Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08436/2015

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 25 August 2017	**On 30 August 2017**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

MONICA [C]

[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr M Karnik, Counsel instructed by Kabir Ahmed solicitors.

For the respondent: Mr C Bates, a Senior Home Office Presenting Officer

DECISION AND REASONS

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1. The appellant appeals with permission against the decision of the First-tier Tribunal to refuse her leave to remain in the United Kingdom on private and family life grounds. She is a United States citizen but her husband and three children, now aged 14, 12 and 8, are all British citizens.

Background

2. The appellant is a citizen of the United States: she was born on a United States Air Force Base, and was naturalised at birth. Her father, who is of Puerto Rican origin, was then serving in the Canal Zone. The appellant and her father are estranged and have been since 2001, when she met her husband and subsequently came to the United Kingdom to marry him.

3. The appellant met her husband in 2001 in the United States when he visited there. In April 2002, she entered the United Kingdom on a visit visa, with the intention of marrying him. On 15 June 2002, the parties married and following her marriage, the appellant obtained indefinite leave to remain as her husband's spouse, without leaving the United Kingdom.

4. The appellant has not lived in the United States since 2001, and is estranged from her father since then. She has not worked since 2003, when she had her first child, born in the United Kingdom. The appellant and her husband own a property in London from which they receive rental income (about £30,000 a year). In about 2003, the parties left the United Kingdom.

5. From 2003 to 2010, the family lived in Syria, because the appellant's husband was studying Arabic at Damascus University. The husband worked as an English teacher. They had two more children during this time, a boy born in 2005 and a girl in 2009. The children are all home schooled by the appellant. The family returned to the United Kingdom for visits, from time to time, and would have been made aware that the wife had lost her indefinite leave to remain after 2 years living abroad.

6. In 2010, the family moved to Egypt which was a safer place for the appellant's husband to continue his Arabic studies. They remained there on tourist visas, which they renewed to enable them to stay. Neither party worked during the family's time in Egypt: the family lived on the rental income from their London property (about £2500 a month, or £30,000 per annum).

7. In 2011, there was a revolution in Egypt and the family eventually felt that it had become unsafe for foreigners. In 2013, they moved to Turkey, where they found the visa situation easier. In 2014, the husband decided to return to the United Kingdom and set up a business here. The appellant remained in Turkey, caring for the three children there, for about 11 months. She found it difficult and stressful to manage the home and her family in her husband's absence. In the end, the appellant's husband accepted that the separation was just too difficult for the appellant, and that the whole family should come to the United Kingdom.

8. On 7 March 2015, the whole family returned to the United Kingdom. On their return in 2015, the appellant and her family had been outside the United Kingdom for over 13 years. Indefinite leave to remain is lost if a person is outside the United Kingdom for more than 2 years.

9. The parties did not give much thought to the basis on which the appellant could stay in the United Kingdom. The appellant had always been able to enter the United Kingdom as a visitor, since they left, and expected that in March 2015, the same would be true.

10. The appellant's husband and children had no difficulty entering the country, as they are British citizens. The appellant was interviewed by an immigration officer who offered two options, either to return to the United States and make an application to come to the United Kingdom as a spouse, or to enter on a six-month visit visa. The appellant chose the visit visa option. She expected that she would be able to make a successful application for leave to remain once here.

11. The appellant's case is that the children are now settled back into their country of nationality and it would be unreasonable to expect them to leave. She continues to home school the two younger children, which she has done since they were born, but they have developed a wide network of home-schooled friends and take part in many activities here.

12. The elder boy, who is 14, is in mainstream education here: he found it difficult to settle in the first year, but is now doing well and will be beginning to study for his GCSEs soon. The appellant and her husband do not wish to disrupt his education again at this important time. The family has relocated many times, and it has taken its toll on all of them. The appellant and her husband consider that the children need to begin putting down roots and developing relationships.

13. After coming to the United Kingdom, the appellant and her husband initially lived with the husband's brother and his wife, but have now bought their own home, where they live with the husband's mother, who has several medical conditions, including breast cancer (diagnosed in 2016), hypertension, and diabetes. The appellant goes to medical appointments with her mother-in-law and supports her emotionally: they have a close bond. Her brother-in-law and his wife are not involved with the mother's care.

14. The appellant's husband continues to study Arabic. The husband's business is not doing well, certainly not well enough to support two homes, one in the United Kingdom and one in the United States. The appellant considers it unlikely that he would be allowed to move to the United States but has not researched that possibility.

Refusal letter

15. During the currency of her visit visa, the appellant applied for leave to remain but the respondent refused, both under the partner and parent routes, and outside the Rules on Article 8 ECHR grounds.

16. The respondent noted that the appellant could not meet the requirements of the partner or parent routes, and that therefore EX.1 was not applicable. Under the partner route, E-LTRP.2.1(a) specifically excludes those who are in the United Kingdom as a visitor. Under the parent route, E-LTRPT.2.3 excludes those who do not have sole responsibility for a child and E.LTRPT.3.1 also excludes those who are in the United Kingdom as a visitor. Again, EX.1 was inapplicable.

17. The respondent considered paragraph 276ADE but the appellant could not meet the residence requirements of that rule.

18. Under exceptional circumstances, the respondent acknowledged that the appellant had a British spouse and three British citizen children. However, the appellant could not meet the Rules and should not be permitted to circumvent them: she should apply for entry clearance from abroad.

19. The section 55 best interests of the children were briefly considered but no weight was given to the home schooling of her children. The respondent recognised that as British citizens, the children could not be expected to go and live elsewhere, but she considered that the appellant's British husband could look after the children while she applied for re-entry to the United Kingdom.

20. Alternatively, despite their right to grow up in the United Kingdom, the respondent considered that the children, and the appellant's husband, could return together with her to the United States, where family life could be enjoyed together and there would be only a proportionate degree of disruption to their private life in the United Kingdom. The respondent did not consider that a grant of leave outside the Rules was appropriate.

21. The appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

22. The First-tier Tribunal Judge accepted that the appellant had private and family life with her husband and children, established long before their return to the United Kingdom and not while she had precarious leave. The private and family life developed by the appellant in the United Kingdom since her arrival was, however, developed while her leave here was precarious and in accordance with section 117B(5) of the Nationality, Immigration and Asylum Act 2002 (as amended), the Judge attached little weight to that.

23. He did not consider that the mother-in-law's needs were sufficient to amount to exceptional circumstances. The Judge considered that the attitude of the adult parties was too casual: they were educated people with experience of living in many countries and he did not believe that they had been unable to understand the online materials about how to apply for indefinite leave to remain. The appellant's husband had been in the United Kingdom for 11 months before returning to Turkey to collect his family and the Judge considered that in that time he would have taken advice on relocating and re-establishing family life in the United Kingdom.

24. The Judge accepted at [50] that this family would experience significant difficulties in obtaining immigration status for the husband in the United States and that it would not be reasonable for the children, who are British citizens, to relocate there, particularly having regard to their current ages and circumstances.

25. The Judge considered it reasonable for the appellant to return to the United States: he accepted that she left there 16 years ago, has no real current family ties now, and has not worked since the birth of her first child in 2003. The husband had a sister in Florida and it had not been suggested that she could not accommodate the appellant in these circumstances. The Judge found that requiring the appellant to go to the United States would interfere with her family life rights but considered that such interference was proportionate.

26. The Judge did not consider it unduly harsh or unreasonable to expect the appellant to return to the United States and comply with the United Kingdom Immigration Rules, as she should have done before coming here. Any interference with her private and family life rights, or her husband's right to study, was proportionate in the circumstances.

27. The Judge made no express findings about the children's section 55 best interests, in particular the difficulties the older child had experienced in adapting to mainstream schooling, and the home-education of the younger two. He considered that the separation would not be for long: the appellant's husband would meet the financial requirements of Appendix FM-SE by reason of the £30,000 income per annum from the London property. The husband was not currently working and would be able to care for the children while the appellant regularised her status.

Grounds of appeal

28. The appellant sought permission to appeal to the Upper Tribunal. She argued, first, that the First-tier Tribunal erred in finding that it would be proportionate for her to return and make her application for entry clearance from the United States, relying on *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40 and the public law principle of consistency in decision making (see *R on the application of Golam Mowla v Secretary of State for the Home Department* [1992] 1 WLR 70 CA, which concerned the failure of the respondent to exercise her discretion to give leave to enter and indefinite leave to remain on the merits.

29. The appellant argued that she had told the immigration officer that she wished to enter for settlement, not as a visitor, and that it was the immigration officer who advised her to enter and then apply for leave to remain. In addition, the Judge had failed to have any, or any proper regard, to the appellant's home schooling the children, whose education would be interrupted if she were removed.

30. Secondly, the appellant contended that the Judge's reasons at [47] and [49] were inadequate. A lay person, however intelligent, could not have a proper understanding of the complexity of the Rules, which were difficult even for lawyers to interpret (see *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568 at [4] and

Singh v Secretary of State for the Home Department [2013] EWCA Civ 74 at [59]). The appellant's solicitors had sent a covering letter invoking EX.1 which the respondent had failed to understand.

Permission to appeal

31. Permission to appeal was given on the basis that the Judge had failed to make proper findings on the section 55 best interests of the appellant's children, or to give weight to the home education of the younger two children. Nor had the Judge considered paragraph 117(6) which, given that she has a genuine and subsisting relationship with her British citizen children, indicated that there was no public interest in her removal.

Rule 24 Reply

32. The respondent in her Rule 24 Reply considered that the appellant should return to the United States. She relied on *R on the application of Chan v Secretary of State for the Home Department* (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015 UKUT 00189 and argued that it was open to the respondent to consider the appellant returning to the United States on that basis.

33. The Reply continued:

> "3. It is submitted that the Judge has considered all the relevant factors in relation to the children and the family as a whole. It is submitted that the Judge, although not having expressed this directly with the term 'best interests', has found that the appellant's best interest lie in them remaining in the United Kingdom, given her findings that requiring the children to leave the United Kingdom would be too much of an upheaval for them and finds that they have the benefit of wider family members and that separation would not cause a significant impact on the children. … As such, the Judge found it reasonable for the interference.
>
> 4. Given the above finding, it is submitted that the appellant's claim was bound to fail and it is submitted that the failure explicitly to reference section 117B is not material, given the Judges consideration that the separation is reasonable and proportionate has considered all the relevant factors under that section. …The grounds suggest that the appellant would succeed solely under section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (as amended); however, in light of *AM (Pakistan) v Secretary of State for the Home Department* [2017] EWCA Civ 180, it is clear the section 117B(6) is not a standalone provision and still needs to be considered in the light of the wider public interest. The Judge having had regard to the wider public interest found that separation was proportionate and as such it is submitted that the outcome of the appeal would remain the same. …"

34. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

35. In argument before me, Mr Karnik repeated elements of the grounds of appeal above and contended that the appellant's behaviour had been straightforward and above board. There was no deception or misbehaviour by her. He argued that at [55] in the

decision, the Judge had misdirected himself as to the balancing exercise to be undertaken, and that his consideration of Article 8 was skewed by that, since Article 117B(6) was not considered at all.

36. For the respondent, Mr Bates noted that the appellant's husband intended to study in the United Kingdom and was also the children's parent. He could carry on home-schooling them in her absence, and in any event, the eldest child was now studying at a state school. The appellant could not meet the requirements of Appendix FM-SE and thus *Chikwamba* did not apply as there was no certainty of success. Also, *Chikwamba* had been overtaken by the integration of Article 8 ECHR into the Immigration Rules and should not now be treated as good law on the Rules as they now stood.

37. The basic point was that a 6-month visit visa should not be a route to settlement; the appellant needed to make an out of country application. She would experience some difficulty as she was now an overstayer. The immigration officer could not give to the appellant a right which did not in law exist, and there was little weight in the other circumstances relied upon.

38. If the Tribunal found a material error of law, Mr Bates said that he would have very little argument against allowing the appeal outside the Rules.

39. Responding for the appellant, Mr Karnik said that it would be disproportionate to remove the appellant as this was the only country in the world where the appellant and her family could live together safely.

40. I reserved my decision, which I now give.

Discussion

41. This appellant did not have a Returning Resident visa on 7 March 2015 when she sought to re-enter the United Kingdom. As far as the requirements of the Immigration Rules (the partner and parent routes and paragraph 276ADE) are concerned, the choice which the immigration officer gave the appellant between returning to the United States or entering on a visit visa and applying for leave to remain during its currency was unhelpful. Entry on a visit visa bars her from both the partner and parent routes, and she has not lived in the United Kingdom for long enough to meet the requirements of paragraph 276ADE.

42. The question is therefore whether her removal to the United States to make that application is proportionate under Article 8 ECHR. I accept that *Chikwamba* is inapplicable here: this is not a case where the appellant is certain of success under the Rules, and *Chikwamba* predates the present form of the Rules.

43. There is no section 55 best interests finding, which is itself an error of law. It is normally in the best interests of children to live with both their parents: in the case of these children, they have lived in Syria and Egypt under difficult circumstances, and in Turkey without their father under circumstances in which he concluded that the separation was too hard and the family should be reunited. The elder boy had real

difficulty adapting to state education when he reached the United Kingdom and he is of an age where his GCSE studies are about to begin. The younger two have been home-educated by this appellant for their whole lives. All of these matters add weight to the best interests consideration but may not be determinative overall.

44. There remains the question of proportionality under Article 8 ECHR. The First-tier Tribunal Judge found that removal was proportionate, but did not consider section 117 B(6) of the 2002 act. Section 117A of the 2002 Act requires a Court or Tribunal in all cases to consider 'the public interest question', that is to say, whether an interference with a person's right to respect for private and family life is justified under Article 8(2), and to have regard to the considerations listed in section 117B.

45. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest, but section 117B(6) qualifies that:

> "(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> > (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
> >
> > (b) it would not be reasonable to expect the child to leave the United Kingdom."

46. The apparent conflict between those two provisions was considered by the Court of Appeal in *MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor* [2016] EWCA Civ 705 and I am guided by the following passage in the judgment of Lord Justice Elias at [17] and :

> "17. Subsection (6) … does not simply identify factors which bear upon the public interest question. It resolves that question in the context of article 8 applications which satisfy the conditions in paragraphs (a) and (b). It does so by stipulating that once those conditions are satisfied, the public interest will not require the applicant's removal. Since the interference with the right to private or family life under article 8(1) can only be justified where there is a sufficiently strong countervailing public interest falling within article 8(2), if the public interest does not require removal, there is no other basis on which removal could be justified. It follows, in my judgment, that there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal. It is not legitimate to have regard to public interest considerations unless that is permitted, either explicitly or implicitly, by the subsection itself.
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> …
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> 19. In my judgment, therefore, the only questions which courts and tribunals need to ask when applying section 117B(6) are the following:
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> > (1) Is the applicant liable to deportation? If so, section 117B is inapplicable and instead the relevant code will usually be found in section 117C.

(2) Does the applicant have a genuine and subsisting parental relationship with the child?
(3) Is the child a qualifying child as defined in section 117D?
(4) Is it unreasonable to expect the child to leave the United Kingdom?

If the answer to the first question is no, and to the other three questions is yes, the conclusion must be that article 8 is infringed.

…

40. … Had Parliament intended to require considerations bearing upon the conduct and immigration history of the applicant parent to be taken into consideration, I would have expected it to say so expressly, not for the matter to have to be inferred from a test which in terms focuses on an assessment of what is reasonable for the child. This does not in my view mean that the wider public interests have been ignored; it is simply that Parliament has determined that where the seven-year rule is satisfied and the other conditions in the section have been met, those potentially conflicting public interests will not suffice to justify refusal of leave if, focusing on the position of the child, it is not reasonable to expect the child to leave the UK. When section 117A(2)(a) refers to the need for courts and tribunals to take into account the considerations identified in section 117B in all cases, that would not in my view have been intended to include specific circumstances where Parliament must be taken to have had regard to those matters."

47. The First-tier Tribunal Judge did not consider the guidance in *MA (Pakistan).* The answers in this appeal to the questions at [19] in that judgment are: no, the appellant is not liable to deportation; yes, she has a genuine and subsisting parental relationship with her three children, all of whom are qualifying children under section 117D because they are British citizens; and the Judge found at [50] that it was unreasonable for the children to be expected to leave the United Kingdom.

48. On the basis of those answers, there can be only one outcome to this appeal, and that is that the appellant succeeds. The First-tier Tribunal erred in law in failing to apply *MA (Pakistan)* and its decision will be set aside and remade to that effect.

DECISION

49. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of an error on a point of law.
I set aside the previous decision. I remake the decision by allowing the appeal.

Date: 29 August 2017 Signed *Judith AJC Gleeson*

Upper Tribunal Judge Gleeson