



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

Appeal Numbers: HU/07600/2018
HU/09741/2018, HU/07591/2018
HU/07592/2018, HU/07598/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 28 February 2019**

**Decision & Reasons Promulgated
On 2 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

**A.M. (FIRST APPELLANT)
L.M. (SECOND APPELLANT)
H.K. (THIRD APPELLANT)
A.K. (FOURTH APPELLANT)
S.K. (FIFTH APPELLANT)
(ANONYMITY DIRECTIONS MADE)**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Symes of Counsel instructed by Ali Levene Solicitors LLP

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The personal details of the Appellants in these linked appeals are a matter of record on file and are not repeated here - in keeping with the anonymity direction that has been made in these proceedings and which I continue.

Suffice to say that the Appellants are a family comprising two parents and three minor children. The minor children are presently aged 11, 8 and almost 3 years old. The eldest of the three children entered the United Kingdom in the company of her mother in 2010. The other two children were born in the United Kingdom.

2. The Appellants appeal against the decisions of First-tier Tribunal Judge Colvin promulgated on 8 January 2019 dismissing on human rights grounds each of their linked appeals against decisions of the Respondent dated 9 March 2018 to refuse leave to remain in the United Kingdom.
3. The immigration histories of the Appellants are summarised at paragraph 2 of the Decision of the First-tier Tribunal. Save with one caveat Mr Symes acknowledged that this paragraph set out an accurate and adequately comprehensive recitation of the immigration histories. It is convenient to repeat it here:

“The immigration history is that the first appellant [A.M., the father of the family] was granted leave to enter the UK on 2 October 2008 as a student until January 2010 and subsequently was granted leave as a Tier 1 (Post Study Work) until January 2012. The second appellant, [L.M., the mother], entered the UK with her daughter [S.K.] in October 2010 with entry clearance as dependants of the first appellant and had leave until January 2012. The other two children [H.K. and A.K.] were born in the UK. This application was made in April 2011 to extend the first appellant’s Tier 1 leave and on human rights grounds. It was refused on 9 May 2017 and a subsequent appeal Decision promulgated on 26 January 2018 dismissed the Tier 1 appeal but allowed the human rights appeal to the limited extent that the respondent give proper consideration to the welfare of the children. The second refusal is dated 9 March 2018 on the grounds that the appellants do not fulfil the requirements of private and family life under the Immigration Rules and that it is not unreasonable for the children to return to Pakistan with their parents”.

4. The caveat, or perhaps more accurately the further detail, that Mr Symes brought to my attention at the commencement of hearing before me was in respect of an absence from the UK of the First Appellant shortly after his initial grant of leave to remain as a Tier 1 (Post-Study Work) Migrant. Variation of leave was granted in this capacity in or about January 2010, and the First Appellant then left the UK to return to Pakistan: he was absent from the United Kingdom for a period of eight months between February and October 2010.
5. Mr Symes very properly brought this circumstance to the attention of the Tribunal because it is pertinent to the basis of challenge raised in the grounds of appeal upon which permission to appeal to the Upper Tribunal was granted. I shall explore this in more detail further below, but suffice

to say for the moment pursuant to paragraph 276A(a) of the Rules this broke the continuity of lawful residence for the purposes of consideration of paragraph 276B of the Immigration Rules.

6. The Appellants' appeals were brought against the decisions of the Respondent dated 9 March 2018. In considering the appeals First-tier Tribunal Judge Colvin has prepared what seems to me to be a particularly detailed and thorough consideration of the evidence. Indeed there is no suggestion in the challenge raised by the Appellants that the Judge overlooked any material evidence, and there is no specific challenge to any of the primary findings of fact. In this regard, it is perhaps pertinent to note in particular the findings at paragraphs 26-28 with regard to the circumstances of the family.
7. The Judge concluded that both parents were well-educated and had significant work experience - setting out the details of such matters at paragraph 26. The Judge also found that both parents had extended families in Pakistan with whom they remained in contact (paragraph 27). The Judge concluded on the basis of all of these circumstances that he did not find that there would be very significant obstacles to the parents reintegrating in Pakistan (paragraph 28). In this context the Judge stated:

"They have significant qualifications and work experiences to assist them and there is no evidence before me to suggest that they would be unable to find substantial employment. In any event they have a number of family members who were well-established with good jobs particularly in Islamabad and no satisfactory reason has been given as to why these family members would not support them, at least initially on return."

8. The Judge gave consideration to the circumstances of the children - rehearsing the evidence, including an independent social worker report that had been produced in support of the appeals in considerable detail. The Judge makes observations and findings in respect of the social worker report: I note in particular the following:

"Whilst I accept the obvious point that the removal of these children to Pakistan will require some significant adjustment to a new way of life and education system, some other assumptions made by [the social worker] seem to lack a clear and specific evidential foundation when it comes to the particular circumstances of this family. For example, she considers that the parents are unlikely to have the resources to support the family on return to Pakistan but does not specify why she has reached that view particularly as on the evidence before me I find that this is unlikely to be the case when considering their respective qualifications, work experience and family connections. Another example are the remarks in the report regarding the children's education opportunities in Pakistan. She says that they may be disadvantaged in respect of their

education progression in Pakistan as they do not know how to read and write in Urdu and that the same social and learning opportunities available to them in the UK may not be similarly available in Pakistan. The issue of the extent that these children speak and understand Urdu appears not to have been explored and nor has the likelihood, on the evidence before me, that their parents would choose a private English Medium school in Islamabad which is likely to make their transition to a new education system significantly easier even if they have to learn to become more proficient in Urdu. The other issue of [S.K.] having to conform to a different lifestyles as a young Muslim girl/woman in Pakistan is an issue of some importance but, again, the Report fails to put this in context. [S.K.] will be returning with well-educated, middle-class and relatively sophisticated parents who are well aware and sensitive to this issue and who no doubt will do all that they can to protect and support her from the worst forms of discrimination that exists against women including taking decisions as regards her education and social circumstances in a cosmopolitan city such as Islamabad. In short they will not only be good role models for her to follow but are likely to have the resources to overcome, or at least lessen, any discrimination that she may face.” (paragraph 41)

9. Against this background and evaluation the Judge made an assessment of the children’s best interests. The Judge concluded that *“the best interests of all these children is that they remain living with their parents in a family unit”*, and in respect of the two older children *“their best interests would be to remain in the UK with their parents as an ideal result”* (paragraph 42).
10. It seems to me that the Judge’s conclusion as to ‘best interests’ was in substance to accept what must have been the highest at which the Appellants sought to put their ‘best interests’ case.
11. Necessarily - ‘best interests’ being a primary, but not a paramount, consideration in the context of immigration - the Judge’s conclusions in respect of ‘best interests’ was not inevitably favourably determinative of the appeals. It provided a primary foundation for the assessment of the different and wider issue of ‘reasonableness’. The Judge recognised this:

*“However I must go beyond this and assess the ‘reasonableness’ test under s.117B(6) particularly as it has been considered in the recent case of **KO** when it comes to looking at the facts in the ‘real world’ and asking the ultimate question: is it reasonable to expect these children to follow their parents to Pakistan as they have no right to remain here.”* (paragraph 42)
12. The Judge’s consideration of this issue is set out at paragraphs 44 and 45 with the ultimate conclusion then being set out at paragraph 46.

“44. I have set out above my findings in relation to the parents returning to Pakistan and have concluded that there are no very significant obstacles to their reintegration into Pakistan. I further consider that on a balance of probabilities the evidence is that they will be able to provide satisfactorily for the welfare of their children on return for the reasons given and this includes their stated choice of private education in the English Medium system and the ability to gain access to appropriate medical treatment for [H.K.]’s conditions which are relatively common childhood ones. I am also in no doubt that these parents will provide a supportive setting to assist these children to adapt to life in Pakistan and in this context it is to be noted that these children have lived within the culture of their parents and been exposed to a multi-cultural school population whilst in the UK over many years. There is also the important evidence that [S.K.] has remained in social media contact with her cousins in Pakistan using the Pashtu language so she clearly has some connection with and understanding of their lives.

45. Before reaching my conclusion on the issue of ‘reasonableness’ I return to the issue of the 6-year delay on the part of the respondent and to its relevance in this case. There is no doubt that this delay has allowed the family, and [S.K.] in particular, to put down roots and establish themselves in the UK. However, even in this context, regard has to be given to s.117B(5) that states little weight is to be given to a private life established whilst being in the UK with precarious status - although I consider that this is more applicable to the parents rather than the children. The parents said in evidence that it would have been easier if they had been required to return to Pakistan in 2011 - that is, if a refusal decision had been made earlier without the delay. That may well be true on some levels and particularly so in terms of having to change education systems for the eldest child [S.K.]. On the other hand the delay has brought advantages to this family especially in terms of work experience in the UK and in terms of the eldest children having being part of the education system here at such formative ages. In weighing up all these factors, I do not think this is a case where it can be said that the delay has led to any greater expectations of this family being able to stay in this country. But perhaps more importantly I do not think on balance that it has made a critical difference to how this issue of ‘reasonableness’ is assessed in relation to the qualifying children when all the other factors mentioned above are also taken into account.

46. *In conclusion, I have reached the view that whilst the best interests of these qualifying children would have been for the whole family to remain here, it is nevertheless reasonable to expect them to accompany their parents who are required to leave and return to Pakistan. I therefore find that s.117B(6) of the 2002 Act does not apply in this case. And as no other exceptional circumstances have been put forward other than the issue of delay which I have discussed above, I am further satisfied that it is not disproportionate under Article 8 to require these appellants as a family unit to leave the UK."*

13. It is pertinent to note that in respect of the issue of delay the Judge set out in the decision guidance from the cases of **EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41** and **MN-T Columbia [2016] EWCA Civ 893**: see paragraphs 33 and 34. The Judge also rehearsed in detail jurisprudence in relation to 'best interests' and 'reasonableness', including the cases of **EV (Philippines) [2014] EWCA Civ 874**, **ZH (Tanzania) [2011] UKSC 4**, **KO (Nigeria) [2018] UKSC 53**: see paragraphs 35-38.
14. On the face of it the Judge's consideration of the particular facts and circumstances of the Appellants was set within the milieu of the jurisprudence that was applicable to these cases. Again, there is nothing in the challenge to the decision of the First-tier Tribunal that suggests that the Judge has mis-cited or misquoted any of these materials.
15. The only case not cited by the Judge to which Mr Symes directed my attention is **Rhuppiah [2018] UKSC 58**. Mr Symes was not able to confirm that **Rhuppiah** had been employed in arguments before the First-tier Tribunal. Nonetheless he identified that it indicated that in exceptional circumstances the public interest consideration pursuant to section 117B(5) could be ameliorated or negated depending upon the particular circumstances of the case.
16. The appeals having been dismissed by the First-tier Tribunal, the Appellants sought permission to appeal to the Upper Tribunal. This was on the basis of grounds of appeal settled by Mr Symes - who had appeared before the First-tier Tribunal instructed by the Appellants' then representatives Wilson Barker LLP. Permission to appeal was granted on 22 January 2019 by First-tier Tribunal Judge Grimmett.
17. This is a convenient juncture to note that there is some correspondence on file in relation to the grant of permission to appeal and a change of representative. It appears, for reasons that I need not go into and are in any event ultimately not a matter of any particular concern for the Tribunal, that the Appellants' changed representative following the hearing before the First-tier Tribunal and instructed their current representatives Ali Levene LLP. Ali Levene then instructed a different

Counsel to settle grounds of appeal and indeed a different notice of appeal with different grounds settled by different Counsel was forwarded to the Tribunal. It is clear that no decision was ever taken on this 'alternative' application in circumstances where the permission to appeal had already been considered pursuant to the grounds settled by Mr Symes.

18. In brief preliminary discussions before me, Mr Symes indicated that he had taken instructions on the matter and the position was that the Appellants wished to proceed with the appeal on the basis of the grounds settled by him (and upon which basis permission to appeal was granted); the Appellants did not want to apply to amend the grounds to incorporate any of the matters pleaded in the 'alternative' grounds settled by a different Counsel. The appeal before me proceeded accordingly.
19. The grounds of challenge are set out under three separate headings.
20. The first heading is *"Mistake as to Material Fact - Proportionality and Length of time in the UK"*. This ground is premised on the First Appellant having accumulated ten years of lawful residence in the United Kingdom. It is argued in the written ground that in such circumstances he would be eligible for indefinite leave to remain on the basis of long residence under paragraph 276B of the Immigration Rules, provided that there were no reasons why it would be undesirable for him to be given indefinite leave to remain. Further, it is argued that the First-tier Tribunal Judge erred in marginalising or disregarding this circumstance at paragraph 43 of the Decision:

"The fact that the first appellant may be eligible to make a further application on the basis of continuous long residence is not a matter that I can take into account in terms of the position as it is before me at the time of this appeal hearing."
21. I have noted above that at the outset of the hearing before me Mr Symes brought to my attention the fact that there had been an interruption to the continuity of the First Appellant's residence by reason of an eight month absence from the United Kingdom. In those circumstances, Mr Symes acknowledged that he could not rely upon the ground as drafted because the necessary premise was not made out. He explained that the confusion had arisen because no reference had been made to this period of absence in any of the materials or witness statements before the First-tier Tribunal. As I have already indicated, it seems that once Mr Symes was aware of the period of absence he very properly fulfilled his duty to not pursue the point any further and to inform the court of the reasons for so doing.
22. Mr Symes indicated that the two remaining heads of challenge were in substance facets of the same point, and invited me to give consideration to the submissions with particular regard to the third heading *"Misdirection on Relevance of Delay"*.

23. Mr Symes reiterated the fact of the delay in the Respondent's consideration of the Appellants' applications. This is identified at paragraph 2 of the First-tier Tribunal Judge's decision: the Appellants' applications were initially made in April 2011 and it was just over six years before they were refused in May 2017. Even then, the applications were not refused on a full and proper basis, resulting in remittal by the First-tier Tribunal to the Secretary of State to consider the welfare of the children - resulting in the new decisions of March 2018.
24. Having emphasised the fact and duration of delay, Mr Symes acknowledged that the Judge had directed himself to relevant jurisprudence (paragraphs 33 and 34), before focussing his submissions on the Judge's consideration of such matters at paragraph 45 (quoted above).
25. In the course of his submissions Mr Symes ultimately acknowledged that he was driven to assert that the Judge had erred in principle in consideration of delay as a possible factor that could lead to a favourable outcome in the case; he acknowledged he could not establish an error of law by pursuing a submission premised on a disagreement as to the Judge's evaluation of weight to be accorded to any particular factors in the appeal.
26. It seems to me that such an acknowledgement - properly and appropriately made - presents Mr Symes with an insurmountable difficulty in the instant case. In substance he seeks to argue that the Judge effectively proceeded on the basis that delay could not in any circumstance favourably avail the Appellants. I do not accept that such a submission can succeed in circumstances where the Judge not only properly directed himself to the relevant jurisprudence, but also, in my judgment, manifestly balanced the delay in the overall consideration, and in so doing implicitly recognised the possibility that delay could 'tip the balance' in favour of applicants/appellants. This is clear from the final sentence of paragraph 45:

"But perhaps more importantly I do think on balance that it [the delay] has made a critical difference to how this issue of 'reasonableness' is assessed in relation to the qualifying children when all the other factors mentioned above are also taken into account."

Inherent in that passage is a recognition that delay can be a significant and important factor, but that the Judge considers it in the overall consideration of the case. I can see no error of principal.

27. I accept that there may be some awkwardness in the reference to delay having "*brought advantages*" in circumstances where, as was indicated, the parents said it would have been easier to have had a decision in good time and then to have returned to Pakistan in 2011. The disruptions now faced - particularly in the context of S.K.'s education - undermined any concept of advantage, for example in having been admitted to the

education system, when the alternative of having returned to Pakistan in 2011 subsequent to a prompt refusal would have resulted in an ability to pursue education without disruption. It seems to me some caution is appropriate before describing factors that accumulate in consequence of delay as being 'advantageous'. However, it is nonetheless adequately clear that the Judge expressly recognised the disruptions inherent in now returning/relocating to Pakistan - and indeed found that it was in the best interests of the children not to have their education disrupted and to remain in education in the UK. In all such circumstances I do not consider that the reference to 'advantage' undermines the overall consideration of the issue in the appeals - and far less is it indicative of an error of law.

28. The second heading in the grounds of challenge is "*Misdirection of Law - Interests of the Children*". As noted above Mr Symes indicated that this and the third head of challenge were essentially facets of the same point, and in this regard focused his submissions on the issue of delay. Indeed it seems to me that the second head of challenge in the main part simply restates the substance of the Appellants' case - with particular reference to the children - as it was presented before the First-tier Tribunal. I do not accept that it could be said that the Judge failed to identify that the issue was one of reasonableness, or that he applied the wrong legal framework. As I have noted above, in my judgement the Judge set out with manifest care the appropriate legal framework and considered his findings of fact - which are not the subject of any challenge - against that framework.
29. In all such circumstances I reject the challenge to the decision of the First-tier Tribunal.

Notice of Decisions

30. The decisions of the First-tier Tribunal contained no error of law and accordingly the decisions in each of these linked appeals stand.
31. The Appellants' appeals remain dismissed.

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

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

Date: 29 March 2019

Deputy Upper Tribunal Judge I A Lewis