Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/37383/2014
IA/37384/2014
IA/37387/2014
IA/37389/2014

THE IMMIGRATION ACTS

Heard at Field House
On 17 December 2015

Decision & Reasons Promulgated
On 06 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR MUHAMMAD MAIMOON WAHEED (first appellant)
MRS GUL-E-RAANA KALSOOM (second appellant)
MR MUHAMMAD MAHAD MAIMOON (third appellant)
MR ABDUL AAHAD MAIMOON (fourth appellant)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Dogra of counsel
For the Respondent: Mr D Clarke, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellants against a decision of the First-tier Tribunal dismissing their appeals against a decision taken on 3 September 2014 to refuse their applications for leave to remain in the UK based on their private and family life.

Background Facts

2. The appellants are citizens of Pakistan. The first appellant was born on 22 February 1982, the second appellant (his spouse) was born on 22 September 1981, and the third and fourth appellants (their children) were born on 25 April 2002 and 9 February 2012 respectively. They applied for leave to remain in the UK under the Immigration Rules HC395 (as amended) (the 'Immigration Rules') based on their private and family life. These applications were refused by the respondent on the basis that the appellants could not meet the requirements under the Immigration Rules and that there were no exceptional circumstances justifying leave outside of the Immigration Rules.

The Appeal to the First-tier Tribunal

3. The appellants appealed to the First-tier Tribunal. In a determination promulgated on 2 April 2015, Judge Sweet dismissed the appellants' appeals. The First-tier Tribunal found that none of the appellants could meet the requirements of the Immigration Rules under appendix FM in respect of family life. In respect of the claim to private life under paragraph 276ADE of the Immigration Rules the only relevant sub-section was (vi) but the judge was not satisfied that there would be very significant obstacles to their integration in Pakistan. In respect of exceptional circumstances the judge did not consider that there were any particular circumstances to be considered. The judge took into account the respondent's responsibility under section 55 of the Borders, Citizenship and Immigration Act 2009 ('s55') to consider the best interests of the children finding that no exceptional circumstances arose to consider their claims outside of the Immigration Rules. The judge further found that even if Article 8 were considered outside the Immigration Rules it would not be disproportionate to remove the appellants.

The Appeal to the Upper Tribunal

4. The appellants sought permission to appeal to the Upper Tribunal. On 2 June 2015 First-tier Tribunal Judge Frankish refused permission to appeal. On 5 August 2015 Deputy Upper Tribunal Judge Archer granted the appellants permission to appeal on the basis that it was arguable that the First-tier Tribunal judge had failed to properly consider the best interests of the children. Thus, the appeal came before me.

Summary of the Submissions

5. The grounds of appeal focus on Muhammad Mahad Maimoon (hereafter 'Mahad'). It is asserted that the judge failed to consider that it would be in the best interests of the child to return to Pakistan with his family and that the judge failed to take into account the relevant authorities. It is submitted that the judge made no adverse credibility findings which means that the judge found all the witnesses to be wholly credible. It is asserted that the judge did not refer to the respondent's policy on assessing children who have been continuously resident in the UK for 7 years. It is submitted that there is one material provision of the Immigration Rules in the present context, namely paragraph EX.1(i)(cc). The central submission is that the judge failed to consider whether the respondent had discharged the duties imposed under s55. It is submitted that there is no reference to the statutory guidance. The material error is found at paragraph 35 of the decision where there is no assessment of the best interests of the child.

6. In the alternative the grounds assert that the judge made errors in assessing the Article 8 appeal. The judge has failed to consider the impact on removal of the child. His private life deserved more anxious scrutiny in the circumstances.

7. Ms Dogra submitted that there were 2 grounds – the best interests of the children has not been considered properly. Paragraph 35 of the decision contains the only reference to s55. The second ground is that the judge failed to consider Article 8 considering that there were no exceptional circumstances. The judge needed to consider s117B (6).

8. The judge failed to apply Singh v SSHD: Khalid v SSHD [2015] EWCA Civ 74 ('Singh and Khalid') which was authority for the proposition that the concept of exceptional circumstances is not a threshold by which individual Article 8 considerations need to be carried out. The judge should have considered the appellants' rights outside the Immigration Rules. There was a limited consideration under the Immigration Rules. At the date of the application the child was not in the UK for 7 years so there is no assessment under the Immigration Rules as to whether or not it would be in his best interests to return to Pakistan so factors in his best interests were never considered. She submitted that it is clear from the case law of Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC) ('Azimi Moayed') and EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 ('EV (Philippines') that once a child is in the UK for 7 years it is possible that it may not be appropriate for them to return. The best interests always have to be considered. They have not been considered under the Immigration Rules because the child did not have 7 years residence. In this case there were additional considerations that would have led to an independent assessment of Article 8. The risks and concerns were set out in the witness statement of the first appellant. Mahad came to the UK when he was 5 and started his education in the UK in which he has now been for 7 years.

He has no ties with Pakistan which is a distant memory. He is doing very well at school. His formative years have been spent in the UK and if he is returned to Pakistan he would suffer serious set-backs. Mahad stated why he wished to remain in the UK. He says that his schooling is important and all his friends are in the UK. The letter shows he has reached an age where he has his own independent private life distinct and separate from his parents.

9. Ms Dogra submitted that there must be some form of weighing exercise. The judge has failed to undertake a proportionality exercise. No consideration has been given to the guidelines in EV Philippines. If it is disproportionate to return Mahad to Pakistan then there are exceptional circumstances for the whole family as it would be disproportionate to separate a young child from his parents.

10. Mr Clarke submitted that the reasons for refusal letter explained why the first and second appellants could not rely on Paragraph EX.1. Singh and Khalid was authority that the circumstances must render the Immigration Rules a disproportionate interference. He submitted that at paragraph 32 of the decision the judge dealt with paragraph 276ADE and at paragraph 35 dealt with the best interests of the children. S55 is a proportionality test and it was open to the judge to find that there were no circumstances meriting consideration outside the Immigration Rules. The judge at paragraphs 9-26 set out the evidence. It is clear that the judge was mindful of all the issues identified at paragraph 35 of EV Philippines. At paragraph 9 the judge set out the oral evidence of the first appellant. The judge set out in detail the education, friends, his age, the effect of a change in school etc. The judge took issue with the witness statements of the appellants. The judge disputed that there were no ties to Pakistan, the second appellant has family in Pakistan. She stayed with family in Pakistan for 22 days 2 months before the hearing. Mahad speaks Urdu contrary to the oral evidence. At paragraph 16 the judge finds that the family previously lived with the first appellant's family. The judge sets out inconsistencies in relation to the first and second appellants working in the UK. The second appellant confirmed in oral evidence matters that were contrary to what was said in the witness statements. The appellants returned to Pakistan in 2008, 2010 and 2 months before the hearing for periods of between 14 and 22 days. The judge took all these circumstances into consideration when finding there were no exceptional circumstances. It is difficult to construe this case as anything other than a normal child of that age. There is nothing to demonstrate that it would be disproportionate or require consideration outside of the Immigration Rules.

11. Mr Clarke submitted that in accordance with Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 00415 (IAC) s117 does not come into effect until you get to the second stage. He submitted that there is no merit in the argument that if you do not qualify under the Immigration Rules you have to look outside the Immigration Rules. The judge took into account other circumstances but where

there are no compelling circumstances there is no need to consider s117 unless you are considering the claim outside of the Immigration Rules.

12. With regard to 7 years Mr Clarke submitted this is not a determinative factor. In Azimi-Moayed it was considered that there are other issues to be considered. The starting point is that being with parents is likely to be in a child's best interests. 7 years residence is only one factor. The parents have no entitlement to be in the UK. This is not a child on his own in the UK, there are other countervailing factors. Even if the case is considered outside the Immigration Rules the appellants cannot succeed. The test in s117B is if it reasonable for the child to leave the UK. In AM (s.117B) Malawi [2015] UKUT 0260 (IAC) speaking English and financial independence is only neutral, no rights from 117 can be obtained.

13. In reply Ms Dogra submitted that in the grant of permission with regard to EX.1 there was no indication that it is to be argued. The Immigration Rules do not apply, EX.1 would not have been triggered. It is not correct that the First-tier Tribunal judge must have taken factors into consideration – there were no findings on the factors set out. There was simply a rehearsal of what the evidence was. The judge needed to make findings. With regard to Mahad it is clear from the witness statement that what was detailed was the consequences of removal, the emotional trauma, setbacks and deterioration in education. These factors rendered any removal disproportionate. The consequences were not dealt with by the judge. The third appellant has spent longer in the UK than he has in Pakistan. He has never attended school in Pakistan. Whilst he hasn't reached a pivotal stage in his education he is in secondary school. He is involved in activities outside of school. The fact that he has returned to Pakistan for holidays does not suggest a connection to Pakistan that would be renewable. Whilst he does speak some Urdu the level is not of a fluent speaker. His school reports indicate he is speaking in English. Ms Dogra referred me to the headnote in Azimi-Moayed particularly ii) and iii). There is nothing significant to say that the appellants should be removed. Taking into account the best interests of the child the maintenance of effective immigration control would not outweigh the interests.

Legislative Provisions

Nationality and Immigration Act 2002 ('NIA Act')

14. As from 28 July 2014 statutory provisions in a new Part 5A of the NIA Act (inserted by s.19 of the Immigration Act 2014) requires, in legislative form for the first time, the Tribunal to take certain factors into account when determining whether a decision made under the Immigration Acts breaches respect for private and family life. The decision in the instant case is a decision made under the Immigration Acts. The relevant provisions provide:

15. As from 28 July 2014 statutory provisions in a new Part 5A of the 2002 Act (inserted by s.19 of the Immigration Act 2014) requires, in legislative form for the

first time, the Tribunal to take certain factors into account when determining whether a decision made under the Immigration Acts breaches respect for private and family life. The decision in the instant case is a decision made under the Immigration Acts. The relevant provisions provide:

16. Section 117A sets out the scope of the new Part 5A headed "Article 8 of the ECHR; Public Interest Considerations" as follows:

> '117A Application of this Part
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).'

17. The considerations listed in s.117B are applicable to all cases and are:

> '117B Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.'

18. Section 117D provides the definition of a number of terms used in Part 5A. A "qualifying child" means a person under the age of 18 who is either a British citizen or who has lived in the UK for a continuous period of seven years or more. The requirement in s.117A to "have regard" to the considerations in s.117B means a court or Tribunal must have regard to those considerations in substance even if no explicit reference is made to the statutory provisions (see Dube (ss.117A – 117D) [2015] UKUT 90 (IAC)).

19. As a consequence, the court or Tribunal is required to give the new Rules (at [47]): "greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights" (see also SSHD v SS (Congo) and Others [2015] EWCA Civ 387).

20. Immigration Rules

'EX.1. This paragraph applies if

(a)

(i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.'

'**Paragraph 276ADE (in force from 9 July 2012 to 27 July 2014)**

The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

…

(iv) is under the age of 18 years and has lived continuously in the UK for at east 7 years (discounting any period of imprisonment) and it would be not be reasonable to expect the applicant to leave the UK …'

Discussion

21. The only real challenge in respect of the findings of the First-tier Tribunal judge are in relation to the third appellant Mahad. The findings in relation to the fourth appellant are not challenged and neither are the findings in relation to the first and second appellants.

22. The judge has engaged with the evidence in some detail. At paragraphs 9-26 of the decision the evidence and contradictory factors are set out. A judge does not have to set out every piece of evidence that he has considered and weighed in the balance when considering proportionality. However, the judge has not engaged in any meaningful way with a consideration of the best interests of the children in this case. Whilst a judge does not need to refer to section 55 there does need to be a consideration of the child's best interests. Although the respondent's reasons for refusal letter engages with the Secretary of State's duty under s55 the judge appears to have referred only in passing to the consideration given to Mahad's best interests by the Secretary of State and has not reached any conclusion as to what the best interests are identified to be. For example at paragraph 7 the judge states:

"The respondent considered its obligations under Section 55 of the Borders, citizenship and Immigration Act 2009 in respect of the children's welfare, but there were no exceptional circumstances justifying leave outside the Immigration Rules under Article 8 European Convention on Human Rights."

23. At paragraph 35 the judge states:

> "… I have taken into account the Secretary of State's responsibilities under section 55 of [the] 2009 Act to consider the welfare of the children and much emphasis was put by the appellants' representative on the rights of the third child, who is clearly well integrated into school and social life in the UK, having arrived in the UK aged 5 and now being aged 13."

24. I find that the judge has materially erred by failing to consider the best interests of the children. It is not clear that another tribunal would be likely to have arrived at the same conclusions.

Re-making the decision

25. As I set out above the grounds of appeal and the submissions made by Ms Dogra concern the third appellant. There is no challenge to the findings in relation to the other appellants other than if Mahad's appeal succeeds then the other appellants should be permitted to remain in the UK.

26. In this case the third appellant had not lived in the UK for a continuous period of 7 years at the time of the application. Although the grounds of appeal assert that Paragraph EX.1 applies Ms Dogra's submissions were that the appellants did not satisfy the Immigration Rules. As Mahad had not lived in the UK for a continuous period of 7 years EX.1 and 276ADE(iv) are not satisfied. The appellants fail to satisfy the requirements of the Immigration Rules and I therefore accept Ms Dogra's submission that the child's best interests can only be considered when considering Article 8 outside of the Immigration Rules. The best interests of the children were considered by the respondent when considering exceptional circumstances.

27. The correct approach to determining a claim under Article 8 is that set out in R v SSHD ex parte Razgar [2004] UKHL 27. A Tribunal should consider 5 questions, namely:

> "(i) 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?
>
> (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
>
> (iii) If so, is such interference in accordance with the law?
>
> (iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing 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?
>
> (v) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

28. In this case I do not consider it necessary to consider the first 4 questions posed as it is not disputed that there is a private life and that a decision that would result in Mahad being removed from the UK is an interference with his private life, that the consequences in the circumstances of this case are of such gravity to engage Article 8, that the interference is in accordance with the law and is necessary. The core issue is to determine what Mahad's best interests are, to consider whether it would be reasonable for him to leave the UK and whether the interference in Mahad's Article 8 rights is proportionate to a legitimate aim.

29. In ZH (Tanzania) v SSHD [2011] UKSC *4* the Supreme Court noted that s 55 of the Borders, Citizenship and Immigration Act 2009 was enacted to incorporate the UK's obligation under article 3(1) United Nations Convention on the Rights of the Child that, *'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'*

30. The court held:

> "26. ... This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. ...
>
> …
>
> 33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. ..."

31. In Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC) the Upper Tribunal in considering the case law in relation to decisions affecting children identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:

> "i) 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.
>
> ii) It is generally in the interests of children to have both 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.

iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases."

32. In EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 it was held that 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.

33. I have considered the factors identified in ZH (Tanzania), Azimi-Moayed and EV Philippines set out above. Mahad is now 13 years of age. He entered the UK when he was 5 ½ years of age. He has been in education in the UK for just over 8 years. It is generally in the interests of children to have both stability and continuity of social and educational provision. Mahad is not however at a critical stage in his education. It was stated that Mahad is at an age where his social and school connection are more important than his family. It was stated that he can no longer remember Pakistan and has no ties or connections there. Mahad in his letter to the First-tier Tribunal, sets out several reasons as to why he wants to remain in the UK. He is very happy with his school and the teachers from whom he gains a great deal of support. The school has excellent facilities. All his friends are here and he has no friends in Pakistan. He says that he knows that he lived in Pakistan before because his parents told him but he does not remember it any more. He says that his 'mom's' brothers and sisters and his grandparents are all in the UK and he sees them all the time. His father's family are also here. He also has friends at the basketball and tennis club. In oral evidence at the hearing before the First-tier Tribunal it became apparent that there were some material inconsistencies in the evidence. In fact Mahad's maternal grandparents and other relatives are in Pakistan and Mahad has visited Pakistan for holidays and has stayed with his

maternal grandparents there. There was an inconsistency with the evidence from Mahad's school report which stated that Urdu was his first language.

34. Mahad has clearly has had an opportunity to develop a social awareness and to have built up independent friendships outside of his family as is demonstrated by the witness evidence. Although he speaks some Urdu I accept that he would experience some linguistic difficulties in re-locating to Pakistan.

35. It is in the best interests of children to grow up in the cultural norms of the society to which they belong. 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. Mahad is a national of Pakistan as are his parents. I consider that Mahad's residence in the UK is not so lengthy that would be inappropriate to disrupt the development of his social, cultural and educational ties. He has spent some of his formative years here but he is still at an age where his family is central to his well-being. Although 7+ years residence is a weighty factor, there was never an expectation that he would remain in the UK permanently as his parents entered on a temporary basis. This factor cannot be held against Mahad in assessing his best interests as he had no knowledge of his parent's immigration status. However, this does not mean that this factor is irrelevant. In MH (Pakistan) [2011] CSOH 143, at Paragraph 56, the court held:

> "The propriety of taking account of immigration history, the precariousness of the position when a relationship was entered into, and the need to maintain immigration control is confirmed by Lady Hale at paragraph 33 in ZH (Tanzania)."

36. Both parents are from Pakistan and have been here for 8 years. They came to the UK on a temporary basis. Mrs Kalsoom obtained leave to enter as a Tier 4 student and was subsequently granted Tier 2 leave until January 2016 but that was curtailed in 2014 at which point she had no leave to remain in the UK. The appellant have a family network and connections in Pakistan. They do not meet the requirements of the Immigration Rules for leave to remain. Their ties to Pakistan have been maintained and it is reasonable to expect that the benefit of the education and work experience that they have had in the UK will enhance their opportunities in Pakistan.

37. In the case of E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 00315 (IAC) it was held that:

> "35. In our judgment, putting together the various sources of guidance noted above, the correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication. Here the parents and the children are Nigerian. The parents came here for the temporary purpose of study by the first appellant and neither they nor their children had any basis of expectation that they would be allowed to make their future home here. The

> children have no connection with the United Kingdom by way of nationality or any other nexus independent or their residence as being part of the parents' household.
>
> ...
>
> 43. It is important to recall that although the appellants may all have been here lawfully, they came to the UK for a temporary purpose with no expectation of being able to remain in the UK. The third appellant happened to be born in the UK whilst her parents were here for a temporary purpose. The expectation was that they would all return to Nigeria once the first appellant's studies were completed. Those who have their families with them during a period of study in the UK must do so in the light of that expectation of return."

38. At Paragraph 10 of MH Pakistan [2011] CSOH 143the court held:

> "None of this was a matter of controversy between the parties and I noted that in one of the cases to which I was referred, ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 WLR 148, Baroness Hale of Richmond considered how these factors would apply in an ordinary immigration case where a person was to be removed because he has no right to be or remain in the country. At paragraph 18 she noted that the Convention jurisprudence recognised that the starting point was the right of all states to control the entry and residence of aliens …"

39. I find that the best interests of Mahad are to be cared for by and to live with his parents. He has gained the benefits of 8 years of education in the UK which will enhance his opportunities in Pakistan. The Secretary of State noted in the reasons for refusal letter that Pakistan has a functioning education system. Mahad is not British citizen and has no rights to be educated in the UK. I do not consider that it would be inappropriate to disrupt level of development of his social cultural and educational ties as there are countervailing factors to the contrary. Whilst I recognise that a move to Pakistan will require some adaptation to a new home and a new school he is still at an age where he is adaptable. He will be supported by his parents. He is part of what is obviously a close knit and supportive family. As set out in E-A neither he nor his parents had any basis or expectation that they would be allowed to make their future home here.

40. I am mandated by Parliament to give effect to section 117 of the 2002 Act. Section 117A is engaged because I am required to decide whether the impugned decision to refuse leave to remain would breach the right to respect for private life under Article 8 enjoyed by the appellants.

41. Sufficient weight must be accorded to the public interest in the maintenance of effective immigration controls (s117B(1)). In this case the appellants do not meet the requirements for leave to remain in the UK. Further, sufficient weight must be accorded to the interests of the economic well-being of the United Kingdom, in that persons who seek to enter or remain in the United Kingdom must be financially independent (s117B(3)). The appellants have not had recourse to public funds. Little weight is to be accorded to a private life formed when the person's

Immigration status is precarious (s117B (5)). Although, as I set out above, the precarious status of Mahad's stay in the UK cannot be held against him it is not an irrelevant factor when considering the proportionality of the decision to remove the appellant.

42. However, section 117B(6) is of a different nature and is directly relevant. In Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC) the Upper Tribunal held, at paragraph 20 that :

> "…
>
> Within this discrete regime, the statute proclaims unequivocally that where these three conditions are satisfied the public interest does not require the removal of the parent from the United Kingdom. Ambiguity there is none."

43. In the headnote in that case the position was set out as

> "(i) … 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)."

44. In considering section 117B(6) therefore the only real question in this case is whether it would not be reasonable for Mahad to leave the UK. The public interest in immigration control is not relevant.

45. The Court of Appeal stated in VW (Uganda):

> "19. … While it is of course possible that the facts of any one case may disclose an insurmountable obstacle to removal, the inquiry into proportionality is not a search for such an obstacle and does not end with its elimination. It is a balanced judgment of what can reasonably be expected in the light of all the material facts …
>
> ...
>
> 24. EB (Kosovo) now confirms that the material question in gauging the proportionality of a removal or deportation which will or may break up a family unless the family itself decamps is not whether there is an insuperable obstacle to this happening but whether it is reasonable to expect the family to leave with the appellant …"

46. For the reasons I have already set out above I have found that it would be reasonable for Mahad to leave the UK with his family. This is so even in the absence of any of the countervailing factors that I identified.

47. Having weighed all the factors set out above and having found that it is reasonable to expect Mahad to leave the UK I find that the interference with his Article 8 rights is proportionate to the legitimate public end sought to be achieved namely, the aim of preserving the economic well-being of the country. The refusal

to grant the appellant leave to remain in the UK is proportionate and therefore the appeal is allowed and the Secretary of State's decision stands.

48. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

Decision

49. The decision of the First-tier Tribunal involved the making of an error of law. I set aside that decision.

50. I re-make the decision. The appellants' appeals are dismissed. The Secretary of State's decision stands.

Signed P M Ramshaw Date 4 January 2016

Deputy Upper Tribunal Judge Ramshaw