Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/30365/2015
IA/30366/2015
IA/30367/2015
IA/30368/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th September 2017	**On 26th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR I.F. (FIRST RESPONDENT)
MRS H.F. (SECOND RESPONDENT)
MASTER S.F.$_1$ (THIRD RESPONDENT)
MASTER S.F.$_2$ (FOURTH RESPONDENT)
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Ms Willocks-Briscoe, Senior Home Office Presenting Officer
For the Respondents: Mr S Ahmed, Counsel

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction is made on the basis that two of the Appellants are minor children and the decision concerns their welfare.

DECISION AND REASONS

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1. The Secretary of State for the Home Department appeals with permission against the decision of a First-tier Tribunal (Judge Stewart) allowing the appeals of Mr I.F., Mrs H.F., Master S.F.$_1$ and Master S.F.$_2$ against the refusal of the Secretary of State to grant them leave to remain in the UK. The date of the refusal decision is 25th August 2015.

2. For the sake of clarity throughout this decision I shall refer to the Secretary of State as “the Respondent”, and to I.F., H.F., S.F.$_1$ and S.F.$_2$ as “the Appellants”. This reflects their respective positions before the First-tier Tribunal.

Background

3. The Appellants are a family of four. Mr I.F. and Mrs H.F. are husband and wife; S.F.$_1$ and S.F.$_2$ are their dependent minor children. The family are all citizens of Pakistan. S.F.$_1$ was born on [ ] 2004 in Pakistan and entered the UK in March 2009 accompanied by his mother. Both have remained here since that time. By the time of the Respondent’s refusal, S.F.$_1$ had lived in the United Kingdom just short of seven years. By the time of the hearing before the First-tier Tribunal however, it was accepted that S.F.$_1$ had lived here over seven years and thus became a qualifying child for the purposes of Section 117B of the Nationality, Immigration and Asylum Act 2002.

4. Likewise S.F.$_2$, who was born in the United Kingdom in 2010, also fell short of the seven year qualifying period at the date of the Respondent’s refusal but it is correct to say that by the time of the hearing before me S.F.$_2$ also has now lived in the United Kingdom over seven years.

5. I.F. entered the United Kingdom on 25th June 2005 and applied for asylum. That application was refused. However he remained here, and in 2009 his wife and child S.F.$_1$ entered the United Kingdom lawfully on visit visas. At the time of Mrs. H.F.’s entry, S.F.$_1$ was 5 years of age, having been born in Pakistan.

6. Mrs H.F. remained in the UK outwith the terms of her visa entry as an overstayer, and in 2010 S.F.$_2$ was born in the UK and accordingly has lived all his life here.

7. In June 2012, Mr I.F. applied for leave to remain in the UK under family and private life, with his wife and children being named as dependants. That application was refused on 6th February 2013 with no right of appeal. Mr I.F. asked the Respondent to reconsider her decision. She refused to do so on 10th April 2014. This led to all four Appellants commencing judicial review proceedings on 1st July 2014. That action was compromised on 9th June 2015 and by consent it was agreed that the Secretary of State would reconsider the Appellants’ application and if the reconsideration resulted in the Respondent maintaining her refusal, the Appellants would have a right of appeal.

8. Suffice to say the Secretary of State did reconsider, but announced her decision to maintain her refusal of the applications by letter, dated 25th August 2015. It is that refusal which forms the basis of the present appeals.

FtT Hearing

9. When the Appellants' appeals came before the FtT, the judge heard evidence from Mr I.F. and Mrs H.F. The judge noted their background history and then turned his attention to the third Appellant, S.F.$_1$.

10. In [20] to [23] the judge set out what he called the "pros" and "cons" of what amounted to the best interests of S.F.$_1$ remaining in the United Kingdom. He judged that it would not be reasonable to expect S.F.$_1$ to leave the United Kingdom.

11. Thereafter, the judge said the following at [25]:

> "As I see it, the case turns on the interference with the rights of the Appellants to a private and family life under Article 8 of the European Convention on Human Rights."

He then set out the five stage test in **Razgar**. Following that self-direction the judge simply said at [26] the following:

> "I am satisfied that the proposed removal of the third appellant would be an interference with his right to a private life which has consequences of such gravity as to engage Article 8. The interference is in accordance with the law and necessary in a democratic society in the interests of maintaining an effective immigration controls (sic). However such interference is not proportionate to that legitimate public end."

He then allowed the appeals of all Appellants on human rights grounds.

12. Permission to appeal the FtT decision was granted by DJ Murray. Thus the matter comes before me to decide whether the decision of the FtT discloses such error of law that it must be set aside and re-made.

Error of Law Hearing

13. I heard submissions from Ms Willocks-Briscoe for the Respondent and Mr Ahmed for the Appellants. Ms Willocks-Briscoe submitted that the issue before me is a narrow one. A proper reading of the decision showed that the FtT Judge had erred in that he had treated the best interests of the eldest child, S.F.$_1$, as paramount. He had therefore applied the wrong test. In other words, the judge had not done that which he was tasked to do, which was to assess the family unit as a whole; the starting point being the best interests of S.F.$_1$. The test to be applied was whether it would be reasonable to expect S.F.$_1$ (and S.F.$_2$) to relocate to Pakistan with their

parents. A holistic approach to the facts must be taken, bearing in mind that both parents were present in the UK unlawfully, their father being a failed asylum seeker and their mother being an overstayer.

14. The FtT had taken no account of the fact that the family were reliant upon state schools for the children's education and reliant upon the NHS.

15. She submitted that the decision should be set aside for material error and re-made.

16. Mr Ahmed on behalf of the Appellants sought to defend the decision. He pointed out that the FtT had kept in mind the fact that $S.F._1$ was in education. He referred to [17]. He agreed that the point in issue is a narrow one – that is to say the reasonableness test. He submitted however that the decision was a balanced one and it should therefore stand.

17. At the end of submissions I announced my decision that I was satisfied that the decision of the FtT contained material error of law requiring it to be set aside and re-made. I now give my reasons for this finding.

Consideration

18. The approach to be taken to reasonableness, particularly within the structure of 117B is set out and defined by the Court of Appeal in **MA (Pakistan and Others) [2016] EWCA Civ 705**.

19. Section 117B(6) provides that the public interest does not require a person's removal where a person has a genuine and subsisting relationship with a qualifying child and that it would not be reasonable to expect the child to leave the United Kingdom. This is a freestanding provision and requires the decision-maker to decide first of all what are the best interests of the child, and secondly to consider the reasonableness of any proposed return. It was recognised by the court in **MA** (paragraph 47) that, even accepting the focus upon the child, it would not follow that leave must be granted whenever the child's best interests are in favour of remaining. Even where the child's best interests are to stay, it may still not be unreasonable to expect the child to leave. In considering the reasonableness test it is necessary to pay regard to the wider public interest, which includes the factors set out in 117B, namely the burden on taxpayers; integration into society; immigration status of the parents and the full context in which the matter arises.

20. I find that in the present cases the judge has not directed his attention to the relevant considerations nor applied to them the degree of detail that might reasonably be expected.

21. In terms of the wider immigration history, the parents are both long time overstayers. In terms of their integration into society there is very little evidence as to where their income is derived from. There is very little

consideration, as I so find, as to what quality of life the family may expect if returned to Pakistan. From the information that there is, it appears that the children's father is educated to degree level and certainly the evidence indicates that the mother has family members living in Pakistan with whom she and the children are in contact. There was some mention of linguistic difficulties for the children but it was clear from the hearing before the FtT that the children's mother required an Urdu interpreter and therefore there was no evidence that the children would be unable to pick up the language.

22. I find therefore that there has been inadequate consideration as to the element of reasonableness and that this amounts to an error of law such that the decision shall have to be set aside.

23. Having announced my decision, I canvassed with the parties the appropriate venue for disposal of this matter indicating that if there was no further evidence to be brought, then I would dispose of the matter in the Upper Tribunal. Mr Ahmed at this point said that there was further evidence which was not available presently but would be obtained for the rehearing. He said that this would take the form of a medical report on $S.F._1$, who has now been diagnosed with diabetes. In addition school reports on $S.F._2$ would be presented.

24. Clearly therefore findings of fact will need to be made again and a proper consideration conducted as to all elements in favour of the children remaining and those that support their leaving. In accordance therefore with the Senior President's Practice Directions, this matter will be remitted to the First-tier Tribunal for rehearing. No findings of fact are preserved. I was informed that the new evidence should be available in around six weeks time, and I express the hope that this matter can be set down for hearing sooner rather than later.

Notice of Decision

The appeal of the Secretary of State is allowed to the extent that the decision of the First-tier Tribunal is set aside for it to be re-made in that tribunal (not Judge Stewart).

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

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 both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed C E Roberts Date 23 September 2017

Deputy Upper Tribunal Judge Roberts