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

**Appeal Number: IA/33725/2015**
**IA/33728/2015**
**IA/33729/2015**
**IA/33730/2015**

**THE IMMIGRATION ACTS**

**Heard in Birmingham**
**On Thursday 3 August 2017**

**Determination Promulgated**
**On Tuesday 15 August 2017**

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**HS**
**PK**
**AK1**
**AK2**

Respondents

**Representation:**

For the Appellant: Mr Mills, Senior Home Office Presenting Officer
For the Respondent: Mr H Sarwar, instructed by Malik Law Chambers

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

Anonymity was granted by the First-tier Tribunal. The Respondents in this appeal include a minor child. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I therefore continue the order. Unless and until a tribunal or court directs otherwise, the Respondents are granted anonymity. No report of these proceedings or any form of publication thereof shall directly or indirectly identify them or any member of their family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

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## DECISION AND REASONS

### Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Secretary of State appeals against a decision of First-Tier Tribunal Judge Shergill promulgated on 21 December 2016 ("the Decision") allowing the Appellants' appeals against her decision dated 15 October 2015 refusing them leave to remain based on their private life and family life in the UK. The focus of the appeals is on the position of the two children, one of whom remains a minor child.

2. The First and Second Appellants are the parents of the Third and Fourth Appellants. The Third Appellant was born on 25 December 1997. The Fourth Appellant was born on 24 April 2000. The Appellants are all nationals of India. The First Appellant entered the UK clandestinely in 2000. The Second Appellant came to the UK with the children on a visit visa in 2007 and overstayed. Following enquiries made by me during the hearing, I have now been provided with a copy of the passports of the Second to Fourth Appellants showing that they entered the UK on 6 June 2007. The application which led to the Respondent's decision under refusal was made on 13 June 2014 and therefore almost immediately that the two children, then both minors, had attained a period of residence of seven years.

3. The Judge allowed the appeals on human rights grounds on the basis that paragraph 276ADE(1)(iv) of the Immigration Rules ("the Rules") was satisfied as it was not reasonable to expect the children to return to India. He did so also outside the Rules on the basis that removal would disproportionately interfere with the children's rights under Article 8 ECHR ("Article 8") and it was not in their best interests to return.

4. The Respondent appeals on the basis that the Judge misdirected himself in law by failing to take into consideration the public interest when dealing with the question whether it was reasonable to expect the children to return and failing to consider, in relation to the children, sections 117A and 117B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). As Mr Mills accepted in his submissions, those grounds are really two sides of the same coin.

5. Permission was granted by First-tier Tribunal Judge Mailer on 12 June 2017 in the following terms so far as relevant:

   > "[3] It is arguable that the Judge failed to consider all relevant factors when considering the third and fourth appellants' appeal. It is also arguable that the relevant public interest considerations under s117B were not properly assessed."

6. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

**Error of law decision and reasons**

7. The main thrust of the Respondent's case is that the Judge failed to have regard to the Court of Appeal's judgment in MA (Pakistan) and others v Secretary of State for the Home Department [2016] EWCA Civ 705 ("MA (Pakistan)"). The judgment is one to which the Judge claims to have had regard at [10] of the Decision. However, the Judge then went on at [13] to [22] to deal with the parents' cases first before turning to the children's cases at [23] to [36] of the Decision.

8. Having concluded that the parents' cases involved a "gross violation of immigration control" ([20]), he then went on to consider the children's cases on the basis that none of the factors considered in relation to the parent's cases could be taken into account when dealing with the children. He repeated a number of times in his consideration of the children's cases that the children could not be blamed for the parent's immigration violations. Expressly, at [31] he said this:-

   > "[31] Both AK1 and AK2 were at the time of the application at important junctures in their education. That is an education that they had no right to expect and which has been obtained at public expense. However, the children (as AK1 was then) are not to be blamed for their immigration status or the gross violations of immigration control by the parents."

9. I took little persuading that there is an error of law in the Decision. Whilst, as Mr Mills rightly submitted, the "sins of the parents" are not to be visited on the children when it comes to assess their best interests that does not mean that those are to be left out of account when assessing proportionality. Specifically, MA (Pakistan) requires public interest factors such as immigration control to be weighed in the equation when considering whether it is reasonable to expect a child to return to his/her country of origin whether under or outside the Rules. The Judge has clearly failed to note this part of the judgment in MA (Pakistan) when making his assessment. This discloses a very clear error of law in the Decision.

10. Mr Sarwar sought to persuade me that the error is not material. He pointed me to the Respondent's policy dated August 2015 which makes clear that a period of residence of seven years is significant and that strong countervailing factors are required to outweigh that period. In this case, the two children arrived in the UK aged seven and nine years and had both spent the requisite seven years in the UK. I was unpersuaded by that submission. Proportionality is a matter of balancing factors for and against an appellant. In this case, the Judge has made strong findings against the parents which are relevant to the public interest in removal. There is no assessment of how those findings are to be balanced against

the children's interests. Whilst the outcome may be the same if that assessment is carried out correctly, I could not say that this would necessarily be so. It follows that the error of law is not immaterial.

11. Mr Sarwar also sought to persuade me that, if I set aside the Decision, I should remit to the First-tier Tribunal. Having regard to the Tribunal's guidance as to when it is appropriate to remit, I indicated to him my view that this is a case where it is not appropriate to remit. There are no issues of credibility. The Judge has made findings which I am able to take into account as they are unchallenged (and even though I set aside the Decision) and I have before me the evidence which the Judge had save for the oral evidence (as to which findings have been made).

12. I did however agree to take oral evidence from the two children (one of whom is now no longer a child) so that I could be aware of the updated position as to their private lives. I deal with that evidence within my decision below so far as relevant.

13. For the above reasons, I find that the Decision discloses a material error of law. I set aside the Decision of First-tier Tribunal Judge Shergill. I now move on to re-make the Decision.

**Decision and reasons**

14. I start with the Court of Appeal's judgment in MA (Pakistan). The Court of Appeal there considered six individual cases all concerning children who had been resident in the UK for more than seven years and therefore fell within the definition of "qualifying" children. In two of the cases, paragraph 276ADE(1)(vi) was in play. In the remaining four cases, section 117B(6) of the 2002 Act was the focus. In all cases, however, the question of "reasonableness" of return of a child who had lived in the UK for seven years arose. Although, as the Court observed at [10] of the judgment, there are some distinctions to be drawn between paragraph 276ADE(1)(iv) and section 117B(6), when it came to deal with the individual appeals, it adopted the same approach.

15. The Court held, following the Court of Appeal's judgment in MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450 that the consideration of "reasonableness" imports other public interest considerations including such matters as the parent's immigration history. The best interests of the child are, however, a primary consideration. Moreover, paragraph 276ADE(1)(iv) and section 117B(6) provide that the fact of the child being resident for more than seven years or being a British citizen is a factor to be given some weight in favour of leave to remain being granted (see [45] of MA (Pakistan)) As such, as noted at [49] of MA (Pakistan), section 117B(6) "establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."

16. I start therefore with the best interests of the child. I have to consider that at the date of the hearing before me and therefore the Third Appellant is no longer a child. She is though still part of the family unit and has not moved to form her own independent life. She told me in oral evidence that she hopes to go to university. She has been unable to do so as a result of her immigration status. Although she would presumably be able to apply as a foreign student, she could not do so whilst she is in the UK. Rather than simply wasting time whilst waiting for these appeals to be concluded, she has embarked on another BTEC course which she has been advised will help her when, she hopes, she will eventually be permitted to continue with her university education. She wishes to undertake a degree in psychology.

17. The Third Appellant told me that she does not want to go back to India, a country she left aged nine years. She is now aged nineteen. She has made a lot of friends in the UK. She sees them every day. They all live close by. She practises sport. She plays badminton once per week. She attained reasonable grades in her A levels. She hopes to be able to apply to university in December.

18. The Fourth Appellant is now aged seventeen years. He is at school studying for A levels. He is experiencing some difficulties with work experience as he wants to go into medicine but he has been unable to undertake some work placements because of his immigration status. As a result, he has only been able to do some voluntary work. He expects to apply later this year to go to university next year. He too has a number of friends, attends school clubs and goes to the gym nearly every day.

19. Although I have set aside the Decision, as I note above, there is no challenge by the Respondent to the facts as therein set out. Those appear at [31] and [32] of the Decision. I have already set out [31] at [8] above. Paragraph [32] reads as follows:-

> "I accepted their credible evidence to conclude that they do not know any other place other than the United Kingdom given the young ages that they came here. They have been in the United Kingdom well in excess of the various time thresholds set out in case law. I accept that they do not read or write any Indian languages; and AK1 only speaks Punjabi with AK2 only knowing a little. He will be disproportionately affected by returning in my view. His high academic achievements have the hallmarks of a great future ahead of him. Yet by being returned to India he will be illiterate and with limited verbal communication skills. He may be able to go into science related subjects, where English is likely to be the lingua franca, but that presupposes he will be able to make the social transition into life there. I accept he is at an important social and existential juncture in his life given his adolescence; social ties and integration into life in the United Kingdom. That disruption is not in his best interests and is likely to cause irreparable and disproportionate damage to his future life chances"

20. The position in relation to linguistic difficulties may be somewhat overstated; the Third Appellant said, for example, that she attends the gurdwara and would presumably therefore be able to understand and communicate in her native language. However, overall, particularly as regards the Fourth Appellant who is the only remaining "child" to whom the best interests' consideration applies, I concur with that view. It was clear from his evidence that he is completely integrated into society in this country and is doing very well at school and has a promising future ahead of him. He left India aged seven years and will have less understanding than his sister of the educational system there. He is at a crucial point in his education and social development. It is clear that his best interests at this point in time very strongly favour him remaining in the UK.

21. The Third Appellant is now an adult but a young one. She too will be affected by removal to India. She has not lived there for over ten years. Whilst she may have had a longer period in education there before coming to the UK, there is no doubt that it is in the UK that she has received most of her education. It is also in the UK that she has made friends. Of course, if she were returned to India there is nothing to prevent her from applying to attend university in the UK as a foreign student. Whether that is financially viable is not something on which I received any evidence. However, to that extent, it may be possible to avoid undue interference with her educational plans. However, it is in any event the case that removal would disrupt the social ties which she has formed here. Although I recognise that the public interest has to be balanced against the interference with her individual interests, it is the case that she is at no fault for the situation in which she finds herself.

22. I turn then to consider the cases of the parents (First and Second Appellants). As will be clear from what I say above in relation to the factual background, their cases are ones entirely undeserving of compassion. The following passages taken from the Decision ably summarise the position in their cases:-

> "[14] The parents have committed gross and flagrant breaches of immigration control; not only by entering clandestinely and working illegally but then compounded by the mother bringing the other two appellants to the United Kingdom, never to return. I have no doubt that there was a concerted effort to obtain a free education and economic advantage in doing so.
> [15] They have managed to support themselves here for a number of years through illegal working and family contributions. I am satisfied there is no sound reason why the wider family would not be willing to pay the £450 they currently pay for rent to support the family in India.
> [16] I am unable to attach much weight to the parents claims made about lack of prospects for jobs; lack of family ties and an inability to support themselves back in India. The reality is that there is a family member there; they were well into adulthood when they came here and they come from one of the larger towns in Punjab (Jullundur)…
> [19] In terms of Article 8 rights, the family life claims are dependent on the children and they will follow their parents or vice versa. My conclusions are drawn

below on that matter. I am not satisfied there are any other family life claims. As for private life claims, I have considered how section 117B of the 2002 Act applies. The parents claim to be supported by others and/or working. They claim not to have been reliant on public funds. However, they have both benefitted from the NHS and sending their children to school….

[20] In terms of their immigration status, coming to the United Kingdom on a visit visa when the first appellant was already here illegally is likely to have involved some dishonesty from the outset in terms of the motives for visiting. I have no doubt that there was never any intention to leave when the visa was applied for. The first two appellants have orchestrated the entire situation. I am satisfied their actions are a gross violation of immigration control both in terms of entry into the United Kingdom which on balance I have concluded was orchestrated from the outset without any intention to return…."

23. Section 117B of the 2002 Act is relevant to the assessment of the proportionality of removal of the parents but also to the question of reasonableness of removal of the children, whether under paragraph 276ADE(1)(iv) or section 117B(6). There does not appear to be any issue about the Appellants' ability to speak English. Very clearly, both the Third and Fourth Appellants speak fluent English. I accept Mr Mills submission that none of the Appellants is financially independent. As he pointed out, the fact that any working was illegal is also relevant to the public interest but in any event, the Appellants' evidence is that they receive support from wider family members. They have also been reliant on public funds at the very least in relation to the education which the Third and Fourth Appellants have received.

24. The private lives of all the Appellants have been formed whilst they have been here without leave. Certainly, in the case of the parents, I can only give little weight to their private lives. The position is more nuanced in relation to the children. They had no choice about their residence here. They were brought here by their parents and have lived here because their parents chose to. As case law makes clear, the "sins of the parents" should not be visited on the children, certainly when their best interests are being assessed. I have already made clear that the Fourth Appellant's best interests strongly favour him remaining. I have also made the point that the Third Appellant does not bear any blame for the position in which she finds herself.

25. As Mr Mills submitted, and I accept, the main public interest issue in this case is immigration control, given the flagrancy of the breaches which I have accepted and the apparently cynical manipulation of the immigration system by the First and Second Appellants to meet their own ends. As they say in their statements, they wished to make a better life for their children and that is an understandable sentiment for a parent. It is probably though a sentiment shared by parents all over the world. To permit all parents to bring their children to the UK so that they can obtain better education (at the expense of the public here) and better life chances would lead to a complete breakdown of migration control. It does not

therefore excuse the breaches of immigration control which both parents have committed to achieve their aim.

26. I turn then to assess the reasonableness of requiring the Fourth Appellant to return to India against that background. His best interests are a primary consideration. They are not however paramount and can be outweighed by other considerations. I also take into account the Respondent's policy which is that a period of residence of seven years for a child is a significant milestone and something strong is required to outweigh that as a consideration. As the Court of Appeal remarked at [46] of the judgment in MA (Pakistan), when dealing with that policy, the disruption to a child's life by removal will become more serious as they get older and removal is therefore likely to become "highly disruptive".

27. Ultimately, in this case, the balance is between the Fourth Appellant's best interests on the one hand and the public interest in removal of the family on the other. Both factors are in this case, very strong. The case is therefore very finely balanced. However, I am (just) persuaded that, in this case, the position of the Fourth Appellant wins out. He is at an acute point in his education. It is doubtful that he could adjust to the education system in India at this point and still fulfil his promise and ambition (as the First-tier Tribunal Judge found). He is said to speak little of the language. He knows little of the education system there. Both he and his sister are completely integrated in the UK, having spent ten formative years of their life here.

28. For those reasons, I find that it would not be reasonable for the Fourth Appellant to be removed to India. It follows that his appeal is allowed on the basis that he satisfies paragraph 276ADE(1)(iv) of the Rules.

29. The First and Second Appellants are in a genuine and subsisting relationship with the Fourth Appellant who is, for now at least, a qualifying child. It follows since I have found that it would not be reasonable for him to be removed to India, that section 117B(6) provides that the public interest does not require their removal at least at this point in time. I do note however that the Fourth Appellant will turn eighteen next year. Whilst as the case law makes clear, that does not automatically break any family life ties, as and when the children go on to form their own independent lives, the parents' rights to remain in the UK may weaken in the equation as time moves on. They will though have achieved their ambition of giving their children a better future.

30. The position is slightly different in relation to the Third Appellant. She was a minor child at the date of application and therefore the issue is whether it would be reasonable to remove her. Her best interests no longer fall to be factored into the equation because she is no longer a child. It is though highly relevant that she too had been here for seven years when the application was made and that she was, at that date, a child. Again, by reference to the Respondent's policy

guidance, the fact that she has been here for seven years is a factor which is to be given weight in her favour although that obviously falls to be balanced against the public interest, particularly in relation to immigration control.

31. On balance, I am satisfied that it would not be reasonable to remove the Third Appellant. Although she is no longer a child, as I note above, she has spent ten of her formative years here; indeed, she has been here for nearly half her life. She may remember more of her former life since she was slightly older when she arrived. However, she too has assimilated into a life in the UK and would, following a period of ten years, find it very difficult to adjust. Added to that difficulty, I have of course found that her brother and parents should not be removed. It follows that she would be returning to a country with which she has little familiarity and where she has not lived since she was a young child. It appears there may be some family there but I have little detail about that. Given her young age and that she remains part of the family unit, I am satisfied that it is not reasonable to remove her, with the result that she too succeeds under paragraph 276ADE(1)(iv) of the Rules.

**DECISION**

**I am satisfied that the Decision contains material errors of law. The decision of First-tier Tribunal Judge Shergill promulgated on 21 December 2016 is set aside.**

**I re-make the decision as follows:**

**I allow the appeals of the Third and Fourth Appellants under paragraph 276ADE(1)(iv) on the basis that it would not be reasonable for them to be removed to India.**

**I allow the appeals of the First and Second Appellants outside the Rules on the basis of Article 8 ECHR since, as the parents of a qualifying child who it would not be reasonable to remove, the public interest does not require their removal.**

Signed Dated: 14 August 2017

Upper Tribunal Judge Smith