Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/40383/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 2 June 2015	**On 8 June 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAHID TARIQ

Respondent

Representation:
For the Appellant: Mr M Matthews, Senior Home Office Presenting Officer
For the Respondent: Mr S Winter, Advocate, instructed by Livingstone Brown, Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but the rest of this determination refers to them as they were in the First-tier Tribunal.

2. The appellant is a citizen of Pakistan, born on 15 September 1998. On 14 April 2014 the respondent granted limited leave to remain until 31 July 2014 so that he could finish his exams for the academic year 2013/2014. On 25 July 2014 he sought further leave. The respondent refused that application by decision and letter dated 24 September 2014. Under

reference to paragraph 276ADE(i) of the Immigration Rules, it was considered reasonable to expect the appellant to leave the UK because:

(a) You have completed your exams for the academic year 2013/2014, the sole reason for your previous grant of leave outside the Rules;

(b) You spent 7 years of your life living in Pakistan;

(c) You speak some Urdu, a language widely spoken in Pakistan which will aid your re-integration into Pakistani society;

(d) You last travelled back to Pakistan as recently as 2009; and

(e) Given that your parents and siblings have no valid leave to remain in the UK it is expected that you will all leave and return to Pakistan as a family unit, so you can continue to enjoy your family life together.

3. The respondent found no exceptional circumstances to warrant consideration outside the Rules.

4. By determination promulgated on 26 January 2015 First-tier Tribunal Judge Kempton allowed the appellant's appeal, concluding at paragraph 27:

> "… the appellant has shown that interference with his private life would be disproportionate if he were to be expected to leave the UK … whatever his father may have done in relation to immigration history is not relevant in the assessment for this particular appellant."

5. The respondent sought permission to appeal to the Upper Tribunal on the following grounds:

(i) … the Tribunal failed to provide adequate reasons for considering the case outside the Immigration Rules … when no findings have been made in respect of the merits of the appellant's case within the Rules.

(ii) … the Tribunal erred by not considering section 117B(1) to (5) [of the 2002 Act] with regards to weight placed when making a reasonableness assessment under 117B(6)(b). While the legislation is referred to, along with the Rules … there are no documented findings in respect of this legislation.

(iii) The Tribunal found … that it would not be reasonable to expect the appellant to leave the UK because he is in education. While the Tribunal refers to … *EV (Philippines)* [2014] EWCA Civ 874 … insufficient reasons have been provided for going against the findings in that judgment at paragraph 60 … that it is reasonable to expect children to leave the children with their parents, and the UK cannot be expected to educate the world.

(iv) … the judge notes … that the appellant does speak Urdu, that his father needed an Urdu interpreter … at court which indicates that the family speak Urdu at home … that he has family in Pakistan … and this, together with the judge's findings that it is in the best interests of a child to be with his parents, fails to address the [respondent's] submission that there is no reason why the appellant could not continue his education in Pakistan.

6. The judge granting permission to appeal observed that the judge should perhaps also have had regard to *Patel* [2013] UKSC72 where the Supreme

Court held that a foreign student has no right to remain in the UK to receive education on private life grounds.

7. Mr Matthews pointed out that the family came to the UK on the basis of a work permit fraudulently obtained by his father in 2005, in respect of which his father was later subject to a criminal conviction. The appellant's residence has always been either unlawful or precarious. Although the judge at paragraph 9 set out the legislation including section 117B which provides that little weight is to be given to private life in such circumstances, the substance of the determination did not suggest that the principle had been recognised. It was not clear whether the judge had allowed the appeal on the basis of section 117B(6) and whether in or out of the Immigration Rules. The outcome of the case should not have been dictated by the better interests of the child and no more. The whole family circumstances and history were glossed over in the determination. The statutory provision that the maintenance of effective immigration controls is in the public interest was recited but not applied. The judge focused on the appellant only and ignored the family context. The appellant's mother father and 2 younger siblings are also in the UK and all lack status. The judge did not consider what was to happen to the wider family. The future of the appellant as a child could not be determined without that assessment. The judge did not address whether it was reasonable to expect the whole family to go or to stay.

8. Mr Winter submitted that there was no error in the determination. The judge set out the relevant provisions of statute and of the Rules. She should not be taken to have thereafter overlooked them. Alternatively, if there were any error, it was not material. Read sensibly and as a whole the judge adequately justified her conclusion on whether it was reasonable and proportionate to expect the appellant to leave the UK. As to section 117B it was plain that the appellant spoke English. The judge had not said anything explicitly about his financial independence but it was obvious that he is in the UK as a student. As to the wider effect of the decision this was an appeal only by the son of the family, not by the family as a whole. It was appropriate to assess his position rather than that of the family. Mr Winter accepted that it is the known policy of the respondent that if a family includes a child with leave to remain other members are not usually removed, on the basis of family life and proportionality. The judge should be taken to have been aware of that. The assumption behind her decision was plainly that all the family would stay. Absence of explicit statement of a particular point on which the outcome depended need not be fatal to a determination. The judge had it in mind that the appellant is here with his parents and his siblings. Her decision implied that it was not reasonable to expect the return of the rest of the family. The case turned not so much on the best interests of the child as on a reasonability question. If it was reasonable for the appellant to stay it was reasonable also for his parents and siblings to stay.

9. I observed at this point that although it had been assumed all round so far that section 117B(6) raises a question relevant to this case, in fact it does

not. It applies where *another* party, not the child, is to be removed. Parties agreed.

10. To this, Mr Winter submitted that the appeal properly fell to be allowed under paragraph 276ADE(i)(iv) of the Rules, which raised precisely the question whether it would be "reasonable to expect the applicant to leave the UK." That does I think identify the crucial issue, as indeed the respondent did in the decision under appeal. Mr Winter said finally that the judge answered that question, so any error was immaterial.

11. I indicated that in my view the determination errs materially in law.

12. As to whether the judge paid any real attention to section 117B(4) and (5), Mr Winter pointed out that at paragraph 21 the judge noted that the appellant had established family and private life here "albeit without right to do so." That is the only recognition of the nature of the appellant's residence. That was not split down by either party into its various periods, but appears to have been always either on an unlawful or on a precarious basis. That of course is not personally attributable to him, but the judge was under a statutory obligation to give little weight to private life established under such circumstances.

13. The judge did not consider that point at all. The provision does not apply only to periods of adult life. There is of course the requirement in section 55 of the 2009 Act for the respondent to discharge her functions "having regard to the need to safeguard and promote the welfare of children who are in the UK", which the judge also set out in her determination. It is to be presumed that the two statutory provisions do not result in conflict. The obligation on the respondent under section 55 is intended to be expressed and discharged in terms of the Immigration Rules, including paragraph 276ADE.

14. It is not a question whether a judge sets out in full the requirements of part 5A of the 2002 Act, but whether in substance she applies them. In this case the provisions were set out but not applied.

15. The judge in my opinion was also wrong to find the immigration history of the appellant's father (and the rest of the family) irrelevant. The reasonability of expecting the appellant to leave the UK turned not only on his better interests but on whether that was a reasonable expectation in the whole circumstances of the case. That plainly included factor (e) expressed in the respondent's refusal letter. The judge was wrong to bypass that matter and the effect of her decision on whether not the whole family was to be expected to leave or to remain. Although there was only one party to the appeal, that did not enable the appellant to succeed without consideration of the family context and immigration history. The judge was not relieved from an assessment along the lines explained in *Zoumbas* [2014] SC (UKSC) 75, in *EV* and in *PW* [2015] CSIH 36, to which Mr Matthews made reference.

16. The determination errs materially in law, principally because the judge answered the crucial question (a) after citing Part 5 of the 2002 Act but without applying it, and (b) confining herself to the appellant's immediate interests, and wrongly excluding the wider circumstances of the case.

17. The determination is **set aside**. No findings of the First-tier Tribunal are to stand.

18. The respondent took a neutral course on whether the decision should be remade in the First-tier Tribunal or in the Upper Tribunal. The appellant was content for it to be remitted. The case is apt for entirely fresh consideration in the First-tier Tribunal and is accordingly **remitted** there. The member(s) of the First-tier Tribunal chosen to consider the case are not to include Judge Kempton.

19. No anonymity direction has been requested or made.

Upper Tribunal Judge Macleman
4 June 2015