Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/31452/2013
IA/31460/2013
IA/31464/2013
IA/31470/2013
IA/31476/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 19th June 2014	**On 23rd July 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NAYYAR ZAMAN MALIK
ANGELA MALIK
ANOSH MALIK
MAHA MALIK
ONEIL ABRAM MALIK

Respondents

Representation:

For the Appellant: Mrs Pettersen, HOPO
For the Respondents: Ms Aspinall of Counsel instructed by Rayan Adams Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Nicholson made following hearings at Manchester on 7th January 2014 and 20th February 2014.

Background

2. The claimants are nationals of Pakistan. The first claimant came to the UK on 20th June 2008 with leave to remain as a Tier 1 General Migrant which was subsequently extended on 7th July 2011. His wife and three children had leave as his dependants.

3. Prior to the expiry of the second grant, they applied for further leave to remain, but were refused on 24th July 2013 because, on the evidence presented to the Secretary of State, they did not show that they had access to £3,300 for a consecutive 90 day period ending no more than 31 days before the date of application.

4. The judge dismissed the appeal under the Immigration Rules and there is no challenge to that aspect of his decision.

5. He did however allow the appeal on Article 8 grounds for the following reasons.

6. In Patel and others v SSHD [2013] UKSC 72 the Supreme Court held that there was no near miss principle as such. In this case the miss was of a technical nature in that the Appellants had failed to comply with the requirement to send in specific documents. The judge was satisfied that the claimants did in fact have UK bank accounts containing more than sufficient funds to meet the requirements of the Rules; the circumstances in which they failed to comply should not be ignored.

7. They had all been in the UK legally since 2008 and had not returned to Pakistan since. They had little to return to. The judge said that it was well-documented that the situation for Christians in Pakistan was a difficult one at present, although it was to the claimants' credit that they had not sought to seek asylum, but the general difficulties faced by people of their faith in Pakistan was common knowledge.

8. The principal claimant had built up a business with a considerable income. His wife works as a carer. Two of the children were in education and another is hoping to go to university. Their education would be interrupted part way through and their planned future in the UK would come to an end. They would be returning to a particularly difficult situation in Pakistan where the family home has been the subject of dispute.

9. The fifth claimant was under 18 and his best interests had to be taken into account. He was a Pakistani national and had spent the greater part of his life in Pakistan and would have no language problems there. On the other hand he had been in the UK for almost six years, was part way through his education, and his removal would have a seriously adverse effect on him.

10. The judge wrote as follows

> "Set against the weight to be attached to immigration control there is very considerable prejudice to private life in this case given the length of time that the family have been here, the fact that they have made this country their home,

the specific situation of the younger Appellants, the likely effect of removal at this time on Mr Nayyar Zaman Malik's business and the fact that for one of the Appellants, the child Oneil Malik, there are some factors (not all) which point towards a conclusion that his life lies in remaining in this country."

11. He allowed the appeal.

The Grounds of Application

12. The Secretary of State sought permission to appeal on four grounds.

13. First, the judge erred in law by considering the situation for Christians in Pakistan without evaluating the objective evidence and applying it to the individual circumstances. He failed to consider the nature of the difficulties, the differential impact of them on returnees, how these claimants could be affected, their ability to overcome them and the areas in which any difficulties were concentrated geographically.

14. Second he erred in finding that Article 8 was engaged in the cases of claimants who were in education in the UK, since they could all apply for leave to enter the UK as students if they wished.

15. Third the judge erred in his consideration of the minor child's best interests. He was a mature teenager who would shortly reach his majority. He had been in the UK for less than seven years, the threshold identified in paragraph 276ADE(iv) and, given that he was a Pakistani national who had lived there for the significant majority of his life, the judge was wrong to find that his best interests demanded that he stay in the UK.

16. Finally the judge erred in finding that private life was engaged in respect of the first and second claimants, having failed to direct himself whether the prejudice suffered amounted to interference of such gravity as to engage Article 8 as per the second Razgar question.

17. Permission to appeal was granted by Judge Grimmett on 26th March 2014 for the reasons stated in the grounds.

Submissions

18. Mrs Pettersen relied on her grounds.

19. With respect to ground 1, the difficulties for Christians in Pakistan was not pleaded before the judge. Any interruption to the adult children's studies could be mitigated by their applying to come to the UK to study. There was no evidence of any detrimental effect to the minor claimant by his removal to the country of his nationality. In practice the judge had considered this to be a near miss case, since he had taken post application evidence into account, and that had infected his decision.

20. Ms Aspinall defended the determination. The reference to Christians had not affected the judge's consideration of Article 8 but in any event he was entitled to consider the situation that the family would face on return to Pakistan in his considerations of proportionality. It would be unreasonable to expect the children to have to apply for entry clearance since they were part way through their studies. There was no authority for the proposition that a child under the age of 18, by a few months, should not benefit from Section 55. It was clear from the determination that the judge had in fact considered all of the relevant Razgar questions and reached a decision open to him.

Findings and Conclusions

21. The grounds amount to a disagreement with the decision but disclose no arguable error of law.

22. The judge did not found his decision on the basis that Christians in Pakistan presently face difficult times, and accordingly there was absolutely no requirement to give the level of detail cited in the grounds. The comment about Christians adds little to his reasoning. In any event the judge was plainly right to consider all of the circumstances in the round, including the situation in Pakistan. He accepted, for example, that there had been a family dispute which rendered return to the family home problematic, clearly a relevant consideration for him.

23. Whilst the right to education is not a protected right as such within Article 8, the fact that the adult claimants were midway through courses or about to embark on them was again a relevant factor for the judge to consider. He could have reached the conclusion that, since they could apply for entry clearance to resume their studies, removal would not be disproportionate, but it was open to him to conclude otherwise, bearing in mind all of the other factors in this case.

24. There is no basis for a submission that because the sixth claimant was approaching 18 his best interests should not properly be considered.

25. Finally, it is not arguable that the judge was not entitled to conclude that the principal Appellant and his wife did not enjoy private/family life in the UK deserving of respect. The fact that they came to the UK under the points-based system does not undermine their ability to establish private life here. On the judge's findings, in 2008, the family intended to make their life in the UK. The principal Appellant has established a business and his wife works as a care assistant.

26. In Philipson (ILR – not PBS evidence) India [2012] UKUT 00039 the Tribunal held

> "While the judge might well have been entitled to conclude that the immigration decision did not interfere with the right of respect for family life, because there was no question of the family members being separated, there was in our judgment private life established in this country when the claimant

> and her family had relocated from India on the understanding and belief that she was being admitted under a Rule that would allow them to remain indefinitely in the UK. She had an expectation of permanent residence in the UK if she continued to meet the conditions of the work permit. In our judgment that was a legitimate and reasonable one having regard to the nature of the Rules throughout her stay. Although it was not a legal right or an indefeasible expectation because policy could always change, we would normally expect transitional provisions to be made in cases where a person is encouraged to leave their own country to take on a demanding and very low paid job as a care assistant. In our judgment, there was private life deserving of respect. The question then arises whether interference with it is proportionate and justified."

27. The same principles apply here.

28. The judge did not, as Mrs Pettersen submitted, apply the near miss principle. He was required to undertake a balancing exercise. The legitimate aim identified by the Secretary of State was the economic wellbeing of the country and the importance of immigration control. The judge acknowledged that the failure to meet technical evidential requirements should be accorded weight. Nevertheless the fact that the claimants actually do have more than sufficient funds to meet the substantive requirements of the Rules was not an irrelevant factor for him.

29. The Secretary of State's grounds amount to a disagreement with the decision.

Decision

30. The judge's decision stands. The claimants' appeals are allowed.

Signed Date

Upper Tribunal Judge Taylor