



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

Appeal Numbers: IA/02101/2016
IA/02102/2016
IA/02103/2016
IA/02104/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 6 December 2017**

**Decision & Reasons
Promulgated
On 24 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

**MR BS
MRS BK
MISS GK
MISS BK
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr E Waheed, Counsel instructed by Linder Myers
Solicitors

For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellants in this case are Indian nationals comprising a father and mother and their two minor children born in the UK on 13 April 2009 and 22 October 2013 respectively. The first appellant entered the UK on 27 May 2000 as a visitor on a valid visit visa which he overstayed. The second appellant entered the UK on 15 July 2008 and married the first appellant four days later on 19 July 2008. The first appellant applied for leave to remain in the UK on 12 February 2010 which was refused on 22 April 2010 with no right of appeal. A reconsideration request was received on 7 May 2010 but the refusal maintained on 18 August 2010. On 26 September 2011 a human rights application was made and this application was refused on 22 April 2016 (with further representations having been made on 8 July 2015). Those further submissions were refused by letter dated 1 April 2016 which was appealed to the First-tier Tribunal.
2. The First-tier Tribunal in a decision promulgated on 30 March 2017 dismissed the appellants' appeals. The appellants appealed to the Upper Tribunal on the following grounds:

Ground 1 - misdirection as to law

3. It was submitted that the First-tier Tribunal failed to correctly apply **MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705** and that the panel in this case had applied the incorrect test when assessing best interests; as the date of application is not a bar to the time when best interests are considered. It was submitted that **MA (Pakistan)** provided the starting point which was that "leave should be granted unless there are powerful reasons to the contrary".

Ground 2 - failure to account for material evidence

4. It was submitted that the judge failed to give consideration to the statements of the third appellant, a typewritten statement and a handwritten statement in the appellants' bundle as to her life in the UK and that the Tribunal declined to hear oral evidence from the third appellant solely on account of her age notwithstanding Lady Hale's opinion in **ZH (Tanzania) v SSHD [2001] UKSC 4** and it was not open to the First-tier Tribunal to neglect to account for the evidence of the third appellant. It was submitted that had they done so they would have found that the respondent's reasons were not of the required powerful nature to displace the starting point that the third appellant should be granted leave.
5. For the reasons that are below I am not satisfied that the decision discloses any material error of law.

Ground 1

6. The Tribunal reminded itself that the best interests of the children are paramount [22]. The Tribunal rightly found that given the age of the third appellant at the date of application she could not succeed under the Immigration Rules but I note that the Tribunal went on to find that even if that limitation were disregarded it must also be shown it is not reasonable to expect the third appellant to leave the United Kingdom. The Tribunal, at [40] found that the third appellant was a qualifying child for the purposes of section 117B (but that it was not accepted that it would not be reasonable to expect the child to leave). There is nothing to indicate in my findings that the Tribunal did not consider the best interests of the children at the date of the hearing (when she was over seven). The decision, considered as a whole, sets out the evidence that was before the Tribunal including from the first and second appellant and from a Mr Mediraj who was a friend of the first and second appellants and his daughter was a friend and classmate of the third appellant.
7. It is important to note that in considering the evidence the Tribunal found that the first and second appellants were “reluctant to admit the truth” and it was noted that both the first and second appellant had a long history of abuse of UK immigration law. However the Tribunal quite properly, when considering the best interests of the children, reminded themselves, at [45], that these best interests were “obviously innocent of their parents’ wrongdoing”; the primary consideration required under Section 55 of the Borders, Citizenship and Immigration Act 2009 was also given. At paragraph 53 of **MA (Pakistan)**, in discussing the relevant case law, including **ZH (Tanzania)** and **Zoumbas v Secretary of State for the Home Department [2013] UKSC 74**, it was confirmed that the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or that as provided by their parent. It is evident that that is what the Tribunal did in this case.
8. The Tribunal reached the conclusion there was no evidence that the removal of the children would cause them any significant difficulty and that it was plainly in their best interests that they remain with their parents whose devotion was not questioned.
9. With respect to the approach to **MA (Pakistan)** both representatives relied on **MA (Pakistan)** including that the fact that a child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two reasons. First, because of its relevance to determining the nature and strength of the child’s best interests; and second because it established as a starting point that leave should be granted unless there are powerful reasons to the contrary (paragraph 49 **MA (Pakistan)**). I take account that the Tribunal noted these submissions at [31] of the decision and reasons.
10. Although it was submitted that powerful reasons were not provided for outweighing the starting point that leave should be granted, that is not the case. The Tribunal noted, in addition to the difficulties with the credibility

of the first and second appellants, that they had failed to leave the United Kingdom on each occasion that an adverse decision has been made against them and it is not disputed that the first appellant has been an overstayer since 2000.

11. At paragraph 53 of **MA (Pakistan)** in discussing the relevant case law including **ZH (Tanzania)** and **Zoumbas v Secretary of State for the Home Department [2013] UKSC 74** it was confirmed that the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or that as provided by their parent. It is evident that that is what the Tribunal did in this case.
12. I have also taken into account that the appellant in **MA (Pakistan)** included an appellant who was 8 years of age and whom, it was found, could adapt to life elsewhere and that his social life was dominated by his life with his parents and the younger brother. Although Mr Waheed sought to distinguish the particular appellant from the third appellant in the case before me, I am of the view that the Tribunal gave sufficient weight to the circumstances of the third appellant including that she had been resident in the UK since birth and the views of her parents, the issue of language, the issue of education and contact with friends and the issue of culture. It may be that other Tribunals might have struck the balance differently, however the conclusion that this panel reached was open to them. The Tribunal was required to have regard to the wider public interest in maintaining effecting immigration control and I note that the first appellant in this case has been in the UK without permission for longer than the parents in **MA (Pakistan)**.
13. It cannot be said that the Tribunal misdirected itself in law in relation to the proper approach. No error of law is disclosed in ground 1.

Ground 2

14. Mr Waheed relied heavily on the grant of permission to appeal to the Upper Tribunal from the First-tier Tribunal which identified that the panel decided not to hear from the third appellant because of her age and noted that the panel did not refer to the contents of the appellant's witness statement.
15. There may be circumstances where it is not proper to call evidence from a child but young age in itself is not a sufficient reason to exclude oral evidence particularly when it is necessary to assess best interests and the Presidential Guidance indicates the Tribunal should be alerted to enabling any person including children to give evidence and to make suitable arrangements.
16. I note that at [8] of the decision and reasons, the Tribunal took into consideration that it had a witness statement before it for the third appellant but in view of the fact that the third appellant was only 7 years

old “the Tribunal did not consider it appropriate for her to give evidence in person”. Although it was the main thrust of the submissions before me that this vitiated the panel’s decision I do not share that conclusion.

17. The Tribunal reminded itself, at [22], that when considering the immigration decision the best interests will be a primary consideration but all other factors must be balanced including the public interest in maintaining effective immigration control.
18. It was not argued, and it cannot be properly said, that the evidence of the third appellant was divergent from that of her parents. The evidence of the third appellant as set out in her handwritten witness statement, which was reproduced in typewritten statement, consisted of a number of lines which indicated what school the third appellant attends, where she lived and the names of eight of her friends. The third appellant also listed family friends and stated she liked the UK because she was born there. The statement went on to indicate that the third appellant had a bunk bed and that she celebrates Christmas, Diwali, Easter, birthdays, Halloween and also the New Year.
19. The Tribunal, in considering the evidence before it, noted that the first appellant accepted that his children could adapt to life in India but also expressed concern about the weather in India and noted that his children whilst they speak English they understand Punjabi and that the first appellant encourages the children to speak Punjabi but they are resistant (and I note that the witness statement from the third appellant was in English). The Tribunal summarised the evidence from the second appellant, including that she has never worked because her children are too young and her daughter is in school and “has a circle of friends both in and out of school and that she speaks mostly English and a little Punjabi”. In addition the third witness described the third appellant as “similar to any child brought up in the UK and having no resemblance to an Indian born child”. He explained that his daughter and the third appellant are good friends and like to eat pizza, chicken and chips as well as Indian food and that they are immersed in British culture”.
20. The Tribunal went on at [36] to consider the third appellant’s situation and did not accept that her claimed immersion in British culture was a sufficient reason to make it unreasonable for her to be removed from the UK alongside her parents. The Tribunal considered her age and that she was adaptable. The Tribunal also considered that there were school reports produced to the Tribunal showing that she is polite and sociable and was learning and the Tribunal specifically took into account the class teacher’s comment that “the third appellant should be able to continue her schooling”.
21. The Tribunal went on to reach a finding open to it that the third appellant would be able to adapt to any environment and would thrive there equally. The Tribunal also took into consideration that there was some knowledge

of the Punjabi language as it is used in the family home and “which her parents say they have encouraged her” and therefore the Tribunal reached a conclusion open to it that the third appellant would be able to communicate and adapt without any serious difficulty and that there was no impediment to her continuing education in an effective manner. The Tribunal went on to consider and reach findings in relation to the contact with friends and rejected the submissions in relation to the claimant and the child’s preferred foods.

22. I have had regard to the relevant case law and Practice Guidance and in particular that:

“The Tribunal may decline to issue a witness summons under the Tribunal Procedure Rules or to permit a child, vulnerable adult or sensitive witness to give evidence where it is satisfied that the evidence is not necessary to enable a fair hearing of the case and it must decline to do so where the witness’s welfare would be prejudiced by them giving evidence.”

23. The age of the child was one of the deciding factors in the Tribunal not hearing from the third appellant. The Tribunal gave detailed consideration to the substance of the evidence which was contained in her statement, although not specifically referring to that but rather to the evidence of the three witnesses. I note that Mr Waheed did not submit that her evidence was divergent in any significant way from that given by the witnesses at the hearing. A proper reading of the Tribunal’s conclusions indicates that they were satisfied that the evidence of the third appellant was not necessary to enable a fair hearing of the case and/or that her welfare would be prejudiced by giving of such evidence. I am not satisfied that there was any procedural unfairness in the Tribunal’s approach.

24. It cannot not be said that the conclusions reached by the Tribunal were irrational and, as identified, they gave adequate reasons for those conclusions.

Notice of Decision

25. The decision of the First-tier Tribunal does not disclose an error of law and shall stand.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

As the appeal includes minor appellants, I make an anonymity direction. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Dated: 12 January 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

As the appeal is dismissed no fee award is made.

Signed

Dated: 12 January 2018

Deputy Upper Tribunal Judge Hutchinson