



IAC-AH-CJ-V2

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

Appeal Numbers: IA/07392/2014  
IA/07400/2014  
IA/07405/2014  
IA/07410/2014  
IA/07414/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 27<sup>th</sup> November 2015**

**Decision & Reasons Promulgated  
On 19<sup>th</sup> January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**MR ASHFAQ MUHAMMAD (FIRST APPELLANT)  
MRS SHEHLA ASHFAQ (SECOND APPELLANT)  
M A (A MINOR) (THIRD APPELLANT)  
R A (A MINOR) (FOURTH APPELLANT)  
T A (A MINOR) (FIFTH APPELLANT)  
(NO ANONYMITY ORDER MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Miss K McCarthy, Counsel

For the Respondent: Mr P Nath, Home Office Presenting Officer

**DECISION AND REASONS**

1. The first Appellant is a citizen of Pakistan born on 23<sup>rd</sup> April 1974. The second Appellant Mrs Shehla Ashfaq is his wife born on 15<sup>th</sup> January 1981. The third, fourth and fifth Appellants are their three minor children born respectively on 16<sup>th</sup> December 2002, 15<sup>th</sup> March 2004 and 22<sup>nd</sup> December 2006. The Appellants have an extensive immigration history and the immigration history is set out at paragraph 3 of the determination of Immigration Judge Maxwell. The Appellants' most recent application was made via solicitors' letters dated 4<sup>th</sup> November 2013 and 4<sup>th</sup> December 2013 where they asked that the Appellants' cases be considered pursuant to the European Convention of Human Rights. Those applications were considered by the Secretary of State and refused by a Notice of Refusal dated 17<sup>th</sup> January 2014.
2. The Appellants appealed and the appeal came before Judge of the First-tier Tribunal Maxwell sitting at Richmond on 2<sup>nd</sup> October 2014. In a determination promulgated on 16<sup>th</sup> October 2014 the Appellants' appeals were dismissed under the Immigration Rules and on human rights grounds.
3. On 24<sup>th</sup> October 2014 Grounds of Appeal were lodged to the Upper Tribunal. On 6<sup>th</sup> November 2014 Designated Judge of the First-tier Tribunal Murray refused permission to appeal. On 17<sup>th</sup> November renewed Grounds of Appeal to the Upper Tribunal were submitted on the Appellants' behalf.
4. On 16<sup>th</sup> February 2015 Deputy Upper Tribunal Judge Bruce granted permission to appeal. Judge Bruce noted that the Grounds of Appeal of the first Tribunal identified an arguable point of law in that the First-tier Tribunal began its assessment whether it is "reasonable" that the third and fourth Appellants leave the UK with reference to the "appalling" immigration history of their parents. Judge Bruce considered that no regard had been given to the historical development of paragraph 276ADE(1)(iv) nor the current IDI which states that "strong reasons" will be required to remove a child who has accrued seven years long residence. Judge Bruce noted that the starting point was the established private life of the child and that it was arguable that insufficient regard had been had to the Respondent's own guidance on the correct interpretation of that Rule.
5. Ironically Judge Bruce found that the renewed Grounds of Appeal had less merit and although there was authority for the proposition that illegal working is not to be considered a "very serious criminal offence" the First-tier Tribunal was entitled to draw adverse inferences from the fact that the adults in this family have deliberately sought to circumvent immigration control, have worked illegally and have accessed services such as education and the NHS to which they were not entitled.
6. On 5<sup>th</sup> March 2015 the Secretary of State responded to the Grounds of Appeal under Rule 24. That response submits that the judge considered

the submissions made relating to paragraph 276ADE(iv) at paragraphs 4 and 5 of his determination and that careful consideration was given to the letters of the third and fourth Appellants and noted their wishes to remain in education in the UK. The Rule 24 response submits that the best interests of the children have been considered fully in the determination (their ages being 11 and 10 years old at the date of determination) and that the judge had given strong reasons why the children should be removed with their family members as a whole and has noted the relevant case law that deals with children who have exceeded seven years' residence and whose parents have a bad immigration history. Furthermore the judge it is submitted had dealt with the requirements of Section 117 that underpins the current Immigration Rules and that the judge had explained how he had reached his conclusions on primary consideration and had carried out the balancing assessment making his decision on proportionality all of which were open for him to make. The Rule 24 response concludes by submitting that the grounds amount to no more than argument about what weight the judge should have placed on the children's over seven years' residence and that there is no material error of law.

7. It was on that basis that the appeal first came before me to determine whether or not there was a material error of law. I found that there was. At paragraph 25 of the judge's determination he has taken the wording from the decision in *EV (Philippines) and Others v SSHD* and I agreed with the submission made by Miss McCarthy that in doing so he has failed to give due and proper relevant consideration of the evidence provided and referred to at paragraphs 19 and 20 of his determination when deciding that the children would be able to settle into the educational regime in Pakistan. At paragraph 19 the First-tier Tribunal Judge found that the children would be able to follow classes because English is a compulsory subject and science is taught in English in Pakistan. It was submitted to me that the evidence is that the classes in most schools other than private schools will be in the local language rather than English and that the judge failed to give any due consideration as to whether the children's parents could afford to send the children to private school. Further, whilst the judge found that the children are capable of communicating in Urdu Miss McCarthy emphasised that the evidence was that the children can understand their mother when she speaks to them in Urdu but that they reply in English. She strongly pointed out that the children cannot read or write Urdu. There is some weight in the submission that the First-tier Tribunal Judge therefore ignored that evidence that the children would not be able to follow classes and textbooks that are taught in their local language.
8. Further I agreed with the point made by Miss McCarthy that the judge erred when he found that "none of them has yet reached a crucial stage of their education." It was difficult to assess when that would or would not

be but bearing in mind that the third Appellant has recently moved from primary to secondary school and the fourth Appellant will do so at the end of the current school year it was reasonably argued that the judge's analysis was wrong and that even if he had reached such a conclusion case law in the format of *Azimi-Moayed and Others* supports the submission that the children's length of residence weighs heavily in favour of a finding that their overwhelming best interests are to remain in the UK. I was satisfied that the judge has failed to take into account properly these considerations and that he has erred in giving unreasonable weight to the first and second Appellant's immigration history when comparing that against the rights of the third and fourth Appellants in particular to whom he had failed to give due and full consideration of their position.

9. In finding that there was a material error of law I gave directions indicating that the matter could be dealt with by way of submissions. It is on that basis that the appeal comes back before me for rehearing. The Appellants appear by their instructed Counsel Miss McCarthy. Miss McCarthy is extremely familiar with this matter. She appeared before me on the hearing of the error of law, is the author of the initial Grounds of Appeal to the Upper Tribunal and of a skeleton argument that is provided to me in readiness of this hearing. The Secretary of State appears by her Home Office Presenting Officer, Mr Nath.
10. The facts are not in dispute. The issue is that set out both within the error of law and the directions for the resumed hearing, namely whether the best interests of the children should warrant the allowing of the appeal pursuant to Article 8 of the European Convention of Human Rights when viewed against the other factors including the negative immigration history of the first and second Appellants.

### **Submissions/Discussions**

11. Miss McCarthy relies on her skeleton argument. She acknowledges that the principal issue involved herein is whether or not the negative behaviour of the first and second Appellants in having flouted the immigration laws of the United Kingdom is outweighed by the best interests of the children. She accepts that the Appellants are a family from Pakistan consisting of father, mother and their three children born 16<sup>th</sup> December 2002, 15<sup>th</sup> March 2004 and 22<sup>nd</sup> December 2006 respectively. She points out that the older two children have remained in the UK continuously since they entered on 8<sup>th</sup> March 2006 on a visit visa and then overstayed and that as at the date of the Notice of Refusal the third and fourth Appellants had lived in the UK for seven years and five months and the fifth Appellant, who was born in the UK, all her life. As at the date of the First-tier decision the third and fourth Appellants had lived in the UK for eight years and six months. I note that a fourth child who is not part of this appeal was born in the UK on 6<sup>th</sup> April 2014. As at the date of the rehearing Miss McCarthy points out that the older two children have

lived in the UK for nine and a half years and the third child has spent her entire life of nearly nine years in the UK and as of 22<sup>nd</sup> December 2016 will be eligible for registration as a British citizen.

12. Miss McCarthy submits the children's best interests are the starting point and I refer to the guidance given in *EV (Philippines) and Others v the Secretary of State for the Home Department [2014] EWCA Civ 874*. Namely:

“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 and 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 connection 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.”

13. Miss McCarthy takes me to paragraphs 26 to 30 of her submissions to be found within her skeleton. She points out that the third and fourth Appellants are children aged 12 and 11 respectively as at the date of the rehearing and that they arrived in the UK when they were aged 3 and 2 respectively and that they have lived in the UK for nine years and six months as of the date of the rehearing of this appeal. The fifth Appellant was born in the UK and has spent her entire life of nearly nine years in the UK. She points out that the fifth Appellant will be in a position in December 2016 to register as a British citizen and that the Secretary of State has no discretion to remove her. Further she points out that the children have only ever been educated in England within the British system and that the older two children are secondary school students and so they have entered a crucial stage of their education in which they are embarking on pre-preparation for choosing options leading to public examinations to be taken when they are 16.
14. She reminds me that the two older children have not been to Pakistan since they entered the UK and that the third child has never been to Pakistan. She submits that they have socialised as British children and been brought up as British children. She takes me to the children's statements and school statements submitting that these statements show the children to be happy settled children who are no different from their British citizen peers, involved in sporting and extra-curricular activities, and that they are achieving well at school. She submits that they have no memory of any connection to Pakistan so there is no question of “renewing” it and that if they are removed from the UK they would have to start afresh in a completely alien environment.
15. She acknowledges that the children have limited understanding of Urdu but points out that they are not proficient nor do they write it and submits

that they would not be able to follow classes in Pakistan in Urdu and takes me to the first Appellant's witness statement in which he submits that it is his belief that if they were returned they would fall behind in their education. Further she submits that although the children are healthy they would not have access to the same level of healthcare in Pakistan and that the overwhelming best interests of the children lie within their remaining in the UK. She submits that the behaviour of their parents plays no part whatsoever in deciding what the children's best interests are.

16. Miss McCarthy then takes me to the balancing exercise reminding me that the question for the Tribunal is whether the best interests of the children are outweighed by their parents' own disregard for the Immigration Rules. She acknowledges that the "seven year child concession" has been withdrawn but submits that it remains a form of benchmark that to use her phrase "starts to tick the balancing exercise". She places emphasis on the ministerial statements setting out why DP5/96 was introduced and the ministerial statements made setting out why it was withdrawn on the basis that it was now covered by the Article 8 assessment. She places reliance on the view expressed by Blake J in *Azimi-Moayed & Others [2013] UKUT 197 (IAC)* when the judge when analysing what amounts to lengthy residence found that that was not clear-cut but that past and present policies have identified seven years as a relevant period. She consequently indicates that despite the policy being withdrawn it is now enshrined within Article 8 and that seven years is still considered to be a relevant period.
17. Finally Miss McCarthy points out that the children are now well beyond seven years in their period of residence and in fact are at nine and a half years and that the policy argument weighs in favour of the children's best interests as being the deciding factor. She submits that they have strong ties to the UK and whilst accepting that on their own, the first and second Appellants could not win, the only criteria she submits upon which the Secretary of State can rely is one of public interest and she submits that that is outweighed by the best interests of the children. She asked me to allow the appeal.
18. Mr Nath takes me to the original Notice of Refusal dated 17<sup>th</sup> January 2014. He starts by reminding me that in that Notice of Refusal the Secretary of State acknowledges that consideration has been given to whether it would be unreasonable to expect the first and second Appellant's three children to accompany them to Pakistan. He takes me directly to paragraphs 30 to 37 reminding me that neither the first nor second Appellant have any immigration status in the UK and indeed that they have not done so since 180 days after their last entry to the UK as visitors on 3<sup>rd</sup> August 2006. He points out that none of the Appellants are British citizens and as such the Appellants will all be removed to Pakistan as a family unit. Consequently he contends that the third to fifth Appellants will continue to receive their

parents' support and affection following their return to Pakistan and that would greatly assist their re-assimilation into their home country. He takes me to the Country Information Report on education in Pakistan and submits that none of the three minor children Appellants have yet reached a crucial stage in their education and that adequate educational facilities exist in Pakistan and that English language is used as a medium of education in several subjects. Accordingly he considers that it would not be unreasonable to expect the Appellants' children to return to Pakistan with their parents as a family unit and that it would not be contrary to their best interests to expect them to do so. In making such a decision he considers that the Secretary of State's duties under Section 55 of the 2009 Act have been appropriately discharged.

19. Mr Nath seeks to contradict Miss McCarthy's assessment of the educational upheaval that would befall the children if they are forced to leave the UK and submits that guidance can be found in the correct approach at paragraph 39 of *AM (Section 117B) Malawi [2015] UKUT 260 (IAC)* which states:

"The trauma, or excitement, of a new school, new classmates and new teachers is an integral part of growing up. In too many appeals the Appellants have presented with arguments whose basic premise is that to change a school is to submit a child to a fresh and unduly harsh experience."

20. He submits that the exercise to be carried out is one that needs to be carefully balanced and that the public interest needs to be considered. He asked me to give due consideration to the guidance to be found in *SS (Congo) & Others [2015] EWCA Civ 387*. He asked me to reject the appeal.

## Findings

21. This is one of an increasing number of appeals that appears to be coming before the Upper Tribunal which requires the Tribunal to conduct a balancing exercise between the public interest consideration and the rights to family and private life enshrined in Article 8 of the European Convention of Human Rights. It has to be remembered that Section 117B is not something new. Effectively it embodies in statute factors that it was already necessary for the court/Tribunals to consider. The starting point is that the maintenance of effective immigration control is in the public interest. Further little weight should be given to a private life established by a person at a time where the person's immigration status is precarious. The first and second Appellants have a quite appalling immigration history. They have openly overstayed their visas. It is not an issue before me as to why they have been allowed to overstay to the length of time that they have. Bearing in mind shortly before their visas expired the fifth Appellant was born and that the children had all been receiving education and healthcare throughout the state system, it is difficult to believe that this

can be one of those cases where the Appellants could not have been traced by the Secretary of State. The fact that the scenario has arisen at all therefore has been exacerbated by the failings of the Home Office.

22. Consequently as a starting point I have regard to the matters set out in Section 117B of the 2002 Act and that the Appellants have remained unlawfully within the UK. Guidance is given as to the approach to be adopted by the court in the Court of Appeal in *SS (Congo) & Others* where Lord Justice Richards in giving the judgment of the court said:

“39. iv) On the other hand, the fact that the interests of a child are in issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the state authorities would otherwise enjoy. Article 8 has to be interpreted and applied in the light of the UN Convention on the Rights of the Child (1989): see *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] AC 144, at [26]. However, the fact that the interests of a child are in issue does not simply provide a trump card so that a child applicant for positive action to be taken by the state in the field of Article 8(1) must always have their application acceded to; see *In re E (Children)* at [12] and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166, at [25] (under Article 3(1) of the UN Convention on the Rights of the Child the interests of the child are a primary consideration - i.e. an important matter - not *the* primary consideration). It is a factor relevant to the fair balance between the individual and the general community which goes some way towards tempering the otherwise wide margin of appreciation available to the state authorities in deciding what to do. The age of the child, the closeness of their relationship with the other family member in the United Kingdom and whether the family could live together elsewhere are likely to be important factors which should be borne in mind.”

23. Blake J in *Azimi-Moayed & Others* acknowledged that 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. He further noted that lengthy residence in a country other than the state of origin can lead to a development of social, cultural and educational ties that it would be inappropriate to disrupt in the absence of a compelling reason to the contrary.
24. Each case must inevitably turn on its own facts and must give due consideration to the judicial dicta and in particular to the guidance given in *EV (Philippines)* recited above as to what best interests of children are. I note Miss McCarthy seeks to rely on the enshrinement effectively of the Home Office Policy DP5/96 and the fact that a child has spent a significant period of his or her life in the United Kingdom will continue to be an important relevant factor to be taken into account when evaluating whether removal of their parents is appropriate. In this case the third and



fourth Appellants had, as at the date of the Notice of Refusal, lived in the United Kingdom for seven years and five months. At the date of the appeal before the First-tier Tribunal they had been here for some eight years and six months. At the date of the rehearing before me they had lived here for nine and a half years. I have seen evidence produced on their behalf in support of their appeals which is not challenged by the Secretary of State. In addition there is a fifth Appellant who has spent his entire life of nearly nine years in the United Kingdom and as of 22<sup>nd</sup> December 2016 will be eligible for registration as a British citizen. None of these children have ever been to Pakistan. Their principal language I accept is English albeit that they have some understanding of Urdu. Their social and indeed cultural upbringing is as if they were UK citizens. I accept that if they are removed they will be removed as a family to Pakistan, English is spoken in many Pakistani schools and that they cannot rely on the benefits of UK healthcare as being a basis for their remaining within the UK.

25. However I am persuaded that the best interests of these children, bearing in mind their ages, the length of time that they have lived in the UK, their connections to the UK, their schooling, friends, family and potential difficulties that they would have as children who have never been to Pakistan, in adapting to life if they are returned there, along with the length of time they have been in education in the UK and the stage that their education has reached, are such that it would be a breach of their rights pursuant to Article 8 for them to be removed.
26. On that basis, and that basis alone, I am satisfied that the best interests of the children outweigh the public interest in maintaining immigration controls and the removal of the whole family from the UK. It is clear that the appeals of the first and second Appellants must rise and fall alongside those of their three children. It could not be in any Appellant's best interests for the children to be separated from their parents. I emphasise that I am not persuaded by the submission of Miss McCarthy that the fact that the first and second Appellants are of good character, both speak English, are willing and able to work and support their family and have strong community ties to the UK, outweighs their appalling immigration history. However, it is inappropriate for the Tribunal to be seeking to "punish" the first and second Appellants due to their appalling immigration history. It is purely in this instant case, and turning on the facts of this case and applying the legal principles appropriate thereto, that I am persuaded that the public interest of the maintenance of immigration control is in this case outweighed by the best interests of the children and as a result the Appellants' appeals are allowed pursuant to Article 8 of the European Convention of Human Rights.

## **Notice of Decision**

Appeal Numbers: IA/07392/2014  
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IA/07414/2014

The appeals of all five Appellants are allowed pursuant to Article 8 of the European Convention of Human Rights.

No anonymity direction is made.

Signed \_\_\_\_\_ Date \_\_\_\_\_

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT**  
**FEE AWARD**

No application is made for a fee award and none is made.

Signed \_\_\_\_\_ Date \_\_\_\_\_

Deputy Upper Tribunal Judge D N Harris