Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/07623/2014
IA/07625/2014
IA/07630/2014
IA/07631/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 20 January 2016	**On 2 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR HAMAYOUN PERVEZ CHUGHTAI (FIRST APPELLANT)
MRS SHAZIA RIFFAT (SECOND APPELLANT)
MISS AMEENA FATIMA (THIRD APPELLANT)
MASTER MUHAMMAD ALI SUBHANI CHUGHTAI (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms Bhachu, Counsel, instructed by UK Migration Lawyers Limited
For the Respondent: Mr I Richards, Senior Presenting Officer

DECISION AND REASONS

1. The appellants appeal from the decision of the First-tier Tribunal (Judge Nixon sitting at Birmingham on 13 August 2014) dismissing their appeals against the decision of the Secretary of State to remove them as persons subject to administrative

removal under Section 10 of the Immigration and Asylum Act 1999, their human rights (Article 8) claims having been refused. The First-tier Tribunal do not make an anonymity direction, and I do not consider that the appellants are required to be accorded anonymity for these proceedings in the Upper Tribunal.

Relevant Background

2. Mr Pervez and his wife, Shazia Riffat and their two children entered the UK on 8 December 2006 with entry clearance as visitors. Mr Pervez applied for leave to remain on human rights grounds on 4 May 2007 with his wife and children as dependants. This was refused on 1 August 2007 because there were no sufficient compelling or compassionate grounds to justify a grant of leave, and there was no reason why Mr Pervez and his wife and two children could not return to Pakistan. Mr Pervez then applied for leave outside the Rules on 24 January 2012 with his wife and children as dependants. This was refused on 20 March 2013 because Mr Pervez, his wife and children were not British citizens or settled in the UK and at the time of the application his children had only been in the UK for five years.

3. The Secretary of State gave fresh consideration to the appellants' application for further leave to remain on 22 January 2014.

4. The older child, Ameena, had been born in Pakistan on 12 May 1996, and the younger child, Muhammad, had been born in Pakistan on 24 April 1998. Specific consideration had been given as to whether the children qualified for leave to remain under Rule 276ADE. The oldest child was aged 15 at the date of application, and she was now aged 17. Although she had lived continuously in the UK for at least seven years, it was reasonable to expect her to leave the UK because she would be returning to Pakistan with both of her parents, who were Pakistani citizens, as a family unit. They could help her to adjust to change and provide her with maintenance and accommodation. Having lived with her parents, who were both Pakistani citizens, and having lived in the UK, which is a multicultural society with a resident Pakistani diaspora, Ameena had not lost social, cultural and family ties to her home country. The same considerations applied to the younger child, save that he was aged 13 at the date of application, and was now aged 15.

5. A decision was also made under exceptional circumstances. Mr Pervez stated in his witness statement that he wished for an extension of leave to allow him to recover from a fall and to resolve problems relating to a family dispute over the ownership of his father's estate. But, as stated in the refusal of his application for leave to remain raised in May 2007, in view of the fact that he had been discharged from hospital, the Secretary of State was satisfied there were insufficient grounds preventing him from returning to Pakistan where relevant medical treatment was available for his current condition. Furthermore, the Secretary of State did not consider the family dispute to be sufficient grounds to amount to compelling and compassionate circumstances.

The Hearing before, and the Decision of, the First-tier Tribunal

6. Both parties were legally represented before Judge Nixon. In her subsequent decision, the judge set out the appellants' case at paragraphs [6] to [11], and the respondent's case at paragraphs [12] to [14].

7. At paragraph [16] the judge noted a concession by Mr Blundell, Counsel for the appellants, that the appellants could not meet the criteria under the Rules and that the appeal was on human rights grounds (outside the Rules) only. She found that the appellants could not meet the eligibility criteria of Appendix FM, and did not propose to go into further detail, owing to this concession.

8. At paragraph [17], the judge said there was no dispute that the first two appellants could not meet the criteria under paragraph 276ADE of the Rules.

9. At paragraph [18] she said that before considering whether or not the removal of the adult appellants would breach their Article 8 rights, she would consider the position of the children. The first consideration for her was their best interests in accordance with Section 55 of the Borders, Citizenship and Immigration Act 2009.

10. At paragraph [19], she held that the children met the first part of Rule 276ADE(1)(iv). The remaining question was whether it would be reasonable for them to be expected to leave the UK. She agreed with Mr Blundell that whether their position was assessed under Rule 276ADE(1)(iv) or under Article 8, the outcome would be the same. She said she would take into account when assessing their best interests the principles set out in **EV (Philippines) [2014] EWCA Civ 874**.

11. In paragraph [20] she said it was undoubtedly in their best interests to remain with their parents, and it was not suggested by either side that she should consider the question of whether they should remain in the UK without their parents. They had been in education in the UK since 2007. Whilst they had not been entitled to state education because of their status, she could not hold the actions of Mr Ilyas, a man who should have known better, against the children. They were at GCSE and A level stage respectively, and had done well in integrating into both the education system and the local community.

12. At paragraph [21] she took into account the evidence that the third appellant spoke and wrote Urdu, whilst the fourth appellant stated he could not write Urdu, although he had no difficulties speaking Urdu or in understanding Urdu. She found that the children lived in a household where Urdu was the spoken tongue and that they lived in a part of Birmingham where Urdu was predominantly spoken. She noted that the third appellant had candidly stated in her evidence that she remembered her friends and school in Pakistan. She had found that having left the country for seven years only and having not distanced themselves totally from the culture and the language, it was not unreasonable to expect them to reintegrate into Pakistani culture and society without too much difficulty.

13. At paragraph [22] she found that whilst they had done well at school in the UK, she had not been presented with any evidence to suggest that moving from the UK to Pakistan at this stage would have a disastrous effect on their future education. As for the fourth appellant's literacy, she did not accept his evidence about him not being able to write in Urdu, as he left Pakistan when he was aged 9 and he would therefore have been taught at least the basics of how to write the language. Also, much of the teaching in Pakistan was in English.

14. At paragraph [23] she noted that the children had been in the UK with their parents without leave for some seven years. While they had done well at school and had made some strong connections, she kept in mind the statutory public interest considerations in Section 117B of the 2002 Act. She found it was not overwhelmingly in their best interests to remain, and their interests did not outweigh the need to maintain immigration control.

15. The judge went on to give detailed reasons as to why she did not find the second appellant to be a credible witness and as to why she found Mr Ilyas to have been dishonest in his evidence. Mr Ilyas and his brother had provided the family with accommodation and had supported them financially. So she did not accept Mr Ilyas's evidence that he would not give his sister (the second appellant) and her family financial assistance if they were returned to Pakistan. She found that the appellants would have sufficient finances available to them from family in the UK and from proceeds from the property in Pakistan, to enable them to resettle in Pakistan. She noted that the first appellant continued to receive medication, but she had not been told that he would be unable to receive such medicine or ongoing treatment in Pakistan.

16. She concluded at paragraph [31] that the public interest considerations, namely the length of time they had been in the UK unlawfully, their willingness to receive NHS treatment to which they were not entitled, and to obtain education for the children to which they were not entitled, outweighed the interference with any family or private life that the appellants may have established. So she dismissed the appeals under the Rules, and also on human rights grounds outside the Rules.

The Initial Refusal of Permission

17. I set out below Judge Brunnen's reasons for refusing permission as they provide a convenient summary of the grounds upon which permission was sought. Also, the reasons given by Judge Brunnen for refusing permission foreshadow the stance taken by the respondent in her Rule 24 response:

    1. In a Determination promulgated on 2nd September 2014 Judge of the First-tier Tribunal Nixon dismissed the Appellants' appeals against the Respondent's decisions to remove them from the UK.

    2. The grounds on which permission to appeal is sought submit in Ground One that the Judge erred in law by referring to the Immigration Rules as amended by HC194 as the

applications on which the Respondent's decisions were based had been made in January 2012. This is immaterial, since the Judge actually decided the appeals on the basis of Article 8 outside the Immigration Rules.

3. The grounds submit in Ground Two that the Judge erred in that she did not direct herself that it was for the Respondent to establish that her decisions were proportionate. It is correct that the Judge did not expressly direct herself in this manner. However the Judge carried out a proper balancing exercise, weighing the competing private interests of the Appellants against the public interest and concluded that the public interest prevailed. It is not arguable that had the Judge expressly directed herself as to the burden of establishing proportionality she might have come to a different conclusion.

4. Ground Three submits that the Judge failed to make any sufficient findings as to whether the best interests of the two minor Appellants were against their removal and conflated different issues. However it is implicit in the Judge's statement that it was not overwhelmingly in their best interests to stay in the UK that she did consider that to do so was in their best interests but that, for the reasons she expressly identified, their interests in so doing was outweighed by other factors. In this ground it is also submitted that it was impermissible for the Judge to have regard to S.117B of the 2002 Act when assessing the best interests of these Appellants. However, in referring to that section the Judge was weighing the public interest against the Appellant's private interests. When so doing she was required to have regard to that section.

5. Ground Four submits that in making his findings as to the credibility of the evidence of the Second Appellant the Judge failed to take account of the incorporation by reference to her husband's statement into her evidence and the reference therein to assistance from an acquaintance. However, the perceived lack of any early reference to this person was but one of the several reasons given by the Judge for rejecting the existence of this person and finding the actions of the adult Appellant's and family members to be culpable. It is not arguable that had the Judge noticed the incorporation of husband's evidence it might have led to a different conclusion.

6. The grounds do not identify any arguable, material error of law.

The Eventual Grant of Permission

18. On a renewed application for permission to appeal to the Upper Tribunal, Upper Tribunal Judge Richard Chalkley granted permission to appeal for the following reasons:

> I am persuaded the judge's consideration of the Article 8 claim outside the Rules may have been influenced by the fact the appellants could not meet the requirements of the Rules. All challenges are properly arguable.

The Hearing in the Upper Tribunal

19. At the hearing before me to determine whether an error of law was made out, Ms Bhachu abandoned ground 1, in the light of the decision of the Court of Appeal in **Singh and Khalid [2015] EWCA Civ 74**. She sought to support ground 3 by

reference to **Treebhawon and Others (section 117B(6)) [2015] UKUT 0064 (IAC)**, a decision of a Presidential panel promulgated on 19 November 2015. Paragraph (i) of the head note reads as follows:

> Section 117B(6) is a reflection of the distinction which parliament has chosen to make between persons who are, and who are not, liable to deportation. In any case where the conditions enshrined in Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 are satisfied, the Section 117B(6) public interest prevails over the public interests identified in Section 117B(1)-(3).

20. On behalf of the Secretary of State, Mr Richards adhered to the Rule 24 response which had been settled by his colleague, John Parkinson. When the determination was read in the round, it was clear the judge adequately considered the best interests of the only remaining child. Any inadequacies were those of style, rather than substance. It was submitted that, shorn of peripheral detail, this was a mundane case of overstayers remaining in the UK without leave, assisted by perhaps well-meaning relatives. There was nothing compelling about those circumstances such that would lead the appellants to demonstrate a disproportionate breach. The adult appellant was found to be not credible, as was Mr Ilyas. The appellants and their relatives have deliberately invented unlikely and untruthful stories to support them remaining here, and to exaggerate the difficulties on return to Pakistan.

Discussion

21. **EV (Philippines) v SSHD [2014] EWCA Civ 874** provides the most recent guidance from the senior courts on the approach to best interests and the question of reasonableness. Clarke LJ said:

> 34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.
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> 35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
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> 36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child

has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hypothesi, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.

22. Lewison LJ said:

49. Second, as Christopher Clarke LJ points out, the evaluation of the best interests of children in immigration cases is problematic. In the real world, the appellant is almost always the parent who has no right to remain in the UK. The parent thus relies on the best interests of his or her children in order to piggyback on their rights. In the present case, as there is no doubt in many others, the Immigration Judge made two findings about the children's best interests:

(a) the best interests of the children are obviously to remain with their parents; [29] and

(b) it is in the best interests of the children that their education in the UK [is] not to be disrupted [53].

50. What, if any, assumptions are to be made about the immigration status of the parent? If one takes the facts as they are in reality, then the first of the Immigration Judge's findings about the best interests of the children point towards removal. If, on the other hand, one assumes that the parent has the right to remain, then one is assuming the answer to the very question the Tribunal has to decide. Or is there is a middle ground, in which one has to assess the best interests of the children without regard to the immigration status of the parent?

23. The judge went on to analyse **ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC** 4 in order to elicit an answer to this question. He reached the following conclusion:

58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis the facts are as they are in the real world. 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?"

On the facts of **ZH** it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens. That was a long way from the facts of the case before them. No one in the family was a British citizen. None had the right to remain in the country. If the mother was removed, the father had no independent right to remain. With the parents removed, then it was entirely reasonable to expect the children to go with them:

> 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.

Jackson LJ agreed with both judgments.

The relationship between s117B(6) and the Rules

24. In **AM (S117B) Malawi [2015] UKUT 260 (IAC)** the Tribunal held that the duty of the First-tier Tribunal was quite clear. The First-tier Tribunal was required to have regard to considerations listed in Section 117B. It had no discretion to leave any of those considerations out of account, if it was a consideration that was raised on the evidence before it. The Tribunal continued in paragraph [13]:

> There is also in our judgment no requirement that the FtT should pose and answer the same question more than once, simply as a matter of form. Thus since both paragraph 276ADE(1)(iv) of the Immigration Rules, and S117B(6), both raise the same question in relation to a particular child, of whether or not it would be reasonable to expect that child to leave the UK: it is a question that need only be answered once.

The alleged error identified in the grant of permission

25. The reasons given by Upper Tribunal Judge Chalkley for granting permission to appeal are Delphic. Following the **Nagre** line of authority, and also **SS (Congo)**, the judge was right to be influenced by the fact that the appellants could not meet the requirements of the Rules when considering an Article 8 claim outside the Rules. If, as was conceded, the appellants could not meet the requirements of the Rules, there needed to be compelling circumstances outside the Rules for an Article 8 claim to succeed.

Ground 2

26. It was for the appellants to identify and prove the existence of such compelling circumstances. I do not consider that the judge needed to formally direct herself that it was for the respondent to establish that the proposed interference was proportionate to the legitimate aim pursued. The public interest considerations in play under Article 8(2) were self-evident and beyond argument.

Ground Three

27. Ground 3 was that the judge misdirected himself in law in her approach to assessing the best interests of the third and fourth appellants. This error of law challenge gains some traction because the judge has not clearly distinguished between the exercise of balancing best interests in favour of the children returning with their parents to their country of origin against the best interests militating in favour of them remaining here, before going on to consider wider proportionality considerations. Instead, these wider proportionality considerations feature periodically in her discussion of the children's best interests.

28. The way it is put in paragraph 11 of the renewed grounds of appeal is that Judge Nixon expressed a conclusion which suggested she had impermissibly considered the public interests codified by Section 117B of the 2002 Act when assessing the best interests of the third and fourth appellants.

29. The way it is put by Ms Bhachu is that the judge's approach is shown to be impermissible by the decision in **Treebhawon**. She also submits that the judge erred in law by not taking account of (a) the wishes of the third and fourth appellant, (b) their level of their integration into UK society, and (c) the principle that they should not be blamed for their parents' conduct.

30. Although the judge did not clearly distinguish between best interest considerations and wider proportionality considerations, I find that the judge has made sufficiently clear findings on both questions, such as to produce a sustainable conclusion that the proposed interference is a proportionate one. Although the wider proportionality considerations are interwoven with best interest considerations, they do not contaminate them. In short, I am wholly unpersuaded that if the best interest considerations were separated out from the wider proportionality considerations, the result would have been any different.

31. The judge's approach was also not necessarily wrong in the light of the different approaches sanctioned by the Court of Appeal in **EV (Philippines)**. For in that case the Court of Appeal simultaneously endorsed the conventional approach (best interests for and against, followed by wider proportionality considerations) and also a real world approach, where the starting point is whether it is reasonable for the child to follow her parents with no right of remain to the country of origin.

32. At paragraph [23] of **Treebhawon**, a Presidential panel held that when a Tribunal is first considering an appellants' Article 8 claim by reference to the Immigration Rules, the purpose of the exercise is to decide whether relevant qualifying conditions are satisfied by the person concerned, and that the exercise is performed without reference to part 5A. The latter reasoning was engaged directly only where the decision making process reaches a stage of concluding the person does not satisfy the requirements of the Rules.

33. The judge did not clearly distinguish between the exercise of assessing reasonableness under Rule 276ADE(1)(iv) from the assessment of the same question in the context of Section 117B(6). But the judge did not materially err in this regard, because Mr Blundell rightly submitted that the outcome would be the same in both cases.

34. The outcome could only be the same in both cases if the same considerations applied in both cases. They do, as is apparent from the passage in **AM (Malawi)** cited above.

35. Part 5A does not apply to the exercise conducted under the Rules, following **Treebhawon**. But this is academic, as the domestic jurisprudence requires the decision-maker to assess relevant public interest considerations arising under Article 8(2) – such as the strong weight before reaching a conclusion under Rule 276ADE as to whether it is reasonable to require a child who has accrued seven years' residence to leave the UK.

36. When considering proportionality, it was not essential that the judge should direct herself that the sins of the parents should not be visited on the children. There is, for example, no reference to such a principle in the guidance on Article 8(2) given by Lord Justice Clarke at paragraph [37]. But in any event, at paragraph [20] the judge directed herself to similar effect by saying that she could not hold the actions of Mr Ilyas, a man who should have known better, against the children.

37. I do not consider that the judge failed to take account of the wishes of the children or of their level of social integration in the UK.

Ground 4

38. Ground 4 is that the judge failed to take a material matter into account. At paragraph [14], the judge considered the second appellant's oral evidence that the family's dealings with the Home Office, and the aftermath of the first appellant's accident, had been handled by a non-lawyer called Mrs Adam. The judge held that the first mention of the elusive Mrs Adam had come in the second appellant's evidence, despite a lengthy and detailed witness statement.

39. But at paragraph 3 of the same statement, the second appellant stated she would not be repeating the contents of her husband's statement. In her husband's witness statement (dated 2014) and in the letter which accompanied the appellants' applications in January 2012, there had been reference to the fact that the first application was made by an acquaintance who was not a qualified lawyer. Whilst Mrs Adam was not named in the first appellant's witness statement, or in the letter which accompanied the application, the account given to the judge was not new. It had been part of the appellants' account for more than two years.

40. I do not consider that the evidence relied on discloses a material error by the judge. It does not appear to be disputed that the first time that the name of Mrs Adam was mentioned was in the second appellant's oral evidence. If it had been mentioned two

years earlier, the Home Office could have made inquiries into her existence and whereabouts. The burden rested with the second appellant to prove her case that the family had been a victim of misfortune at the hands of Mrs Adam, to whom the second appellant had allegedly entrusted the sum of £2,800 in order to regularise the family's status. The judge gave adequate reasons for finding neither the second appellant nor Mr Ilyas was truthful regarding the handing over of this claimed sum of money to Mrs Adam, and indeed that Mrs Adams was a complete fabrication designed to, "distance themselves from the fact that they had 'buried their heads' regarding their status in the UK."

41. For the reasons given above, I find that the decision of the First-tier Tribunal did not contain an error of law.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. These appeals to the Upper Tribunal are dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Monson