Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33604/2014
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THE IMMIGRATION ACTS

At Field House
On 23.02.2016

Decision and Reasons Promulgated
On 04.03.2016

Before

Upper Tribunal Judge John FREEMAN

Between

Akhtar MEHMOOD & others

Appellants

And

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: *Shivani Jegarajah* (counsel instructed by MKM)
For the Respondent: Mr Nigel Bramble

DETERMINATION AND REASONS

1. These are appeals, by the appellants, against the decision of the First-tier Tribunal (Judge Amanda Kelly), sitting at Hatton Cross on 7 August 2015, to dismiss appeals by a family who are all citizens of Pakistan, and, apart from the youngest, born there.

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.
(2) persons under 18 are referred to by initials, and must not be further identified.

2. The judge, in accordance with established, if slightly old-fashioned practice, referred to the appellants by their ordinal numbers; but I think it will be clearer if I describe them by their positions in the family. The husband was born in Pakistan in 1966, and came here on a visit visa in 2004: as it is said to have been valid till 2009, I can only suppose it was a multiple-entry one. However, he did not leave after six months, or at all, but was joined in 2005 by his wife, born in 1972, and their sons, SM, born 1 July 1999, and N, born 21 October 2001. There was no further contact between them and the Home Office till 2010, when an application for indefinite leave to remain was first rejected for lack of a fee, then refused on its merits, a decision maintained on reconsideration in 2011. On 30 June that year their daughter A was born here.

3. A further application was made in 2012, and refused in 2013: following an application for judicial review, that decision was reconsidered, resulting in the decisions under appeal, to refuse all the appellants leave to remain on 8 August 2014. Miss Jegarajah realistically conceded, first that the parents had no basis of stay in their own right, apart from the position of the children; and second, that at A's age her best interests must lie in staying with her parents, wherever they went.

4. <u>Law and Rules</u> It follows that the present appeal is really about the two sons. The relevant provisions are first s. 117B of the Nationality, Immigration and Asylum Act 2002, the only parts with which I am concerned being

> (1) The maintenance of effective immigration controls is in the public interest.
> (and)
> (6) 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.

5. There is no question but that both sons are 'qualifying children', having been here for over seven years by the date of the decision (see s. 117D); nor that, on the judge's findings, their parents have a 'genuine and subsisting parental relationship with them'. So far as the sons' own position is concerned, the judge referred to paragraph 276ADE of the Rules: the relevant part being this:

> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> …
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK

6. <u>Authorities</u> It follows that the only live question before the judge was whether it would be reasonable to expect either of the sons to leave the United Kingdom. The issue on this appeal is whether she was right to answer that question, in each case, by balancing their interests against what she quite reasonably described as the 'blatant disregard' shown

by their parents for the immigration laws of this country. Mr Bramble seeks to uphold the judge's conclusion by authorities such as *Zoumbas* [2013] UKSC 74 and *EV (Philippines) & others* [2014] EWCA Civ 874. Miss Jegarajah argues that both 276ADE (iv) and s. 117B (6) pose a question which has to be answered for each of the sons on the merits of his own situation, regardless of the parents' cases.

7. The judge was writing before the decision in *Treebhawon & others* (section 117B(6)) [2015] UKUT 674 was 'reported' on 10 December; but it may give some hindsight into the issues before her. The relevant part of the judicial head-note appears at (i):

> *Section 117B (6) is a reflection of the distinction which Parliament has chosen to make between persons who are, and who are not, liable to deportation. In any case where the conditions enshrined in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 are satisfied, the section 117B(6) public interest prevails over the public interests identified in section 117B (1)–(3).*

8. That must answer Mr Bramble's reliance on s. 117B (1): only if the word 'reasonable' in (6) and paragraph 276ADE (1) (iv) itself includes consideration of the public interest in immigration control can the judge's reference to that be upheld. As noted in *Treebhawon*, there is of course a quite different régime in force in deportation cases under s. 117C, one of which was the subject of *KMO* (section 117 - unduly harsh) [2015] UKUT 543 (IAC), also relied on in the Home Office's response to the grounds of appeal; but that is another matter entirely.

9. The judge herself referred to *EV* in support of her approach, and summarized the effect she gave to it at paragraph 34. *EV* was not a deportation case; but it was decided before s. 117B was enacted by the Immigration Act 2014 , and on facts materially different from those in the present case, because the appellants in *EV* had not been in this country long enough (see paragraph 15 of the decision) to benefit from paragraph 276ADE or any equivalent provision of the Rules. It follows that it cannot be treated as an authority on the meaning of 276ADE, or s. 117B (6).

10. The other authority relied on by the Home Office in their response is *Zoumbas* , which was enacted before 276ADE appeared in the Rules at all. It seems from paragraph 8 of the decision that this was what might be called a 'straight-eight' case, meaning one where the only question was what was, or was not required by article 8 of the Human Rights Convention. Again that does not help answer the question on this appeal, which can only be done by turning to what the judge said herself.

11. <u>Decision under appeal</u> The judge, in an exceptionally clear and well-thought out decision, first concluded, on SM (see paragraph 30) that "All other things being equal … it would be in his best interests to remain in this country with his family …". That conclusion was modified by another, for which she gave detailed reasons at 31, that "… a return to Pakistan would not pose any substantial risk to his health or well-being or bar him from pursuing his long-term ambitions." On that basis, she ended her consideration of his individual case in isolation by saying at 33 "… whilst I have concluded that, on balance

and in the absence of all other considerations, it would be in [his] best interests to remain here, I do not find it to be overwhelmingly so."

12. Turning to N, the judge reached a similar conclusion at paragraph 36 "Again, in the absence of any other factors, I find that it would be in his best interests to remain in this country"; but once more, she went on at 37 to say "However, as with his older brother, I am not persuaded that returning to Pakistan would bring with it only negative consequences".

13. Dealing with both the sons at paragraph 39 the judge concluded that "… in the absence of all other factors, it would be in the best interests of [both] to remain in this country". Finally she decided at 43 that it would be reasonable to require them to leave the United Kingdom :

> Whilst this will inevitably cause them some distress and hardship, I am not persuaded that this will be sufficiently grave to outweigh the wider interests of maintaining immigration control.

14. <u>Conclusions</u> This was a case where the parents' abuse of the immigration system was gross and obvious: if the judge was entitled to balance the public interests against their sons', as she did, then she was very clearly also entitled to go on to decide against them on the merits. If it were simply a question of an article 8 balancing exercise, or even of interpreting the word 'reasonable' as it appears in paragraph 276ADE, then it could not be said that she was wrong to deal with the question before her on that proportionality basis.

15. However, Parliament has chosen to draw a clear distinction in ss. 117B and C, between those who are, and are not liable to deportation. Those liable have to show that the effect of their own deportation on any qualifying child they may have would be unduly harsh; and, if they have been sentenced to four years' imprisonment or more, ''very compelling circumstances'' over and above that. This is the "more rigorous and unyielding regime" referred to at paragraph 19 of *Treebhawon* .

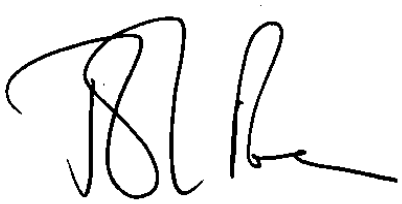
16. As the Tribunal went on to say in that decision, a different public interest is recognized in the case of those *not* liable to deportation, and the effect is set out at paragraph 20: when Parliament said that, in cases covered by s. 117B (6), the public interest did *not* require the deportation of those with a qualifying child who it would *not* be reasonable to expect to leave the United Kingdom, they meant exactly what they said.

17. It seems quite clear from the decision in *Treebhawon* itself, and from the juxtaposition of ss. 117B and C, that 'reasonable' in s. 117B (6) means reasonable from the point of view of the qualifying child. While courts and tribunals have to balance the different aspects of the child's own interests, taking into account the situation of the family as a whole, as the judge did in this case, we are not required, in a case covered by that sub-section where deportation is not in issue, to balance those interests against those of society. That is of course something which will still have to be done in cases where there is no qualifying child; and, where any children have been here for less than seven years, very much in the

light of Parliament's prescription of that as the qualifying period for consideration solely on their own merits.

18. It is equally clear from the judge's decision that, considering each of the sons' cases from their own point of view, she would have found that it would not be reasonable to expect either of them, and particularly SM, to leave the United Kingdom. The result is that both their appeals are allowed: while both the parents' and A's would otherwise have to be dismissed, they are allowed too.

Appeals allowed



(a judge of the Upper Tribunal)