Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/02264/2015
HU/02266/2015
HU/02268/2015
HU/02269/2015

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 23 October 2017	**On 6 November 2017**
Decision prepared immediately following the hearing on 23 October 2017	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

ZAHIDA [I] (FIRST APPELLANT)
MUHAMMAD [I] (SECOND APPELLANT)
[M I] (THIRD APPELLANT)
[K I] (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Sharma, Counsel, instructed by Malik Law Chambers
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Immediately following a hearing on 19 September 2017, I gave a decision in which I found that the decision of the First-tier Tribunal had contained a

material error of law. Much of what is stated within that decision is repeated below.

2. The appellants in this case are national of Pakistan consisting of a mother (the first appellant), who was born in December 1974, her husband (the second appellant), who was born in August 1975, and their two children (the third and fourth appellants), who were born respectively on September 2007 (the third appellant) and December 2010 (the fourth appellant). The third appellant was born in Poland but came here with his parents on 2 February 2008. The fourth appellant, their daughter, was born in the UK.

3. The first appellant had arrived as a student in this country on 2 February 2008 (with her son and husband) with a short period of leave which was subsequently extended and then she was granted further leave as a post-study worker to 30 September 2013. She made an unsuccessful application for leave to remain as a Highly Skilled Migrant, which was refused in the same year, and although she applied for judicial review of this decision this was refused in October 2014. Accordingly, though she (and the other appellants) had been resident lawfully in the United Kingdom for the first five or so years that they were here, technically thereafter the family has been here without leave, although throughout this period they have been attempting to regulate their position.

4. The second appellant, the first appellant's husband, had leave granted in line with hers as her dependant and the lawfulness of the stay of her children is the same. They have been in this country lawfully while their mother was here lawfully, but currently they do not have leave to remain.

5. On 22 June 2015, by which time the appellants had been unlawfully in this country following the refusal of the first appellant's unsuccessful application for leave to remain as a Highly Skilled Migrant in 2013, the first appellant sought leave to remain on the basis of her family life. She also asked for reconsideration of the decision to refuse her leave as a Highly Skilled Migrant. This application was refused and the appellants appealed against this decision.

6. The appeals were heard at Hatton Cross by First-tier Tribunal Judge M R Oliver on 28 November 2016, but in a Decision and Reasons promulgated on 6 January 2017, Judge Oliver dismissed the appeal. The appellants then appealed to this Tribunal and were given leave to do so.

7. At the time the application was made, the oldest child was 7 years and 8 months old, having been in the UK for over seven years.

8. The basis of the application, as I noted in my decision as to error of law, made immediately following the hearing on 19 September 2017, was clear from the witness statements contained within the appellants' bundle which had been before Judge Oliver and it was that pursuant to paragraph

276ADE(1)(iv) the Tribunal needed to consider whether it would be reasonable to expect the older child to leave the UK. Paragraph 276ADE(1)(iv) provides as follows:

> **"Requirements to be met by an applicant for leave to remain on the grounds of private life**
>
> 276ADE(1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> …
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK …"

9. Clearly, at the time this application was made the third appellant was under the age of 18 years and had lived continuously in the UK for at least seven years, so under the Rules, his removal could only be justified if it could not be said that "it would not be reasonable to expect the applicant to leave the UK". In other words, the third appellant's application should have been allowed unless it was reasonable to expect him to leave the UK.

10. As I noted in my earlier decision, in the witness statement which had been made for the hearing before Judge Oliver, the second appellant (the father of the third appellant) said as follows at paragraph 14:

> "My son has lived in the UK for over eight years. Indeed, the respondent, under the Immigration Rule 276ADE, acknowledges and recognises the right of a child's private life in the UK and the practical difficulties which a child would face on [sic] the country he is to be removed to. …"

11. I also noted that the first appellant in her statement at paragraph 24, had stated as follows:

> "24. The [respondent] does not deny that my son's integration into the UK is not relevant or immaterial. The position which is set out in EX.1 of Appendix FM of the Immigration Rules and paragraph 276ADE of the Immigration Rules is that unless there are strong public policy reasons as to why a parent of a qualifying child should be or must be removed from the UK, the [respondent] would be expected to respect and preserve a parent of child private life under EX.1 of Appendix FM of the Immigration Rules, under paragraph 276ADE of the Immigration Rules and under Article 8 of ECHR."

12. I set out these excerpts from the witness statements and noted that although what was contained therein, which had presumably been settled by the appellants' solicitors, could perhaps have been better worded, nonetheless it was clear that the argument that they were making was that their applications under Article 8 should have succeeded under the Rules.

13. I also noted that notwithstanding this at paragraph 8 of his decision, Judge Oliver had stated as follows:

> "It has not been suggested that the appellants can bring themselves within the Rules concerning settlement on the basis of family or private life, but it is argued that their appeals should succeed for compassionate reasons and because there are exceptional circumstances."

14. The judge was clearly wrong in so stating, and it is notable that within his extremely brief decision (amounting to no more than two and a half pages in total) there was not even any reference to paragraph 276ADE(1)(iv) of the Rules nor was there any reference to Section 117B(6) of the Nationality, Immigration and Asylum Act 2002, inserted by Section 19 of the Immigration Act 2014, which provides as follows:

> **"117BArticle 8: public interest considerations applicable in all cases**
>
> …
>
> (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."

15. As I noted in my earlier decision, in *MA (Pakistan)* [2016] EWCA Civ 705, a decision handed down on 7 July 2016 (which again had not been mentioned within Judge Oliver's decision, even though it is the leading case dealing with the circumstances in which the long residence of a child should be considered), at paragraph 49 Lord Justice Elias, with whom the other judges agreed, stated in terms that:

> "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."

16. I accepted the argument made on behalf of the appellants by Mr Sharma that it had been incumbent on Judge Oliver to consider properly what the best interests of the children were by reference to the evidence which had been adduced. I found that in this case Judge Oliver had not only seemingly misunderstood the length of time the children had been in this country before applying under Article 8, but also did not show that he had understood that so far as an Article 8 application was concerned it was incumbent on him to consider the case as at the date of his decision. When dealing with the argument that the period of seven years which the older child had been in this country was a matter which was of some weight, he dismissed this argument in the following terms:

> "10. It is further argued that they should be allowed to remain because of the best interests of their children under Section 55 of the ***Borders, Citizenship and Immigration Act 2009***. Although it is right that their son has now been in the United Kingdom for over eight years, he had been here for only five years when his parents embarked on the unsuccessful applications noted above. Although the period [of] seven years was suggested in *Azimi-Moayed and others (decisions affecting children; onward appeals)* [2013] UKUT 197 as a positive pointer, it was also suggested that the seven years ran from the age of 4 years. In this case the son was only 4 months old on arrival."

17. As I have already stated in my earlier decision, and repeat in this decision, that is not an accurate statement of what was stated in that case. The seven years does not "run" from the age of 4 years; the most that the judge could have understood from the decision in that case was that the period from 4 years old was more significant than the seven years from the date of birth, but the court did not decide that the earlier period could just be ignored. It is clear, in my judgment, that when one considers in particular the judgment in *MA (Pakistan)* it is incumbent on the judge to at least give proper reasons as to why, notwithstanding the seven years that the oldest child had been in the UK, its relevance to the strength of her best interests could be overcome. As the court found in *MA (Pakistan)* "leave should be granted unless there are powerful reasons to the contrary" and the judge should have embarked on a proper proportionality exercise with this in mind, which he did not.

18. At the error of law hearing, although Mr Clarke, then appearing on behalf of the respondent, had sought to persuade the Tribunal that the judge had effectively considered the best interests of the children, he was obliged to concede that his reasoning was perhaps not as thorough as it might have been. One of the things which I noted that the judge had not appeared to have considered at all when finding at paragraph 11 that "their best

interests lie in remaining with their parents" was whether or not their best interests would be to remain in this country with their parents; as already noted, there is no consideration at all of the provisions set out within Section 117B(6) of the 2002 Act, which deals with whether or not a parent should be removed when it would not be reasonable to expect a child with whom they have a genuine and subsisting qualifying relationship to leave.

19. For these reasons, I found that Judge Oliver's failure to have regard to the relevant Rules, statutes and authorities (in particular *MA (Pakistan)*) was a material error of law such that the decision he made would have to be set aside and remade. Having canvassed the opinion of both representatives at that time, it was agreed that although there would have to be some further fact-finding, that could be carried out by this Tribunal and it would be more appropriate for the remaking of the decision to be in this Tribunal rather than remitting the appeal back to the First-tier Tribunal. I agreed and gave further directions for the service of up-to-date witness evidence with regard in particular to the best interests of the children, and arranged for the hearing then to be relisted before me.

The Rehearing

20. Regrettably, despite the very clear directions which I made, up-to-date witness evidence was not in fact served. It would have been helpful in particular, as I had made clear during the previous hearing, if up-to-date evidence had been provided with regard to the current position of the third and fourth appellants, the children. However, having heard full arguments on behalf of both parties, and being assisted in particular by a very full skeleton argument prepared on behalf of the appellants by Mr Sharma, I consider that I can properly dispose of this appeal without the need of a further adjournment on the basis of the evidence which I have heard.

21. Both the first and second appellants gave evidence before me in which essentially they relied on the witness statements they had made, as well as answering some supplementary questions relating to the position with regard to their children. They were both cross-examined very fairly and very briefly by Mr Duffy.

22. Essentially, and this not challenged, both appellants are very well-qualified scientists. They both have bachelor's degrees. The first appellant has two master's degrees, one in biophotonics which she obtained in Paris and another in nanotechnology, which she acquired in England; her husband only has one master's degree in addition to his bachelor's degree, both in science subjects acquired in Pakistan. As already noted, other than the fact that they did not leave the UK with their children having initially failed to obtain leave to remain, their immigration history is not a bad one; throughout the time when thy have not had leave to remain, they have been seeking to regularise their position.

23. Were this Tribunal just concerned with the position of the parents, although well-qualified, it could not be said that either of them satisfied any of the requirements set out within paragraph 276ADE(1)(iii) to (vi) of the Immigration Rules and nor could it be said that, absent their children, there would have been any especially compelling reason why they should be granted permission, exceptionally, to remain in this country outside the Rules. Perfectly reasonably, their reasons for wishing to remain in this country are largely economic; because of the specialisms they have, they would be able to obtain far better employment in this country than they could back home, but that on its own would not be a reason why absent their children their claims should be allowed under Article 8. However, when one considers the overall proportionality, which this Tribunal will have to do when considering whether or not it is "reasonable" for the oldest child, who is a qualifying child, to return, the fact that they would almost certainly not be a burden on this country but would be productive workers is a matter which will have to be taken into account when the "reasonableness" of the child returning to Pakistan (which is a misnomer because, as I understand matters, he has never been to that country, having been born in Poland and then having come to this country when some 4 months old) is considered. The only visit in fact made by the older child to Pakistan was a very brief visit so that he could be seen by relatives at a time when he was in this country lawfully, and he returned shortly after. For the purposes of this appeal Mr Duffy does not suggest that that visit was of any significance.

24. Although I have not seen up-to-date school reports, there is no reason to doubt that the children are both doing very well at school. The first appellant describes her daughter as "brilliant", which is how I would expect a bright child to be described by a proud parent, and it seems very clear, and is not disputed, that as bright young children will, they have adapted very well to life in this country and have very many friends of no doubt different cultures, with whom their lives are entwined. They do both understand Urdu, because although their first language is English, Urdu remains spoken in the household primarily between the first and second appellants, whose first language it remains. However, the prevailing culture in which they have been brought up is that of the UK.

25. I have in mind as I must the precise guidance given by the Court of Appeal in *MA (Pakistan)* at paragraph 49, which I now repeat, in full:

> "49. 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."

26. On behalf of the respondent, Mr Duffy agreed that he could not realistically dispute that the best interests of these children (and in particular the older child, the daughter, who was a "qualifying child" as defined within Section 117D of the 2002 Act) was to remain in the UK. However, that was only the starting point; the test this Tribunal had to consider was whether or not it was reasonable (or not unreasonable) to expect that qualifying child, the third appellant to leave the UK. The test was the same under paragraph 276ADE(1)(iv) and (in respect of the parents) under Section 117B(6) of the 2002 Act. Setting out the factors fairly, Mr Duffy invited the Tribunal to take account of the fact that the first and second appellants were educated, intelligent people with family in Pakistan (they both have a number of siblings and some parents remaining there) and that the children were very bright and could adapt. However, it was accepted that the immigration history of the parents was not a particularly bad one, and other than that they overstayed while they were still seeking leave to remain, there was no other factor on which the respondent wished to rely.

27. On behalf of the appellants, Mr Sharma referred the Tribunal not just to the guidance given in *MA (Pakistan)* but also to the guidance given by the respondent which is set out at paragraph 11 of his skeleton argument and is as follows:

> *"The requirement that a non-British citizen child has lived in the UK for a continuous period of at least the seven 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 seven years.****"*

28. As properly and rightly accepted by Mr Duffy on behalf of the respondent, this Tribunal, when considering an appeal under Article 8 has to consider the position as at the date of hearing, and as at today's date the older child has not just been here seven years, but has been here in this country for four months short of ten years, which includes the very formative years from 4 onwards. In my judgment, her case is therefore stronger than it was when she had just been here for seven years, because in the intervening period her roots have become much stronger.

29. I consider the case from her point of view to begin with. It has been accepted, as I have noted, on behalf of the respondent, that the best interests of both children (but I am now considering the position of the

older child) are that she should remain in this country. This is a primary consideration although not necessarily paramount, but having regard both to the guidance given by the respondent herself, and also to that given by the Court of Appeal at paragraph 49 of *MA (Pakistan)*, I approach her case on the basis that strong reasons will be required in order to justify removing that child from the UK. Although the Tribunal is not restricted in considering factors relating to the child herself, but may also take into account the immigration history of her parents (which was reluctantly accepted by Lord Justice Elias in *MA (Pakistan)*, who felt bound by the previous decision of the Court of Appeal in *MM (Uganda)* [2016] EWCA Civ 450), in this case, the reasons why the removal of this child could be said to be justified are not sufficiently strong. I bear in mind the length of time she has been here, which is a powerful factor against removal, but also that on the other side, although there is always a public interest in enforcing immigration control, in this case there is a lack of the aggravating features which regrettably are so commonly found in cases of this sort. There is no suggestion that the first and second appellants, if granted leave, would be anything other than assets to the UK, and the third appellant (and her brother) appear bright, able children who themselves would also be assets to this country. That of itself is not a reason why they should be allowed to remain, but as the older child is a "qualifying child" as noted above, and the presumption (albeit a rebuttable presumption as accepted by Mr Sharma in his submissions) is that that child should be allowed to remain unless there are strong reasons why he should not, I do not consider in the circumstances of this case, having conducted a proportionality exercise in which I have considered all the factors, that it would be reasonable to expect that child to leave.

30. It follows that having regard to Section 117B(6) of the 2002 Act, the public interest does not require either of her parents to be removed either, because it is stated in terms at Section 117B(6) that:

> "In the case of a person who is not liable to deportation, the public interest does not require that person's removal where the person has a genuine and subsisting parental relationship with a qualifying child, and it would not be reasonable to expect the child to leave the United Kingdom."

As I have found that it would not be reasonable to expect the third appellant to leave the United Kingdom, and clearly both parents have a qualifying relationship with that child, it is not in the public interest to require either parent to leave.

31. In these circumstances, clearly it is not appropriate to order the removal of the fourth appellant either, and so the appeals of all four appellants must succeed on Article 8 grounds and I will so find.

Notice of Decision

I set aside the decision of First-tier Tribunal Judge Oliver as containing a material error of law and remake the decision as follows:

The appellants' appeals are allowed, on human rights grounds, Article 8.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig
31 October 2017

Dated: