Upper Tier Tribunal **Appeal**
Numbers: HU/04468/2016
(Immigration and Asylum Chamber)
HU/04474/2016

HU/04481/2016

HU/12617/2016

THE IMMIGRATION ACTS

Heard at Manchester
On 15th October 2018

Decision Promulgated
On 19th October 2018

Before

Deputy Upper Tribunal Judge Pickup
Between

SN
SSMK
SSK
SSAK
[Anonymity direction made]

Appellants

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellants: Mr H Semega-Janneh, instructed by Farani Taylor Solicitors
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellants' appeal against the decision of First-tier Tribunal Judge Durance promulgated 6.2.18, dismissing their linked appeals against the decision of the Secretary of State, dated 3.5.16, to refuse their human rights claim for leave to remain in the UK. The appellants comprise two parents, born in 1981, and two children born in 2008 and 2011 respectively.

2. First-tier Tribunal Judge Simpson granted permission to appeal on 5.6.18.

3. Although Judge Durance did not anonymise the decision, given that minor children are involved I consider it appropriate to do so, in the usual terms.

Error of Law

4. For the reasons set out briefly below, I found that there was an error of law in the making of the decision of the First-tier Tribunal such as to require the decision to be set aside and remade. Having reached that decision, both parties agreed that the matter could be dealt with on the basis of submissions only without the need to take any further evidence.

5. Judge Bird's reasons for granting permission to appeal are not entirely clear as the wording is somewhat garbled. However, the primary ground of appeal relates to the failure of the First-tier Tribunal to take account of the fact that one of the two children had crossed the seven-year threshold under paragraph 276ADE of the Immigration Rules and thus the parents met the requirements of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. Whilst the judge addressed the best interests of the children, there was no assessment of reasonableness of expecting the children to leave the UK or how that test has to be approached in the light of MA (Pakistan) and Others v Upper Tribunal (IAC) and Anor [2016] EWCA Civ 705.

Voice Recordings

6. Judge Bird also considered it arguable that there was a failure to have regard to R (Ahsan) v SSHD [2017] EWCA Civ 2009, and there may have been a denial of a fair opportunity for the appellant to obtain the voice recording of his ETS-TOIEC English language test. The grounds complain that the issue of obtaining a copy of the voice recording was simply ignored by the judge. However, on this issue Mr Semega-Janneh was unable to demonstrate that any such issue had been raised during the First-tier Tribunal appeal hearing. Mr McVeety pointed out that the recordings are held by ETS and not the respondent. It is not clear that any voice recording was ever requested or adjournment sought to obtain it. In the circumstances, I found that this ground of appeal was not made out.

7. Mr McVeety accepted that the decision contains no reference to section 117B of the Nationality, Immigration and Asylum Act 2002 or the reasonableness test under 276ADE, nor was he able to point to where the

appropriate consideration might be inferred. Fairly, neither did he advance that such consideration can be demonstrated to be immaterial to the outcome of the appeal.

8. In the circumstances, I found the omission a material error of law requiring the decision to be set aside and remade. However, I preserve the findings of the First-tier Tribunal in relation to the ETS and the other issues summarised at [42] of the decision of the First-tier Tribunal.

Relevant Considerations

9. It is not necessary to repeat the entire history and to recite all the facts of the case set out in Judge Durance's decision. However, the relevant factors include the following considerations, including findings preserved from the decision of the First-tier Tribunal.

10. The adult male, Mr K, came to the UK in 2004 with leave as a student, subsequently extended to 2013. In 2012 his leave was curtained to 9.11.12. Two subsequent applications as a Tier 1 entrepreneur were refused. This appeal relates to an application made in January 2015 for indefinite leave to remain.

11. The female adult, Ms N, first entered the UK in 2006 on a dependent student visa and was subsequent granted further leave as the spouse of Mr K. Her dependent leave was also curtailed in 2012.

12. The two children were born in the UK. They and their parents are Pakistani nationals. The significant change in circumstances since Judge Durance's decision is that the second child has now reached the 7-year threshold, which strengthens the collective case for the appellants to remain in the UK and I have taken that fully into account.

13. In summary, I preserve the following findings in relation to the male adult appellant:

    (a) That he used deception in his ETS English language assessment by using a proxy;

    (b) In the circumstances, the curtailment of his leave was lawful;

    (c) He has been working illegally at Manchester Airport, in breach of his leave and thus this is another act of deception on his part;

    (d) He also falls for refusal under paragraph 322(2) of the Immigration Rules given that he made false representations in order to obtain further leave to remain in the UK. He also falls for refusal under paragraph 322(5) for refusing/failing to attend the interview. His excuses for not doing so were rejected by the First-tier Tribunal;

14. I also preserve the findings that neither adult appellant was able to demonstrate very significant obstacles to integration in Pakistan. Neither adult appellant can qualify under Appendix FM, on the basis of 10 years' lawful residence in the UK. No health grounds argument was raised on behalf of the parents at the First-tier Tribunal.

15. In respect of the children, I preserve the following findings:

    (a) Although each child was born in the UK, they both speak Urdu as well as English. They enjoy family life with their parents in the UK;

    (b) There are no health concerns sufficient to engage the N high threshold;

    (c) That the best interests of each child is to remain with their parents and to return with them to Pakistan.

16. At the present date, the children have been living in the UK for 10 and 7 years respectively. They have never visited Pakistan and have no first-hand knowledge of life there.

The Reasonableness Test

17. Each child appellant has reached the 7-year threshold under paragraph 276ADE so that it is necessary for the tribunal to consider whether it is reasonable to expect that child to leave the UK. This is the same test outside the Rules pursuant to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 in relation to whether the public interest requires the removal of the parent appellants who each have a genuine and subsisting relationship with their two children. However, following MA (Pakistan) and Others v Upper Tribunal (IAC) and Anor [2016] EWCA Civ 705, this reasonableness test requires consideration of the wider public interest. However, where the 7-year threshold has been crossed, strong or powerful reasons are required to justify removing them from the UK.

18. Also relevant under s117B in an outside the Rules consideration is that immigration control is in the public interest and that little weight is to be given to a relationship established whilst immigration status is unlawful and that little weight is to be given to private life developed whilst immigration status is either unlawful or precarious. As continued presence in the UK depended on leave, it is clear that the immigration status of each appellant was at least always precarious but latterly was unlawful.

19. In making the reasonableness assessment it is necessary to consider the best interests of each child, relevant to both the reasonableness assessment and consideration of proportionality outside the Rules. The younger child has only recently crossed the 7-year threshold, but the elder child has lived in the UK for some 10 years since birth and this means that

there is a significant degree of integration in the UK that should not be undervalued.

Best Interests

20. Judge Durance made a comprehensive best interests assessment pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009. Following the guidance of EV (Philippines), the judge took into account the ages, length of residence, state of education, and that they have never lived in Pakistan. The judge noted that as both spoke Urdu there would be no linguistic difficulties in integrating in Pakistan. Mr Semega-Janneh pointed me to the ongoing medical treatment for the son's eye squint (A36) but I am satisfied that they have no health difficulties that cannot be treated in Pakistan.

21. Their family life would continue with their parents in the same family unit and they would have the assistance of their parents in integrating in Pakistan. The judge concluded at [41(n)] that neither child had become so attuned to life in the UK that their integration in Pakistan is contrary to their best interests. That may not be the correct test, which is to assess what is in the best interests of each child, not merely would would not be contrary to their best interests. However, on an assessment of the evidence as a whole I am satisfied that the same conclusion would be reached that their best interests are to accompany their parents to Pakistan.

22. I note from [62] onwards that the judge took full account of the children's schooling and Mr Semega-Janneh drew my attention to the school reports showing excellent performance in school and that they are well-settled there, as is clear from the headteacher's letter at A18. They have developed friendship groups with peers. The headteacher was of the view that if either child were to experience any major change to schooling this would be detrimental to their person and academic development. However, such a strident view has to be taken into account against the background that many children move schools as parents change jobs, move homes, relocate to other parts of the country, and even move abroad for work or other reasons. Children are adaptable and as each child is still in primary school they have not reached any crucial stage in their education. It also has to be recalled that neither child has any entitlement to be raised or educated in the UK, as they are not British, have no settled status, and are without immigration leave to remain.

23. As Judge Durance did in the best interests assessment, I also take into account the relative youth of the children. They are Pakistani nationals and will have the support of their parents in integrating in Pakistan, the country of their nationality, culture and ethnic background. They will be familiar with the culture given that they have been raised within a Pakistani family speaking Urdu in the home. I find that they will be able to readily adapt to a new life in Pakistan and that their significant stay and

life in the UK will mean that there will be challenges in adapting to life in Pakistan, but I am not satisfied that these would amount to very significant obstacles to their integration in Pakistan.

24. Without needing to recite all the same evidence and considerations, for the same reasons I reach same conclusion as Judge Durance at [80] that the best interests of the children are to remain with their parents and to relocate with their parents to Pakistan.

25. Even if the best interests of the children or either of them were to remain in the UK given their life here to date and the significant degree of integration, the reasonableness assessment requires the tribunal to take into account the wider public interest. Whilst the children are not to be blamed for the transgressions of their parents, the fact remains that the wider public interest must include the immigration history of their parents. Not only were they here on an entirely temporary basis, supposedly for the duration of the father's studies, but that leave was curtailed in 2012 so that they should have returned to Pakistan at that time, when the children were quite young. More significantly, the extension of leave to 2012 was only obtained by the deception of the father, perpetrating a fraud on the Secretary of State by tendering a dishonestly obtained English language certificate. The father also worked illegally in the UK. This behaviour is not to be condoned and suggests a disregard or contempt for immigration authorities. I conclude that there is a strong public interest in removing the adult appellants from the UK.

26. Considering the evidence overall, and for the reasons set out above, I find that there are strong and powerful reasons that in my view make it reasonable in all the circumstances to expect the children as well as the adults to leave the UK to go to Pakistan, even though the 7-year threshold has been passed, and even though it is now 10 years that the eldest child has been in the UK. In the circumstances, applying paragraph 276ADE I am satisfied that it is reasonable to expect each child to leave the UK. It follows that the Immigration Rules cannot be met and under consideration of s117B(6) in respect of the parents results in the same conclusion on the reasonableness test outside the Rules.

27. Applying the R (Razgar) v Secretary of State for the Home Department [2004] UKHKL 27 stepped approach, taking into account the best interests assessment, the reasonableness assessment under s117B(6), the immigration history and public interest in removing the appellants from the UK, and in conducting the proportionality balancing exercise, I find that the public interest in removing the children along with their parents significantly outweighs their article 8 rights to respect for family and private life, so that the decision of the Secretary of State was entirely proportionate and not disproportionate to the rights of each of the appellants individually as well as collectively. On the facts of this case I find that the decision is not unduly harsh on any of the appellants, giving

particular consideration to the circumstances of each child. Although they at present know only life in the UK and are settled and doing well at school, and will have a cohort of friends and associates outside the immediate family unit so that they have roots in the UK, they are still young enough to adapt to life in Pakistan with their parents. Schooling and further education is available in English there, but in any event they speak Urdu. They will have the opportunity to make new friends and to enjoy a full private and social life. They will have the time to integrate before going on to secondary and further education. There is no reason why any appropriate medical treatment would not be available and no reason why they would not be able to look forward to a full and rewarding life in Pakistan.

28. It follows that the appeal of each appellant on human rights grounds must fail.

Decision

29. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeals by dismissing the appeal of each appellant.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. However, given that children are involved, I consider it appropriate to make an anonymity order.

Direction Regarding Anonymity

Unless and until a Tribunal or court directs otherwise, each appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify that appellant or any member of his/her 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.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a no fee award.

Reasons: the appeal of each appellant has been dismissed so there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated