Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/00243/2017
HU/00247/2017
HU/00251/2017
HU/00256/2017
HU/00258/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 October 2018	**On 1 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

MR MUHAMMAD SULEMAN ANJUM (FIRST APPELLANT)
MRS ERAM SHAHZADI (SECOND APPELLANT)
MISS T S (THIRD APPELLANT)
MR S H (FOURTH APPELLANT)
MR A H (FIFTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr D Coleman, of Counsel, instructed by Messrs Paul John & Company Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal, with permission, against a decision of Judge of the First-tier Tribunal Birk who, in a determination promulgated on 24 October 2017, dismissed the appellants' appeals against a decision of the Secretary of State made on 9

December 2016 to refuse their applications for leave to remain on human rights grounds.

2. The first appellant entered Britain in February 2000 as a student and had leave to remain until March 2011. The second and third appellants (his wife and first child) entered Britain on 25 January 2008. The third appellant was then aged 2. The fourth and fifth appellants were born in Britain in October 2008 and December 2010. Therefore at the date of the determination of the appeal in October 2017 the third appellant had been in Britain for nine years, that is since the age of 2 and the fourth appellant had also been in Britain for nine years less five days and the fifth appellant had been in Britain for almost seven years.

3. The judge considered the provisions of paragraph 276ADE(iv) when considering the Article 8 rights of the appellants, it having been agreed that the focus of this appeal related to the rights of the children. He noted that it was argued that the fourth and fifth appellants could not speak Urdu and that they had never been to Pakistan.

4. He also noted that the principal appellant had received a suspended sentence in relation to his obtaining a British passport and trying to use it, fraudulently, to open a bank account in order to stay in the United Kingdom. He noted that the children were at school here and appeared to be doing well at school and that the principal appellant and his wife had family in Pakistan. The principal reason that the family had wished to stay in Britain was because their children would receive a better education and life here as there were more opportunities here.

5. The judge noted that the principal appellant had spent eighteen years in Britain and that the second appellant had spent nearly ten years here.

6. The judge set out relevant case law which interpreted the provisions of Section 55 of the Borders, Citizenship and Immigration Act 2009. In paragraphs 15 onwards he made findings and in particular he stated that it was clear that the first and second appellants could not meet the requirements of Appendix FM or paragraph 276ADE.

7. He stated that the focus of the appeal had been on the ability of the third and fourth appellants to meet paragraph 276ADE(iv) and the other appellants would seek to "piggyback" upon those appellants as they were all a family unit. He emphasised that the best interests of the children were for each to continue to be cared for by their parents who can meet all their emotional and physical needs and he stated that the family could return as a family unit and that he considered that the parents would be able to help the children to adapt to their new environment. He noted that there was no health issues and said there was no particular evidence regarding the ties of the children to the UK.

8. He concluded that any disruption to the current lives of the children will be overcome after the short-term because they would have the assistance and support of

their parents and extended family in Pakistan. He said he took into account the fact that the third and fourth appellants had attained a residency of over seven years in the United Kingdom and the fifth appellant just some months short of his seven years (the judge was wrong when stating that the fourth appellant had been in Britain for seven years as the fourth appellant, who had been born in Britain had lived here for nine years to the date of the decision, as had the third appellant who had been born here in October 2008).

9. Mr Coleman informed me that an application for British nationality had now been made on behalf of the fourth appellant.

10. The judge then considered the issue of reasonableness under paragraph 276ADE, stating that he was looking at the case holistically and that despite the children having lived in Britain "for such periods as nine, seven and six years respectively" he found that it was reasonable for the third and fourth appellants to leave Britain.

11. When considering Article 8 outside the Rules the judge did refer to the first appellant's length of residency in Britain and indeed in paragraphs 32 and 34 he referred to the provisions of Section 117B of the 2002 Act but concluded that it was reasonable to expect the children to leave Britain.

12. At the beginning of the appeal I referred to the provisions of Section 117B(6) and in particular to the terms thereof. That sub-Section reads as follows:-

> "(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 responsibility for the qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom".

13. I pointed out that, at Section 117D, a qualifying child was defined as a person under the age of 18 and who was either a British citizen or had lived in Britain for a continuous period of seven years or more.

14. I asked Mr Coleman to address me on the term "liable to deportation". He pointed out that the Immigration Directorate's guidance at Section 1, version 29.0 of 11 January 2018 said that where there was low level criminal activity it was unlikely that a person would be refused under the character, conduct or association grounds for a single conviction which result in a noncustodial sentence outside the relevant timeframe. He therefore pointed out that if the principal appellant had been applying for leave to remain he would not be caught by the general grounds of

refusal. It was accepted by Mr Tufan that the principal appellant could not be considered to be "liable to deportation".

15. Mr Coleman then referred me to the determination of **ET and MT [2018] UKUT 88,** accepting that that decision, which is, of course, reported post-dated the decision of the judge in this appeal. He referred to the facts of that case in which the parent had been convicted of fraud and received a community based sentence and had a poor immigration history but despite that the Tribunal had thought that her behaviour was not such as to affect the issue of the reasonableness of that appellant as child being removed.

16. The Tribunal in that determination had referred, at paragraph 30, to the issue of reasonableness and in the following paragraph had stated that in looking at the countervailing factors in that case they had little difficulty in concluding that it was appropriate that the appellant should be granted leave to remain.

17. Mr Coleman referred me also to the terms of the judgment of Elias LJ in **AM (Pakistan) and Others [2017] EWCA Civ 180** which he said endorsed his decision in **MA (Pakistan) [2016] EWCA Civ 705** where at paragraph he had stated:-

> "It seems to me that there are powerful reasons why, having regard in particular to the need to treat the best interests of the child as a primary consideration, it may be thought that once they have been in the UK for seven years or are otherwise citizens of the UK they should be allowed to stay and have their position legitimised if it would not be reasonable to expect them to leave even though the effect is that their possibly undeserving families can remain with them".

18. He argued that taking into account the length of time which the children had been in Britain – (a length of time which had been misunderstood by the judge) the decision of the judge was in error of law.

19. In reply Mr Tufan referred to the judgment in **MA (Pakistan)** arguing that at paragraph 73 that Elias LJ had stated:-

> "The appropriate test can no longer be compelling reasons that is not the language of Section 117B(6) or paragraph 276ADE and it sets the bar too high. It may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling".

20. He also referred to the judgment in **AM (Pakistan) [2017] EWCA Civ 180** where at paragraph 26 Elias LJ had stated:-

> "It is true as the respondents emphasise, that in **MA (Pakistan)** the court observed that significant weight should be given to the fact that a child has been here for seven years, but the FtT in terms recognised that fact".

21. He argued that the judge had properly weighed up all relevant factors and reached conclusions which were fully open to him.

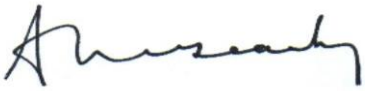
22. I considered that there are material errors of law in the determination of the Immigration Judge. He clearly erred when working out the ages or the length of time the two eldest children had been in Britain and I consider that in a case such as this that is material given that the children had been in Britain for such a lengthy period of time. Moreover I do not consider that he properly considered the terms of Section 117B as it relates to the children. While I have in mind the judgment of the Court of Appeal in **Mukarkar [2006]** EWCA Civ 1045, I consider that although this judge did very carefully consider all relevant factors he did make an error such that I should set aside his decision. He cannot, of course, be blamed for not taking into account the determination in the Upper Tribunal in **ET and MT** which I consider, although a reported decision, was in my view principally concerned with the procedural point regarding the pilot scheme but it must, in any event, be given some weight because it is a reported decision of the President of the Upper Tribunal; it does indicate the emphasis which should be placed on the rights of children who have lived in Britain for a long period of time.

23. It is therefore appropriate, having set aside the decision of the First-tier Tribunal, to remake the decision. I focus on the terms of Section 117B(6). I considered first the issue of whether or not the first appellant is "liable to deportation". Clearly for the reasons given by Mr Coleman he is not. I am therefore left with a situation where the public interest does not require his removal. I consider clearly that he and indeed his wife have a parental relationship with the qualifying children and clearly the case that all the children are now, as at the date of this decision, qualifying children and indeed the two eldest have lived in Britain for more than a continuous period of 10 years. I also take into account that the second child is now entitled to, and has applied for, British nationality. The reality is that the second and third child have never lived in Pakistan and have lived in Britain all their lives and indeed were both born here. In due course the third child will also be entitled to British nationality.

24. Although I accept the dictum of Elias LJ in **AM (Pakistan)** that the relevant test is not whether or not their circumstances are compelling, I can only conclude taking the facts set out above, that there are cogent reasons which mean that the children should be allowed to remain. I also take into account also that the first appellant lived in Britain legally for eleven years and has now lived in Britain for 18 years.

25. Taking these factors into account and following the judgment of the Tribunal in **ET and MT** I consider that having set aside the decision of the First-tier Judge it is appropriate that I shall remake the decision and allow these appeals.

No anonymity direction is made.

Signed  Date: 26 October 2018

Deputy Upper Tribunal Judge McGeachy