UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBERS: HU/15262/2016
HU/15263/2016, HU/15264/2016
HU/15265/2016, HU/15266/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 17 July 2018

Decision and Reasons Promulgated
On: 11 September 2018

Before

Deputy Upper Tribunal Judge Mailer

Between

[A A]
[N M]
[B A]
[H A]
[Z A]
ANONYMITY DIRECTION MADE

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellants: Ms S Ieangar, counsel, instructed by Nasim & Co Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. 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.

2. The appellants are nationals of Pakistan. The first two appellants are the parents of the third, fourth and fifth appellants. Their respective dates of birth are 1 January 1981, 29 October 1985, 19 February 2009, 7 September 2013 and 18 December 2014.

3. I shall refer to the first appellant as "the appellant."

4. They appeal with permission against the decision of the First-tier Tribunal Judge Herlihy, promulgated on 4 January 2013. She dismissed their appeals against the respondent's decision to refuse their human rights claims for leave to remain in the UK on the basis of family and private life in the UK.

5. At the hearing before the First-tier Tribunal on 8 December 2017, Judge Herlihy was handed a copy of the decision of First-tier Tribunal Judge Owens dated 26 February 2015, dismissing the appeals of the appellant, his wife and the third appellant - [BA] - pursuant to Article 8 of the Human Rights Convention. She directed herself at paragraph [33] to the approach to be adopted, as set out in Devaseelan (2002) UKIAT 00702.

6. Judge Herlihy referred the appellant's oral evidence. He 'confirmed' that he had three children in the UK. [BA] was the oldest and would be nine in February 2018. He is attending primary school [14]. He "conceded" that [BA] is friendly, well behaved and makes friends easily. At the date of Judge Owens' decision [BA] was only six, albeit that he was attending school [13]. She noted at [14] that Judge Owens had found that [BA] speaks Urdu and English. In his evidence to Judge Herlihy, the appellant claimed that [BA] does not speak Urdu. He speaks to his son in Urdu [14].

7. Judge Herlihy considered the oral evidence of the second appellant and [MUA], the appellant's nephew.

8. In her findings, she recorded that it is not disputed that the appellant cannot bring himself under the ambit of Appendix FM of the Immigration Rules as a partner or on the basis of his private life. It was claimed that [BA] has now been in the UK for over seven years and that he meets the requirements of paragraph 276ADE(1)(iv) of the Rules. It was contended that it would not be reasonable to expect him to leave the UK. She referred to the secretary of state's own guidance in respect of a child who has had continuous residence of more than seven years in the UK. Strong reasons would be required to refuse an application in those circumstances [27]. She had regard to s.117B of the 2002 Act.

9. Judge Herlihy again noted at [29], that the fact that a child has been here seven years must be given significant weight when applying the reasonableness test and that there must be strong expectations that the child's best interests will be to remain in the UK with his parents as part of the family unit. That ranks as a primary consideration in proportionality assessments.

10. She had regard to relevant decisions which she set out at [30-31]. She directed herself at [34] in accordance with the guidelines set out in Deevaseelan. She stated that since the decision of First-tier Tribunal Judge Owens, [BA]'s private life has become more entrenched and established [34].

11. She did not find the appellant's evidence that he feared ill treatment in Pakistan from a past employer, to be credible. No claim for asylum or under Article 3 based on such a fear had been made [35]. The appellant had raised this before an independent social worker whose report is dated 21 December 2015 and was now almost two years old. There have been no further reports in respect of the current family circumstances. The claims in the report as to the fear of ill treatment on return were not substantiated [35].

12. Judge Herlihy stated at [19] that the appellant speaks to his children in Urdu and that the children understand it and speak it. Speaking English would be an advantage in Pakistan.

13. She was not satisfied that [BA] has reached a critical age in his education and that he would be unable to adapt to a school in Pakistan [35]. His own mother has completed higher education in Pakistan, speaks fluent English and Urdu and has worked in Pakistan as a teacher. The appellant's evidence was that the children are also learning Arabic as part of their studies of the Koran which his wife teaches.

14. Judge Herlihy was not satisfied that the appellants have given a complete and honest account of their family connections in Pakistan. The appellant's claim that he is not in contact with his family was contradicted by the evidence of his nephew who said that he believes the appellant is in contact with his family [36]. The appellant's wife claimed to be estranged from her family on account of her marriage to the appellant within a few months of her arrival in the UK, and this may have been against her family's wishes. However, it is unlikely that the appellants would receive such support from the appellant's sister if she really was estranged as claimed [36].

15. Judge Herlihy was not satisfied that the appellants have established that [BA] has established a significant degree of integration into the UK and a private life beyond the realms of his family and school. There was some contradiction about his after school activities. She was satisfied that these largely consist of playing cricket and football once a week with friends. There was no indication that he had any wider level of integration beyond his school and family [37].

16. She accepted that there may be some initial difficulty for [BA] on return to Pakistan if he attends school where the medium of education is a language other than English. However, there was no reason why the appellants' children would not be able to obtain satisfactory educational provision in Pakistan. Although removal to Pakistan would cause some disruption in their education, there is no reason to suppose that they cannot achieve their potential given that their mother is well educated and both parents have worked previously in Pakistan.

17. There was no evidence that educational provision would not be available and would not be of a good standard, given the level of education of their mother. There was no evidence from the children's teachers with regard to the impact of their removal from their school and environment. Any disruption would be of a temporary nature [38].

18. [BA] was described as a child who makes friends easily. He has made good academic progress. It is likely that the children will have more family ties in Pakistan than subsist in the UK where the only family member is the appellant's sister and their cousins. The appellant's children will have developed a private life within the UK as have all the

appellants. There was no evidence with regard to the links which, particularly with [BA], may have developed in the community outside the family. These links are likely to be limited to friends from school and the school community [39].

19. She had regard to the report of a private GP at [40] who assessed the appellant as requiring psychological treatment, finding him to be depressed. She set out in some detail the problems with the report which limited the weight she can attach to it. There was however no evidence that the appellant was receiving treatment for any medical condition. The evidence did not suggest that he is suffering from any severe medical condition and no submissions were made with regard to that at the hearing [40].

20. She considered the provisions of s.117B of the 2002 Act. The appellants and their children developed private and family life here at a time when their parents knew that the development and continuance of this was dependent on meeting the requirements of the Rules. There was no evidence produced regarding the family's financial situation. Both the appellant and his wife have worked here illegally. The appellant does not speak English sufficiently well to aid integration although his wife is a fluent speaker.

21. The appellant's presence in the UK has always been precarious from the outset. His immigration history is an unedifying one. He knew from November 2005 that he had no lawful right to remain here but remained to pursue family and private life. His wife similarly knew that she had no leave after 30 April 2011 but they chose to marry and remain and pursue their family life in the UK knowing that they had no legitimate expectation that they could do so [42].

22. She took into account the fact that the appellant and his wife sought to develop their private and family life after the expiry of their initial leave. This was in the knowledge that their immigration status was precarious and unlawful. They have chosen to marry and only sought to regularise their status after the birth of [BA] in February 2009, when they made an Article 8 application in March 2011 when [BA] was already aged 2.

23. The decision of Judge Owens dated 26 February 2015 records that the applications were dismissed less than a month after being submitted and that the appellant's wife chose not to exercise her right of appeal. It is clear that the appellant, his wife and [BA] could have returned to Pakistan at any stage but chose not to do so and elected to remain illegally, with the appellant's wife giving birth to their remaining children in 2013 and 2014 – [42].

24. She noted that the appellant has only ever had a total of five months' lawful residence in the UK and overstayed many years before making the first application in 2011 and his wife has remained unlawfully from April 2011.

25. She had regard at paragraphs [44] and [45] of her decision, to the decisions of the Court of Appeal in EV (Philippines) and others v SSHD [2014] EWCA Civ 874 and MA (Pakistan) and Others [2016] EWCA Civ 705.

26. She found that there were strong reasons for refusing [BA]'s leave to remain, notwithstanding the significant weight that must be given to the period of residence. She accepted that the leave to remain in breach of the immigration control 'was not made by [BA] as he is a minor and cannot be blamed for the actions of his parents' [45].

27. She noted that none of the appellants is a British citizen. The action of the parents has shown a repeated disregard for immigration control. They have been the consumer of significant public support in terms of maternity, health and educational provision, most of which was incurred when they had no entitlement to remain in the UK. Those constituted the relevant factors when considering the public interest and the proportionality exercise [45].

28. The appellants would be returning to Pakistan as a family unit. The parents will be returning with the benefit of skills acquired in the UK to a country where they have spent all their formative years and have lived for the majority of their lives. They are likely to be able to access support from the appellant's family in Pakistan and the UK.

29. In dismissing the appeals she found that the decision to remove the appellants was not disproportionate in the circumstances [46]. There were not sufficiently compelling and compassionate circumstances justifying a grant of discretionary leave [47].

30. On 15 May 2018 First-tier Tribunal Judge Landes granted the appellants permission to appeal. She found it to be arguable that the Judge should have assessed the best interests of the child appellants and in particular the third appellant, and made a finding, beyond simply saying that the welfare and best interests of young children would be to live with and be brought up by their parents. It was arguable that without such a finding she could not properly assess whether it would be unreasonable to expect [BA] to leave the UK.

31. Ms Iengar, who did not represent the appellants before the First-tier Tribunal, adopted the grounds of appeal. There has been a conflation between the best interest considerations and the reasonableness of expecting the children to return to Pakistan. The best interests of all three children must first be assessed, following which there should be an assessment of reasonableness.

32. There has been no clear finding of what the best interests of each child was. Ms Iengar stated that there was a reference at [33] to the fact that [BA] has now been in the UK for nine years. The Judge referred at [31] to the decision of the Tribunal in EA (Article 8 - best interests of child) Pakistan [2011] UKUT 00315 where it was found that the welfare and best interests of young children will be to live and be brought up by their parents. The Judge found that there was accordingly no issue of separation in the case of [BA], who will be returning to Pakistan with his parents and younger siblings [33].

33. Ms Iengar submitted that there has simply been a general reference to EA, but there has been no finding in respect of the best interests of the children or where those best interests lay. The Judge accepted that [BA] has developed an extended private life in the UK. It is unclear what the "powerful reasons" are for refusing leave (MA (Pakistan), supra). The Judge relied on fairly generic countervailing factors.

34. There was no reference to the independent social welfare report at [38]. This is a report of Ms Shuli Greenstein dated 21 December 2015 which set out the social circumstances for the appellants and their children. The report was before the secretary of state, and was produced at H1 of the respondent's bundle.

35. In her 2015 report, Ms Greenstein observed [BA] speaking fluent English and was able to write clearly in English. He also said he can understand Urdu and does try to speak the

language to his mother, however he is not fluent. She noted that the appellant is concerned about the impact of relocating to Pakistan would have on the children's education.

36. The social worker also noted that [BA] views himself as British and has a large group of peer friendships. The children have continued to flourish and develop in the stable and nurturing environment in which they currently reside. The children have developed social norms and cultural expectations of their peers and the local community. In her opinion it would be inappropriate to disrupt these. To uproot any member of the family would have a devastating effect on the family dynamic and would impact negatively on the children's developing confidence, stability and emotional well being and prevent them reaching their full potential.

37. Any forced relocation would mean that the children would lose out on their ability to engage in and continue with their education, family ties and social connections in the UK. It would therefore seem to be a reasonable decision to make in the children's best interests that the family remain in the UK.

38. On behalf of the respondent, Mr Tufan referred to and strongly relied on the decision of the Court of Appeal in AM (Pakistan) and Others v SSHD [2017] EWCA Civ 180. He submitted that the Judge has properly directed herself. He referred to paragraph [73] in MA, where the Court held that the appropriate test can no longer be compelling reasons: that is not the language of s.117B(6) or paragraph 276ADE and it sets the bar too high. It may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling.

39. Mr Tufan submitted that Judge Herlihy has considered the best interests, starting at [29] of her decision. She set out the relevant cases from [31-33].

40. In reply Ms Iengar submitted that the best interest consideration is the first question to be considered. Reasonableness then comes into play. There was no proper weight given to the report in relation to any of the assertions made. Accordingly if there has been a consideration of the best interests at all, this has taken place on the account of reasonableness. The parents' conduct is a factor to be taken into account with regard to reasonableness but it is not determinative. The findings of the social worker at page 17 were not properly taken into account.

Assessment

41. In granting permission to appeal, Judge Landes found that it was arguable that the Judge should have assessed the best interests of the child appellants and in particular [BA], beyond stating that their best interests would be to live with and to be brought up by their parents. In the absence of such a finding she could not properly assess whether it would be unreasonable for the third appellant, [BA], to leave the UK.

42. I have set out in detail the assessment and findings of the First-tier Tribunal Judge Herlihy.

43. She properly directed herself in accordance with the relevant authorities. It was noted that the fact that a child has been here for seven years must be given significant weight when applying the reasonableness test. There must be strong expectations that the child's best interests will be to remain in the UK with his parents as part of a family unit [29].

44. The Judge also properly directed herself in accordance with the Deevaseelan guidelines. She had regard to the decision of First-tier Tribunal Judge Owen. She noted that [BA]'s private life had become more entrenched and established.

45. It is contended that there was no reference to the independent social worker report dated 21 December 2015. However, the Judge did refer to that report at [35]. In particular she noted that the report dated 21 December 2015 was now almost two years old and that there had been no further reports.

46. I have set out the contents of that report, the effect of which is that [BA] in particular sees himself as British and has a large group of peer friendships. It was contended that to uproot any member of the family would have a devastating effect on the family dynamic. The children would lose out on their ability to engage in and continue with their education, family ties and social connections in the UK.

47. The Judge was aware that she had to consider the best interests of the children, who would be returning as a unit to Pakistan. [32] She noted that [BA] had remained living here since his birth and had been in the UK for nine years [9]. Apart from the earlier social welfare report, there was no further evidence produced relating to the current position of the children since December 2015.

48. I also note that in the application seeking permission, there was no contention in the grounds that the Judge did not take into account the 2015 social welfare report.

49. It was contended that the Judge failed to identify any "strong reason" for refusing [BA]'s leave to remain. Allied to that was the contention that the Judge erred in failing to properly assess his best interests, or the other children's. Nor was a finding made as to where their best interests lay.

50. I find that the Judge has properly directed herself and approached her assessment on the basis of the Court of Appeal decisions in EV (Philippines) and MA (Pakistan). She set out the actions of the parents which constituted a repeated disregard for immigration control. The appellant has only ever had a total of five months' lawful residence in the UK and has overstayed for many years prior to making his first application in 2011. Further, his wife had remained here unlawfully from April 2011.

51. I have had regard to the decision in AM (Pakistan) and Others v SSHD [2017] EWCA Civ 180. This was a decision of Lord Justice Elias, who had also presided in the decision of MA (Pakistan). In AM the secretary of state was appealing against the decision of the Upper Tribunal which set aside the First-tier Tribunal's decision dismissing the appeals of the appellants.

52. Elias LJ noted the decision of the First-tier Tribunal in that appeal. The argument centred on the two elder children. The question to resolve was whether or not paragraph 276ADE(1)(iv) of the Rules applied to them. In that case there were also five applicants, all members of one family. The first two appellants were husband and wife. The other three were their children. The fifth and third appellants were teenage sons aged 16 and 13 at the relevant time. The fourth appellant was four. All were citizens of Pakistan. The father came to the UK as a visitor with entry clearance valid from June 2004 until June 2009. The

mother and two elder children came as short term visitors a year later in June 2005 and the family remained here illegally after the expiry of their visas.

53. At paragraph [14] of AM it was noted that the First-tier Tribunal found that notwithstanding that the children's best interests were to remain in the UK, they should be refused leave to remain. She had found that it was not overwhelmingly in their best interests to remain here. She gave reasons for that conclusion, as set out at [13] in AM.

54. She accepted that they were settled in their schools, had developed sporting and other interests, were benefiting from an English education and had developed close friendships which they did not want to lose and whose loss would cause some emotional distress. She was satisfied that they would be able to pursue their sporting interests and further education in Pakistan where English is the official language. She did not find that the distress from losing friends would be long lasting or irreversible. They would be returning to an extended family there.

55. Elias LJ noted at [14] that notwithstanding the children's best interests were to remain in the UK, the Judge held that they should be refused leave to remain. The reason was that their parents had shown a blatant disregard to the immigration law, choosing to remain illegally on the expiry of their visas. They did not seek to regularise their status for many years, and even when they did, they remained illegally in the country after their applications had been refused.

56. In their appeal to the Upper Tribunal, Upper Tribunal Judge Freeman was satisfied that when properly construed, s.117B(6) and paragraph 276ADE(1)(iv) required the Court to ask whether it was reasonable or not only from the point of view of the qualifying child. On that analysis, the appeals of the two teenage boys had to succeed in the light of the findings of the First-tier Tribunal Judge.

57. In the secretary of state's appeal to the Court of Appeal against Judge Freeman's decision, Lord Justice Elias posed the question whether the Court is bound by MA (Pakistan). It was contended that it was binding with regard to the construction of s.117B(6) of the 2002 Act but was not a binding decision as to the construction and application of the reasonableness rule in paragraph 276ADE(1)(iv) – [21].

58. Lord Justice Elias noted at [22] however, that it is true that in MA (Pakistan) the court noted at paragraph [13] that it had simply been a common assumption that the construction of the rule should reflect the construction of the primary legislation. But in fact two of the appellants in MA were relying solely on paragraph 276ADE so the decision as to its proper meaning is binding on them.

59. In any event, the logic of the argument is that the criteria in the rule would be easier to satisfy than the criteria in the section passed by Parliament, notwithstanding the use of the same concept. Lord Justice Elias did not accept that the draftsman could possibly have intended such a result, which would give the public interest a more limited influence than Parliament has required. On the assumption therefore that the construction of s.117B(6) adopted in MA is correct, it must likewise apply to Rule 276ADE.

60. As the Court in AM was bound by the decision in MA as to the proper construction of the provisions in issue, it necessarily followed that the decision of the Upper Tribunal Judge could not stand [23].

61. At [26] Lord Justice Elias rejected the submission that if the First-tier Tribunal had struck a fair balance between the interests of the children and the wider public interest in immigration control, it must inexorably have led to the conclusion that leave to remain should be granted.

62. He further stated at [26] that it is true, as emphasised by the respondents, that in MA the Court observed that significant weight should be given to the fact that the child has been here for seven years, but the First-tier Tribunal in terms recognised that fact. The First-tier Judge also recognised that "greater significance is likely to be attached to time spent in this country by a child when they are of school age and therefore are developing ties and attachments outside the immediate family unit".

63. Lord Justice Elias concluded that there was no material error by the First-tier Judge and she reached a conclusion well open to her on the evidence. It recognised that she had regard to the other public interest considerations specified in s.117B, which in view of MA she was entitled to do. She could legitimately have regard to the matters she considered in the context of applying the reasonableness test.

64. Judge Herlihy was well aware of the decisions setting out the proper approach to be adopted. She was aware that she had to consider the children's best interests [32]. She proceeded to consider all the evidence in detail. She accepted that the children will have developed a private life within the UK.

65. She had regard in particular to the potential difficulties faced by [BA] on return to Pakistan. She has given proper reasons for concluding that there is no reason to suppose that they cannot achieve their potential given that their mother is well educated and both parents have worked previously in Pakistan. There was no evidence that educational provision would not be available, nor that this would not be of a good standard given the level of education of their mother. Any disruption would be temporary in nature.

66. In the circumstances, I find that Judge Herlihy has given sustainable reasons for her findings.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any material error on a point of law. The decision shall accordingly stand.

Anonymity direction not made.

Signed Dated: 2 September 2018

Deputy Upper Tribunal Judge Mailer