



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: **HU/11248/2017**
HU/11255/2017
HU/11264/2017
HU/11274/2017

THE IMMIGRATION ACTS

Heard at Field House
On: 1 November 2018

**Decisions & Reasons
Promulgated**
On: 4 December 2018

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

**MUHAMMED [Y]
SAFIA [T]
[M T]
[E T]
(Anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the appellant: Mr Z Raza of Counsel
For the respondent: Mr I Davies, Senior Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Pakistan and mother, father and their two children. They appealed to the First-tier Tribunal against the decision of the respondent dated 13 September 2017 to refused to grant them leave to remain in the United Kingdom under paragraph 276ADE and Article 8 of the European Convention on Human Rights. First Tier Tribunal Judge Povey in a decision dated 19 June 2018 dismissed their appeals.
2. Permission to appeal was granted by first-tier Tribunal Judge Keane on 17 September 2018 stating that it is arguable that the Judge's assessment of proportionality was arguably in error and that the Judge did not adequately incorporate into his assessment the rather greater degree of upheaval and adjustment which [MT] would experience upon leaving the United Kingdom as he is a qualified child who has been in the United Kingdom seven years and 11 months.

First-tier Tribunal's findings

3. The Judge made the following findings in his decision which in summary are the following.
 - I. The test under paragraph 276 ADE of the immigration rules sets out the requirements to be met for leave to remain in the grounds of the applicant's private life. In respect of the children who have been in the United Kingdom continuously for seven years, the test is whether it would be unreasonable for them to leave the United Kingdom.
 - II. The best interests of the children in any assessment are a primary consideration and although they will not always determine the outcome of an immigration decision, no other factor should be given more weight. The best interests of children must be considered first as they are an integral part of the proportionality assessment under Article 8 of the European Convention on Human Rights. A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.
 - III. The children have left their whole life lives in the United Kingdom and have never visited Pakistan. There are however Pakistani citizens. The evidence was that they spoke Urdu but not as fluently as they spoke English. The children can speak and understand Urdu and their parents would be on hand to assist when required. The third appellant is nine years old at the fourth appellant is six years old. They are both primary school in years four and one.
 - IV. It is the respondent's intention that the appellant will be removed as a family. They are familiar with the culture of Pakistan and can help their children integrate into Pakistani society. The appellants have family in Pakistan. The first

appellant has his parents and siblings and the second appellant has her father, stepmother and siblings. They remain in contact with their respective relatives and they can assist them on return to settle down.

- V. The third appellant has lived continuously in the United Kingdom for over seven years. Applying the test under paragraph 276 ADE (iv) and 117B (6) of the NIA Act 2002 regard must also be had to the child's best interest. The respondent's decision does not interfere with any of the appellant's family lives in the United Kingdom, as day would be removed as a family unit. There was no evidence of any other relationships in the United Kingdom akin to family life.
- VI. In assessing the children's best interests as a primary consideration, the first and second appellant's immigration history and conduct are not relevant. The fact that the third appellant has been in the United Kingdom for over seven years significant weight is accorded, with strong reasons required to refuse leave to remain. Thereafter, wider public interest must be considered including the first and second appellant's immigration history.
- VII. The best interests of the children are to remain and be raised by their parents within the existing family unit. The children would face a degree of upheaval and adjustment if required to leave the United Kingdom. Their parents have lived their whole lives in the United Kingdom and through them they have an awareness of the Pakistani culture and heritage. They remain adaptable to change and are only beginning to become more outward looking. Their social lives are likely to remain dominated by their parents and the family unit, remain intact in Pakistan. Their parents' previous lives in Pakistan and the existence of a wider family network are likely to assist the children in integrating into Pakistani life. The appellants are all Pakistani nationals and would be able to enjoy full rights as citizens.
- VIII. The first and second appellant came to this country with a student visa and they could have had a realistic or reasonable expectation of remaining in the United Kingdom for the long term. Their immigration history is poor, and they have overstated the United Kingdom since 2010. After their application was refused, they took no steps to return to Pakistan and waited six years before submitting their current application.
- IX. When considering the evidence as a whole and the maintenance of effective immigration control, the interference of the appellant's removal that it would have on their private life is proportionate when regarding the public interest in effective immigration control.

- X. The Judge dismissed the appellants appeals under the Immigration Rules and under Article 8.

Grounds of appeal

4. The main issue in this appeal is whether or not it is reasonable to expect the third appellant to leave the United Kingdom as a qualified child. In respect of Article 8, the Judge's analysis is wrong. To succeed under Article 8 the appellants need to demonstrate that the removal will amount to a disproportionate breach of their rights under Article 8 and this does not depend upon them showing very substantial difficulties and exceptional circumstances et cetera" which the Judge found.
5. It was made clear in **MA Pakistan [2016] EWCA Civ 705** the parents conduct is only relevant under the proportionality assessment and not for the reasonableness of return test. It is submitted that the Judge's reasonableness assessment is therefore materially defective, and it is this consideration which is key under both the immigration rules and section 117B amounting to a material error of law. There was insufficient and consideration of the best interests of the qualifying child by the Judge in this case.

The hearing

6. I heard submissions from both parties at the hearing which I have considered. Mr Raza said that the Judge did not consider that strong and powerful reasons are needed to require a qualifying child to leave the United Kingdom. He said that the Judge has not assessed whether the qualifying child could return to Pakistan. He submitted that the Judge considered the gravity of the appellant's parents immigration conduct and not whether there are strong and powerful reasons which was the correct test to apply. The best interests of the qualifying child was to remain in the United Kingdom.
7. Mr Jarvis on behalf of the respondent stated that that the case of **MT and ET** is not useful in this case and it is not binding on the First-tier Tribunal and distinguished the case from the facts in this appeal. He submitted that there was no error of law.

Decision on error of law

8. In considering this appeal I have taken into account the case of **R (Iran) v SSHD [2005] EWCA Civ 982**, where Brooke LJ summarised at [9] the errors on points of law that will most frequently be encountered in practice:

"9. ...

- (i) making perverse or irrational findings on a matter or matters that were material to the outcome;
- (ii) failing to give reasons or any adequate reasons for findings on material matters;
- (iii) failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- (iv) giving weight to immaterial matters;
- (v) making a material misdirection of law on any material matter;
- (vi) committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
- (vii) making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

9. The grounds of appeal essentially argue that the Judge should have considered whether there are "powerful reasons" to expect the qualifying child to leave the United Kingdom given that he has been in this country for over seven years. Therefore, the case for the other appellants claim for leave to remain rests on the best interests of the eight-year-old qualifying child.
10. The argument advanced by the appellant's counsel is that once it is established that a child has been in this country for seven years, he cannot be removed under any circumstances. I do not read the law and jurisprudence as a more nuanced approach is necessary, and all the circumstances of the child and his family must be considered. That does not mean that the best interests of the qualifying child should be compromised in any way as the circumstances of the whole family will inform his best interests. I do not except the argument that any child who has been in this country for seven years must automatically be granted leave to remain with his parents and other siblings.
11. The Judge applied the that the correct test that the best of interests of a qualifying child has to be determined taking into account all the likely circumstances of the qualifying child if returned as a family unit to Pakistan. The Judge applied the right test when he said that the best interests of the children in any assessment are a primary consideration and although they will not always determine the outcome of an immigration decision, no other factor should be given more weight.

12. The First-tier Tribunal Judge in his decision considered all the evidence in the appeal and found that the appellants could return to Pakistan, which for, and continue their private and family life in that country, as a family unit. The Judge stated that it would not be unreasonable to expect the qualifying child to return to Pakistan with his parents and siblings. The Judge was entitled to find that moving countries entails some upheaval and adjustment but that does not in itself mean it would be unreasonable.
13. The Judge had to take into account all the factors relevant to the appellant's qualifying child's well-being if returned to Pakistan. Therefore, the Judge was entitled to take into account all the circumstances of this family and there was no material error because the qualifying child's best interests were carefully considered over and above all else.
14. The Judge was required to make an adequate legally and factually finding, a proper assessment of the best interests of the qualifying child in that it must be based on a careful consideration of the likely circumstances of the qualified child and the other children, if returned as a unit to Pakistan.
15. The Judge found that the qualifying child's grandparents and other relatives live in Pakistan and can assist the appellants to settle down in Pakistan and reintegrate into that society. The Judge found that the parents are in contact with their family in Pakistan which demonstrated to him that the appellants will have their extensive family to assist them on return. This informed the Judge's decision as to whether the qualifying child and the other children would be granted all that is necessary for their growth and to reach their full potential in Pakistan.
16. There was no suggestion that the parents' will not be able to look after their children in Pakistan. The children's best interests are served with being provided with all the requirements for their growth, security, education and to be able to reach their full potential. There was no evidence before the Judge that the qualified child would not be able to achieve this in Pakistan. The Judge further considered that the appellants have no family in the United Kingdom. The best interests of the children also include social interaction with their relatives and culture of the country of which they are citizens. The Judge considered that qualifying child was able to speak Urdu and will have their parents to guide them in integrating. There is no material error in this reasoning.
17. It was asserted that the Judge into account the adverse immigration history of the parents when considering the qualifying child's best interests. It is also clear from the case of **MA Pakistan [2016] EWCA Civ 705**, that the fact that there is a qualified child is a

relevant consideration and one that might be said to point to it being in the child interest to remain in the United Kingdom, but it is equally clear that the assessment of reasonableness must take account of the conduct of the claimant and his wife.

18. I do not accept that the parent's adverse immigration history was taken against the qualifying child or is best interests. The decision would inevitably have been the same on the facts of this appeal. I say this because it was not material to the issue that the First-tier Tribunal Judge had to decide. The issue for decision was whether requiring the appellant and his family's return to Pakistan would be in breach of the immigration rules or Article 8 of the European Convention on Human Rights.
19. The ultimate question in this appeal was whether it would be unreasonable for the family to leave the United Kingdom as a family unit taking into account the best interests of the qualifying child. The Judge was entitled to find that the appellants could return to Pakistan as a family unit can continue with their family and private life in that country and there is no perversity in the conclusions that the Judge reached on the evidence before him.
20. I consider some case law below to enforce the Judge's conclusion that a child who has just reached the age of nine can be returned with her parents and siblings to the country of his or her nationality.
21. Although **R (on the application of Osanwemwenze) v SSHD 2014 EWHC 1563** was not specifically concerned with section 117B it has some relevance in terms of the reasonableness of a child leaving the UK. In this case, the claimant's 14-year-old stepson from Nigeria had been in the United Kingdom for more than 7 years and had leave to remain in his own right. It was held that this was an important but not an overriding consideration and it was reasonable to expect the claimant's family including the stepson to relocate to Nigeria. The parents had experienced life there into adulthood and would be able to provide for the children and help them to reintegrate.
22. In **AM (S 117B) Malawi [2015] UKUT 260 (IAC)** the Tribunal held that when the question posed by s117B(6) is the same question posed in relation to children by paragraph 276ADE(1)(iv), it must be posed and answered in the proper context of whether it was reasonable to expect the child to follow its parents to their country of origin; **EV (Philippines)**. It is not however a question that needs to be posed and answered in relation to each child more than once.
23. In **R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705** it was held that when considering whether it

was reasonable to remove a child from the UK under rule 276ADE(1) (iv) of the Immigration Rules and section 117B(6) of the Nationality, Immigration and Asylum Act 2002, a court or tribunal should not simply focus on the child but should have regard to the wider public interest considerations, including the conduct and immigration history of the parents. It was also confirmed however that if section 117B(6) applies then "there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal." It was additionally held, however, that the fact that a child had been in the UK for seven years should be given significant weight in the proportionality exercise because of its relevance to determining the nature and strength of the child's best interests and as it established as a starting point that leave should be granted unless there were powerful reasons to the contrary. The Court of Session has approved and followed the approach taken in **MA (Pakistan) in the case of SA, SI, SI and TA v SSHD [2017] CSOH 117.**

24. In the recent case of **MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088** it was held that a very young child, who had not started school or who has only recently done so, will have difficulty in establishing that her Article 8 private and family life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part. On the particular facts of a child who had been in the UK for ten years from the age of 4, that her mother had abused the immigration laws by overstaying on a visit visa and then making a false asylum claim and at some stage using a false document to obtain employment was not such a bad immigration history as to constitute the kind of "powerful" reason that would render the child's removal to Nigeria reasonable.
25. Therefore, the fact that the qualifying child's life from the ages of 4 to 11 are more significant than the first four years of his life. The qualifying child being at the age of eight, is not at a pivotal stage of her education and can adapt to life and the education system in Pakistan. The Judge referred to the case of **Azimi Moyed and others [2013] UKUT 00197** it was stated that the children's connections to the United Kingdom become more important from ages of 4 to 11. The qualifying child was eight years old and therefore her ties to this country were still tenuous. There is no material error of law in the Judge's findings on the evidence.

26. Having considered the decision of the First-tier Tribunal Judge, in the round, I am of the view that the First-tier Tribunal Judge did not fall into material error both in fact or in law. The appellants appeal is no more than a quarrel with the First-tier Tribunal Judge's findings which he was entitled to make on the evidence. I find that the differently constituted Tribunal would not come to a different decision on the facts of this case considering the facts and the jurisprudence.
27. The upshot is that the decision of the First-tier Tribunal is not affected by a material error and I find that the First-tier Tribunal did conduct a proper assessment of all the appellants' and the qualifying child's rights pursuant to the Immigration Rules and Article 8. I uphold the decision dismissing the appellants appeals.

Conclusions

28. I therefore find that the appellants appeals must fail pursuant to the Immigration Rules and Article 8 of the European Convention on Human Rights.

DECISION

The appellants appeals are dismissed

I make no anonymity orders

The appeal has been dismissed and there can be no fee order

Signed by

A Deputy Judge of the Upper Tribunal
Mrs S Chana

Dated 29th day of November 2018