IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2023-001707
UI-2023-001708

First-tier Tribunal Nos: HU/51396/2021
HU/51397/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 13 August 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

and

(1) FN (PAKISTAN)
(2) BS (PAKISTAN)
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellants: Mr Ilahi, Counsel
For the Respondent: Ms Julie Isherwood, Senior Home Office Presenting Officer

Heard at Field House via Teams on 24 July 2023

Although is an appeal by the Secretary of State, I shall refer hereafter to the parties as they were in the First-tier Tribunal.

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellants are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellants, likely to lead members of the public to identify them. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellants, who are husband and wife, appeal against the decision of First-tier Tribunal Judge Beg promulgated on 13 March 2023 ("the Decision"). By the Decision, Judge Begg dismissed their appeals and the concomitant appeals of their two minor children against the decision of the respondent dated 7 April 2021 to refuse each member of the family leave to remain in the United Kingdom.

Relevant Background

2. The appellants are all nationals of Pakistan. The first appellant was born on 11 April 1981, and the second appellant was born on 14 October 1986. Their daughter, "N" (who was the third appellant before the First-tier Tribunal) was born on 15 August 2013. Their son, "M" (who was the fourth appellant before the First-tier Tribunal) was born on 10 July 2017.

3. The first appellant arrived in the United Kingdom on 19 January 2007 with entry clearance as a student. He was granted further periods of leave to remain until 28 March 2016. On 29 March 2016 he applied for indefinite leave to remain as a Tier 1 (General) migrant. His application was refused on 6 December 2016, and an Administrative Review maintained the decision on 18 January 2017.

4. On 5 January 2017 the first appellant applied for indefinite leave to remain under the 10-year long residence category. His application was refused on 4 November 2017. The subsequent appeal was dismissed on 21 December 2018. His appeal to the Upper Tribunal was refused on 2 April 2019, and on the same date he became appeal rights-exhausted. On 7 August 2020 he applied for further leave to remain on private life grounds.

5. The second appellant entered the United Kingdom on 28 January 2015 as a dependant partner of her husband. On 26 March 2016 she applied for leave to remain as a Tier 1 (HS) dependent partner. Her application was refused on 1 December 2016. On 4 January 2017 she applied for leave to remain as a spouse, but the application was refused on 17 November 2017. On 7 August 2020 she applied for further leave to remain on the basis of family and private life established in the UK.

6. N entered the UK at the same time as her mother, on 28 January 2015. M was born in the UK on 10 July 2017. The first and second appellants included their children in the application for further leave to remain made on 7 August 2020.

7. The respondent refused the applications of each member of the family on 7 April 2021 on suitability grounds (the first appellant having used deception in a previous application), on eligibility relationship grounds (no one in the family had settled status), and because the appellants did not meet the requirements of EX.1. The respondent noted that the appellant's children were not qualifying children, as they were neither British citizens nor were they settled in the UK, and nor had they continuously lived in the UK for 7 years. The respondent stated that the appellants would be able to support their children in Pakistan, and they would be able to enter the education system there.

8. In the context of a consideration of Gen.3.2 of Appendix FM, the respondent took into account that there were behavioural issues relating to the fourth appellant, N. However, it was considered that the first appellant would be able to gain employment in Pakistan to support his family. The best interests of the children were to remain with their parents. They would be able to receive education in Pakistan. The fourth appellant's illness was not of a type or severity which would warrant a grant of leave to remain in the UK. The respondent asserted that there was nothing exceptional in the family's circumstances.

The Hearing Before, and the Decision of, the First-Tier Tribunal

9. The appeals of all four members of the family came before Judge Beg sitting at Taylor House on 13 March 2023. Both the appellants and the respondent were represented at the appeal hearing, which took place on the Cloud Video Platform. The first and second appellants gave oral evidence.

10. In the Decision at [19], the Judge said that the issues before her were, firstly, whether the appellants met the requirements of paragraph EX.1 of Appendix FM of the Immigration Rules; secondly, whether they met the requirements of paragraph 276ADE; and thirdly, whether their removal would breach their rights under Article 8 ECHR.

11. At [22], the Judge noted that, at the date of the hearing, the third appellant had been in the UK for 7 years. She referred to *MA (Pakistan)* [2016] EWCA Civ 705, in which the Court of Appeal considered how the question of reasonableness should be approached and the factors which the Tribunal should take into account.

12. At [24], the Judge cited NA (Bangladesh) [2021] EWCA Civ 953, where the Court held that there was no presumption in favour of a 7-year-old child being granted limited leave to remain. However, there was no presumption in the opposite direction either. The common-sense starting point was that if neither parent had leave, then the natural expectation was for the child to go with them, and it was reasonable to expect them to do so.

13. At [25], the Judge said that she took into account the school reports. She found that the third appellant was born in Pakistan and entered the UK when she was about 2 years old, with her mother. While she was well-settled in school and was likely to have made friends, she had a strong family life with her parents and siblings rooted in Pakistani culture at home. She did not accept the evidence of the first and second appellants that their children only spoke English. The second appellant admitted in her evidence that both she and her husband spoke Urdu at home. Both of them gave evidence through an Urdu Interpreter. She found that the third and fourth appellants spoke both English and Urdu.

14. At [26], the Judge found that it was in the third appellant's best interests to continue her family life with her parents and siblings. If her parents were removed from the UK, then it would be in her best interests for her to be removed with them. She would be able to enter the education system in Pakistan, supported by her parents. She would be able to make new friends at school and establish her own private life.

15. The Judge turned to deal with the position of the fourth appellant:

> 27. In respect of the fourth appellant, I bear in mind a history of behavioural issues. The first appellant gave evidence that his son is autistic but attends a main-stream school where he is supported by staff with speech and language. The [S] Children's Centre, in a letter dated 6 December 2019, stated that in 2019 he attended sessions with his mother in speech and language therapy.
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> 28. I take into account the Child Development report dated 23 May 2022 by Dr [S], a doctor in community paediatrics. The report states that [M] was diagnosed with autism spectrum disorder on 23 May 2022. He states that he will need a highly supportive environment and an individualised structural education program to improve his learning potential. He states that the support should be planned and reviewed by the school in partnership with the parents. He states that consideration should be given to a referral to a speech and language therapist.

16. The Judge summarised the import of *Papsohvili -v- Belgium* (App number 41638/10 (13.12.16) and *AM (Zimbabwe)* [2020] UKSC 17. The Judge continued:

> 31. I find that [M] would be able to attend school in Pakistan. He would be supported by his parents who have a good understanding of his needs. He would be able to have 1:1 language and speech therapy support. The first appellant gave evidence that he comes from Mansehra, which is in the Kyber Pakhtunkhwa province of Pakistan. There is no credible evidence before me that [M] would not have access to language and speech therapy support.
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> 32. The second appellant in her evidence said that there would be no support for a child with autism in their area. However, she accepted that there may be such support available in the large cities. I find that it is reasonable for

the family to consider moving to a larger city. There is no credible evidence that Pakistan does not have specialist paediatric doctors.

33. In evidence that first appellant said his father is a retired bank manager. He supported the first appellant in his studies in the United Kingdom, paying significant overseas student fees. The first appellant also has a brother in Pakistan who has his own electrical repair business. I find that the appellant's parents and brother would be able to provide him and his family with a home on return and financial support until he is able to secure employment.

17. At [34], the Judge said that she did not find it credible on the first appellant's evidence that he would find it impossible to find employment in Pakistan. He had a MA degree in Computer Engineering from the University of East London, which he completed in 2009. He also had work experience in the UK, including running an IT business. He would have an advantage in the job market. The second appellant held a MA degree in Islamic Studies. She would be able to seek employment such as teaching.

18. At [37], the Judge recorded that the second appellant was asked in cross-examination what concerns she had about her in-laws. She made no reference to any fear of harm, other than to state that her in-laws might think that her autistic son was crazy. She did not find her a credible witness. She found that there was no credible evidence that the families of the first and second appellants would be unsupportive towards all of the appellants. On the contrary, she found that there would be a network of support for them with their relatives.

19. Having given reasons as to why EX.1 did not apply, and also why the appellants did not qualify for leave to remain on private life grounds under Rule 276ADE, the Judge went on to consider proportionality. At [50], she found that there was no new or additional evidence before her addressing the issue of the first appellant's application failing on suitability grounds. In light of the lengthy determination of Judge Sullivan, she found that the first appellant made false representations in a Tier 1 (Highly skilled) migrant application dated 17 March 2016. As a result, the respondent deemed that his presence in the UK was not conducive to the public good.

20. The Judge held that false representations in an application for leave to remain were highly relevant when considering the public interest. She concluded, at [56], that taking the evidence in the round, any interference in the appellants' Article 8 rights would be proportionate and would not result in unjustifiably harsh consequences.

The Reasons for the Grant of Permission to Appeal to the Upper Tribunal

21. The first and second appellants applied for permission to appeal to the Upper Tribunal. Permission was refused by the First-tier Tribunal, but on a renewed application for permission to appeal, Upper Tribunal Judge

Lindsley granted permission to appeal on 14 June 2023 for the following reasons:

3. The grounds of appeal contend, in short summary, as follows. It is argued that the First-tier Tribunal has erred in law by failing to consider that the appellant's older child had been in the UK for 7 years and that their younger child had been diagnosed with autistic spectrum disorder. It is in the best interests of both children to remain in the UK, and in failing to apply *R (On the application of) MA (Pakistan) -v- SSHD* [2016] EWCA Civ 705, with respect to the reasonableness of the removal of the younger child, given the devastating impact it would have on him in light of the country of origin materials before the First-tier Tribunal, the First-tier Tribunal erred materially in law.

4. It is arguable that there was no reference to any country of origin materials by the First-tier Tribunal in support of the finding that the appellants' younger autistic child would receive the support he requires on return to Pakistan, and thus that relevant material was not considered when finding that return to Pakistan would be reasonable and in his best interests, and that there was an unlawful failure to consider material evidence such as that set out in the grounds of appeal. It is arguable that consideration of such material might have affected the proportionality decision under Article 8 ECHR.

5. **The appellants' solicitors must file with the Upper Tribunal and serve on the respondent a schedule of the <u>country of origin evidence relevant to the provision for or problems for the youngest child on return to Pakistan</u> that was before the First-tier Tribunal within 14 days of receipt of this grant of permission to appeal as it is unclear to the Upper Tribunal which reports were before the First-tier Tribunal.**

<u>The Rule 24 Response</u>

22. In a Rule 24 response dated 13 July 2023, Mr Melvin of the Specialist Appeals Team gave the respondent's reasons for opposing the appeal. Apart from the reference to the Country Information material in the grounds of appeal, there was no Country evidence material provided by the representatives at the First-tier hearing which showed that the fourth appellant would be unable to receive treatment for ASD in Pakistan, or that he would face any other problems in Pakistan. No witness statement had been provided by Counsel who attended the hearing on behalf of the appellant to say that detailed submissions were made on this issue with reference to any Country Information. The CPIN on medical and healthcare provision in Pakistan, dated 2020, detailed that speech therapy was available at a cost of approximately £10 sterling equivalent per session. The grounds of appeal had no merit: the Judge of the First-tier Tribunal had directed herself appropriately.

<u>The Hearing in the Upper Tribunal</u>

23. At the hearing before me to determine whether an error of law was made out, Mr Ilahi_(who did not appear below) acknowledged that no Country of Origin Information had been relied on by the appellants in the First-tier Tribunal. He also acknowledged that there was no Country Guidance authority on the prospects for children with ASD in Pakistan. Accordingly, he was constrained to accept that the error of law challenge was confined to an argument that, as he put it, the Judge had not properly considered the case of *MA (Pakistan).* Mr Ilahi handed up a copy of this decision, and he took me through the Court's discussion of the case of *AZ (Pakistan)* beginning at paragraph [90]. One of the passages quoted in the grounds of appeal was at paragraph [102], where Elias LJ held that it was not open to Upper Tribunal Judge Perkins to hold that it would not be unreasonable to require the autistic child to return to Pakistan, given the overwhelming and permanent harm that would thereby be caused to this child's way of life. The consequences for him would be little short of catastrophic. Mr Ilahi submitted that, by parity of reasoning, Judge Beg ought to have held that the consequences for the fourth appellant would be little short of catastrophic.

24. On behalf of the respondent, Ms Isherwood adopted the Rule 24 response and submitted that no error of law was made out. The Judge's reasons for finding that would be reasonable for the fourth appellant to return with the rest of his family to Pakistan were adequate and sustainable.

25. In reply, Mr Ilahi submitted that the child would not only require language and speech therapy in Pakistan, but also a specialist teacher or educational psychologist. So, the Judge's reasoning had been inadequate.

Discussion and Conclusions

26. I find that the appellants' representatives inadvertently misled the Upper Tribunal when renewing the appellants' application for permission to appeal. The grounds of appeal gave the false impression that Judge Beg had failed to take into account Country of Origin Information provided by the Refugee Documentation Centre in Ireland, stating that children with disabilities and special needs in Pakistan are amongst the most marginalised members of society. It is reported that neglect, lack of awareness, social stigma, inadequate services and healthcare hover over their daily lives. Such children are generally one of the most vulnerable groups in Pakistan, facing serious disadvantages in the realm of social and economic development. The children and their families face multiple economic adversaries, emotional disturbance, and psychological adjustment.

27. In fact, as was acknowledged by Mr Ilahi, neither this report nor any other report of similar import was relied on by the appellants before the First-tier Tribunal. Accordingly, the specific ground on which Judge Lindsley granted permission falls away. There was no unlawful failure to consider relevant material placed before the First-tier Tribunal.

28. Another argument put forward in the grounds of appeal is that the Judge failed to consider that a child with ASD facing removal to Pakistan - even if not having accrued seven years' residence - was likely to be in the same or worse position as a child who had accrued seven years' residence, as shown by what was said in *MA (Pakistan)* at paragraph [102].

29. As indicated earlier, paragraph [102] relates to the case of *AZ (Pakistan).* AZ entered the UK on 6 February 2007 as a student. Her husband and eldest child (born on 31 August 2006) entered at the same time. AZ gave birth to a second son in the UK on 27 March 2009. On 27 February 2010 AZ made a further application for leave to remain as a student, which was refused. Her appeal was dismissed, and AZ's appeal rights were exhausted on 13 September 2011. A further application was made outside the Immigration Rules on 14 October 2011. This was refused on 19 October 2012 with no right of appeal. A reconsideration request was sent to the Home Office on 30 October 2012. In a letter dated 13 January 2014 the refusal was maintained. This decision was appealed to the First-tier Tribunal, which dismissed the appeal. Permission to appeal was granted to the Upper Tribunal on the sole ground that section 117B (6) of the 2002 Act had arguably not been properly applied.

30. In a determination promulgated on 11 May 2015, Upper Tribunal Judge Perkins agreed that a need for reasonableness as specified in section 117B (6) had not been considered by the FTT, and so he set aside the decision and remade it. He held that there was nothing of substance in the cases of the parents and the youngest child. The parents had remained illegally in the UK, and the younger child was still very small, and his private and family life was inextricably tied to his parents. The case turned on the position of the eldest son with autism and the impact that his removal would have on the others or that their removal would have on him.

31. The Judge considered extensive evidence relating to the child's autism, which had resulted in him being identified as a child with special educational needs. He had significant problems with language, social interaction and communication and displayed stereotyped behaviour and mannerisms. Very active steps had been taken to deal with his problems through regular therapy and specialist teaching. The Judge accepted that there would be very little prospect that the child would receive the support of this level in Pakistan, since the evidence was that there was simply not the degree of expertise available. Nonetheless, he concluded that it was reasonable to expect the child to leave in the United Kingdom, notwithstanding that it was sad for the child and frustrating for the parents.

32. After holding that Judge Perkins' conclusion was not open to him, given the overwhelming and permanent harm which would be caused to the child's way of life if he were returned to Pakistan, and that the consequences for the child of returning to Pakistan would be little short of catastrophic, Elias LJ continued as follows, in [103]:

> "In my judgement, 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 underlining 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 legitimized unless there is good reason not to do so. I accept 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 the significant factor pointing the other way."

33. On analysis, there are two key points of difference between the case of *AZ* and the case that was before Judge Begg. Firstly, unlike the autistic child in AZ's case, the fourth appellant had not resided in the UK for seven years at the date of the hearing. Elias LJ expressly stated that his finding might have been otherwise without the seven years' residence. Secondly, in AZ's case evidence had been placed before the Tribunal that there was simply not the degree of expertise available to provide the autistic child with the support he needed in Pakistan. No such evidence was placed before Judge Beg. On the contrary, Judge Beg received oral evidence to the effect that there might be support for the fourth appellant in the larger cities.

34. The fact that the background evidence in 2015 showed that AZ's autistic child would not receive the support which he required in Pakistan was rightly not treated by the Judge as establishing a factual precedent such that she ought to infer that the fourth appellant would also be unlikely to receive the support he required on return to Pakistan. In addition to the passage of time, the Judge did not have the necessary information to draw the inference that the fourth appellant's position on the autistic spectrum was the same as that of AZ's child, and hence that his needs in Pakistan would be comparable.

35. For the above reasons, the Judge did not err in law in finding that it would be reasonable for the fourth appellant to leave the UK with his parents and older sibling. The Judge gave adequate reasons for reaching this conclusion, which was reasonably open to her on the evidence.

36. There is also not merit in the argument that the Judge failed to take into account that the older child had accrued seven years' residence at the date of the hearing. The Judge gave express consideration to the implications of this, and the Judge gave adequate reasons for finding that it would be reasonable for the older child to leave the UK with the rest of the family, notwithstanding the fact that she had accrued seven years' residence in the UK.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Anonymity

Although the First-tier Tribunal did not make an anonymity direction, I have decided to make such a direction for these proceedings in the Upper Tribunal, as their principal focus has been on the appellants' autistic child.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
2 August 2023