Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/19344/2016**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 28th July 2017	**On 7th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

MRS. NIMRA ASAD MALIK
(NO ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Munawar Ali of Rightway Legal, Solicitors.
For the Respondent: Mr S.Kotas, Home Office Presenting Officer.

DETERMINATION AND REASONS

Introduction

1. The appellant is a national of Pakistan. She applied for leave to remain as the wife of a British national and the parent of a British child. Her application was refused as she had not supplied her husband's wage slip for the month before the application nor was the necessary letter from his employer. The respondent had requested these by letter dated 9 June 2016 and had also asked for

© CROWN COPYRIGHT 2017

evidence that their child, A, mentioned in the application lived with the appellant. However, no response was received.

2. In a decision promulgated on 24 November 2016 Judge of the First-tier Tribunal Shanahan dismissed her appeal. There was a limited right of appeal, namely, on human rights grounds. The judge looked at matters through the prism of the immigration rules in accordance with the established principles. The appellant had given an explanation as to why the wage slip had been omitted, stating her husband's employer had been taken over. She also explained there were no letters in their daughter's name, she being only two years of age. The judge was not satisfied with the explanations given and found the suitability and financial requirements in the rules were not met. The judge did accept there was a genuine and subsisting relationship with her daughter who is a British national. However the judge was not satisfied it would be unreasonable to expect the child to leave the United Kingdom with her parents. Outside the rules the judge found no breach of article 8.

3. Permission to appeal was granted on the basis it was arguable that the judge erred in law in concluding it would be reasonable to expect the appellant's child to leave the country of her nationality.

4. On 29 June 2017 she gave birth to her son who is also a British national. There is a statement from the appellant dated 25 July 2017 to the effect that her husband is in full-time employment and she cares for his disabled mother. Her representative submitted that the appellant's presence was necessary in order to look after not only the children but her husband's disabled mother. Her husband was in full-time employment.

5. The presenting officer submitted that no material error of law was established. At the time the First tier Judge made the decision the second child had not been born. The judge had concluded that it was reasonable for the appellant's firstborn to leave with her and this was open to the judge.

Consideration

6. At the time of the judge's decision the appellant second child had not been born. The hearing took place in October 2016 at which stage it would not have been known she was pregnant. Consequently, no error of law can arise from facts subsequent to the decision.

7. The judge did accept that the appellant's firstborn child was British. Mr Ali stated that the appellant lodged the appeal herself. The appeal was determined on the papers so the judge did not have the benefit of submissions. The judge accepted the appellant's daughter was a British citizen and considered EX1.1 (a) (ii) and whether it would be reasonable to expect the child to leave the United

Kingdom. The judge concluded that given the age of the child, two years of age, she had not formed any significant private life and it would be reasonable for her to accompany her mother whilst an entry clearance application was made. The judge at paragraph 15 stated that they had not been provided with sufficient evidence to establish it would not be reasonable to expect the child to leave the United Kingdom. In looking at section 117 B (6) the judge appreciated that the public interest does not require the person's removal where there is a genuine parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. However, whilst acknowledging the appellant's daughter was a qualifying child the judge took the view it would not been established it would be unreasonable to expect her to go with her mother.

8. Notably, there is no reference to the respondent's I.D.Instructions of August 2015, particularly in relation to the best interests of the child. 11.1 considers the application of EX 1 of appendix FM and paragraph 276 ADE(i), meant to reflect the duty in section 55 of the Borders, Citizenship and Immigration Act 2009. The judge had accepted there was a genuine and subsisting parental relationship. Point 11.2.3 of the Guide provides that in the absence of criminality the decision maker should not make a decision which would have the effect of forcing a British child to leave the United Kingdom. Where the decision to refuse an application would require a parent or primary care to return to a country outside the EU the case must always be assessed on the basis it would be unreasonable to expect the child to leave. The application of section 117 B (6) was considered by the Court of Appeal in MA et al[2016] EWCA Civ 705 and guidance was given as to the reasonableness test. Reference is made to the established jurisprudence that the best interests of the child are a primary consideration. The focus is solely on the child.

Error of law

9. It is my conclusion that the judge materially erred in law in concluding the appellant's child could go to Pakistan either with one or both parents. That conclusion does not pay sufficient regard to the rights of a British child and ignores the respondent's Guidance. As stated, the judge was at a disadvantage in that the appeal was being determined on the papers. The judge did refer to limited information, including details about her caring responsibilities towards her mother-in-law and her husband's work commitments. The reality is that now the appellant has a second child which makes a move to Pakistan all the more unrealistic. Given the issues arising I am in a position to remake the decision without hearing further evidence. I would do so and allow the appeal.

Decision.

The appeal is allowed

Deputy Upper Tribunal Judge Farrelly 6TH September 2017