



IAC-AH-KEW-V1

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

Appeal Numbers: IA/46524/2014
IA/46433/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 7 December 2015**

**Decision & Reasons Promulgated
On 28 January 2016**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MA
AU**

(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr Diwnycz, a Senior Home Office Presenting Officer

For the Respondents: Mr Hussain, instructed by B Assured Law

DECISION AND REASONS

1. I shall refer to the respondent as the appellants and to the Secretary of State as the respondent (as they appeared respectively before the First-tier Tribunal). The appellants, MA (aged 15) and AU (aged 2 years) are brother and sister and citizens of Pakistan. They entered the United Kingdom in July 2013 as child visitors. They sought further leave to remain under Article 8 ECHR but their applications were refused on 31 October 2014. The appellants appealed to the First-tier Tribunal (Judge

Myers) which, in a decision promulgated on 6 March 2015, allowed the appeal on Article 8 ECHR grounds. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The circumstances in this case are unusual. The appellants came to the United Kingdom to visit their uncle and aunt and with whom they are now living. Both the uncle and aunt have parental responsibility for the appellants acquired after they were granted a special guardianship order in respect of both children at Bradford County Court in March 2014. It appears that the uncle and aunt are childless and readily accepted the opportunity to, in effect, adopt the appellants when they came to visit with their parents from Pakistan in July 2013. The children continue to have contact by Skype with their parents on a regular basis.
3. The grounds of appeal assert that the judge paid insufficient attention to the fact that the appellants had failed to satisfy the relevant Immigration Rule concerning adoption/*de facto* adoption. Both parties had accepted that the appellants could not succeed under the Immigration Rules. The grounds of appeal assert that the judge has, in effect, used Article 8 as a general dispensing power and as a substitute for the Immigration Rules. The judge had failed to identify any unjustifiably harsh circumstances or exceptional circumstances which would indicate that the children needed to remain living in the United Kingdom. Family ties with Pakistan had not been cut and “various legal authorities” (*sic*) supported the view that the children’s best interests would be served by allowing them to remain living with their natural parents in Pakistan. The judge had also failed to give insufficient consideration to Section 117 of the Nationality, Immigration and Asylum Act.
4. I find that Judge Myers has produced an even-handed decision which readily identifies the factors weighing against these appellants in the Article 8 assessment as well as seeking to identify, by proper reference to the evidence, their best interests (Section 55 of the Borders, Citizenship and Immigration Act 2009) The judge notes at [21] that a special guardianship order under the Children Act 1989 is “usually intended for those children who cannot live with their birth parents and who would benefit from a legally secure placement. A parent cannot apply to discharge a special guardianship order without the permission of the court which is not the case with a residence order made under Section 8 of the Children Act 1989. As the judge observed, a special guardianship order represents something of a halfway house between residence and adoption; unlike adoption, a special guardianship order does not end the legal relationship between the child and his/her birth parents. I note that the Bradford County Court had previously made residence orders in respect of the children in favour of the uncle and aunt in October 2013. The first appellant’s views as to where he wished to live and with whom had been taken account of in the county court proceedings [22]. The judge also noted that there was
“... a report from [the first appellant’s] school which showed that he had settled in well and was making excellent progress. [The second appellant]

was observed to have a strong attachment both to her uncle and aunt and was sometimes upset when her aunt left the room. The assessment of the aunt and uncle found that they provided the children with good care and met all of their needs.”

5. The judge properly noted that
“... the county court would have made a full assessment of the children’s best interests but would not have had any regard to their immigration status and to some extent was being presented with a fait accompli because by that stage the parents had returned to Pakistan and the children were well-settled with their aunt and uncle.”
6. The judge also refers to a report from a psychologist (Dr Latif) which recorded the strong attachment between the children and the aunt and uncle in the United Kingdom. Demonstrating an even-handed approach to the evidence, the judge [24] noted “some difficulties” with Dr Latif’s report including the failure of the expert to comment on the fact that the second appellant had already experienced trauma of having been removed from her birth parents who had returned to Pakistan. It was plainly open to the judge to observe, notwithstanding those misgivings regarding the report, that a further disruption to the child who is now older and whose bond with the aunt and uncle is stronger, would have a negative impact upon her.
7. The judge regarded the Section 55 analysis of the respondent to be deficient [26] observing that no account had been taken of the wishes and feelings of the first appellant or indeed the reports and orders of the Bradford County Court. I agree. Decision as regards an individual’s immigration status, whether taken by the Tribunal or the respondent, cannot occur in a vacuum and to the exclusion of proceedings which may be occurring or have occurred before other courts and Tribunals, in this case Bradford County Court.
8. At [27] the judge reserved harsh words for the uncle of the children whose evidence regarding the circumstances in which the children came to remain in the United Kingdom she plainly did not accept. The uncle sought to persuade the judge that the children had arrived as genuine visitors and that a decision had only been made after their arrival that they should not return to Pakistan with the parents. The judge rejected that account. However, the judge correctly observed that the intentions of the adults involved in this matter should not be allowed to obscure the best interests of the children with which the Tribunal was concerned as a primary consideration. In short, the judge found the children’s best interests should not suffer simply in order that the deceit of the uncle and aunt (and the parents from Pakistan) should be in some way punished. Moreover, the judge was aware of those very issues raised in the grounds at [28] as she observed that the children are not British citizens and who have no right to an education or healthcare in the United Kingdom and whose ties to their birth parents have not been severed. Contrary to what the grounds assert, the judge did have regard to Section 117 factors when she noted at [30] that “family life in this case was established when the

appellants' immigration status was precarious ...". Had the judge ignored the public interest concerned with the failure of this application or had she also ignored or sought to underplay factors which weighed against the appellants in the Article 8 analysis, she may have fallen into error. However, the judge's decision to allow the appeal on Article 8 grounds can hardly be described as perverse on these facts and the judge has, as I have observed, carefully set out the factors both for and against the appellants. Another Tribunal may have come to a different conclusion but that is not the point. The Upper Tribunal should hesitate before interfering with the findings of the First-tier Tribunal which are not perverse and which have been achieved by a proper analysis of the evidence. In the circumstances, I can identify no error of law in the judge's decision which would lead me to set it aside.

Notice of Decision

This appeal is dismissed.

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

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

Date 1 January 2016

Upper Tribunal Judge Clive Lane