Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08183/2017

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 18 December 2018 **On 25 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

MUHAMMED [B] (+ 3)
(NO ANONYMITY ORDER MADE OR REQUESTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr Bedford, instructed by Farani Taylors Solicitors LLP

DECISION AND REASONS

The appellant and proceedings

1. This Pakistani citizen born in 1979 appeals a decision of the respondent to refuse him and his wife and their 2 children, born in the United Kingdom, leave to remain on the basis of their family and private life here. The appellant had been granted leave to enter as a student in 2006 which had been variously extended until 19 April 2015. The application he made days before his leave expired was refused and efforts to obtain an in country right of appeal by judicial review were unsuccessful in February 2016. The

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appellant then made of further application for indefinite leave to remain on the basis of his long residency which was similarly refused without right of appeal but in the event on judicial review he was successful in obtaining a consent order for reconsideration which led to a further refusal decision on 10 July, but with an in country right of appeal. In the meantime, the appellant and his wife had had a 2nd child, the 4th appellant. The judge was satisfied that the appellant had not had 10 years lawful leave, but only 9 years 3 months, that there were no significant obstacles to the families' reintegration in Pakistan, so that the appellants did not meet any of the requirements of the immigration rules. With regard to the position of the children born in 2012 and 2015 respectively, the judge concluded that whilst the best interests of the children were to stay in the UK and benefit from education and health services available in the UK, the weight to be afforded that position did not outweigh the public interest in removal in the context of the absence of difficulty on return for the parents who would be able to support children.

2. The appeal is brought with permission granted at the First-tier Tribunal. Mr Bedford maintained 3 grounds of appeal at the hearing:

   (a) First, the judge was wrong to find that the appellant had worked illegally because:

      (i) until his leave expired in August 2015 he would have been able to work because he was a student, so any work would have been lawful

      (ii) a matter that the judge should have taken into account before finding it adverse that he had lied about his employment when registering the birth of his 3 children is that people from East Asia have a culture of lying to save face and this explains why when reporting the births of the children he said he was working when he was not: he was too embarrassed to tell the truth that he was a student or latterly that he was unemployed because he did not have immigration status. The equal treatment bench book sets out that judges should take into account such cultural factors.

   (b) Second, the error tainted the consideration of the minor appellant's best interests because:

      (i) for one thing the judge has started his proportionality assessment with the finding about the father working illegally when he should have been looking at the best interests of the children as his primary consideration and

      (ii) for another in weighing up what was in the best interests of the children he allowed his adverse finding against the father to creep in and affect his best interest consideration so that there was no proper consideration of the best interests of the children separately or outside the negative public interest factor of the father's illegal working, that is reflected in the judges use of the

conjunctive in the last sentence of paragraph [39] where he states:

> *The fact that I have made findings that the appellant has worked in this country illegally further detracts on the merits of his case and is an added factor in the balancing exercise when assessing proportionality and the best interests of the children.*

3. Third the judge has failed to make any explicit finding of fact as to whether or not the son who has learning difficulties would receive any educational provision in Pakistan at all given the UN country information he quotes at [38] to the point that Pakistan has some of the worst, if not the worst, facilities for dealing with disabled children in the world and certainly in south Asia.

4. Other grounds in the application did not attract positive comment in the grant of permission and Mr Bedford did not rely on them before me.

5. Ms Cunha submitted that the judge was entitled to the adverse credibility finding. The reference in the equal treatment bench book to people of East Asia do not specifically assist the appellant. The point was that he had admitted lying on 3 different occasions to 3 state entities. In any event that was not the only factor which impacted on the overall adverse credibility assessment there was also the judge's findings at [32] that he had failed to establish an alternative source of income from illegal working because although he said he was maintained by his friend in the UK the friend did not come to court and his letter simply said that he lived with him at his house and made no reference to the question of rent nor the provision of financial support, and although he and his wife said that they received income from his mother who lives in America, there was no evidence beyond the assertion.

6. Ms Cunha submitted that in any event the adverse credibility finding did not have any impact in the assessment of the best interests of the children. The decision clearly follows the structure approved in the case of <u>KO Nigeria</u> with the position of the parents being assessed prior to that of the children in order to provide the real-world setting, with the judge considering whether or not they fall to be returned in the light of their own circumstances before turning to the position of the children. It is quite clear reading the decision that the judge has separately considered the position of the best interests of the children, the consideration is at paragraphs [37-38] and that is clearly reinforced by the fact that the judge concludes that the best interests of the children are to remain in the United Kingdom, and then moves on to look at whether or not the weight to be attached to that position with regard to the son assessing whether or not his condition is "so problematic that his removal would have such a serious effect on his future development that his removal would be disproportionate to the public interest of maintaining effective immigration control. The use of the conjunctive in [39] does not detract from that

position as it follows the assessment that his circumstances do not make removal disproportionate.

Discussion

7. I find no merit in the grounds. The point that the appellant enjoyed a window when as a result of student status he would have been able to work legally has no impact on the question of credibility that was being decided by the judge. This was a case where the appellant admitted that he had lied. The fact that he could have worked legally had he elected to do so for part of his period of residence does not alter that.

8. The judge has clearly identified the appellant's explanation of embarrassment and considered it at length at [32] and was entitled to find that his lying on 3 different occasions and on each giving different types of employment on the 2 birth certificates and then again in his discussions with the clinician at the Royal Free London child development clinic, were not adequately explained by embarrassment. The evidence of the appellant was that he did not work illegally, and in deciding whether or not to believe that evidence the judge was entitled to take into account that he had admitted lying when he had interacted with officialdom in connection with the birth of his children. The grounds assertion that the judge should have accepted as an adequate explanation that he was embarrassed because as the bench book points out people from East Asia may be affected by considerations of saving face. Contrary to Mr Bedford's submission that is not such an obvious point that the judge should have taken it on board himself, not least because if it had been so obvious one would have expected his counsel to mention it, but also because he's not from East Asia. There is no issue before me that having found that the appellant had worked illegally the judge was entitled to weigh that against the appellant in the overall balancing exercise along with the public interest point that the appellant had failed to meet the requirements of the rules.

9. Nor do I find any merit in the assertion that the structure of the judge's reasoning shows that the assessment of the best interests of the children was affected by his adverse credibility conclusion in respect of their father. It is quite clear on a fair reading of the decision that the judge dealt with the arguments concerning the position absent the question of the children between [32 to 36] before turning to deal with the position of the children at [37 to 38] because [37] starts: "I now need to consider the best interests of the children".

10. I find that [39] adds no force to the grounds. The paragraph is the concluding paragraph and explicitly expressed to be a summary of the balancing exercise of proportionality. The best interests assessment is not a balancing exercise. The point is further made clear by the judge's framing of the proportionality assessment in the structure of section 117B of the 2002 Act. The paragraph is no more than a reflection of the earlier findings pertinent to subsections (1) and (5), and the additional public

interest factor of the appellant having worked illegally and does no more than reference the earlier finding at [37] that the best interests of the children, and specifically of the son, do not of themselves operate to make removal disproportionate to the public interest of maintaining effective immigration control. Although the judge makes no reference to private life considerations of children set out at section 117B (6) of the 2002 Act or paragraph 276 ADE of the immigration rules because neither of the children are qualifying children, neither having obtained 7 years residence in the UK, the consideration as to whether or not their best interests operate to make removal disproportionate is plainly a consideration of the test reflected in the private life rules as well as the Act in respect of qualifying children, so that their position has been considered at the highest, and self-evidently discretely from the position of their parents.

11. The ground that the judge needed to make an explicit finding about whether or not the son would receive any education in Pakistan at all mistakes the burden. Contrary to the written grounds there is no burden on the respondent to show that the appellant will receive a learning difficulties appropriate education. The appellant argued for a specific factual matrix on return to Pakistan and had the opportunity to bring forward evidence to support it. The duty of the judge was to say what he made of the evidence presented. The report relied upon by the appellant was a background paper prepared for the "Education for All Global monitoring report of 2015" and addressing the education of children with disabilities in India and Pakistan. The judge plainly read it because he confirms the accuracy of counsel's quotes, but he was entitled to his conclusion that it was generic and did not deal specifically with the position of children with learning difficulties. The judge found that the appellant would have material support in Pakistan particularly from the appellant's wife's family who lived in Pakistan as well as through his own employment. Whilst the report made statements reflecting the challenges faced by mainstream teachers in addressing the needs of children with disabilities and criticises the lack of concrete advancement of the aspirational national policy of providing for persons with disabilities, and flagged up that in any event Pakistan has the highest out-of-school population (whether amongst those with disabilities or otherwise) there was no suggestion, as Ms Cunha pointed out, that as apparently from the report some parents do, that these parents would be content to assume that there was nothing that could be done to us improve the son's position because their evidence was were very concerned about his education and taking concrete steps to maximise his position. The judge was also taken to a key finding from the report which included that children, "across southern contexts" and so including Pakistan which says that children with disabilities were 10 times more likely not to attend school, and that when they do attend school the level of learning is below that of their peers. In conclusion the judge was entitled to his conclusion that the evidence did not establish that there was no schooling available for children with learning difficulties or that the position would be so adverse as to compel

a finding that his position made an otherwise proportionate decision disproportionate.

12. AS (Iran) [2017] EWCA 1539: “In approaching criticism of reasons given by a First-tier Tribunal, the Respondent correctly reminds us to avoid a requirement of perfection. As Brooke LJ observed in the course of his decision in R (Iran) v The Secretary of State for the Home Department [2005] EWCA Civ 982, "unjustified complaints" as to an alleged failure to give adequate reasons are all too frequent. The obligation on a Tribunal is to give reasons in sufficient detail to show the principles on which the Tribunal has acted and the reasons that have led to the decision. Such reasons need not be elaborate, and do not need to address every argument or every factor which weighed in the decision. If a Tribunal has not expressly addressed an argument, but if there are grounds on which the argument could properly have been rejected, it should be assumed that the Tribunal acted on such grounds. It is sufficient that the critical reasons to the decision are recorded.”

13. As was said in Mukarkar [2006] EWCA Civ 1045 “Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis.”

14. In respect of each of these grounds I find that acceptable reasoning was set out in the First-tier Tribunal decision.

Decision

15. The appellant has failed to show that the decision is marred by legal error and the decision dismissing the appeal stands.

Signed

Date 18 December 2018
Deputy Upper Tribunal Judge Davidge