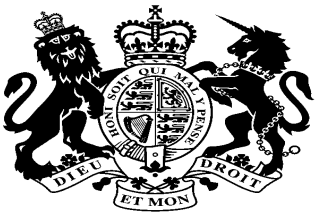

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12985/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 12 April 2019	**On 09 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

ARSHAD [M]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Nicholson (for Rainbow Solicitors)
For the Respondent: Mr D Clarke (Senior Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Arshad [M], a citizen of Pakistan born 3 April 1967, against the decision of the First-tier Tribunal (Judge Watson) of 28 January 2019 dismissing his appeal on asylum grounds, itself brought against the refusal of his human rights claim of 5 June 2018.

2. The Appellant entered the UK on 22 June 2017 with a visit visa valid to 18 December 2017. He applied for indefinite leave to remain on 28 September 2017, an application that was refused on 5 June 2018.

3. The Appellant had married his wife, the Sponsor Ms [B], on 15 August 2000, in the UK. His wife entered the UK in 2007 and subsequently became a British citizen. Ms [B] had visited the Appellant in Pakistan over time. The Appellant's last UK visit began on 22 June 2017, and the application leading to this appeal was made on 28 September 2017.

4. The Appellant's case before the First-tier Tribunal was essentially as follows. He was a businessman regularly travelling between the UK and Pakistan. He maintained his relationship with his wife by visiting regularly, using the visit route to the maximum possible extent permitted by the Rules so as to remain in the UK for at least half the time. This was realistic as he could maintain his business (which involved trading between the UK and Pakistan) from either country. A family dispute had made relations with the Appellant's parents difficult at one time though they were now dead.

5. They have four children, [F], [A], [Z] and [AA], aged 16, 14, 8 and 2 at the date of the hearing below. In the Appellant's absence Ms [B] was their primary carer. However, these arrangements became unrealistic as his wife's mental health had deteriorated in recent times, such that she was unable to adequately care for their children, particularly [A] who had a condition called Turner mosaicism requiring regular monitoring and growth hormone injections.

6. Before the First-tier Tribunal there was medical evidence that Ms [B]'s physical health had deteriorated due to her anxiety as to the Appellant's immigration status. Anti-depressants had in fact led to a worsening of her stress-induced symptoms and she had been referred to Berkshire Adult Mental Health Services. The doctor opined that she faced a likely deterioration in both her own health and her capacity to care for the children without the Appellant.

7. The First-tier Tribunal accepted that the Appellant had always complied with immigration control and that there had been some kind of family dispute in the past with the Appellant's parents. Now they were deceased, there was no reason why the Appellant's wife could not live in Pakistan. There was evidence showing remittances from the Appellant in Pakistan to his UK family, and a bank account showed funds of £68,000 held as of September 2016; various documents showed evidence of his business's operations in 2016, and confirmed the Appellant's ownership of a house in Pakistan. Ms [B] suffered from headaches and was being treated with antidepressants. There was medical evidence confirming [A]'s condition. Ms [B] was clearly able to attend appointments with [A], and had done so for many years.

8. The First-tier Tribunal found that there were no insurmountable obstacles to life in Pakistan. Ms [B] could cope with life there if required, albeit she might prefer to live in the UK. The Appellant could not meet the requirements of the Exception provision under Appendix FM, as this required him to satisfy the "parent" definition which was not possible unless he had sole parental responsibility. There were no unjustifiably harsh consequences occasioned by the refusal, and essentially family life could continue as at present via visits between the UK and Pakistan. There was nothing shown to adversely affect the children's welfare if their father returned to Pakistan, as they could continue their schooling and healthcare under their mother's supervision.

9. Grounds of appeal contended that the First-tier Tribunal had erred in law in failing to determine the appeal by reference to the mandatory statutory criteria governing the best interests of British citizen children.

10. The First-tier Tribunal granted permission to appeal on 7 March 2019 on the basis the exception under the Immigration Rules should have been considered.

11. Before me Mr Clarke accepted that there were clear material errors of law in the decision, particularly the failure to apply the section 117B(6) legal framework. Given that there were in fact four British citizen children involved in the case, there was only one rational outcome to the appeal, and he emphasised that the Secretary of State could have no reasonable objection to the appeal's success. Mr Nicholson expressed his agreement with admirable concision.

Findings and reasons

12. I accept that the First-tier Tribunal made material errors of law in this appeal.

13. Section 117B(6) of NIAA 2002 states:

> "**117B Article 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."

14. Quite how the centrality of that provision to the appeal's disposition eluded the First-tier Tribunal is unclear; it was certainly not down to any lack of direction from Mr Nicholson, whose written submissions had clearly referenced it. Given the stance taken by the Respondent on the appeal, it is

clearly appropriate to proceed to remake the decision without any further hearing.

15. The Appellant's childrens' nationality is of particular importance because it brings into play considerations going beyond those present, for example, in the case of a foreign national child who has established seven years of residence in the UK. As was noted by Baroness Hale in *ZH* [2011] UKSC 4 relevant considerations in removing a British citizen child include the potential deprivation of the practical benefits of that citizenship, "and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle." However, these distinct benefits of British citizenship were simply not considered at all.

16. The key question is the reasonableness of the departure from the UK of the British citizen children. Jackson LJ in *EV (Philippines)* [2014] EWCA Civ 874 at [35] stated: "A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life ..."

17. *Azimi-Moayed* [2013] UKUT 197 (IAC) states that as a starting point it is in the best interests of children to be with those of their parents who are their primary carers. If a parent has no further right to remain in the United Kingdom then it is to be expected that it is in the interests of a dependent child to follow them absent some particular reasons to the contrary. Stability and continuity of social and educational provision, and an upbringing consonant with the cultural norms of the society to which their parents belong, are usually in their best interests.

18. Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 explained that wider public interest considerations had to be taken into account when assessing the reasonableness of a child's relocation, beyond its best interests. The fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise as was shown by the Secretary of State's published guidance from August 2015 in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave, because 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. Nevertheless, it may be reasonable to

require the child to leave where there are good cogent reasons, even if they are not compelling.

19. In *MT and ET Nigeria* [2018] UKUT 88 (IAC) the Upper Tribunal examined the best interests of the child where the mother and daughter had lived in the UK for around a decade (for the latter, from the age of four to fourteen) by the time of the appeal hearing. The First-tier Tribunal found that the daughter had no memory of Nigeria and was well integrated in school and socially; it was clearly in her best interests to remain in the UK. However, her mother had overstayed her original visit visa, pursued a false asylum claim and received a community order for using a false document to obtain employment. The uprooting from school and loss of her friends were no different to the common experience of any child whose parents decided to make a significant move abroad or otherwise.

20. The Upper Tribunal disagreed with the First-tier Tribunal's assessment. It relied on *MA Pakistan* for the proposition that seven years' residence in the UK "establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary". As it put it, it was necessary to look for "powerful reasons" why a child who has been in the United Kingdom for over ten years should be removed, notwithstanding that her best interests lie in remaining. Accordingly the mother was merely a somewhat run of the mill immigration offender who came to the United Kingdom on a visit visa, overstayed, made a claim for asylum that was found to be false and who has pursued various legal means of remaining in the United Kingdom: these were not sufficiently powerful reasons to counteract the child's best interests when assessing reasonableness: the appeal was accordingly allowed.

21. Drawing together the threads above, it is clear that, when assessing the reasonableness of a child's relocation, stability and continuity of social and educational provision, and an upbringing consonant with the cultural norms of the society to which their parents belong, are usually in their best interests. General speaking greater weight will attach to the private life of children who have been developing private life connections outside the family unit, and as a rule of thumb residence from the age of four upwards, when the child is developing external ties, is particularly important. For qualifying British citizen children such as those present here, the Secretary of State needs to establish "strong reasons" justifying the childrens' departure as "reasonable".

22. It is difficult to imagine a stronger case for satisfaction of the partner route than one where there are not less than four British citizen children involved, two at a stage of their schooling when disruption could have significant consequences, and where one has a medical condition in relation to which she has established a treatment regime in this country. It is also clear that the mother's ability to care for the children will be significantly compromised without her husband being able to live with them on a permanent basis. The

elder children have lived in the UK for much of their lives, the younger ones for all their lives. The other section 117B factors of precariousness of residence, English language proficiency and financial independence do not carry any significant weight here: the Appellant's application during a period when he was present as a visitor was essentially driven by force of circumstances, and he clearly speaks English and is a successful businessman.

23. Accordingly the appeal is allowed.

Decision

There is a material error of law in the decision appealed.

I remake the decision on the appeal by allowing the appeal.

Signed Date 28 April 2019

Deputy Upper Tribunal Judge Symes