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

Appeal Numbers: IA/01880/2014
IA/01887/2014
IA/01889/2014
IA/01891/2014

**THE IMMIGRATION ACTS**

| **Heard at Birmingham Sheldon Court** | **Determination Promulgated** |
|---|---|
| **On 16th January 2015** | **On 28th January 2015** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**(1) WAHEED MURAD**
**(2) CATHERINE WAHID**
**(3) MEEKAIL JOSHUA GILL**
**(4) ASAHEL JEREMIAH GILL**
**(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr Alisdair David (Counsel)
For the Respondent: Mr Neville Smart (Home Office Presenting Officer)

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Narayan promulgated on 5th September 2014, following a hearing at Stoke-on-Trent on 26th August 2014. In the determination, the judge allowed the appeal of Waheed Murad, of Catherine Wahid, of Meekail Joshua Gill, and of Asahel Jeremiah Gill. The Respondent Secretary of State subsequently applied to, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## The Appellants

2. The Appellants are citizens of Pakistan. They comprise a family of two parents and their children. The first Appellant, the father, was born on 1st April 1971. The second Appellant, the mother, was born on 20th February 1968. Their two dependent children, the third and fourth Appellants were born on 19th May 2002 and 20th May 2004 respectively. All appeal against the decision of the Respondent dated 17th December 2013 to refuse their applications for variations of leave to enter or remain in the United Kingdom.

## The Appellants' Claim

3. The Appellants' claim is that they cannot relocate back to Pakistan, given that there are two young children, who would face many difficulties, of social, cultural, and family ties in that country, in circumstances where these children are at school, the eldest having been in the UK for six years and eleven months at the date of the decision before the judge. They have thrived at school and have progressed well in their education.

## The Judge's Findings

4. The judge referred to the relevant law applicable before him. The judge refers to Appendix FM of the Immigration Rules and paragraph 276ADE, as well as to Article 8 of the ECHR (see paragraphs 8 to 11). He observes, "I have also considered, in accordance with Section 19 of the Immigration Act 2014, Section 117B Article 8, public interest considerations applicable in all cases" (paragraph 16). The judge also refers to the obligations upon a decision-maker under Section 55 of the BCIA 2009 in relation to the welfare of children (see paragraph 25).

5. In a very long determination (running into nineteen pages) the application of these provisions are not, however, properly brought together at the end of the determination. Section 117B, for example, is not mentioned again in the determination when the judge makes his "findings of fact and conclusions" (see paragraphs 27 to 34). There is a reference to paragraph 276ADE and the judge recognises the requirement to consider "exceptionality" in terms of the "unjustifiable harsh consequences for the individual or their family" which must "encompass the best interests of the child" (paragraph 30).

6. The nub of the conclusions, however, appear at paragraph 34. The judge gives specific consideration to Section 55 BCIA in his findings of fact and observes that, "It is obvious that the children's education and the stage they have reached is a relevant matter in respect of Section 55 of the Act". He observes that the children have been living in the UK for approximately six years and eleven months. He notes that "The children have thrived at school and have progressed with their education".

7. The most important conclusion, however, is that, "I find that for them to be uprooted now to go to school in Pakistan after being educated in England in English would be completely disruptive to their education and their wellbeing in general". He finds that there would be a violation of Section 55 of the Act because,

> "There are exceptional circumstances which consisted of the right to respect to private life, warrants consideration by the Secretary of State for a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules, bearing in mind the need to safeguard and promote the welfare of children in the United Kingdom".

8. He observes that,

> "In effect the children will not be fluent in Urdu and if they were to return to Pakistan and wish to continue further education which they are entitled to so do, that the language barrier of being educated in Urdu would be a disproportionate interference with their ability to further their education in Pakistan".

9. The judge was clear that the children had developed and cultivated a private life and this was well documented in the witness statements. He went on also to find that, "The family have behaved and integrated as best as anyone could in the local community". Therefore,

> "In the circumstances the family as a unit are entitled to a grant of leave outside of the Rules. I find that any disruption to their private life is not proportionate to the legitimate aim and maintaining effective immigration control and is not in accordance with the Respondent's duty under Section 55". (Paragraph 34).

The appeal was allowed.

## Grounds of Application

10. The grounds of application state that the judge's reference to exceptionality makes no reference whatsoever to the public interest, it is not a proportionality exercise, and is inconsistent with the case of

**McLarty (deportation proportionality balance) [2014] UKUT 315**. The judge also failed to have regard to the mandatory criteria in Section 117 of the 2002 Act. On 26th September 2014, permission to appeal was granted.

## Submissions

11. At the hearing before me on 16th January 2015, Mr Smart, appearing for the Respondent Secretary of State, submitted that in **SS (Nigeria) [2013] EWCA Civ 550** emphasised the importance of an Act of Parliament stipulating a policy to be implemented, such as in relation to the requirement of "public interest considerations", which the judge herein overlooked in failing to apply Section 117B. In **SS (Nigeria)** the court had made it clear that, "An Act of Parliament is ... to be specially respected, but all the more so when it declares policy ..." and this is a case where "The policy is general and overarching" (see paragraph 53).

12. Second, the judge had not applied the proper proportionality balance in the right way (see **McLarty [2014] UKUT 315**) because he had not addressed the importance of the public considerations specifically. The case of **SS (Nigeria)** had also emphasised that "The proportionality doctrine" is "A primary taciturn of legitimacy for the purposes of ECHR Article 8(2)" (see paragraph 36). This is a case where the judge had simply failed to have regard to factors that outweighed the individual interests of the parties.

13. In reply, Mr David submitted that there was nothing in Section 117B which actually went against the Appellants. All the factors of Section 117B were in the Appellants' appeal. For example, the judge refers to how the principal Appellants are financially solvent, and this is a consideration specifically in Section 117B which goes in favour of the public interests being against removal. Furthermore, the parties spoke English and the judge specifically refers to the fact that the children were integrated, and that the family were integrated into British society, which also was a factor that specifically went in favour of the public interest being on the Appellant's side.

14. Second, even if the children were not as such as could be described in terms of "a qualifying child" because they had not been in the UK for seven years, the fact was that they had been in the UK for a period of time such that the judge was able to conclude, specifically in relation to Section 55 of the BCIA, that, "Any disruption to their private life is not proportionate to the legitimate aim and maintaining effective immigration control and is not in accordance with the Respondent's duty under Section 55" (paragraph 34). This was because they were "educated in England in English" and that their removal "would be completely disruptive to their education and their wellbeing in general" (paragraph 34).

15. Third, Mr David submitted that, even though the judge had made certain findings which were not in the Appellant's favour, such as their "not

having been completely frank and forthcoming about the abilities of their children to speak Urdu" (see paragraph 32). This does not mean that this finding actually went against them in any Article 8 evaluation. Indeed, the judge did not think so.

16. What could have gone against the family were if it could be said that "little weight should be given to a private life established by a person at a time when the person's immigration status is precarious" and this is not what could be said of the parties because their status was not precarious. All in all, therefore, everything in Section 117B was in favour of the parties here.

**Error of Law**

17. Notwithstanding Mr David's elegant submissions before me, made with admirable clarity, I am satisfied that the determination falls into an error of law.

18. First, there is a duty on the judge to specifically consider Section 117B. He does not do so. The nub of the decision is in paragraph 34 and there is no reference there to Section 117B. It is true that there are findings made in favour of the Appellants, such as that they "have behaved and integrated as best as anyone could". It is also true that the judge holds that "any disruption to their private life is not proportionate to the legitimate aim and the intended effective immigration control". However, it is not clear on what basis these conclusions are arrived at.

19. For example, whereas the judge does refer to Section 55 BCIA, and does state that the appeal should be allowed on this basis in the last sentence of paragraph 34, nevertheless, there are also constant references to the appeal being allowed "Outside the requirements of the Immigration Rules, bearing in mind the need to safeguard and promote the welfare of children in the United Kingdom" (see paragraph 34). There is a reference to how, "I therefore find that in the circumstances the family as a unit are entitled to a grant of leave outside of the Rules".

20. It is certainly true that Section 117B is a non-exhaustive list. It is also true that "the maintenance of effective immigration controls ..." does not carry a fixed weight in all the circumstances. If it did then the fact that one spoke English or the fact that one was financially independent would be meaningless. The requirement of public interest is therefore mutable. By contrast, in deportation cases involving foreign criminals, Section 117C does carry an exhaustive list. That is not applicable here. But the judge does not allow the appeal under Section 117B. He allows it outside the Immigration Rules. He also appears to allow it under Section 55 of the BCIA.

21. It was incumbent on the judge to specifically consider Section 117B, and to consider whether these were qualifying children, and if not, to say so. Accordingly, I find the determination as a whole to be one which falls into

error. If the judge were to go "outside of the Immigration Rules" on the basis that there are "exceptional circumstances" then the judge had to explain.

22. The conclusion that "There are exceptional circumstances which consisted with the right to respect to private life, warrants consideration by the Secretary of State for grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules ..." (paragraph 34) is not enough.

**Notice of Decision**

23. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This matter is remitted back to the First-tier Tribunal under Practice Statement 7.28 to enable proper findings to be made by the judge in relation to Section 117B in particular, as well as the other provisions that are applicable. This appeal will be heard by a judge other than Judge Narayan with the positive findings in favour of the appellants being preserved.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 28th January 2015