

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: PA/08493/2017**

**THE IMMIGRATION ACTS**

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| **Heard at Liverpool** | **Decision & Reasons Promulgated** | |
| **On June 7, 2018** | **On June 12, 2018** | |
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**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

**MS P N R**

(ANONYMITY DIRECTION MADE)

Appellant

**and**

**the Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr Nicholson, Counsel, instructed by GMAIU

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Pursuant to Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Procedure Rules) I make an order prohibiting the disclosure or publication of specified documents or information relating to the proceedings or of any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified. The effect of such an “anonymity order” may therefore be to prohibit anyone (not merely the parties in the case) from disclosing relevant information. Breach of the order may be punishable as a contempt of court.
2. The appellant entered the United Kingdom on February 20, 2011 with leave as a Tier 4 (student) migrant visa and this allowed her to remain here until June 1, 2013. On May 11, 2012 she applied and was subsequently granted leave to remain as a Tier 1 (entrepreneur) migrant and she was granted leave to remain along with her dependent spouse and child until December 5, 2015. On December 21, 2015 she applied for leave to remain on family and private life grounds but this was rejected by the respondent on January 30, 2017.
3. On March 15, 2017 the appellant lodged an application for asylum but this was refused by the respondent on August 18, 2017 under paragraphs 336 and 339M/339F HC 395
4. The appellant appealed that decision on September 4, 2017 and her appeal was heard by Judge of the First-tier Tribunal Tobin on January 12, 2018 who in a decision promulgated on February 15, 2018 dismissed the appeal on all grounds.
5. The appellant appealed that decision on or around February 21, 2018 and Judge of the First-tier Tribunal Hodgkinson found on March 7, 2018 there was an arguable error of law on article 8 ECHR grounds only.
6. There had been no Rule 24 response filed in this matter but Mr Diwnycz conceded that the Judge’s assessment of the article 8 claim was lacking and there was, in his view, an error in law.
7. Having considered the Judge’s decision and in particular paragraphs 41 and 42 of that decision I am satisfied that the article 8 claim was not considered adequately and I therefore concur with the submissions of the representatives that there was an error of law on this issue only.
8. Mr Nicholson indicated he did not intend to call any further evidence and invited me to allow the appeal. He stated that the appellant’s child had been born in February 2010 and had arrived in the United Kingdom in February 2011. The child therefore had lived in the United Kingdom not only for more than seven years but for almost all his life. The appellant had entered the United Kingdom legally and had remained here legally until her application, dated December 21, 2015, was refused on January 30, 2017 at which time she had lodged a protection claim. There was evidence before the Tribunal of ongoing family proceedings and the fact that the child’s father was no longer in their lives due to his abusive behaviour.
9. Mr Nicholson pointed to the recent decision of MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088(IAC) in which the Tribunal made clear, “A very young child, who has not started school or who has only recently done so, will have difficulty in establishing that her Article 8 private and family life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part.”
10. Mr Nicholson relied on the fact that the respondent’s own guidance, recently updated in February 2018, made it clear that where removal of the appellant would mean the child would be unable to remain in the United Kingdom then it was an issue of reasonableness as to whether the appellant should be removed. There was no “very poor immigration history” or criminal behaviour and in determining both the best interests of the child and the reasonableness of removal the Tribunal must give significant weight to the fact that the child has lived in this country for over seven years. He invited me to allow the appeal.
11. Mr Diwnycz acknowledged the points made by Mr Nicholson and agreed there was little that he could put forward which contradicted the arguments that had been advanced before the Tribunal.

**FINDINGS**

1. I am concerned solely with an article 8 appeal having set aside the previous findings on this issue. It was agreed:
   1. The appellant had entered the United Kingdom legally and her son had been living in the United Kingdom from around February 26, 2011. He had therefore been in this country for more than seven years.
   2. There was no adverse immigration history and no suggestion that the appellant had engaged in any criminal activity.
   3. The appellant and her former husband were separated following domestic abuse. There are ongoing contested family proceedings in which the appellant opposes contact by her former husband to their child due to his abusive behaviour.
2. In assessing the appellant’s appeal I have had regard to the fact the child is a qualifying child under section 117B(6) of the 2002 Act because the appellant has a genuine and subsisting relationship with him. Section 117D(1)(b) of the 2002 Act makes clear he is a qualifying child for the purposes of section 117B(6) of the 2002 Act.
3. I have also had regard to the Family Migration policy dated February 21, 2018 which makes clear that only in circumstances where it was likely the child would have to leave the United Kingdom would Section EX.1 of Appendix FM of the Immigration Rules be engaged. Taking into account the background that was presented both to the First-tier Tribunal and this Tribunal it seems to me that this is a case where the child is residing with the appellant and he has had no contact with his father since 2015. Whilst the father seeks contact through the courts the position I am faced with is that if the appellant was required to leave the United Kingdom then that would force that child to also have to leave the United Kingdom because there would be no one to effectively care for the child.
4. The appellant does not have a poor immigration history. No negative factors under section 117B of the 2002 Act apply in this case and in considering the best interests of the child I place significant weight on the above factors including the fact he has lived here virtually all his life, speaks English as his first language and applying the respondent’s own guidance there would appear to be no countervailing circumstances that would require the appellant to be removed from the United Kingdom.
5. The Higher Courts have made it clear that when carrying out any proportionality assessment significant weight must be given to the fact the child has been here for more than seven years because of its relevance in determining the nature and strength of the child’s best interests and because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary. Mr Diwnycz did not seek to persuade me from this approach.
6. The Tribunal recently in MT reinforced this point and this authority taken alongside MA (Pakistan) [2016] EWCA Civ 705 leads me to the ultimate conclusion that requiring the appellant to leave the United Kingdom, on the facts before me, would be disproportionate.

**DECISION**

1. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law in relation to article 8 ECHR.
2. I set aside the decision in relation to article 8 ECHR.
3. I remake the decision and allow the appeal under article 8 ECHR.

Signed Date June 7, 2018



Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT**

**FEE AWARD**

I do not make a fee award as no fee was paid.

Signed Date June 7, 2018



Deputy Upper Tribunal Judge Alis