



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

Appeal Number: HU/05339/2016
HU/05345/2016
HU/05349/2016
HU/05352/2016
HU/05356/2016

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke

On 2 November 2017

**Decisions & Reasons
Promulgated**

On 6 November 2017

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

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(A)
(B)
(C)**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Sood, Trent Centre for Human Rights

For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant is the husband of the second appellant. They have three daughters born in 1999, 2001 and 2003. I shall refer to them as A, B and C in this decision. They are all citizens of Pakistan.
2. The appellants have appealed against a decision of First-tier Tribunal Judge Swinnerton dated 24 January 2017, in which dismissed their human rights appeals were dismissed on Article 8 grounds.

Background facts

3. The first appellant arrived in the UK as a student in February 2004. He remained with leave in various capacities until an application based upon Article 8 was refused in 2012. In December 2015, he was served with an enforcement notice. Although the papers include reference to the first appellant having benefitted from leave extended by statute when he made the 2015 application, Mrs Sood clarified that it was accepted that at that time the first appellant was an overstayer and that it follows that at the date of the First-tier Tribunal hearing all the appellants were overstayers.
4. The second appellant came to the UK as the first dependent's a dependent in February 2011 and the three children entered as his dependents on 30 September 2011. Since this time the appellants have lived as a close family unit in the UK. Their claim to remain based on Article 8, outside of the Immigration Rules was refused in a decision dated 17 February 2016, and the appellants' appealed to the First-tier Tribunal.
5. At a hearing on 12 January 2017 the appellants were represented by Counsel. The first and second appellants gave evidence and reliance was placed upon documentation relating inter alia, to the circumstances of the children.

Decision under appeal

6. In a comprehensive decision, the First-tier Tribunal accepted the evidence relevant to the children's circumstances, and noted that return to Pakistan would be "*especially disruptive to the two eldest because of the stage their education is currently at*": at the time, A was in the first year of her A levels and B was in the final year of her GCSEs. The First-tier Tribunal did not consider that their removal would be a disproportionate breach of Article 8, when all the circumstances were considered in the round.

Issue before Upper Tribunal

7. Mrs Sood clarified that there was a single issue for me to determine: was the First-tier Tribunal hearing tainted by procedural unfairness by reason of the failure to hear from the eldest child, A? Mrs Sood acknowledged that the respondent and the First-tier Tribunal played no role in causing procedural unfairness, and the blame for the unfairness is attributable to the appellants' previous solicitors and Counsel.
8. The grounds of appeal argue that it was unfair for the First-tier Tribunal to proceed without hearing from the elder child, A. The grounds assert that she attended the Tribunal "*for the purpose of giving evidence as to their education and social integration within the UK (particularly important as they have studied through primary/secondary school in this country) and of how more self-willed and independent they are within the education and social structures here, making their relocation insuperable*" but that "*neither the solicitor nor the barrister had acceded to the appellant's request to call the 17 year old at least to give evidence, and a complaint against the lawyers is pending*".
9. When granting permission to appeal Upper Tribunal Judge Hanson observed that if the assertion that A was prevented from giving evidence is shown to be correct it may indicate procedural unfairness. The appellants were directed to file evidence of any complaint made to the previous representatives and any response to that complaint.
10. At the hearing before me Mrs Sood argued that the hearing was infected by procedural unfairness because A was not permitted to give evidence by Counsel representing the family. The consequence of this, according to Mrs Sood, is that the First-tier Tribunal did not hear any evidence from the children on three important issues: their westernisation, their integration into the UK and their education. Mr McVeety submitted that the evidence provided came nowhere close to establishing any misconduct or negligence on the part of the previous representatives and in any event the First-tier Tribunal considered all relevant evidence, including evidence from the first and second appellants regarding the important issues raised by Mrs Sood.
11. After hearing from both parties, I reserved my decision.

Error of law discussion

12. Although the parents' witness statements available to the First-tier Tribunal do not contain any detailed evidence regarding the children, it is clear from the record of proceedings that Judge Swinnerton permitted related questions to be asked in examination in chief. The first appellant was asked, inter alia: "*what differences would your daughters face if they go back to Pakistan?*" and "*how would their education be affected in Pakistan?*". The second appellant was asked "*how would your daughters be affected especially your family and your daughters' education, if they returned to Pakistan?*" and she gave a lengthy answer.
13. The First-tier Tribunal also referred to an "*extensive bundle*" that included testimonials and correspondence from the schools (pg 2). The First-tier Tribunal was well-aware of the appellants' case that the three children were doing well and had reached a critical stage in their UK education such that their education and social lives would be seriously disrupted if they had to return to Pakistan (pg 4). The First-tier Tribunal also conducted a detailed assessment of the best interests of the children, treating these as a primary consideration: they have been in the UK since 2011, they have been doing well in education and A and B were at very important stages in their education (pgs 5-6). This was balanced against the absence of any specific information about the difficulties the children would face in Pakistan (pg 6) and the finding (pgs 7-8) that the family could reintegrate into Pakistan by supporting each other as a settled stable family unit and with the support of friends and family. The First-tier Tribunal expressly accepted that the return to Pakistan would be especially disruptive to the older two children because of their stage in education but did not consider this would be so disruptive so as to prevent them from going to University or fulfilling their aspirations. The First-tier Tribunal took into account that friendships could be maintained by modern means of communication.
14. These are all findings that were entirely open to the First-tier Tribunal. The First-tier Tribunal considered section 117B of the Nationality, Immigration and Asylum Act 2002, the best interests of the children and conducted a balancing exercise for the purposes of Article 8. This is not a case in which section 117B(6) of the 2002 Act applied because the children were not 'qualifying children', having not been resident in the UK for seven years, and the First-tier Tribunal was entitled to take this into account.
15. I am not satisfied that there was any procedural unfairness as a result of A not giving oral evidence before the First-tier Tribunal given the particular circumstances of the case.

- (a) There was ample evidence available to the First-tier Tribunal addressing the wishes and feelings and best interests of the children. This was to be found in the school reports and the oral evidence of their parents.
- (b) This is not a case in which fairness required A to give evidence, because the evidence that she could provide was given on her behalf by her parents. I acknowledge the need to involve children in the decision-making process, thus taking reasonable steps to ensure that relevant and accurate information is assembled to make a properly informed decision about the child's best interests: see Articles 3 and 12 of the United Nations Convention on the Rights of the Child. In this case the parents are articulate and educated. The first appellant is a gas engineer and studied in the UK from 2004 to 2008. The second appellant is a teacher. They were entirely capable of communicating the views of their children, and did so. There was none of the possible conflict as identified in ZH (Tanzania) v SSHD [2011] 2 AC 166 at [34-37]. Each appellant desired the same outcome. The wishes and feelings of each family member was well known and entirely consistent with the others. This is not a case in which there was any particular need to hear separately from the children. Their views were well known and understood. In other words, the First-tier Tribunal had a sufficiently clear idea of the children's circumstances, views and best interests - see MA (Pakistan) v SSHD [2017] Imm AR 53 at [52].
- (c) The three issues said to have been of particular importance to the children were adequately addressed by the First-tier Tribunal, as were the issues that A wished to give evidence in support of - see para 2 of her witness statement dated 18 October 2017. Detailed findings were made regarding the children's education, and it was accepted that the elder two children were at critical points in their education. The parents were specifically asked how return to Pakistan would impact upon their children. As their Counsel said in his response to the appellants' letter of complaint:

"I took the appellants through their evidence and they had a full opportunity to explain to the court what their daughters were studying, what their future career aspirations were and how removal to Pakistan would adversely affect their education and lives in general. They

also explained that they were estranged from their family members in Pakistan...”

The appellants were therefore provided with an adequate opportunity to give evidence regarding the impact of the children’s westernisation and inability to integrate. Their answers focused upon the impact to their education. As the First-tier Tribunal noted (bottom of page 6) there was no specific information about the difficulties the children would face. The First-tier Tribunal was well-aware that it was part of the appellants’ case that the family would face real difficulties and hardship in reintegrating to Pakistan (middle of pg 4). The difficulties referred to in the grounds of appeal, such as the inability to be free to study and work and choose their own life partner in Pakistan, are difficulties of less significance, where, as here the family unit itself is supportive of such choices and freedoms. Reference is made to pressure from the wider family but it is difficult to see why the family could not relocate to a larger and more liberal part of a city in Pakistan, away from such family pressures. In any event the evidence from the first appellant was that he could not count on family members for support (bottom of pg 3) and they were estranged (pg 7 and para 5 of Counsel’s statement).

- (d) This was not a finely balanced decision for the First-tier Tribunal. Any additional evidence emanating directly from A was most unlikely to tip the balance. The Immigration Rules could not be met by a long distance. The children were not ‘qualifying children’ for the purposes of section 117B(6). There are no very compelling or compassionate circumstances. The first and second appellant’s immigration history was such that there is a strong public interest in their removal, albeit of course the children’s best interests are to be determined without reference to the immigration status of the parents. As set out in E-A (Art 8-best interests of child) Nigeria [2011] UKUT 00315 those who have their families with them during a period of study in the UK must do so in the light of the expectation of return. See also EV (Phillipines) v SSHD [2014] EWCA Civ 874 (not a ‘seven year’ or s 117B(6) case), per Lewison LJ at [60-61]. Even if A gave evidence directly, the result would have been the same. After all, the child’s views must be considered objectively and in the round – see MK (best interests of child) India [2011] UKUT 00475 at [20].

(e) Given that there were no health concerns or particularly compelling circumstances relating to the children, and the parents were able to provide the relevant oral evidence, there was no obligation on the First-tier Tribunal to make further enquiries. The failure to do so was not unreasonable and did not result in unfairness - see MA (Pakistan) (supra) at [59].

16. In addition, I do not accept that A was prevented from giving oral evidence. This appears to be the belief of the first appellant, as set out in a letter dated 23 October 2017, but having considered all the evidence in the supplementary bundle, I do not regard this to be well-founded.

- (i) A's evidence (as contained in her witness statement) is that Counsel said: "*it is not necessary for your girls to give evidence*" and they had no alternative but to follow this advice. The first and second appellants have not provided witness statements as to what happened or what was said on the day of the hearing, although their views appear in the letters of complaint in the supplementary bundle. As set out above, Counsel asked A's parents to provide the evidence that A would have given and in these circumstances, A's summary of the advice given by Counsel that it was not necessary for her to give evidence, appears logical and reasonable. That approach is broadly consistent with Counsel's summary of what took place in his response to the complaint - see paras 5 and 11 of Counsel's statement.
- (ii) Counsel also states at para 3 that he "*briefly explained the court procedure and explained that the children would not be called to give evidence as it is inappropriate for minors to give evidence at court.*" If advice was given in such stark terms, it was plainly incorrect. It is well known that situations arise both in and outside of this jurisdiction, where it is appropriate for minors to give evidence in courts and Tribunals. When Counsel's statement is read as a whole and together with A's statement, Counsel must have meant that generally speaking minors do not give evidence in cases such as this. In any event what is significant in this particular case is that Counsel considered A's evidence to be unnecessary as her parents could provide all the relevant evidence, and the appellants accepted this advice.
- (iii) Cases involving a very similar factual matrix are not uncommon before the First-tier Tribunal. The clear majority of such cases proceed effectively without even older children

giving oral evidence. Their wishes and feelings are often not in dispute and in any event can be fully conveyed by their parents and school.

- (iv) The first and second appellants have challenged and made complaints about previous legal representatives, prior to the hearing before the First-tier Tribunal. They are educated and were capable of explaining their view that an application should be made for A to give evidence. They did not do so and chose to follow Counsel's advice.
- (v) In the email sent to the appellants' former solicitors and Counsel immediately after the hearing at 3.45pm, the second appellant complained about the way in which the case was prepared and was entirely silent as to what was said about A giving evidence. In the complaint letter dated 4 February 2017 the first appellant did not criticise Counsel's failure to call A but merely stated "*Why did they not get my eldest daughter's statement? She was there and can speak*".

17. Having considered all the available evidence I am not satisfied that the appellants have made out the only ground of appeal that has been pursued on their behalf. I do not accept that there was any procedural unfairness as alleged, for the reasons outlined above. In summary the appellants, including A, have not been caused any procedural unfairness as a result of the failure to call her before the First-tier Tribunal. The evidence that could have been provided orally by A, was given by her parents. There were no particular features of the case that required A to provide separate evidence in order for the hearing to be fair.

Decision

18. The decision of the First-tier Tribunal did not involve the making of an error of law and I do not set it aside.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
6 November 2017