Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/29387/2014
IA/29389/2014
IA/29392/2014
IA/29396/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th September 2017	**On 3rd October 2017**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

MR SACHIN RASIKBHAI PATEL
MRS NIMISHABEN SACHIN PATEL
MASTER DHRUV SACHIN PATEL
MISS PREEMA SACHIN PATEL
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr H Kannangara, instructed by Malik Law Chambers Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are a husband, wife and two children born on 12th November 1967, 14th February 1974, 21st September 1996 and 22nd September 1998 respectively. Their appeal against the refusal of leave to remain on Article 8 grounds was dismissed by First-tier Tribunal Judge Whalan in a decision promulgated on 21st April 2015.

2. Permission to appeal was granted by Upper Tribunal Judge Bruce on the following grounds: "It would appear from paragraph 36 that the parties agreed that had the Fourth Appellant applied for leave to remain under paragraph 276ADE(1)(iv) at the date of the appeal hearing, she would have been successful. This factor does not feature at all in the First-tier Tribunal's reasoning on Article 8, which is all predicated on the Appellants' failure collectively and individually to meet the requirements of the Rules, see for instance the reference to EV (Philippines) [2014] EWCA Civ 879. Nor has consideration been given to paragraph 276A0(iii) of the Immigration Rules which expressly obviates the need to make a valid application if 276ADE is argued on appeal.

3. The matter came before Upper Tribunal Judge Pinkerton on 12th February 2016. He found that, in the Respondent's decision letter, specific consideration was given to the circumstances of the fourth Appellant including an acknowledgement that she had lived in the UK for at least seven years. However, to meet the Rules there would also need to be a finding or a concession that it would not be reasonable to expect an applicant who had been here for that period to leave the UK. The decision letter set out why the Respondent considered that it was reasonable to expect the fourth Appellant to leave the UK because she would be returning to India with her parents who are both Indian citizens and they would be returning as a family unit. Upper Tribunal Judge Pinkerton concluded at paragraph 13:

> "In the light of the decision letter it would be surprising indeed if a concession was made by the respondent that the fourth appellant was able to satisfy the requirements of the Rules as at the date of hearing and I do not accept that such a concession was made. The respondent had already argued that it would be reasonable to expect the fourth appellant to leave the UK. The F-tT judge considered the position as at the date of the hearing and reasoned also why it would be reasonable for the fourth appellant to leave the UK in the company of her parents. None of this points to the fourth appellant being able to meet the requirements of the Rules either at the date of decision or at the date of hearing".

4. The Appellants appealed to the Court of Appeal and permission was granted by Silber J on the following grounds:

> "Permission is granted because there was no proper consideration of the approach advocated by the Court of Appeal in the recent case of MA (Pakistan) v UT and Secretary of State [2016] EWCA Civ 705 that:
>
> > '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'.
>
> Was this significant weight given in this case to the fourth appellant's residence in the UK for seven years and its relevance to determining her best interests? In addition, were there powerful reasons to the contrary?"

5. By consent it was ordered that the Appellants' appeal was allowed and the matter remitted to the Tribunal on the basis of the limited grounds on which permission was granted.

6. It was noted in the statement of reasons that the decision of MA (Pakistan) was promulgated on 7th June 2016 which postdated the Upper Tribunal decision under challenge. Therefore, it was not possible for the Tribunal to consider the case of MA (Pakistan) at the time of the decision.

7. Accordingly, the appeal comes before me on a very limited basis. Unfortunately, the situation has changed somewhat since the appeal was remitted by the Court of Appeal. Both the third and fourth Appellants are now adults. They are soon to turn 21 and 19 years old at the end of this month. The situation therefore is that they would be able to satisfy paragraph 276ADE(1)(v) of the Immigration Rules if they made an application today because they have lived in the United Kingdom for over half of their lives. However, the appeal is limited to Article 8 because at the date the application was made neither of the two minor Appellants at that time had seven years' residence in the UK and could not at the time of application satisfy the requirements of 276ADE.

Submissions

8. Mr Kannangara submitted that, in carrying out an Article 8 assessment today, considerable weight should be attached to the fact that the third and fourth Appellants can satisfy 276ADE(1)(iv) when assessing proportionality. Even though they were now adults, they were not leading independent lives. Mr Kannangara

relied on Singh [2015] EWCA Civ 630: "A young adult living with parents and siblings will have family life and it does not automatically cease at the age of 18." He submitted that the Appellants had family life in the UK and the issue was one of proportionality. MA (Pakistan) was relevant to the extent that significant weight should be attached to the seven years' residence as a child and there had to be strong reasons to refuse leave where the seven year requirement was met. He submitted that the poor immigration history of the parents was not sufficient because the Rules provided for applications to be made by overstayers and the threshold was not as high as that applied to criminal offenders. Before the minor Appellants became adults, it was not reasonable to have expected them to leave the UK because their significant length of residence was not outweighed by the poor immigration history of their parents. The fourth Appellant would have met the Immigration Rules throughout the appeal process. The family's ties to the UK have become stronger with the passage of time and, therefore, the first and second Appellants should be granted leave in line with the third and fourth Appellants.

9. Mr Tufan relied on the following paragraphs of MA (Pakistan):

> "47. Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child's best interests are in favour of remaining. I reject Mr Gill's submission that the best interests assessment automatically resolves the reasonableness question. If Parliament had wanted the child's best interests to dictate the outcome of the leave application, it would have said so. The concept of 'best interests' is after all a well established one. 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 in the country where it is proposed he should return. What could not be considered, however, would be the conduct and immigration history of the parents".
>
> "54. There are three issues which arise in these cases relating to the best interests of the children. First, as I have said, Mr Gill submits that once the best interests have been determined, that necessarily resolves the reasonableness question. For reasons I have given, I reject that submission. There is nothing intrinsically illogical in the notion that whilst the child's best interests are for him or her to stay, it is not unreasonable to expect him or her to go. That is so even if the reasonableness test should be applied so as to exclude public interest considerations bearing upon the parents".

10. Mr Tufan also relied on the following paragraphs of Treebhawon [2017] UKUT 13 (IAC):

> "27. We remind ourselves of the composition of the family unit and to reflect the passage of time, certain updated data. Mr Treebhawon (*'the father'*) is aged 45 years and has resided unlawfully in the United Kingdom during the past 13 years. The mother of their four children, from whom he is separated, has not formed part of the family unit since 2008, the separation

having begun and progressed some years previously. There are four children of the family:

(i) The oldest child of the family, a girl now aged 18 years, has resided continuously in the UK during the past 9 years, having the status of unlawful overstayer during the bulk of that period.

(ii) The second and third children, twins now aged 16, have resided in the UK during the past six and a half years, unlawfully throughout.

(iii) The youngest child, now aged 13, has resided in the UK during the past five years, unlawfully during most of that period."

"50. Next, we are mandated by section 55 of the Borders, Citizenship and Immigration Act 2009 to give primacy to the best interests of the third, fourth and fifth Appellants as all are children. We consider that the best interests of these children will primarily be served by the maintenance of the family unit: as already noted, this will predictably occur. The second dimension of these three Appellants' best interests is that, on balance, they would be better off in certain respects, in particular economically, if the family were to remain in the UK. This we must take into account in the balancing exercise as a primary consideration".

11. Mr Tufan submitted that these paragraphs demonstrated that, even though the eldest child case had lived in the UK continuously for nine years and was now an adult, the panel dismissed the Appellants' appeal on Article 8 grounds.

12. In the present case, the first and second Appellants had a blatant disregard for immigration law, the family were not financially independent and had no right to work in the UK. Mr Tufan relied on Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803. The children had been educated at public expense and the family had access to the National Health Service at public expense. This appeal should be dismissed for the same reasons given by the presidential panel in Treebhawon. It was open to the second and third Appellants to make an application to remain under the Immigration Rules. Even if I concluded that the third and fourth Appellants could succeed under the Rules and it was not proportionate to refuse leave, then I could not allow the appeals of the first and second Appellants because there were no unjustifiably harsh consequences. It did not follow that the first and second Appellants could succeed given their blatant disregard for immigration law.

13. Mr Kannangara submitted that there was an undisturbed finding of the First-tier Tribunal that it was in the best interests of the third and fourth Appellants to remain in the UK. The fact that the first and second Appellants had worked illegally and not paid tax were not countervailing factors because this was part of their status as an overstayer. They had not claimed public benefits and they could speak English. There was nothing to prevent their integration into the UK. This case was finely balanced and it should be decided in the Appellants' favour. The only point against the Appellants was that they were overstayers and that in itself was not sufficient.

14. The parents' conduct cannot be held against the children. At the time of the First-tier Tribunal decision, had the judge applied Section 117B correctly, then the first and second Appellants' claim would have succeeded under Article 8. Unfortunately, the First-tier Tribunal Judge did not look at Section 117B(6). Given that he had acknowledged that the fourth Appellant could satisfy the Immigration Rules, he should have allowed the appeal of all four Appellants. This was consistent with the decision of Treebhawon in which the Appellants would win or lose, all together, as a family unit. There were no countervailing factors identified in Section 117B. Proportionality required the parents to remain in the UK with the young adults and the first and second Appellant should be allowed to remain until the third and fourth Appellants became independent.

15. Mr Kannangara submitted that the Appellants entered the UK as visitors and overstayed, the first Appellant entering in September 2003 and the remaining Appellants entering in August 2006. They submitted an application for leave to remain in August 2012 and this application, having been refused, eventually came before First-tier Tribunal Judge Whalan who dismissed the appeal on the basis that the refusal of leave was proportionate. There is some dispute as to whether a concession was made before the First-tier Tribunal. The judge stated at paragraph 36 that:

> "It is also acknowledged that if the Fourth Appellant was to re-apply under paragraph 276ADE, she would now satisfy the provisions of 276ADE(iv)".

16. There are two parts to 276ADE(iv); one is that a child has seven years' residence in the UK, and the second is that it would not be reasonable to expect the child to leave the UK. At the date of hearing the fourth Appellant had seven years' residence as a child in the UK, however the question of reasonableness was not addressed by the judge. He dealt with the best interests of the third and fourth Appellant, given that the third Appellant had only recently attained the age of 18, and concluded that it was in their best interests that they should not return to India. However, he found that the proportionality exercise was finely balanced and that the best interests of the third and fourth Appellant did not tip the balance in their favour. The poor immigration history of the first and second Appellants meant that the balance was in favour of the need to maintain immigration control. The judge considered Section 117B(1) to (5), but made no mention of Section 117B(6). This may well be because he acknowledged at paragraph 36 that the provisions of 276ADE(iv) were satisfied, namely that the fourth Appellant had seven years' residence and it would not be reasonable to expect her to leave the UK.

17. Mr Kannangara argued that, had Judge Whalan properly considered Section 117B(6), he would have allowed the appeals of all four Appellants because, having acknowledged that the fourth Appellant satisfied paragraph 276ADE(iv), then the removal of the first and second Appellants was not in the public interest.

Preserved findings

18. The findings of fact of the First-tier Tribunal are not disputed and are as follows. The Appellants were born and grew up in India until leaving for the UK in September 2003 and August 2006. The first Appellant worked in India while the second Appellant was a housewife. The third and fourth Appellants both attended school in India. They are all fluent in Hindi. The third and fourth Appellants, like the first and second Appellants, are fluent in English. They all have existing family ties to India; the parents of the first and second Appellants are all living in India, and indeed the first Appellant's parents provided a home for the family before they moved to the UK. All four Appellants entered the UK legally as visitors but then remained illegally as overstayers. The first Appellant overstayed for over eight years, and the second, third and fourth Appellants overstayed for over five years before lodging applications to regularise their status. Both the first and second Appellants worked illegally in the UK. This work has been fairly consistent since at least 2009 when the family left the home of the first Appellant's sister and neither have paid or had any intention to pay tax or NI. All four Appellants have received NHS care to which they are not entitled. The third and fourth Appellants also received an education in the UK. Since 2012 the family have lived in their own rented accommodation costing £750.

19. The First and Second Appellants have pursued from the outset a calculated plan of economic migration designed to circumvent the normal, regular immigration channels. The First Appellant's' intention from the outset was to establish a life for himself and his family in the UK. It was never his intention to return to India. The first Appellant, and abetted by the second Appellant, has pursued from the outset a planned and determined economic migration, albeit one pursued without status or permission since March 2004. Their children, the third and fourth Appellants, cannot be blamed for this. The first and second Appellants, deliberately delayed making applications whilst accruing necessary evidence of family and private life in the UK until the status of their children became more critical.

Discussion and conclusions

20. The Court of Appeal has remitted this matter to be decided following MA (Pakistan). It is interesting that the paragraph relied upon by Silber J, paragraph 49 of MA (Pakistan), makes no reference to reasonableness but states that seven years' residence in itself would have to be given significant weight in the proportionality exercise, and that it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary. Accordingly, whether there was a concession or not, it would appear that neither the First-tier Tribunal or the Upper Tribunal had identified powerful reasons against granting leave to remain to the fourth Appellant.

21. The situation before me is now somewhat different. I find that the third and fourth Appellants would satisfy paragraph 276ADE(v) if they made an application today. They have lived in the UK for over ten years, albeit illegally because of the actions of their parents. The third Appellant came to the UK at the age of 9 and is now almost 21. The fourth Appellant came to the UK at the age of 7 and is now almost 19. They have been in the UK for more than half their lives. They would be able to satisfy paragraph 276ADE if an application was made today. On that basis, it would be disproportionate to refuse leave to remain because it cannot be said to be in the public interest to refuse an application when the Immigration Rules are satisfied. Accordingly, for that reason I allow the appeal of the third and fourth Appellants' under Article 8.

22. I now turn to consider the appeals of the first and second Appellants. They have lived in the UK illegally for over ten years. They have worked illegally and they have never paid tax. However, they do not appear to have had significant health needs and although they have had access to the NHS they have not received any benefits and have supported themselves from their illegal working. The parents of the first and second Appellants still live in India.

23. In relation to family life, I accept that they still have family life with the third and fourth Appellants. The situation really has not changed since the hearing before the First-tier Tribunal, save that the third Appellant has gone to university and the fourth Appellant has started A levels, but they are still, as young adults, dependent on their parents which amounts to more than normal emotional ties. I find that the first and second Appellants have established family life with the third and fourth Appellants. A refusal of leave would interfere with family life if the third and fourth Appellants chose to remain in the UK, and not return to India, as they would be entitled to do if granted leave to remain.

24. I also find that the first and second Appellants have established private life in the UK over the course of the last ten years and removal to India would interfere with that private life. The decision is in accordance with the law. The first and second Appellants cannot satisfy the requirements of paragraph 276ADE of the Immigration Rules.

25. The issue is therefore whether the refusal of leave would be proportionate. I must take into account the matters listed in Section 117B. The ability to speak English is a neutral factor. I am not persuaded by Mr Tufan's submission that they cannot be considered to be financially independent because they have been working illegally. However, they have not been a burden on the taxpayer in that they have not claimed benefits, neither have they contributed and paid tax. There is nothing to suggest that they have been unable to integrate into society. I attach little weight to their ten years' private life because it was established when they were in the UK unlawfully.

26. Taking into account all these factors, including the Article 8 rights of the third and fourth Appellants, to be able to remain in the UK, continue their studies, and to be able to remain living as a family unit with their parents, I find that the balance falls in favour of the first and second Appellant being granted leave to remain. I have taken into account the undisturbed findings of the First-tier Tribunal Judge that they both came as visitors and overstayed and that the first Appellant's intention on coming to the UK was in order to make a better life for himself and his family. They have therefore shown a blatant disregard for immigration law and have remained in the UK illegally for a significant amount of time, working illegally and not paying taxes. However, on the other side of the balance is the fact that the two adult children are able to satisfy the Immigration Rules. The third and fourth Appellants are still dependent on the first and second Appellants, and whilst their wrongdoing cannot be condoned, it could not be said that for the majority of their lives the third and fourth Appellants could be held responsible for the actions of their parents.

27. There is also the point made by Mr Kannangara that, had the First-tier Tribunal Judge specifically considered Section 117B(6) and whether it was reasonable for the fourth Appellant to leave the UK, he should have concluded that it was not reasonable for her to do so following MA (Pakistan). The First-tier Tribunal judge found that her best interests were served in remaining in the UK and therefore in assessing reasonableness he would need to look at whether there were strong countervailing factors to the contrary. Given that the fourth Appellant cannot be blamed for the actions of her parents, their illegal overstaying and illegal working had limited impact on whether it would be reasonable for her to leave the UK. It was clear from the First-tier Tribunal Judge's findings that the fourth Appellant was about to take GCSEs and was of an age where she would have formed relationships outside the family unit. At the time of that decision she had been living in the UK for nine years. Applying MA (Pakistan), it could not be said that they were strong countervailing factors justifying a refusal of leave.

28. I agree with Mr Kannangara that this case is finely balanced, but I find on the particular facts of this case, the balance falls in favour of the first and second Appellants. Therefore, I also allow their appeals under Article 8 on the basis that the refusal of leave was disproportionate.

29. Accordingly, I find that, on the particular circumstances of this case, the refusal of leave to remain was disproportionate. I allow the appeals of all four Appellants on Article 8 grounds.

Notice of decision

Appeals allowed

No anonymity direction is made.

J Frances

Signed Date: 29th September 2017

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable.

J Frances

Signed Date: 29th September 2017

Upper Tribunal Judge Frances