Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16124/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd October 2018	**On 12th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MRS HINA [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Goldborough, Solicitor, Julia & Rana Solicitors
For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge VC Dean) dismissing her appeal against the decision of the respondent made on 14 November 2017 to refuse to grant her leave to remain as a partner of a settled person because she did not have valid leave to remain when she submitted her application and the requirements of EX.1 were not satisfied. Judge Dean found that EX.1 was not satisfied, and also that the sponsor did not meet the minimum income requirement ("MIR"). He held that that it was proportionate to require the appellant and the two children to relocate to Pakistan either to enjoy family life there

with the sponsor on a permanent basis or, alternatively, on a temporary basis while the appellant made an out of country application.

The Reasons for the Grant of Permission to Appeal

2. On 13 August 2018 First-tier Tribunal Judge Mailer granted permission to appeal for the following reasons:

> "(3) The grounds assert that the Judge failed to take into account the best interests of the two children. The second child was born in the UK after the appellant's application was made but before the father was granted ILR in November 2017. He will be registered as a British citizen and will not be treated as a national of Pakistan. Nor did the Judge consider **R (Chen) v SSHD [2015] UKUT 00189**.
>
> (4) It is arguable that the Judge's s.55 assessment is inadequate in the circumstances. There was no consideration as to whether even a temporary separation would be disproportionate having regard to the appellant's business and the likelihood of the younger son's registration as a British citizen."

The Appeal Hearing

3. At the hearing before me to determine whether an error of law was made out, Mr Goldborough produced evidence that the second child, [H], had been issued with a British passport on 7 September 2018.

Discussion

4. On analysis, the error of law challenge is no more than an expression of disagreement with findings and conclusions that were reasonably open to the Judge on the evidence, and which were also entirely consonant with the relevant jurisprudence.

5. The Judge was required to assess the human rights claim on the facts as they stood at the date of the hearing. [H] was not a British citizen at the date of the hearing, and the Judge directed himself appropriately in holding that he was not determining an application by [H] for citizenship. The Judge was right not to treat [H] as a qualifying child, and thus right not to treat s117B(6) of the 2002 Act as being engaged.

6. On the facts as they stood at the date of the hearing, neither child was a qualifying child. In addition, the Judge found at [32] that on the available evidence the sponsor was a long way off meeting the MIR for the appellant, let alone for the appellant plus one or two children.

7. The Judge made a sustainable finding that the appellant did not meet the requirements of the Rules for leave to remain, and there was no imminent prospect of her doing so. In the circumstances, it was clearly open to him to find that the parents faced a reasonable choice: either to relocate to Pakistan as a family on a permanent basis or for the sponsor to remain here to grow his business and to support an out of country application by

the appellant when the MIR was met.

8. With regard to the latter option, the Judge noted at [35] the sponsor's evidence that he did not have a difficulty with it. The Judge also noted at [37] that in the period 2010 to 2013 the family had lived on separate continents, with the appellant remaining in Pakistan with their first child, and family life being maintained by the sponsor making return visits.

9. Mr Goldborough pleaded that the Judge failed to take into account that the sponsor would need to arrange child care for [H] while the appellant and their first child were in Pakistan. But the appellant was not being forced to leave [H] behind in the United Kingdom, contrary to his best interests. It was open to the Judge to find at [41] that it was in the best interests of both children to remain with their mother, and hence to return with her to Pakistan on either a permanent or temporary basis. The **Chen** jurisprudence was not engaged, as (a) there was good reason under the Rules to require the appellant to return to Pakistan and (b) it could not be said that she was likely to succeed in an out of country application in the immediate future. The fact that the second child might have obtained a British passport by the time of such an application was not in itself going to be determinative of its success. The key issue was and is compliance with the MIR.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and so the decision stands. This appeal to the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is required for these proceedings in the Upper Tribunal.

Signed Date 7 October 2018

Judge Monson
Deputy Upper Tribunal Judge