



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/25991/2016
HU/26762/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 27 June 2018

Decision and Reasons Promulgated
On: 20 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MR M K
MASTER A K
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellants: Ms C Charlton, Bhogal Partners Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are nationals of Pakistan. The first appellant is the father of the second appellant, A K, who was born on 14 November 2002.
2. The appellants appeal with permission against the decision of First-tier Tribunal Judge Cas O'Garro, promulgated on 31 July 2017. She dismissed their appeals against the respondent's decision dated 11 November 2016 to refuse their application for leave to remain on human rights grounds.

Background to the appeal

3. The first appellant - 'the appellant' - entered the UK on 6 March 2006 on a visit visa. On 1 February 2007 his wife entered the UK with A K

4. Their two daughters entered the UK at the same time.
5. His wife and daughters returned to Pakistan in about 2007 or 2008. It was accepted that the appellant and his wife were officially separated since her return to Pakistan [4].
6. On 13 March 2014 the appellant's application for leave to remain on the basis of his and his A K's private and family life was refused with no right of appeal. Following judicial review proceedings the respondent re-made the decision on 9 July 2014 and refused the application with a right of appeal.
7. In July 2014 the appeal was heard by the First-tier Tribunal and was dismissed. The subsequent appeal to the Upper Tribunal was allowed in August 2015 and remitted to the First-tier Tribunal. On 17 June 2016 the appeal was allowed to the limited extent that the respondent reconsiders the appellant's application.
8. Further information was requested and on receipt of the information the respondent made the current decision dated 11 November 2016. The respondent considered that it was reasonable for A K to leave the UK with his father and continue his education in Pakistan. The removal would not breach Article 8.

The hearing before the First-tier Tribunal on 5 July 2017.

9. First-tier Tribunal Judge Cas O'Garro set out the appellant's written and oral evidence.
10. When the appellant's wife and daughters returned to Pakistan, A K remained with his father. A K was three and a half years old when he came to the UK and the appellant had care of A K. He enrolled him in school in the UK. He claimed to have had sole responsibility for his upbringing since then.
11. A K is in Year 9 at school. The appellant contended that this is a crucial point of his education as he will be commencing his GCSE course work in September 2017 [18]. He said it was upsetting that A K suffers mentally and emotionally by the uncertainty in his life. He has made many friends in the UK. He asserted that to remove him would be unreasonable and not in his best interests.
12. It appears from A K's witness statement that he claimed to suffer from a lack of sleep and cannot eat properly. He feels scared about his immigration status in the UK. It upsets him. His friends are able to go on holiday and he feels left out and this is extremely unfair.
13. The appellant claimed that he and A K will struggle to survive in Pakistan with no family home or support network. Although he has two brothers and three sisters in Pakistan, he cannot seek help from them as they are all married, aged over 60 and have their own families to look after.
14. She also heard evidence from A K and referred to his statement.
15. In her findings First-tier Tribunal Judge Cas O'Garro found that the appellant has been in the UK illegally since 2007. He came as a visitor and overstayed. He has had

no regard to the immigration laws in this country. His wife came and returned to Pakistan. He did not leave however, and compounded the situation by keeping his child here [26].

16. He did nothing to regularise his status until A K was here for seven years. He obtained a report from Hounslow Child and Adolescent Health Service who assessed A K on 20 April 2017 and found that A K often feels low mood and cries when he is thinking a lot. The writer of the report stated that this is to do with his and his father's immigration status. According to the report this is A K's main worry, and the fact that he is not able to travel like his peers at school due to not having a visa [26].
17. Judge Cas O'Garro further found that the appellant has family in the UK who have been supporting him financially. He also worked doing "odd jobs". A K has been in education throughout his stay in the UK. He has not yet started preparing for his GCSE examinations.
18. She found that the appellant has family in Pakistan. He has five siblings. He is in contact with at least one of them. His siblings are older than him and are in their sixties. She found that this must mean that they are fully established in life with adult children and are therefore able to support the appellant financially and with accommodation if he returns to Pakistan [28].
19. His wife is also from a rich family with a business which would put them in good stead for A K and indirectly the appellant. She would expect that A K's mother and her family would be happy to support A K financially and the appellant would get the benefit of that support [28].
20. Judge O'Garro set out the relevant Immigration Rules and guidance from [29] onwards.
21. She referred to EX.1 which she stated applies in this case. In considering whether it is reasonable to expect a child appellant to leave the UK she had regard to MA (Pakistan) v SSHD [2016] EWCA Civ 705. The best interests of the child are a primary consideration [35].
22. She stated at [36] that A K is the sole and central issue in the appeal. She turned to his best interests. She referred to decisions including EV (Philippines) and others v SSHD [2014] EWCA Civ 874 and set out the various factors identified in that decision. She considered A K's welfare with reference to those factors [38-39].
23. She noted how the situation is affecting him emotionally as confirmed by the Hounslow Child and Adolescent Mental Health Service report [40].
24. She found that even though A K has not lived in Pakistan since he was "a tiny tot" she saw no reason why he could not establish a connection there. He has aunts, uncles, sisters, his mother and his mother's close family members. He would have contact with his father's friends and family members who form part of the Pakistani community in the UK. This means that he has some knowledge and familiarity of Pakistani culture.

25. That did not mean that A K would not find life in Pakistan very different from the life he enjoyed in the UK. It will assist him in adapting. He can speak Urdu even if he is not able to read and write it. He will not have any particular difficulties picking it up. He would be able to be educated in Pakistan and has not yet started preparing for his GCSEs.
26. She did not consider that his education would be significantly disrupted. There are also international schools in Pakistan where the teaching is in English. It is likely from the appellant's evidence, that his mother comes from a wealthy family and may be able to afford for him to have an English education.
27. She had no details of A K's friendships or activities in the UK. She was satisfied however that having regard to his length of residence here this can lead to the development of social and cultural and educational ties that would be inappropriately disrupted without compelling reasons.
28. She was satisfied that overall, A K's best interests would be to remain in the UK because his ties formed through his residence here would not be disrupted and he would be likely to have better future opportunities both educationally and economically by continuing to live here [43].
29. However, she stated at [44] that she did not find this to be a case where his best interests point "overwhelmingly in favour of remaining in the UK because of the factors I have already mentioned above (paragraph 41) which indicate that he would be able to form a connection with his country of nationality."
30. The fact that it is in his best interests to remain in the UK does not mean of itself that it would not be reasonable to expect him to leave the UK, either under Appendix FM, paragraph 276ADE(iv) which applies to him or for the purpose of s.117B(6) of the 2002 Act, as a qualifying child [45].
31. She had regard to the respondent's guidance quoted in PD (Sri Lanka) [2016] UKUT 106. She referred to MA (Pakistan), supra. The fact that he has been in the UK for seven years must be given significant weight when carrying out the proportionality exercise. It has established a starting point that leave should be granted, unless there are powerful reasons to the contrary [47].
32. She considered at [48] that there are powerful reasons to the contrary. The appellant has no right to remain here. He came as a visitor and deliberately remained without regulating his status until A K was here for seven years. He does not speak English. There is no evidence that he will be financially independent if granted leave. He relies presently on relatives for financial support.
33. She found that it is reasonable, bearing in mind the public interest in maintaining immigration control, for A K to go to Pakistan with the appellant. A K has not reached a critical stage in his education. He will be able to adapt to life there, with both parents' support. His father is still at the centre of his life and he is able to support A K and promote his development. A K has relatives in Pakistan and he will not be totally unfamiliar with the culture [49].

34. He will be in a stable state, which he craves as noted in the mental health service report. Currently he is not in a stable situation so far as his immigration status is concerned. This is causing him a great deal of distress. In Pakistan he will have an education, his close family, in particular his mother and sisters whom he will get to know, and will be brought up in the country of his nationality and cultural heritage [49].
35. Despite his residence of over ten years, she was not satisfied that it would be unreasonable to expect A K to leave the UK. The Judge therefore found that he did not meet the requirements of paragraph 276ADE(1)(iv)- [50]. Nor did he meet the requirements of paragraph 276ADE(vi) [51].
36. With regard to Article 8, she was satisfied that the interference with those rights are proportionate.
37. On 3 May 2018, Upper Tribunal Judge Coker granted the appellant permission to appeal. She found that it is arguable that the Judge failed to approach s.117B(6) of the Nationality, Immigration and Asylum Act 2002 appropriately. She arguably applied the wrong test in concluding that it was not “overwhelmingly” in the best interests of A K to remain in the UK.

The appeal before the Upper Tribunal

38. Ms Charlton submitted that the Judge did not properly assess A K's evidence. The reconciliation between the first appellant and his ex-wife was not addressed. Attempts to reconcile failed and his wife returned to Pakistan with her daughters but left her son with the appellant.
39. The appellant separated from his wife officially in April 2015. He has had very little contact with her via the telephone. The last contact with her was in January 2014 [15]. There was no evidence to substantiate the finding that the appellant's family would be there to support him as stated at [28].
40. Ms Charlton referred to A K's witness statement before the Tribunal. There he stated that his mother telephoned his father round about January 2014 and wanted to speak to him. He does not remember the conversation he had with her but she was crying and asked about his school. He has not had contact with her since. Nor did he have contact with his sisters.
41. In his statement he stated that on some occasions he has found it difficult to concentrate at school because he worries about his future and his education.
42. She submitted that the Judge found that A K's best interests would be for him to remain in the UK but nevertheless found it to be reasonable to remove him despite having no proper assessment of the actual situation he would face. Nor was his private life part of the balancing exercise undertaken, where it is clear from his evidence that he has many ties and connections outside the family home.
43. Nor was there evidence substantiating the Judge's expectation that his education would not be significantly disrupted and it is likely that his mother comes from a

wealthy family and according to the appellant's evidence may be able to afford for him to have an English education.

44. Nor was it true as asserted by the Judge at [42] that there were no details of friends. He referred to them in his written and oral evidence, showing the strength of his ties.
45. In the grounds seeking permission it was contended that the Judge made no mention of the fact that A K, while being able to understand and speak Urdu, can neither read nor write the language and this nullifies the assertion that he can continue his education in Pakistan [49]. However, at [41] the Judge stated that there was nothing to suggest that he would have particular difficulties picking the language up.
46. On behalf of the respondent, Mr Melvin submitted that the Judge directed himself appropriately in accordance with the relevant Court of Appeal decisions. She considered the best interests of A K, having regard to the situation in the UK as well as Pakistan. She reached a conclusion open to her on the evidence.
47. She fully understood the family situation. The fact that there may be no contact does not mean that there would be no support. There was no reason why A K could not establish a connection with Pakistan. He has knowledge and familiarity with the Pakistani culture [41].
48. The appellant will be returning with his father who will look after him. He will be able to find education in any event in Pakistan. He had not yet started preparing for his GCSEs.
49. She had proper regard to MA (Pakistan). The fact that A K has been here for seven years must be given significant weight in the proportionality exercise. She noted that it was established that as a starting point, leave should be granted unless there were very powerful reasons to the contrary [47].
50. She understood the family position as noted in [15 and 28]. A K's mother is from a rich family with a business that should be in "good stead for A K and indirectly the appellant." She noted that the appellant and his wife are separated and that they are not in a subsisting relationship [30].
51. He submitted that there are thus no errors of law.
52. In reply, Ms Charlton submitted that the proper analysis of what is reasonable as set out in MA was ignored. There needed to be good, cogent reasons. There had not been sufficient attention given to what A K would be returning to as opposed to what the position might be based on conjecture.

Assessment

53. As noted by Upper Tribunal Judge Coker, the First-tier Tribunal Judge's in stating that it was not overwhelmingly in the best interests of A K to remain in the UK might be adopting the wrong test.
54. However, Judge O'Garro did have proper regard to the approach set out in decisions including EV (Philippines) and others v SSHD [2014] EWCA Civ 874. She referred

to MA (Pakistan) at [47] noting that the fact that the child has been in the UK for seven years must be given significant weight. Leave should be granted unless there were powerful reasons to the contrary.

55. In his judgment in MA (Pakistan), Elias L.J. held that 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 s.117C(5), so should it when considering the question of reasonableness under s.117B(6). Those sections are in substance free standing provisions, and even so the Court in MM held that wider public interest considerations must be taken into account in applying the “unduly harsh” criteria. That must be equally so with respect to the reasonableness criteria in s.117B(6).
56. Accordingly the appeal is to be analysed on the basis that the only significance of s.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 [45].
57. In applying the reasonableness test, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Lord Justice Elias referred to published guidance in August 2015 and the IDIs titled “Family Life (As a Partner or Parent) and Private Life: Ten Year Routes” in which it was expressly stated that once the seven years' residence requirement is satisfied, there needs to be “strong reasons” for refusing leave. Those instructions were not in force when the applications were determined. However, they merely confirm what is implicit in adopting a policy of this nature [46]. 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. It may be less so when the children are very young because the focus of their lives is 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.
58. Judge O'Garro set out the evidence before her in some detail. She was aware of the family history including the fact that A K's mother returned to Pakistan. She had proper regard to the Hounslow Child and Adolescent Mental Health Service assessment in April 2017. She noted that the writer of the report found that A K often feels low in mood and cries when he thinks a lot. This is to do with his and his father's immigration status. That is his main worry [26].
59. She took into account his education throughout his stay in the UK as well as the fact that he had made friends at school. He had not yet started preparing for his GCSEs. She noted that the appellant's wife is from a rich family and expected that she would be happy to support A K financially. It is evident from A K's witness statement that he has had conversations with his mother in about January 2014. She was crying at the time and asked about his school.

60. In the Hounslow assessment dated 8 June 2017 it is noted at B13 under the heading “formulation/hypothesis” that the appellant did not think that A K has been affected by his mother's leaving. A K stated that he has put that out of his mind.
61. Judge O'Garro referred to A K's life in the UK. She did not consider that his education would be significantly disrupted if he were to be removed to Pakistan. She noted that there are international schools in Pakistan where the teaching is in English. It is in that context that she found it likely that his mother would be able to afford “for him to have an English education” [41].
62. I accept Ms Charlton's submission that this may amount to mere supposition as to what may be waiting for him in Pakistan as opposed to evidence substantiating that expectation. There was no contention that appropriate education for A K would not be available in Pakistan.
63. The appellant would be returning with his father and the Judge found he would be able to support him in Pakistan. His father was still at the centre of his life and would promote his development. She noted that A K has relatives in Pakistan and is not totally unfamiliar with the culture and traditions there, having maintained contact with his father's friends and family and those who formed part of the Pakistani community, in the UK.
64. She also took into account the public interest considerations under s.117B, including the fact that the appellant had been in the UK illegally since 2007. He came to the UK as a visitor and overstayed. He therefore has had no regard to the immigration laws in his country [26].
65. I find that Judge O'Garro has considered the evidence as a whole. She has given sustainable reasons for concluding that it would not be unreasonable to expect A K to leave the UK.

Notice of Decision

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

Anonymity direction made.

Signed

Dated: 16 July 2018

Deputy Upper Tribunal Judge C R Mailer