
**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/06733/2016

**THE IMMIGRATION ACTS**

| **Heard at Manchester** | **Decision & Reasons Promulgated** |
|---|---|
| **On 7 December 2017** | **On 23 January 2018** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE O'RYAN**

**Between**

**ATIF [K]**
**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Rungasamy instructed by Lawrence Lupin Solicitors .
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1 This is an appeal against the decision of Judge of the First-tier Tribunal Borsada, in which the Judge dismissed the protection and human rights appeals of the Appellant. The Appellant is a national of Pakistan, who is married by way of Islamic marriage ceremony only in the UK to Sameerah [K], a national of Mauritius, who like the Appellant has no

leave to remain. Together they have two children, LK, born February 2009, and HK, born November 2012 in the UK.

2 The Appellant last arrived in the United Kingdom in 2005 using a false passport. He had entered as a visitor on several prior occasions. The Appellant appears to have made some attempt to regularise his position in the United Kingdom in 2009, but it would appear that the Respondent could not find reference to any valid application made at that time. The Appellant ultimately made a protection claim on 9 December 2015.

3 The Appellant claimed to fear a real risk of serious harm on return to Pakistan due to a family feud with another family, arising out of his first marriage. It was said that the breakdown of that relationship had resulted in threats from his former spouse's family. It was also asserted that the Appellant's second wife Sameerah [K] feared serious harm in Mauritius, also because of a feud arising out of a marital dispute there. It was also argued that removal of the family from the UK would result in a disproportionate interference with the private and family lives of the four family members.

4 The Respondent refused that claim in a decision dated 2 April 2017. The Appellant appealed, the appeal coming before the Judge on 31 March 2017.

5 The Judge records the Appellant's submissions regarding the best interests of the children at paragraph 7(vii). Submissions noted were that LK had lived in the UK for more than seven years; it was not reasonable for LK to leave the United Kingdom bearing in mind the time the child had spent in the UK, their immersion in all aspects of life in this country, the stages of LK's personal and educational development which had been reached, and the level of connection with their country of origin as well as the likelihood that they will be able to make a useful contribution to the UK and its society, and that both children had spent all their lives in the UK and knew nothing of life in either of their parents countries of origin.

6 The Judge rejected the credibility of the Appellant's protection claim at paragraphs 9 - 11 of the decision, finding that the Appellant had relied upon bogus documentation in support of his claim for protection including a counterfeit passport, and noted that the Appellant had delayed his claim for protection since 2005. The Judge also found at para 12 that there was insufficient evidence provided by Sameerah [K] for the Judge to make any clear findings about her alleged claim for protection and was not satisfied that there was any truth to her claims without more. The Judge held that it was open for the Appellant and Sameerah [K] to enter and reside in Pakistan [12].

7 At paragraph 13, the Judge turned to the position of the children as follows:

> 'As for the children: I note that they were both born in the UK and have known no other life. I note too that the older child has been here for more than seven years and therefore the parties were right to direct me to the reasonableness test. I have considered the welfare of the children as (*sic*) primary matter and my conclusion is that given their ages their key welfare need is to remain in the care of their parents and for their parents to continue to look after them. In determining reasonableness, I note the factors that it is necessary to take into account as set out in paragraph 7 (vii) above and having regard to those factors it was my view that in respect of the children the Appellant has not demonstrated that it would be unreasonable for the children to leave the UK particularly given that this would be with their two loving parents one of whom is from Pakistan and who would therefore be able to help them make the necessary adjustments to life in that country. In make (*sic*) these findings I note that there was very little evidence provided beyond the school reports which might have made me question the reasonableness of expecting the children to leave the UK. Certainly the fact that the children were now going to school in this country and were doing well at school was not in itself grounds the finding that the Respondent's decision was an unreasonable one particularly given that these children are not British and therefore should not automatically expect to receive an education in this country. In stating this I also note that I have seen no evidence that the children would not be able to receive a similar education in Pakistan or indeed in Mauritius should the family choose to move to either of these places. I am therefore not satisfied even having regard to the Appellant's article 8 claim and that of his family that his claim under this heading is made out. The decision of the Respondent which necessarily entails an interference with the Appellant's private and family and that of his wife and children is indeed a proportionate one having regard to the Respondent's legitimate interest in maintaining effective immigration control taking all of the factors into account including those that I have specifically discussed already including all the factors going for and against the Appellant and not forgetting that the Appellant's private life and that of his wife was established in this country at a time when they had no immigration status or a precarious one (see also five stages in N v Razgar [2004] UKHL 27) (see also section 177B of the Nationality, Immigration and Asylum Act 2002)."

8 The appellant was dismissed.

9 Grounds of appeal against that decision argue in Ground1 that the Judge's assessment in relation to s.55 Borders Citizenship and Immigration Act 2009 was irrational, in light of the fact that the Judge had accepted that the children were born in the UK, have known no other life except for one in the UK, were doing well at school. The grounds also assert that it had been submitted before the Judge that 'the child' (presumably LK) speaks only English and would have language barrier and either Mauritius or Pakistan.

10 It was also argued that the Judge's finding that '... my conclusion is that given the ages their welfare is to remain in the care of their parents and their parents to continue to look after them', the Judge treated the

presence of the parents in the LK's life as an overriding factor in establishing that it would be reasonable for the child to relocate outside of the United Kingdom, disregarding all other factors under section 55.

11 It was also argued that the Judge failed to give adequate weight to the fact that LK had been resident in the United Kingdom for more than seven years (indeed eight years) and referred to the ratio in MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (IAC) & Anor [2016] EWCA Civ 705 that length of residence itself can be a major factor in granting leave to remain unless there are strong reasons to deny it.

12 A second Ground argued that the Judge failed to apply the guidance set out in PD and Others (Article 8 : conjoined family claims) Sri Lanka [2016] UKUT 108 (IAC) that:

> "In considering the conjoined Article 8 ECHR claims of multiple family members decision-makers should first apply the Immigration Rules to each individual applicant and, if appropriate, then consider Article 8 outside the Rules. This exercise will typically entail the consideration and determination of all claims jointly, so as to ensure that all material facts and considerations are taken into account in each case."

13 In a decision dated 24 August 2017, Judge of the first-tier Tribunal Pullig granted permission to appeal, expressing the view that in relation to the best interests of each child, there was little to be found regarding the evidence of their respective circumstances.

14 I heard submissions from the parties which are set out in my record proceedings.

15 In summary, Mr Rungasamy for the Appellant relied upon the grounds of appeal, but additionally argued (only in his reply to Mr Harrison) that the Judge erred procedurally by failing to adjourn the appeal of his own motion (there having been no application on behalf of the Appellant before the Judge for any adjournment) to obtain further information as to the circumstances of the children. I observed that this argument was not a ground of appeal set out in the grounds of appeal, and I do not find that it is a Robinson obvious point, and reject it, although the potential for further evidence relating to the children's circumstances is a matter to which I returned below.

16 The his part, Mr Harrison sought to defend the Judge's decision, relying upon a Rule 24 reply dated 13 September 2017, and expanding on it orally.

**Assessment**

17 Although in both PD and Ors, and in MA Pakistan, it was held that it was not appropriate for the position of children to be considered first, or in isolation from the position of adult applicants, it was common ground in

both decisions, and consistent with now long-standing jurisprudence, that the best interests of a child affected by an immigration decision need to be determined prior to the determination of the proportionality of the immigration decision, and for those best interests to be taken into account in that proportionality assessment.

18 In general terms, the grounds of appeal challenge the way that the best interest assessment was carried out, and that inadequate consideration was given to the length of time that the older child LK had remained in United Kingdom, particularly in light of the guidance set out in MA Pakistan.

19 I find that those grounds are made out. Whereas the Judge finds at paragraph 13 that the children's key welfare need is to remain in the care of the parents and for their parents to continue to look after them, this does not represent a decision as to *where* it would be in the best interests of the children to remain. There is a distinction between finding that in general terms it would be in the best interests of children to remain in the care of their parents, on the one hand, and a further, more specific finding, that such best interests were to remain in their parents' care in country A, as opposed to country B. The importance of determining *where* it may be in the best interests of children to reside, not merely with whom, is apparent from, for example, EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA Civ 874 , paras 33-34 .

20 Without determining in which country it may be in the best interests of the children to reside, with their parents, it is difficult to find that the Judge has thereafter proceeded to determine, on the proportionality issue, whether other factors, including the importance of maintenance of immigration control, outweigh that which is in the children's best interests.

21 Further, paragraph 49 of MA Pakistan provides as follows:

> "1. Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted *unless there are powerful reasons to the contrary.*" (Emphasis added)

22 I am of the view that the Judge's reasoning at paragraph 13 of the decision does not demonstrate that the Judge directed himself in accordance with the principle that leave should be granted to LK unless there were powerful reasons to the contrary.

23 I note that the submission that the child (or possibly children) do not speak any language of Pakistan is not recorded at paragraph 7(vii). I am inclined to find that such submission was made, as it is an important feature of the Appellant's case that it would not be reasonable for LK to leave the UK. In any event, even if not made, any language difficulties likely to be experienced by a child upon leaving the UK are, I find, matters on which findings of fact need to be made irrespective of whether any specific submission is made in relation to it. There is no such finding.

24 I observe that the adverse immigration history of the Appellant, including his use of false documents in relation to his entry to the UK and his asylum claim, does not appear to have been factored into the Judge's assessment of whether it would be reasonable to expect the children to leave the UK (and, following MA (Pakistan), paras 43 and 45, the Judge was entitled to take such factors into account). It could be said therefore that there are matters potentially in favour of the Appellant, and those militating against the Appellant, which have been left of out account in the reasonableness assessment in relation to LK. I cannot say with any confidence what the Judge's decision might have been if all those considerations had been taken into account in the assessment.

25 I therefore find that there are material errors of law in the Judge's assessment of the proportionality of the removal of the family members.

26 On behalf of the Appellant Mr Rungasamy indicated that he now had instructions that one of the Appellant's children may in fact have a hearing difficulty, and that if the matter were to be remitted to the First-tier Tribunal, the Appellant would benefit from the opportunity of adducing further evidence as to any health problems relating to the children.

27 I find that due to the degree of further fact-finding that may be required in this matter, that it is necessary for the matter to be remitted to the First-tier Tribunal.

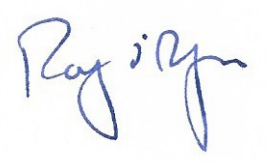
**Decision.**

I find that the making of the decision involved the making of a material error of law.

I set aside the Judge's decision.

I remit the appeal to the First-tier Tribunal. There being no challenge against the Judge's decision to reject as incredible the Appellant's protection claim, the Judge's findings in relation to that claim, at paragraphs 9 to 11, are retained.

Signed: Date: 19.1.18



Deputy Upper Tribunal Judge O’Ryan