Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/42234/2014
IA/42236/2014
IA/42239/2014
IA/42241/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 7 December 2015	**On 18 December 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

MSQ
SH
AM
AM
[Anonymity direction made]

Claimants

Representation:
For the claimants: Ms A Seehra, instructed by Farani Javid Taylor Solicitors
For the appellant: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The claimants, with dates of birth as recorded in the decision of the First-tier Tribunal, are all citizens of Pakistan. They form husband and wife, and their two children.

2. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Howard promulgated 17.6.15, allowing on immigration grounds and human rights grounds the linked appeals of the claimants against the decision of the Secretary of State, dated 5.10.14, to refuse their applications for leave to remain in the UK and to remove them from the UK pursuant to section 10 of the Immigration and Asylum Act 1999. The Judge heard the appeal on 1.4.15.

3. Designated First-tier Tribunal Judge Zucker granted permission to appeal on 2.9.15.

4. Thus the matter came before me on 7.12.15 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out below I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Howard to be set aside and remade.

6. The relevant background can be briefly summarised as follows. The first claimant arrived in the UK in 2006 with leave as a student. His wife the second claimant joined him as his dependant in 2007 and their two children, the third and fourth claimants, were born in the UK in 2003 and 2012. The first child has now been in the UK for over 7 years and the appeal largely revolved around his needs as autistic. Whilst being educated in mainstream schooling, his education is tailored to his specific needs.

7. The adult claimants had no leave beyond 2010. In July 2012 the first three claimants made application for leave to remain in the UK. Prior to the decision of the Secretary of State the fourth claimant was born and made a joint application. It is against the refusal of these applications with which the present appeal is concerned.

8. As Judge Howard found at §12 of the decision, none of the claimants could meet the requirements of the Rules. The judge specifically rejected the contention that the third claimant met paragraph 276ADE, because it requires the 7-year criterion to be met at the date of application, which it was not. At §13 the judge specifically stated that the claimants did not meet the requirements of any of the Immigration Rules. In the circumstances, the decision is in error in allowing the appeal on immigration grounds, as Ms Seehra conceded, and for that reason alone must be set aside.

9. The grounds also submit that the judge erred in venturing into a free-standing article 8 consideration, relying on Singh v SSHD [2015] EWCA Civ 74, which in turn endorsed the ration of Nagre. It is now clear that if the consideration under the Rules has fully addressed any family life or private life issue arising under article 8, there is

no reason to go on to a separate and distinct consideration of article 8. In SSHD v SS (Congo) & Ors [2015] EWCA Civ 387, the Court of Appeal held that it is clear that whilst the assessment of Article 8 claims requires a two-stage analysis, and there is no threshold or intermediary requirement of arguability before a decision maker moves to consider the second stage, whether that second stage is required will depend on whether all the issues have been adequately addressed under the Rules. In other words, there is no need to conduct a full separate examination of article 8 outside the Rules where in the circumstances of a particular case, all issues have been addressed in the consideration under the Rules. The same case upheld the MF (Nigeria) formulation of the need to identify compelling circumstances in order to justify a grant of LTR outside the Rules. In the present case, at §14 not only did Judge Howard apply the wrong test for going on to consider article 8 outside the Rules, but failed to identify what compelling circumstances were insufficiently provided for in the Immigration Rules and why those circumstances would render the decision of the Entry Clearance Officer unjustifiably harsh. Instead, the judge referred to "an arguable case that there may be good grounds for granting leave to remain outside the Rules." There was no reference to compelling circumstances.

10. It may be that had the judge applied the correct test, he would have found the circumstances of the third claimant sufficiently compelling to at least justify an article 8 consideration outside the Rules. However, it is not possible to make such a conclusion in the absence of identified compelling circumstances to justify consideration of article 8 at all. In the circumstances for this reason also the decision is in error and cannot stand.

11. I also note an error in the judge's treatment of section 117B of the 2002 Act, which sets out public interest considerations which must form part of any article 8 ECHR proportionality assessment. At §16(4) the judge appears to give credit in the proportionality balancing exercise to the fact that the first claimant speaks excellent English and that the family is not in receipt of any benefits. As AM (s117B) Malawi [2015] UKUT 0260 (IAC) makes clear, "An appellant can obtain no positive right to a grant of leave to remain from either s117B(2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources."

12. The judge makes no reference to the fact, other that reciting the statute, that immigration control is in the public interest and there is no, or insufficient, attention paid to the direction that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. As has now been made clear in Dube (ss.117A-117D) [2015] UKUT 00090 (IAC), judges are duty bound to "have regard" to the specified considerations. Further, the status of a person whose lawful presence in the UK depends on the granting of further leave to remain is entirely precarious. On the facts of this case, the claimants were all in the UK unlawfully and thus both 117B(4) and (5) apply.

13. The judge did consider 117B(6), under which the third claimant would be a qualifying child, having been in the UK for more than 7 years. However, the assessment as to whether it would be reasonable to expect him to leave the UK takes no account of the fact that none of the claimants are British and have any right to education or any other special treatment in the UK. The test under 117B(6) appears to be no different to that under 276ADE.

14. The third principal ground submits that the judge erred in allowing the appeal on human rights grounds principally on the basis of the third claimant's autism. In granting permission to appeal, Judge Zucker stated, "It is arguable that the high threshold which would need to have been met was not established and that the judge therefore erred in his proportionality assessment. The Upper Tribunal may be assisted by consideration of the guidance in Akhalu (health claim: ECHR Article 8) [2013] UKUT 400 (IAC)."

15. Undoubtedly, this family should have left the UK in 2010, when the student leave expired. It is clear that even though they do not claim state benefits, they have used NHS and educational services, to which they are not entitled, at considerable public expense. They are already a significant burden on the state. None of these factors appear to have been adequately brought into the proportionality balancing exercise. The judge concentrates only on whether the third claimant can be "educated appropriately in Pakistan," and his finding that that the parents cannot afford to pay for specialised education. At §16(5) the judge was not satisfied that sponsorship, suggested by the representative of the Secretary of State, was available for the third claimant. The judge went on to identify the issue as being whether the third claimant "were able to go to and function at a school that has no provision for his needs there would be no argument but that collectively this family should be removed. However, he cannot and provision for him is not available in Pakistan." It is not clear whether in referring to 'provision' the judge is referencing the inability of the parents to meet the cost of specialist education at the Oasis Trust, or whether, as Ms Seehra contended, the judge was referring to the claimants' evidence that the school would not accept the child because they only accept non-verbal pupils, and the third in fact claimant speaks English.

16. In any event, the judge has not taken account of the principles set out in Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400 (IAC), to which this case is akin, even though it may be arguable as to whether education of an autistic child is a health issue. There it was held that in conducting the proportionality assessment the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a very few rare cases. "The consequences of removal for the health of a claimant who would not be able to access equivalent health care in their country of nationality as was available in this country are plainly relevant to the question of proportionality. But, when weighed against the public interest in ensuring that the limited resources of this country's health services are used to the best effect for the benefit of those for

whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interest in removal." I take into account in this regard that the situation of a child, where the Tribunal is statutorily required to take account of the best interests, may be somewhat different than for an adult. However, without reaching any conclusion on the matter, I find that this issue was not adequately addressed in the First-tier Tribunal decision.

17. In conclusion, I am satisfied that the judge has failed to adequately address the best interests of the child against the competing factors in favour of the public interest in removal of this family to Pakistan. The proportionality assessment is rather one-sided and incomplete, such that it amounts to an error of law and cannot stand.

18. In setting aside the decision, I have considered Ms Seehra's submission that I should preserve the findings of the First-tier Tribunal. However, those findings are so inextricably tied up with the inadequate article 8 assessment that I am satisfied they are also drawn into question. Further, it would be impracticable to tie a judge's hands especially when, as an in-country case, the circumstances have to be considered as at the date of any future hearing. I thus do not preserve any such findings.

19. Ms Seehra explained that the claimants were not in a position to proceed with a hearing to remake the decision in the linked appeals and further submitted that this case should be remitted to the First-tier Tribunal. I accede to that request.

20. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal Judge vitiates all findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

21. In all the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

22. 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 remit the decision in the linked appeals to the First-tier Tribunal to be made afresh.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

23. The linked appeals are to be relisted before the First-tier Tribunal sitting at Hatton Cross;

24. The time estimate is 2 hours;

25. No findings of fact are preserved and the linked appeals are to be heard afresh;

26. The claimants should serve and lodge with the First-tier Tribunal not later than 14 days before the listed hearing a single new, paginated and indexed, bundle of all subject and objective materials to be relied on, together with copies of all case authorities or statutory provisions, or policies, etc. The Tribunal must not be asked to trawl through previous bundles in order to locate the relevant evidence. The Tribunal is unlikely to accept such evidence and information submitted on the day of hearing.

27. The Tribunal may issue further directions as appropriate.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. The First-tier Tribunal made an order. Given the circumstances of children being involved, I continue that anonymity order.

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.

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

I make no fee award.

Reasons: The outcome of the linked appeals remain to be decided.

Signed

Deputy Upper Tribunal Judge Pickup

Dated