Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers:
IA/11266/2015
IA/11270/2015
IA/11273/2015
IA/11279/2015
IA/11283/2015

THE IMMIGRATION ACTS

Heard at: Field House
On 25th April 2017

Decision & Reasons Promulgated
On 12th June 2017

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

MI
HAQ
MBQ
MQ
AQ
(anonymity direction made)

Appellants

And

The Secretary of State for the Home Department

Respondent

For the Appellants: **Mr I. Khan, Counsel instructed by direct access**
For the Respondent: **Mr K. Norton, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

1. The Appellants are all nationals of Pakistan. They are respectively a mother and her four children. HAQ is today aged 21, MBQ is 16, MQ is 15 and AQ is 12. On

the 20th April 2016 the First-tier Tribunal (Judge Coutts) dismissed their linked appeals against the Respondent's decisions to refuse to vary their leave to remain on human rights grounds and to remove them from the UK under s47 of Immigration, Asylum and Nationality Act 2006. The Appellants were granted permission to appeal against that decision on the 3rd March 2017 by Deputy Upper Tribunal Judge Chapman.

Anonymity

2. There is no reason why the identity of the adult Appellants should be protected. The case does however turn on the presence in the United Kingdom of the three minor Appellants. I have had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders. I am concerned that identification of the adult Appellants could lead to identification of children involved and I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies to, amongst others, both the Appellants and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Background and Matters in Issue

3. The crux of this case is the family life that the Appellants all share in the UK with a Mr IAQ. IAQ is the husband of the first Appellant, and the father of the children. He has lived in the United Kingdom for at least 11 years and was granted indefinite leave to remain on the 20th December 2014. The family sought leave to remain pursuant to the provisions of Appendix FM of the Immigration Rules, and failing that, placed reliance on Article 8 'outside of the rules'. Their case was that there were insurmountable obstacles to family life continuing in Pakistan, and/or in the alternative that their removal from the UK today would be a disproportionate interference with their right to family life. The Appellants further relied upon the provision relating to private life, paragraph 276ADE(1) of the Immigration Rules. They submitted that three of the children had lived for a continuous period of more than seven years in the UK and it would not be reasonable to expect them to leave. MI and HAQ argued that they faced very significant obstacles to their integration in Pakistan; these were the same factual matters relied upon in respect of the case under Appendix FM, namely that the family would face very severe socio-economic hardship and would in effect be destitute.

4. The findings of the First-tier Tribunal were:

   (a) There were not very significant obstacles to either of the adult appellants re-establishing themselves in Pakistan;

   (b) It was not unreasonable to expect the younger children to leave the UK;

   (c) The process of resettlement may involve some hardship for the family but there were not insurmountable obstacles facing them in Pakistan;

   (d) The claims all failed under the rules;

   (e) In the circumstances it was not disproportionate to expect this family to leave the UK.

5. The Appellants now appeal on the ground that the First-tier Tribunal failed to take material evidence/submissions into account in reaching its conclusions. In granting permission Judge Chapman considered it arguable that the First-tier Tribunal had erred, in particular in its approach to the position of the three children, who at the date of the appeal had been in the UK for approaching ten years.

Error of Law: Discussion and Findings

6. The chronology of relevant events is as follows:

2004	IAQ comes to UK on a student visa. Subsequently varied to be granted leave as a work permit holder
31.5.2006	MI and three younger children join IAQ as his dependents
31.1.07	MI and three younger children all granted further leave
10.4.08	MI and three younger children all granted further leave
16.3.09	MI and three younger children all granted further leave
3.10.09	MI and three younger children all granted further leave until 3.10.14
12.6.11	HAQ enters the country with leave to enter as the dependent of IAQ
3.10.14	Applications lodged for further leave to remain

4.5.15	Respondent refuses to vary leave in all five cases and makes directions for the appellants' removal pursuant to s47
14.3.16	Hearing before the First-tier Tribunal
20.4.16	First-tier Tribunal decision

Before me the Respondent accepted that all of the Appellants have had valid leave to enter or remain since their arrival. By virtue of section 3C of the Immigration Act 1971 all five will continue to have lawful leave at least until these proceedings are finally determined.

7. The First-tier Tribunal was required to first consider whether any of the appeals before it could succeed with reference to the Immigration Rules, and if not whether the Respondent's decisions were nevertheless a disproportionate, and thus unlawful, interference with the Article 8 rights of the individuals concerned.

8. It was not immediately clear from the face of the determination why neither MI nor any of her minor children would be able to succeed with reference to the rules relating to partners and children in Appendix FM. IAQ had settled status at the date of the applications, there was no dispute as to the relationships involved, all the applicants had valid leave to remain at the date of the applications and it is noted at paragraph 21 of the determination that the HOPO on the day had accepted IAQ's earnings to be in excess of £37,000, "above the required income threshold to support a partner and children". The answer was revealed by a letter dated 3rd October 2014 which covered the applications for further leave to remain[1]. This indicated that the applications were being made under Article 8 'outside of the rules', the reason being that at the date of application IAQ's earnings were not sufficient to meet the threshold imposed in Appendix FM (Mr Khan's instructions were that they were then in the region of £26,000 per annum).

276ADE(1)(vi)

9. The First-tier Tribunal's determination started then with the provisions relating to private life, as they applied to MI, and her adult son HAQ, who was at the date of the hearing aged 20. The relevant provision was that at paragraph 276ADE(1)(vi) of the rules, which required the Appellants to show that there were "very significant obstacles" to their integration in Pakistan.

[1] Annex L Respondent's bundle

10. The Tribunal found that both of these adults can speak Urdu, that they had both spent most of their lives in Pakistan, that they know and understand the culture and that they have close relatives in Karachi. The Tribunal accepted that return to Pakistan would be disruptive and difficult but on balance did not consider the high test in paragraph 276ADE(1)(vi) to be met.

11. Mr Khan takes issue with those conclusions on the ground that the Tribunal failed to take into account the submissions made to the effect that the family would face destitution if returned to Pakistan, where they would have no home, jobs or support. I reject this ground as unarguable. Setting aside any legal argument about whether economic hardship might qualify as a "very significant obstacle" there would have been no evidential foundation for the Tribunal to have accepted these submissions. Both adult Appellants are healthy and able to work, they have close family members to whom they could turn and failing that IAQ would be able to support them with remittances from the UK. In respect of the close family members in Pakistan, the Tribunal noted that IAQ and MI have two adult daughters living there; Mr Khan contended that it was an error for the Tribunal to have weighed that in the balance where both women have outstanding applications for entry clearance to join the family here. This point too is unarguable. At the date of the appeal these daughters remained in Pakistan where they lived in their grandparents home. It is difficult to see how their possible future absence from Pakistan could present either HAQ or MI with an obstacle to their integration.

12. I find there to be no error of law in the approach taken to 276ADE(1)(vi).

276ADE(1)(iv)

13. Having considered the position of the adults under the rules, the Tribunal turned to consider the position of the children, at the date of the appeal before it aged 15, 14 and 11. The relevant rule in these cases was paragraph 276ADE(1)(iv) which required the applicants to demonstrate that they have lived in the UK for a continuous period of at least seven years, and that it would not be reasonable to expect them to leave the UK. The first limb was not in issue, it being accepted that these children had been brought to the UK in May 2006. At the date of the appeal they had therefore been living here for almost ten years.

14. The reasoning is found at paragraph 36:

> "These appellants, being the younger children of the family here, followed their mother [MI] to join their father [IAQ], here in May 2006. It is therefore not unreasonable that they should follow their mother when she returns to Pakistan and they can, of course be

> joined at the same time by their father and their brother, Hamza. They will also have the support of their grandparents and two sisters who remain in Karachi and who will be able to assist them with readjusting back to life in Pakistan. They speak Urdu, there is no reason to believe that upon attending school in Pakistan that they cannot continue to obtain the achievement levels that they have shown at school here. I note that [AQ], the fifth appellant, is currently in her last year of primary school; however it do not consider this to be a significant issue as the family's return to Pakistan is likely to take place after the end of her current school year".

15. Mr Norton contended that these were all good reasons to find that the children's removal would be reasonable and asked that the findings be upheld. I agree that the factors considered were all relevant, but I am unable to uphold the overall finding. That is because the factors identified are not the only relevant matters that the Tribunal should have weighed in the balance. The fact that these children had lived in the UK for more than seven years was relevant not only to the first limb of sub-paragraph (1)(iv) of the rule, but it played a role in the second, since it served to illustrate the strength and depth of their individual private lives here.

16. The genesis of the 'seven year' provision was the concession known as DP5/96. That policy, and those which followed, created a general, but rebuttable, presumption that enforcement action would "not normally" proceed in cases where a child was born here and had lived continuously to the age of 7 or over, or where, having come to the United Kingdom at an early age, 7 years or more of continuous residence had been accumulated[2]. Although there have been shifts and amendments to this policy over the years, the government has consistently maintained that a residence of at least 7 years' duration is a significant benchmark. As the policy statement[3] which accompanied the introduction of paragraph 276ADE (1)(iv) put it:

> "a period of 7 continuous years spent in the UK as a child will generally establish a sufficient level of integration for family and private life to exist such that removal *would normally not* be in the best interests of the child"

[my emphasis]

The Hansard record of the debate in the House of Lords on the introduction of section 117B(6) (in the Immigration Act 2014) sets out the government's position on the significance of the seven year mark, as explained by then Home Office Minister Lord Wallace of Tankerness:

[2] For a history of the rule and its development see Dyson LJ in Munir v SSHD [2012] UKSC 32 paras 9-13
[3] *The Grounds of Compatibility with Article 8 of the ECHR*: Statement by the Home Office (13 June 2012) at 27.

> "we have acknowledged that if a child has reached the age of seven, he or she will have moved beyond simply having his or her needs met by the parents. The child will be part of the education system and may be developing social networks and connections beyond the parents and home. However, a child who has not spent seven years in the United Kingdom either will be relatively young and able to adapt, or if they are older, will be likely to have spent their earlier years in their country of origin or another country. When considering the best interests of the child, the fact of citizenship is important but so is the fact that the child has spent a large part of his or her childhood in the United Kingdom"[4].

17. The Respondent's current policy statement reaffirms that this is the starting point for consideration of the rule. The Immigration Directorate Instruction 'Family Migration: Appendix FM Section 1.0b *Family Life (as a Partner or Parent) and Private Life: 10-Year Routes'* ("the IDI") reads:

> 11.2.4. Would it be unreasonable to expect a non-British Citizen child to leave the UK?
>
> The requirement that a non-British Citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, recognises that over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and *strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years.*
>
> The decision maker must consider whether, in the specific circumstances of the case, it would be reasonable to expect the child to live in another country.
>
> The decision maker must consider the facts relating to each child in the UK in the family individually, and also consider all the facts relating to the family as a whole. The decision maker should also engage with any specific issues explicitly raised by the family, by each child or on behalf of each child.

[my emphasis]

18. All of this guidance recognises that after a period of seven years' residence a child will have forged strong links with the UK to the extent that he or she will

[4] At column 1383, Hansard 5th March 2014

have an established private life outside of the immediate embrace of his parents and siblings. It is that private life which is the starting point of consideration under this Rule. The relationships and understanding of life that a child develops as he grows older are matters which in themselves attract weight. The fact that the child might be able to adapt to life elsewhere is *a* relevant factor but it cannot be determinative, since exclusive focus on that question would obscure the fact that for such a child, his "private life" in the UK is everything he knows. That is the starting point, and the task of the Tribunal is to then look to other factors to decide whether, on the particular facts of this case, these displace or outweigh the presumption that interference with that private life will normally be contrary to the child's best interests. Those factors are wide-ranging and varied. The IDI gives several examples including, for instance, the child's health, whether his parents have leave, the extent of family connections to the country of proposed return. In MA (Pakistan) Elias LJ (albeit reluctantly) accepted that it must also encompass matter pertaining to the family as a whole, including the factors at s117B(1)-(5) as they relate to the parents. The assessment of what is "reasonable" will call for the Tribunal to weigh all of these matters into the balance and to see whether they constitute "strong reasons" - the language of the current IDI – to proceed with removal notwithstanding the established Article 8 rights of the child in the UK.

19. None of that featured in the reasoning in the present case. These were children who had always had lawful leave, as had their parents. There was no criminality, nor any other obvious countervailing factors. No weight appears to have been given to the uncontested fact that the children had established private lives in this country.

20. I am accordingly satisfied that the reasoning in respect of the three young Appellants is incomplete, flawed and must be set aside.

Article 8 ECHR

21. At paragraph 41 the First-tier Tribunal directed itself that "in light of current jurisprudence, after applying the requirements of the immigration rules, only if there may be arguably good grounds for granting leave to remain….is it necessary for Article 8 purposes to go on to consider whether there are exceptional or compassionate circumstances". It went on, at paragraph 42, to find that no such exceptional or compassionate circumstances existed, and the appeals were dismissed on this ground.

22. Before me Mr Norton accepted that this would appear to be an application of what became known as the *Gulshan* gateway test, derived from Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC) and disapproved by the Court of Appeal in MM (Lebanon) [2014] EWCA Civ 985 [Aikins LJ at 128]. There is no need for any intermediary test, nor are the Appellant's required to

demonstrate any exceptionality. The test is whether it would be proportionate to remove them. He further accepted that the findings on Article 8 would need to remade if I set the decision in respect of 276ADE(1)(iv) aside.

23. It follows that the findings on Article 8 are set aside to be remade.

The Re-Made Decision

276ADE(1)(iv)

24. I start with the Rules. Since neither adult Appellant can qualify, I deal only with the children, Appellants 3-5.

25. The relevant rule is paragraph 276ADE(1)(iv), and the applicable guidance is that set out above, as well as in the decisions of MA (Pakistan) [2016] EWCA Civ 705 and PD and Others (Article 8 – conjoined family claims) [2016] UKUT 108.

26. At the date that I remake the decision in these appeals the children have all lived here for ten years. I accept that the first limb of sub-paragraph (iv) is therefore met.

27. The Respondent's guidance states that it would *normally* be contrary to the children's best interests to remove them after that length of residence. That is my starting point. I accept that these children have established strong private lives and have put down roots outside of the home. I have been given letters from their Head of House from their current school who describes all three pupils "thriving", being children who have evolved into "global citizens", involved in the local community and raising money for various charities. Both girls have made excellent academic progress and are considered likely to attend a Russell Group university. Their brother MQ is also commended for his representation of the school on the sports field. In addition to their life at school the children have become accustomed to British culture and have developed close friendships. I accept that all three children have established a very strong private life in the UK and in accordance with the published guidance that is a matter that must attract substantial weight to.

28. I bear in mind that young people are adaptable and that they could go back to Pakistan. They can all speak Urdu and have demonstrated learning capacity to improve it if necessary. They could resume or build relationships with other family members and new friends. They could attend school. I have placed some weight on those factors.

29. The fact that return to Pakistan is *possible* does not however make it reasonable. I remind myself of the guidance in MA (Pakistan) and the published policy of

the Respondent. There are no factors in these cases which would lead me to depart from the presumption inherent in that guidance. I am satisfied that it would be contrary to these children's best interests to disrupt their education, friendships and home. I must now look to whether there are any countervailing factors such that those best interests would be outweighed.

30. This is a family unit who have made no claim on public funds. Although at the date of application IAQ was not earning a sufficiently high income to satisfy the rules, it was expressly conceded before the First-tier Tribunal that today he is. The children – and their sponsor father – all speak fluent English. They have all had lawful leave for the entire time that they have lived in the United Kingdom. There is no criminality involved. Their private lives have of course been established at a time when their status was precarious, but I bear in mind that the rule exists to regularise the position of children with long residence, and that as children they can hardly be blamed for continuing to grow up whilst their immigration status was less than settled.

31. I have considered the fact that it would be possible for these children to return to Pakistan but I am not satisfied this amounts to a "strong reason" – the language of the Respondent's policy - why they should do so today. They have established private lives in the UK, recognised by policy and caselaw as matters attracting considerable weight, and on a balance of probabilities I find that it would not be reasonable to expect them to leave the UK.

32. The Third, Fourth and Fifth Appellants all succeed in their appeals under the Rules.

MI: Article 8 ECHR

33. MI has an established private and family life in the United Kingdom. She has lived in this country since 2006. I accept if she were to be removed from the UK there would be an interference with that life.

34. The decision to remove is a lawful one: the Secretary of State is entitled to remove persons who no longer qualify for leave to remain.

35. In assessing whether or not it would be proportionate for MI to be removed, I must have regard to the public interest factors set out in s117B of the Nationality. Immigration and Asylum Act 2002. In his submissions Mr Khan placed emphasis on section 117B (6) of the NIAA 2002:

> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

36. It is not in issue that MI has a genuine and subsisting parental relationship with her three minor children. For the reasons set out above, I am satisfied that it would not be reasonable for the children to leave the UK: I have reached that decision having weighed in the balance all of the other public interest factors at (1)-(5). It cannot therefore be said to be in public interest that MI is removed. It follows that her appeal must be allowed on Article 8 grounds.

HAQ: Article 8 ECHR

37. The position of HAQ is not so straightforward. He is now an adult so cannot benefit, like his younger siblings, from policies relating to children. He is not a parent so cannot benefit, like his mother, from the terms of s117B(6).

38. I heard oral evidence directly from HAQ, who adopted his witness statement dated 30th September 2015. He explained that he was fifteen years old when he was brought to the UK as a dependent of his work permit father. He had lived, until that point, with his grandparents in Karachi. He has not been back to Pakistan since. He attended school, and following his GCSEs progressed to Redbridge College. He is working part-time at Marks and Spencer's for pocket money but hopes to go to university. He wants to work in investment banking. In response to Mr Norton's questions HAQ said that he could not simply transfer his qualifications to Pakistan he would have to do other exams there if he wanted to go to university. His father could not afford the fees. Here it is easier because he would be able to get a student loan. HAQ told me that he has a lot of friends in the UK. He has a girlfriend who he has been with for over three years. She is mixed race, of Moroccan origin. He has a good friend called Paul who he goes to the pub with. He has got used to life here and enjoys his social life a lot. He does not think that he would "fit in" in Pakistan. He continues to live as part of the family unit with his parents and siblings, and is financially maintained by his father.

39. When HAQ told me that he was "used to life here" I did not doubt it for a moment. The objective observer could be forgiven from assuming that this personable young man had lived here all his life. His accent, demeanour and outlook were that of a young Londoner. I have no difficulty in accepting that he has an established private life in this country. HAQ is now aged 21. He remains at home with his parents and younger brother and sisters. Apart from the "going out money" that he earns in his part time job, he is financially dependent upon his father, and remains in full time education. Mindful that in

these scenarios there is no bright line between minority and majority I am prepared to accept that HAQ continues to have a family life here.

40. His removal would result in an interference with his enjoyment of those Article 8 rights.

41. Although not an exhaustive list, my assessment of proportionality is framed by the factors set out in s117B of the 2002 Act.

42. HAQ has always had lawful leave to enter or remain in this country. Neither he, nor any member of the family, has ever breached a condition of leave. He has however no present claim for leave to remain under the rules. In the case of his siblings and mother, the rules and statute specifically provide for further leave to be granted. There is no such provision for a 21 year old who has only lived in this country for six years.

43. He speaks fluent English, and that is plainly something that has helped him to integrate into life in the UK.

44. HAQ is supported by his father. Although there is no suggestion that any member of this family have ever had any recourse to public funds I must weigh against HAQ the fact that he is not financially independent: Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803.

45. HAQ has never had settled status in the UK so I am bound, by terms of statute to attach little weight to the private life that he has established whilst his status was 'precarious'.

46. HAQ has no children so s117B(6) has no application. So too s117B(4) since he has never been here unlawfully.

47. Aside from these factors the thrust of the case is that HAQ spent a proportion of his childhood here, remains part of the family unit and has in the time that he has spent in this country become integrated. Mr Khan stresses that all of the time that HAQ has lived here he has had leave to do so. He is ambitious and would like to get a job in the City and contribute to the economy. As his links to this country have become deeper, his ties to Pakistan have accordingly diminished. He does not want to go back to live with his grandparents in Karachi or adapt to the education system in Pakistan. His social life will undoubtedly be impaired; he will not for instance be able to "go down the pub with Paul" or see his girlfriend. I have placed as much weight as I am able on those matters.

48. Having considered all of these factors in the round I am unable to conclude that it would be disproportionate for HAQ to be refused further leave or removed from the UK today. Life in Karachi will be different, but it cannot be said that

it would be unjustifiably harsh, nor even unreasonable. HAQ has a home to go to. He has close family members including two sisters who live there. Although he is obviously used to life in the UK I do not accept that he has become entirely alienated from Pakistani culture or language. Karachi is not a village where it might be said that life would be very restrictive for a young man. HAQ placed some emphasis on the financial cost to his father of him studying in Pakistan. I am unable to find that his removal would be disproportionate because his father cannot, or does not want to, pay his tuition fees. I am bound by the terms of s117B(5) to attach "little weight" to the private life that HAQ has developed since he has been here. In those circumstances the significant weight that must be attached to the public interest (in removing persons with no further right to remain under the rules) must prevail. It is of course the case that HAQ could apply to enter or remain in the UK as a Tier 4 (General) Student Migrant if he wished to continue with his studies here. That his father would have to find the money for his fees does not make that option disproportionate.

Decisions

49. The decision of the First-tier Tribunal contains material errors of law such that the decision must be set aside.

50. The re-made decisions in the appeal are as follows:

"The appeals of the First, Third, Fourth and Fifth Appellants are allowed on human rights grounds.

The appeal of the Second Appellant (HAQ) is dismissed."

51. There is a direction for anonymity.

Upper Tribunal Judge Bruce
8th June 2017