Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/22371/2014
IA/22372/2014
IA/22373/2014
IA/22374/2014
IA/37423/2014

<u>THE IMMIGRATION ACTS</u>

Heard at Field House	**Decision & Reasons Promulgated**
On 19 May 2017	**On 30 May 2017**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

<u>Appellant</u>

and

MR MNK
MRS SN
MISS AN
MASTER DN
MASTER IN
(ANONYMITY DIRECTION MADE)

<u>Respondents</u>

<u>Representation</u>:

For the Appellant: Mr P Armstrong, Home Office Presenting Officer
For the Respondents: Mrs S Akinbolu, Counsel, instructed by M&K Solicitors

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DECISION AND REASONS

1. My task in this case is to re-make the decision on the appeal brought by the respondents (hereafter the claimants) against the decision made by the appellant (hereafter the Secretary of State or SSHD) refusing to grant them leave to remain. On 16 January 2016 Upper Tribunal Judge (UTJ) Chalkley set aside the decision of First-tier Tribunal Judge S J Clarke, finding he had materially erred in law in failing to give consideration to the public interest when assessing whether the claimants, who were appeal rights exhausted in 2009, should succeed in their appeal on Article 8 grounds. UTJ Chalkley directed that their case be set down for a further hearing at which there might be five witnesses. In the event, it did not prove necessary to hear any oral evidence because Mr Armstrong confirmed that the SSHD did not dispute any of the witness statements in which the claimants gave details of their family circumstances.

2. The decision of UTJ Chalkley provides a helpful summary of the background to this case, which is suitably anonymise:

   "2. The [claimants] are all nationals of Pakistan and members of the same family. The first named [claimant] was born [in] 1993. His wife, the second named respondent, was born [in 1997]. Their daughter, the third named appellant, AN, was born in [early] 2001, the fourth respondent, DN, was born [in late 2003] and the fifth appellant, IN, was born [in late 2006].

   3. The first [claimant] entered the United Kingdom in October 2003 as a student and the second, third and fourth [claimants] entered the United Kingdom as dependants of the first [claimant] in July 2006. The fifth [claimant] was born in the United Kingdom.

   4. The [claimants'] leave to remain in the United Kingdom was lawful until 2009. In May 2009 an appeal against leave to remain as a Tier 1 Migrant by the first named [claimant] and as his dependants by the remaining [claimants] was refused. Thereafter, the first [claimant] made application for leave to remain as a Tier 4 Migrant and his dependants made applications in line with his, as his dependants, but those applications were refused with no right of appeal by the claimant in November 2009. At that time the [claimants] were appeal rights exhausted. Since 2009 the [claimants] have remained in the United Kingdom, without leave.

   5. The [claimants] lodged an application for leave to remain outside the Rules in May 2013. That application was refused, initially with no right of appeal, but following the commencement of judicial review proceedings, the Secretary of State agreed to reconsider the cases, taking into account

Section 55 of the Borders, Citizenship and Immigration Act 2009 and the Immigration Rules.

6. The [SSHD] refused the application on 2nd May, 2014 for the first, second, third and fourth [claimants]. The [SSHD] noted the [claimants'] immigration history and considered the parent route and EX.1 and Appendix FM(1) of the Immigration Rules. It was acknowledged that the third and fourth [claimant] had lived in the United Kingdom continuously for more than seven years, but it was contended that it was not unreasonable for them to leave the United Kingdom as a family unit.

7. The [SSHD] refused the application for the fifth [claimant] on 10th September, 2014 because the child no longer resided with his adoptive parents and their application for adoption was withdrawn. The child lives with his biological parents, the first and second [claimant] and had done so since May 2014. The [SSHD] considered that the fifth [claimant] could return to Pakistan with his family members.

8. The [claimants] appealed and their appeal was heard at Taylor House on 5th November, 2015 and again on 30th June, 2016 by First-tier Tribunal Judge S J Clarke. Judge Clarke noted that there was still in existence a family court access order in respect of the fifth [claimant]. In fact by the time of the hearing before the First-tier Tribunal Judge the fifth [claimant] was back living with his family."

3. Mrs Akinbolu submitted that it would be unreasonable to expect the claimants to leave the UK, notwithstanding that they had remained without leave since 2009. The fifth claimant was now a British citizen (since 7 March 2017) and his older sister and brother had both been in the UK for over seven years. All of the children were doing exceptionally well at school and the eldest was doing her GCSEs. All three children identified themselves as British. The family had clear ties with the community and their circle of friends included people of different backgrounds. They had close ties with other relatives and their families in the UK. They were not reliant on public funds. For the fifth claimant to have to return to Pakistan with his family would be particularly unreasonable because he had spent seven years of his life being fostered by his relatives in Wolverhampton as a result of the illness of the second claimant (his mother). The second claimant was diagnosed in 2007 with a rare form of aplastic anaemia, a life-threatening condition. Because of her illness a Family Court order had been taken out. On 25 January 2016 the Family Court recorded that:

> "This court is not able to confirm whether [the fifth claimant] returned to the care of his parents, but if he has returned to live permanently with his parents the residence order no longer reflects the reality of the situation and the court could entertain an application to discharge the order."

He was now back with his biological family permanently and he was now a British citizen so could not be removed anyway.

4. Mrs Akinbolu stated that in terms of the likely situation the claimants would face on return to Pakistan, the family home in Kashmir had been destroyed in the bombings. There were no family members in Pakistan able to assist them. The children did not speak Urdu to the requisite level and do not write it; their only schooling has been in the UK. Whilst the family had remained in the UK unlawfully since 2009 their level of non-compliance was minimal as they had not attempted to evade the authorities and had actively attempted to regularise their status.

5. Mr Armstrong submitted that the parents could not meet the relevant requirements of the Immigration Rules and neither could the children. The central issue in these appeals was whether it was reasonable to expect the children to return to Pakistan. Although the fifth claimant was now a British citizen, the Court of Appeal in **MA (Pakistan)** at paragraph 47 made clear that the fact that a child was a British citizen was not determinative of the issue of whether it was reasonable to expect the family to live abroad. There were important public interest considerations in this case: the family had remained unlawfully in the UK since the end of 2009; the parents had always known their immigration status was precarious; they were not financially independent; their continued presence in the UK had been a cost to the taxpayer, especially in relation to the extensive medical treatment given to the second claimant. Whilst the SSHD did not dispute the account given in the witness statements of the family's circumstances in the UK, their own subjective impressions that they could not receive an adequate education in Pakistan was not supported by the objective evidence. They still had family in Kashmir. The religion of the family, Islam, was the official religion of Pakistan. The first two claimants spoke Urdu. The first claimant had worked in Pakistan. The children were highly intelligent and could adapt to life in the UK. Whilst there was still a Family Court residence order in place for the fifth claimant, that could be discharged. There were no continuing health needs.

My Assessment

6. In deciding these appeals I have taken into account the entirety of the evidence including updated witness statements from the claimants and the extended family members in Nottingham and Wolverhampton, a number of school reports and a report by an independent social worker, David Chapman dated 28 March 2017 which concludes that the family is vulnerable and it would be strongly in the best interests of the three children to be allowed to remain in the UK with their parents.

7. In many respects the facts of this case illustrate the acute dilemma posed for courts and Tribunals by changes made to the Immigration Rules and the statutory framework since the Human Rights Act 1998. Were I to attempt to decide the case

purely on the basis of Strasbourg jurisprudence on Article 8, I would find the case a finely balanced one

8. On the one hand there are a significant number of factors counting in favour of the claimants. Not only do they enjoy close ties of family life between themselves, but their ties with relatives have at least two aspects that give them the character of family life ties within the meaning of Article 8. The family is supported financially by the second claimant's brother who lives in Nottingham. The fifth claimant has enjoyed close family life ties with his uncle and aunt and their family in Wolverhampton as a result of going to live with them for eight years following the serious illness of the second claimant. The claimants have significant private life ties within their local community and the eldest child has clearly begun to form significant ties outside of the family. The decisions refusing them leave to remain outside the Immigration Rules clearly amounts to an interference with their right to respect of family and private life. In terms of assessment of the proportionality of these decisions, the factors in their favour include: the fact that they have now lived in the UK for a considerable period (the first claimant having been here since October 2003; the second, third and fourth claimants since July 2006 and the fifth claimant having been born in the UK in December 2006); that they all speak English; that they have actively involved themselves in their local community; that the children are all performing exceptionally well at school and are regarded as model pupils; that they have very close ties with other relatives in the UK who have become British citizens; that these ties have gone beyond normal emotional ties, by virtue of the decision of close relatives to financially support them and to take on the fostering of the fifth claimant; that they have been able to overcome the very significant challenges posed by the serious ill-health of the second claimant.

9. On the other hand, there were a number of public interest factors that weight against them in the balancing exercise. They have remained in the UK unlawfully since 2009 and even when they resided here lawfully, the first claimant was in the UK with limited leave as a student and he and his family have never had a legitimate expectation that they would be permitted to remain in the UK. Whilst the family has not had recourse to public funds, the serious health problems of the second claimant have been at the expense of the taxpayer.

10. Application of the considerations set out in Section 117A-D of the NIAA 2002 reinforces the basis for counting the above considerations against the claimants. The family may not have had recourse to public funds, but they are financially dependent on relatives, they are not financially independent. The family's private life ties in the UK have been formed whilst their immigration status has been precarious.

11. In addition, leading cases have established that the Immigration Rules strike a balance between the individual and the wider community and a failure to meet the requirements of the Immigration Rules adds to the weight of public interest factors counting against applicants.

12. However, the guidance given in leading cases includes the guidance given in **MA (Pakistan)**, a case on which Mr Armstrong placed great reliance. It is true that that case emphasises that the assessment of reasonableness must take into account public interest considerations and that the best interests of the child, even if they for him or her to stay, do not determine the issue of reasonableness. At the same time, Elias LJ attached particular significance to the SSHD's own policy in respect of children who had resided in the UK for seven years or more. At paragraph 46 he stated:

> "Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled 'Family Life (as a partner or parent) and Private Life: 10 Year Routes' in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be 'strong reasons' for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down 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 when the children are very young because the focus of their lives will be on their families, but 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 interests 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."

13. It is pertinent to examine further what the SSHD's own policy guidance Appendix FM 1.0 Family Life (as a partner or parent) and Private Life: 10 Year Routes states, in particular in relation to children who have lived in the UK for a continuous period of seven years. Paragraph 11.2.4 provides:

> "**11.2.4. Would it be unreasonable to expect a non-British Citizen child to leave the UK?**
>
> The requirement that a non-British Citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, recognises that over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years.

The decision maker must consider whether, in the specific circumstances of the case, it would be reasonable to expect the child to live in another country.
The decision maker must consider the facts relating to each child in the UK in the family individually, and also consider all the facts relating to the family as a whole. The decision maker should also engage with any specific issues explicitly raised by the family, by each child or on behalf of each child.

Relevant considerations are likely to include:

a. **Whether there would be a significant risk to the child's health**
For example, if there is evidence that the child is undergoing a course of treatment for a life threatening or serious illness and treatment will not be available in the country of return;

b. **Whether the child would be leaving the UK with their parent(s)**
It is generally the case that it is in a child's best interests to remain with their parent(s). Unless special factors apply, it will generally be reasonable to expect a child to leave the UK with their parent(s), particularly if the parent(s) have no right to remain in the UK;

c. **The extent of wider family ties in the UK**
The decision maker must consider the extent to which the child is dependent on or requires support from wider family members in the UK in important areas of his or her life;

d. **Whether the child is likely to be able to (re)integrate readily into life in another country. Relevant factors include:**

- whether the parent(s) and/or child are a citizen of the country and so able to enjoy the full rights of being a citizen in that country;

- whether the parent(s) and/or child have lived in or visited the country before for periods of more than a few weeks. The question here is whether, having visited or lived in the country before, the child would be better able to adapt, and/or the parent(s) would be able to support the child in adapting, to life in the country;

- whether the parent(s) and/or child have existing family or social ties with the country. A person who has extended family or a network of friends in the country should be able to rely on them for support to help (re)integrate there;

- whether the parent(s) and/or child have relevant cultural ties with the country. The caseworker must consider any evidence of exposure to, and the level of understanding of, the cultural norms of the

country. For example, a period of time spent living mainly amongst a diaspora from the country may give a child an awareness of the culture of the country;

- whether the parents and/or child can speak, read and write in a language of that country, or are likely to achieve this within a reasonable time period. Fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice;

- whether the child has attended school in that country.

e. **Any country specific information, including as contained in relevant country guidance**

f. **Other specific factors raised by or on behalf of the child.**

Parents or children may highlight the differences in the quality of education, health and wider public services or in economic or social opportunities between the UK and the country of return and argue that these would work against the best interests of the child if they had to leave the UK and live in that country. Other than in exceptional circumstances, this will not normally be a relevant consideration, particularly if the parent(s) or wider family have the means or resources to support the child on return or the skills, education or training to provide for their family on return, or if Assisted Voluntary Return support is available."

14. Applying these considerations to the third and fourth claimants in this case, there are no significant risks to their health (a); save in one important respect, it appears reasonable on balance to expect them to leave the UK with their parents (b); the children, like their parents, are dependent financially on support from wider family members in the UK (c); whilst citizens of Pakistan, they have not lived there since they were 5 and 2½ respectively and their ability to adopt to life in Pakistan would be hampered by the absence of a family or a network of friends in Pakistan able to support them or to help them re-integrate there (d); they have cultural ties with Pakistan but they are not able to write Urdu and the language they have spoken at home and in school in the UK has been English (d); they have never attended school in Pakistan (d); Pakistan has an adequate educational system (e); and the first claimant has skills relevant to obtaining employment in Pakistan(e).

15. These considerations, some which evidently count in favour of these two claimants, some which evidently count against, lend support for the view that the assessment of their circumstances very much turns on the guidance given in the first paragraph of 11.2.4: "The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and

strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years". In this regard, I attach significant weight to the fact that the third claimant, now 16 is doing her GCSEs and has shown unusual initiative in exploring a future career in law in this country. The evidence demonstrates that the family espouses British values.

16. Even so, had the family comprised just the first four claimants, there would have still in my view, been sufficiently strong reasons for finding the decision refusing them leave proportionate. But of course there is the situation of the fifth claimant to be added into the mix and he is someone who, since the date of decision and the date of hearing before the First-tier Tribunal Judge has become a British citizen. Again, it is instructive to pay regard to the SSHD's own guidance. At paragraph 11.2.3 it is stated:

> "**11.2.3. Would it be unreasonable to expect a British Citizen child to leave the UK?**
>
> Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.
>
> The decision maker must consult the following guidance when assessing cases involving criminality:
>
> - Criminality Guidance in ECHR Cases (internal)
> - Criminality Guidance in ECHR Cases (external)
>
> Where a decision to refuse the application would require a parent or primary carer to return to a country **outside the EU,** the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.
>
> In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.
>
> It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.
>
> The circumstances envisaged could cover amongst others:

- criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
- a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules."

17. The above is not the entirety of the guidance given on British citizen children and further paragraphs make clear that if not satisfied that there are any exceptional circumstances that would warrant a grant of leave to remain outside the Immigration Rules, the case must be referred to the European Casework for review. That is not a relevant step in this case because the fact of the child being a British citizen has only arisen in the course of the appeal proceedings and it is therefore a matter for me to determine. Nevertheless the guidance makes very clear that where the decision to refuse the application would require a parent or primary carer to return to a country outside the EU, "the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer".

18. Two matters are of particular importance when applying the guidance to the facts of the fifth claimant's case. First, although there is still an extant Family Court residence order, it is accepted by Mr Armstrong that the child has recommenced living with his own family and thus his only primary carers are his two parents. There has been no suggestion that the child wishes to return to live with his relatives. There is no suggestion that this case involves any criminality (indeed apart from overstaying, the family appear to be a model family).

19. I consider the SSHD's guidance is important in this case because, as the Upper Tribunal said in **SF and others** **(Guidance, post–2014 Act) Albania [2017] UKUT 00120(IAC)** at paragraph 12:-

    "[w]here there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it."

20. Manifestly, the decision refusing the application of the fifth claimant would require him to return to a country outside the UK. Hence it is unreasonable to expect him to leave the UK with his parents.

21. That brings the case back to its starting point, which both parties agreed was whether or not the claimants can meet the reasonableness requirement. In this connection it is important to again apply primary legislation, Section 117B(6) in particular which provides:

> "(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."

22. This provision provides a legal route to stay for parents that is not available to them under the Rules (unless suitability requirements are met).

23. It seems to me that Section 117B(6) has particular application in these appeals since it is not in dispute that the first and second claimants are in a genuine and subsisting relationship with the fifth claimant and, by application of the SSHD's own policy, it cannot be reasonable to expect him to leave the UK.

24. Mr Armstrong sought to submit at one point that Section 117B(6) could not assist the first two claimants because the fifth claimant had not for a considerable period since his birth had a parental relationship with his parents. However, even leaving aside that the residence order did not appear to deprive the first two claimants of their parental rights, Mr Armstrong concedes that since the end of 2014 the fifth claimant has been back with his own parents, enjoying a genuine and subsisting relationship with them. Section 117B(6) contains no requirement of historic duration of the parental relationship; it is in the present tense.

25. My assessment of the claimant's case, including the five claimants together, is that the decisions made against them amount to a disproportionate interference with their right to respect for private and family life. The fifth claimant is no longer subject to immigration control in any event. Given that it would not be reasonable to expect the fifth claimant to leave the UK, the removal of his family (i.e. removal of the first four claimants) would prevent him from remaining in the UK. Against this background, I am also satisfied that the third and fourth claimants meet the requirements of paragraph 276ADE(iv). In short, I consider that applying the respondent's own policy the conclusion of the reasonableness assessment in relation to all five claimants, must be that it would be unreasonable to expect any of them to leave the UK.

Notice of Decision

26. For the above reasons:

    The decision of the First-tier Tribunal Judge has already been set aside for material error by UTJ Chalkley.

The decision I re-make is to allow the claimants' appeals on Article 8 grounds.

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.

Signed Date: 26 May 2017

Dr H H Storey
Judge of the Upper Tribunal