First-tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19272/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 July 2015	**On 19 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR F K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Dogra, Counsel instructed by Bukhari Chambers
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 5 April 1978 and he appeals against the decision of the Secretary of State dated 9 April 2014 to refuse him leave to remain in the United Kingdom under paragraph FM and paragraph 276ADE.

2. The appellant claims to have arrived in the United Kingdom in March 2004 clandestinely hidden in a lorry and made no attempt to regularise his stay.

3. His wife joined him in the United Kingdom with their son HK in 2005. At the time of his arrival in the United Kingdom HK was 3 years old, having been born on 29 July 2002. Both his wife and his son entered the UK illegally in 2005. In December 2008 the appellant was served with an IS151A when encountered trying to board a flight to Pakistan. On 28 May 2009 a second child was born in the UK. The appellant made an application on 5 April 2012 for leave to remain outside the Immigration Rules on the basis of his private life and his family life in the United Kingdom. That application was refused on 5 June 2013 and the appellant was given no right of appeal. Following an application for judicial review the Secretary of State reconsidered the application and a further decision was issued on 9 April 2014. This afforded the appellant a right of appeal. The appeal proceeded on the basis that there was no right of appeal granted to the wife and children but the matter has proceeded on the basis that they are dependants on the outcome of the appellant's appeal.

4. The respondent refused the appellant's application having considered Appendix FM. It was accepted that the appellant met the suitability requirements for his family and private life to be considered. He could not succeed on the basis of his relationship with his partner as she had no valid leave to remain in the UK and therefore he did not meet the requirements of E-LTRP.1.2-E-LTRP.1.12 under Appendix FM.

5. Consideration was given to whether he had leave to remain as a parent under the Immigration Rules. In order to be eligible under Appendix FM his child should have lived in the UK continuously for at least seven years immediately preceding the date of application and paragraph EX.1 applied (E-ELTRPT 2.2).

6. It was considered that both of the children were under the age of 18 and living in the United Kingdom, that neither were British citizens or settled in the UK. His client's children resided with him and his wife, also a Pakistan national, who was not settled in the UK and for this reason the appellant failed to meet the eligibility requirement as a parent.

7. It was specifically stated in the notice of decision that the appellant had failed to meet the mandatory eligibility criteria of E-LTRP.1.2 and E-LTRPT.2.3. Under E-LTRP.1.2 the appellant's partner must be either a British citizen present and settled in the UK or in the UK with leave as a refugee or humanitarian protection and under E-LTRPT.2.3 either –

> "*(a) the applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parents (who is a British Citizen or settled in the UK); or*
>
> *(b) the parent or carer with whom the child normally lives must be –*
>
> *(i) a British citizen in the UK or settled in the UK;*

(ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); or

(iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix."

The appellant did not have sole responsibility for his child and the parent or carer with whom the child normally lived did not meet the requirements.

8. Under paragraph 276ADE the appellant had not lived in the UK for twenty years. It was not accepted that he had no ties including social, cultural or family with the country to which he would have to go if he is required to leave the UK.

9. The circumstances of HK, the son, were considered as he was alleged to have lived in the UK continuously for seven years and it was considered whether at his stage of development it would be reasonable for him to be returned to Pakistan. He was 11 years old and just embarking on secondary education. However, at this early stage of his education it would be reasonable to expect him to continue his studies in Pakistan where he could continue to build on educational foundations forged in the UK. He had spent his life in the UK but he was with his parents who were both Pakistani nationals. This would have a major influence during his formative years.

10. The First-tier Tribunal Judge Osborne heard the appeal on 31 July 2014 and dismissed the appeal.

11. An application for permission to appeal was granted by First-tier Tribunal Judge Bird on the basis that the judge had failed to give adequate weight to the fact that HK had been in the United Kingdom since the age of 3 and the judge had failed to take into account and consider the best interests of the younger child at all. This child had never lived in Pakistan.

12. An error of law was found on the basis that the judge had indeed failed to consider the best interests of both of the children and despite an otherwise comprehensive judgment that the judge approached the evidence without an assessment of both of the children.

The Hearing

13. At the hearing I made it clear that the hearing was confined to an assessment of the best interests of the children and how that assessment would affect any decision made in relation to the parents.

14. F K attended and gave oral testimony and adopted his statement dated 31 July 2014. First he stated that his son was due to start his GCSEs in September 2015. He then stated he was in year 8 and he was not sure when he was due to start his GCSEs.

15. Under cross-examination he confirmed that his son was attending secondary education at Kings Heath School and he attended there two months ago. Before that he was attending an Islamic school. When asked he claimed he did not know the

school his son was attending was an Islamic school: he said it was convenient and near their home he was asked the name of it and he said it was the 'Islamic Centre' or something like that. He confirmed that they spoke Urdu and Pashtu at home.

16. The language of instruction in the Islamic Centre was in Urdu, Arabic and English. He confirmed that HK attended primary school until year 5 and then attended Islamic School for one year.

17. The appellant confirmed he had no right to work in the UK and he only became aware when solicitors told him he had no right to work here, but he needed to support himself and he worked with a friend, part-time. There were less opportunities for work available in Pakistan.

18. Mrs F K attended and confirmed that HK had only gone to a state maintained secondary School in year 8. Prior to that he attended an Islamic School for a full year of 7 and half a year of Year 8 and had left in April 2015. Before then he had attended the LL Primary School. He was due to commence his GCSE course in September 2016. He was sent to the Islamic School because his friend said it was very good.

19. The youngest child was at full-time school. She stated that they spoke Pashtu at home and the children replied in English.

20. Mr Tufan made his submissions. The key question whether it was reasonable to request that these appellants be returned to Pakistan. There was evidence that the children spoke in two languages in the household, that was Urdu and Pashtu. The elder child had been exposed to an Islamic school and therefore had been exposed to Urdu and to Islamic culture. He submitted that the child had been taken out of the school to give the impression that he was culturally integrated into the UK.

21. He referred to **EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA Civ 874** particularly paragraphs 58 and 60.

22. AK was born in 2009 and recently turned 6 years old. She had been exposed to a language at home and her best interests were to stay with the parents wherever that was.

23. Ms Dogra made submissions and accepted that the appellants could not comply with Appendix FM. However paragraph 276ADE, sub-Section (iv) applied to HK. He would be under the age of 18 but had lived in the UK for seven years. He had now been in the UK for almost ten years, having arrived in 2004. Some of the language being spoken at home was not sufficient to suggest that it was reasonable he could return. He might have some understanding of the mother tongue but it was clear from the evidence his primary language was English. He would have had to adapt to education back in Pakistan. The school he had attended was an Islamic school but this did not necessarily expose him to the cultural norms of his country. He had been in the UK since the age of 3 and he was not likely to remember Pakistan. **EV (Philippines)** raised the factor of costs but this was only one issue in the overall assessment.

24. With respect of AK she had lived all her life in the UK and had never been to Pakistan. It would be disproportionate to remove her to Pakistan under Article 8 and if that were the case it would be disproportionate to remove the parents.

25. Under Section 117 she submitted that family life should be considered in relation to the children. The test was the same in relation to paragraph 276 and Section 117 in relation to the reasonableness of return.

Conclusion

26. Paragraph 276ADE sets out that the requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

> *"(i) Does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1 in Appendix FM; and*
>
> *(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and*
>
> *(iii) has lived continuously in the UK for at least 20 years discounting any period of imprisonment; or*
>
> *(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years discounting any period of imprisonment and it would not be reasonable to expect the applicant to leave the UK; or*
>
> *(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK discounting any period of imprisonment; or*
>
> *(vi) subject to sub-paragraph 2, is aged 18 years or above, has lived continuously in the UK for less than 20 years discounting any period of imprisonment but has no ties including social, cultural or family with the country to which we would have to go if required to leave the UK."*

27. Following **ZH (Tanzania) v SSHD [2011] UKSC 4** the Supreme Court acknowledged that the best interests of a child should be a primary consideration and **Zoumbas v Secretary of State for the Home Department [2013] UKSC 74** outlines the seven steps which should be taken into account when assessing the best interests. Those best interests I have addressed as my starting point and before deciding whether it is reasonable to expect HK and AK to relocate outside the United Kingdom. I note that although the best interests of the child can be outweighed by a cumulative effect of other considerations no other consideration can be treated as inherently more significant. **Zoumbas** confirmed that the children should not be held responsible for the actions of their parents.

28. HK entered the UK with his mother in 2005 both entering illegally. Since that time he has lived with his parents and has not returned to Pakistan. I note from **Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)** that 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 point suggests that so should dependent children who form part of their household unless there are reasons to the contrary. That said it is generally also in the interests of children to have stability and continuity of social and educational provision.

29. **E-A (Article 8 – best interests of child) Nigeria** [2011] UKUT 00315 (IAC) recognised

'that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case'.

And that

'adaptability of the child in each case must be assessed and is not a conclusive consideration on its own'.

30. HK has experienced a substantial period of residence in the United Kingdom and in the normal course of events I would have considered that he would have put down considerable roots and friendships but a striking factor in this is that he was removed from his primary school in year 5 and placed for year 6 and most of year 7 in another school which is an Islamic School. His father at first stated, which I do not believe, that he did not know that this was an Islamic School. Merely from the name of the school it is clear that the school is Islamic. Indeed his father confirmed that he was taught in Urdu, Arabic and English at that school and his mother confirmed that the fees were paid privately and at home the children were spoken to in Pashto. I find both children are exposed to Urdu and Pashto. I take into account that HK was, at the date of the hearing, nearly 13 years old and the evidence given, although it was contradictory between the mother and the father, that he was entering his GCSE period of study in September 2016. He had spent a year and a half, in fact nearly two academic years, at the privately funded Islamic School in the United Kingdom. He has not yet commenced his formal GCSE education.

31. This does suggest to me that although he may have forged some friendships he is adaptable and that he has been exposed to Islamic culture both at home and at school. He is still in his early years and although I take into account the reports from his previous school LL I was supplied with no up-to-date school reports from either Kings Heath or from the Islamic School.

32. The social and educational provision for HK is such that he will remain with his parents and, as I have stated above, has been attending a private Islamic School which he could do in Pakistan. Although he has had lengthy residence in this country I am not persuaded that in fact his social, cultural and educational ties would be so disrupted. Policies have identified that seven years is a relevant period and that seven years from the age of 4 is likely to be more significant to a child than the first seven years of life as very young children are focused on their parents rather

than their peers and are adaptable but it is clear from the educational history of HK that he is indeed adaptable and sociable.

33. I find it would also be in the best interests of HK to stay with his parents and his sister, receive an education and experience the cultural heritage of the country of his nationality.

34. Both his parents and his sister are Pakistan nationals and he has been brought up by his parents who have lived in Pakistan for some considerable time. A submission was made that HK has grown up in a different environment with different cultural understandings than he would have in Pakistan. However he has been brought up by his parents who would have introduced him to their cultural way of life and confirmed that they speak to him in Urdu. Indeed it was the parents' friends who told them to send him to the local Islamic School.

35. It was suggested that HK had developed his own network and private life outside school but the evidence produced from LL School dated from 2012 to 2013, which was sometime ago and although the report described as a popular boy, this suggests that he would be able to adapt and make new friendships on his return.

36. There was no statement from HK himself or evidence from his friends although I do note that he had an achievement certificate awarded for perfect attendance during April 2015.

37. Despite the fact that his parents stated in their witness statement of 31 July 2014 that private education could not be afforded in Pakistan, nonetheless private education was being funded in the UK for a year and a half and I have no doubt from the evidence that was provided that private education would be available in Pakistan albeit at a cost. Failing that there was no evidence that there was no education or health systems in Pakistan.

38. I can understand that HK will face some practical difficulties in relocating but he will be with his parents who, no doubt, will support him.

39. He is clearly an intelligent boy who could be expected to adapt to a new country and a new environment and make new friends. It is not the case that he would be required to learn a second language as his evidence was given that Pashtu and Urdu were both spoken in the home and indeed he has attended a school which has taught in languages other than English and to which he adapted.

40. HK is still at a young age and although he has been in the UK for over seven years and been in education he has been removed from mainstream education in this country and placed in an Islamic School. That is not a criticism of that decision but it has shown that he is flexible and has been exposed to at the least an educational culture which is predominant in Pakistan. He has not reached an education stage whereby he is about to commence his GCSEs and I have no doubt that there are courses that he can follow in Pakistan. Lastly, this course of return will not interfere with his family life because his family would be returned together subject to what I have to say about AK.

41. Although the point was not taken, there was no indication of exactly when the mother entered the United Kingdom with HK, and nonetheless the respondent appeared to proceed on the basis that he did enter in 2005 and thus applied Paragraph 276 ADE (the child must be in the UK for seven years preceding the application which was made in April 2012). This will, however, have implications should he attempt any registration for citizenship. My only use of this point is that there was no indication that either of the children were British citizens.

42. I turn to a consideration of AK. She was born in the United Kingdom and has lived here continuously for six years (rather than the seven years required by Paragraph 276ADE) and attends school. I note that she has never been to Pakistan.

43. I find her best interests are to remain with both her parents and her brother, to continue with education whether in the United Kingdom or in Pakistan and to know her cultural background and heritage.

44. Although the papers indicated that she had some speech and language difficulties she has undergone significant treatment. I note from the speech and language report of Esther Ryan dated 18 June 2014 that AK underwent speech and language therapy reassessment and it was considered that she had made significant progress and her communication difficulties are now moderately delayed. It was further stated she:

> "*shall continue to progress well as she matures with the ongoing support of you and good language models from school staff.*"

45. There was no indication to suggest that AK could not adjust or that she had significant special educational needs. She is young, in primary education and because of her age adaptable. Both of the parents at the hearing availed themselves of an Urdu interpreter and I was told that the children also speak Pashtu at home. She too must be flexible linguistically as she will be taught in English and have other languages spoken to her at home.

46. Although the educational and health systems may be preferable in the United Kingdom there was no evidence that the appellants could not avail their children of the benefits of those systems in Pakistan.

47. Had HK spent time only in one school I would have been less inclined to find that moving his educational career abroad was acceptable but for the reasons given above his interests are like his sister to remain in the family unit and to retain their cultural heritage which can be done by returning abroad.

48. In my consideration of whether it is reasonable to expect HK to return home, I enlist **EV (Philippines)**, paragraph 58 to 60 where Lewison LJ stated

> *'58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against*

which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?

59. On the facts of ZH it was not reasonable to expect the children to follow their mother to Tanzania, no least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens'.

60. That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the immigration judge found it is obviously in their best interests to remain with their parents. Although it is, of course a question of fact for the tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world."

49. Neither of the parents in this case entered the United Kingdom legally and despite their lengthy residence in the United Kingdom, has always known that their status here was not only precarious but unlawful. None of the family can comply with the immigration rules and, for the reasons given above, I conclude that it is reasonable to expect HK and his sister to return with their parents. Further to **SS Congo v SSHD** [2015] EWCA Civ 317 my starting point is the immigration rules.

50. For completeness following **Singh v SSHD [2015] EWCA Civ 74** and to ensure that all relevant factors have been addressed, particularly with regards the children, I have applied principles enunciated in **Razgar v SSHD [2004] UKHL 27**. I do not accept that there is family life in the United Kingdom but I can accept that the family have engaged a private life in the UK and the threshold for the engagement of that private life has been reached**.** The refusal decision taken by the Secretary of State, for the reasons given above, in relation to HK and paragraph 276ADE (which does not apply to AK) was taken in accordance with the law and for a legitimate purpose, that is protection of rights and freedoms of others through the maintenance of immigration control.

51. I have taken into account and must take into account Section 117B of the Nationality Immigration and Asylum Act 2002 when assessing the weight to be accorded to the public interest and the proportionality of the Secretary of State's decision

Section 117B Article 8: public interest considerations applicable in all cases

"(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to -

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(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."

52. The appellant and his wife had interpreters, at court and there was evidence that the appellant was working illegally and thus no information on whether he was paying tax. It was the case that the children were both at school and it would appear that the family are accessing care from the NHS (AK has been accessing speech and language services) and thus I conclude that the family are a burden on the tax payer. At all times the appellant has remained in the United Kingdom unlawfully. I take these factors into account.

53. Section 117B(6) specifically states

(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.

54. I have explored the reasonability of whether either of the children should be expected to return to Pakistan and found that it is reasonable for them to do so for the reasons outlined and despite the length of time HK has spent in the United Kingdom.

55. When considering the proportionality of the decision I have considered any other factors and in particular any delay in relation to the claim beyond the parents' control. Bearing in mind the number of claims that the respondent needs to process I am not minded to consider that there has been any significant delay on the part of the respondent as a result of a dysfunctional system, **EB Kosovo v SSHD** [2008] UKHL 41, such as to reduce the weight to be accorded to the Secretary of State's

position. The appellant has been in the United Kingdom since 2004 and failed to make any attempt at regularising his stay until 2012 some eight years after entry.

56. The question I must ask in relation to Article 8 is most succinctly set out in **Huang v SSHD [2007] UKHL 11**

'In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality'.

57. I do not accept that there would be significant difficulties in the appellant's return. He and his wife have spent the majority of their lives in Pakistan and been educated there. He and his wife retain their linguistic skills, he worked in Pakistan before his arrival here and neither have any significant health issues. They will return together as a family and can never have had an expectation of remaining here. This decision was specifically focussed on the interests of the children and an assessment of the reasonableness of their return.

58. I find that the decision of the Secretary of State was a lawful and proportionate decision.

Notice of Decision

The appeal is dismissed under the Immigration Rules and on Human Rights grounds.

Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

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. This is because minors are involved.

Signed Date 14th August 2015

Deputy Upper Tribunal Judge Rimington

FEE ORDER

As the appeal has been dismissed there can be no fee award.

Signed Date 14th August 2015

Deputy Upper Tribunal Judge Rimington