Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers:**
HU/15609/2016

HU/15613/2016

HU/15618/2016

HU/15620/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd March 2018	**On 25th April 2018**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

RA
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M K
(ANONYMITY DIRECTIONS MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Saini of Counsel, instructed by Apex Legal Services
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants appeal against the decision of First-tier Tribunal Judge Cooper promulgated on 22 December 2017, in which the Appellants appeal against the Respondent's decision to refuse their applications for leave to remain on the basis of private and family life dated 4 June 2016 was dismissed.

2. The Appellants are all nationals of Pakistan who are mother and her three children. Their dates of birth are 25 May 1983, 12 October 2007, 29 November 2009 and 24 September 2015. The First Appellant entered the United Kingdom on 2 February 2009 as a spouse with valid leave to remain until 17 June 2009. Further applications as the dependent partner (of a Tier 1 Post Study migrant and on a human rights application) were made and refused in 2009 and 2013. The Second Appellant also entered the United Kingdom as a child joining his parent on 2 February 2009 with leave to remain valid to 17 June 2009. He was also included in the same further applications as his mother. The Third Appellant was born in the United Kingdom and was included as a dependent on the last application in 2013 which was refused. The Fourth Appellant was born in the United Kingdom and had no prior applications to the one leading to the decision under appeal.

3. On 17 March 2016, the Appellants made an application for leave to remain in the United Kingdom under the parent and private life route, which was refused in a single composite letter dealing with all of the Appellants on 4 June 2016. The Respondent firstly considered the First Appellant's position under Appendix FM of the Immigration Rules but found that the requirements were not met for a grant of leave to remain as a parent because although it was accepted that the Second Appellant had lived in the United Kingdom continuously for at least seven years immediately preceding the date of application, paragraph EX.1 did not apply as it was considered reasonable for him to leave the United Kingdom and return to Pakistan with the other Appellants. The Respondent also decided that the First Appellant did not meet the requirements of paragraph 276ADE of the Immigration Rules on the basis that there were no very significant obstacles to her reintegration into Pakistan because she was born there and had spent the majority of her life there, spoke English and was believed to continue to maintain close cultural, social and familial ties to Pakistan.

4. In respect of the Second Appellant, the Respondent first considered whether he was entitled to leave to remain as a child under Appendix FM but he did not meet the requirements as the First Appellant's application had already been refused. In relation to private life, the Respondent accepted that he had lived continuously in the United Kingdom for at least seven years but deemed it reasonable for him to return to Pakistan with his mother and two siblings such that the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules were not met.

5. In respect of the Third and Fourth Appellants, the Respondent refused their applications under Appendix FM on the same basis as for the Second Appellant, that they did not have a parent with leave to remain and in relation to private life, neither child had been continuously resident in the United Kingdom for at least seven years and did not meet any of the requirements of paragraph 276ADE of the Immigration Rules.

6. The Respondent separately considered whether there were any exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules, but did not accept that there were. In particular, it was considered reasonable for the Appellant to return to Pakistan as part of a family and that friendships and relationships made in the United Kingdom could be maintained on return. The Respondent was not satisfied that the Appellants would suffer any greater hardship than other people in Pakistan on return and there was no explanation as to why financial support from a family friend in the United Kingdom could not continue on return, at least in the short term. The child Appellants would be able to enter the education system in Pakistan and would be supported by their mother to reintegrate. The Respondent considered that the best interests of the children were to remain with their mother and return to Pakistan with her.

7. Judge Cooper dismissed the appeal in a decision promulgated on 22 December 2017 on all grounds. It was accepted before the First-tier Tribunal that the central issue in the appeals was whether it was reasonable for the children to be removed to Pakistan which required firstly, an assessment as to their individual best interests. There was no dispute that the best interests of the children were to remain with their mother as their primary carer and the best interests of the Fourth Appellant went no further than this given his very young age at the time of application and hearing. Consideration was then given to the best interests of the Second and Third Appellants, the detail of which I return to below, with a conclusion that their best interests would lie in remaining in the United Kingdom in continuing their education here. However, when undertaking the balancing exercise for the purposes of Article 8 of the European Convention on Human Rights, Judge Cooper's conclusion was that their removal to Pakistan would not be a disproportionate interference with their right to respect for private and family life under Article 8.

The appeal

8. The Appellants appeal on the grounds that the best interests of the child Appellants were not given primary consideration in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009. In particular, the First-tier Tribunal did not consider their length of stay in the United Kingdom and the strong roots they had put down at a formative part of their life, that all of the children were in education and the eldest has been in the United Kingdom for nine years since the age of one. Secondly, the Appellants appeal on the basis that there had been insufficient consideration of the Article 8 claim of the First Appellant who had formed a strong family and private life in the United Kingdom.

9. Permission to appeal was granted by Judge Chohan on 19 January 2018 on all grounds.

10. In oral submissions, Mr Saini for the Appellants sought to expand upon the grounds of appeal, some of which was adding detail and flesh to that

which was originally claimed and some of which was straying towards reliance on a new unpleaded ground of appeal. The latter was the submission that the First-tier Tribunal fails to make any reference to the Respondent's guidance 'Family Migration: Appendix FM Section 1.0b – Family Life (as a Partner or Parent) and Private Life: 10-Year Routes' which contains an expectation of leave being granted to children with seven years continuous residence in the United Kingdom unless there are strong countervailing reasons.

11. The part of the Respondent's guidance relied upon by the Appellants at the oral hearing, in substance goes no further than the guidance given by the Court of Appeal in MA (Pakistan) v Secretary of State for the Home Department [2017] EWCA Civ 705 as to the best interests of the children and the application of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. Although Counsel relied further on the original intention set out in the Home Office 'Statement of Intent: Family migration' (June 2012) that only criminality would be a sufficiently strong counterveiling factor against a child's continuous residence in the United Kingdom for at least seven years, Lord Justice Elias found in paragraph 46 of MA (Pakistan) that the requirement went no further than 'strong reasons'. For these reasons, I did not consider the submission to be a new distinct ground of appeal in which an application should be made to amend the grounds.

12. The Appellants rely specifically on paragraphs 13, 26 and 28 of MA (Pakistan) which contain preliminary remarks about paragraph 276ADE of the Immigration Rules and section 117B(6) of the Nationality, Immigration and Asylum Act 2002 and then submissions from the parties as to the scope of consideration under section 117B(6). MA (Pakistan) was also relied upon as the basis of a submission that the immigration history of the parents is not relevant to any consideration of the public interest, and the First-tier Tribunal therefore erred in law as the immigration history of the First Appellant was the only reason for refusing leave. However, Counsel then accepted that the immigration history of a parent(s) was a factor to be considered in the round.

13. In response, Mr Duffy submitted on behalf of the Respondent that the decision of the First-tier Tribunal was an adequate one which included sufficient consideration of the best interests of the children and assessment of proportionality under Article 8. Although the best interests of the eldest two children were found to be to remain in the United Kingdom, there were countervailing factors against a grant of leave to remain, in particular the poor immigration history of the family and the finding of deliberate manipulation of the system by making an application deliberately within weeks of the Second Appellant having been in the United Kingdom for seven years continuously. The findings and decision made by the judge were open to him on the evidence and there were no material errors in the decision.

Findings and reasons

14. The Appellants' first ground of appeal is that the First-tier Tribunal has failed to properly consider the best interests of the child Appellants in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009. Specifically, that the Judge failed to consider the children's length of residence in the United Kingdom and the strong roots they have put down here including their progress in education. However, in circumstances where the First-tier Tribunal expressly considered all of these factors (which are clearly set out in paragraphs 49 and 53 to 55), and concluded that it was in the best interests of the Second and Third Appellant to remain in the United Kingdom, it is difficult to see where the Appellants could be dissatisfied with the findings made, let alone show an error of law in the assessment of the best interests.

15. Contrary to the written grounds of appeal, as identified by Judge Chohan when granting permission to appeal, the Appellants' real complaint is that insufficient weight has been attached to the children's best interests given their length of residence in the United Kingdom when determining whether their removal from the United Kingdom would be unreasonable and ultimately whether it would be a disproportionate interference with their right to respect for private and family life under Article 8 of the European Convention on Human Rights.

16. The Appellants are right to highlight the lack of express reference to the Court of Appeals decision in MA (Pakistan) in the First-tier Tribunal's decision which is clearly applicable to the facts of the present appeal, however I do not find that in substance there has been any failure to consider the right factors in making the decision as to whether it is reasonable to expect the child Appellants to leave the United Kingdom nor any failure to attach sufficient weight to their best interests, by reference to their length of residence in the United Kingdom or otherwise.

17. Lord Justice Elias found that the only significance of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 is that where the seven year rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted (paragraph 45). This was expanded in paragraph 49 where he stated that *"the fact that the child has been in the UK over 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 nature and strength of the child's best interests; and second, because it establishes a starting point the leave should be granted unless there were powerful reasons to the contrary.".*

18. Although it is well-established that the conduct and immigration history of the parents is not relevant to the assessment of a child's best interests, it is relevant to the wider assessment of whether it is reasonable to expect the child to leave the United Kingdom and ultimately whether removal is a disproportionate interference with their right to respect for private and family life under Article 8. The Court of Appeal in MA (Pakistan) rejected the submission that the best interests assessment for a child automatically resolved the reasonableness question. In paragraph 47, Lord Justice Elias

held that *"Even where the child's best interests are to stay, it may still not be unreasonable to require a child to leave. That will depend upon careful analysis of the nature and extent of links in the UK and in the country where it is proposed he should return."*. He went on to refer to the decision of Lord Justice Christopher Clark in EV (Phillipines) v Secretary of State for the Home Department [2014] EWCA Civ 874 as to how a tribunal should apply the proportionality test where wider public interest considerations are in play in circumstances where the best interests of the child are that he should remain in the United Kingdom, finding that the same principles would apply on the wider construction of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. That decision refers to factors to consider to determine the best interests of a child and then how emphatic an answer falls to be given to the question of whether it is in the best interests of the child to remain, as to how much weight should be given to that compared to the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country, including whether the applicants have no entitlement to remain and if they have a poor immigration history.

19. In paragraph 36 of EV (Phillipines), Lord Justice Clark held, *"The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interest that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interest to remain, but only on balance (with some factors pointing the other way), the result may well be the opposite."*.

20. In the present case, the First-tier Tribunal noted that the child Appellants had been brought up with Pakistani influences and family in the United Kingdom, including eating Pakistani food, with Urdu being spoken at home and with the Second and Third Appellant having some grasp of that language as well as learning other languages at school. Further, that the Appellants had close family members in Pakistan, including the First Appellant's father and siblings who will live together in the extended family home there. Specific consideration was given to the length of residence of the children and their education but there were no factors, individually or cumulatively to show that it was overwhelmingly in the children's best interests to remain in the United Kingdom. The strongest factor was acknowledged to be the significance attached to the length of residence of the children but no specific deleterious consequences on return. Specific consideration was also given to the public interest in this case, with specific reference to the First Appellant's poor immigration history and finding that she deliberately remained in the United Kingdom until the point was reached that the Second Appellant would have been resident here for seven years to make an application to acquire status on that basis.

21. The First-tier Tribunal's reasons for the conclusion that there would be no disproportionate interference with the Appellants' rights to respect for private and family life under Article 8 of the European Convention on Human Rights are set out in summary in paragraph 71 as follows:

"I do not doubt that returning, or going for the first time, to Pakistan will present the children with difficulties. They will have to get to know Urdu better than they know it now, and comes to terms with a different society and culture. However I am satisfied that their upbringing to date has occurred against the background of that language and those cultural norms. They will be returning with their mother, to their mother's extended family. The eldest child [...] is at a stage in his schooling where he would be preparing to move secondary school, so it could be seen as a "natural break" in his education, and an appropriate time for him to make the change to the Pakistani education system."

22. The conclusion and the reasons for it show that not only has the First-tier Tribunal properly assessed the best interests of the children under section 55 of the Borders, Citizenship and Immigration Act 2009 but has also attached sufficient weight to them in the balancing exercise to determine the question whether it is reasonable for them to leave the United Kingdom as part of the ultimate question as to whether their removal would be a disproportionate interference with their right to respect for private and family life under Article 8 of the European Convention on Human Rights. Despite the lack of express reference to the Respondent's guidance or to the Court of Appeal's decision in MA (Pakistan), the First-tier Tribunal's decision was in accordance with both and there is no error of law as to the assessment of best interests or findings on Article 8. Those findings were open to the First-tier Tribunal on the basis of the evidence before it.

23. The Appellants' second ground of appeal is that the First-tier Tribunal erred in its assessment of the First Appellant's individual interests under Article 8 of the European Convention on Human Rights. There is however no error of law in the assessment of her interests absent a finding further to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 that it would not be reasonable to expect any or all of her children to leave the United Kingdom. As set out in the decision in paragraphs 57 to 61, the First Appellant has remained in the United Kingdom unlawfully since 2009 such that little weight should be given to the private life that she has established here in that time. There was further little detail of any significant private life in the United Kingdom which could not be re-established in Pakistan. There would be no interference with her family life as she would return to Pakistan with her three children and in the circumstances, there is no error of law in the finding that her removal would, on assessment of her own individual interests, be proportionate to the legitimate aim.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

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  Date 23rd April 2018

Upper Tribunal Judge Jackson