Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/17701/2016
HU/18850/2016, HU/18856/2016, HU/18859/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 April 2018	**On 8 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS S K (FIRST APPELLANT)
MR G S (SECOND APPELLANT)
MISS A K (THIRD APPELLANT)
MASTER G S (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondents: Mr A Rehman, legal representative from Mayfair Solicitors

DECISION AND REASONS

1. I shall refer to the parties as they were before the First-tier Tribunal. Therefore the Secretary of State is the Respondent and Mrs K and her family members are once more the Appellants.

2. This is a challenge by the Respondent to the decision of First-tier Tribunal Judge Suffield-Thompson (the judge), promulgated on 1 September 2017, in which she allowed the Appellants' appeals on human rights grounds. Those appeals had in turn been against the Respondent's decision of 6 July 2016, refusing their respective human rights claims.

3. Although there is a fairly lengthy immigration history, the last applications made by the Appellants was in February 2015. These were deemed to be human rights claims.

4. The first two Appellants are husband and wife, and they are the parents of the third and fourth Appellants. The third Appellant was born in 2004 and came to this country in early 2010. The fourth Appellant was born in the United Kingdom in 2012.

The judge's decision

5. Having considered the circumstances of the first, second and fourth Appellants the judge concludes that they could not satisfy any of the relevant Article 8-related Rules [38-43]. Viewed in isolation, the judge also concludes that none of them can succeed in their Article 8 claims on a wider basis [54-57 and 59]. However she regards the position of the third Appellant as being significantly different from her other family members. In light of her age and time spent in this country (seven years and seven months as at the date of hearing) the judge concludes that the relevant Immigration Rules were satisfied [44 and 45] and that her best interests lay in remaining in this country [64]. As a result of this the judge concluded that all of the appeals should succeed on human rights grounds and "under the Immigration Rules".

The grounds of appeal and grant of permission

6. The Respondent's grounds are succinct. It is said that the judge was wrong to have found that paragraph 276ADE(1)(vi) of the Rules was satisfied because the third Appellant was under the age of eighteen. It is also said that there was inadequate reasoning as to why the other appeals were allowed. Finally it is said that the judge failed to conduct an adequate proportionality assessment, having regard to wider public interest factors.

7. Permission to appeal was granted by First-tier Tribunal Judge Kimnell on 20 February 2018.

The hearing before me

8. Mr Tufan submitted that the judge erred in two basic ways. First, none of the provisions of paragraph 276ADE(1) could be met by the third Appellant because she was under eighteen as at the date of the last application and, as at the same date, she had not been in this country for the requisite seven years. Second, the judge had failed to conduct a reasonableness assessment as required in light of MA (Pakistan) [2016] EWCA Civ 705.

9. In response, Mr Rehman eventually accepted that paragraph 276ADE could not apply to the third Appellant for the reasons set out by Mr Tufan. However, he submitted that the judge had in fact looked at wider public interest issues at [52-59] and had then looked at the third Appellant's circumstances outside of the Rules. There was a reference to the public interest in [57]. He submitted that there were no material errors in the judge's decision.

10. In reply, Mr Tufan submitted that the judge had only paid "lip service" to the public interest in [57] and that more was required.

11. At the end of the submissions I asked the representatives for their views as to what should happen if I concluded there were material errors of law. Both representatives initially stated that I could and should remake the decision based on the evidence now before me.

12. Mr Rehman relied on section 117B(6) of the Nationality, Immigration and Asylum Act 2002. Mr Tufan asked me to consider MA (Pakistan), AM (Pakistan) [2017] EWCA Civ 180 and also Treebohowan No.2.

13. At this stage Mr Rehman raised a new point, namely that an application has apparently been made on behalf of the fourth Appellant for registration as a British citizen under paragraph 3 of schedule 2 to the British Nationality Act 1981 (that the child was stateless and has been in the United Kingdom for more than five years). He referred me to the decision of the Administrative Court in MK [2017] EWHC 1365. Although this application was outstanding before the Respondent it was very likely that the fourth Appellant would be registered as a British citizen in due course. He suggested that this of itself was a relevant factor in any reasonableness assessment that I may conduct.

14. In the end he did not ask me to adjourn a remaking decision until that application has been decided. I indicated that I would consider the best course of action to take. I then reserved my decision on error of law.

Decision on error of law

15. I conclude that the judge has erred in law in certain respects but, having found this to be so and wit reference to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, I do not exercise my discretion to set her decision aside. This conclusion is based on the following.

16. It is an indisputable fact that as at the date of the human rights claims in February 2015 the third Appellant was under eighteen and had not been in this country for seven years. Therefore neither paragraph 276ADE(1)(iv) or (vi) could have applied. To this extent the judge was wrong in concluding otherwise.

17. In turning to a consideration of Article 8 outside the context of the relevant Rules, the judge was of course obliged to consider at least the mandatory factors set out under section 117B of the 2002 Act. In particular, as the

third Appellant was clearly a qualifying child for the purposes of section 117B(6), a balancing exercise was required, comprising of a best interests assessment, together with wider public interest considerations under section 117B(1)-(5). A very brief reference is made to these provisions in [24] where the judge sets out the submissions of the Presenting Officer. Somewhat unfortunately, no further reference is made later on in the decision when it comes to what is described as the "assessment of proportionality" at [53] onwards. There is also no specific reference to MA (Pakistan) and the reasonableness test. It appears as though the judge has failed to approach a core issue in the appeals in a legally correct manner. There is, on the face of it, an error here too.

18. However, substance is almost always more important than form. For the reasons set out below, there are a number of factors which, when viewed cumulatively and realistically, strongly point towards the conclusion that the judge was fully entitled to find that the Appellants should succeed on Article 8 grounds, notwithstanding the errors made.

19. The judge correctly noted that the third Appellant had arrived in the United Kingdom aged five, and had then spent important years of her life here, placing her in the category of children who are likely to have formed stronger ties in this country than those who were still only very young [60]. This was a significant factor.

20. The error relating to paragraph 276ADE(1) makes little material difference to the substance of the third Appellant's case as at the date of the hearing because of the engagement of section 117B(6)(a), with reference to section 117D(1) (she being a qualifying child).

21. There has been no challenge to the judge's factual findings, nor has any of the evidence before her been called into question by the Respondent. This evidence included a very supportive psychological report on the third Appellant, together with letters from her school and other family members in the United Kingdom. Having read all of this material for myself, it is quite clear that the judge was fully entitled to place significant weight upon this (as she clearly did) at [60-63]. In summary, the evidence indicated that departure from the United Kingdom at that stage of her life would be detrimental to the third Appellant's emotional, educational and mental wellbeing. There is also a finding that the third Appellant has very close bonds with her grandparents in this country [44] and [60].

22. It clearly follows that the judge was entitled to conclude that the third Appellant's best interests lay in remaining with her family *and* in the United Kingdom [64].

23. Bringing the preceding factors together, and bearing in mind the recent useful reminder by the President at [33] of MT and ET (child's best interests; *ex tempore* pilot) Nigeria [2018] UKUT 00088 (IAC), "powerful reasons" were required to show that the third Appellant should have to leave this country.

24. Did such "powerful reasons" exist here? What is of note is the fact that the judge did actually consider relevant wider public interest factors, albeit not perhaps in a particularly well-structured form (i.e. within a methodical reasonableness assessment). The immigration history and other circumstances of the first and second Appellants are dealt with in [54-56]. The history is not, on any view, particularly poor. The judge found the parents to be credible, and accepted that "every effort" had been made to regularise the family's status in the United Kingdom [56].

25. Importantly, specific reference is made to the overarching public interest in maintaining immigration control at [57]. In my view, this was more than mere "lip service" as suggested by Mr Tufan. The judge states that notwithstanding her favourable view of the parents, the significance of the public interest was undiminished.

26. The judge has considered the issue of the ability of the third Appellant to re-integrate into Indian society [44]. This has to be seen in the context of the manifestly strong bonds established in the United Kingdom (see above).

27. Even factoring in the inability of the Appellants to satisfy the relevant Rules and leaving out of account the application made on behalf of the fourth Appellant (which I accept has occurred), the combination of the evidence, the judge's findings and conclusions, and the current legal landscape, leads me to the ultimate view set out earlier. Whilst there are errors in the decision, they do not warrant setting it aside.

Notice of Decision

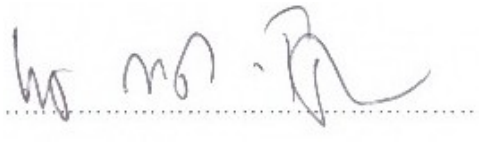
The decision of the First-tier Tribunal contained errors of law. However, with reference to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, I do not set it aside.

The decision of the First-tier Tribunal stands in respect of all four appeals.

This has the effect that the Respondent's decisions of 6 July 2016 are unlawful under section 6 of the Human Rights Act 1998.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

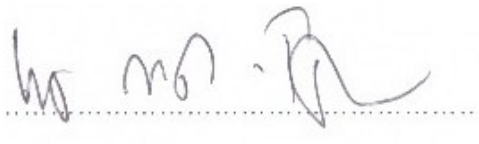
Signed  Date: 1 May 2018

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have upheld the decision of the First-tier Tribunal allowed the appeals, I have considered making a fee award and have decided to make no fee awards. I agree with what the First-tier Tribunal said about this issue: important evidence had only been provided for the appeals and no awards are appropriate.

Signed  Date: 1 May 2018

Deputy Upper Tribunal Judge Norton-Taylor