Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/31338/2015
IA/31340/2015
IA/31342/2015
IA/31344/2015
IA/31345/2015

THE IMMIGRATION ACTS

Heard at Field House

On 18 July 2017

Decision & Reasons Promulgated
On 27 July 2017

Before

UPPER TRIBUNAL JUDGE KING TD

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD [A]
NAZIA [A]
[M H A]
[M Z A]
[A A]

Respondents/Claimants

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondents/ Claimants: Mr A Jafar, Counsel instructed by Eden Solicitors

© CROWN COPYRIGHT 2017

DECISION AND REASONS

1. The claimants are a family of five Pakistani nationals. The parents arrived in the United Kingdom as visitors on 13 November 2006 with their 11 year old daughter (born [ ] 2014). Their 14 year old son (born [ ] 2001) arrived in January 2008 with his grandmother but she returned soon after. The third child was born in the United Kingdom on [ ] 2008.

2. So far as the parents are concerned they have long overstayed the expiry of their leave and have remained in the United Kingdom notwithstanding the service of a notice of their liability to detention and removal served upon them in April 2009. It also transpires that deception was used in relation to the son's arrival in the United Kingdom by the use of an alias and a passport in a different name.

3. The Secretary of State for the Home Department refused the application in respect of leave to remain on the basis of private and family life in a decision of 7 September 2015. An appeal against that decision came before First-tier Tribunal Judge Oliver. The determination was promulgated on 16 November 2016.

4. Challenge is made to that determination which allowed the appeals of the claimants by the Secretary of State. It was noted that the First-tier Tribunal Judge had failed to distinguish between the "best interests assessment" and the "reasonableness assessment" as required by a decision in **MA (Pakistan)**. It was also submitted that the judge failed to give due consideration to the factors set out in 117B.

5. Permission was granted to argue the matter on that basis and thus the matter comes before me.

6. In a fairly brief determination the Judge identifies EX.1 under Appendix FM in consideration as to whether or not it would be reasonable for the children to return.

7. In terms of considering the best interests of the children that is briefly considered applying the principles in **EV (Philippines and Others) [2014] EWCA Civ 874**. Paragraph 35 sets out as follows:-

> "A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (d) what stage their education has reached; (d) to what extent they have been become distanced with the country to which it is proposed they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in

adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens."

8. In paragraph 14 it was noted unsurprisingly the decision in **Azimi-Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197** that the starting point must be that the best interests of the children are to remain with their parents and went on to say that in that connection it is necessary to consider that one of the children was aged 2 at the time of arrival in the United Kingdom and one was born here and had never lived in Pakistan. It was said that neither of them can have any experience of life in Pakistan.

9. In paragraphs 15 the judge set out certain factors which would lead to the conclusion that it was in their best interests to remain in the United Kingdom. Reference is then made to the public interest as defined in Section 117B. It was said that no evidence was heard or questions asked as to the financial circumstances of the family and any burden on the state but concluded that the interests of the children had to take precedence.

10. Mr Jafar, in his helpful submissions, invites me to find that the judge has considered all matters properly such that his conclusions are not to be challenged.

11. With respect to Mr Jafar I disagree.

12. 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 & Others) [2016] EWCA Civ 705**.

13. Section 117B(6) provides that the public interest does not require the 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.

14. This is a freestanding provision requires the decision maker to decide first of all what are the best interests of the children, secondly consider the reasonableness of any proposed return. It was recognised by the court in the judgment at 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 go. 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.

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

16. In terms of the wider immigration history it has been indicated it is not simply that the parents have been long-time overstayers but they employed deception in bringing their eldest child to the United Kingdom. In terms of their integration into society it is to be noted that their income is that from friends, with little indication that either parent is working. Indeed in terms of the application that was made, the section on accommodation and finances, was not completed, other than indicating that the family was living in two rooms of a shared house owned by a friend. There is little analysis conducted as to the nature of the education enjoyed by the children otherwise than some letters speaking as to their progress at school. There is very little careful consideration, as I so find, as to what quality of life they may expect if returned to Pakistan. In terms of linguistic difficulties the older son of course spent most of his life in Pakistan and it is not unreasonable to expect younger children to pick up the language. Clearly the elder child has been brought up substantially by the grandparents who remain in Pakistan and so there is clearly some support. I find that the examination as to the best interests let alone reasonableness of return was superficial in the extreme. Contrary to what was stated by the judge at paragraph 15, evidence was adduced as to the limited financial situation of the family and their accommodation.

17. In support of his submissions, Mr Jafar seeks to rely upon the decision of the Court of Appeal in **AM (Pakistan and Others) [2017] EWCA Civ 180**. He invites me to find that the circumstances of the family in that case are not dissimilar from the circumstances in the current appeal. The parents were overstayers but their two children were qualifying children. As in the current case the judge cited **EV (Philippines and Others)**. What perhaps has been overlooked in those submissions, is that although the circumstances may have been similar, the First-tier Tribunal Judge had come to the conclusion, that although the best interests of the children were to remain it was not unreasonable to expect them to return. That was a decision that was disagreed with by the Upper Tribunal but the Court of Appeal said that the Upper Tribunal was incorrect in the approach taken and upheld the First-tier Tribunal Judge. Thus it is not a decision on its facts which is supportive of what Mr Jafar contends.

18. I find that there has been inadequate consideration as to the element of reasonableness, indeed as I have indicated a somewhat superficial consideration of all relevant matters. I find there to be an error of law such that the decision shall be set aside. Clearly 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.

19. In accordance therefore with the Senior President's Practice Direction this matter will be remitted back to the First-tier Tribunal for re-hearing. No finding of facts to be preserved.

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 to be remade.

No anonymity direction is made.

Signed Date 26 July 2017

Upper Tribunal Judge King TD