Upper Tribunal
Immigration and Asylum Chamber

Appeal Numbers:
HU/11171/2016

HU/11173/2016

HU/11174/2016

HU/11176/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 October 2018	**On 18 October 2018**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

MUHAMMED RIZWAN KHAN + 3
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

Representation

For the Appellant: Mr W M Rees, of Counsel, instructed by Farani Taylor Solicitors
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

Background

1. The appellant is a Pakistani national born on 9 May 1978. His wife and their two children born in October 2008 and January 2013 are his dependants. He entered the UK as a student and thereafter married his wife in Pakistan. She joined then joined him. Their last period of leave expired in July 2009 and an application for an extension was refused on the basis that the appellant had relied on a fraudulent diploma from the Cambridge College of Learning. That decision was not challenged. Thereafter several applications for leave were made but all refused. The most recent application was made on family and private life grounds.

2. The appeal was heard by First-tier Tribunal Judge Bowler at Hatton Cross on 15 September 2017 and was dismissed by way of a determination promulgated on 4 October 2017. Permission to appeal was refused by First-tier Tribunal Judge Davidge on 4 April 2018 but granted on renewal by Upper Tribunal Judge Freeman on 16 August 2018. Permission appears to be limited to the issue of whether it is reasonable to expect the older, qualifying, child to leave the UK and whether MA (Pakistan) [2016] EWCA Civ 705 had been properly applied.

3. There has been a Rule 24 response from the respondent opposing the challenge.

The hearing

4. I heard submissions from both parties at the hearing before me on 15 October 2018.

5. Mr Rees submitted that the judge had fallen into error in the determination by applying the wrong MA test; i.e. taking as the starting point the fact that the qualifying child's status should be regularized unless there was *"good reason"* not to do so (at paragraph 101) instead of *"powerful reasons"*. It was argued that the application of the wrong test had a material impact upon the judge's findings. It was also argued that the seven-year requirement under paragraph 276ADE (1)(iv) had been met, that it was not reasonable to expect the child to leave the UK and that the sins of the father should not be visited on the son. Reliance was placed upon the decision of MT and ET (child's best interests; *ex tempore* pilot) Nigeria [2018] UKUT 00088 (IAC) where it was confirmed that *"powerful"* reasons were needed to remove a qualifying child from the UK (ET had been in the UK for over ten years since the age of four). It was also submitted that the third appellant would soon be entitled to apply for British nationality.

6. A complaint was also made against the judge's refusal to allow a number of family members, who had travelled from Scotland to the hearing, to give oral evidence.

7. In response, Ms Fijiwala submitted that there was no material error. The requirements of 275ADE had not been met at the date of the application and so the case fell to be considered outside the rules. There was no indication that the judge had refused to hear from the other witnesses. There had been no request for a record of proceedings and nothing to show that their evidence would have made any difference. With respect to the issue of the reasonableness test, the judge had properly considered the best interests of the child first. The language issue had been considered at paragraphs 81-88, the claim of a fear of terror incidents at 89-92 and the welfare of the children at 93. It was the grant of permission and not the grounds that had raised the matter of the wrong test having been applied yet the court in MA had referred to *"strong reasons"* (at 46), *"powerful reasons"* (at 49) and *"good reasons"* (at 103). Indeed, the judge in the present case had cited *"strong reasons"* at paragraph 78. There was, therefore, nothing in this point. The judge recognised that significant weight should be given to the period of residence (at 111-113) and the children's circumstances alone were considered when the assessment was undertaken. This was consistent with MA. The judge's reasonableness assessment commenced at paragraph 101. It was noted that there were many family members in Pakistan. Schooling opportunities were also considered. Then the immigration history of the parents was taken into account along with the fact that they had never contributed to the UK economy yet had accessed the NHS without paying for services obtained. The child was not close to registering for British nationality at the date of the hearing. The IDIs were also considered.

8. Mr Rees replied. He stood by the points already made and submitted that the third appellant qualified under the rules at the date of the hearing. The evidence of the other witnesses had not been heard. That evidence would have gone to the integration of the appellants to British society. The older child's knowledge of Urdu was limited. The issue of terrorism impacted on the minds of the children. The judge had fallen into legal error in paragraph 101 when she referred to *"good reasons"*.

9. That completed submissions. I then reserved my determination which I now give with reasons.

Findings and conclusions

10. I have carefully considered all the evidence before me and the submissions that have been made by both parties.

11. The basis on which permission was granted centred on the issue of whether it would be reasonable for the third appellant, as a qualifying child, to leave the UK. Tied in with this was the issue raised by Judge Freeman on the First-tier Tribunal Judge's use of the language of MA (Pakistan) and thus its application.

12. Judge Freeman was not taken with the complaint that the judge failed to allow other witnesses to give oral evidence. There is nothing in the determination to suggest that leave was sought for the witnesses to do so, no contemporaneous notes from Counsel who represented the appellants at that hearing and no statement of truth to confirm what it is maintained had transpired. In fact, the record of proceedings shows that when the judge observed that there were a lot of children in the court room, Counsel indicated that they had not been told to come. He then stated that he did not plan on calling the appellant's sister and family as witnesses as there was nothing they would add to their witness statements and the Presenting Officer confirmed that she would not be cross examining them in any event. It was only then that the judge records that he indicated that it would be better for the appellant's sister and her children to go outside for refreshments than to stay in the waiting area. Their brief statements were before the judge and these were considered with all the other evidence (at 21 and 67). In all the circumstances, therefore, I do not consider that this complaint has been made out.

13. There is also no merit in the submission that the requirements of paragraph 276ADE had been met in terms of the third appellant. The judge addressed this point at paragraphs 58-63. The relevant date is that of the application. Even allowing for the further submissions to count as a fresh application, the third appellant had been here under seven years at the relevant time and the fourth appellant was only two.

14. Nor do I find any merit in the criticism that when assessing the best interests of the third appellant, the judge fell into legal error by referring to *"good reasons"* in paragraph 101 when it is maintained that Elias LJ referred to *"powerful reasons"* in MA. As pointed out by Ms Fijiwala, there are also references to *"strong reasons"* and *"good reasons"* in MA (at 46 and 103 and, indeed, additionally at 73) which suggest that the phrases were used interchangeably. That is exactly what Judge Bowler has done; there are references to *"strong reasons"* and *"good reasons"* in her determination and an appropriate self-direction in respect of MA (at paragraph 100). The judge also shows that she is aware of the significance of the seven-

year period and the considerable weight to be given to that (at 111 and 113). There is nothing in the assessment which would support the argument that the MA language was wrongly used and that the test was thus not properly applied; indeed, experienced Counsel and instructing solicitors did not even include this argument in the grounds. Had it been of such significance then I am in no doubt it would have been included as a primary criticism. I also consider it to be somewhat ironic, considering the emphasis now placed on that 'error' by the judge, that Counsel, himself, referred in his grounds to the issue in precisely the same terms as the judge is now criticized for doing (at paragraph 11 of the grounds).

15. I now turn to the judge's assessment. Having properly found that the requirements of the rules had not been met, the judge embarked of an assessment outside the rules. No issue is taken with any of her findings regarding the adult appellants and so I proceed to her analysis of the position of the two children. The judge considered their best interests at 73-95. The assessment is detailed. The judge properly referred to relevant case law and acknowledged that the best interests was a primary consideration (at 73-76). The point she made at paragraph 76 equates with that made in MT and ET that a younger child is less likely to have a private life outside that of the family. She also notes that the length of residence in itself is not the sole determinant of best interests.

16. The judge noted that the third appellant who had been born here would have been reliant on his parents and immediate family for much of his life given his young age. This was not a child who came here when he was a few years old and then spent seven of his more influential years putting down roots and making a separate private life. The judge considered the key issue raised by the parents – education. Whilst it was argued for the child that his knowledge of Urdu was limited because English was spoken at home, the judge was perfectly entitled to reject that contention in circumstances where the child's mother could not understand basic questions in English and where other evidence suggested that Urdu was the language used at home (GP's evidence). The judge was also entitled to be sceptical about the claim that a child could only be taught in Urdu. I am aware from country guidance cases that there are English speaking schools in the cities and as the appellants have a large family in Karachi, finding an appropriate school in such a large city should not be a problem. The judge also noted that the appellants had made no efforts to make the relevant enquiries into the options available. Of course, as the children are so young and have a spoken knowledge of Urdu, it would be possible for them to learn to read and write it just as the many children who come to the UK learn to read and write English at school here. The judge noted that the third appellant was a bright boy and found that with the

support of his parents he would be able to improve his knowledge. At worst as the judge notes, it would take the appellants some time to catch up with their peers if they attended an Urdu speaking school.

17. The judge also took account of the claim that there were terror incidents in Karachi. The judge noted that the evidence was insufficient to show that the situation would impact upon the welfare of the children and she also noted that the appellants' relatives lived there and there were no claims that they had suffered in any way. The reference to mobile phones being stolen was, she correctly observed, a crime that also occurred in the UK. Similarly, the claimed problems of gas and water shortages, power cuts and infrastructure difficulties were found to be insufficient to threaten the welfare of the children. As for the climate, there was no evidence that this would adversely impact on their health.

18. The judge gave weight to the importance for the children to establish relationships with their grandparents (both maternal and paternal sets remain there) and with a large number of uncles and aunts and their families. She noted that the first appellant had obtained an education here and had some experience of working both here and previously in Pakistan. She considered that that would assist in finding employment. The judge then properly concluded that the evidence did not show that the best interests of the children required them to stay in the UK.

19. The judge then went on to consider s.117B(6) in terms of the third appellant as a qualifying child. She properly directed himself as to MA in respect to the issue of reasonableness. She made it very plain that the child was not to be blamed for the poor immigration history of his parents and that the starting point was that his status should be legitimized unless there were good reasons not to do so. I have already addressed the issue of *"good reasons"* above. I would add, however, that my conclusions are reinforced by the fact that this direction comes immediately after the judge had cited MA and so the correct test and approach would have been fresh in her mind. She noted that the child was still young, at primary school and only just beginning to venture beyond the protection and support of his immediate family. His years here would not have had the same impact in terms of his social and cultural roots than they would have done at a later age. He would be able to continue with clubs and activities in Pakistan. In all the circumstances the judge found that it would be reasonable for the child to leave the UK.

20. In the judgment of MA, the particular case of MA and his family (combined and heard with other cases) was unsuccessful. Indeed, his circumstances are very similar to those of our appellant. MA had

entered as a student, his wife had joined him thereafter and they had two sons born in the UK, one of whom had been here over seven years (eight at the date of the hearing before the First-tier Tribunal and ten years when the appeal came to the Court of Appeal). The court found that the First-tier Tribunal Judge's findings that the child's social life was dominated by his parents and younger brother, that he was in primary education, that his parents offered him a loving environment, that there were no health issues, that there were many extended family members in Pakistan and that it was reasonable, therefore, for him to leave the UK showed no errors of law. It was accepted that the judge had shown he was aware of the significance of the seven-year period, that he had given sufficient weight to that matter and that whilst other judges may have struck the balance differently, this decision was not legally wrong. The court held that *"It may be reasonable to require the child to leave where there are good cogent reasons..."* (at 73).

21. In the same way, Judge Bowler undertook a full assessment and concluded that the best interests of the child appellants did not require them to remain in the UK and that it was reasonable for the third appellant to leave the UK. She followed the correct legal approach in assessing the evidence and the issues. She gave weight to the length of residence and she reached fully reasoned conclusions.

22. It is worth noting here that at the date of the hearing the third appellant was a long way off from an entitlement to apply for British nationality.

23. It follows that I conclude that the judge properly considered the evidence and the issues before her and that she made no errors of law.

Decision

24. There are no errors of law in the determination of the First-tier Tribunal Judge. The decision to dismiss the appeal stands.

Anonymity order

25. There has been no request for an anonymity order at any stage and I see no reason to make one.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

16 October 2018