Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/20952/2015
IA/20956/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 November 2016	**On 11 May 2017**
Prepared 15 November 2016	

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MYK
AnK
(ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appearances:

For the Appellants: Mr A Otchie, Counsel instructed by Malik Law Chambers
For the Respondent: Mr S Walker, Senior Presenting Officer

DECISION AND REASONS

1. The First Appellant, a national of Pakistan, date of birth [ ] 1972 and the Second Appellant, his wife, a national of Pakistan, date of birth [ ] 1977, appealed against the decisions of the Secretary of State, dated 30 April

2015, to refuse applications made on 11 November 2014 for leave to remain on the basis of family and private life.

2. Their appeals came before First-tier Tribunal Judge Lagunju who, on 25 January 2016, allowed their appeals with reference to Article 8 ECHR. Permission was given to the Secretary of State to challenge the decisions which also at that stage included that of a further Appellant, [AK], the daughter of the First and Second Appellants. She does not feature directly as an Appellant in this appeal but she remains a dependant of the First and Second Appellants, along with a further child, [RK], born in the United Kingdom on 20 December 2010 but a Pakistan national.

3. The Respondent considered the position of the Appellants and their children with reference to the Immigration Rules (the Rules). It is accepted that the First and Second Appellants do not meet the requirements of Appendix FM or paragraph 276ADE(1) because they do not meet the eligibility requirements either as their husband and wife status, the period of time they have been in the United Kingdom and the claim of very significant obstacles to return.

4. The skeleton argument and submissions made on behalf of and in respect of [AK] make a simple factual error. First, her date of birth is [ ] 2004 and secondly, she entered the United Kingdom on 18 October 2008. Her application to remain was made on 11 November 2014. Therefore at the date of application she had not been in the United Kingdom seven years immediately preceding the date of application. The position is that [RK] does not come within the provisions of Paragraph 276ADE(1) of the Rules because she had only lived, at the date of application, some four years and four months in the United Kingdom and therefore did not meet the seven years' continuous period required.

5. In respect of both [AK] and [RK], it was argued that there were no very significant obstacles to return.

6. The position was therefore that the only issues were the best interests of the children and whether or not there were circumstances that warranted the consideration of Article 8 ECHR, bearing in mind that this was not a deportation case.

7. Mr Walker did not specifically argue that Article 8 could not fall to be considered but rather the merits of the case did not give rise to that outcome.

8. It was also not argued that either the First or the Second Appellants' personal circumstances in being in the UK were precarious circumstances where their immigration status was not settled gave rise to any general basis to remain on their merits. It was also argued that both of them had come to the United Kingdom from Pakistan at ages when they were thoroughly embedded in cultural and social ties in Pakistan and, as Urdu speakers, could communicate on return. Rather the way the case was presented was that, particularly by reference to [AK], their mistakes, overstaying in the United Kingdom and lack of status or the presence of precarious status, should not be held against the best interests and future and development of [AK] and [RK].

9. As a generality it was said that the First and Second Appellants were originally from Kashmir, although it appeared that the Second Appellant's family is still based there and the First Appellant's family is based in Rawalpindi.

10. The position therefore is that the factual circumstances are that the two children are in mainstream education in the United Kingdom and I first consider them by reference to Section 55 BCIA 2009 where their best interests lie.

11. The children's best interests, if it is simply a choice between which education system and where they are presently, as opposed to change, lie in remaining in the United Kingdom, certainly so far as [AK] is concerned. She has now spent a significant number of years in education in the United

Kingdom and is inevitably settled here with friends and acquaintances. Her written representation produced to me shows just how much she enjoys her life in the United Kingdom.

12. In effect neither she nor [RK] know any different. In considering this matter a starting point in this case is the decision of First-tier Tribunal Judge Sethi, promulgated on 12 March 2014, who considered an appeal against the Respondent's decision of 25 October 2013 to refuse to grant the First and Second Appellants and [AK] leave to remain following the refusals of respective human rights claims.

13. The judge found that the children [AK] and [RK] were in education, that the First and Second Appellants' business was being developed, they were self-sufficient and feared the disruption that return to Pakistan would cause, particularly to the detriment of the children, their education and future opportunities. It was acknowledged that the First Appellant had family members in Pakistan and that the Second Appellant had remaining family members in Pakistan although possibly in Kashmir. It was also indicated that the Second Appellant was particularly concerned because she had been a teacher and therefore had personal knowledge of the education system / opportunities in Pakistan and the extracurricular activities were more limited. The activities that [AK] and [RK] could ultimately enjoy were different, there were different expectations upon girls and their conduct in Pakistan than could be conducted here and that [AK], whilst understanding Urdu, did not speak it well. Therefore she would have difficulties integrating into Pakistan. The Second Appellant accepted that it was the children's parents' choice that had maintained them in the United Kingdom and it was because there was a better life for them here that they wished to remain.

14. Judge Sethi set out the factual matters that were found and in particular concluded that the best interests of the children lay in a return to Pakistan. The judge took into account a number of factors in that assessment.

15. First, their best interests were served by being brought up in the care of their parents, wherever that might be. Secondly, although [AK] was settled, in the ordinary meaning of the word, in the UK and enjoys a normal life here as enjoyed by a child of similar age and, bearing in mind her status and length of time she had spent in the UK, did not demonstrate that she would suffer any real or lasting detriment if required to return to Pakistan with her parents, where she would in any event be continuing in education. Thirdly, although the Second Appellant considered her children would not receive the same quality of education or extracurricular activities through the Pakistan education system, there was no evidence that the children would be denied an education. Fourthly, there would be some distress for [AK] and separation from friendships she had developed in the United Kingdom and withdrawal from extracurricular activities which she had become accustomed to and enjoyed. Fifth, the children could converse with their parents in English and the evidence does not suggest that they could not develop competence in Urdu. Sixth, they are able to adapt and would be able to adapt to a different system. Seventh, of [AK] the judge took into account the period of time that had then been spent in the United Kingdom bearing in mind when she entered. Eighth, there was an inability of the First and Second Appellants to meet the Immigration Rules. Ninth, the First and Second Appellants had developed a business which was successfully running and the effect of them leaving would be that their staff would lose employment and that the consequences were not disproportionate. The judge also found that the children had developed friendships in their community and took the view that they would be able to do so again in Pakistan just as the First and Second Appellants, who had been successful in making a business in the UK, would be similarly able to do so in Pakistan. Therefore relocation, albeit disruptive, whatever emotional upset there might be, was not disproportionate.

16. The major change in circumstances since that decision in 2014 is of course that [AK] has been in school longer. It follows also that [RK] will have

developed a wider range of friendships and perhaps a greater measure of independence, not in the sense of independence from the family but independence in the sense of her own friends, contacts and connections.

17. Before me what was essentially argued was nothing in relation to the First and Second Appellants, save the role that they have in caring for their children and the benefits that they have brought to them partly derived through their life in the United Kingdom.

18. In the circumstances I therefore consider whether or not there are the kind of exceptional circumstances that might show that Article 8 should be considered outside of the Immigration Rules. I do take into account the case of EV (Philippines) [2014] EWCA Civ 874 and I do not hold against the children of the First and Second Appellants that their parents' conduct in the UK is such that they have chosen to reap the benefits of remaining in preference to their life in Pakistan.

19. I also take into account the case of MK [2011] UKUT 00475 and the case of Azimi-Moayed [2013] UKUT 197, in particular the discussion about the implications of interruption in education, its consequences and the extent to which there should not be overemphasis on an interruption in education, so much as it is a factor forming part of the whole assessment. The primary importance of the best interests of affected children is undeniable and the duties under Section 55 of the BCIA 2009 stand independently as statutory requirements which must be addressed.

20. I take into account the case of Jeunesse v the Netherlands (2015) 60 EHRR 17 and the general principle derived from it that if a family life is created when a person knew that their immigration status was precarious it is likely that only in exceptional cases will the removal of the non-national family member be exceptional. There is a plethora of case law around the issue of what may be exceptional circumstances, as used in different contexts, nevertheless the essential question is whether the effect of the decision render the outcome unduly harsh in terms of the consequences for the individual or the family and therefore, in considering exceptional

circumstances, that must include a consideration of the best interests of a child in the UK but there will not often be occasions when that is shown to be disproportionate. If it were otherwise, the presence of a child in the UK would simply trump any other considerations, see ZH Tanzania [2011] UKSC 4.

21. I concluded that it is arguable that the circumstances are such as to show the decision could be disproportionate in terms of the impact on [AK]. I do not see, in relation to the First and Second Appellants or indeed [RK], anything that demonstrates that there are exceptional circumstances. So far as [AK] is concerned, and that is the real basis on which the appeal has been mounted, essentially it is the interruption in her education and a return to life in Pakistan where freedoms for women are different to that in the United Kingdom. It does not seem to me that there really is a case that the education system fails so badly in Pakistan that it would be disproportionate to return her now in terms of her educational development and progress. Rather it seems to me that the position is there would be disruption for her that would not be in her best interests but to a degree that is a consequence of the choice of keeping the family together, which is obviously desirable and the fact that the First and Second Appellants' only basis to remain would be as her carers.

22. I consider with reference to Section 117B(6) of the NIAA 2002 that in a non-deportation case the removal of a qualifying child is not required. Nevertheless I take the view that it is reasonable for her to return to Pakistan with her parents and that it is not disproportionate to do so. I am particularly persuaded by the fact that her parents are very keen, educated people who wish to ensure their daughter has the best and they will do their best on return to Pakistan to foster the development and educational enhancement of both [AK] and [RK]. I do not accept the evidence that there is no family in Pakistan and therefore that there would be no possible support available.

23. I have no educational psychologist's or expert's report on the impact on either child's confidence or educational development by being removed from schooling in the UK. I take as my starting point what they would have in Pakistan is different and nevertheless they can make friends and undergo examinations and qualifications as they wish. I take into account that removing the First and Second Appellants will create problems for the disposal of their business and ensuring payment for the sale price or however their finances are arranged but I do not accept that that constitutes exceptional circumstances or that the financial hardship of itself justifies the view that the decision is disproportionate. I take into account the public interest which should be given significant weight I find in the context of the facts, particularly because the First and Second Appellants have taken choices to remain with its obvious consequences which they would prefer to ignore. In the circumstances I find the Respondent's decision is proportionate: The public interest outweigh the various factors concerning [AK] and [RK]'s best interests.

NOTICE OF DECISION

The appeals are dismissed

ANONYMITY ORDER

An anonymity order is made because of the age of the children.

DIRECTION REGARDING ANONYMITY – RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

TO THE RESPONDENT
FEE AWARD

The appeal has failed and therefore no fee award is appropriate.

Signed Date 10 March 2017

Deputy Upper Tribunal Judge Davey

P.S. I regret this decision has been so delayed in promulgation which has been caused by the case file being mislocated. I have taken the opportunity to consider the cases of Hesham Ali [2016] UKSC 60, Agyarko [2007] UKSC 11 and MM (Lebanon) [2017] UKSC 10 in so far as they may bear on the issues.