Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/35032/2014
IA/35037/2014
IA/35040/2014
IA/35046/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4 August 2015	**On 26 August 2015**

Before

UPPER TRIBUNAL JUDGE GILL
DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAQIB SHAHZAD
HAJRA SAQIB
ZERAK SAQIB
RAYNAH SAQIB
(NO ANONYMITY ORDER MADE)

Respondents

Representation:
For the Appellant: Mr Abbas, of Imperium Group Immigration Specialists
For the Respondent: Ms Isherwood a Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is against the decision promulgated on 13 April 2015 of First-tier Tribunal Judge Bowler ("the Judge") which allowed the respondents' appeals under a second stage Article 8 ECHR assessment.

2. The applicant at this hearing is the Secretary of State. For the sake of consistency with the decision in the First-tier Tribunal we shall refer to her as the respondent and to the family as the appellants.

Background

3. The 1st and 2nd appellants are spouses, born (respectively) on 7 April 1978 and 14 October 1977. They are the parents of the other minor appellants who were born on 20 August 2005 and 11 April 2007 respectively. They are all citizens of Pakistan. The 1st appellant came to the UK on 25 July 2004 to study with leave extended on various occasions until 28 February 2009. The 2nd appellant came to the UK on 25 October 2004 to study with leave extended on various occasions until 18 February 2009. They became overstayers thereafter as various applications were rejected as invalid or refused. The 3rd and 4th appellants were born in the United Kingdom. As at the date of the Judge's determination, they were 9 years 7 months and 7 years 11 months old, respectively.

4. On 16 March 2012 they applied for leave to remain on the basis of their family life. The respondent refused the applications. Judicial review proceedings against the refusal were settled with the respondent agreeing to reconsider the appellants' applications within three months. On 14 July 2014, the respondent decided to remove the appellants. This is the decision that was the subject of the appeal before the Judge. The respondent's reasons for refusing the applications were set out in a letter dated 14 July 2014.

5. The Judge dismissed the appeal under the Immigration Rules. In relation to para 276, she dismissed the appeals of the 3rd and 4th appellants on the basis that, as at the date of their applications (16 March 2012), neither had lived in the United Kingdom continuously for at least seven years. However, she allowed the appeals outside the Immigration Rules, having assessed the Article 8 ECHR private life claims under jurisprudence relating to Article 8. She did not consider the right to family life.

6. The Judge's assessment is set out at paragraphs 45 to 66. For reasons which we will give shortly, we decided to set aside the Judge's decision and re-make the decision on the appeals. In re-making the decision, we preserved the Judge's findings of fact, to the extent not vitiated by the errors of law found. It is therefore appropriate to set out paragraphs 45 to 66 of the determination. The preserved findings in relation to the 3rd and 4th appellants are underlined. Since the Judge's findings in relation to the 1st and 2nd appellants were not challenged, all of her findings regarding them, i.e. the findings at 46 to 48, stand.

45. The Appellants each have a private life in the UK and the decision would be an interference with those private lives.

46. Turning to question (2), considering Appellants 1 and 2 alone initially, their private life will have developed from their studies and Appellant 1's work, although little evidence was produced regarding the extent of their private life. If Appellants 1 and 2 went back to Pakistan there is no reason why they could not use their skills to obtain employment there. The qualifications they have gained here could be used by them in Pakistan. I apply the reasoning in the case of MG (assessing interference with private life) Serbia and Montenegro [2005] UKAIT 00113 where it was stated that "a person's job and precise programme of studies may be different in the country to which he is to be returned and his network of friendships and other acquaintances is likely to be different too, but his private life will continue in respect of all its essential elements". Appellant 1 and 2's work, network of friendships and other acquaintances are likely to be different in Pakistan, but in a similar way their private life would continue in respect of all its essential elements. Applying the MG case referred to, the Respondent's decision would not be an interference with that private life of such gravity as potentially to engage Article 8.

47. The mental health problems Appellant 2 has suffered and is being treated for do not alter this conclusion. No evidence was put to me to show that she would be unable to access mental health treatment in Pakistan.

48. The fact that Appellants 1 and 2 have their money tied up in a house which they bought also does not affect my decision. The house could be sold (and it is now fortunate that a sale would produce a profit rather than a loss).

49. However, the situation is different when I consider Appellants 3 and 4. Their private life results from their school life and friendships they have developed inside and outside school. They have known no other life than their life in the UK and are immersed in UK society and culture. I therefore find that the decision of the Respondent would have consequences of such gravity as to potentially engage Article 8 in respect of Appellants 3 and 4.

50. The answer to question (3) is yes: the interference is in accordance with the law. It arises from the application of the Immigration Rules.

51. Turning to question (4), it would be in furtherance of a permitted aim under Article 8.2, namely the preservation of the rights and freedoms of others by the maintenance of a system of immigration control and the interests of the economic well-being of the UK by the imposition of requirements for qualifying for leave to remain. The remaining question is whether it would be proportionate having regard to that aim.

52. This is question (5). The crux of the issue is whether the Respondent's decision was proportionate having regard to the importance of the public interest in the maintenance of an effective system of immigration control primarily through the Immigration Rules.

53. In assessing the proportionality of the Respondent's decision I must have regard to Section 55 BIA 2009 and the relevant case law. Mr Abbas has referred me to the cases of R (on the application of TS) v SSHD [2010]

EWHC 2614 and ZH (Tanzania) v SSHD [2011] UKSC 04. I also refer to the cases of Zoumbas v SSHD [2013] UKSC 74 and EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 where the approach to be taken was set out.

54. It is clear from the jurisprudence that the best interests of a child are in an integral part of the proportionality assessment under Article 8 ECHR and, in making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration. The child's best interests do not of themselves have the status of the paramount consideration. Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant.

55. I must also have regard to Section 117B NIAA which sets out specific public interest considerations I must consider in carrying out the proportionality assessment.

56. Recognising those requirements I find that the decision taken by the Respondent was not proportionate for the following reasons.

57. It is clearly in the best interests of Appellant 3 and 4 to be with Appellant 1 and 2 as their parents. However, that is not the only element of the best interests of Appellant 3 and 4 that I should consider. I note the case of LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (IAC). Appellant 3 and 4's educational welfare, as part of the UK education system where they are clearly thriving (as shown by the various school papers in pages 150-163 of the Appellant' bundle), points strongly to their continued residence here as necessary to promote those interests. They only speak English although they can understand a few words in Urdu. I note that in the LD case it was stated that very weighty reasons are needed to justify separating a child from a community in which he or she had grown up and lived for most of his or her life.

58. I also refer to the case of E-A (Article 8 - best interests of child) Nigeria [2011] UKUT 315 (IAC) and I take account of the statements regarding the impact of residence at different times in a child's life. I note the statement in that judgement that "During the period of residence from birth to the age of about four, the child will be primarily focused on self and the caring parents or guardian. Long residence after this age is likely to have greater impact on the well-being of the child." Appellants 3 and 4 have spent all their lives in the UK and all their education has been in the UK. Those years have been formative years for them when they will have started to make relationships outside their relationship with their parents. While I recognise that Appellants 3 and 4 are bright and industrious children who may be able to adapt to a new life in Pakistan and that Pakistan has a functioning education system, that does not mean that it is in their best interests to move to Pakistan.

59. I have considered to what extent Appellants 3 and 4 have become distanced from Pakistan and how renewable their connection with Pakistan may be. They have very limited contact with family in Pakistan. Appellant 1's family in Pakistan has issues with Appellants 2, 3 and 4 because of the love marriage. Appellant 2's mother cannot speak with them as she does not

speak English. The family in Pakistan are remote to Appellants 3 and 4 as they have had no meaningful contact with them. They have never had more than a limited and indirect connection with Pakistan through their parents.

60. Considering all these factors I therefore find that it is in the best interests of Appellant 3 and 4 to remain in the UK with their parents, Appellants 1 and 2.

61. In relation to section 117B NIAA 2002 I find that all the Appellants speak English. They are and have been financially independent and have not been a burden on the taxpayer: Appellant 1 has taken on some casual work and they have taken in lodgers to provide income.

62. However, the private lives of all the Appellants have been established by them primarily while their immigration status has been precarious since 18 and 28 February 2009. Section 117B NIAA 2002 directs that little weight should be given to a private life established when a person's immigration status is precarious. However, it also states that the public interest does not require removal where a person has a genuine and subsisting relationship with a "qualifying child" and it would not be reasonable to expect the child to leave the UK. Both Appellants 3 and 4 are "qualifying children" as they are under 18 years old and have lived in the UK for a continuous period of 7 years or more. For this purpose I may take into account the length of time they have lived in the UK as at the date of the hearing. Appellant 3 has lived in the UK for 9 years 7 months. Appellant 4 has lived in the UK for 7 years 11 months. I find that Appellants 1 and 2 are in genuine and subsisting relationships with Appellants 3 and 4.

63. This leaves the question as to whether it would be reasonable to expect Appellants 3 and 4 to leave the UK. I find that it would not be reasonable to expect Appellants 3 and 4 to leave the UK for the following reasons. They have spent all their lives in the UK and all their education has been in the UK. They only speak English. They are nearly 8 and 10 years old and are therefore at ages when they have formed strong social and cultural links to the UK, which is the only country they know. If they left the UK they would be going to Pakistan where they would have to deal with a very different society and culture of which they have no experience, Appellant 3 only having visited as a baby and Appellant 4 never having visited.

64. I have also considered the impact of other factors in the proportionality exercise. I take into account that although their immigration status was precarious from 2009, they have never hidden from the immigration authorities and have never been deceitful about their status. They made numerous unsuccessful attempts to apply for leave to remain in 2009 and then wrote claiming their Article 8 rights. After a paid application system for Article 8 claims was introduced they applied on that basis in March 2012.

65. The only countervailing factor which Section 117B set against the factors identified above including the best interests of Appellants 3 and 4 is the maintenance of effective immigration controls, but for the reasons stated

above Section 117B provides that it is not in the public interest to remove the Appellants.

66. Therefore considering all the factors which are in the Appellants' favour under Section 117B NIAA 2002, the best interests of the children and the fact that it is not in the public interest to remove Appellants 1 and 2, I find that the decision taken by the Respondent was not necessary and proportionate. The appeal on human rights grounds under Article 8 ECHR is allowed.

7. First-tier Tribunal Judge Davies granted permission to appeal on the basis that it was arguable that;

(1) "The Judge has not given the correct weight to the fact that the Appellants did not have leave to remain in the United Kingdom",

(2) "The Judge has given undue weight to both the minor Appellants educational requirements and the length of time they had resided in the United Kingdom", and

(3) "The Judges [sic] findings as to the ability of the Appellants to reintegrate into Pakistani society do not appear to be based on the evidence and appear to have given little regard to the fact that the Appellants will be returned as a family unit."

8. We note here that no application for permission to appeal against the dismissal of the appeal by the Judge under the Immigration Rules was made by the appellants. That part of the decision therefore stands.

Error of law

9. Ms Isherwood submitted that the family's leave had ceased in 2009 and that they had no basis to remain in the UK. The reasons they wanted to stay were because the children were at school, and they wanted to start a business. The 2nd Appellant had obtained medical treatment. The Judge had not properly considered the case law principles and in particular those identified in EV (Philippines) and Others v SSHD [2014] EWCA Civ 874. Reliance was also placed on AM (S 117B) Malawi [2015] UKUT 0260 (IAC), Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) and Zoumbas v SSHD [2013] UKSC 74. They would be returned as a family and had no entitlement to remain here. They have always only had a temporary capacity here. The length of the residence was not determinative. They had no legitimate expectation of living here. The Judge when considering private life must look at the situation of the family as a whole. S 117B of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") was stated but not applied.

10. Mr Abbas submitted that the judgment was well reasoned. The Judge correctly applied the guidance in EV (Philippines). The facts here can be distinguished from EV (Philippines) as in that case the children were not born here, were

younger, and had lived here for less time. The 3rd Appellant here is almost eligible to be registered as a British citizen. The children are qualifying children within the meaning of Appendix FM EX(1)(a) of the Immigration Rules and accordingly the family do not need to meet certain eligibility requirements for leave to remain as it is not reasonable to expect them to leave the UK. The Judge was aware of the need to apply little weight to their private lives and did not need to explicitly mention everything. There was no material error of law as the Judge was entitled to make the findings she did. It is for the Judge to determine the facts and weight to apply to individual facts. It would be disproportionate to require them to leave given the children's integration

Case law

11. We were specifically referred to EV (Philippines) (paragraphs 34 to 37 and 58 to 60), AM (Malawi) (head note 4 and 6), Forman (head note 1), Zoumbas (paragraph 24), and Green (Article 8 – new rules) [2013] UKUT 00254 (IAC) (paragraph 38). We will not set out the relevant extracts but have considered them all and apply the principles derived from them.

Discussion and decision on error of law

12. We are satisfied that the Judge made a material error of law in her failure to properly apply s117B of the 2002 Act. The following are our reasons:

13. At paragraph 65, the Judge said that only factor which countervailed the factors in favour of the children was the maintenance of immigration control. It is therefore readily apparent that she completely failed to consider the fact that the children are at state school and the 2nd Appellant has accessed the NHS for medical treatment. They are not and never have been financially independent and are and have been a burden on the taxpayer. The failure to have regard to that statutory factor rendered that assessment fatally flawed. This is entirely separate to the need to maintain an effective immigration control.

14. This is not just a disagreement with the weight given to a factor (Green) but completely ignoring a statutorily relevant factor. She ignored the financial burden on the taxpayer in paragraph 62 and despite saying in paragraph 55 that she had regard to s117B of the 20002 Act she failed to apply all of it.

15. At paragraph 64, the Judge said that the immigration status of the appellants was precarious from 2009. Leaving aside, for present purposes, the immigration status of the 3rd and 4th appellants, the Judge erred in stating that the immigration status of the 1st and 2nd appellants was precarious from 2009. Their immigration status was precarious from the start, as they arrived as students. From 2009, they have been in the United Kingdom unlawfully. Section 117B distinguishes between immigration status that is unlawful (see s.117B(4) and immigration status that is precarious (see s.117B(5)). This misunderstanding as to the true position in relation to the 1st and 2nd appellants led the Judge to err in

her approach to the balancing exercise, as it led her to accord less weight to the state's interests, given that the greater period for which the immigration status of the 1st and 2nd appellants was precarious or unlawful.

16. If the Judge had not erred in leaving out of account an aspect of the state's interests (whether the appellants were a burden on taxpayers) and in misunderstanding the true immigration status of the 1st and 2nd appellants, she may well have reached a different conclusion when balancing the state's interests against the circumstances of the appellants, in particular, the 3rd and 4th appellants.

17. We therefore find that there is a material error of law, announced that to the parties, and set the Article 8 ECHR decision aside.

Re-making the decision

18. Mr Abbas submitted that the circumstances had changed over time. The 3rd appellant was due to start High School in September and would soon be eligible for British nationality. The family had been here lawfully until 2009. The adults had studied, worked, and made contributions. It was accepted that they are now a burden on the state but previously they were entitled to access educational services. The children's position has to be looked at independently of the immigration status of the adults as explained in EV (Philippines). They have been here for more than 7 years and are at a crucial stage of their education. The 3rd appellant has only been to Pakistan for 1 month whilst an infant, and the 4th appellant has never been to Pakistan. It will be hard to adapt linguistically. The best interest of the children outweighs the needs of immigration control given the depth of the attachment. This is not trumped by the contention that they would return as a family unit as, if so, the rules and legislation would not take account of a qualifying child as a child has attachments.

19. Ms Isherwood submitted that the family have not lost ties with family in Pakistan. The 1st appellant was sponsored by his father to study here and they still have contact, and the 2nd appellant's father helped them purchase their house. They said that they want to stay to run a business and for the children's education. They always intended to stay permanently. They are and will be a burden on the state as the children are at state school and the family have received NHS treatment. The facts here are in some respects worse for these appellants than in EV (Philippines) and AM (Malawi), as in those cases the children each arrived with leave. It is clear from AM (Malawi) that the mere presence of the children in the UK, and their academic success, was not a trump card. They would return to Pakistan as a family unit and it is reasonable to expect them to do so where the children can be educated in Pakistan and they would have the assistance of immediate family to help with integration. Little

weight is to be attached to their private life as it was all developed while their leave was precarious.

20. Mr Abbas submitted that the children here are in a stronger position than those in EV (Philippines) as in this case they have been here for far longer and they do not share the culture of their parent's home country. The children's circumstances must be considered away from their parent's circumstances. They are attached to the community here. The 3rd appellant is going to a new school here with the same peer group. In Pakistan he would struggle to relate to his new circumstances. Mr Abbas accepted that they can be housed and educated in Pakistan.

Case Law

21. We note here the guidance contained in MM and Others v Secretary of State for the Home Department [2014] EWCA Civ 985 that, if the relevant rule does not provide a complete code, then the Article 8 proportionality exercise should be undertaken. There will generally be no or only a relatively small gap between the new rules and the requirements of Article 8 in individual cases. The position was further clarified in Secretary of State for the Home Department v SS (Congo) [2015] EWCA Civ 387 where it was confirmed that compelling circumstances would need to be identified to support a claim for a grant of leave to remain outside the new Immigration Rules in Appendix FM.

Discussion

22. The appellants did not apply for permission to appeal against the Judge's decision to dismiss the appeal under the Immigration Rules. As we have stated (paragraph 8 above) that decision stands. We are not therefore required to decide for the purpose of Appendix FM – EX.1. (a) (ii) whether it would be reasonable to expect the children to leave the UK and return to Pakistan. However, we shall consider that issue below in relation to the assessment of Article 8 outside the Immigration Rules.

23. As we have stated above, we have underlined the preserved findings of the Judge at paragraph 7 above as well as the unchallenged findings in relation to the 1st and 2nd appellants. We informed the parties of the preserved findings in paragraphs 57 to 64 before we proceeded to re-make the decision and that the unchallenged findings in relation to the 1st and 2nd appellants at paragraphs 46 to 48 stand. Given these findings, it is not necessary for us to conduct a full five-step analysis of the Article 8 claims of the appellants outside the Immigration Rules.

24. We turn first to consider whether it is reasonable for the 3rd and 4th appellants to leave the United Kingdom. We find that it is reasonable for them to leave the UK for the following reasons.

25. In relation to EV (Philippines), in their favour the children have both been here for over 7 years and have spent their entire lives here. The 3rd appellant has lived in the United Kingdom for ten years and the 4th for 8 years 3 months. They speak English and only a little Urdu. They go to school and inevitably have friends. They are used to the English style of education and curriculum. They have been in education here for 6 and 4 years respectively. The 3rd appellant has just left Primary School. The 4th appellant has left year 3 in Primary School. The Judge found at paragraph 49 that they are immersed in UK society and culture. This is a preserved finding. Nevertheless, this fact does not, of itself, mean that it is unreasonable to expect them to leave the UK. In the modern world, there are many examples of children leaving their home countries and travelling across the world to live in a country with a culture to which they have had no exposure at all. There are many examples of children who have travelled to the United Kingdom from all parts of the world and settled here successfully, notwithstanding the lack of any prior exposure to society and culture in the United Kingdom and often with little or no knowledge of the English language.

26. The 3rd and 4th appellants have a connection with Pakistan through their parents, grandparents, and extended family. They would form part of the majority religion and culture. We take into account that the 1st and 2nd appellants have very limited contact with their family in Pakistan (see paragraph 59 of the Judge's determination). However, the reality is that there is no evidence that the 3rd and 4th appellants would lose contact with any extended family in the United Kingdom. Thus, little though the contact with extended family in Pakistan may be, it will still be more that they benefit from in the United Kingdom.

27. We take into account that the culture and system of education in Pakistan will be unfamiliar to the 3rd and 4th appellants. A preserved finding of the Judge was that they are bright and industrious children who may be able to adapt to a new life in Pakistan. Given the support of their parents , there is no reason why they would be unable to settle into life and school in Pakistan. The 3rd appellant has to start a new school in the United Kingdom in any event, although we acknowledge that he would be starting a new school in the United Kingdom in the company of his peer group, making the experience in the United Kingdom more familiar than would be the case in attending school in Pakistan for the first time. As the children are bright and industrious, there is no reason why they would be unable to learn Urdu.

28. The 1st and 2nd appellants' oral evidence at the previous hearing (see paragraph 26 of that determination) was "that *the bank loan has now been paid off and the house now had a value of approximately £400,000*", that being in keeping with the evidence they submitted at that hearing where evidence was produced (page 136 of their bundle) that a house sold in their street for £398,099. This should stand all of the appellants in good stead, in that, the funds will be available for

them to have a new home and for the 3rd and 4th appellants to be educated in an English speaking school in Pakistan.

29. We accept that it is in the best interests of the 3rd and 4th appellants to continue their education in the United Kingdom, if only because the system of education here is one they are familiar with, they speak English and only know a few words of Urdu. However, any disadvantages are ameliorated to a large extent, given the financial position of their parents, the possibility of their being financed to study in an English speaking school whilst they learn Urdu prior to entering mainstream education in Pakistan. We recognise that they will have better education opportunities in the United Kingdom. However, it is always open to them to return to undertake further studies in the United Kingdom at an appropriate stage in their lives.

30. In all of the circumstances and having given weight to the best interests of the children as a primary consideration, we find that the 3rd and 4th appellants will be able to adapt to life in Pakistan. We find that it would be reasonable for them to leave the United Kingdom and live in Pakistan.

31. With this finding in mind, we turn to the balancing exercise we are required to carry out in relation to proportionality. Although Mr Abbas informed us that the 3rd appellant is now eligible to be naturalised as a British citizen, we cannot determine the Article 8 claim on the basis that he is a British citizen until he has made his application and had his application accepted. Naturalisation is always at the Secretary of State's discretion.

32. We find that the immigration status of the 1st and 2nd appellants was precarious from the date of their respective arrivals until February 2009, from which time they have been in the United Kingdom unlawfully.

33. However, in relation to the 3rd and 4th appellants, the position is a little more complicated. In ZH (Tanzania), the Supreme Court considered that the immigration status of parents should not be attributed to minors who have had no control over their situation. There is an issue as to whether this survives s.117B(4) and (5) under which it is directed that little weight should be given to private life established at a time when a person is in the United Kingdom unlawfully or at a time when the person's immigration status is precarious. The subsections do not make an exception for children. We are inclined to the view that this aspect of ZH (Tanzania) does not survive s.117B(4) and (5). However, we have decided to err on the side of caution and not take into account in the balancing exercise the precarious immigration status of the 3rd and 4th appellants since birth as they have never had any form of leave.

34. We take into account that the appellants have never hidden from the immigration authorities and have never been deceitful about their status. We also take into account that the Judge found at paragraph 46 that there is no reason why the 1st and 2nd appellants could not use their skills to obtain

employment in Pakistan. We find that all of the appellants will be able to continue their private lives in all its essential elements in Pakistan, albeit that the 3rd and 4th appellants will be doing so, with the help and support of their parents, in a country they do not know.

35. We take all of these considerations in relation to the circumstances of the appellants and weigh them against the state's interests. As we have explained, there are two dimensions to the state's interests. There is the state's interest in immigration control. There is also the fact that the 3rd and 4th appellants attend school in the United Kingdom and that the 2nd appellant has obtained medical treatment on the NHS. The family have therefore been an economic burden on the UK.

36. We give such weight as we consider appropriate to each of the considerations we have discussed, applying s.117B(4) and (5) in relation to the 1st and 2nd appellants as we have explained. In all of the circumstances and having taken all relevant matters into account (whether or not expressly referred to above), we have concluded that removal would be proportionate and not in breach of the rights of any of the appellants under Article 8. The decision to remove the appellants is a proportionate response to the need to retain the integrity of immigration control and for the economic well being of the country.

Decision:

The making of the decision of the First-tier Tribunal did involve the making of a material error on a point of law.

We set aside the decision.

We dismiss the appeals on immigration grounds.

We dismiss the appeals on human rights grounds (Article 8).

Signed:
Deputy Upper Tribunal Judge Saffer
24 August 2015