



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

**Appeal number: IA/29000/2014  
IA/29001/2014  
IA/29002/2014  
IA/29003/2014**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On September 22, 2015**

**Decision and Reasons  
Promulgated  
On October 5, 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**MR SHAKEEL KHAN  
MRS MUSARRAT KHAN  
MISS WAJIHA SHAKEEL KHAN  
MASTER OMER DANYAL KHAN  
(NO ANONYMITY DIRECTION)**

Appellant

**and**

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

Respondent

Representation:

Appellant

Mr Ahmed, Counsel, instructed by Law Lane Solicitors

Respondent

Mr Parkinson (Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. The first-named appellant came as a visitor in June 2004 with his wife (second-named appellant) and children (third and fourth-named appellants) as dependants. They were incorrectly issued with a C-visa covering the period June 11, 2004 to June 11, 2006. The error was

corrected and their passports were then endorsed with a "Visa Exempt Official" on August 3, 2004 and their leave to remain here was valid until July 5, 2009.

2. On July 9, 2013 the appellants applied for further leave to remain on basis of long residence. The respondent refused their applications on August 13, 2013 without a right of appeal. Judicial Review proceedings were issued and on April 3, 2014 a consent order was lodged with the Court whereby the respondent agreed to reconsider their application if the appellants withdrew their Judicial Review claims.
3. On July 2, 2014 the respondent refused their applications and at the same time issued removal directions. The respondent considered their claims under Appendix FM and paragraph 276ADE of the Immigration Rules and under Article 8 ECHR.
4. The appellant appealed this refusal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on July 15, 2014.
5. The matter was listed before Judge of the First-tier Tribunal Robinson on March 5, 2015 and in a decision promulgated on March 20, 2015 the Tribunal dismissed their appeals under Article 8 ECHR.
6. The appellant applied for permission to appeal on April 2, 2015 and permission to appeal was granted by Judge of the First-tier Tribunal White on May 20, 2015 finding it arguable:
  - a. The Tribunal should have considered the appeal under paragraph 276ADE before considering the appeal under Article 8 ECHR.
  - b. In assessing the best interests of the children the Tribunal had given insufficient weight to the effect on them of relocation given their long residence in the United Kingdom.
  - c. The Tribunal failed to have sufficient regard to the provisions of section 117B of the 2002 Act.
7. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I see no reason to make an order now.

### **SUBMISSIONS**

8. Mr Ahmed adopted both the grounds of appeal and the permission to appeal. He firstly submitted there was a material error because the Tribunal had failed to make a finding on the Immigration Rules. The Tribunal should have considered the position under the Rules as paragraph 276ADE(iv) HC 395 applied because the children had been in the United Kingdom for more than seven years and the Tribunal should have considered whether, in those circumstances, it was reasonable for the appellants to be returned. Secondly, he argued that the Tribunal failed to demonstrate any consideration of Section 117B factors and that in itself

was a material error as statute required that those factors had to be considered in each case. Thirdly, he submitted that the Tribunal had not properly considered proportionality.

9. Mr Parkinson opposed the application and relied on the refusal letter dated June 5, 2015. Whilst conceding the Tribunal had not specifically addressed paragraph 276ADE HC 395 it was clear from the findings that the Tribunal considered it reasonable for the children to leave the United Kingdom. The Tribunal had also considered the children's best interests including their education, location and language and was fully aware of the length of time they had been here. The Tribunal reminded itself that the children's interests were a primary consideration but also properly took into account the parent's poor immigration history and the fact the first-named appellant purposefully delayed submitting the application until seven years had elapsed. There was no requirement to set out the requirements of section 117B of the 2002 Act but in any event the Tribunal had considered the relevant evidence in its assessment of proportionality. There was no material error.

#### **DISCUSSION AND REASONS ON ERROR IN LAW**

10. All of the appellants in this appeal are citizens of Pakistan and whilst they were all born there they had all lived in the United Kingdom since June 2004 having entered lawfully. The first named appellant came as an employee of the Pakistan High Commission and the remaining appellants as his dependants.
11. There is no dispute that they resided lawfully in this country until July 5, 2009 when the first named appellant ceased employment with the Pakistan High Commission. No applications were made to extend their leave until July 9, 2013 and their applications were eventually refused on July 2, 2014.
12. The respondent considered their claims firstly under Appendix FM of the Immigration Rules; secondly, under paragraph 276ADE HC 395 and then thirdly, outside of the Rules albeit the respondent concluded there were no exceptional circumstances sufficiently compelling to justify allowing their applications to remain in the United Kingdom.
13. When the matter came before the Tribunal on March 5, 2015 Judge of the First-tier Tribunal Robinson refused their applications under Article 8 ECHR. Whilst the Judge recorded on page 4 of his determination that the respondent had considered the children's private life, with reference to paragraph 276ADE, he failed to actually deal with the claim under the Rules as evidenced by end of his decision when he concluded by stating, "the appeal is dismissed on human rights grounds (Article 8)."
14. Mr Ahmed's first challenge is that by failing to deal with the appeal under paragraph 276ADE there was a material error. Mr Parkinson, in his oral submissions, accepted the Judge had not specifically dealt with paragraph

276ADE but argued that taking the determination as a whole it was clear he had considered the Rule. The thrust of his submission being that his consideration under Article 8 ECHR included the factors referred to in paragraph 276ADE.

15. Paragraph 276ADE(iv) HC 395 states that where the applicant is under the age of 18 years and has lived continuously in the United Kingdom for at least seven years and it would not be reasonable to expect the applicant to leave the United Kingdom then such an application should be granted.
16. I am satisfied the Judge erred by failing to deal with the appeal under paragraph 276ADE.
17. Whilst Mr Parkinson vociferously argued that the Judge had considered all the relevant factors I am satisfied that if the Judge had allowed the appeal under Article 8 without firstly considering the claim under the Immigration Rules then the respondent would have submitted grounds of appeal arguing an error in law.
18. Every application post July 2012 must be considered with reference to the Immigration Rules before any consideration under Article 8 should be undertaken. It is clear from the determination that the Judge's only consideration was under Article 8 as he made no finding under the Rules.
19. The failure to make a finding under the Immigration Rules is an error and whilst I considered whether the Judge's assessment under Article 8 could rescue the determination I concluded that it could not.
20. I therefore find this to be a material error because the Judge failed to consider the appeal under the Rules.
21. I did raise with Mr Ahmed whether this was a case that I could proceed with in the absence of any other evidence but he submitted that the case should be remitted to the first tier Tribunal. Mr Parkinson argued that this was not necessary because the evidence that was before the Tribunal set out the position as at March 2015.
22. The only change appeared to be that the children had progressed further at school with the youngest child now having just commenced secondary school.
23. I was satisfied that no further evidence was needed because in March the tribunal was aware the youngest child would be starting secondary school. The child had only recently commenced secondary school and I am satisfied this change would not alter the factual matrix presented on behalf of this family.
24. Mr Ahmad wanted to provide further evidence of the first-named appellant's integration but I am satisfied that such an opportunity had already been given both at the First-tier hearing and as a result of the

directions that had been issued to the parties since permission to appeal had been granted.

25. Paragraph [2] of those directions makes clear that the parties should prepare for today's hearing on the basis that if the decision was set aside any further could be considered at the hearing. No further evidence had been produced prior to the hearing.
26. I am satisfied I consider this appeal based on the evidence already filed.
27. I have therefore considered their appeals under paragraph 276ADE. There are two separate claims under this Rule because there not only do I have to consider claims from the two children but I also have to consider the claims from the two adults.
28. At paragraph [42] of the Judge's decision he recorded that there were close family members in Pakistan and at paragraph [23] he also recorded that family members such as grandparents and aunts/uncles were living in Pakistan and the families were not estranged.
29. Paragraph 276ADE(vi) HC 395 states where an appellant is over the age of 18 for there has to be very significant obstacles to their integration into Pakistan for such an application to succeed. No such argument has been put forward at any stage and based on the evidence before me I am satisfied a claim under paragraph 276ADE on behalf of the adult appellants must fail.
30. The other argument advanced is that the child appellants should succeed under paragraph 276 ADE because it would not be reasonable to expect them to leave due to the time they had spent here.
31. I have had regard to the bundle of documents that was presented at the earlier hearing and included within this bundle were reports from the children's schools which indicated appropriate progress and good participation with both children giving the appearance of being well settled.
32. I also have had regard to the fact that the children have been brought up in the United Kingdom having come here legally with their parents in June 2004. However, their lawful leave expired in October 2009 by which time the children had spent just over five years in the United Kingdom.
33. I am told that both children speak good English and although their understanding of Urdu would not be to the same standard as children their own age who live in Pakistan, the evidence presented was that they were able to speak to their mother in Urdu as well as English. There were no health issues relevant to either child although there was some medical evidence regarding problems their mothers' problems.

34. In considering their claims under paragraph 276ADE I also have to have regard to the circumstances that exist in Pakistan and in particular the fact that they have close family with whom their parents are in contact.
35. The Judge previously rejected the first-named appellant's claims concerning the sale of a property and the findings made on that were clearly open to him.
36. Accordingly, in considering their claims under the Immigration Rules I am satisfied that although they had been here for more than seven years it was not unreasonable to expect them to leave the United Kingdom with their parents and to return to Pakistan-a country of which they are citizens and were born in. I therefore dismiss their appeals under the Immigration Rules.
37. I have also considered Mr Ahmed's submissions concerning the approach to Article 8 and in particular that the Judge did not give sufficient weight to section 117B of the 2002 Act and carried out an inadequate proportionality assessment under Article 8 ECHR. I am satisfied that these submissions are inextricably linked.
38. The Judge at paragraphs [33] and [34] of his decision set out the correct test to be followed when approaching Article 8 ECHR (Razgar [2004] UKHL 00027) and correctly identified that the fifth question posed by Lord Bingham was what this appeal would turn on namely "was it proportionate to require the appellants to leave the United Kingdom?"
39. The Judge properly reminded himself that the children's best interests were a primary consideration and it was in their best interests to be brought up in a safe, loving environment by their parents.
40. He noted that neither child had any special health nor educational needs, they had grandparents in Pakistan albeit they had not met them for many years and they both spoke Urdu but not fluently.
41. The judge recognised that relocation to Pakistan would mean the children would have to adjust to an unfamiliar environment, educational system and culture. The Judge also recognised that there were a number of family members in Pakistan who may well be able to help the family to resettle.
42. Mr Ahmed submitted that the Judge had failed to consider section 117B of the 2002 Act. This section was inserted by section 19 of the Immigration Act 2014.
43. Section 117B(i) makes clear that the maintenance of effective immigration control is in the public interest.
44. I do not accept Mr Ahmed's submission that the Judge did not have regard to section 117B because he acknowledged the ability of all parties to speak English as well as the fact that the first-named appellant had continued to work, albeit illegally. The Judge also had regard to the fact

that the private life created since 2009 had been created at a time when they were here unlawfully and when their immigration status was precarious.

45. Section 117B(6)(b) states the public interest does not require a person's removal where it would not be reasonable to expect a qualifying child to leave the United Kingdom and whilst there is no specific reference in the determination to section 117B it is clear that the Judge had these factors in mind.
46. Satisfying all of the positive aspects of Section 117B did not mean every application must succeed and similarly a failure to satisfy the positive factors and to fall foul of the negative factors did not mean every application would fail. However, they were factors that should be taken into account when carrying out the aforementioned proportionality assessment.
47. I reject Mr Ahmed's submission that he did not have regard to the evidence. The Judge had regard to the length of time the children had been here, the fact that they were settled, spoke English and had had little contact with their relatives in Pakistan having visited them only once since coming to the United Kingdom in 2004.
48. The children clearly wished to remain in the United Kingdom and it follows that if their appeals succeed then the adult appeals would also succeed as they would be required to look after them. The Judge correctly identified their best interests and as the Supreme Court made clear in Zoumbas v Secretary of State for the Home Department [2013] 1 WLR 3690 their best interests are not in themselves of paramount consideration. The Judge has to have the Judge regard to any countervailing circumstances and that is exactly what he did in his decision.
49. At the outset he identified the children's best interests were a primary consideration (paragraph [36] of his decision) but he then went on to consider all the facts of the case including having regard to the 2002 Act.
50. His conclusion was that it may well be disruptive for them to return to Pakistan but they would be accompanied by their parents and on arrival they would have support from close family. The judge concluded his assessment in paragraph [45] but that paragraph should not be read in isolation of his other findings.
51. Mr Ahmed's submissions on this issue amount to nothing more than a mere disagreement.
52. Accordingly, I do not find there has been any material error in the Judge's approach to Article 8 and his dismissal of their Article 8 claims stands.

## **DECISION**

53. There was a material error in respect of the Immigration Rules because no decision was made on that aspect of the claim. I have considered the evidence and I dismiss the appellants' appeals under the Immigration Rules.

54. I uphold the Tribunal's decision in respect of Article 8 ECHR.

Signed:



Deputy Upper Tribunal Judge Alis

**TO THE RESPONDENT  
FEE AWARD**

I make no fee award.

Signed:



Deputy Upper Tribunal Judge Alis