Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/18557/2018
HU/18576/2018
HU/18581/2018

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 5 August 2019	**On 15 August 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

AMMAR [Y] (FIRST APPELLANT)
M A (SECOND APPELLANT)
A A (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE FOR SECOND AND THIRD APPELLANTS ONLY)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms A Bhachu, Counsel, instructed by City Law Practice Solicitors
For the Respondent: Mr D Mills, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellants, nationals of Pakistan, have permission to challenge the decision of Judges O'Brien and Meichen of the First-tier Tribunal sent on 1 May 2019 dismissing

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their appeal against the decision made by the respondent on 24 August 2015 refusing them leave to remain.

2. The second and the third appellants are the first appellant's children born in July 2014 and December 2015.

3. The appellants' grounds are three-pronged, the first alleging that the judges erred in going behind a concession made by the respondent that the first appellant's partner, NB, had an "active role" in the life of her child Z born in February 2013; the second contending that the judges acted in a procedurally unfair manner by failing to put to the first appellant their apparent concerns as to whether the first appellant's partner had in fact played an active role in her child's life since Z went to live with their father in Scotland in November 2016; the third submitting that the judges erred in failing "to carry out a child's best interests [of the child] test and proper assessment as to a family split".

4. I am grateful to both representatives for their careful submissions.

The issue of the concession

5. Both the appellants' first and second grounds relate to the issue of the concession.

6. The first ground focuses on the accepted fact that the respondent in the refusal letter stated that the first appellant's partner, NB, played an "active role in [the child Z's] life, as evidenced by train/coach tickets and letters from [Z's father]".

7. The panel noted at paragraph 44 that Z had lived with the first appellant and Ms NB until November 2016, since when she had lived with her father in Falkirk. They noted that they had been told that Z went to live with her father because Ms NB had a number of medical conditions and for financial reasons. The panel noted further that Ms NB had limited leave on the basis of her relationship with Z. That leave had been granted until February 2016 but was extended until 21 December 2018 and she had made an application for further leave to remain prior to that date. The panel then went on to assess Z's circumstances as follows:

> "46. The witnesses said that Z's father brings her to visit them on weekends by car. He drops Z off in (sic) the way to visit his brother in London. They set off on Friday afternoon at around 6pm and arrive at 2-3am on Saturday. He then picks up Z up (sic) on Sunday morning to take her back. However, the witnesses were inconsistent about when Z last came and when she is next visiting. Ms [NB] even contradicted herself in that regard. They were also inconsistent about the frequency of the weekend visits outside school holidays.
>
> 47. We were not persuaded on balance that Z ever visits Birmingham outside school holidays. Even in school holidays, it does not appear that Z has ever visited for longer than a week or two. Ms [NB] claimed that Z was due to visit during the Easter holidays; however, the First Appellant was unaware

of any such plans and we were not satisfied that Z would in fact be visiting any time soon.

48. Ms [NB] claimed to have last visited Z in September 2018; however, the only evidence in the Appellants' bundle of tickets between Birmingham and Scotland are: an adult single train ticket to Glasgow on 3 November 2016; an adult single train ticket back on 16 November 2016; two standard bus tickets to Glasgow on 2 April 2017; and two standard bus tickets back on 6 April 2017. The Appellants' bundle was sent to the Tribunal on 4 April 2019 and contains many documents post-dating Ms [NB's] last claimed visit to see Z. On each occasion, Ms [NB] claimed that she took a taxi between Glasgow and Falkirk, on each occasion consisting of £60 and paid for by friends she had in the area. However, no taxi receipts were provided nor any evidence from the friends who gave her the money. All in all, we were not satisfied that Ms [NB] has visited Scotland since April 2017, and even then are unpersuaded that she spent all of her time with Z, instead finding that she spent at least some of her time with friends.

49. All in all, notwithstanding the Respondent's concession in the refusal letter that Ms [NB] played an active role in Z's life, we find that their face-to-face contact is minimal. Instead, most, if not all, contact between Z, her half-siblings and Ms [NB] takes place via Whatsapp and other modern means of communication.

50. We doubt that the First Appellant has much at all to do with z. He knew very little of her visits to Birmingham, which Ms [NB] explained on the basis that Z was her child. Certainly, we reject any suggestion that the First Appellant has a parental relationship with Z."

8. From the above, at least two things are clear. First, the panel was not simply considering the state of the evidence since the date of the respondent's decision (24 August 2018) but was also revisiting the nature of Ms Bibi's involvement with Z since April 2017 - indeed by implication since Z moved to Scotland in November 2016 (see in particular the last sentence of paragraph 48 and the first of paragraph 51). Second, the panel was not simply seeking to particularise what type of active role Ms NB played in Z's life, but was assessing that she did not play such a role. If the wording of paragraph 49 left this issue slightly ambiguous, the panel made its position unequivocally clear in paragraph 51: "[w]e find that this family is already split and has been since November 2016". One way or another therefore, the panel did not consider that Ms Bibi's role in Z's life was an active one.

9. Hence the panel's findings did involve a negation of the respondent's concession. The question is therefore whether the panel's approach to this issue was procedurally fair. Mr Mills' position is that the panel acted fairly in that the issue of the nature of Ms NB's relationship with Z was raised by the Home Office Presenting Officer and both the appellant and Ms NB were cross-examined regarding it. The appellants' representatives could not claim to have been deprived of the opportunity to address the issue. Ms Bhachu's position is that the effect of the panel's assessment was to go behind the respondent's concession and this was not made clear to the parties at the time. When the respondent had made the concession in August 2018, they were already aware that the family was geographically split and had taken that into

account. The respondent had extended Ms NB's leave to December 2018 in full knowledge of the geographical separation.

10. I am persuaded that the panel's treatment of the concession was flawed. Having themselves explicitly identified it as a "concession" in paragraph 49, they were required to ensure that any decision on their part to revisit it was made known to the parties. In this case (i) the respondent did not seek to withdraw the concession; and (ii) the appellant's representative (Ms Bhachu being involved at the FtT hearing also) specifically sought to rely on it: see paragraph 18. In those circumstances, the panel should not have gone behind the concession without alerting the parties that they were considering doing so. Mr Mills is right that the issue of Ms NB's relationship with Z was the subject of cross-examination, including as to its nature and extent pre-August 2018. But that does not mean that the first appellant was alerted to the fact that the panel was in fact not minded to accept that Ms NB's had had an active role in Z's life up to August 2018. Had the appellants' representatives been aware that the panel was going to revisit the nature of Ms NB's role over the period November 2016-August 2018, they may well have sought to obtain further evidence about the nature and extent of the contact between Ms NB and Z during that period. It is possible Z's father could have been called as a witness. The first appellant and Ms NB should have been given an opportunity to produce further evidence. From paragraph 46 it would appear that the inconsistencies in the evidence of the first appellant and Ms NB regarding when Z last visited were about the very recent past, not the period November 2016-August 2018, yet the panel made adverse findings on both periods. It is also unclear whether they were afforded an opportunity to explain the contradiction said to have arisen in their evidence. The appellants' grounds do not cite higher court authority on concessions, but the Upper Tribunal decision they cite, **Kalidas (agreed facts – best practice) [2012] UKUT 00327 (IAC)**, properly reflects in my judgement the established position that whilst it is within a Tribunal's remit to go behind concessions as to facts, this is to be regarded as an exceptional step and judges must ensure that if there is any withdrawal of a concession on the part of the respondent, that is made unambiguously clear to the other side: see further **Rauf [2019] EWCA Civ 1276**. In this case, the Home Office Presenting Officer, although having cross-examined the witnesses about the entire history of Ms NB's relationship with Z, said nothing in submissions to indicate that the concession was to be regarded as withdrawn.

11. The appellants' third ground avers that the panel failed to carry out a lawful best interests of the child assessment. In my judgement, there is an integral connection between the judges' approach to the best interests of the child, Z, and their decision to go behind the concession. At paragraph 51 the panel stated:

> "It is suggested that removing the Appellants would result in a family split. We find that this family is already split and has been since November 2016. Since then, there has been minimal direct contact between Z and her Birmingham-based family. We accept that Ms [NB] could not come and go between Pakistan and the United Kingdom whilst her leave continues pursuant to s3C. If she left, her leave would cease and her application would be treated as withdrawn.

> However, Z could visit her in Pakistan; indeed, it would appear that Z has previously been taken to Pakistan by her father for a family occasion. We reject any suggestion that any of the children's best interest would thereby be prejudiced."

12. If indeed the nature and extent of Ms NB's involvement with Z was in fact minimal – and she had not in fact played an active role since November 2016 – then the panel's assessment could not be faulted. It would have been wholly within the range of reasonable responses for them to take the view that Ms NB's ties with Z could be maintained by Z visiting Pakistan. Given, however, that this factual assessment was arrived at by a procedurally unfair route, I cannot exclude that there was also legal error in the best interests of the child assessment. In this regard, there is not just the fact that the respondent had conceded that Ms Bibi had an active role in Z's life some twenty months after Z moved to Scotland, but the fact that the respondent had extended Ms NB's leave to remain on the basis of her relationship with Z even after had moved to Scotland (that was the panel's express understanding of the terms of the grant as set out at paragraph 45). It is a reasonable inference that that decision by the respondent incorporated the view that it was in Z's best interests to have her mother present in the UK and able to maintain meaningful parental contact between cities. The respondent's past grants of leave to Ms NB are not of course determinative of the issue of whether the respondent was entitled to refuse leave to the first appellant and their two other children, but the fact of the matter is that Ms NB continues to have (shared) parental responsibility for Z, which needed to be weighed in the balance in the proportionality assessment.

13. For the above reasons I conclude that the panel materially erred in law and their decision must be set aside.

14. I see no alternative to the case being remitted to the FtT.

DIRECTIONS

15. To assist the task of the next judge or panel, I hereby direct that:

> the respondent submit to the Tribunal, with a copy to the appellants' representatives, an addendum clarifying whether or not he wishes to maintain or withdraw the concerns expressed in the refusal decision regarding Ms Bibi's active role in the child Z's life;
>
> if the respondent does indeed move to withdraw the concession, the appellants' representatives should consider calling Z's father as a witness;
>
> the case be set down for a CMR before the FtT in Birmingham within 4 weeks of this decision being sent.

16. I also record that I received a rule 15(2A) notice which included under the Tribunal Procedure (Upper Tribunal) Rules 2008 a Home Office letter of 2 July 2019 confirming that Ms NB has been granted a period of 30 months limited leave on the ten year parent route under paragraph D-LTRPT.1.2. of Appendix FM.

17. To summarise:

The decision of the FtT is set aside for material error of law.

The case is remitted to the FtT (not before Judges O'Brien and Meichen).

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the second and third appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. . This direction applies both to these two appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 14 August 2019

Dr H H Storey
Judge of the Upper Tribunal