



Upper Tier Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/40953/2014  
IA/40958/2014, IA/40960/2014  
IA/40961/2014, IA/40962/2014  
& IA/40964/2014

THE IMMIGRATION ACTS

Heard at Field House  
On 2 February 2016

Decision & Reasons Promulgated  
On 18 February 2016

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

MI

FI

AI

AR

ArA

AIA

~~[No anonymity direction made]~~

Claimants

**Representation:**

For the claimants:

Mr E Fripp, instructed by Morden Solicitors (London)

For the appellant:

Ms A Brocklesby Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimants, comprising mother, father and four children, are all citizens of Pakistan.
2. This is his appeal of the Secretary of State against the decision of First-tier Tribunal Judge Emmerton promulgated 3.7.15, allowing the claimants appeals against the decisions of the Secretary of State, dated 1.10.14, to refuse their applications for leave to remain in the UK on grounds of private and family life. The Judge heard the appeal on 17.2.15.
3. First-tier Tribunal Judge Davies refused permission to appeal on 5.10.15. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Pitt granted permission to appeal on 28.10.15.
4. Thus the matter came before me on 2.2.16 as an appeal in the Upper Tribunal.

### **Error of Law**

5. For the reasons set out herein I find that there was an error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Emerton to be set aside.
6. The relevant background can be briefly summarised as follows. The first four claimants came to the UK as family visitors in 2007, but overstayed their visa limit. The second claimant made an asylum claim, which was refused on 4.7.07. The two younger child claimants were born in the UK, in 2007 and 2009 respectively. The first claimant made an asylum claim in 2010, refused on 11.8.10. They did not leave the UK. Some 4 years later, on 21.2.14 the claimants sought leave to remain in the UK on the basis of private and family life, refused on 3.4.14. On 9.8.14, the Secretary of State agreed to reconsider the decision, resulting in the refusal decisions of 1.10.14.
7. It thus follows that the claimants have had no right to be or remain in the UK since 2007. As summarised by the judge at §18, "...the parents' claims, on their own, would not justify the granting of leave. They are failed asylum seekers and overstayers, who have been content to flout immigration law by remaining illegally in the UK." Other than the arguable claim under paragraph 276ADE in relation to the three older children who have been in the UK over 7 years, the judge regarded the appeals as unmeritorious.
8. At §24 of the decision the judge cited the well-know dicta from Azimi-Moayed, 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 UK then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary."
9. In essence, Judge Emerton found that because the older children are in education in the UK, and because of their lack of Urdu, it is in their best interests to remain in the UK and applying paragraph 276ADE(iv) considered it would not be reasonable to expect them to leave the UK.

10. Following on from the decision to allow the appeal of the oldest child, the judge went on to allow the appeals of the two other older children, who have also spent more than 7 years in the UK. The judge then allowed the appeal of the parents and the youngest child on article 8 grounds, it being necessary for the family to stay together.
11. In granting permission to appeal, Judge Pitt found it “arguable that grounds two and four have merit where in the best interests and reasonableness assessment under paragraph 276ADE(iv) the First-tier Tribunal Judge did not address the family situation as a whole and wider issues such as the reasonableness of the children returning to Pakistan when this would be with their parents, the parents having ties in Pakistan and their ability to assist the children to reintegrate and so on.”
12. However, Judge Pitt found no merit in grounds 1 and 3, being misconceived in law, and thus the appeal is limited to grounds 2 and 4 only.
13. It is absolutely clear that there was and could be no merit in the appeals of the parents either under immigration grounds, in respect of which they could not qualify, or on private or family life grounds outside the Rules pursuant to article 8 ECHR.
14. Whilst the judge may have considered the factors set out in EV (Philippines), I am satisfied that the assessment of reasonableness of removal of the children was flawed.
15. As pointed out in EV (Philippines), which case the judge cited at §23 of the decision, the best interests assessment of children should be made in the light of the real world facts that none of the family had any right to remain in the UK and in particular the children had no right to be educated in the UK.
16. It may be that the judge conflated the best interests assessment with the reasonableness assessment under 276ADE and failed to recognise that reasonableness of removal can outweigh if not entirely displace those best interests. I find that the judge failed to undertake the correct balancing exercise and that the assessment made was manifestly unbalanced in favour of the claimants. Any reading of the decision demonstrates that the judge concentrated almost exclusively on those factors in favour of the children and that there was little if any regard given to the public interest. The advantages of education in the UK is not a trump card; as stated in EV (Philippines), but ignored by the judge, “we cannot educate the world.” At §33 of the same case the Court of Appeal said, “Whether or not it is in the interests of a child to continue his or her education in England may depend on what assumptions one makes as to what happens to the parents.”
17. In determining whether or not the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here, and also to take account of any factors that point the other way.” At §37 the Court of Appeal stated, “In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-

being of the country, and the fact that, *ex-hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.”

18. The assessment of whether it was reasonable for the children to be removed from the UK should have taken into account significant factors entire absent from consideration, including that the family was a drain on the public purse, being in receipt of state benefits, with no employment or financial security. None of the family was a British citizen and none had any right to be in the UK. The parents’ poor immigration history was mentioned, but not given adequate weight in the reasonableness assessment.
19. In summary, I find that the judge failed to assess the family situation as a whole and lost sight of the reasonableness or otherwise of expecting the children to return to Pakistan with their parents, who had ties to Pakistan, where they had spent the vast majority of their lives, and who would be able to assist their children to integrate. I reject the submission of Mr Fripp that the complaint of the Secretary of State is no more than a disagreement with the outcome of the appeal. I find the decision flawed and amounting to such error of law as requires the decision to be set aside to be remade.
20. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the assessment of a crucial issue at the heart of an appeal is flawed, effectively there has not been a valid determination of that issue. The error of the First-tier Tribunal vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
21. In all the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President’s Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

### **Conclusions:**

22. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the decision in the appeal to be remade afresh in the First-tier Tribunal, with no findings preserved.



**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**

### **Consequential Directions**

23. The appeal is remitted to the First-tier Tribunal at Taylor House;
24. No findings are preserved. The appeal is to be reheard de novo;
25. The estimated length of hearing is 2+ hours;
26. An interpreter in Urdu will be required.

### **Anonymity**

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

### **Fee Award**

**Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal to the Upper Tribunal has succeeded and the outcome of the appeal in the First-tier Tribunal remains to be decided.

A handwritten signature in black ink, appearing to be 'James W.', written in a cursive style.

**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**