Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/05906/2014**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 29 May 2015	**On 16 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AB
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

Appellant:	Mr S Winter, of counsel, instructed by Gray & Co., Solicitors
Respondent:	Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The anonymity direction made earlier in these proceedings is preserved because the appeal focuses on the circumstances of two young children.

2. The Secretary of State for the Home Department (the "SSHD") brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal (the "FtT). This is an appeal by the SoS against a

decision of FtT promulgated on 2 April 2014, which allowed the Appellant's appeal and held that it was contrary to Article 8 of the European Convention on Human Rights (the "ECHR") to remove the Appellant and his family to Pakistan.

Background

3. The Appellant is a national of Pakistan, born on 13 May 1982. The Appellant and his wife (SA) arrived in the UK on 24 July 2006 with visit visas valid until 24 January 2007. They have remained in the UK without leave since then. They have two children, RA born on 11 May 2007 and AA born 14 May 2009. The Appellant, his wife and both children are citizens of Pakistan.

4. On 6 July 2012, the Appellant made an application for leave to remain in the UK, claiming that removal would breach Article 8 ECHR. His application was refused on 20 January 2014, when the SSHD made a decision to remove the Appellant as an illegal entrant.

FtT Decision

5. The Appellant appealed to the FtT successfully. It was conceded that the Appellant could not fulfil the requirements of the Immigration Rules. The judge considered the circumstances of the children, RA and AA and found that the needs of the children were such that the SoS' decision to remove the all members of the family unit infringed their rights under Article 8.

6. Permission to appeal was granted in the following terms:

> "*The judge has made clear findings as to the current state of the elder child. The Article 8 case turned on the best interests of the children. An arguable error of law has arisen in relation to findings as to the children and the context of the spectrum of objective evidence to which the Respondent has drawn attention*."

7. In a determination dated 20 August 2014, Upper Tribunal Judge Dawson set aside the FtT's decision finding that a material error of law had been made, stating *inter alia*

> "*It seems to me that the judge carried out an incomplete exercise and permitted the best interests of the children to dictate the outcome of the appeal without a proper analysis of the factors militating against such an outcome*".

In other words, an inadequate balancing exercise had been conducted.
It was further directed that the decision be remade by the Upper Tribunal. I am reminded by the error of law decision to give effect to Section 117B(vi) of

the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") and I note further the statement:

> "*RA will be a qualifying child by virtue of his length of residence in the United Kingdom.*"

8. Although the FtT's decision was set aside there was no criticism of her findings of fact in relation to the children. In essence, they are that RA has been diagnosed with autism and that although RA's parents have family members in Pakistan, none of those family members, at present, has the skills necessary to communicate with RA and "*handle*" him. The FtT noted that RA has difficulty relating to strangers, that he would view his relatives in Pakistan as strangers and that his quality of life would be adversely affected if he was returned to Pakistan because of his inability to understand and deal with a significant change in environment, culture and language. RA has poor communication skills. The FtT expressed concerns that RA's younger brother, AA, was too young to have received a formal diagnosis of autism but has displayed developmental delays and early indicators of an inability to settle, which indicate that he will require additional care and structured support to pursue the ordinary activities of daily living.

The Hearing

9 This case called just after 2pm on 29 May 2015. Counsel for the Appellant stated that there were two problems with proceeding. The first was that the Appellant and his wife were present and were ready to give evidence, but the Appellant's wife required an Urdu interpreter. Although an interpreter had been requested, none was available. The second was that parties' agents anticipated that by the time an interpreter could be found, there would be insufficient time left in the day to deal with this case. Counsel told me that his intention was solely to have the Appellant and the Appellant's wife adopt the witness statements which were before the first tier tribunal, so that each of them could then be offered for cross examination of the Home Office presenting officer.

10 The Home Office presenting officer told me that it was her hope that she would be able to adduce certain evidence about the Appellant's family circumstances in cross examination.

11 When I reviewed the file, I could see that both parties had lodged Rule 15(2A) notices, but those Rule 15(2A) notices relate to documents in the inventories of productions now lodged. Those inventories of productions contain documentary evidence, case law and background materials. They do not contain witness statements. No notice had been given that either party intended to lead oral evidence, nor had any Rule 15(2A) application been made for the admission of evidence. The SSHD had neither cited nor brought

any witnesses to court and had relied solely on the voluntary attendance of the Appellant and his wife. If they had chosen not to come today there would be no prospect of cross examination. The Home Office presenting officer argued that as the FtT's decision had been set aside, the only way to carry out the necessary fact finding exercise would be to take oral evidence from the Appellant and his wife.

12 I refused to delay this case any further. No Rule 15(2A) notice had been intimated to enable either party to lead oral evidence. The determination of Upper Tribunal Judge Dawson dated 20 August 2014 set aside the FtT's decision and found no error of law in its findings of fact. The error of law diagnosed lay in a failure "*…to consider the interests of the Appellant's children in the context of a proportionality assessment of all the factors weighing in favour of the claimant against the public interest*".

13. I considered the documentary evidence which had been lodged addresses the most important issues. This consists of:

(i) The Home Office PF1 bundle;

(ii) The witness statements (for the Appellant and his wife) which were before the first tier tribunal;

(iii) Two inventories of productions for the Appellant, addressed specifically to the Upper Tribunal;

(iv) A list of authorities for the Appellant; and

(v) An inventory of productions for the Respondent containing background materials.

14. Ms Johnstone reiterated the Secretary of State's challenge, arguing that while the autism of the children is a compassionate factor in the childrens' favour this does not equate to a disproportionate interference with the right to respect for a private or family life. She argued that it would not be unjustifiably harsh for this family to remove to Pakistan - where there is already a network of support available from family members. She relied on background materials to say that assistance for families with children with Autism exists in Pakistan and would be available to the Appellant and his family.

15 Mr Winter relied on the findings of the Judge in relation to the children and argued that to carry out the balancing exercise, one should start with the fact that RA is a qualifying child under Section 117B(vi) of the 2002 Act; the Appellant is not a person liable to deportation; because of his needs, it would not be reasonable to expect RA to leave the United Kingdom; and would be

unduly harsh to force a young child with autism to face the distress of the upheaval of removal. It was contended that the public interest is outweighed by the best interests of the children, giving rise to a disproportionate breach to a right to respect for private life.

Findings of Fact

16 The Appellant's oldest child (RA) is a "qualifying child" under Section 117B(vi) of the 2002 Act because of the length of his residence in the UK (he was born here and has never lived anywhere else). It is not disputed that the Appellant does not meet the requirements of either paragraph 276ADE nor of appendix FM to the Immigration Rules.

17. The Appellant and his wife entered the UK as visitors in 2006. They have not enjoyed any legal basis for remaining in the UK since 24 January 2007. RA & AA are the children of the Appellant and his wife. They were both born in the UK and have never been granted leave to either enter or remain in the UK.

18. The documentary evidence establishes that RA (the eldest child) has a diagnosis of Autism, he has an impairment in his use and understanding of spoken language, he is bilingual (Urdu and English) but relies on a combination of short phrases and pointing and requires support to interact with other children. Although RA is in mainstream schooling, he travels to school by taxi and receives significant support from adults which enables him to participate in ordinary primary education. He benefits from routine and consistency. Any change to his routine is likely to present a challenge.

19. AA attends both mainstream and specialist nurseries and, although a child of his age would have normally started primary school, he has been held back and will not begin primary 1 until August this year (one year later than would normally be anticipated). AA has benefitted from support not just of nursery staff but also additional support from therapists and psychological services for more than two years, and has a special educational programme tailored specifically for him. He has had support from speech and language therapists and psychologists. He is making progress, but the progress is slow. His linguistic development is delayed. His cognitive development (communication, play skills and co-ordination) has caused concern. There is a real likelihood that AA has a learning disability. One of the consequences of AA's developmental delay is that he becomes anxious in unfamiliar settings. It is likely that he will struggle with mainstream schooling. It may be that he will require specialist schooling.

20. In Pakistan a few unstructured facilities and services are available for autism. Autistic children have (wrongly) been associated with Down syndrome sufferers or those suffering from mental illnesses, but attitudes are changing and, recently, autistic children are being differentiated (because of awareness)

as the number of children diagnosed has dramatically increased. Although diagnostic facilities & resources are not as readily available in Pakistan as they are in the UK, they do exist there.

21. The Society for Children with Autism and Learning Differences has developed a project (Pakistan Centre for Autism) in Pakistan. The project started in 2012, and now has training staff/teachers available in Pakistan.

22. The background materials indicate that care for autism in the UK is better than the care for autism in Pakistan. However, the evidence supports the finding that non-governmental organisations are active in education about the existence of autism and the needs of those suffering from autism and that the programme of training extends to rural areas. It is also clear, and I so find, that care and treatment is now available in Pakistan for those suffering from autism and that a specialist school and day care centre for autistic children exists in Islamabad.

Article 3 ECHR

23. It is argued that the rights of the Appellant's children under Article 3 ECHR would be breached by return. The Respondent relies on **GS and EO (Article 3 Health cases) India 2013 Imm AR 223** and **GS India and others SSHD 2015 EWCA Civ 14**.

24. In **N v UK Application 26565/05** the Grand Chamber upheld the decision of the House of Lords and said that in medical cases Article 3 only applied in very exceptional circumstances particularly as the suffering was not the result of an intentional act or omission of a State or non-State body. The European court of Human Rights said that Article 3 could not be relied on to address the disparity in medical care between Contracting States and the applicant's state of origin. The fact that the person's circumstances, including his or her life expectancy, would be significantly reduced was not sufficient in itself to give rise to a breach of Article 3. Those same principles had to apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which might cause suffering pain or reduced life expectancy and required specialist medical treatment that might not be readily available or which might only be available at considerable cost. Notably the court held that no separate issues arose under Article 8(2) in that case and so it was not even necessary to consider the Claimant's submission that would removal would engage her right to respect for private life.

25. I take full account of the case of **GS and EO** and **GS (India)**, but in reality, a high threshold is set. RA suffers from Autism. AA probably has a learning disability. I do not minimise the impact of their conditions but neither of the boys suffer from life threatening conditions. Even on the Appellant's own argument, return to Pakistan has no impact on the life expectancy of either of

the boys. The argument is about the quality of life for the boys and the services which are available to them. The argument, in reality, is a comparison of the psychiatric, psychological and support services available to the two children. The background materials make it quite clear that the quality of such services in the UK is better than the services in Pakistan, but that is not the test for an Article 3 consideration.

26. In **Nacic and Others v Sweden (Application no. 16567/10) ECtHR (Fifth Section) 2012** it was held that aliens who were subject to expulsion could not, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that an applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State was not sufficient in itself to give rise to a breach of Article 3. The decision to remove an alien who was suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness were inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal were compelling. (As I have already indicated, in **N v UK Application 26565/05** the European court of Human Rights said that Article 3 could not be relied on to address the disparity in medical care between Contracting States and the applicant's state of origin).

27. Whilst I have sympathy for both of the Appellant's children, their conditions do not approach the elevated threshold for engagement of Article 3 of the 1950 Convention.

Article 8 ECHR

28. In **MM (Zimbabwe) v Secretary of State for the Home Department [2012] EWCA Civ 279** the Court of Appeal noted that the courts had declined to say that Article 8 could never by engaged by the health consequences of removal but they had never found such a breach and had not been able to postulate circumstances in which such a breach was likely to be established. The only cases where the absence of adequate medical treatment in the country to which a person is to be deported would be relevant to Article 8 are those where it is an additional factor to be weighed in the balance with other factors that engaged Article 8 (paras 17 – 23). This approach was endorsed by Laws LJ in **GS(India) and Others 2015 EWCA Civ 40 (para 86).**

29. I consider that this case turns on the question of proportionality. In determining this issue I am bound to give effect to the governing statutory regime, to which I now turn. The Appellant's central argument is that because RA suffers from autism, he cannot return to Pakistan. I have already found that that argument and the facts of this case do not engage Article 3. It

is not realistically disputed that Article 8 is engaged in this case and that the respondent's decision is an interference with the Appellant's right to respect for both family and private life.

30. Both parties' representatives made submissions concerning Section 117 of the 2002 Act. Section 117 is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within **Razgar**.

31. By virtue of section 117D a "qualifying child" means a person who is under the age of 18 and who— (a) is a British citizen, or (b) has lived in the United Kingdom for a continuous period of seven years or more. If a child is a qualifying child for the purposes of section 117B of the 2002 Act as amended, the issue will generally be whether it is not reasonable for that child to return to the country of origin under scrutiny. Although **R(on the application of Osanwemwenze) v SSHD 2014 EWHC 1563** was not specifically concerned with section 117B it has some relevance in terms of the reasonableness of a child leaving the UK. In this case, the Claimant's 14-year-old stepson from Nigeria had been in the United Kingdom for more than 7 years and had leave to remain in his own right. It was held that this was an important but not an overriding consideration and it was reasonable to expect the Claimant's family including the stepson to relocate to Nigeria. The parents had experienced life there into adulthood and would be able to provide for the children and help them to reintegrate.

32. The focus in this case is on sub-section (6) of Section 117B. What counts against the Appellant is that the maintenance of effective immigration control is in the public interest (Section 117B sub-section (1)). There is inadequate evidence for me to make a finding about whether or not the Appellant is able to speak English (Section 117B(2)). There is no reliable evidence before me that the Appellant is financially independent. The lack of such evidence has the effect in law of fortifying the public interest in play (Section 117B(3)). Section 117B(4) and (5) are irrelevant to this appeal.

33. Section 117B(6) is in two parts which are conjunctive. Section 117B(6)(a) weighs in favour of the Appellant because it is not disputed that he has a genuine and subsisting paternal relationship with a qualifying child. It is Section 117B(6)(b) which is determinative of this case. It is reasonable to expect RA to return to Pakistan?

34. The weight of reliable evidence in this case indicates that return to Pakistan would form a period of upheaval for this family but that upheaval is outweighed when balanced against the public interests and the Respondent's interests in maintaining fair and effective immigration control and keeping a watchful eye on the fragile economy of the UK.

35. The effect of the Respondent's decision does not cause separation for this family. The family will remain together. I am mindful of Section 55 of the Borders, Citizenship and Immigration Act 2009, and the case of **ZH (Tanzania) v SSHD [2011] UKSC 4.**

36. I remind myself of the cases of **Azimi-Moayed and others (decisions affecting children; onward appeals), [2013] UKUT 00197** and **PW [2015] CSIH 36.** It is the intention of the SoS to ensure that the Appellant, his wife and their two children stay together. It has long been established that it is in the interests of children to remain with their parents. The Respondent's decision maintains the unity of this family and does not separate the children from the parents. The interests of the children are served because the integrity of the family unit is not challenged.

37. The impact of the SSHD's decision is that the Appellant, his wife and their two children will return to Pakistan where they have extended family members. The impact on RA and AA is that their education and the help they are receiving from health services, care and treatment in the UK all come to an end - but the background materials indicate that education and healthcare is available (albeit at a lower level) in Pakistan. There is nothing before me from which I can draw the conclusion that return to Pakistan would result in neglect or destitution for either of the children. Housing, healthcare, education and family support are all available to them in Pakistan. Furthermore, it is well settled that the "better v worse" prism is the wrong approach in law.

38. New routines will have to be established for RA and AA. It may take RA and AA some time to adapt to new routines and a change of environment but there is no reliable evidence placed before me to indicate that either RA or AA cannot adapt; it is a fact of life that changes occur and individuals have to adapt to those changes. The needs of RA and AA may be different to the needs of many other children but, on the evidence placed before me, their conditions do not deprive them of the ability to adapt. They will have the enduring support of their parents and the wider network of family members on return to Pakistan.

39. I therefore conclude the SSHD' decision is not a disproportionate breach of the Article 8 rights of the Appellants or the other affected members.

Decision

I dismiss the appeal under Articles 3 & 8 ECHR.

Signed:

DEPUTY UPPER TRIBUNAL JUDGE DOYLE
Date: 2nd June 2015