Upper Tribunal
(Immigration and Asylum Chamber)
Numbers: IA/11672/2014

IA/11673/2014

IA/10144/2014

IA/11675/2014

IA/11674/2014

Appeal

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 19th November 2015	**On 30th December 2015**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR HUSSAIN KARAMAT – FIRST RESPONDENT
MRS FAMEEDA KARAMAT – SECOND RESPONDENT
MISS MARIA KARAMAT – THIRD RESPONDENT
MR ZEESHAN KARAMAT – FOURTH RESPONDENT
MISS HALEEMA KARAMAT – FIFTH RESPONDENT
(NO ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mrs R Pettersen, Home Office Presenting Officer
For the Respondents: Mrs U Sood, of Counsel instructed by Trent Centre for Human Rights

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of a First-tier Tribunal (Judge Shimmin) which in a decision promulgated on 17th November 2014 allowed the appeals of the Respondents against the Secretary of State's refusal of 20th January 2014 to grant them indefinite leave to remain in the UK and giving directions for their removal under Section 10 of the Immigration Act 1971.

2. The First-tier Tribunal (FtT) allowed the Respondents' appeals by reference to their Article 8 ECHR rights. It found the Secretary of State's decision to be disproportionate.

3. For the sake of clarity, I shall throughout this decision refer to the Secretary of State as "the Respondent" and to the Respondents as "the Appellants"; this reflects their respective positions before the FtT.

Background

4. By way of background, the first and second Appellants are husband and wife. The remaining Appellants are their children. They are all citizens of Pakistan born respectively 1st January 1961, 1st January 1971, 29th July 1992, 25th June 1996 and 5th February 1999. It will be seen from those dates of birth that the first four Appellants are adults and since these are in-country appeals, they fall to be treated as such. The fifth Appellant is a minor and because of that, her case encompasses different considerations.

5. The first Appellant entered the United Kingdom in 2006 with valid entry as a Work Permit Holder. His wife and children entered on 21st September 2007 with valid leave as his dependents.

6. Shortly after the entry of his dependents Mr Karamat's leave to remain was curtailed. In fact the curtailment notice took effect on 29th September 2007 which is only a week or thereabouts after his dependents arrived.

7. Suffice to say that following that curtailment of his leave, neither Mr Karamat nor his dependents left the United Kingdom. They have remained here since. The three children entered education on arrival.

8. Mr Karamat then made various applications to remain here; none of those applications were granted. The latest one made on 4th April 2013 forms the basis of the refusal made by the Respondent on 20th January 2014.

9. It is clear therefore that all Appellant's are in the United Kingdom without permission and their status is precarious to say the least.

10. The present applications made by the Appellants for indefinite leave to remain were refused because the Respondent considered that they did not meet the requirements of Appendix FM or paragraph 276ADE of the Immigration Rules. In reaching her decision the Respondent took into

account that the family are all nationals of Pakistan. They would return there as a family unit. There were no exceptional circumstances justifying a grant of leave outside the Immigration Rules under Article 8 ECHR and they had remained here without leave.

11. Their appeals came before FtT Judge Shimmin who heard evidence from all Appellants. He also accepted a concession made on their behalf by their representative, that none of them could meet the requirements of the Immigration Rules. He accepted that concession and made a finding reflecting the same [20] but then went on to allow the appeals under Article 8 ECHR.

12. The Respondent sought and was granted permission to appeal. Permission was granted by the Upper Tribunal in the following terms:

> "On the 17th November 2014 First-tier Tribunal Judge Shimmin allowed the appeals against the refusal of the applications for ILR and direction for the removal of this family from the UK pursuant to section 10 Immigration Act 1971 on the basis they were over stayers. The Judge assessed the merits of the claim by reference to Article 8 ECHR and found the decision not to be proportionate.
>
> Mr Karamat Hussain (DOB 1-01-1961) applied for ILR. He named in that application Fameeda Kuser (01-01-71) Zeeshan Karamat (25-06-96) and Haleema Karmat (sic) (05-02-99) as dependants. The dependant's (sic) applications were refused in line in accordance with paragraph 322(1) of the Rules. The application was considered and refused by reference to the Immigration Rules on both family and private life grounds. It was found as part of that assessment that the family could return to Pakistan as a unit and continue their life there. The application for Maria Karamat was considered and refused by reference to the Rules. Maria was born on 29-07-92 and is therefore an adult. No member of this family has leave to remain and are nationals of Pakistan.
>
> Before the Judge it was conceded that the decisions under the Rules were correct and could not be appealed. In paragraph 48 the judge states that as the appellants do not come within the Rules he was required to consider the claim by reference to Razgar. The Judge proceeds thereafter to allow the appeal claiming the decision is not proportionate and not in the best interests of the children by reference to matters that were arguably considered when assessing the requirements of the Rules, which were found not to enable the applicants to succeed as accepted by their own representative.
>
> …in a non deport case there is no need to undertake a full assessment under Article 8 ECHR unless there are article (sic) 8 issues raised that have not been adequately addressed by the consideration under the Rules. In this case the judge arguably erred in failing to address his mind to such an approach. It was accepted that family life was not in issue as the family could return together. The private life failed as the requirements of 276ADE could not be met and the reality of returning as a family was considered in relation to EX.1 and it found not to warrant a grant of leave.

> The judge considered section 117 but this requires a full balancing assessment to be undertaken which is arguably missing from the determination.
>
> The grounds are arguable."

Thus the matter comes before me to decide initially whether the FtT decision discloses an error of law requiring the decision to be set aside and remade.

Error of Law Hearing

13. I heard submissions from both representatives; Mrs Pettersen on behalf of the Respondent and Mrs Sood on behalf of the Appellants. Mrs Pettersen relied in the main on the grounds seeking permission which, she said, fully sets out the material flaws in the FtT's decision. She highlighted the following:

    - The FtT makes a material error of fact because it deals with the third and fourth Appellants as minors when in fact at the time of the hearing before it both were adults and therefore they remain in the UK as adults without leave.

    - A failure on the part of the FtT to explain why the current appeals justify consideration outside the Rules, such as to allow the Judge to consider an Article 8 assessment.

    - Even if there were sufficient reasons to justify the Judge venturing into an Article 8 ECHR assessment, he has not carried out a proper balancing exercise under Article 8 by reference to Section 117b of the Rules. He is obliged to do so. The decision should therefore be set aside and remade dismissing all appeals.

14. Mrs Sood relied upon her Rule 24 Response. This included a copy of the skeleton argument which had been put before the FtT. Her Rule 24 Response appeared to take issue with and criticise the UT Judge who granted permission. The criticism appears to relate back to preliminary points which were taken before the FtT, in that the third Appellant Maria Karamat, had had her status revoked.

15. Point 5 of her Rule 24 Response states that it is of note that the UTJ had also not realised that the "seven year rule" applied to the Appellants who had all come to the UK in 2007 as minors.

16. She also submitted that the Respondent throughout in her decision making, had failed to properly analyse the Educational Psychologist's Report which covered the children's education and career pathways to Article 8. She criticised the FtT and the UT permission grant likewise.

17. Mrs Pettersen sought permission to respond. In her further response, she said that essentially the issue before came down to whether or not it would be reasonable to expect the fifth Appellant, who is the only minor left before me, to leave the UK (along with her family) and whether the Judge erred in his approach on the need to undertake a full assessment under Article 8 ECHR.

Is There an Error of Law?

18. I am satisfied that the decision of Judge Shimmin must be set aside for legal error and the decision remade and I set out my findings and reasons for this conclusion below.

19. As I understood it, the Respondent's challenge to Judge Shimmin's decision is two fold. First the Judge misdirected himself in law in failing to follow the correct legal approach in the proportionality assessment. Secondly there was insufficient reasoning to show that the Judge had considered Section 117 as he must do by undertaking a full balancing exercise and showing that the factors contained in 117 (1) the "maintenance of effective immigration control is in the public interest" was addressed by him beyond his merely saying so at [45]. I find those challenges are made out. Therefore the FtT has materially erred to the extent that the decision must be set aside and remade.

Remaking the Decision

20. Both representatives were of the view that should I find an error of law in the FtTs decision, I would be in a position to remake the decision myself; because there was no further evidence to put before me. The only other point Mrs Sood addressed me upon was to emphasise that I should have regard to the two Educational Psychologists Reports dated 2012 and 2014. She submitted that on the strength of those reports the appeals should be allowed.

Consideration

21. The evidence before me in these appeals amounts to this. Mr Karamat says that because his family came to the UK in 2007, there is nowhere now for them to return to in Pakistan. He left his eldest son in the "family home". He claims, his (Mr Karamat's) brother has now taken over that house and become "the owner" of the property. He says his daughters cannot return to Pakistan because they have had extensive education here and are now liberal thinking. It would be difficult for them to adjust to life in Pakistan and they would be viewed with suspicion because of their Western outlook.

22. He says in addition he would have to arrange a marriage for his elder daughter Maria. Both Zeeshan his son and Haleema his youngest daughter

wish to continue in higher education; the family could not afford to do this in Pakistan.

23. The children have made lots of friends here, Maria works voluntarily in the local community. In addition the children speak English and would not be able to communicate fluently in Urdu.

24. The Educational Psychologist's Report comes to the conclusion that after many continuous years of living in the UK it would be highly detrimental to the education of the two younger children in particular (Zeeshan and Haleema) as well as their health, physical and emotional wellbeing to return to Pakistan. It does however temper that with saying whilst it is certainly in the best interests of the children to remain with their parents it is not in their best interests to return them to Pakistan where they would struggle to integrate educationally and adjust to life there.

25. An update report from Miss S Noray dated July 2014 outlines that so far as Haleema is concerned, she is part-way through her GCSEs and this is a crucial time in her education. That report does go on to say Zeeshan and Haleema would not be able to pursue a higher level of education due to lack of financial resources. It outlines that Mr Karamat does not work in the UK and that the family are dependent upon charity. It did not specify the source of charity.

26. Not surprisingly Haleema wishes to remain in the United Kingdom, partly with the aim of pursuing higher education. Zeeshan likewise. The reports made no reference to who would fund their higher education here.

27. So far as the evidence is concerned, Mr Karamat came to the UK as a Chef. By his own evidence he says that he left a life and career behind in Pakistan. He sold his share in the family home. He says that he cannot go back to Pakistan because he has no permanent home there. However the plain fact is he has been in the United Kingdom since 2007 without leave. As a chef, it is hard to see what prevents him from returning to Pakistan and using that skill to obtain employment there. It is what he id in the past.

28. Much was made of the children's inability to speak and/or write Urdu. I do not find this to be either credible nor in any event a form of obstacle preventing the family from returning. I note that neither parent has shown that they have skills in the English language since neither has passed the ELTS Test. It is clear from the evidence before me that the children communicate with their parents and to do so they must communicate with them mainly in Urdu. In any event I note that Zeeshan has passed GCSE Urdu. Added to this, although it could be said that they were young when they left Pakistan, Maria left aged 15 years, Zeeshan aged 11 years and Haleema 9 years old. I do not accept therefore that they did not acquire some Urdu language skills whilst living in Pakistan. I am satisfied that they

have retained sufficient skills to show that communication there will not be an obstacle to them.

29. Section 117B sets out the public interest considerations which are applicable in all cases where an Article 8 assessment is carried out:

> "117BArticle 8: public interest considerations applicable in all cases
>
> (1)The maintenance of effective immigration controls is in the public interest.
>
> (2)It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (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."

30. Paragraph 117D provides interpretation. It is now settled law that the best interests of a child are the primary consideration and are to be considered first. It is also trite law that a period of seven years is taken as a threshold point when longevity of residence may render removal of a child disproportionate. However this principle has been tempered by both the contents of the Immigration Rules and the developing jurisprudence, which imposes a "reasonableness test".

31. Therefore it cannot be said that seven years continuous residence of itself, is sufficient to outweigh other factors involved in the public interest consideration.

32. So far as Haleema is concerned she is now 16 years of age. As often happens in these cases time has moved on since the matter was before the First-tier Tribunal. She has now completed her GCSEs and therefore is not at a critical stage of any education. She has expressed a wish to the Educational Psychologist that she would like to remain in the United Kingdom. That is hardly surprising. She wishes to go on to higher education – however that would of necessity be at public expense.

33. What therefore of countervailing factors? Haleema's parents have now been in the United Kingdom for a considerable period of time. Mr Karamat entered in 2006, lawfully as a Work Permit Holder and sent for his family to join him. However very soon after his family joined him his leave was curtailed and he was informed that he should now leave the United Kingdom together with his family. He did not do so. Instead he made several further applications all of which were refused, but still he and his family did not make arrangements to leave. They have therefore been here without leave for several years.

34. It is hard to see how this family maintains itself in the United Kingdom. The Educational Psychologist says that they live on charity. That may be so. But the upshot is that Mr Karamat is not working because he has no right to do so. There is no credible evidence that if allowed to stay Mr Karamat would be able to secure employment sufficient to meet the Rules. From the evidence before me it appears that neither Mr nor Mrs Karamat speak English to the standard required under the Rules. Whilst I accept that there is no claim for benefits by this family, nevertheless they are able to enjoy the benefits of the NHS and more particularly the British education system, to which they are not contributing.

35. Whilst this Tribunal will always hesitate to interfere with the reasoning of the First-tier Tribunal, in these appeals I find the FtT has placed too much emphasis upon the fact that the third fourth and fifth Appellants have been educated in the United Kingdom. I draw strength for this from the guidance given in *EV (Philippines)* [2014] EWCA Civ 874 where the Court of Appeal considered the fact that the education which the children had enjoyed in the United Kingdom as that which they might experience in their home country was "not determinative". Lewison LJ noted:

> "…I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world."

36. The same principles apply in the present cases. As in *EV* it may well be said that the FtT considered, as did the Educational Psychologists, that it would be in the best interests of Haleema and her two siblings to remain here and continue their education in the UK. However such a consideration, in circumstances where family life with siblings and parents continue abroad, will rarely outweigh the public interest concerned with the maintenance of immigration control.

37. There will of course be disruption to the family's life but the evidence in these appeals falls far short of that required to enable the Appellants to say that such a course of action would be unreasonable, where the children's parents whom they will accompany to live in Pakistan as a family, have no immigration status.

NOTICE OF DECISION

The decision of the First-tier Tribunal which was promulgated on 17th November 2014 is set aside. I remake the decision. The appeals of the Appellants are dismissed under the Immigration Rules. The appeals are also dismissed on human rights grounds (Article 8 ECHR)

No anonymity direction is made

Signature
Dated

Upper Tribunal Judge Roberts