Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/19055/2014
IA/19056/2014
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THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24th July 2015	**On 12th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

A M (FIRST APPELLANT)
S A (SECOND APPELLANT)
K A (THIRD APPELLANT)
(ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr J Plowright of Counsel instructed by Nasim & Co Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellants appealed against a decision of Judge of the First-tier Tribunal Davey (the judge) promulgated on 11th December 2014.

2. The Appellants are citizens of Pakistan born 9th August 1973, 26th December 1978, and 25th May 2007 respectively. The first and second Appellants are husband and wife, and are the parents of the third Appellant who is their daughter and who was born in the United Kingdom. The first and second Appellants have another child who is not a party to these proceedings but is dependent upon them, that being their son born in this country on 6th June 2012.

3. The first Appellant arrived in the United Kingdom on 23rd July 2003 and was granted leave to enter as a student until 31st December 2004. He was subsequently granted further leave to remain as a student until 31st March 2006.

4. The second Appellant arrived in the United Kingdom on 11th January 2006 with leave valid until 31st March 2006 as the first Appellant's dependant.

5. The first and second Appellants were subsequently granted further leave to remain as a student and dependant respectively until 30th November 2007. Further leave to remain in the same capacities was then granted until 30th November 2008, with the third Appellant also being granted leave as the first Appellant's dependant.

6. On 29th October 2008 the first Appellant submitted a Tier 1 (Post-Study Work) application which was refused as the qualification submitted was said to have been obtained from the Cambridge College of Learning, and was false. The first Appellant appealed, and his appeal was dismissed in a decision promulgated on 10th February 2010, and a finding was made that he had submitted a false diploma with his application. The first Appellant became appeal rights exhausted on 10th March 2010.

7. On 5th March 2010 the first Appellant submitted an application for further leave to remain, with the second and third Appellants as his dependants. This was refused on 20th May 2010. On 9th June 2010 a request was made for reconsideration, which resulted in the Respondent making decisions dated 8th April 2014 to remove the Appellants from the United Kingdom. The first Appellant had an in-country right of appeal, the second and third Appellants' decisions indicated that their appeal had to be made when they left the United Kingdom. The Appellants all entered appeals while in-country, and a Duty Judge at the First-tier Tribunal Support Centre decided that the second and third Appellants had in-country appeals because they had made human rights claims prior to the decisions to remove them, and therefore could appeal from within the UK pursuant to section 92 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). The Respondent's reasons for refusing the applications once they had been reconsidered, are contained in a letter dated 4th April 2014 which may be summarised as follows:

8. Family life was considered with reference to Appendix FM, the Respondent concluding that there was no category within Appendix FM under which the Appellants could qualify for a grant of leave.

9. The Respondent considered the best interests of the third Appellant, concluding that her best interests would be served by remaining with her parents and returning to Pakistan.

10. The Respondent considered private life with regard to paragraph 276ADE of the Immigration Rules not accepting that the Appellants could qualify for leave to remain under any of the provisions contained therein. The Respondent concluded that if the Appellants were removed from the United Kingdom, there would be no breach of Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

11. The appeals were heard together by the judge on 26th November 2014. The judge found that the appeals could not succeed with reference to Appendix FM, or paragraph 276ADE. The judge went on to consider Article 8 outside the Immigration Rules concluding that Article 8 would not be breached by the Appellants' removal from the UK.

12. The Appellants applied for and were granted permission to appeal to the Upper Tribunal by Judge Pooler. The appeal came before me on 29th May 2015. After hearing submissions from both representatives I found that the judge had erred in that there was no specific consideration and findings made as to the best interests of the third Appellant, and no specific consideration of section 117B(6) of the 2002 Act, and no adequate analysis as to whether it would be reasonable to expect the third Appellant to leave the United Kingdom. The judge had made some conflicting findings, finding in paragraph 20 that there were no material factors militating in favour of the Appellants remaining in the UK, but in paragraph 26 finding that "there plainly are factors which weigh in favour of them remaining, at least principally the age and experiences of their daughter."

13. I set aside the decision of the First-tier Tribunal. No findings were preserved. The hearing was adjourned for further evidence to be given, so that the decision could be re-made by the Upper Tribunal.

Re-making the Decision

Preliminary Issues

14. The appeal came back before me on 24th July 2015.

15. I ascertained that I had all documentation upon which the parties intended to rely, and that each party had served the other with any documents upon which reliance was to be placed.

16. I had the Respondent's bundle with Annexes A – F, and the Appellants' bundle comprising 212 pages, both of these bundles had been before the First-tier Tribunal. I had also received a letter from the Appellants' solicitors dated 15th July 2015 enclosing an additional witness statement of the first Appellant dated 15th July 2015,

a letter from the third Appellant's class teacher, and the third Appellant's school report dated July 2015.

17. I received from Mr Plowright his skeleton argument dated 24th July 2015 and the Home Office Immigration Directorate Instruction on Family Migration – April 2015, together with a copy of **EB Kosovo [2008] UKHL 41**.

18. I received from Mr Wilding **EV (Philippines) [2014] EWCA Civ 874**, and **Nasim and others (Article 8) [2014] UKUT 25 (IAC)**.

19. Mr Plowright informed me that oral evidence was to be given by the first and second Appellants. No reliance was placed upon Appendix FM, but the first and second Appellants relied upon paragraph 276ADE(vi) in relation to their private life, and the Appellants relied upon Article 8 outside the Immigration Rules.

20. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

Oral Evidence

21. The first Appellant gave evidence without the need for an interpreter. There were no difficulties in communication. The first Appellant adopted his witness statements dated 23rd June 2014 and 15th July 2015. In summary the evidence contained in his first witness statement set out his immigration history, which has already been described earlier in this decision. The first Appellant contended that his appeal should be allowed on the basis of his family and private life. He has lived in the UK since 2003 and now has close ties with British society. He and his wife have two children. The family could not be expected to re-start their lives in Pakistan. He would have no job and would be unable to provide for his family. He contended that his children speak only English (he later confirmed in oral evidence that this was not accurate) and had no awareness of Pakistani culture.

22. The Appellant's daughter is in full-time education and has made friends in this country. There had been a considerable delay between requesting reconsideration on 9th June 2010 of the Respondent's earlier decision, and the Respondent's decision refusing the application, dated 4th April 2014.

23. The first Appellant had contributed to this country by working and paying taxes and national insurance, and had also undertaken educational courses.

24. In his second witness statement the first Appellant explained that the third Appellant was aware that the family may have to leave the UK and was upset about this. She did not wish to leave her school and her friends, and her life in this country. The family as a whole were suffering anxiety and depression caused by the uncertainty of their immigration status.

25. The first Appellant was questioned by both representatives and I asked some questions by way of clarification. I have recorded all questions and answers in my

Record of Proceedings and it is not necessary to reiterate them in full here. In very brief summary the first Appellant told Mr Plowright that his daughter is very close to her friends in this country. She wanted to stay in this country because her school and her mosque are here. The first Appellant confirmed that his daughter spoke Urdu.

26. When cross-examined the first Appellant confirmed that he had family in Pakistan, those being his parents and two brothers and their families. He pointed out he also has siblings in the UK. He accepted that his daughter could go to school in Pakistan, but pointed out that the education system in the UK is better and she is doing well at school.

27. Answering a question that I put, the first Appellant explained that English and Urdu were spoken at home, and the family speak Urdu because the third Appellant goes to the mosque, and if she speaks Urdu it would be easier for her to learn Arabic which is the language used in the mosque.

28. The second Appellant gave evidence without the need for an interpreter. There were no difficulties in communication. The second Appellant adopted her witness statement dated 23rd June 2014 which is similar in terms to the first Appellant's statement.

29. In brief summary the second Appellant said in oral evidence when answering questions put by Mr Plowright that the family wish to remain in the UK because the first Appellant had lived here for twelve years, and the second Appellant had been here for ten years. Both their children were born in this country. They would not feel safe in Pakistan, and the third Appellant has friends at school in this country.

30. When cross-examined the second Appellant accepted that she has family in Pakistan, her parents, a sister and a brother. She also has a sibling in this country. She said that schools are expensive in Pakistan.

31. In answering a question that I put, the second Appellant explained that she knew schools were expensive because her sister's children in Pakistan go to private schools.

The Respondent's Submissions

32. Mr Wilding relied upon the reasons for refusal letter dated 4th April 2014. He submitted that there was no evidence that the provisions of paragraph 276ADE(vi) could be met. Both the first and second Appellants were born and educated in Pakistan and they have family members in that country. There was no suggestion that the first Appellant would be unable to work in Pakistan.

33. Turning to Article 8 outside the Immigration Rules, Mr Wilding submitted that the appeal centred on the third Appellant. It was submitted that notwithstanding that she had been born in this country, it would be reasonable for the family to return together to Pakistan.

34. Mr Wilding placed reliance upon paragraphs 43 – 45 of **EV (Philippines)** and in particular paragraph 44. He submitted that the circumstances in this case, were similar to the circumstances in **EV (Philippines)**.

35. I was asked to note that the first Appellant had been found to have submitted a false diploma when applying for leave to remain as a Tier 1 (Post-Study Worker) Migrant and his appeal against that refusal had been dismissed.

36. Mr Wilding referred to **Nasim and Others** to support his submission that no great weight should be placed on the fact that an individual has no criminal convictions.

37. Mr Wilding referred to paragraph 11.2.4 of the IDI Guidance in support of his submission that it would be reasonable for the third Appellant to leave the United Kingdom.

The Appellants' Submissions

38. Mr Plowright relied upon his skeleton argument. In relation to paragraph 276ADE, I was asked to find that there would be very significant obstacles to the reintegration of the first and second Appellants back into Pakistan. It was accepted that the third Appellant could not rely upon paragraph 276ADE(iv) because although she had now lived in the UK in excess of seven years, she had not done so when the application for leave to remain was made, on 5th March 2010.

39. It was submitted that the appeals should be allowed with reference to Article 8 outside the Immigration Rules. Reliance was placed upon section 117B(6). It was submitted that the third Appellant is a qualifying child because she has lived in the UK in excess of seven years, and that it would not be reasonable to expect her to leave the UK. I was asked to take into account that she had never visited Pakistan, and that she had been born in the UK, and educated here.

40. Mr Plowright pointed out that the Appellants had been in the UK longer than the family in **EV (Philippines)**.

41. I was also asked to take into account the delay between the application for reconsideration of the Respondent's earlier decision, which had been made on 9th June 2010, and the Respondent's decision being made on 4th April 2014, and reliance was placed upon **EB Kosovo** in support of the submission that this delay was relevant. Mr Plowright relied upon paragraphs 14 – 16 of **EB Kosovo**. I was asked to find, taking into account the Respondent's delay in making a decision, that less weight should be placed on the need to maintain effective immigration control, when the Secretary of State delays enforcing those controls.

42. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

43. I have taken into account all the evidence, both oral and documentary, placed before me. I have also taken into account the submissions made by both representatives. I have considered the evidence in the round and taken into account the circumstances as at the date of hearing. The burden of proof when considering the Immigration Rules rests on the Appellants, and the standard is a balance of probability.

44. In relation to Article 8 the Appellants have the burden of proving that they have established a family and/or private life that engages Article 8, and the Respondent must then prove that the decision is in accordance with the law, necessary and proportionate.

45. The Appellants do not rely upon Appendix FM, accepting that their appeals cannot succeed under any of the provisions contained therein, and I find as a fact, that this concession is rightly made.

46. It is also accepted that the third Appellant cannot succeed by relying upon paragraph 276ADE(iv), and again I find that this concession is rightly made.

47. The first and second Appellants rely upon paragraph 276ADE(vi) in relation to the private lives they have established in this country. This involves proving that there would be very significant obstacles to integration back into Pakistan. I find this to be a high threshold.

48. I do not find that the Appellants have discharged the burden of proof for the following reasons.

49. The first and second Appellants are citizens of Pakistan and have lived the greater part of their lives in that country. They were educated there, and would have no language or cultural difficulties if they returned. There are no relevant medical issues. It has not been contended that medical treatment is required that would not be available in Pakistan.

50. The first Appellant has lived in this country since July 2003, and the second Appellant since January 2006 and I have taken this into account when assessing whether there would be significant obstacles to their return. I have also taken into account that they have two children, both of whom were born in the United Kingdom. I have considered the best interests of the children as a primary consideration, and have concluded that their best interests would be to remain with their parents as a family unit. I will expand on this later in this decision when I record my findings in relation to Article 8 outside the Immigration Rules, and my consideration of section 117B(6) of the 2002 Act.

51. The first and second Appellants have relatives in Pakistan. They both have parents and siblings, and I am satisfied that they remain in touch with family members. By way of example the second Appellant in her oral evidence confirmed that she had been in contact with her sister who lives in Karachi, and they had discussed the

expense of private schooling in Pakistan. I accept the evidence given by the first and second Appellants that their family members all live in Karachi, although I also accept that they have siblings in the UK.

52. The first Appellant has worked and studied in the UK. I find no reason why he would not be able to find employment in Pakistan, and I am satisfied that the Appellants would have support from family members, and I find that they would be able to find accommodation. The children, when the youngest is old enough, would have access to education in Pakistan.

53. For the above reasons, the first and second Appellants have not proved that there would be very significant obstacles to integration back into Pakistan.

54. In relation to Article 8 outside the Immigration Rules, it was not contended by the Respondent that this should not be considered. In the circumstances of this case, I find that it is appropriate to consider Article 8 outside the Immigration Rules.

55. I have taken into account the principles in **Razgar [2004] UKHL 27** which involves answering the following questions;

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
(3) If so, is such interference in accordance with the law?
(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

56. I accept that the Appellants have established a family life with each other, and have established private lives while in the United Kingdom. I do not accept, and it has not been suggested, that the Appellants have established family life that would engage Article 8, with the siblings of the first and second Appellants.

57. I therefore conclude that Article 8 is engaged in relation to both family and private life. I do not find that the Respondent's decision would interfere with the family life established by the Appellants, as it is not proposed that they should be separated. The Respondent proposes to remove the family as a whole. There would however be an interference with the private lives that have been established.

58. Moving on to the fourth question posed in **Razgar**, I find that the proposed interference is necessary in the interests of maintaining effective immigration control, which is necessary in order to maintain the economic well-being of the country.

59. The central issue in these appeals, is whether the interference that would be caused by removal, is proportionate to the legitimate public end sought to be achieved.

60. I have considered the best interests of the third Appellant, and her younger brother as a primary consideration. I find that it is clear that the best interests of the children would be to remain with both their parents, and to carry on their life in a family unit. I must then decide whether the best interests would be served by remaining with their parents in the United Kingdom, or moving to Pakistan.

61. I have considered the Upper Tribunal decision **Azimi-Moayed (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)**. In summary it was found that as a starting point it is in the best interests of children to be with both their parents, and if both parents are being removed from the United Kingdom, then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.

62. It is generally in the interests of children to have stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. Lengthy residence in a country other that the state of origin can lead to development of social, cultural and educational ties, and seven years has been identified as lengthy residence. The Tribunal found that seven years from age four is likely to be more significant to a child than the first seven years of life.

63. I have also considered **Zoumbas [2013] UKSC 74**. In that decision, in paragraph 25 it was found that it was legitimate for a decision maker to ask herself first whether it would be have been proportionate to remove the parents if they had no children and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance.

64. In paragraph 35 of **EV (Philippines)** Christopher Clarke LJ gave guidance as to factors that should be considered when considering the best interests of children. These were;

- their age;
- the length of time that they have been here;
- how long they have been in education;
- what stage their education has reached;
- to what extent they have become distanced from the country to which it is proposed that they return;
- how renewable their connection with it may be;
- to what extent they will have linguistic, medical or other difficulties in adapting to life in that country;
- the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

65. In paragraph 58 of **EV (Philippines)** Lewison LJ stated;

> 58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?

66. I have taken the above into account. If the first and second Appellants did not have children, then in my view, as they cannot satisfy the Immigration Rules, it would be appropriate to remove them to Pakistan, and this would not breach Article 8.

67. The first and second Appellants have only ever had limited leave to remain, with no expectation of settlement. The first Appellant submitted a false document in an effort to remain in this country. They have had no leave since November 2008 and therefore have remained in this country illegally. Section 117B(1) states that the maintenance of effective immigration controls is in the public interest. Sub-section (4) states that little weight should be given to a private life established at a time when the person is in the United Kingdom unlawfully, and sub-section (5) states that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

68. Both the first and second Appellants initially had a precarious immigration status because they only had limited leave to remain, and thereafter they have remained unlawfully, and therefore little weight is given to their private life. In an event, very little evidence has been submitted as to their private life. There have been four very brief letters contained within the bundle of documents supporting them, and my view is that the main issue in these appeals, centres on the third Appellant. I set out below section 117B(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.

69. I accept that the third Appellant is a qualifying child because she has lived in this country in excess of seven years. I also accept that the first and second Appellants have a genuine and subsisting parental relationship with her. The question is whether it would be reasonable to expect the child to leave the United Kingdom.

70. I take into account the third Appellant is now 8 years of age and was born in this country and has lived here since birth. She has been in education for approximately three years and is at an early stage in her education.

71. There are no relevant medical issues and there would be no significant risk to her health if removed to Pakistan. The third Appellant and her parents are citizens of Pakistan.

72. The family have relatives in Pakistan, and I find that the third Appellant would have a connection to Pakistan, in that she would not have linguistic difficulties, she would have access to education, and there would be no cultural or religious difficulties. Reference has been made to the third Appellant attending a mosque in this country, and it has not been suggested that there would be any difficulties with her attending a mosque in Pakistan. I take into account that the third Appellant is not a British citizen, and that she would be returning to Pakistan with her family.

73. I find that there would be support from family members, and that the first Appellant would be able to find employment and provide accommodation for the family.

74. I have taken into account that the third Appellant has made friends at school, and that the family wish to remain in the UK. I have also taken into account the delay between the request for reconsideration and the Respondent's decisions dated 8th April 2014.

75. However, for the reasons given above, I find that it would be reasonable for the third Appellant to leave with her family, and settle in Pakistan, the country of which she is a citizen.

76. Section 117B(6) does not apply to the third Appellant's younger brother as he is not a qualifying child, although I have considered his best interests as a primary consideration, and concluded, particularly taking into account his young age, that his best interests would be to remain with his parents and return to Pakistan.

77. In considering section 117B, I have also taken into account sub-sections (2) and (3) which state that it is in the public interest that an individual can speak English and be financially independent. I accept that the Appellants can speak English, but I do not accept that they are financially independent, as the first Appellant does not have permission to take employment. The fact that they can speak English does not mean that they have a positive right to a grant of leave, as was confirmed by the Upper Tribunal in **AM Malawi [2015] UKUT 0260 (IAC)**.

78. In conclusion, the Appellants cannot succeed with reference to paragraph 276ADE, nor can they succeed with their appeals in relation to Article 8 outside the rules. I find that significant weight must be attached to the fact that the Appellants cannot satisfy the rules, and significant weight must be given to the need to maintain effective immigration controls which is in the public interest. The best interests of the children are to remain with their parents, and it is reasonable for the third Appellant to leave the United Kingdom.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision. The appeals are dismissed under the Immigration Rules.

The appeals are dismissed on human rights grounds.

Anonymity

The First-tier Tribunal made an anonymity direction. I continue that order pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 because the third Appellant is a minor and these appeals involve considering her best interests.

Signed Date

Deputy Upper Tribunal Judge M A Hall 2nd August 2015

TO THE RESPONDENT
FEE AWARD

The appeals are dismissed. There is no fee award.

Signed Date

Deputy Upper Tribunal Judge M A Hall 2nd August 2015