Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/23209/2018
HU/23215/2018
HU/23212/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 13 June 2019	**On 03 July 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MUHAMMAD [S]
AYESHA [A]
[MA]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms S Latimer, Fountain Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The first and second appellants are a married couple born respectively on 31 January 1984 and 5 November 1983. The third appellant is their son who was born in the United Kingdom on 1 January 2011. All three appellants are citizens of Pakistan.

2. The first appellant entered the United Kingdom on 1 December 2009 with leave to enter as a student valid until 31 March 2011. On 29 February 2011, he applied for further leave as a Tier 1 (Post-Study worker) which was granted until 13 September 2014. On 12 September 2014, he applied for further leave as a Tier 1 (Entrepreneur) but this was refused on 6 November 2014. On 4 April 2018, he applied for further leave to remain on the basis of his private and family life in the UK.

3. The second appellant entered the United Kingdom on 20 May 2010 with leave as a dependant of the first appellant. Her leave was valid until 31 March 2011. On 22 March 2011, she applied for further leave, again as a dependant of the first appellant, now as a Tier 1 Migrant. That application was refused on 21 May 2012 but, as a result of a successful appeal to the First-tier Tribunal, the second appellant was granted leave on 13 September 2012 until 13 September 2014. On 12 September 2014, she applied for further leave to remain as a Tier 1 dependant of the first appellant and this was refused on 6 November 2014. On 4 April 2018, the second appellant applied for leave to remain on the basis of her private and family life in the UK.

4. The third appellant was born in the United Kingdom on 1 January 2011. On 22 March 2011, an application was made for leave to remain as Tier 4 dependant child which was granted on 16 May 2011 until 30 December 2011.

5. On 4 October 2012, the third appellant left the UK, travelling to Pakistan with his parents. On 18 February 2013, he was granted entry clearance as a dependent child and entered the United Kingdom on 14 November 2013 with leave valid until 13 September 2014. On 12 September 2014, he applied for further leave to remain as a Tier 1 dependant child but this was refused on 6 November 2014. On 4 April 2018, the third appellant applied for leave to remain on the basis of his private and family life in the UK.

6. On 31 October 2018, the Secretary of State refused each of the appellant's applications made on 4 April 2018 for leave to remain based upon their private and family life in the UK under Art 8 of the ECHR.

The Appeal to the First-Tier Tribunal

7. The appellants appealed to the First-tier Tribunal. In a determination sent on 16 January 2019, Judge Lloyd-Lawrie dismissed each of the appellants' appeals. The judge found that none of the appellants could succeed under

para 276ADE(1) of the Immigration Rules (HC 395 as amended) or outside the Rules under Art 8 of the ECHR.

The Appeal to the Upper Tribunal

8. The appellants sought permission to appeal to the Upper Tribunal. Permission was initially refused by the First-tier Tribunal (Judge Saffer) on 12 February 2019. However, on 23 March 2019 the Upper Tribunal (DHCJ Gullick sitting as a Judge of the Upper Tribunal) granted the appellants' permission to appeal.

The Grounds of Appeal

9. The appellants were granted permission on their three grounds of appeal.

10. Ground 1 contends that the judge failed to consider the third appellant's relationships with his family in the UK (minor cousins, uncles and aunties) with whom the judge accepted he had "strong ties". The judge failed to take into account the social and emotional impact on the third appellant of the loss of these relationships.

11. Ground 2 contends that the judge failed properly to apply s.117(B) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002"), in particular that both the first and second appellants were fluent in English and were self-sufficient without being a burden on the state.

12. Ground 3 contends that the judge was wrong to find that the third appellant could not rely upon para 276ADE(1)(iv) because he had lived continuously in the UK for at least seven years and it would not be reasonable to expect him to leave the UK because the judge had wrongly concluded that the period between 4 October 2012 and 14 November 2013 when he was in Pakistan broke the continuity of his residence in the UK.

13. In her oral submissions, Ms Latimer relied upon grounds 1 and 3 but placed no reliance on ground 2.

Discussion

Ground 1

14. Ms Latimer submitted that the judge had failed in paras 43 and 44 of her determination to have regard to the evidence concerning the strength of relationships between the third appellant and his family in the UK and the documentary evidence concerning his progress in school. As regards to the former, she relied upon the evidence set out at paras 16-20 of the determination and, in relation to the latter, a school report on the first appellant dated July 2016 at page 183 of the bundle.

15. The judge's consideration of the third appellant's best interests (she refers to him as "A3") is at paras 43-44 as follows:

> "43. I turn first to A3, there is a huge body of case law combined with section 55 which states that I must consider the best interest of the child as a primary consideration. I find that the best interests of the child, as a child who has just turned 8 and is in year 3 at school, to remain with his parents. As stated above, I find that A3 is not a "qualifying child". I accept that the appellant has strong ties to his extended family here and is doing well at school but note that he had stated that he had been very worried at leaving nursery that he would have no friends as he went to a completely new school but that he has made lots of new friends at the school. The Appellant has shown himself to be able to adapt and socialise well. He has also learnt some Welsh and can read and write this despite this not being a language used at home. He spent over a year previously living with his grandfather in the house that he will return to and therefore I find that whilst A3 would in the short term benefit from being allowed to remain in the UK, it would not be unduly difficult for him at this young age with his comparatively short period of residence in the UK, to adapt to living in Pakistan once more. There is an established education system in Pakistan.
>
> 44. I find that both A and A2 will be able to work in Pakistan and will be able to still see at least some of their UK based extended family as one of A2's brothers confirmed that he had been in Pakistan for 4 weeks visiting family 2 years ago. I find that A and A2 always had precarious immigration status and therefore I give little weight to their private life. That applies also to A3 although it is accepted that he will not have had a choice at his age as to what country he resides in. I find whilst it would be pleasing for the Appellants to be able to remain in the UK, that there are no reasons that would tip the balance in their favour. Looking at the test approved by Sedley LJ "what must be shown is more than mere hardship or mere difficulty or mere obstacle. There is a seriousness test which requires the obstacles or difficulties to go beyond matters of choice or inconvenience". I find that there has not been shown to be anything more than a wish to remain in the in UK in this case".

16. That was said in the context of Art 8. But, as Mr Howells submitted, the judge also dealt with A3's best interests in para 37 under the rubric "Immigration Rules" as follows:

> "37. I find that it would not result in unjustifiably harsh consequences for the Appellants to return to Pakistan as a family unit. I find that it is in the best interests of A3 to remain with his parents. However, I find that A3 has lived in Pakistan for a year growing up from 1 year 9 months to 2 years 10 months of age. They could return to live in the same house with A's father where they have lived previously as confirmed by A and A2. He would therefore have the benefit of a supportive grandparent. I find that the Appellant can understand Urdu well and can speak some Urdu

> although is not fluent. I find that the evidence of the witnesses was contradictory and that there was an intention to portray that A3 had far less ability in Urdu than he actually does. I find that the A2's mother talks to A3 in Urdu and that he replies in a mixture of English and Urdu. I find that at least one of his Uncles also talks to him in Urdu on occasions and that he understands him but answers in English. I find that the Appellant has managed to adapt and learn some Welsh since starting school and can now read and speak some Welsh. It follows that with some assistance he should be able to swiftly improve his Urdu as he already has good understanding of the language. His parents are in a position to help him as they are both fluent in the language. I find also that the Appellant's have many members of extended family in a City in Pakistan who could support them and provide social support should the family wish to relocate to the City. I find that the family are well supported by family financially in the UK and that there is no reason to suggest that this could not continue for as long as was needed if they returned to Pakistan. I therefore find exceptional circumstances do not apply".

17. Leaving aside the slight curiosity that the judge placed para 37 in the context of her consideration of the Immigration Rules, I am not persuaded by Ms Latimer that the judge failed to take into account all of the circumstances relevant to the third appellant including his relationships with his other family members in the UK and his progress in school.

18. The judge set out the documentary evidence, albeit in summary, at paras 12-13 and the evidence of the witnesses at paras 16-20 in some detail. The judge accepted that the third appellant had "strong ties" with his "extended family" in the UK (see para 43). As Mr Howells submitted, it has not been suggested that there was any "family life" with these other relatives and his relationship with them fell to be considered as part of his private life. In reality, that may well be a distinction without a difference in any event (see Singh and Singh v SSHD [2015] EWCA Civ 630 at [25]). The judge clearly considered the impact upon the third appellant of leaving the UK and travelling with his parents to Pakistan. At the date of the hearing, the third appellant was just 8 years old and in year 3 at school. There was nothing in the evidence to displace the common sense position that the third appellant's best interests were to be with his parents if they remained in the UK but in Pakistan if they were removed (see KO (Nigeria) and Others v SSHD [2018] UKSC 53 at [18] and [19]). The judge found that the first and second appellants could, in effect, reasonably be expected to live in Pakistan. The judge noted that the third appellant had been able to adapt and socialise well in the UK (para 43) and also found that the third appellant had some facility in Urdu and would, with the assistance of his parents, "be able to swiftly improve his Urdu as he already has good understanding of the language". The third appellant would, therefore, have access to education in Pakistan and would acquire the necessary improvement in his Urdu – the language he was likely to have to speak in Pakistan. I am satisfied that the judge fully took into account all the evidence concerning the third appellant's best

interests and reached a rational conclusion that his best interests were to be with his parents and that the family's return to Pakistan would not result in "unjustifiably harsh consequences" such that their removal would breach Art 8 of the ECHR.

19. For these reasons, I reject ground 1.

Ground 2

20. Ms Latimer did not place any reliance upon ground 2. She no doubt chose not to do so on the basis that it is wholly unarguable that the fact that the first and second appellants speak English and are financially independent from the state could positively assist their claim under s.117B, and weigh in their favour in assessing proportionality under Art 8 (see Rhuppiah v SSHD [2018] UKSC 58 at [57]).

Ground 3

21. This ground relates to the judge's conclusion that the third appellant could not rely upon para 276ADE(1)(iv). That provides as follows:

> "(1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> ...
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; ...".

22. That provision applies directly to the third appellant. Section 117B(6) of the NIA Act 2002 contains a mirroring provision which would apply to the assessment of the proportionality of removing the first and second appellants where:

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

23. There is no doubt that both the first and second appellants have a "genuine and subsisting parental relationship" with the third appellant. Further, the third appellant is a "qualifying child" if he: "has lived in the United Kingdom for a continuous period of seven years or more; ..." (see s.117(D)(1) of the NIA Act 2002).

24. In this case, the appellant was born in the UK on 1 January 2011. However, he left the UK on 4 October 2012 and returned on 14 November 2013 having been in Pakistan with his parents. The argument before the judge was that that period of absence from the UK broke the period when he "lived continuously in the UK" such that he could not establish that he had lived here continuously for at least seven years.

25. The judge dealt with this exclusively in relation to para 276ADE(1)(iv). For the purposes of that provision, para 276A provided a definition of "lived continuously". Paragraph 276A states that it applied, inter alia, for the purposes of para 276ADE(1). It provides a definition of "continuous residence" in para 276A(a). That, of course, is not the same phrase as "lived continuously" in para 276ADE(1)(iv). However, by virtue of para 276A(c) it is stated that: "lived continuously" and 'living continuously' means 'continuous residence', except that para 276A(a)(iv) shall not apply".

26. Paragraph 276A(a) says this about "continuous residence":

> "(a) continuous residence" means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return, but shall be considered to have been broken if the applicant:
>
> (i) has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or
>
> (ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or
>
> (iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or
>
> (iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or
>
> (v) has spent a total of more than 18 months absent from the United Kingdom during the period in question."

27. The relevant provision is contained within the initial wording of para 276A(a).

28. First, "continuous residence" or, for these purposes "lived continuously", means residence in the United Kingdom for "an unbroken period".

29. Secondly, the provision provides that an individual who is absent from the United Kingdom for a period of "6 months or less", provided they had existing leave to enter or remain upon their departure or return, shall not be considered to have "broken" their period of residence.

30. On the face of it, therefore, the third appellant's absence from the UK for thirteen months "broke" his period of "continuous residence" and it was not saved from that consequence by being a period of six months or less when he had (as the judge found he did not in any event have) limited leave to enter or remain when he left for Pakistan or returned to the UK.

31. Both before the judge, and before me, the appellant relied upon the respondent's guidance (19 December 2018) which under the heading "Is the child a British citizen or have they lived in the UK for a continuous period of at least seven years?" states:

> "Short periods outside the UK – for example for holidays or family visits – would not count as a break in the continuous period of at least seven years required. However, where a child has spent more than six months out of the UK at any one time, this will normally count as a break in continuous residence unless any exceptional factors apply."

32. Ms Latimer submitted that the judge had enquired as to whether there were "exceptional circumstances" but had wrongly limited qualifying circumstances where an individual was "stranded" and "cannot come back". She submitted that was an unduly narrow construction of "exceptional circumstances". The judge dealt with this at para 36 of her determination as follows:

> "36. I have been asked by Miss Francina to find that the Appellant meets the rules for private live on the basis of 7 continuous years residence. I find that A3 does not satisfy this test. He left the UK in October 2012 at age 1 year 9 months. He returned to the UK in November 2013 at age 2 years 10 months. I accept that the Home Office guidance dated 19 December 2018 states that when establishing whether a non-British child has lived in the UK continuously for at least 7 years immediately prior to application, the decision maker should include time spent in the UK with and without valid leave. It goes on to state that were a child spends more than 6 months out of the UK at any one time this will normally count as a break in continuous residence unless any exceptional factors apply. I also accept that 276A provides 5 instances were continuous residence will definitely be broken but does not state that a period of over 6 months but less than 18 months would break it. It does state however that continuous residence will not be considered to be broken where a applicant is absent from the UK for a period of 6 months or less at any one time, "provided that the applicant in question had existing limited leave to enter or remain upon their departure and return". A3 did not have limited leave to remain on his departure. It is accepted that he applied for and was granted this during his period away and on his return, however he did not have this on both entry and return. Further, "exceptional circumstances" in my mind are not made out here and envisage situations where applicants are stranded and cannot come back. It is accepted that A's father had health problems, however, it is of importance and relevance that A felt that he could leave his father with A2 and A3 and was able to return himself to the UK after a few months. I find that the

> need to care for a grieving relative does not amount to exceptional circumstances. However, I find that the Appellant does not get over the hurdle of continuous residence in any event as he did not have limited leave to remain on his exist of the UK and was out of the UK for 13 months, A3 therefore only has 4 years 4 months continuous residence before date of application".

33. There are, in my judgment two answers to Ms Latimer's submissions.

34. First, the respondent's guidance is, no more than that: it is not a proper aid to construing the unambiguous wording of para 276A(a) which distinguishes between periods of residence which are "continuous" and which, by direct contrast, are "broken" by an individual's absence from the UK. That is the unambiguous and natural meaning of "continuous" contrasted with "broken" residence. The only exception to that, relevant to this appeal, is that periods of six months or less do not break an individual's continuous residence when they have leave both when exiting the UK and when returning. It cannot be the case that a period of thirteen months' absence from the UK has any other effect other than to break the first appellant's continuous residence.

35. The respondent's guidance is, in my judgment, no more than a concessionary approach directed to case workers as to how they might exercise discretion in an individual's favour but outside the terms of para 276A and, for these purposes, its application to para 276ADE(1)(iv). The guidance is not a valid means of interpreting the unambiguous words of para 276A so as to read in additional words, and thereby change the meaning of para 276A, that periods in excess of six months' absence from the UK will not break the continuity of residence if "exceptional factors" apply.

36. The proper approach to construing the Immigration Rules is that they should be construed sensibly according to the natural meaning of the words used in order to discern what the Secretary of State must be taken to have intended, and Parliament approved (see Mahad v ECO [2009] UKSC 16). In construing the Rules, their meaning is not to be "discovered" from guidance documents issued by the Secretary of State to officials (see Mahad at [10] and R (Behary and Ullah) v SSHD [2016] EWCA Civ 702 at [8]). The limited exception to that is where there is a "genuine ambiguity" (see Adedoyian v SSHD [2010] EWCA Civ 773 at [70] and Pokhriyal v SSHD [2013] EWCA Civ 1568 at [42] and [43]). There is no ambiguity in para 276A. The guidance would, if it purported to "interpret" para 276A, amount to a substantial rewriting of the meaning of the rule.

37. Secondly, even if the judge was required to look at whether there were "exceptional factors", I do not accept Ms Latimer's submission that the judge solely based her conclusion upon a narrow and "illegitimate" understanding of "exceptional factors" by limiting it to circumstances where "applicants are stranded and cannot come back". Although the judge does refer to this in para 36, she went on to consider whether the

reason why the first appellant was absent from the UK, namely that his parents had taken him to Pakistan where A1's mother had died and his father was grieving, amounted to "exceptional circumstances". That is clearly an assessment made by the judge at the end of para 26 which I set out above. In concluding that these circumstances were not "exceptional", bearing in mind that the first appellant had returned to the UK after a few months, I am satisfied that was not an irrational conclusion or one which no reasonable judge properly directing herself could reach.

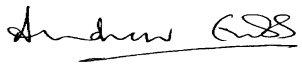
38. For all these reasons, but principally that on a proper interpretation of para 276ADE(1)(iv) the third appellant's absence from the UK for thirteen months broke the continuity of his residence, I reject ground 3 also.

Decision

39. For the above reasons, the First-tier Tribunal's decision to dismiss each of the appellants' appeals did not involve the making of an error of law. The decision stands.

40. Accordingly, the appellants' appeals to the Upper Tribunal are dismissed.

Signed



A Grubb
Judge of the Upper Tribunal

2 July 2019

TO THE RESPONDENT
FEE AWARD

In dismissing the appeals, the First-tier Tribunal made no fee award. That decision also stands.

Signed

A Grubb
Judge of the Upper Tribunal

Dated 2 July 2019