Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers:**
HU/12144/2015

HU/13016/2015

HU/13023/2015

HU/13018/2015

HU/13026/2015

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 22 August 2017	**On 11 September 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

And

MMS
SN
MF
KF
MHM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellants: Mr M Diwyncz, Senior Home Office Presenting Officer
For the Respondent: Mr A Otchie instructed by direct access

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the respondents. This direction applies to both the appellant and to the respondents and a failure to comply with this direction could lead to contempt of court proceedings.

2. Although this is an appeal by the Secretary of State, for convenience, hereafter I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellants are citizens of Pakistan. The first and second appellants (who were born on 13 December 1972 and 1 February 1984 respectively) are the parents of the third, fourth and fifth appellants (who were born on 29 December 2006, 23 July 2008 and 15 February 2013 respectively).

4. The first appellant entered the United Kingdom on 23 March 2003 with a visa valid until 25 November 2003. On 15 July 2005, the first appellant sought leave to remain on the basis of employment and was granted leave valid from 29 July 2005 until 16 July 2008.

5. On 9 July 2007, the second and third appellants (his wife and eldest daughter) entered the UK as his dependents with leave valid until 16 July 2008.

6. On 19 July 2008, the first appellant applied for further leave on the basis of employment but that was refused on 27 August 2008.

7. On 23 July 2008, the fourth appellant was born in the UK.

8. On 22 September 2008, the first appellant sought a reconsideration of the decision refusing him further leave on the basis of employment but that refusal was maintained on 3 November 2008.

9. On 6 March 2009, the first appellant submitted an application for leave outside the Rules and that application was refused on 28 May 2010.

10. On 6 December 2011, the first appellant submitted an application for leave under Art 8 with the second, third and fourth appellants as his dependents. That application was refused on 23 November 2012.

11. On 15 February 2013, the fifth appellant was born in the UK.

12. On 15 January 2014, the first appellant (together with his dependents) were informed that they were liable to removal.

13. On 11 August 2015, the first appellant (together with his dependents) was served with notice, inter alia, affording him an opportunity to submit additional grounds why he should be allowed to stay in the UK.

14. On 26 August 2015, further grounds were submitted relying on the appellants' private and family life in the UK.

15. On 12 November 2015, the Secretary of State refused each of the appellants leave to remain based upon their private and family life in the UK under the Immigration Rules (HC 395 as amended) and outside the Rules under Art 8.

The Appeal to the First-tier Tribunal

16. The appellants appealed to the First-tier Tribunal. The appeal was heard by Judge A E Walker. The focus of the appellants' case was that the first and second appellants could satisfy the requirements of Appendix FM if they met the requirements of para EX.1. That, so far as relevant provides that:

> "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) ... has lived in the UK continuously for at least the seven years immediately preceding the date of application; and
>
> (ii) it would not be reasonable to expect the child to leave the UK; ...".

17. Likewise, the issue of whether it would be "reasonable to expect" either the third or fourth appellants to leave the UK arose in respect of their individual claims under the Rules in para 276ADE(i), (iv) which provides:

> "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:
>
> ...
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any periods of employment; and it would not be reasonable to expect the applicant to leave the UK; ...".

18. It was accepted before the judge that the first and second appellants could not succeed under para 276ADE on the basis of twenty years' continuous residence (para 276ADE(1)(iii)) or because there would be "very significant obstacles" to their integration in Pakistan on return (para 276ADE(1)(vi)). It was also common ground before the judge that the fifth

appellant could not meet any of the requirements of the Rules and his claim was solely founded under Art 8 outside the Rules.

19. In her determination, Judge Walker set out at length the relevant Immigration Rules at paras 10 – 13. At para 14 of her determination she set out s.55 of the Borders, Citizenship and Immigration Act 2009 and the requirement to have regard to, in essence, the best interests of the children. At para 15, the judge set out the relevant provisions in Part 5A of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") in s.117A and s.117B dealing with the public interest considerations in determining whether an individual's removal would be disproportionate under Art 8.2 of the ECHR. Then, the judge set out the questions to be resolved in determining a case under Art 8 together with a number of authorities relevant to the appeal including R (MA (Pakistan) & Others) v SSHD [2016] EWCA Civ 705. At paras 23 – 43, the judge set out in detail the evidence concerning the circumstances of all the appellants based upon the background documents and the oral evidence which the judge heard from the first and second appellants and the brother of the first appellant.

20. At paras 45 – 54, the judge set out her findings on the principal issue argued before her, namely whether it was "reasonable to expect" the third and fourth appellants to leave the UK. The judge accepted that it was in the children's best interests to remain with their parents and also concluded that in relation to both the third and fourth appellants it would not be reasonable to expect them to leave the UK given the integration of their lives in the UK and the disruption to their lives if relocated to Pakistan. As a result, the judge found that the first and second appellants succeeded under Appendix FM and the third and fourth appellants succeeded under para 276ADE(1)(iv). The judge's reasoning is at paras 45 – 53 as follows:

> "45. It is clear, as was stated at the hearing, that the essential consideration in this case is the effect of removal on the children. Neither the first nor the second appellant can meet the rules in their own right and their claim of an adverse effect on their rights to a private and family life is essentially dependent on the effect of removal on the children. As adults without children they have spent a considerable period for their lives in Pakistan, were brought up there and speak Urdu as their first language. As such both could be expected to return to Pakistan and resume their family and private lives with their extended family and friends in Pakistan. However they are not without children and they therefore rely on para EX.1 which allows an exception to the rules where it would reasonable to expect the child to leave the UK.
>
> 46. I found the first and second appellants compelling witnesses. It is clear that the first appellant is proud that he has not ever claimed benefits and that he has not been reliant on the State. He worked when he was able and it is clear that he is desperate to do as again as is the second appellant. I was stuck by the strong desire in particular of the second appellant to be fully integrated into the society in which her children live

and that she has done her best to achieve this within the constraints put upon her by her precarious immigration status.

47. I am satisfied that the third and fourth appellants can speak Urdu but that they prefer to speak English to each other. I also note that the first appellant said that this was the case because the third and fourth appellants do not like the English accent of their parents. I consider that this of itself is testimony to the extent of the third and fourth appellants' integration. I noticed that during the hearing the third and fourth appellants' conversed with each other in English. This seemed to me to be entirely natural and their normal method of communication between themselves. I noticed the fifth appellant speaking Urdu to his mother.

48. Whilst exposing the children to the concerns of adults such as their future in the UK is to be deprecated and which the first appellant said, and I believe genuinely himself believed, it also has to be acknowledged that where the first appellant is so distressed that he has been referred to a psychologist by his doctor it is unlikely to be possible that these concerns be shielded from the children. Whilst the appeal hearing was underway, the third and fourth appellants' were given paper and pens to scribble with. These were passed to me at the end of the hearing and I note that the third appellant has written of her love for the UK and that she has lots of friends and does not want to leave them or leave the UK. She writes of her teachers and where she lives and that she considers that England is her country. She has a very clear idea of her nuclear family and her parents and siblings an does not mention wider family members.

49. Taking into account the cogent evidence I heard from the first and second appellants about the way that they run their family lives, the evidence of the school letters and the letters in support, I am satisfied that it is in the very best interests of the children to remain living together and with their parents. I have taken into account the requirements of s.55 as set out above.

50. Whilst I doubt the effectiveness of the threats that the first appellants and his brother say that they have received I am satisfied that the first appellant considers them to be real and that he feels himself under threat in Pakistan. This fear will have an adverse effect on the ability of the children to be able to adapt to life in Pakistan because the first appellant will constantly be on his guard and will thus not be able to assist the children into life in Pakistan.

51. The third appellant is now aged nearly 10 and the fourth appellant is aged 8. The first appellant was therefore aged over 7 at the time that the representations were made on 26.08.2015 and had remained in the UK for 7 years having entered the UK on 09.07.2007. If I find that it would not be reasonable to expect her to leave the UK then her parents would succeed by relying on para EX.1

52. In assessing the reasonableness of requiring the children to leave the UK it is not simply a question of whether they would be able to relocate and understand the language or even of being able to remain within the confines of their own family and its culture. In this case I am satisfied that the third and fourth appellants are so integrated into their lives in the UK that they would not be able to relocate to Pakistan where the culture they would experience outside their immediate family would be so different from their own experience in the UK that to disrupt their

> existing social, culture an educational ties would be inappropriate. It is clear that both the third and four appellants are bright pupils and doing well in school, a school where they are very clearly liked and have a wide circle of friends and social ties. I note that the fifth appellant speaks Urdu to his mother and that is to be expected in such a young child. This is entirely as anticipated within the guidance set down in **Azimi-Moayed**.
>
> 53. In summary I find that it is unreasonable for the third and fourth appellants to relocate to Pakistan. Further, both have exceeded the 7 year period set down in para 276ADE and therefore both of them meet the requirements of para 276ADE and it follows that the first and second appellants can take advantage of paragraph EX.1."

21. Although the fifth appellant could not succeed under the Rules, the judge found that he succeeded under Art 8. In para 53 she said this:

> "The fifth appellant has his family life with the other appellants and could not relocate on his own to Pakistan as such a young child and he could not enjoy his family life anywhere else other than with the other appellant in the UK. In his case to relocate him to Pakistan would infringe his rights under article 8 of the ECHR and would not be proportionate to the legitimate aim of effective immigration control"

22. Finally, the judge found that all the appellants could succeed under Art 8 outside the Rules also and at para 54 she said this:

> "Further and in the circumstances I have found above the relocation of the appellants to Pakistan would be contrary to the interests and welfare of the children. The removal of the appellants from the UK would therefore not be proportionate to the legitimate aim of effective immigration control and their article 8 rights would be thus contravened."

23. In the result, the judge allowed the first, second, third, fourth and fifth appellants under Art 8 and also allowed the appeals of the first, second, third and fourth appellants (but not the fifth appellant) under the Immigration Rules (see para 56 of her determination).

The Secretary of State's Appeal

24. The Secretary of State sought permission to appeal against Judge Walker's decision on a number of grounds. Those grounds can be summarised as follows.

25. First, the judge failed to take into account the public interest reflected in the cost to the public purse of educating the three children and having regard to the parents' immigration history. Reliance is placed upon the Court of Appeal's decision in MA (Pakistan).

26. Secondly, the judge failed to take into account s.117B of the NIA Act 2002 in finding that the appellants' removal was disproportionate.

27. Thirdly, the judge failed to consider the best interests of each of the children separately.

28. Finally, in finding the first and second appellants to be credible witnesses, the judge failed to take into account that the parents had had no leave since 2008 and were overstayers who refused to leave the UK. The judge's finding was not adequately reasoned and irrational.

29. Permission to appeal was initially refused by the First-tier Tribunal but on 17 May 2017 the Upper Tribunal (UTJ Allen) granted the Secretary of State permission to appeal.

The Submissions

30. In his submissions, Mr Diwyncz, who represented the Secretary of State relied upon the grounds. He acknowledged, however, that he was in difficulties in submitting that the judge's finding that the first and second appellants were credible was irrational; although he contended that it lay at the extreme end of the spectrum of rationality. Instead, Mr Diwyncz focussed on the judge's reasoning in reaching her finding that it would be unreasonable for the third and fourth appellants to relocate to Pakistan. He submitted that the judge had not considered the public interest in reaching that finding as required by MA (Pakistan) and had made no reference to s.117B in her reasoning. That, he submitted, was an error of law even though the judge had set out at length s.117B in her determination and had referred to MA (Pakistan) in her determination.

31. On behalf of the appellants, Mr Otchie submitted that the judge had not erred in law. She was clearly aware of the immigration history of the first and second appellants which she set out at para 3 of her determination. She had also set out s.117B and at para 21 had explicitly stated that she had reminded herself of the case of MA (Pakistan). Mr Otchie submitted that in reaching her findings at paras 45 onwards, the judge must be understood to have applied the law and to have taken into account the public interest in reaching her findings in favour of the appellants.

32. Mr Otchie informed me that, if the decision were to be remade, the claims could only be stronger because of the further length of time the third and fourth appellants have been in the UK and he informed me that there were supporting certificates relating to their schooling subsequent to the hearing before the First-tier Tribunal.

Discussion

33. It was common ground before me that, as a result of the Court of Appeal's decision in MA (Pakistan), in assessing whether it was "reasonable to expect" a child to leave the UK, not only should the child's circumstances and best interests be taken into account, but also account must be taken of the public interest. In effect, the competing factors in favour of the

child remaining in the UK and the public interest must be weighed against one another.

34. In MA (Pakistan), the Court of Appeal endorsed this approach to the provision in para 276ADE(1)(iv) and the equivalent provision in s.117B(6). It is equally applicable to the identical wording in para EX.1 of Appendix FM. Although expressing some reservation, Elias LJ (with whom King LJ and Sir Stephen Richards agreed) accepted that the Court of Appeal was bound by the earlier decision of that court in MM (Uganda) v SSHD [2016] EWCA Civ 450 which had held that in determining whether the effect on an individual was "unduly harsh" under s.117C(5) of the NIA Act 2002 in a deportation case, the public interest had to be factored in when considering whether the impact on any child of an individual's deportation would be "unduly harsh." At [45] in MA(Pakistan) Elias LJ said:

> "In my judgment, if the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the 'unduly harsh' concept under Section 117C(5), so should it when considering the question of reasonableness under Section 117B(6)."

35. The Court of Appeal noted, however the significance of a child's best interests and residence in the UK of at least seven years. At [45], Elias LJ said:

> "...the only significance of section 117B(6) is that where the seven year rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted."

36. At [46], Elias LJ, having referred to the Secretary of State's own guidance, added this:

> "After [7 years] the child will have put down roots and developed roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so where the children are very young because the focus of their lives will be on their families. But if the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interest will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment."

37. What is said in the present case by the Secretary of State is that the judge determined the reasonableness of expecting the third and fourth appellants to leave the UK solely on the basis of the impact upon them of doing so. The judge failed to factor in the public interest. I do not accept that submission.

38. First, whilst I accept that the judge must have regard to the public interest, whether under the Rules in reaching a view on "reasonableness" or s.117B(6) of the NIA Act 2002 outside the Rules and must demonstrate that has been done (see Forman (ss.117A–C consideration) [2015] UKUT

412 (IAC)), the obligation is one of substance not form (see Dube (ss.117A – 117D) [2015] UKUT 90 (IAC)).

39. In this case, the only aspect of the public interest raised by the Secretary of State concerned the immigration history of the first and second appellants, namely that they had been overstayers since 2008 and the cost to the public purse of the three children remaining in the UK. The renewed ground described the parents' immigration history as "appalling". Whether that epithet is appropriate, about which I have doubts, in relation to the first and second appellants' history (having arrived lawfully but overstayed), the judge clearly set out their immigration history at para 3 of her determination. As regards the costs to the public purse, it is not clear whether this was explicitly relied upon before the judge. The Secretary of State's grounds do not positively assert that to be the case and, it may well be, that in considering whether there were grounds for appeal it was a point that occurred for the first time to the drafters of the grounds. In any event, it is a self-evident point that arises in relation to virtually every appellant who succeeds in establishing that they should remain in the UK. I can see no basis upon which this experienced Immigration Judge would fail to have regard to that element of the public interest in any consideration of the public interest.

40. The crucial issue here is whether the judge did consider the public interest. Mr Diwyncz accepted that the judge had correctly directed herself as regard the public interest both by reference to s.117B and MA (Pakistan). Indeed, her specific self-direction to "remind" herself of MA (Pakistan) could only be a self-direction on the point that whether it was "reasonable to expect" either the second and third appellant to leave the UK required a consideration of the public interest. That, after all, is what that case is all about. Whilst the judge did not make specific reference to the public interest until the final sentence of para 53 of her determination and then again in para 54, she clearly had in mind that the public interest involved the "legitimate aim of effective immigration control". That, reading the judge's decision fairly as a whole, must include a reference to the immigration history of the first and second appellants. Consequently, in finding that the first and second appellants met the requirement in para EX.1 and the third and fourth appellants met the requirement in para 276ADE(1)(iv), no doubt it would have been better had the judge spelt out her reasoning in more detail but, in my judgment, she said enough to understand her reasons for allowing the appeals.

41. Mr Diwyncz did not pursue a rationality challenge in respect of the judge's eventual finding. Providing it is clear that the judge did not misdirect herself in law and did, in fact, consider the public interest, to require her to do more would be an exercise in form rather than substance. I am satisfied that she did factor in the public interest in assessing whether it was reasonable to expect the third and fourth appellants to leave the UK and, in the light of the unequivocal findings she made in respect of the

children's best interests and the adverse impact upon them of having to leave the UK where they were fully integrated and returning to Pakistan, the judge was not satisfied that the public interest, including the parents' immigration history as overstayers outweighed the interests of the children.

42. In those circumstances, I am unpersuaded that the judge was not legally entitled to find that the first and second appellants met the requirements of para EX.1 and that the third and fourth appellants met the requirements of para 276ADE(1)(iv).

43. The grounds also contend that the judge failed to consider the individual children's best interests separately. Mr Diwyncz, although he did not resile from the grounds, did not seek to press this argument orally before me. He was right not to do so. It is clear, again on a fair reading of the judge's determination that she considered the best interests of the third and fourth appellants and reached conclusions in regard to them individually. As regards the fifth appellant, given that his parents and siblings succeeded under the Rules, it is quite impossible to see how it would be proportionate to remove him alone. In my judgment, this ground is simply not made out.

44. For these reasons, I reject the Secretary of State's grounds of appeal. The judge did not err in law in reaching her findings under the relevant Rules and in allowing the appeals under Art 8.

45. There is one final point which I raised at the hearing. The judge allowed the appeals of the first, second, third and four appellants under the Immigration Rules. The appellants' application for leave was made on 28 August 2015, in response to a Statement of Additional Grounds (RED.0003). That application, therefore, was made at a time when the rights of appeal under s.82 of the NIA Act 2002 had been amended by s.15 of the Immigration Acts 2014 with effect from 6 April 2015. As a result, the appellants' appeals were limited, so far as relevant to these cases, to Art 8 of the ECHR. Therefore, to the extent that the appeals were to be allowed, they could only be allowed under Art 8. In fact, the judge also allowed all the appellant's appeals under Art 8 and, given her sustainable findings that the first four appellants met the requirements of the Rules, which had already taken into account the public interests, it is impossible to see on what basis any other decision could be made in respect of Art 8. Consequently, any error by the judge in allowing the appeals under the Rules was immaterial to her decision to allow the appeals of each of the appellants under Art 8 which, therefore, stands.

Decision

46. The decision of the First-tier Tribunal to allow the appellants' appeals stands.

47. The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

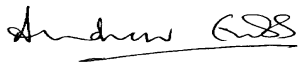
A Grubb
Judge of the Upper Tribunal

8 September 2017

TO THE RESPONDENT
FEE AWARD

Judge Walker made a fee award of any fee which had been paid. As her decision to allow the appeal stands, there is no reason to reach any different conclusion other than to make a fee award in the appellants' favour.

Signed



A Grubb
Judge of the Upper Tribunal

8 September 2017