Upper Tribunal
(Immigration and Asylum Chamber)
HU068422015

Appeal Numbers:

HU068432015
HU068442015

HU068452015

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 3 August 2017	**On 16 August 2017**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

S A
RA
Master A A
Miss N A — Appellants

(ANONYMITY ORDER MADE)

And

The Secretary of State for the Home Department — Respondent

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellants. I take the view that disclosure of the identities of the adult appellants risks disclosing the identities of the third and fourth appellants who are minors. I therefore issue an anonymity order which extends to all the appellants. No report of these proceedings shall directly or indirectly identify them. This direction applies to both the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.
The parties at liberty to apply to discharge this order, with reasons.

Representation:
For the appellants: Ms J Heybroek, of Counsel, instructed by Nasim & Co Solicitors.
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND Directions

1. The appellants have been granted permission to appeal against a decision of Judge of the First-tier Tribunal Phull who, following a hearing on 29 September 2016, dismissed their appeals under the Immigration Rules and on human rights grounds (Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)) against decisions of the respondent of 11 September 2015 refusing their claims for leave to remain on the basis of Article 8.

2. The first and second appellants, born on [ ] 1969 and [ ] 1972 respectively, are the parents of the third and fourth appellants, born on [ ] 2002 and [ ] 2004 respectively. The first appellant entered the United Kingdom on 2 May 2009 as a visitor. The second, third and fourth appellants entered the United Kingdom on 12 September 2009 as visitors. At the time, the third appellant was 6 years 9 months old and the fourth appellant nearly 5 years old. All four overstayed after their leave as visitors expired.

3. In the accounts given by the first and second appellants to the respondent and in their evidence to the judge, the first and second appellants said that the second appellant had suffered domestic violence at the hands of the first appellant's father in Pakistan who was said to be an influential religious leader with a large following and who has vowed to separate the second appellant from the first appellant. It was said that the domestic violence has left the second appellant traumatised, she is under treatment for depression and that the children had witnessed the domestic abuse and violence.

4. The reason for the conflict with the first appellant's father was said to be the fact that the second appellant's maternal grandparents were Ahmadi Muslims who had converted to Sunni Islam. When the first appellant's father discovered that the second appellant's maternal grandparents were previously Ahmadi Muslims, he demanded that the first appellant immediately divorce the second appellant. As a religious leader, his father would not accept the second appellant's background. In evidence before the judge, the witnesses gave evidence to the effect that the family would experience problems at the hands of the first appellant's father.

5. An unusual feature of this case is that representations made on the appellants' behalf to the respondent in a letter dated 8 August 2015 from Nasim & Co Solicitors specifically stated that it was accepted that the family conflict "*cannot realistically amount to a claim for asylum, however it is submitted that the circumstances are so exceptional as to give rise to a level of protection under Article 8"*.

6. By the date of the hearing before the judge, the third and fourth appellants had been living continuously in the United Kingdom for a period of at least 7 years. They were therefore "*qualifying children*" under s.117D of the Nationality, Immigration and Asylum Act 2002. The judge had before her a report from an independent social worker, a Ms Shulamit Greenstein. Ms Greenstein had interviewed all four appellants and gave an account of their circumstances in the United Kingdom, especially the circumstances of the third and fourth appellants. She also gave details of the links that the third and fourth appellants had developed with the United Kingdom. She said that they were very close to their cousins, the children of the first appellant's sister. The two families live together.

7. Importantly, the circumstances of the third and fourth appellants in the United Kingdom were not limited to their relationships with their cousins. In her report, Ms Greenstein described the extent to which the third and fourth appellants were integrated in the United Kingdom.

8. I have carefully considered the appellants' grounds and the submissions before me. I am satisfied that the judge has materially erred in law and that her decision should be set aside for reasons which I will now give:

9. Ms Greenstein's report gave details about the lives of the third and fourth appellants in the United Kingdom and the links they had developed. The judge mentioned Ms Greenstein's report in two paragraphs, i.e. paras 36 and 42, which read:

> "36. I have considered, the independent social worker, Ms Greenstein's, report. It sets out her experience and expertise to prepare the report. She references the report with objective evidence, as set out pages 4 and 5 of the report. She was instructed to prepare a report, and consider the best interests of [the third appellant] and [the fourth appellant], the current social circumstances of the family in the UK and the impact on the children's removal to Pakistan in terms of their physical and mental wellbeing.
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> 42. … the social worker notes at page 11 that, "… In speaking with [the third appellant] and [the fourth appellant], they did present as nervous and anxious when asked direct questions however, appeared relaxed and comfortable with adult family members… The views shared by the family were a true reflection of their current situation and concerns". I understand this to mean that [the third appellant] and the [fourth appellant] are comfortable with their parents. They can help adjust to life in Pakistan away from their grandfather."
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> (my emphasis)

10. The two sentences I have underlined represent the judge's entire assessment of Ms Greenstein's report. The judge failed to engage with the evidence in Ms Greenstein's report about the lives of the children in the United Kingdom and the links they had developed in the United Kingdom.

11. I accept that the judge considered s.55 of the Borders, Citizenship and Immigration Act 2009 at para 46. However, an examination of that paragraph reveals that there was no assessment of the evidence about the ties and links the third and fourth appellants had developed in the United Kingdom. At para 46, she stated:

> "46. … section 55, which I turn to consider now. [The third appellant] and [the fourth appellant] have also overstayed but I find they are minors and cannot be blamed, for the actions of their parents. I find on balance it is in their best interests to be with their parents for support. I accept the children speak English and they do understand some Urdu. There are schools in Pakistan that use the English medium of instruction that they can attend. I find that the children would be returning with their parents and they can be helped to adjust to life in Pakistan on their return. I accept that although they will be separated from their cousins, and this may cause them some upset. I find however the parents can help them adjust. [The third appellant] and [the fourth appellant] can also maintain their relationships through visits and modern means of communication."

12. In MA (Pakistan) [2016] EWCA Civ 705, the Court of Appeal held that the fact that a child has been in the United Kingdom for seven years must be given significant weight when carrying out the proportionality exercise and that there must be a very strong expectation that the child's best interests will be to remain in the United Kingdom with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality exercise.

13. The judge did not refer to (MA (Pakistan) in her decision, although she had the judgment before her. Of course, there was no need for the judge to have made specific reference to (MA (Pakistan). However, her reasoning does not disclose that

she considered the ties of the third and fourth appellants to the United Kingdom, as described in Ms Greenstein's report, nor is there anything that shows that she was aware that significant weight must be given to the fact that the children have been in the United Kingdom for at least 7 years.

14. Accordingly, when the judge's reasoning is read as a whole, it is impossible to escape the conclusion that, when she did mention s.55 at para 46, it was meaningless. The judge's reasoning does not disclose what she made of the ties of the third and fourth appellants to the United Kingdom which, as indicated at paras 7 and 8 above, were not limited to their relationships with their cousins.

15. I am therefore satisfied that the judge erred in law in failing to take into account relevant evidence in reaching her decision on the proportionality, i.e. the contents of Ms Greenstein's report insofar as she described the extent to which the third and fourth appellants were integrated in the United Kingdom.

16. This error is clearly material to the outcome of the Article 8 claims of the third and fourth appellants. If it is disproportionate to remove the children, this would be significant in the balancing exercise in relation to the first and second appellants. Thus, the error is also material to the outcome of the Article 8 claims of the first and second appellants.

17. In addition, it is not clear whether the judge accepted or rejected the credibility of the accounts of the first and second appellants concerning the alleged domestic violence by the first appellant's father, although it is clear that she rejected the claim that the first appellant's father is a well-known religious leader with a large following on the basis that no evidence of his religious position had been submitted. The only assessment of credibility of the accounts of events in Pakistan was at paragraph 41 where the judge described the evidence that the minor cousins of the third and fourth appellants had given to Ms Greenstein when they described what the third and fourth appellants had said to them about their paternal grandfather. After quoting from the relevant parts of Ms Greenstein's report at para 41, the judge said, in effect, that the minor cousins had not attended court to be tested on their evidence. This did not amount to an assessment but an outright rejection of their evidence on the basis that they had not attended court to be tested on their evidence. There was no recognition by the judge that they were minors and no assessment of the evidence she heard from the adult witnesses, i.e. the first appellant, the second appellant, the first appellant's sister and the husband of the first appellant's sister about the alleged domestic violence.

18. I acknowledge that Mr Tufan's submission, that this claim that the second appellant as a person whose maternal grandparents had converted from the Ahmadi religion to the Sunni religion suffered domestic violence for that reason is not supported by the background material and is incredible, has some force. However, this does not change the fact that credibility has not been assessed.

19. I have considered carefully whether the assessment of credibility was material to the outcome. I accept that the judge rejected the evidence that the first appellant's father was a well-known religious leader with a large following on the ground that it was not corroborated by supporting evidence. Nevertheless, I am satisfied that the credibility of the account of the alleged problems in Pakistan is relevant to the balancing exercise in relation to proportionality of removal under Article 8 outside the Rules.

20. I am satisfied that the judge's failure to assess the credibility of the evidence concerning the alleged problems experienced from the first appellant's father was also material to the balancing exercise in relation to proportionality outside the Rules.

21. In the majority of cases, the Upper Tribunal when setting aside the decision will be able to re-make the relevant decision itself. However, the Practice Statement for the Immigration and Asylum Chamber of the Upper Tribunal at para 7.2 recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

> "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
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> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

22. In my judgement, this case falls within para 7.2(b). In addition, having regard to the Court of Appeal's judgment in JD (Congo) & Others [2012] EWCA Civ 327, I am of the view that a remittal to the First-tier Tribunal for a re-hearing on the merits on all issues is the right course of action.

23. The first and second appellants are on notice that the respondent takes issue with the credibility of their evidence that the second appellant experienced domestic violence at the hands of the first appellant's father and also that the first appellant's father is a well-known religious leader with a large following. They will be expected to produce objective evidence to support their claim that converts to the Sunni religion from the Ahmadi religion face a real risk of experiencing difficulties of the sort claimed from Sunni religious leaders and that they do not have a reasonable and safe internal flight, albeit that this will be relevant only to the balancing exercise under Article 8(2).

24. Of course, as a consequence and as I explained to Ms Heybroek, the judge hearing the appeal on the next occasion may make positive findings in their favour or they may run the risk of adverse findings. In either case, if they later make an asylum claim and if the asylum claim is refused, the findings will be stand as a starting point pursuant to the guidance in Devaseelan (Second appeals – ECHR – Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702 . Ms Heybroek acknowledged this. It was clear to me that the first and second appellants have made an informed decision that they wish to rely on the account of domestic violence and the alleged problems with the first appellant's father only in relation to their Article 8 claims.

Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that it is set aside in its entirety.

This case is remitted to the First-tier Tribunal for that Tribunal to re-make the decision on the appellant's appeal on the merits on all issues by a judge other than Judge of the First-tier Tribunal Phull.

Signed Date: 14 August 2017
Upper Tribunal Judge Gill