Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12247/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 July 2016	**On 15 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AA (PAKISTAN)
(ANONYMITY DIRECTION MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent/Claimant: Ms S Sharma, Counsel instructed by Immigration Advice Bureau

DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal the decision of the First-tier Tribunal allowing the claimant's appeal on Article 8 grounds

outside the Rules against the decision to remove him under Section 10 of the Immigration and Asylum Act 1999 because he had stayed in the United Kingdom without leave to remain since 31 December 2008. The First-tier Tribunal did not make an anonymity direction, but Ms Sharma requested that an anonymity direction should be made for these proceedings in the Upper Tribunal as the central focus of the appeal is whether the claimant can "piggyback" on the rights of his child, "S", who was born in Pakistan on 2 April 2003 and who entered the United Kingdom on 11 May 2008 with the claimant's other dependant, his wife, "NM". The application was not opposed by Mr Avery, and so I make an anonymity direction in respect of the claimant and his family members.

The Reasons for the Grant of Permission to Appeal

2. On 26 May 2016 First-tier Tribunal Judge JM Holmes gave her reasons for granting the Secretary of State permission to appeal:

> "1. In a Decision promulgated on 6 January 2016 First Tier Tribunal Judge Lagunju dismissed under the Immigration Rules, but allowed on Article 8 grounds, the Appellant's appeal against the decision to refuse him leave to remain in the UK as an overstayer.
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> 2. The application is in time.
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> 3. The grounds raise the short point that the Judge failed to engage with the guidance to be followed in an appeal of this type, to be found in the decisions of SS (Congo), EV (Philippines) and AM (Malawi). As a result it is arguable that the Judge fell into error, failed to apply adequately or at all s117A-D, and entered into a freewheeling approach to the assessment of the proportionality of the removal required under Article 8 without giving any adequate weight to the public interest. There was no issue that the entire family could be removed in safety to Pakistan, where educational opportunities were available to the Appellant's child, just as they had been available to him."

Relevant Background

3. The claimant entered the UK as a student on 23 September 2003. After a number of extensions, he became appeal rights exhausted in June 2009. He made an application for leave to remain by letter dated 18 October 2014, and the Secretary of State refused the application in a decision dated 11 March 2015.

The Hearing Before, and the Decision of, the First-tier Tribunal

4. The claimant's appeal came before Judge Lagunju sitting at Sheldon Court, Birmingham on 27 October 2015. Both parties were legally represented. In paragraphs [9] to [14] of her subsequent decision, the judge gave her reasons for dismissing the claimant's claim that he would face torture

and/or other cruel, inhumane or degrading treatment on his return to Pakistan at the hands of his father or his wife's brothers, contrary to Article 3 ECHR.

5. The judge then turned to consider the question of whether the claimant qualified for leave to remain on either private or family life grounds under the Rules. She found that he did not meet the high threshold set out in Rule 276ADE(1)(vi). He had failed to provide sufficient evidence to show he would face significant obstacles on return. Although he had spent a significant period of time in the UK, he left Pakistan as an adult and was thus still familiar with the customs and culture of his home country. Also, the fact that he had returned to Pakistan on a number of occasions confirmed the connections that he retained with his home country.

6. The claimant's child S was 7 years old. He could not meet the requirements of Rule 276ADE(1)(iv) because although he was under the age of 18, at the date of application he had only been in he UK for six years and not the required seven years.

7. The judge went on to apply the five point test derived from **Razgar [2004] UKHL 27**. On the topic of proportionality, she said as follows:

> "25. In assessing proportionality I have regard for the appellant's poor immigration history, I therefore attached limited weight to the private life established when the appellant's leave was precarious and when he had no lawful leave in the UK. The appellant entered the UK as a student thus should have had the intention to return on completion of his studies; however he failed to return. I accept however that the appellant did make some attempt to regularise his stay. I consider as relevant that the appellant admitted to working without the necessary permission, this does not assist the appellant's case. I find that the appellant although he has been in the UK for many years could maintain many of the friendships and connections he has formed over the years via telephone and internet. I find the same in relation to his wife.
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> 26. I consider also the appellant's son's private life. I have regard for s.55 of the Borders, Citizenship and Immigration Act 2009 and consider as a primary consideration what would be in the best interests of the appellant's child. I note that although he does not meet the 7 year requirement under the rules, at the date of hearing he had been in the UK for over 7 years as he entered in 2008 when he was 5 years old.
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> 27. I consider the guidance given in **Azimi-Moayed and Others (Decisions affecting children; onward appeals) Iran UTIAC [2013]** and note that the fact that the appellant's son has been here for 7 years since the age of 5 is significant. It can therefore be assumed that in that time he has developed social, cultural

and educational ties in the UK. I consider also the respondent's guidance and note that weight is given to the private life of a child who has resided in the UK for at least 7 years, although I acknowledge it seems to relate specifically to the rules. However I cannot overlook the fact that he has now resided in the UK for 7 years.

28. According to the appellant his son is terrified of returning to their home country Pakistan; he cites child kidnappings and other atrocities which he has been exposed to through the media. I find this unusual given he lived in Pakistan for the first five years of his life and it is his and his parents' home country. In my view the appellant and his wife have a duty to protect their son from assimilating such information.

29. I note however that although he spent the first five years of his life there, he has spent most of his life in the UK. It is therefore likely that between the age of 5 and 12 years old a much more entrenched assimilation into UK culture would have occurred than the ties he is likely to have with Pakistan. I note also that he has embarked on an education in the UK and is approaching a crucial stage in his education, namely his GCSEs. I keep in mind however that it is not in the appellant's favour that he has partly benefitted from the UK education system while his status was precarious, as it is not the responsibility of the UK to educate the world.

30. I note however that this was not the fault of his son who has already, without any say in the matter, had to leave his home and school in Pakistan in order to start again in the UK. I find it would not be in his best interests or in the interests of his education to suffer further disruption by leaving the UK and returning to Pakistan. Such ongoing upheaval and disruption is likely to have long term effects on his education and his development particularly in light of his age. I consider the letter from the GP and his school; both confirm that the appellant's son is suffering from anxiety, is distracted and may require counselling.

31. I consider the expert report prepared by Mr Robert Simpson, Independent Social Worker on the appellant's instructions. I have read and carefully considered the entire report. The report highlights the importance of maintaining established attachments which should 'continue at an appropriate level in order to achieve a stable and settled childhood into adulthood; it also encourages stable and adequate growth.' Although this may be true, it is also true that children are often adaptable and with the right level of support and encouragement do adjust to new situations. I consider however that the appellant's son has already experienced such upheaval by coming to the UK and

having to adapt, thus he should not be subjected to any further instability.

32. The report however has approached the question of attachment and separation on the basis that the appellant would be returned without his parents or one parent thus separated from them. The affects of this are described as 'damaging to the point where such emotional damage, would invariably lead to trauma for the child.' This however is not the case as the family would return together as a unit.

33. The report continues by considering the child's separation from his 'world' including his school and concludes that it would not be in his best interests. The report speaks to the long term damage returning could have on the appellant. I am satisfied based on the findings of the report, the length of time he has been here and the stage he is at in his education, that it would not be in the best interests of the appellant's son to leave the UK.

34. It is of course not expected that he should remain in the UK alone, thus I find it is also in the child's best interests to remain under the care and control of both parents in the UK. The appellant should by no means be rewarded for his poor immigration history and poor decision making. However despite the fact that the appellant, his wife and child do not meet the rules, I find the balance tips in favour of the appellant's son remaining in the UK with his parents in light of the damaging effects removal could have on his well-being and development.

35. In assessing proportionality I also have regard to the public interest and s.117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Although the appellant entered the UK lawfully, much of his private life was established whilst he was in the UK unlawful, I therefore attach limited weight to the private life established in this time. I note however that he did make attempts to regularise his stay and did not attempt to evade the authorities.

36. I note in his favour that he does speak English. I note also that there is no evidence before me to suggest that he has never claimed benefits however I note that his child has been receiving an education in the UK which amounts to a burden on the taxpayer. I note also that the appellant has worked unlawfully in the UK; this undoubtedly counts against him. However, having considered the public interest and appropriately weighing all the matters in this case, I am satisfied that the respondent has failed to show that the appellant's removal is a proportionate response to the aim pursued."

The Hearing in the Upper Tribunal

8. At the hearing before me to determine whether an error of law was made out, Mr Avery submitted that an adequate balancing exercise had not been carried out by the judge as detailed in paragraphs 1 to 3 of the permission application which I reproduce in part below:

> "1. The FTT finds that none of the Appellants satisfy the Immigration Rules. At paragraph 21, the FTTJ proceeds to consider Article 8 outside the Rules, but identifies no compelling circumstances for doing, and does not identify an arguable case that is not already covered by the Rules. See The Secretary of State for the Home Department v SS (Congo) & Ors [2015] EWCA Civ 387.
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> 2. At paragraph 27, the FTTJ gives weight to the child's private life by reference to the Respondent's guidance, which the FTTJ notes relates specifically to the Immigration Rules. It is asserted that there are different considerations when considering a child's private life outside the Rules. Section 117B of the Nationality, Immigration and Asylum Act 2002 applies and little weight must be applied to the child's private life. The Act does not distinguish between a child's private life and an adult's private life. The other considerations within section 117B must also apply, the child cannot be considered as financially independent, but must be regarded as a burden on the taxpayers by virtue of his education (as noted in paragraph 36, but only when considering the adult Appellant).
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> 3. The FTTJ failed to have regard to AM (S 117B) Malawi [2015] UKUT 0260 (IAC):
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> *12. There was no reason to infer that any interruption to the education of the elder child upon return to Malawi would be any more significant than that faced by any child forced to move from one country to another by virtue of the careers of their parents. Nor should the difficulties of a move from one school to another become unduly exaggerated. It would be highly unusual for a child in the UK to complete the entirely of their education within one school. The trauma, or excitement, of a new school, new classmates and new teachers is an integral part of growing up. In too many appeals the FtT is presented with arguments whose basic premise is that to change a school is to submit a child to a cruel and unduly harsh experience. Indeed, as if to illustrate the point, we note that the eldest child of this family has been required to move schools, and from one end of the UK to the other, as a result of the decisions of her parents. The evidence does not suggest she suffered any hardship or ill effect from so doing.*
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> *13. The mere presence of the children in the UK, and their academic success, was not a 'trump card' which their*

parents could deploy to demand immigration status for the whole family."

9. On behalf of the claimant, Ms Sharma submitted that the judge's approach did not disclose an error of law. She had taken full account of the child's best interests in accordance with the guidance given in **EV (Philippines)**, and she had reached a sustainable decision that the proposed interference was disproportionate.

Reasons for Finding an Error of Law

10. The judge erred in engaging with Section 117B of the 2002 Act only after she had already reached the conclusion, on her freestanding proportionality assessment, that the proposed interference was disproportionate. The considerations arising under Section 117B needed to be an integral part of the proportionality assessment, and the relevant considerations had to be addressed before a sustainable conclusion could be reached.

11. Although the best interests of the child are a primary consideration in the proportionality assessment, the judge had to engage with Sections 117B(4) and (5) which stipulate that little weight should be given to a private life that is established by a person at a time when the person is in the United Kingdom unlawfully or when a person's immigration status is precarious. As submitted in the permission application, these sub-Sections apply to children as well as to adults.

12. The beginning of paragraph [34] also discloses another flaw in the judge's approach. If the child qualified for leave to remain under Rule 276ADE, then, following the Upper Tribunal decision in **PS (India),** it would have been open to the judge to find that the child could not be expected to remain here on his own and so he had to remain in the UK under the care of his parents, even though they were both overstayers. But as neither the parents nor the child in this case qualify for leave to remain under the Rules, the judge's starting point needed to be that prima facie it was reasonable to expect the child to be looked after by his parents in the country of return.

13. Accordingly, the decision of the First-tier Tribunal is vitiated by a material error of law such that it must be set aside and re-made.

The Re-making of the Decision

14. Both representatives agreed that I could and should re-make the decision on evidence that was before the First-tier Tribunal. There is no controversy about the judge's primary findings of fact. The issue is whether on the facts as found the claimant has made out a case that there are sufficiently compelling circumstances to justify him being granted Article 8 relief outside the Rules.

15. The respects in which it is in the child's best interests to remain here are set out by Judge Lagunju, and it is not necessary for me to repeat them. The best interest considerations militating in favour of the child returning to Pakistan with his parents are that he will be returning to the country of which he is a national, so he can enjoy to the full the benefits attendant upon his Pakistani citizenship. He will have the support of his parents in adjusting to life in Pakistan. He will be able to continue his education in Pakistan, and will be able to enjoy the same private life as he has enjoyed here, albeit with a different set of friends, fellow pupils and teachers. His return to Pakistan will have the positive benefit of the appellant being immersed in the social and cultural milieu from which both his parents spring, and spending the remainder of his formative years in the society to which he and his parents belong.

16. There is no reason to suppose that the disruption to the claimant's education consequential upon him having to return to Pakistan with his parents will cause long term damage to the child's wellbeing and development. As a 12 year old child at the date of the hearing in the First-tier Tribunal, child S was and still is a long way off sitting for his GCSE examinations.

17. In conclusion, I consider that overall the child's best interests lie in him returning with his parents to Pakistan. But even if I am wrong about that, the best interests in favour of the child remaining here only marginally outweigh the best interests in favour of the child returning with his parents to Pakistan, and accordingly the public interest considerations arising under Article 8(2) do not have to be very strong to make it reasonable to expect child S to return to Pakistan with his parents.

18. As noted by Judge Lagunju, the claimant has a poor immigration history. I do not consider that his previous attempts to regularise his immigration status constitute a mitigating factor. On the contrary, the claimant has frustrated the public interest in firm and effective immigration controls by remaining here with his family despite becoming appeal rights exhausted on 16 June 2009, and despite his application of 27 November 2012 being refused with no right of appeal on 28 June 2013. The claimant entered the United Kingdom as a student, and he did not have a legitimate expectation of being able to remain here with his family (who joined him here as student dependants) on a permanent basis.

19. I consider that the decision appealed against strikes a fair balance between, on the one hand, the rights and interests of the claimant and his dependent family members (who include child S), and, on the other hand, the wider interests of society. It is proportionate to the legitimate public end sought to be achieved, namely the protection of the country's economic wellbeing and the maintenance of effective immigration controls.

Notice of Decision

The decision of the First-tier Tribunal dismissing the claimant's appeal on human rights/protection (Article 3 ECHR) grounds did not contain an error of law, and the decision stands.

The decision of the First-tier Tribunal allowing the claimant's appeal on human rights (Article 8 ECHR) grounds contained an error of law, and accordingly that part of the decision is set aside and the following decision is substituted: the claimant's appeal on human rights (Article 8 ECHR) grounds is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the claimant/respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 15 July 2016

Deputy Upper Tribunal Judge Monson

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal, there can be no fee award and I set aside the full fee award made by the First-tier Tribunal.

Signed Date 15 July 2016

Deputy Upper Tribunal Judge Monson