Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/10254/2017**
HU/10264/2017
HU/10281/2017
& HU/10283/2017

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated:**
On 16 November 2018	**On 4 December 2018**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

RR
IS
HR
ZR
(ANONYMITY DIRECTED)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms A Hashmi (Counsel)
For the Respondent: Mr M Diwnycz (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal brought by all four claimants, from a decision of the First-tier Tribunal (the tribunal) which it sent to the

parties on 28 February 2018; whereupon it dismissed their appeals against decisions of the Secretary of State of 30 August 2017 refusing to grant them leave to remain. The applications have been pursued under article 8 of the European Convention on Human Rights (ECHR).

2. I have directed anonymity in this case. The tribunal did so on the basis that two of the claimant s are minors and that, accordingly, their personal circumstances should not be disclosed to any wider audience than was necessary. Nothing was said, one way or the other, about anonymity before me but I have concluded it would be appropriate to maintain the status quo.

3. The claimants comprise a family unit. RR is a male national of Pakistan and IS, also a national of Pakistan, is his wife. The remaining claimants are the couple's two minor children. Both of those minor children had been in the UK for a continuous period of seven years as at the date of the hearing before the tribunal, both having been born in the UK. But they are, like their parents, nationals of Pakistan.

4. Shorn of all but essential detail, the background is as follows: RR entered the UK on 24 October 2007 with leave as a student. His leave expired on 31 August 2009. He has been unsuccessful in a number of applications for further leave as a student and so, it is right to say, he has been residing in the UK, without leave, for an extensive period. IS joined him in the UK, as his dependent, on a date in May 2008. Given that her leave was dependent upon his leave, she too has been in the UK without leave for a lengthy period. HR was born on 3 March 2009 and ZR was born on 29 September 2010. Both have lived all of their young lives in the UK.

5. On 8 August 2016 the claimant's solicitors applied, on behalf of each claimant, for leave to remain, arguing, as I understand it, that each met requirements contained within paragraph 276ADE of the Immigration Rules and that in any event, failing that, all ought to be granted leave under Article 8 of the ECHR outside the rules. Those applications were not successful which is how matters came to be before the tribunal. The tribunal held an oral hearing of the appeal on 8 January 2018 at which both parties were represented. As will be apparent from what I have already said, the tribunal dismissed the appeal with respect to all four claimants.

6. Permission to appeal was sought on behalf of all four claimants. Extensive written grounds of appeal, taking a number of distinct points, were supplied. Permission to appeal was granted and the granting judge relevantly commented as follows:

> "2. The grounds assert that the judge erred in failing to appreciate the impact of not speaking Urdu would have on the minor appellants' education on return to Pakistan; in failing to consider properly the reasonableness of return for the minor appellants; in misunderstanding the nature of submissions regarding discrimination which related to the

> question of the reasonableness of return/ or obstacles to integration rather than protection issues; and in referring to irrelevant case law relating to Article 8 of the ECHR.
>
> 3. In my view only one of the grounds establishes an arguable error of law and that is the judge's assessment of the reasonableness of expecting the minor appellants one of whom had spent seven years in the United Kingdom at the date of application and both of whom had spent more than seven years here at the date of hearing. The judge gives reasons for his findings that it is not reasonable to expect the child to leave the United Kingdom but does not do so with reference to case law cited in the skeleton argument. In particular Azimi-Moayad and others (decisions affecting children); onward appeals) [2013] UKUT 197 or MA (Pakistan) and another [2016] EWCA Civ 705. Arguably the judge does not take as the starting point that leave should be granted under paragraph 276ABE (1)(iv) and section 117B (6) in the absence of powerful reasons to the contrary and that he fails to assess whether or not there are powerful reasons to the contrary and/ or identify what those powerful reasons are".

7. I have to say that I agree with the granting judge that the bulk of the grounds offered are simply unarguable. So, I have focused, in this decision, upon the ground which the judge did identify as being arguable. Permission having been granted this matter was listed for an oral hearing before the Upper Tribunal (before me) so that it could be considered whether the tribunal had erred in law and, if so, what should flow from that. Representation at that hearing was as stated above and I am grateful to each representative. I hope that they will forgive me for focusing on what I have considered to be the central issue and not addressing what they had to say about matters which I have found to be unpersuasive or peripheral.

8. The situation before the tribunal was such that, if one of the claimants was to succeed, all would effectively or at least very probably do so, because it could not be right to separate the family unit and expect one or more of the claimants to return to Pakistan in circumstances where one or more was entitled to remain in the UK. So, the tribunal had to evaluate the claims of each claimant, on an individual basis, but with a view to its allowing the appeal in respect of all claimants if even a single claimant was able to demonstrate that removal would offend Article 8 rights.

9. The tribunal rejected the arguments advanced in respect of each claimant concerning the Immigration Rules (paragraph 276ADE) and Article 8 of the ECHR outside the rules. It is clear that, in setting about its task, it considered matters with diligence. It addressed much of the evidence before it with care and, as indicated, I have not found the bulk of the criticisms which have been made of its written reasons to be persuasive. But whatever the position might have been within the Immigration Rules, when considering the situation of the child claimants outside the rules, the tribunal was, as it noted, required to take account of the content of section

117B of the Nationality, Immigration and Asylum Act 2002. Subsection (6) of that section makes it clear that in the case of a person who is not liable to deportation, the public interest does not require the persons removal where the person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. Of course, insofar as the rules are concerned, that provision is effectively mirrored within paragraph 276(ADE). The tribunal in considering the position of the children under Article 8 outside the Immigration Rules took into account the wider circumstances rather than focussing solely on the situation of the children themselves. It was entitled to have regard to wider issues following what was said as to that matter in *MA (Pakistan)* cited above. But it was required to give significant weight in the proportionality exercise to the residence of the children in the United Kingdom given that it had exceeded seven years. In *MA (Pakistan)* this was said:

> "49. Although this was not in fact a seven-year case, on a wider construction of section 117A (6), the same principles would apply in such a case. However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary".

10. Although the tribunal's written reasons are thorough, there is no indication that it did appreciate that significant weight ought to be given to the fact of seven years residence and no indication that it appreciated that, given such residence had been established, there would be a requirement for powerful reasons before it could reach a conclusion that the parents and children ought to be required to leave the UK. I do not say, at all, that this was a case where the tribunal was required to find in favour of the claimants or at least some of them. But it did have to show that it appreciated the nature of the test it was applying. Had it properly directed itself it is possible that a different outcome would have been reached. That is sufficient to establish that its decision ought to be set aside.

11. I informed the parties, at the hearing that I would be setting aside the tribunal's decision on that basis. In those circumstances each representative urged me to remit to the tribunal for a rehearing. That, therefore, is what I have decided to do.

12. The rehearing before the tribunal shall be a complete rehearing. It will not be limited to the grounds on which I have set aside the tribunal's decision. The tribunal will consider all aspects of the case, both fact and law, entirely afresh. Further, it will not be limited to the evidence and submissions before the tribunal at the previous hearing. It will decide the case on the basis of all of the evidence before it, including any further written or oral evidence it may receive.

13. I direct that the tribunal rehearing the appeal shall hold an oral hearing. I direct that the tribunal must be differently constituted (in other words that the appeal must be heard by a different First-tier Tribunal judge). I shall not make any further directions as I think that task is best undertaken by a Salaried Judge of the First-tier Tribunal.

Decision

The decision of the tribunal, with respect to each claimant, is set aside. The appeal is remitted for rehearing by a differently constituted First-tier Tribunal.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated: **29 November 2018**

Anonymity

I continue the grant of anonymity originally given by the First-tier Tribunal with respect to each claimant. I do so under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless and until a court or tribunal directs otherwise, each claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify any of the claimants or any member of those claimants' family. This direction applies to all parties of the proceedings. Failure to comply may lead to contempt of court proceedings.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated: **29 November 2018**