



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/38436/2013
IA/38416/2013
IA/38396/2013
IA/38378/2013

THE IMMIGRATION ACTS

**Heard at Birmingham
On 9th March 2015**

**Decision & Reasons Promulgated
On 20th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ALI RAZA
GOHAR ALI
MUHAMMAD ARHAM ALI
RAHEEM ALI
(ANONYMITY ORDER NOT MADE)**

Respondents

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer

For the Respondent: Ms L Mair, Counsel, instructed by Silverdale Solicitors

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against the decision of Judge of the First-tier Tribunal Hawden-Beal promulgated following a hearing on 14th March 2014.
2. The Respondents before the Upper Tribunal were the Appellants before the First-tier Tribunal. I will refer to them as the Claimants.
3. The Claimants are citizens of Pakistan. The First and Second Claimants are married and are the parents of the Third and Fourth Claimants born 9th September 2005 and 13th September 2007 respectively.
4. The Claimants on 7th December 2012 applied for leave to remain in the United Kingdom on the basis of their family and private lives.
5. The applications were refused on 30th August 2013, the Secretary of State not accepting that the Claimants satisfied the requirements of Appendix FM in relation to family life, or paragraph 276ADE of the Immigration Rules in relation to private life. It was not considered that there were any exceptional circumstances that would warrant a grant of leave to remain outside the Immigration Rules.
6. The appeals were heard together by Judge Hawden-Beal (the judge). It was conceded on behalf of the Claimants that they could not satisfy Appendix FM or paragraph 276ADE but it was submitted that the appeals should be allowed with reference to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the rules. The judge accepted that Article 8 should be considered outside the rules, and allowed the appeals on human rights grounds. The Secretary of State was granted permission to appeal to the Upper Tribunal and the appeal came before me on 3rd December 2014. I did not accept that the judge had erred in finding that Article 8 should be considered outside the rules, nor had she erred in finding that the best interests of the children would be to remain in the United Kingdom. I did find that the proportionality assessment was flawed and for that reason set aside the decision of the First-tier Tribunal. Full details of the application for permission, the grant of permission, and my reasons for finding an error of law are contained in my decision dated 9th December 2014.
7. The hearing was adjourned so that further evidence could be given and submissions made in relation to Article 8.

Re-making the Decision

Preliminary Issues

8. I confirmed that I had before me all the documentation that had been before the First-tier Tribunal. I had received a skeleton argument from Ms Mair dated 8th March 2015 which referred to a supplementary bundle which I had not received. I was provided

with a copy of that bundle. Mr Mills confirmed that he had received a copy prior to the hearing.

9. Both representatives indicated that they were ready to proceed. There was no application for an adjournment.

Evidence

10. Both the First and Second Claimants gave oral evidence. The First Claimant adopted his witness statement contained at pages 3-5 of the Claimants' bundle and his additional witness statement at pages 5-7 of the Claimants' supplementary bundle. Both were signed and dated 9th March 2015.
11. The Second Claimant adopted her witness statement dated 9th March 2015.
12. The First Claimant was questioned by both representatives and I have recorded all questions and answers in my Record of Proceedings and it is not necessary to reiterate them here. There were no questions asked of the Second Claimant.
13. In brief summary, the Claimants explained that the First Claimant came to the United Kingdom on 9th March 2006 with a work permit. He was joined by the Second and Third Claimants on 25th April 2006. They were granted visas as his dependants. The Fourth Claimant was born in the United Kingdom on 13th September 2007.
14. The First Claimant was subsequently granted further leave as a Tier 2 sports worker valid until 14th September 2013. His family were granted leave as his dependants.
15. On 8th June 2012 the Claimants' leave was curtailed so that it expired on 8th December 2012.
16. On 7th December 2012 the Claimants applied for leave to remain in the United Kingdom based upon Article 8 of the 1950 Convention.
17. The First Claimant was a professional hockey player in Pakistan and played for Pakistan in the Olympic Games in 2000 and 2004. The First Claimant is a highly qualified coach and has worked for hockey clubs and schools in the United Kingdom.
18. He had no family in Pakistan other than a married sister. He had not been back to Pakistan since he came to the United Kingdom although his wife and children had been back for short holidays.
19. The First Claimant could not take up coaching in Pakistan because coaches in Pakistan are employed by large companies who run the hockey teams and if you do not work for one of those organisations you are not allowed to coach.
20. Both Claimants stated that the children in effect had only ever known life in the United Kingdom and are completely integrated into British society.

The Submissions of the Secretary of State

21. Mr Mills submitted that the issue was whether it was proportionate to remove the family to Pakistan. It was accepted that a finding made by the First-tier Tribunal that it was in the childrens' best interests to remain in this country was preserved.
22. Mr Mills submitted that the question that had to be answered related to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act), and whether it was reasonable to expect the children to leave the United Kingdom.
23. I was reminded of the public interest in maintaining effective immigration control. Mr Mills submitted that there was no reason why the family could not re-establish themselves in Pakistan. It was not accepted that the First Claimant would not be able to find work in Pakistan as he is a highly qualified hockey coach.

The Claimants' Submissions

24. Ms Mair relied upon her skeleton argument. As it was accepted that the best interests of the children would be to remain in the United Kingdom, Ms Mair submitted that it would not be reasonable to expect them to leave. I was asked to find that there were no countervailing reasons to outweigh the best interests of the children. Ms Mair pointed out that the family had been in the United Kingdom legally, and had never breached either immigration law or the criminal law. There was no illegal working to be considered, and I was asked to take into account the length of time that the children had been in the United Kingdom.
25. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

26. I find that it is appropriate to consider Article 8 outside the Immigration Rules for the reasons given in my error of law decision dated 9th December 2014.
27. I accept the immigration history set out in the Claimants' evidence.
28. There was no challenge to the finding made by the First-tier Tribunal that the best interests of the children would be served by remaining in the United Kingdom, and that finding is therefore preserved.
29. I consider Article 8 by following the guidance given in Razgar [2004] UKHL 27 which indicates that the following questions should be considered;
 - (i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
 - (ii) If so, would such interference have consequences of such gravity as potentially to engage the operation of Article 8?

- (iii) If so, is such interference in accordance with the law?
 - (iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
 - (v) If so, is such interference proportionate to the legitimate public end sought to be achieved?
30. It is not disputed that the Claimants have established family life together in the United Kingdom. However there would be no interference with that family life if the Claimants were removed to Pakistan as a family.
31. However all of the Claimants have established private lives while in the United Kingdom, and I find that Article 8 is engaged on that basis. I find that the interference with the Claimants' private lives would be in accordance with the law in that they cannot satisfy the Immigration Rules.
32. The issue that has to be decided is whether the proposed interference is necessary and proportionate.
33. If these appeals involved only the First and Second Claimants, they would not succeed. I accept that the First Claimant is a highly qualified hockey coach, and that he has produced numerous references on behalf of clubs, schools and colleagues. I do not accept that he would be unable to find employment in Pakistan. In my view his evidence indicated that he had made no credible effort to ascertain whether employment was available, as he wished to remain in the United Kingdom.
34. However these appeals involve two children now aged nine and seven. The elder child arrived in the United Kingdom when he was six months, the younger child was born in the United Kingdom.
35. ZH (Tanzania) [2011] UKSC 4 makes it clear that the best interests of children are a primary consideration, and that the best interests of a child broadly means the well being of a child. A consideration of where those best interests lie will involve asking whether it is reasonable to expect the child to live in another country. The best interests of a child can be outweighed by the cumulative effect of other considerations. The Upper Tribunal in Azimi-Moayed [2013] UKUT 00197 (IAC) set out the following in the head note to that decision:
- (i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting points suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
 - (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

- (iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear-cut but past and present policies have identified seven years as a relevant period.
- (iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable."

36. I also take into account and find relevant the guidance given in EB (Philippines) [2014] EWCA Civ 874 and set out below paragraphs 35 and 36;

"35. A decision as to what is in the best interests of children will depend on a number of factors such as

- (a) their age;
- (b) the length of time that they have been here;
- (c) how long they have been in education;
- (c) what stage their education has reached;
- (d) to what extent they have become distanced from the country to which it is proposed that they return;
- (e) how renewable their connections with it may be;
- (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and
- (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the Tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite."

37. In this case, I find that the children have no experience of life in Pakistan. The Fourth Claimant has lived all her life in the United Kingdom, and that is in excess of seven years. The Third Claimant has lived in this country since the age of six months. They have only ever visited Pakistan for short holidays.

38. Both children are doing well at school. I have seen their school reports and certificates, and it is clear that not only are they doing well at school, but they engage in extra-curricular activities. Their education is at a relatively early stage. I do not find that they have any realistic links to Pakistan in that they have no experience of

living in that country, although they are Pakistani citizens. There is no evidence that they would face any linguistic or medical difficulties in adapting to life in that country, but I do find that life in Pakistan would be completely alien to them. Although they are not British citizens, it is my view that the children regard themselves as British, being completely integrated into the British way of life.

39. I conclude that there is considerable weight to be placed, in the balancing exercise, in the scales that favour the children remaining in the United Kingdom.
40. In considering Article 8(2) I take into account section 117B of the 2002 Act which states that the maintenance of effective immigration controls is in the public interest.
41. It is also in the public interest that persons seeking to remain can speak English and are financially independent. The Claimants all speak English and are financially independent. The Claimants have not been in the United Kingdom unlawfully. They have always had leave. I do not accept that their immigration status has been precarious, although it is the case that they have only ever had limited leave to remain.
42. Section 117B(6) is set out below;
 - “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.”
43. It is clear that the First and Second Claimants do have genuine and subsisting parental relationships with their children. I find that the children are qualifying children as defined in section 117D, because they are under eighteen years of age, and have lived in the United Kingdom for a continuous period of seven years or more.
44. I do not find that there are any countervailing features which outweigh the finding that the best interests of the children would be to remain in the United Kingdom.
45. As previously stated, the Claimants have never been here unlawfully. The First and Second Claimants have worked but have done so with permission, and paid tax. There has been no illegality of any sort. There are numerous references that speak well of the Claimants. The First Claimant would have no difficulty in continuing with his employment as a hockey coach.
46. As pointed out by Ms Mair in her skeleton argument Lord Kerr stated at paragraph 46 of ZH (Tanzania);

“Where the best interests of the children clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this

consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."

47. As the best interests of the children are to remain in the United Kingdom, and I do not find countervailing factors, I conclude that it would not be reasonable to expect the Third and Fourth Claimants, as children, to leave the United Kingdom, and therefore section 117B(6) stipulates that the public interest does not require the removal of the First and Second Claimants.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal of the Secretary of State is dismissed. The appeals of the Claimants are allowed on human rights grounds in relation to Article 8 of the 1950 Convention.

Anonymity

No anonymity direction was made in the First-tier Tribunal. There was no application for anonymity made to the Upper Tribunal, and no anonymity order is made.

Signed

Date 12th March 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

Because the appeals are allowed I have considered whether to make a fee award. I have decided that it would be inappropriate to do so. The appeals have been allowed because of evidence presented to the Tribunal which was not presented to the initial decision maker. There are no fee awards.

Signed

Date 12th March 2015

Deputy Upper Tribunal Judge M A Hall