IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/35559/2014
IA/35568/2014
IA/35564/2014

THE IMMIGRATION ACTS

Heard at Field House
On 5 October 2015
Prepared 5 October 2015

Decision & Reasons Promulgated
On 13 October 2015

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADNAN SHAIKH
QURAT-UL-AIN ADNAN
MOHAMMAD ABDULLAH

Respondents

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondents: Ms A Cooke, of Counsel instructed by Messrs Farani.Javid Taylor

DECISION AND DIRECTIONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Quinn, who in a determination promulgated on 11 June 2015 allowed the appeals of the respondents on human rights grounds.

2. For ease of reference, although the Secretary of State is the appellant before me I will refer to her as the respondent as she was the respondent in the First-tier. Similarly I will refer to Adnan Shaikh, Qurat-Ul-Ain Adnan and Mohammad Abdullah as the appellants as they were the appellants in the First-tier.

3. The first two appellants are the parents of the third appellant. The first appellant entered Britain in November 2005 as a student with leave which expired in March 2008. Thereafter he has remained without authority. His wife, the second appellant, joined him as a dependant on 26 April 2007. She too has overstayed since March 2008. The third appellant was born on 11 January 2008 in Britain and has never left Britain.

4. They applied for leave to remain outside the Immigration Rules and were refused on 23 August 2014. Their appeal was heard by Judge Quinn on 28 May 2015. He stated that he was aware of the Supreme Court decision in **ZH (Tanzania) v SSHD [2011] UKSC 4** and Section 55 of the Borders, Citizenship and Immigration Act 2009. He also referred to the decision of the House of Lords in **Razgar** and said that he had taken into account public interest considerations set out in Section 117 of the Immigration Act 2014.

5. He noted the first appellant's evidence that the third appellant could not read or write Urdu at all and understood very little Urdu and that the second appellant had said that her son could not speak Urdu.

6. He noted the determinations in **Azimi-Moayed [2013] UKUT 00197 (IAC)** and **Osawemwenze [2014] EWHC 1564** both of which indicated that a child who was a Pakistani national could integrate into cultural life in Pakistan and that it was reasonable to expect a family to relocate. He also noted the judgment of the Court of Appeal in **EV (Philippines) [2014] EWCA Civ 874** stating that that was a determination which "reminded the Tribunal that it was not the job of the UK to educate the world". He noticed that medical treatment was available in Pakistan.

7. At paragraph 33 onwards he set out his findings on credibility and fact, stating that he considered that the parents had overstated the difficulties their child had with his asthma but stating that the third appellant had been born in London and had always lived here. He was doing well at school. He stated that the third appellant "would be completely unable to cope with the education system in Pakistan at the age of 7", stating that this was because he did not have the ability to write or speak Urdu and that he might not even be admitted to his school. He noted a report from a social worker but stated that he only placed some weight on that as the social worker was not aware of the Immigration Rules and the reasons why the appellants might not meet those Rules. The social worker had said that it would cause emotional and lasting damage to the third appellant should the family be removed from Britain and that that could not be in the third appellant's best interests "as it would place him in an alien environment which he does not appear to have any concept of, or desire to live in". The judge accepted the appellants' representative's submissions that

Pakistan was a country in which the third appellant could not settle easily as aside from the problem of learning Urdu he had been in Britain for seven years and knew no other country.

8. The judge said that he had taken Section 117 into account "and noted that both parents could speak English. They had made some use of the NHS but they were not reliant on public funds".

9. He accepted that the appellants could not meet the requirements of Immigration Rule 276ADE but went on to state:-

> "45. Given the above findings and conclusions I find that appellant 3 has discharged the burden of proof to show that his removal would be disproportionate to the legitimate public end sought to be achieved and I find that the appellant has discharged the burden of proof that such removal would cause the UK to be in breach of its obligations under the 1950 Convention as regards to Article 8 thereof and therefore the appeal succeeds. I find that there are insurmountable obstacles in the way of returning Mohammad to Pakistan and that the correct weight to his best interests was not given by the respondent."

10. The Secretary of State appealed, stating that given the conclusions of the judge regarding the appellant's asthma the only factor that was relevant was the potential disruption to the appellant's education.

11. The first ground of appeal referred to the determination in **MK (best interests of child) India [2011] UKUT 00475 (IAC)** where it was stated at paragraph 51:-

> "… Whilst there would be disruption in the children's education caused by removal to India, it would be temporary. We appreciate that H herself thinks it would take a long time to settle back there - that is a very understandable reaction - but viewed objectively all the evidence indicates that she is a bright, enthusiastic girl who would find it relatively easy to adapt and adjust, and to make new friends, as she has done during her school life here…".

It was asserted that that had been a case where the UK-born child and her older sister, who were arguably more enmeshed in the UK education system than the third appellant in this case, were being removed to India.

12. The first ground of appeal referred to the determination in **E-A (Article 8 - best interests of child) Nigeria [2011] UKUT 315 (IAC)** where it had been stated that analysis of the best interests of children entirely through the prism of the right to education was too narrow an approach. That ground also referred to the Court of Appeal judgment in **EV (Philippines) & Ors v SSHD [2014] EWCA Civ 874** in which it had said, at paragraph 60:-

> "That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the Immigration Judge found it is obviously in their best interests to remain with their parents. Although it is,

> of course a question of fact for the Tribunal, 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."

13. The second ground of appeal stated that the analysis of the factors set out in paragraph 117A – D of the 2002 Nationality, Asylum and Immigration Act had only been given a perfunctory and inadequate consideration by the judge.

14. At the hearing of the appeal before me Mr Avery relied on the grounds of appeal. He emphasised that the parents were long-term overstayers. He stated that it was evident that the determination was not only badly structured but unclear – it appears that the judge was finding that there was a freestanding Article 8 right which would be infringed by removal. The judge had simply not engaged with the Rules or with statute.

15. He referred to the grounds of appeal and stated that the position of the third appellant had not been considered in the context of the wider family which was the relevant context in which to consider such rights. The judge had solely focused on the impact on the child's education.

16. In reply Miss Cooke relied on the skeleton argument in which she has claimed that the judge had properly relied on the judgment in **ZH (Tanzania) [2011] UKSC 4** and his duties under Section 55 of the Borders, Citizenship and Immigration Act 2009 and had taken into account relevant case law. She stated that it was clear that the assessment of the best interests of the child were fact-sensitive and highly personal and that this case could be distinguished from that of the children in **MK**, who had only been in Britain for six years – the older child in that case had spent her first five years in India.

17. She referred to the reference in the grounds to the determination in **E-A** but stated that that had not been mentioned at the hearing. In any event she argued that the principles in that case could be distinguished because the children in that case had been in Britain for less than seven years, were younger and the eldest was in the first year of primary school. She referred to the independent social worker's report which referred to the third appellant's substantial residence which meant that he has put down roots and developed his personal identity and formed friendships and made links here.

18. She also attempted to distinguish the facts in this case from those in the case of **EV** but in any event pointed out that in that case it was stated that the longer a child had been here, the more advanced (or critical) his stage of education, the looser his ties would be with the country of nationality and the more deleterious the consequences of return. She asserted that the judge had properly taken into account all relevant factors and was entitled to reach the conclusions which he had.

19. She further submitted that the judge's analysis of the factors in Section 117A – D were adequate given that the focus of the appeal was on the position of the third appellant and in any event the judge was only obliged to have regard to those factors.

20. She argued that the conclusions of the judge were open to him and indeed that there were exceptional circumstances in this case – she quoted from the judgment of the Court of Appeal in **MF (Nigeria) [2013] EWCA Civ 1192**. She argued that the Rules themselves did not make up a complete code and that the judge was correct to deal with the consideration of the Article 8 of the appellants outside the Rules, applying the relevant **Razgar** test and that his conclusions thereon were fully open to him.

Discussion

21. I consider that there are material errors of law in the determination of the judge. The reality is that it is unstructured. It was for the judge to have considered the applicant's circumstances within the Rules and when applying statute law. His perfunctory reference to Section 117A – D of the 2002 Act is simply insufficient when dealing with the proportionality of removal. He appears to have completely ignored the fact that the first two appellants had overstayed since 2008 and in particular the provisions of paragraph 117B(4) which state that little weight should be given to a private life formed at a time when the person is in Britain unlawfully. That is exactly the case here – the first two appellants have remained without authority since 2008. The public interest in maintaining proper immigration control has been completely ignored by the judge.

22. The reality is that the judge did not identify any exceptional factors in this case. Indeed it is unclear how he reached his conclusions relating to the harm that would be done to the third appellant when the family is removed. Miss Cooke appeared to suggest that the third appellant could only speak very little Urdu but I pointed out to her that initially an Urdu interpreter had been required for the evidence of the first appellant, although it appears that he did not actually use the interpreter. It is very difficult to believe that two people who had been brought up and lived in Pakistan and are living here without, as it appears, working in the wider environment would not speak Urdu at home – the judge should have questioned the position regarding the third appellant's ability to speak Urdu. In any event there is nothing to suggest that as an intelligent child he would not be able to pick up Urdu fairly rapidly let alone the fact that having benefited from education here he would not be able to continue his education in Pakistan. It was claimed by the appellants that £750 per month was sent to them from relatives in Pakistan. The family in Pakistan clearly has sufficient funds to enable them to settle in in Pakistan or indeed to pay for a tutor for the third appellant if required. I note of course that there is a large extended family in Pakistan to which the appellants would be returning. Most importantly, however, the judge has not taken into account the fact that this family would be returning to Pakistan together.

23. He simply ignored relevant case law and in particular the decisions in **EV (Philippines)** and **E-A (Nigeria)**. This determination is unstructured and I consider that the errors of law identified above are material errors of law.

24. I therefore set aside the decision of the First-tier Tribunal and direct that the appeal proceed to a hearing afresh in the First-tier as I consider that the requirements of the Senior President of the Tribunal's Practice Directions are met.

Notice of Decision

The decision of the First-tier Tribunal is set aside. The appeal will proceed to a hearing afresh on all issues.

Direction

The appeal will be heard at Hatton Cross on 17 February 2016, time estimate two and a half hours, no interpreter required.

Signed Date

Upper Tribunal Judge McGeachy