IAC-AH-DP-V2

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/14845/2016
HU/14847/2016
HU/14850/2016
HU/14853/2016
HU/14857/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 September 2018	**On 25 September 2018**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

M A
S M
I C
E A
F A
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Z Nasim, Counsel, Direct Access
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Pakistan. MA was born on 1 June 1976. His wife, SM, was born on 1 April 1978. They have three children. The eldest child, IC, was born on 2 May 2008. EA was born on 4 February 2013. FA on 4 December 2014. I have anonymised the appellants since three of them are young children.

2. The appellants appealed against the decision of the Secretary of State on 2 June 2016 to refuse to grant them leave to remain on human rights grounds. Their appeal was dismissed by Resident Judge JFW Phillips. It is not clear to me when the decision was promulgated; however, it followed a hearing in Newport on 19 October 2017. Permission was granted to the appellants by Upper Tribunal Judge Martin on 31 May 2018. The salient parts of Judge Martin's decision read as follows:

> "It is arguable that in finding it reasonable for the eldest child (who has been in the UK in excess of seven years) to return to Pakistan (in considering Section 117B(6)), the Judge has not identified powerful reasons as indicated by Lord Justice Elias at paragraph 49 of **MA(Pakistan) [2016] EWCA Civ 705**. It is also arguable that the judge was mistaken in thinking the appellants had a poor immigration history.

3. The matter came before me on 10 September 2018 to determine whether the judge made an error of law.

The Background

4. SM came to the UK on 29 December 2007 having been granted leave to enter as a student migrant which was valid until 31 October 2009. She was granted leave to remain as a Tier 4 (General) Student Migrant until 27 May 2012. She was granted further leave to remain under the PBS until 20 August 2015. Her husband, MA, came to the UK on 27 July 2010 with leave to enter as a Tier 1 (Dependant) Partner which was valid until 27 May 2012. He has been granted periods of leave in line with SM as a dependant under the PBS. They made an application for leave to remain on Article 8 grounds on 7 August 2015. This was refused and certified as clearly unfounded under s94 (1) of the 2002 Act on 31 January 2016. They then submitted a Statement of Additional Grounds which the Respondent treated as a human rights application. On 2 June 2016 the application was refused, giving the appellants a right of appeal.

The Hearing Before the FtT

5. The judge heard evidence from the adult appellants. The appeal turned on the facts relating to the appellant, IC. She was born in the UK. She was taken to Pakistan by SM when she was 9 or 10 months old and left in the care of relatives there. SM returned to the UK to study. IC remained in Pakistan for approximately thirteen months. On 27 July 2010 she returned to the UK where she has remained since.

6. At the time of the hearing IC had been in the UK continuously for seven years and four months. She was aged 9. At paragraph 15 of his decision the judge properly

identified the law and the issue; namely, whether it was reasonable to expect IC to return to Pakistan. The judge at paragraph 15 directed himself with respect to **R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705**. He properly directed himself that when considering whether it was reasonable to remove a child from the UK, any court or Tribunal should not focus simply on the child but should have regard to the wider public interest consideration including the conduct and immigration history of the parents.

7. The salient findings of the judge are at paragraphs 16, 17 and 18:

> "16. The issue to be decided is straightforward. Is it reasonable to expect the elder child, [IC], to leave the United Kingdom? In considering this issue I find the following positive factors to be relevant. Firstly, [IC] has now been in the United Kingdom continuously for a little over 7 years and her total residence is more than 8 years. She was born here. [IC] is doing well in school in this country as evidenced by the school reports and awards in the Appellant's bundle. She is being educated through the medium of English. Her circle of friends is in this country. She will have no memory of life in Pakistan. I add that the circumstances of her parents and siblings are also relevant, that the two younger children have only known life in the United Kingdom, that the father plays cricket in this country having obtained coaching qualifications here and that both parents have friends and connections in this country. Neutral to the balance is that it is in the best interests of [IC] and of course of the other children, for the family to stay together.
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> 17. On the other side of the balance there are a number of factors. The mother is qualified to Master's degree level in Pakistan and has obtained further qualifications in the United Kingdom. There is no reason in my judgment why these qualifications cannot be put to use in Pakistan. I do not accept that being outside Pakistan for the last 10 years or a lack of contacts in Pakistan will prevent her obtaining employment there and no objective evidence was called to suggest that individuals with significant academic qualifications have difficulty in obtaining employment in Pakistan. The father is also educated to degree level in Pakistan and has obtained a coaching qualification here. Again, no objective evidence was called to suggest that his qualifications cannot be put to use in obtaining employment in Pakistan. The family speak Urdu at home and parents and children are fluent in this language. I accept the parents' evidence that [IC] does not read and write Urdu, but I do not accept that with her oral language skills and her ability to read and write in English that this is a significant obstacle. Her oral skills should be capable of being adapted in short order. The Appellants have family in Pakistan and there is no reason why this family cannot provide emotional and moral support and with the parents' qualifications there should be no need to turn to the family for financial support. I do not accept, and there is no medical evidence in this regard, that any illness that [IC] suffered from during her stay in Pakistan

as a one year old is endemic to the country and likely to recur on her return.

18. So far as the immigration history of the parents is concerned it is in my judgment significant that they came to this country in the full knowledge that their stay here was temporary. Leave to remain based on the mother's studies expired in August 2015 and the decision to stay beyond that time has been one that they have chosen to make without any basis under the Immigration Rules. It is only by remaining outside the provisions of the rules that the family have, just, reached the seventh anniversary of the eldest daughter's arrival in the United Kingdom."

The Grounds of Appeal

8. At the hearing before me Mr Nasim relied on the grounds seeking permission to appeal. He modified Ground 1 with reference to Upper Tribunal Judge Martin's decision. He argued that the judge failed to properly consider IC's private life in the context of Article 8. Although she had not lived in the UK continuously for seven years at the date of the application; she had at the date of the hearing. The judge did not take proper account of this.

9. Ground 2 argues that the judge failed to apply the principles set out in **MA (Pakistan)** and give due weight to IC's residence here. The grounds refer to the respondent's guidance. There will be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit and that that must rank as a primary consideration in the proportionality assessment. The judge failed to have regard to paragraphs 45, 46 and 49 of **MA**.

10. Ground 3 argues that the judge erred by attaching weight to the parents' immigration status. The Court of Appeal in **MA,** at paragraph 103, stated that temporary residence was insufficient in itself to constitute "powerful" reasons for removing a long resident child even where there had been a long period of unlawful overstaying. It is argued in the grounds that the appellants had leave under section 3C of the 1971 Act ("3C leave"). Mr Nasim did not pursue this, but modified the ground arguing that the judge erred in failing to take into account that the original applications were submitted prior to the expiry of the appellants' leave on 20 August 2015. The Statement of Additional Grounds gave rise to an appealable decision. He argued that it was questionable whether the decision of 31 January 2016 was lawful although he accepted that there was no challenge to it by way of judicial review. However, he argued that this was a material factor when assessing the immigration status. The judge did not properly consider the immigration history.

11. The fourth ground argues that the judge failed to consider all relevant factors when addressing whether it would be reasonable for IC to leave the UK. The judge failed to apply the guidance in **EV (Philippines) and Ors v Secretary of State for the Home Department [2014] EWCA Civ 874** when assessing the child's best interests.

12. Ground 4 argues that the judge failed to have proper regard to the private life established by IC.

13. Ground 5 argues that the judge did not carry out a full assessment under Article 8 properly considering Section 117B (6) of the 2002 Act. The judge failed to consider the appellants were not a burden on public funds and spoke English.

14. I heard submissions from both representatives. Mr Nasim stated that the primary findings of fact were not challenged. However, the thrust of the grounds is that the judge did not identify strong or powerful reasons for dismissing the appeal. Ms Isherwood argued that the judge did not err in law. I asked her to identify the strong or powerful reasons as found by the judge. She said that the decision should be considered as a whole. All factors taken together would establish strong and powerful reasons including the parents' precarious leave.

The Law

15. In **MA** Elias LJ held as follows:

> "43. But for the decision of the court of Appeal in *MM (Uganda),* I would have been inclined to the view that section 117C (5) also supported the appellants' analysis. The language of "unduly harsh" used in that subsection is not the test applied in article 8 cases, and so the argument that the term is used as a shorthand for the usual proportionality exercise cannot run. I would have focused on the position of the child alone, as the Upper Tribunal did in *MAB*.
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> 44. I do not find this a surprising conclusion. It seems to me that there are powerful reasons why, having regard in particular to the need to treat the best interests of the child as a primary consideration, it may be thought that once they have been in the UK for seven years, or are otherwise citizens of the UK, they should be allowed to stay and have their position legitimised if it would not be reasonable to expect them to leave, even though the effect is that their possibly undeserving families can remain with them. I do not accept that this amounts to a reintroduction of the old DP5/96 policy. As the Court of Appeal observed in *NF (Ghana) v Secretary of State for the Home Department* [2008] EWCA Civ 906, the starting point under that policy was that a child with seven years' residence could be refused leave to remain only in exceptional circumstances. The current provision falls short of such a presumption, and of course the position with respect to the children of foreign criminals is even tougher.
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> 45. However, the approach I favour is inconsistent with the very recent decision of the Court of Appeal in *MM (Uganda)* where the court came down firmly in favour of the approach urged upon us by Ms Giovannetti, and I do not think that we ought to depart from it. In my judgment, if the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the "unduly harsh" concept under section 117C(5), so should it when considering the question

of reasonableness under section 117B(6). I recognise that the provisions in section 117C are directed towards the particular considerations which have to be borne in mind in the case of foreign criminals, and it is true that the court placed some weight on section 117C(2) which states that the more serious the offence, the greater is the interest in deportation of the prisoner. But the critical point is that section 117C(5) is in substance a free-standing provision in the same way as section 117B(6), and even so the court in *MM (Uganda)* held that wider public interest considerations must be taken into account when applying the "unduly harsh" criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in section 117B(6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case, I will analyse the appeals on the basis that the Secretary of State's submission on this point is correct and that the only significance of section 117B(6) 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.

Applying the reasonableness test

46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.

47. Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child's best interests are in favour of remaining. I reject Mr Gill's submission that the best interests assessment automatically resolves the reasonableness question. If Parliament had wanted the child's best interests to dictate the outcome of the leave application, it would have said so. The concept of "best interests" is after all a well established one. Even where the child's best interests are to stay, it may still be not unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and in the country

where it is proposed he should return. What could not be considered, however, would be the conduct and immigration history of the parents.

…

49. Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. However, the fact that the child has been in the UK for 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 as a starting point that leave should be granted unless there are powerful reasons to the contrary.

…

103. In my judgment, the observation of the judge to the effect that people who come on a temporary basis can be expected to leave cannot be true of the child. The purpose underlying the seven year rule is that this kind of reasoning ought not to be adopted in their case. They are not to be blamed for the fact that their parents overstayed illegally, and the starting point is that their status should be legitimized unless there is good reason not to do so. I accept that the position might have been otherwise without the seven years' residence, but that is a factor which must weigh heavily in this case. The fact that the parents are overstayers and have no right to remain in their own right can thereafter be weighed in the proportionality balance against allowing the child to remain, but that is after a recognition that the child's seven years of residence is a significant factor pointing the other way."

16. In **EV (Philippines)** Lord Justice Christopher Clarke explained 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 dictate that he should remain in the UK (paras. 34-37):

"34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.

35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain?

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 interests 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 interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hypothesis, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

17. In **MT and ET (child's best interests; extempore pilot) Nigeria [2018] UKUT 0088**. The UT made the following findings:

"30. We conclude firmly that as regards those aspects of the third Appellant's life highlighted above, his best interests, viewed through the lens of Article 8 private life, would be served by remaining in the United Kingdom. The four dominant factors, summarised, are his length of residence in the United Kingdom, his full integration in United Kingdom society, his age and his minimal ties with his country of origin. We observe that this conclusion is expressly foreshadowed in the Secretary of State's IDI, an instrument which, having the status of a material consideration, serves to inform the Article 8 private life analysis.

31. However, the assessment of the third Appellant's best interests from the perspective of his private life only is necessarily incomplete. We must also consider his best interests through the prism of his family life. He is an only child and we find that he has, vis-à-vis his parents, the bonds of love, affection, respect and dependency which one would expect of any child of 14 in a stable, settled family. This is not diluted by the truism that teenagers become progressively independent, resilient and self sufficient. In this context we refer to our assessment in [28] above. Viewed from the twin perspectives of the third Appellant's private and family life, the conclusion that his best interests would be best served by continuing to live in the United Kingdom, with his parents, follows inexorably.

32. At this juncture, we remind ourselves that the best interests of the third Appellant have, by statute, the status of a primary consideration. We are also mindful that our assessment of the best interests of the third Appellant is not determinative of the question posed by both paragraph 276 ADE (1)(iv) of the Rules and Section 117B (6) of the 2002 Act, namely whether it would be reasonable to expect him to leave the United Kingdom. This question cannot be answered without considering the parents' appeals, to which we now turn. At this juncture, we turn to consider the claims of the Appellant's parents, the first two Appellants. Their Article 8 claims cannot succeed under the Rules. They do not come remotely close to doing so.

They can succeed only outwith the Rules, which involves them satisfying the test of compelling/exceptional circumstances prescribed in MF Nigeria (*infra*).

33. The main ingredients in the cases of the parents are that their presence in the United Kingdom was lawful during the first half of the 11 year period under scrutiny; they have been unlawful overstayers since early 2010; they are the parents of a teenage child who has lived continuously in the United Kingdom for 11 years; they have established private lives in the United Kingdom; they are law abiding and self-sufficient citizens; and they have spent most of their lives in their country of origin, Sri Lanka.

34. At this point of the analysis, we ask ourselves whether the dismissal of the parents' appeals would interfere with their rights to respect for their private lives. The answer is, clearly, affirmative. Since the impugned decisions are in accordance with the law and are in furtherance of a legitimate aim, namely the maintenance of immigration control, the next question to be addressed is whether they are proportionate. Proportionality is the "public interest question" within the meaning of Part 5A of the 2002 Act. By section 117A(2) thereof we are obliged to have regard to the considerations listed in section 117B. We consider that section 117B applies to these appeals in the following way:

    (a) The public interest in the maintenance of effective immigration controls is engaged.

    (b) There is no infringement of the "English speaking" public interest, given the uncontested finding that all three Appellants are fluent English speakers.

    (c) While the economic self-sufficiency of both parents is not in dispute and we have no evidential basis for finding otherwise, we consider that this public interest must be engaged since the third Appellant has been, and will continue to be, educated at public expense and if all three Appellants remain in the United Kingdom they will have the capacity to access other publicly funded services and benefits.

    (d) That part of the private lives established by the parents during the second half of their 11 year sojourn in the United Kingdom qualifies for the attribution of little weight only."

The Error of Law

18. The grounds to a great extent overlap. As I see it, the challenge is essentially a complaint that the judge did not properly consider IC's best interests or proportionality in the light of s.117B (6) of the 2002 Act and present law.

19. I conclude that the judge's assessment of IC's best interests is flawed. The judge considered IC's best interests in the context of the child's family life, finding that she would be returning with her family. The judge made findings relating to IC's private life here, but he did not consider how that would impact on the assessment of her

best interests, having regard to the length of time she has been here and that she is in education here. The assessment does not have regard to the factors listed by the Court of Appeal in **EV (Philippines)**. The judge recognised the significance of seven years insofar as it meant that he had to consider reasonableness (and that section 117B (6) was triggered), but in terms of the child's best interests it is unclear what, if any, significance he attached to it. Considering the length of time IC has been here and her age at the hearing, it was necessary for the judge to assess whether it was in her best interests to remain with her family in the UK or to return to Pakistan with her family. In the light IC's circumstances, it was not sufficient, to limit the assessment to whether it is in her best interests for the family to stay together. This was a material error of law because it impacted on the assessment of proportionality. I set aside the decision of the judge to dismiss the appeal on Article 8 grounds.

20. I make a further observation about the decision. The judge fell into error when assessing reasonableness and proportionality because he failed to identify strong reasons (see **MA** para 46 above and Home Office Guidance[1]);

21. Whilst the best interests of the child are not determinative of proportionality, **MA** makes it clear that seven years residence establishes a starting point that leave should be granted unless there are powerful reasons to the contrary. This is the view of the Secretary of State set out in his own guidance. The parents' immigration history was not sufficient to amount to strong or powerful reasons. The judge did not identify strong reasons. The judge attached weight to the parents' immigration history; however, they were run- of- the- mill overstayers with an additional factor, arguably

[1] Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes (Version 1.0 of 106 Published for Home Office staff on 22 February 2018) p75 reads as follows;

> "The requirement that a non- British citizen child has lived in the UK for a continuous period of at least the seven years immediately preceding the date of application, recognises that over time children start to put down roots and to integrate into life in the UK, to the extent that it may be unreasonable to require the child to leave the UK. Significant weight must be given to such a period of continuous residence. The longer the child has resided in the UK, and the older the age at which they have done so, the more the balance will begin to shift towards it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more.

Such strong reasons may arise where, for example, the child will be returning with the family unit to the family's country of nationality, and the parents have deliberately sought to circumvent immigration control or abuse the immigration process for example, by entering or remaining in the UK illegally or by using deception in an application for leave to enter or remain. The consideration of the child's best interests must not be affected by the conduct or immigration history of the parent(s) or primary carer, but these will be relevant to the assessment of the public interest, including in maintaining effective immigration control; whether this outweighs the child's best interests; and whether, in the round, it is reasonable to expect the child to leave the UK".

in their favour, that the respondent went on to make an appealable decision after certifying their claim. Nothing turns on this.

Conclusions

22. There was no further evidence submitted by the appellants following the directions issued by the Upper Tribunal. I heard submissions from both parties, with a view to remaking the decision.

23. There was no challenge to the primary findings of fact made by the judge. IC has been here continuously since the age of 2. She is now 10. She has been in education here since the age of 4 or 5. She is now aged 10. It is without doubt that she has established a private life here. This was accepted by the judge who found that she has a circle of friends here. He found that she had no memory of life in Pakistan. The findings at paragraph 16 would lead to a very clear conclusion that IC's best interests would be to remain here. The findings at paragraph 17 relate to circumstances that the family can expect on return to Pakistan. These are sound findings and impact on the assessment of the child's best interests. However, they are not sufficiently significant to undermine the finding that IC's best interests would be to remain here with her family; although taking them into account, it is by less of a margin.

24. I conclude that it would be in IC's best interests to remain in the UK with her family. Her best interests are a primary and not paramount consideration. I must consider reasonableness and proportionality taking into account all matters.

25. Applying **MA**, I need to consider whether powerful reasons exist why IC who has been in the UK over seven years should be removed, notwithstanding that her best interests lie in remaining here. I heard further submissions from Ms Isherwood who was unable to identify strong or powerful reasons in this case. She relied on the parents' immigration history. It is unarguable that this amounts to strong or powerful reasons.

26. I go on to consider all s117B of the 2002 Act. IC's parents came here on a temporary basis. They have no legitimate expectation that they would be able to remain here. Their stay is precarious. It is a material factor, in favour of removal that the children of the family will be educated at the expense of the British taxpayer. However, these factors do not amount to powerful reasons. It was not argued otherwise by Ms Isherwood. There is no suggestion that the family is unable to support itself or that there are any language problems. Whilst the public interest lies in removing the family, weighing up all factors and applying the law as it currently stands, the appeal succeeds on the basis that it would be unreasonable to expect IC to return to Pakistan. The decision is not proportionate to the legitimate aim. The public interest in the maintenance of immigration control is outweighed by the family's Article 8 rights.

27. The appeal is allowed under Article 8.

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 *Joanna McWilliam*

Date 21 September 2018

Upper Tribunal Judge McWilliam