



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

Appeal Numbers: IA/09152/2015
IA/09154/2015
IA/09158/2015
IA/09159/2015

THE IMMIGRATION ACTS

Heard at Field House

On 13th July 2016

**Decision & Reasons
Promulgated
On 28th July 2016**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

**RANA MUHAMMAD SHAHZAD
NAZIA SHAHZAD**

[L T]

[H T]

(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Ms Z Ahmad, Home Office Presenting Officer

For the Respondents: Mr S Bellara, instructed by Western Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, I shall refer to the parties as in the First-tier Tribunal. The Appellants are citizens of Pakistan and are a husband, wife and two dependent children. First-tier Tribunal Judge Hodgkinson allowed their appeals, under paragraph 276ADE of the Immigration Rules and on human rights grounds, in a decision dated 13th January 2016.

2. The relevant immigration history is that on 2nd June 2006 the first three Appellants were granted entry clearance to come to the UK as visitors until 2nd December 2006. They then returned to Pakistan and the first and second Appellants were granted entry clearance as students valid from February 2007 to November 2008. The third Appellant was granted entry clearance as their dependant. They re-entered the UK on 6th March 2007 when the third Appellant was a year old. The first and second Appellants have remained in the UK with student leave followed by highly skilled post study migrant leave and have made an in time application to vary their leave to remain. The fourth Appellant was born in the UK.
3. The third Appellant was born on [] 2006 and the fourth Appellant was born on [] 2008. They were aged 10 and 6 at the time the application was made and were 10 and 7 at the date of hearing. The judge allowed the appeals, in the case of the third and fourth Appellants under paragraph 276ADE(iv) of the Immigration Rules, and in the case of the first and second Appellants under Article 8.
4. The Respondent applied for permission to appeal on the basis that the judge had found that the two child Appellants met the requirements of 276ADE(iv), having both been in the UK for seven years, and therefore he erred in law in relation to the fourth Appellant who was only six years old at the date of application. Accordingly, the fourth Appellant could not meet the requirements of the Rules. The error was material because it infected the judge's finding in relation to the fourth Appellant's circumstances and whether there were compelling exceptional circumstances for consideration outside the Immigration Rules.
5. Further, in relation to the reasonableness test the judge had erred in finding that the academic success of the children was a trump card. The judge failed to consider the public interest element of maintaining immigration control in assessing the first and second Appellants' appeals under Article 8.
6. Permission to appeal was granted by First-tier Tribunal Judge Page on the grounds that the judge's evaluation of the best interests of the children gave undue weight to their interests, enabling their parents to "piggy back on their rights" and had arguably erred in law in finding that the younger child met the requirements of 276ADE(iv).

Submissions

7. Ms Ahmad submitted that the fourth Appellant could not satisfy the Immigration Rules because she had not been residing in the UK for seven years at the date of application and the judge had erred in law in allowing her appeal under the Immigration Rules. This had affected the whole decision because the judge had approached the appeal on the basis that both children met the Immigration Rules.

8. Further, in relation to the third Appellant the judge had considered education a trump card and had not considered other factors. There was no evidence that the minor Appellants could not continue their education in Pakistan. Ms Ahmad relied on paragraph 39 of AM (S 117B) Malawi [2015] UKUT 0260 (IAC) which stated that:

“There was no reason to infer that any interruption to the education of the elder child upon return to Malawi would be any more significant than that faced by any child forced to move from one country to another by virtue of the careers of their parents. Nor should the difficulties of a move from one school to another become unduly exaggerated. It would be highly unusual for a child in the UK to complete the entirety of their education within one school. 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 First-tier Tribunal is presented with arguments whose basic premise is that to change a school is to submit a child to a cruel and unduly harsh experience. Indeed, as if to illustrate the point, we note that the eldest child of this family has been required to move schools, and move from one end of the UK to the other, as a result of the decisions of her parents. The evidence does not suggest she suffered any hardship or ill effect from doing so.”

9. Ms Ahmad submitted that the judge had only looked at the education of the minor Appellants and not at other factors in assessing whether it was reasonable for them to leave the UK and return to Pakistan with their parents.
10. Mr Bellara submitted that there was no public interest weighing against the Appellants in this case. He accepted that their private life was precarious because the first and second Appellants only had leave on a temporary basis. However, they had complied with the Immigration Rules and remained lawfully in the UK. None of the other factors in Section 117 weighed against the Appellants and in fact there was a qualifying child, the third Appellant. Therefore, there had to be something powerfully countervailing to weigh in the balance for the public interest and the child could not be blamed for the immigration status or precarious nature of their parents' leave.
11. Mr Bellara relied on MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705, in particular paragraphs 99 to 117, and the case of PD v Secretary of State for the Home Department [2016] UKUT 108 at paragraphs 18 to 26.

Relevant case law

12. In PD, McCloskey J observed that it would be absurd to consider the child's position entirely independently of, and in isolation from, the position of the parents given that the child's best interests will usually require that he or she lives as part of the family unit. But the focus on the family does sit happily with the language of Section 117B(6). Had Parliament intended to require considerations bearing upon the conduct and immigration history of the applicant parent to be taken into consideration, I would have expected it to say so expressly, not for the matter to have been inferred from a test which in turn focuses on an assessment of what is reasonable for the child. This does not in my view mean that the wider public interests have to be ignored; it is simply that Parliament has determined that where the seven year rule is satisfied and the other conditions in the section have been met, those potential conflicting public interests will not suffice to justify refusal of leave if, focusing on the position of the child, it is not reasonable to expect the child to leave the UK.
13. In MA (Pakistan), the Court of Appeal held at paragraph 46.

“Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise.”
14. The Court of Appeal approved of the approach in EV (Philippines), namely that a decision as to what is in the best interests of children will depend on a number of factors such as their age, the length of time that they have been here, how long they have been in education, what stage their education has reached, to what extent they have become distanced from the country to which it is proposed that they return, how renewable their connection with it may be, to what extent they will have linguistic, medical or other difficulties in adapting to life in that country and the extent to which the course proposed will interfere with their family life or their rights if they have any as British citizens.
15. In MA, at paragraph 49, the Court of Appeal held that the fact that the child has been in the UK for seven years would need to be given significant weight to the proportionality exercise for two related reasons. First because of its relevance to determining the nature and strength of the child's best interests and second because it establishes a starting point that leave should be granted unless there are powerful reasons to the contrary.
16. The Court of Appeal went on to conclude:

“100. There can surely be little doubt that if the reasonableness test required a focus on the position of the child alone, ignoring wider considerations of immigration control, the argument for him being granted leave would be overwhelming. It would not be reasonable to require him to leave the UK given that he has spent virtually all his life here.

101. But for the reasons I have given, that is not the test. The court can have regard to the wider public interest including the immigration history of the applicant and his parents. The question, therefore, is whether the judge was entitled to conclude, having regard to these considerations and all other aspects of the public interest, that it would not be unreasonable to require the child to return to Pakistan.”

Discussion and Conclusions

17. It was accepted at the outset of the appeal that the judge had erred in law in allowing the fourth Appellant’s appeal under the Immigration Rules. She was six years old at the date of application, 23rd December 2014, and was unable to satisfy paragraph 276ADE(iv). Accordingly, I set aside the judge’s decision to allow the fourth Appellant’s appeal under the Immigration Rules.
18. I therefore consider whether her appeal should be allowed on Article 8 grounds. I asked Ms Ahmad if she was challenging the judge’s findings in respect of the third Appellant. Ms Ahmad submitted that those findings were challenged and it was apparent from paragraph 13 of the grounds of appeal that that was in fact the case. Paragraph 13 states:

“The parents [sic] appeals are challenge [sic] in respect of the findings under article 8 and the eldest child (reasonableness test) and the youngest child in respect of the Rules and Article 8.”
19. The Respondent challenges the reasonableness test on the basis that the judge in this case considered only the education of the children and failed to take into account other factors including the public interest elements of maintaining immigration control. When asked to identify what those public interests elements were Ms Ahmad submitted that it was the precarious nature of the parents’ private life in that they had been here as students and post-study work migrants and secondly that the parents could not satisfy the Immigration Rules. I am not persuaded by Ms Ahmad’s submission that there was any error of law in the judge’s assessment of reasonableness in this case for the reasons that follow.
20. The judge made the following findings. The third Appellant had resided in the UK since March 2007, a period of nearly nine years and she was currently 10 years old. He took into account the fact that the family would travel to Pakistan as a family unit. Also, that the first and second Appellants had entered the UK lawfully and had resided in the UK lawfully even though they only ever had temporary leave. He acknowledged that their immigration status had throughout been precarious. The private lives of the Appellants had been created and developed in circumstances where their status in the UK had been precarious although the children

themselves could not have been expected to have had any knowledge of their status in the UK or its consequences.

21. The judge found that the first Appellant had worked throughout his period of residence and then maintained his family accordingly. They had accessed NHS treatment in the UK and the children had benefited from free education. The Appellants all speak fluent English.
22. The judge then went on to consider the education of the minor Appellants and commented that there was a wealth of documentation before him which was unchallenged. He concluded that this established that both of the children were fully integrated into the education system in the UK and they were both doing well. Both children spoke basic Urdu, but they were illiterate in the Urdu language and would struggle to cope with the education system in Pakistan. Their first language was English and they would be taught in Urdu if they returned to Pakistan.
23. The judge concluded that the first and second Appellants' immediate and long-term accommodation and employment prospects were unclear and the cost of private education was unlikely to be cheap. Therefore removal to Pakistan would be challenging to all Appellants as the situation was uncertain. The judge concluded that, bearing in mind the children were fully integrated in the education system, their removal would have significantly harsh consequences on them both in terms of their education and their endeavours to integrate into what is, in reality, an alien society. Neither child had any knowledge of Pakistan; the third Appellant was only one year old when she came to the UK. The judge concluded that it was in the best interests of both children, not only to continue living with their parents, but to continue living in the UK bearing in mind their educational history, their ages and the length of time they had lived in the UK.
24. The judge accepted that they had not commenced secondary education and would be able to adjust to life in Pakistan and to the education system there, but that was not the test, the test was whether it was reasonable to expect them to leave having considered all relevant factors. The judge considered all relevant factors and concluded that there would be unacceptably harsh consequences to expect, particularly that of the third Appellant and to a lesser extent the fourth Appellant to be uprooted from the UK. A separation of the two girls from each other was also an inconceivable option.
25. Accordingly, I find it is quite clear from these findings that the judge has considered all the factors set out in EV (Philippines) and has not considered merely the educational records of both of the children. Whilst he had considered the children together and is mistaken in respect of the fourth Appellant that does not undermine his findings in relation to the third Appellant and he has taken into account all relevant circumstances appertaining to her situation and integration into the UK.

26. The judge looked at the evidence in the round and his conclusion at paragraph 34 was consistent with the Court of Appeal in MA. He has not just looked at the child's best interests in isolation, but considered them as a whole against the background of their immigration history and that of their parents. There was no error of law in the judge's finding that it would be unreasonable for the Third Appellant to leave the UK.
27. The judge properly considered Section 117B of the 2002 Act and the public interest factors referred to therein. There is little weight to be attached to the public interest because the parents have remained here lawfully throughout, even though their immigration status was temporary and their private life precarious. The judge took into account all relevant factors. There was no error of law in his decision to allow the appeals of the first and second Appellants on Article 8 grounds.
28. Given that I have set aside the decision in respect of the fourth Appellant, I now consider the circumstances existing at the current time in assessing Article 8. There was no dispute on the facts of this case. I find that the fourth Appellant has lived in the UK all her life, she is doing well at school and is integrated in the UK. She has no knowledge of Pakistan and is not literate in Urdu. Her first language is English and she would be taught in Urdu if returned to Pakistan. Her parents had been residing in the UK lawfully for nine years, although their leave was temporary. Removal to Pakistan would have harsh consequences on the fourth's Appellant's ability to integrate and her education.
29. I have upheld the judge's decision that it would be unreasonable for the third Appellant to be required to leave the UK. She was a qualifying child for the purposes of 117B(6). I attach significant weight to the best interests of the fourth Appellant who has now been residing in the UK for seven years. Her parents' private life is precarious and they are unable to satisfy the Immigration Rules, but they have been residing lawfully in the UK for over nine years. I find that there is little public interest weighing in favour of removal.
30. Therefore, it would not be proportionate to remove her parents and equally it would not be proportionate under Article 8 to remove the fourth Appellant who was dependent on her parents and part of the family. There could be no separation of the family unit in that respect and it would be disproportionate in the circumstances.
31. Accordingly, I find that there was no error of law in relation to the judge's conclusion that the third Appellant satisfied paragraph 276ADE(iv) of the Immigration Rules and the judge allowed the appeals of the first, second and third Appellants on the correct basis. There was an error in respect of the fourth Appellant and I set aside the decision to allow her appeal under

the Immigration Rules and remake it. The appeal of the fourth Appellant is allowed on Article 8 grounds.

32. In summary, the Respondent's appeal is allowed in respect of the fourth Appellant and dismissed in respect of the other three Appellants. The fourth Appellant's appeal is allowed under the Immigration Rules.

Notice of Decision

The Respondent's appeal is allowed only in relation to the fourth Appellant. The decision is remade allowing the fourth Appellant's appeal on human rights grounds.

No anonymity direction is made.

J Frances

Signed

Date: 26th July 2016

Upper Tribunal Judge Frances