Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03297/2018
HU/03301/2018
HU/03304/2018
HU/03306/2018
HU/03310/2018

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 8th January 2019	**On 24th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) SADIA [K]
(2) KASHIF [K]
(3) [H K]
(4) [S K]
(5) [A B]
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mrs Pettersen, Senior Home Office Presenting Officer
For the Respondent: Mr S Ell, Counsel instructed by direct access

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of Judge Caskie, promulgated on the 1st May 2017, to allow the appeals against refusal of the appellants' human rights claim based on private and family life grounds. For convenience, I shall refer to the parties in accordance with their status in the First-tier Tribunal, that is to say, to Sadia [K] as "the first appellant" and to the Secretary of State as "the respondent". The First-tier Tribunal did not make an anonymity direction and I therefore do not see that any purpose would be served by making one now.

Background

2. The following facts are uncontentious. The first and second appellants are a married couple and are the parents of the other three appellants. The second appellant arrived in the UK, alone, on the 16th January 2004. The first appellant joined him on the 12th May 2011. The eldest child, [HK], arrived on the 12th November 2012 when he was less than 6 months' old. [HK] is currently aged 6 years and suffers from autism. The other two children were born in the United Kingdom and are currently aged 4 years and 2 years respectively. Various applications for further leave to remain have been made and refused, including most recently an application based upon the second appellant's long residence in the United Kingdom. That application appears to have failed due to his absence from the UK for a period of in excess of 12 months between the 31st October 2011 and the 12th November 2012.

3. The essence of the appellants' case was that (a) there would be very significant obstacles to [HK]'s integration in Pakistan due to what were said to be the inadequate facilities existing in that country for children with autism, and (b) it would be accordingly necessary for all the appellants to be permitted to remain in the United Kingdom so as to preserve their family life together.

4. It will be thus immediately apparent that the first task of the judge, upon which the fate of all the appellants would likely depend, was to resolve the question of whether [HK]'s removal to Pakistan would constitute a breach of his private-life right to physical and moral integrity. That question in turn depended, at least in the first instance, upon whether there would be "very significant obstacles" to [HK]'s integration in Pakistan under paragraph 276ADE(iv) of the Immigration Rules. The judge did not however address that question. He instead made a general observation that the Secretary of State "had reached conclusions on this case inside the Immigration Rules" - conclusions with which he expressed his entire agreement - before noting that the three child appellants had not resided in the UK for a period of seven years so as to qualify them for consideration of a grant of leave to remain on the ground of 'reasonableness' under paragraph 276ADE(iv).

5. The judge thereafter went on to state that he was "satisfied the case requires to be considered outside the Immigration Rules" (paragraph 9). The reasoning behind that conclusion is obscure. The judge referred to

letters from friends of the family that showed "a degree of commitment from them". He also noted that the older children were receiving educational and social services in the UK which, he concluded, "would be significantly interfered with by removal". However, given that the judge had not addressed the question of whether such matters might give rise to "very significant obstacles" to the appellants' integration on return to Pakistan, it remains unclear how they could be said to lie beyond the contemplation of the Immigration Rules and thus to require consideration outside them.

The grounds of appeal

6. However, none of the above flaws in the judge's analysis form the basis of the grounds upon which Judge Gill granted permission to appeal on the 6th November 2018. Those grounds instead focus upon what is said to be the judge's flawed analysis of the evidence of [HK]'s disability and the availability of facilities in Pakistan to assist in overcoming it, as well as a fairly general criticism of the balance that the judge struck between the public interest in applying immigration controls in a consistent manner on the one hand and the obstacles posed by [HK]'s disability to his integration in Pakistan on the other. I therefore turn to consider those grounds

7. Having concluded that it was necessary to conduct an analysis of the appellants' private and family-life claim outside the Rules, the judge stated that "in reality this case is a balance between the best interests of [HK] and the flagrant breach of immigration control by their parents" (paragraph 10).

8. In dealing with the latter, the judge noted that the appellants' immigration status had always been "temporary and precarious" (the suggestion by Judge Gill that the judge "may have erred in failing to take into account section 117B(3)" of the 2002 Act is to this extent not borne out) but considered that the parents' decision to overstay their leave to remain was to some degree offset by an understandable desire to protect what they perceived to be in [HK]'s best interests [paragraphs 10 and 12]. The judge also noted that it was accepted by the appellants that the second appellant had used a proxy to obtain an English language certificate; something which he described as a "serious matter that undermines the integrity of the immigration system" [paragraph 10]. He also found that each of the appellants spoke English, noting that this was essentially a neutral factor that did not strengthen the appellants' human rights claim but neither did it detract from it. Finally in relation to those factors that weighed in favour of the public interest in removal, he noted that, "the family are not financially independent and that counts against them particularly as [HK] will cost the state substantially" [paragraph 14].

9. In dealing with [HK]'s disability, the judge said that he was, "in no doubt that [HK]'s development will be impaired by requiring him to move to Pakistan where the facilities for autistic children are much less developed that in his now home area of Leeds" [paragraph 11]. Following a review of

the evidence, the judge said that, "in relation to private life and in particular, [HK]'s, I consider this an exceptional case" [paragraph 14]. The judge went on to state that the impact of removal on [HK] "would be harmful to this child" [paragraph 15]. He concluded by saying that he was "not satisfied that he [HK] would in reality be able to access suitable facilities in Pakistan and … the public interest issues in the present case are outweighed by the needs of this child, notwithstanding the serious misconduct by the parents".

The rival submissions

10. Mrs Pettersen submitted that neither the evidence nor much of the judge's own reasoning supported this conclusion. Firstly, the judge failed to explain why he had not accepted the respondent's evidence that there were various specialist schools in Pakistan, including 'Amin Maktab School' and 'Oasis School' in Lahore, the National Special Education Centre for Intellectually Challenged Children in Islamabad, along with various government-provided special education centres. Secondly, as the judge himself noted at paragraph 12 of his decision, the only evidence that the appellants had produced to counter this were newspaper reports which, absent oral testimony from the appellants, the judge was not satisfied provided a truly representative of the picture in Pakistan [paragraph 12]. In reply, Mr Ell pointed to paragraph 6 of the decision in which the judge referred to a witness statement by the first appellant in which she stated that "there were extremely limited facilities for children with autism in Pakistan". The judge had also at that stage referred to what he described as "supporting newspaper articles" which, by way of example, he said showed that less than fifty per cent of doctors in Pakistan had heard of autism and that the limited facilities available were massively overstretched. Finally, Mr Ell pointed out that whilst the facilities referred to by the Secretary of State were said to provide for children with disabilities, they were not said to cater specifically for children with autism.

Conclusion

11. It seems to me that throughout his decision the judge was reversing the correct burden of proof and that, had he applied it correctly, he would have been bound to conclude that the appellants had failed to discharge the onus of proving that there was a lack of adequate facilities in Pakistan for children with autism amounting to very significant obstacles to [HK]'s integration on return. Whilst at paragraph 12 the judge acknowledged the considerable difficulties faced by the appellants in establishing "the paucity of facilities for caring for autistic children in Pakistan", he nevertheless went on to state (at paragraph 15) that he "not satisfied that [HK] would in reality be able to access suitable facilities in Pakistan". However, the question for the judge was not whether he was satisfied that [HK] would be <u>able</u> to access suitable facilities in Pakistan, for this implies that it was for the Secretary of State to prove this, and the mere fact that the Secretary of State had chosen to adduce evidence of the existence of

such facilities in Pakistan did not mean that he thereby assumed the legal (as opposed to an evidential) burden of proof. Rather, the correct question for the judge was whether he was satisfied that [HK] would be unable to access suitable facilities in Pakistan. The judge had acknowledged the very considerable difficulties that were faced by the appellants in proving this upon the limited evidence they had placed before him. In my judgement, those difficulties were insurmountable. Indeed, it was clear from the appellants' evidence that specialist facilities are available for autistic children (such as the 'Autism Resource Centre' in Rawalpindi) albeit that those facilities are overstretched and come at a price [see page 87 of the appellant's bundle of documents]. It therefore seems to me to follow that the appellants had failed to discharge the burden of proving that facilities for autistic children in Pakistan would be insufficient for [HK]'s needs and that, accordingly, he would face 'very significant obstacles' to his integration on return to that country.

12. I therefore hold that the judge made an error of law which, had he not made it, would have led to the dismissal of the appeal.

Notice of Decision

13. The appeal of the Secretary of State from the decision of the First-tier Tribunal is allowed.

14. The decision of the First-tier Tribunal to allow the appeals against refusal of the appellants' application for leave to remain on private and family life grounds is set aside and substituted by a decision to dismiss those appeals.

Judge Kelly Date: 14th January 2019

Deputy Judge of the Upper Tribunal