Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/02032/2014
IA/02041/2014
IA/02046/2014
IA/02051/2014
IA/02055/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 5th August 2014	**On 12th September 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MNM (FIRST APPELLANT)
RM (SECOND APPELLANT)
AM (THIRD APPELLANT)
FM (FOURTH APPELLANT)
MM (FIFTH APPELLANT)
(ANONYMTY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Byrne, Counsel instructed on behalf of Drummond Miller Solicitors
For the Respondent: Ms O'Brien, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first two Appellants are the parents of the remaining Appellants. They appeal, with permission against the decision of the First-tier Tribunal (Judge Doyle) who in a determination promulgated on 14th April 2014

dismissed their appeals against the decision of the Secretary of State to refuse to grant leave to remain under paragraph 276ADE and Appendix FM and on Article 8 grounds outside the Rules.

2. Unless and until a Tribunal or Court directs otherwise the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify the Appellants or any members of their 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. I have made such a direction as the evidence before the Tribunal refers to three Appellants all of whom who are minor children.

3. The background to the appeal is as follows. The first Appellant entered the United Kingdom in October 2001. His wife and the third Appellant, the eldest child entered the UK in 2005. The remaining children, namely the fourth and fifth Appellants were born in the United Kingdom.

4. As to the immigration history, following the arrival of the first Appellant in the UK in October 2001, he claimed asylum. That application was refused in or about January 2002. His appeal was dismissed on 21st March 2003 and by the end of June 2003, the first Appellant's appeal rights were exhausted. The first Appellant therefore remained in the UK and did not make any further application for leave until submitting the application that is subject of the current appeals on 25th July 2013. As to the position of his wife and eldest child, they entered the United Kingdom illegally in 2005 joining the first Appellant. As I have stated, the remaining children were born in the United Kingdom. Since that time all the family members have been resident in the United Kingdom.

5. On 25th July 2013 applications were made on behalf of the Appellants for leave to remain in the United Kingdom on the basis of their private and family life under paragraph 276ADE and Appendix FM of the Immigration Rules. In the alternative, it was submitted that leave outside of the Rules under Article 8 should apply. The Respondent refused those applications in notices of immigration decision dated 29th August 2013. Those notices set out that as the applications were made at the time when none of the Appellants had leave to enter or remain, there was no right of appeal against the refusals. Thus it appears a pre-action protocol letter was submitted in or about November 2013 challenging the Secretary of State's decision to refuse those applications under Appendix FM, paragraph 276ADE and Article 8 of the ECHR. The Secretary of State responded to this by a letter dated 16th December 2013 (exhibited in the Appellants' first bundle at pages 10-15) and at the same time issued a notice of immigration decision which allowed a right of appeal. Thus the decisions of the Respondent were made on 29th August 2013 to be read in the light of the letter of 16th December 2013.

6. In summary, the Secretary of State refused their applications after considering Appendix FM and paragraph 276ADE of the Immigration Rules. The thrust of the refusal was that the Appellants were not British citizens and neither the first Appellant or second were considered to be able meet the Rules for eligibility as either a partner or parent for the purposes of Article 8 of the ECHR. Whilst it was accepted that both the first and second Appellants had a genuine parental relationship with the child (the third Appellant) who had lived in the United Kingdom for seven years, it was considered that it was not unreasonable for the children to leave Britain. It was further not considered that the first and second Appellant had established a private life in the United Kingdom under the provisions of paragraph 276ADE and that it had not been demonstrated that in the light of their previous residence in Pakistan that they had "no ties" to their country of origin.

7. The Appellants exercised their right to appeal the decisions of the Secretary of State and the appeal came before a Judge of the First-tier Tribunal on 4th April 2014. The judge heard evidence from the first Appellant and had regard to two bundles of evidence produced on behalf of the Appellants including letters of support, school reports, certificates, photographs, expert report and in bundle 2 a series of legal authorities and the Home Office Guidance. The judge set out his conclusions at paragraph [12](a)-(n). The judge took into account that it had not been argued that either the first, second or fifth Appellants could fulfil the requirements of paragraph 276ADE of the Immigration Rules nor was it argued that the Appellants could fulfil the requirements of Appendix FM.

8. The judge went on to state that it was "beyond dispute" that the third and fourth Appellants have lived in the UK for more than seven years and thus the focus on the case was on paragraph 276ADE(iv) of the Immigration Rules on the basis that both the third and fourth Appellants were under the age of 18 years and had both lived continuously in the UK for more than seven years.

9. As the judge identified, the question for the Tribunal was whether or not it would be reasonable to expect either the third or fourth Appellants to leave the UK. In the conclusions reached, the judge made reference to the expert evidence at (e) and (f) but reached the conclusion at (g) that all five Appellants were Pakistani nationals and that the progress made by the third and fourth Appellants in the UK had been made against "the first and second Appellants' informed choice to remain in the UK, to raise their family in the UK and to enable the third and fourth Appellants to benefit from education in the UK, when they knew they did not have any entitlement to be in the UK". The judge made reference to the fact that it was not the children who made those decisions but went on to state that that did "not altered the fact that the third and fourth Appellants have reaped the benefits of living beyond the borders of their country of nationality without the necessary permission to do so." In respect of the expert evidence at (f) the judge noted the report

was two years' old, it was not clear from the report what information was available to the expert nor was it clear from the report whether or not he had spoken directly to the third Appellant. The report had said that the third Appellant was an intelligent, capable and polite child who was doing well in education and had nice circle of friends.

10. The judge went on to consider the Supreme Court decisions in **ZH (Tanzania) v SSHD [2011] UKSC 4** and **Zoumbas v the SSHD UKSC**. The judge found that the first and second Appellants were Pakistani nationals whose siblings remained in Pakistan. They both spoke Urdu and continued to communicate with each other in that language. The judge found that neither the first nor second Appellant had any right to be in the UK and had remained there for a decade when not entitled to do so. He also reached the conclusion that they had made a "conscious decision to have children in the UK and educate them in the UK." At (l) he reached the conclusion that there was no material before the Tribunal to indicate that education was not available for the children nor was there any risk to the children if they returned to Pakistan. He took into account that they were well-settled in the UK and spoke English as a first language and participated in activities that any other UK child would participate in and found that they were well-integrated. The judge found that return would not be without disruption but in view of the progress made in their education and their background they had transferable skills which meant they could adapt to the culture and way of life in their country of nationality. At (m) the judge took into account that there was no true obstacle to the return of the third and fourth Appellants to Pakistan and that they were talented children who could re-establish themselves in Pakistan and thus it was not unreasonable to expect either of the Appellants to leave the UK. Thus he dismissed the appeal under the Immigration Rules.

11. As to Article 8 outside the Rules, the judge found at paragraph [15] that it was intended that the five Appellants would be removed together as a family unit, there was no material to indicate that they would be inadequate reception facilities available for the children and the decision would maintain the integrity of the family unit and ensure that they would not be separated from their parents. The judge considered the Upper Tribunal decision of **Gulshan** and reached the conclusion by looking at their private life that the most important aspect of the children's private life was that with their parents and that their education could continue in Pakistan, they could develop new friendships and when weighting together the matters, it would not be disproportionate for the Appellants to return to Pakistan. Thus he dismissed the appeal also on Article 8 outside of the Rules.

12. An application for permission to appeal the decision was made and permission was granted by First-tier Tribunal Judge Page on 1st May 2014 for the reasons set out in that notice.

13. At the hearing of the appeal before me, Mr Byrne, Counsel instructed on behalf of the Appellants relied upon the Grounds of Appeal as drafted. There were three grounds that were identified by Mr Byrne; the first relying upon the mistake of fact made by the judge when considering the expert evidence of Mr Gibb. It was submitted that he had made a mistake of fact in his determination at [12](f) and that the mistake of fact necessarily affected the weight that the judge ultimately gave to that report and thus vitiated his conclusions that it would be reasonable for the third and fourth Appellants to return to Pakistan. He relied upon the decision of **Hamden v SSHD** [**2006] CSIH 57**. He submitted that this was material and that if the mistake of fact had been right, it would have formed the basis for criticising the report. However, the judge was wrong to state that it was not clear from the report what information was available to the expert as that was set out clearly at section 2 and furthermore, when the judge stated it was not clear whether he had spoke directly to the third Appellant, that was also set out at paragraph 2 of the report. Thus, it was submitted that the source of the report was found by the judge to be unconfirmed and left open a question that ultimately affected the weight of the report that the author had not even met the third Appellant and had no information from that source available to him.

14. Furthermore it was submitted that thereafter the determination did not engage with the report for the reasons set out at paragraph 10 of the grounds.

15. As to ground 2, he submitted that the Tribunal asked the wrong question at paragraph [12](g) and asked the question whether it was reasonable for the family to return to Pakistan. However the question for the Tribunal was whether or not it was reasonable for the children to go to Pakistan and therefore that should have been considered first before considering the question of the parents in the context of the whole family. He submitted this was important because the Rule gave the child rights not capable of being diminished by extraneous considerations including the behaviour of third parties. In this case he submitted the judge collapsed the whole set of family circumstances rather than considering whether or not the children met the Rule. The Rule was as focused one focusing on the individual children and the question of reasonableness. The approach was not consistent with that set out in **ZH (Tanzania)**.

16. As to ground 3, he submitted that the decision of the Tribunal failed to give any reasons for discounting the submission as to what was "reasonable" for the purposes of 276ADE(iv). In particular, the submissions at paragraph [13]-[17] set out the jurisprudence relating to the length of residence of seven years being highly relevant. Furthermore under the heading "avoidance of injustice/prejudice", an argument was advanced that as they had qualified during the transitional period where the Rule did not require it to be unreasonable to return, it was also a material consideration which the judge did not take into account.

17. As to the disposal, Mr Byrne asked for the appeal to be remitted because the findings of fact in relation to the report were made on a misapprehension of the facts and could not be relied upon and it would be artificial to consider the findings of fact made by the judge in the light of the mistaken facts and a way to avoid any artificiality would be for to remit the matter to the Tribunal.

18. Ms O'Brien on behalf of the Secretary of State submitted that it was fair to comment that the judge had failed to notice that the sources of information were set out at paragraph 2 of the report. However she submitted it was not material and that regardless of the error the judge did take into account the contents of the report (see paragraph [12](e). As to weight given to the report, the judge was aware that the third and fourth Appellants had been in the United Kingdom for seven years and therefore the only question he needed to ask was "is it reasonable for the children to leave the UK". By reading the determination as a whole he did consider the relevant factors. He did not dispute that they were doing well and that they were resilient children. Whilst there was no doubt that the children were doing well the question was whether or not it would be unreasonable to reintegrate to their country of nationality. It would not be right, she submitted to blame the children for the behaviour of their parents however it was a matter that could not have been left out of account. She submitted the judge looked at **Zoumbas** but overall the judge found that it would not be unreasonable to return to Pakistan.

19. As to ground 2, she submitted that when the determination was read as a whole the judge was aware that it was a holistic fact based assessment and took factors into account. It was not possible to ignore the parasitic benefits for the children or the parents and for the parents it was the only basis upon which they could remain.

20. As to ground 3, she submitted that the transitional arguments did not apply as the application was not made until July 2013. Even if the judge did not take into account the submissions in the skeleton argument at paragraphs [13]-[17] it would not have changed the outcome of the appeal.

21. She submitted that the error of the judge was not being clear in his determination but that was not a material error. She submitted if there was not an error it was not necessary for any further evidence.

Decision

22. I have given careful consideration to the submissions of the parties and having done so I have reached the conclusion that the decision of the First-tier Tribunal does disclose errors of law in its approach to the evidence and the issues in this case. I have not reached this decision lightly but have given careful consideration to the matters raised by the

grounds and relied upon by Mr Byrne and also the reply by Ms O'Brien however I have reached the conclusion that on balance I am satisfied that those grounds are made out.

23. The judge was correct to identify that the crucial issue in this appeal was paragraph 276ADE(iv) in relation to the third and fourth Appellants (both minors) who are under the age of 18 years and have both lived in the UK continuously for more than seven years. Thus the issue was whether or not it would be reasonable to expect either of them to leave the United Kingdom. In deciding that question, there was evidence submitted on behalf of the Appellants including school reports, letters from the children and other such documentation. Central to that issue was the expert report commissioned on behalf of the Appellants from Mr Gibb an educational psychologist (see page 90; an inventory of productions). The judge summarised the report at (e) stating as follows:-

> "(e) The report from Mr Gibb, reproduced at documents 90 to 97 of the first inventory of productions for the Appellants, state that the relocation of the third Appellant to Pakistan would have a detrimental effect and would harm her confidence, restrict her educational prospects and hamper the social and educational progress the third Appellant has made and so limit her potential."

24. However the judge went on to state (f):-

> "Mr Gibb's report is two years' old. It is not clear from Mr Gibb's report what information was available to him. It is not even clear from the report whether or not he spoke directly to the third Appellant. What I take from Mr Gibb's report is that the third Appellant is an intelligent, capable, polite child who is doing well in education and has a nice circle of friends. The various items of documentary evidence produced indicate that exactly the same can be said for the fourth Appellant. The question for me remains whether or not it will be unreasonable to expect either of the third or fourth Appellants to leave the UK."

25. As both advocates have stated, that is plainly wrong. The report sets out at paragraph 1 of the summary of the instructions and at paragraph 2 which provides the sources of information the expert had access to when making an assessment and reaching the conclusions for his report. The sources of information plainly set out what information was available to him and also that he spoke directly to the Appellant and the family members as indicated at paragraph 2. Thus I am satisfied that the judge did proceed on a mistake of fact or as Mr Byrne states a "material misapprehension" (see decision of **Hamden** as cited at [10]-[11]), that the source of the report was unconfirmed and also that the author had not met the Appellant who was the subject of the report.

26. The issue was whether that was material to the decision ultimately reached. Ms O'Brien submits that whilst the judge made a mistake of fact

he did not vitiate his decision. In this respect, I prefer the submission of Mr Byrne. It seems to me that the judge by proceeding from the wrong premise that this was material to his decision as he went on to conclude that it was reasonable for the Appellants to return to Pakistan and therefore can be said that the mistake went to the root of the decision. Having considered the report to be deficient as set out at (e) that was a matter which plainly affected the weight that could be attached to the report and that thus the assessment and conclusions reached. So much is clear by the use of the words "what I can take from Mr Gibb's report …" and demonstrates that the weight of the report was diminished by what was seen by the judge as important deficiencies. Indeed if there were right then the weight attaching to the report and the conclusions reached would be undermined by the failure to set out the sources of the information including that of the principal Appellant. In the circumstances I am satisfied that the factual misconception was taken into account by the judge and ultimately affected the weight that he could attach to the report and thus rejecting the assessment of the expert.

27. I also consider that having reached that erroneous view of the report, the judge did not make any further assessment of its contents when reaching the conclusion on the question of reasonableness. This is exemplified by the conclusion at [12] where it was stated that "no material was placed before me to indicate that education is not available to the third and fourth and fifth Appellants in Pakistan". Whereas the report did make an assessment of the issue at 7.3 with reference to the material at 6.1. It was incumbent upon the judge to consider that in the light of the report.

28. Whilst the core of the report dealt with the educational needs of the children concerned, it went further than that and made an assessment of the children's assimilation into British culture and life. As the report noted, "The education of an individual never stands alone from the culture and context in which it takes place" (see 7.5) and thus the assessment made of this issue in the report was a relevant and material consideration to the overall question of reasonableness. That was also a material consideration left out of account by not taking into account the matters in the expert report in this regard.

29. I am also persuaded by Mr Byrne's submission that the judge did not take into account the earlier jurisprudence of the Tribunal relating to children who had accumulated seven years' residence when reaching a decision on the reasonableness of return. The judge did properly have regard to the two Supreme Court decisions of **ZH (Tanzania)** (as cited) and **Zoumbas v SSHD** (as cited) and whilst reference was made to the decision of **Azimi-Moayed and Others**, the quote in the determination at (i) did not reflect the more relevant parts of the authority which states that:-

> "Length of residence in the country other than the state of origin can lead to development of social, cultural and educational ties that it would be

> inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear but past and present policies have identified seven years as a relevant period."

30. Such authority stems from the jurisprudence of **EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98**, **E-A (Article 8 – best interests of child) [2011] Nigeria UKUT 00315** where it was stated:-

> "Absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of completing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend on the facts in each case."

31. In this context the ages of the children has direct distinct relevance as those who have spent their childhood and teenage years in the United Kingdom. Such children are in a different position to those of a younger age. Such jurisprudence is not inconsistent with the Home Office Guidance on the application of EX.1 and thus the issue of putting down roots and integration into life in the United Kingdom and in the light of the children's ages was a material consideration which was not taken into account in the decision.

32. As to ground 2, the questioned posed by the judge at (g) and (m) was in effect whether it was reasonable for the family to return to Pakistan. It seemed to me that this asked the wrong question and that the assessment should have begun with considering whether it was reasonable for the children to return to Pakistan taking into account the evidence relating to the material considerations as set out in the earlier jurisprudence. Such matters would entail the consideration of the "best interests" principle. The Rule does provide for the children's interests to be considered which should not be diminished by consideration should as the poor immigration history of the parents and their behaviour. The judge at (g) took into account when considering reasonableness of return the parents' immigration history and that it was their "informed choice" to remain in the UK and to raise their family in the UK when they had no entitlement. Whilst the judge did properly state that it was their parents' decision and not that of the children, such a consideration at the outset of the assessment of reasonableness is I find, inconsistent with the test to be applied. I consider that Ms O'Brien is correct to say that in reaching an overall decision as to reasonableness all findings are required to be taken into account which would include what she described as the "parasitic benefits for the parents" but the point made by Mr Byrne adds weight when he submitted that it must be circular if a parent's immigration status could affect the Appellant's ability to meet the Rule in circumstances when the application is made because the parents are unlawfully present in the UK.

33. As to ground 3, and the argument advanced on the basis of whether the Appellant qualified during a transitional period, it is not necessary to reach a conclusion on this ground in the light of the errors identified earlier.

34. In those circumstances I have reached the conclusion the decision cannot stand and should be set aside. Having reached that conclusion, the errors of law identified demonstrate that material evidence and considerations were not taken account of and thus affected the overall assessment of the question of reasonableness thus none of the findings of fact can stand. In those circumstances, I have reached the conclusion that the submission made by Mr Byrne should be followed that it is in the interests of justice for the appeal to be remitted to the First-tier Tribunal to consider all the evidence and to reach a conclusion on the issues raised in this appeal. Whilst I have heard some submissions from the parties it seems to me that it is important for the Tribunal to consider any new evidence that the Appellant seeks to place before the Tribunal as this is an in country appeal and from what I have heard the circumstances of the third Appellant have or are about to change. The expert evidence is now not current and will also, I anticipate, require updating. The question of the Tribunal concerns the best interests of minor children and therefore I consider that it is in the interests of justice that the right disposal is for this appeal to be remitted to the First-tier Tribunal for the fact finding and assessment of the evidence to be made in the light of the evidence. Thus I have reached the decision that that course should be adopted, having given particular regard to the overriding objective and that there are issues of fact that are central to the appeal that require determination.

35. Therefore the decision of the First-tier Tribunal is set aside and the case is to be remitted to the First-tier Tribunal at Glasgow for a hearing in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act and the Practice Statement of 10th February 2010 (as amended)

36. The following directions should apply:

    (i) The case should be heard afresh with all issues to be decided at the hearing none of the findings shall stand.

    (ii) A paginated and indexed bundle of all documents be relied on at the hearing must be provided no later than seven days before the hearing date.

    (iii) Any updated expert evidence is to be filed and served upon the parties and the Tribunal no later than seven days before the hearing.

    (iv) The case to be listed before the First-tier Tribunal sitting at Glasgow with a time estimate to be confirmed by the Appellants' representatives and confirmation as to whether an interpreter is required and if so what language.

Direction regarding anonymity – rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

A. The appellant is granted anonymity throughout these proceedings, unless and until the Tribunal directs otherwise, and be referred to as FK. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to a contempt of court.

Signed Date 9/9/2014

Upper Tribunal Judge Reeds