



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/33221/2015 +5

THE IMMIGRATION ACTS

Heard at: Manchester
On: 21 September 2017

Decision & Reasons Promulgated
On: 22 September 2017

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

ZA + 5
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr Mustafa, Counsel
For the Respondent: Ms Peterson, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellants.

1. I have made an anonymity order because this decision refers to the circumstances of four minor children.
2. The first and second appellants are the father and mother of the third to sixth appellants. The elder two children, the third and fourth appellants, Z and A, were born in Pakistan in 2002 and 2003 respectively. They came to the United

Kingdom ('UK') with their parents in 2007 and have therefore resided here for over seven years. The younger two children, the fifth and sixth appellants, M and K were born in the UK in 2011 and 2014 respectively. All the appellants are Pakistani citizens.

3. The appellants have appealed against a decision of the First-tier Tribunal dated 4 January 2017 in which it dismissed an appeal against the decision of the respondent dated 6 October 2015 refusing leave on Article 8 grounds. The First-tier Tribunal was satisfied that it would be reasonable for Z and A to leave the UK with their parents and siblings as a family unit, and dismissed the appeal on human rights grounds.
4. In overly lengthy and unfocussed grounds of appeal the appellants challenged the First-tier Tribunal's approach to Article 8, and in particular the approach to reasonableness. Permission to appeal was granted by First-tier Tribunal Judge JM Holmes in a decision dated 20 July 2017.
5. In a rule 24 response dated 4 August 2017 the respondent submits that the First-tier Tribunal directed itself appropriately.

Hearing

Error of law

6. Mr Mustafa relied upon the grounds of appeal.
7. After hearing from Mr Mustafa I indicated two provisional concerns to Ms Peterson: (i) the First-tier Tribunal failed to direct itself that significant weight must be attached to Z and A's residence of over seven years; (ii) the best interests assessment of Z is contradictory and unclear.
8. Ms Peterson acknowledged that there were some missing sentences in the decision but the First-tier Tribunal was clearly aware of the length of residence of the children and the assessment of reasonableness was made in light of this.
9. After hearing from both representatives, I indicated that I was satisfied that the decision contains an error of law, for the reasons I set out in more detail below. Mr Mustafa invited me to remit the appeal to the First-tier Tribunal. Ms Peterson invited me to remake the decision myself given the absence of any factual dispute. Having had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual agreement in this case, I decided that it is appropriate to remake the decision in the Upper Tribunal.

Rehearing

10. The representatives helpfully narrowed the issues in dispute, such that both agreed that it was only necessary to hear very brief oral evidence. The representatives agreed that Z and A are qualifying children and the only remaining disputed issue relates to whether or not it would be reasonable to expect them to return to Pakistan with their family. Both representatives also agreed that the appeal is limited to human rights grounds.
11. Ms Peterson invited me to dismiss the appeal and submitted that the very lengthy residence and best interests of the children are outweighed by their parents' adverse immigration history.
12. Mr Mustafa invited me to take into account the updated evidence relevant to the children. In a letter of support dated 19 September 2017 the Family Refugee Support Project summarised the children's circumstances in the UK. Mr Mustafa invited me to find that to remove Z and A would be unreasonable given the strength of their connections to the UK, notwithstanding their parents' immigration history.
13. At the end of the hearing I reserved my decision, which I now provide with reasons.

Error of law discussion*Approach to length of residence*

14. The correct approach to the reasonableness test in 276ADE and section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') has been considered in MA (Pakistan) V SSHD [2016] EWCA Civ 705 (7 July 2016). The Court of Appeal found that where the child has been in the UK for seven years section 117B(6) together with the respondent's own policy requires significant weight to be given to the length of residence. Elias LJ said this (my emphasis is underlined):

"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. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in

the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.

...

49...However, the fact that the child has been in the UK for seven years would need to be given significant weight in 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 as a starting point that leave should be granted unless there are powerful reasons to the contrary."

15. When the First-tier Tribunal decision is read as a whole, there is no adequately clear indication that it attached significant weight to Z and A's length of residence when considering the reasonableness test or carrying out the proportionality exercise. The First-tier Tribunal was clearly mindful of the length of residence and that lengthy residence is a relevant factor – see [6], [21] and [25]. However, that is different to attaching significant weight to it, and the failure to do so constitutes an error of law.

Z's best interests

16. I acknowledge that the First-tier Tribunal considered the starting point to be that it would be in the children's best interests to remain given their length of residence and there needed to be powerful reasons to override this at [25]. Indeed the First-tier Tribunal considered there to be a "*stronger argument*" in Z remaining in the UK to complete her GCSEs and "*that being the case there would need to be considerations of substantial moment to override the interests of [Z] continuing at school in the UK*" [21]. However, at [24] the First-tier Tribunal concluded it to be in "*the best interests of all four children to remain with their family and return to Pakistan where they will benefit from being educated within their own culture.*" I am satisfied that this conclusion contradicts the earlier finding at [21] and in any event was not open to the First-tier Tribunal as far as Z is concerned, given her particular circumstances: she has resided in the UK from the age of five and was 14 at the date of the First-tier Tribunal hearing; as an older child, the disruption to her private life should be regarded as particularly serious. It is difficult to see how this level of disruption would be mitigated by the nebulous and unparticularised "*benefit*" to be gained from "*being educated within [her] own culture*".
17. This is a case in which it was patently obvious that it was not in Z's best interests to return to Pakistan and the First-tier Tribunal has acted irrationally in reaching the contrary conclusion.

18. The assessment of Z's best interests must be distinguished from the finding as to whether there are powerful reasons, such as the parents' immigration history that nevertheless render her removal reasonable. A proper and lawful consideration of the latter requires a proper and lawful best interests assessment. As this was absent regarding Z, the conclusion reached on reasonableness is infected by an error of law and must be remade.

Remaking the decision

Approach to evidence

19. Both representatives agreed that I should consider all the evidence for myself but that many of the First-tier Tribunal's findings could be preserved. I therefore accept that the first appellant's credibility has been damaged by the misleading evidence he provided when making his asylum claim and in his evidence before the First-tier Tribunal. I turn firstly to a consideration of Z's best interests.

Best interests

20. I conclude that the best interests of Z, viewed through the lens of Article 8 private life, would be overwhelmingly served by remaining in the UK. There are six dominant factors:

- (i) She has spent nearly 10 years in the UK.
- (ii) She came to the UK as a young child and has spent some of her most formative years (5 to 15) and two-thirds of her life in the UK.
- (iii) Z's ties to Pakistan are limited although I accept she has links through her parents, ethnicity and ability to speak and understand basic Urdu, and probably has a clear understanding of Pakistani culture. However, she was just a young child when she left and I accept she sees herself as thoroughly British with an identity based on British multi-cultural society.
- (iv) Her integration into UK society can be described as nearly complete.
- (v) Z will find it very difficult to return to Pakistan at this particular stage of her education and childhood. She has now passed the half way stage of her GCSEs (which can be contrasted with the position before the First-tier Tribunal when she was "*not far through that process*").
- (vi) Z suffers from coeliac disease and has grown accustomed to living with that condition in the UK and not Pakistan.

Reasonableness / proportionality

21. I am mindful that the best interests assessment is not determinative of the question posed section 117B(6) of the 2002 Act, namely whether it would be reasonable to expect Z to leave the UK. As Elias LJ noted in MA (Pakistan) at [47] even where the child's best interests are to stay, it may still be not unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and Pakistan, as well as any other relevant wider considerations – see [45] of MA (Pakistan), EV (Philippines) v SSHD at [34-37] and PD and Others (Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 108 (IAC).
22. This question cannot be answered without considering the parents' appeals, to which I now turn. Their Article 8 claims cannot succeed under the Rules. They do not come close to doing so. They can potentially succeed only outside the Rules. The dismissal of the parents' appeals would interfere with their right to respect for their private lives. Since the impugned decisions are in accordance with the law and are in furtherance of a legitimate aim, namely the maintenance of immigration control, the next question to be addressed is whether they are proportionate. It is important to acknowledge their immigration history is very poor: they entered the UK in 2007 as visitors with no real expectation of leaving; the first appellant has been found to have made an asylum claim that is not well founded and to have provided misleading evidence; they are longstanding unlawful overstayers from 2011 and it is only in 2015 that they sought to regularise their position. Although they are law abiding, they have spent most of their lives in their country of origin, Pakistan and significant weight must be attached to their flagrant breach of immigration controls in the UK.
23. Proportionality is the "public interest question" within the meaning of Part 5A of the 2002 Act. By section 117A(2) I am obliged to have regard to the considerations listed in section 117B. I consider that section 117B applies to these appeals in the following way:
- (a) The public interest in the maintenance of effective immigration controls is engaged. I have already explained above why the immigration history of the first and second appellants is very poor. They have shown a blatant disregard for immigration laws.
- (b) There is no material infringement of the "English speaking" public interest. Having heard very briefly from the first appellant and considered the relevant updated evidence, I accept that the parents understand and speak basic English. I note the concerns recorded by the First-tier Tribunal regarding this, but these are based upon evidence that is now out of date. All four children are fluent in English.

(c) The economic interest must be engaged because the children have been, and will continue to be, educated at public expense and if the appellants remain in the UK they will have the capacity to access other publicly funded services and benefits. The parents have been surviving on NASS support. On the other hand, the first appellant is able and willing to work if he has permission to do so. As noted by the First-tier Tribunal, both parents are well educated and intelligent. The first appellant was a shop owner and has achieved qualifications in plumbing in the UK.

(d) The private lives established by the parents during the entirety of their time in the UK qualifies for the attribution of little weight only.

24. This brings me back to section 117B(6), which provides:

“In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

(a) the person has a genuine and subsisting parental relationship with a qualifying child; and

(b) it would not be reasonable to expect the child to leave the United Kingdom.”

25. It is not disputed that section 117B(6)(a) is met regarding Z and A. In my consideration of Z's best interests above I have already highlighted the salient facts and factors. I must balance these with the outcome of the forecast, which must necessarily be undertaken, based on the premise of the entire family returning to Pakistan - see PD (supra). On the one hand, this would be hugely disruptive for Z and would decimate the friendships, relationships and activities that form the core of her private life. It would also obstruct her education significantly as she is more than half way through her GCSE course. Importantly it would involve her transfer to a society whose culture, values, norms and language are less familiar to her. Emotionally, it would undoubtedly be stressful and damaging. In addition, she would have to cope with the challenges she will face in Pakistan as a result of her coeliac disease, which will inevitably be different from those she has become accustomed to dealing with in the UK. Furthermore, this fundamental transformation of her life and lifestyle would occur at an age and stage of critical importance to her development - she is 15 and in the final year of a two year course, likely to determine her future educational and employment prospects.

26. On the other hand, taking into account Z's age and the support of a stable family unit, she would, foreseeably, adapt over time. Both her parents were born and raised in Pakistan and maintain links there. They both have the ability to secure employment there and should be able to re-settle into Pakistan. There is no suggestion that Z's health would be detrimentally affected, albeit it may present more or different challenges.

27. The test to be applied is that of reasonableness. The application of the reasonableness test involves a balance of all material facts and considerations – see MA (Pakistan) (supra). The application of this test will invariably be intensely fact sensitive, see EB (Kosovo) v SSHD [2008] UKHL 41, at [7] - [12], per Lord Bingham. I attach significant weight to Z's length of residence in the UK (some 10 years). Other factors of particular strength are: her time in the UK spanned nearly two-thirds of her life; her deep immersion in all aspects of life in this country; the critical stage of her personal and educational development which has been reached; the likelihood that she will make a useful contribution to UK society; she has grown up alongside younger siblings who have also spent significant periods in the UK – her sister, A, has been in the UK for over seven years from the age of four and her two younger siblings have never known life in Pakistan having been born here in 2011 and 2014. I must weigh N's best interests which have the status of a primary consideration.
28. The main countervailing factor is that the first and second appellants have no legal right to remain in the UK and have a very poor immigration history. This is a factor of undeniable weight. However, it has been frequently stated that a child's best interests should not be compromised on account of the misdemeanours of its parents – see Baroness Hale in ZH (Tanzania) v SSHD [2011] UKSC 4, at [20]-[21] and [35], and MA (Pakistan) at [52 and 53] and per Elias LJ at [102]:

“In my judgment, the observation of the judge to the effect that people who come on a temporary basis can be expected to leave cannot be true of the child. The purpose underlying the seven year rule is that this kind of reasoning ought not to be adopted in their case. They are not to be blamed for the fact that their parents overstayed illegally, and the starting point is that their status should be legitimised unless there is good reason not to do so. I accept that the position might have been otherwise without the seven years' residence, but that is a factor which must weigh heavily in this case. The fact that the parents are overstayers and have no right to remain in their own right can thereafter be weighed in the proportionality balance against allowing the child to remain, but that is after a recognition that the child's seven years of residence is a significant factor pointing the other way.

29. I consider that there are strong factors supporting the conclusion that it would not be reasonable to expect Z to leave the UK. There are no strong reasons that bear upon her personally pointing in the other direction. I have taken into account the fact that her parents are overstayers and have weighed that in the balance but in my judgment this does not outweigh the preponderance of factors in support of Z remaining in the UK, as outlined above. I conclude that it would be unreasonable and a disproportionate breach of Article 8 for Z to be removed. Accordingly, her appeal succeeds under Article 8.

Parents and Z's siblings

30. Having thus concluded, the effect of section 117B(6) of the 2002 Act is that the public interest does not require the removal of either parent or siblings. The effect of dismissing the parents' appeals would be to stultify the decision that Z qualifies for leave – see PD (supra). In short, it would be unreasonable and disproportionate (notwithstanding their immigration history) to remove the parents because this would inevitably mean that Z would have to leave with them. All the appellants' appeals therefore succeed under Article 8.

Decision

31. The decision of the First-tier Tribunal contains an error of law and is set aside.

32. I remake the decision by allowing the appeals of all the appellants on Article 8 of the ECHR grounds.

Signed: Ms Melanie Plimmer
Judge of the Upper Tribunal

Dated: 21 September 2017