellant, since he will have seen him only very infrequently since his birth.

13. Looking at the decision in the round and bearing in mind the limitation that the Upper Tribunal can only interfere with the decision on a material error of law by the First-tier Tribunal, and bearing in mind the limited grant of permission relating to the best interests of the child, I find that even though the First-tier Tribunal Judge could have set out more clearly within the decision the best interests of the child, the failure to do so is not material to the outcome of the appeal. As the judge stated at paragraph 38, the primary question was whether the appellant had established a genuine relationship with Mr [R] in the UK. Unfortunately for Mr [R] the judge's conclusion on that was that she had not. At paragraph 59 the judge stated:

> "I find that the appellant has not proved to the necessary standard that there is a genuine and long-standing relationship with Mr [R]. Article 8 does not therefore come into play as the appellant has not to my mind

> shown a genuine private/family life with her sponsor. As such, I do not consider whether any interference would be disproportionate."

14. As already stated above, I have to proceed on the basis that there is a finding that cannot be challenged that the appellant does not have family life with Mr [R]. In the circumstances, I cannot see that any further consideration of the best interests of the child could have made any material difference to the outcome of that appeal.

Decision

15. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point law.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed

Upper Tribunal Judge Pickup

Dated 12 December 2019

To the Respondent
Fee Award

I make no fee award as the appeal has been dismissed.

Signed

Upper Tribunal Judge Pickup

Dated 12 December 2019