Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/13274/2017**
HU/11985/2017
HU/11956/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 July 2021	**On 28 September 2021**

Before

THE HON. MR JUSTICE LANE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT

Between

BUSHRA SALEEMI
MUHAMMAD IQBAL SALEEMI
ASFANDYAR SALEEMI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr K. Forrest, instructed by Norman Lawson & Co Solicitors.
For the Respondent: Mr T. Lindsay, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellants are nationals of Pakistan. They are members of the same family. Together with another family member, they appealed to the First-tier Tribunal against the decision of the respondent on 26 September 2017

refusing to grant them leave to remain in the United Kingdom on the grounds of their family life. Judge Doyle dismissed their appeals, although he allowed the appeal of the other family member. Permission to appeal against Judge Doyle's decision was refused by the First-tier Tribunal and by this Tribunal, but the latter decision was reduced by the Court of Session following Eba proceedings.

2. There was then a hearing before us in order to determine whether permission to appeal should be granted. On 12 March 2021 we issued our decision granting permission to appeal, and directing the appellants' representative to file and serve perfected grounds of appeal, dealing with the issues which the permission hearing had identified as central. Mr Forrest complied with those directions, and, also in accordance with directions, Mr Lindsay has filed a response to Mr Forrest's grounds.

3. The first and second appellants are husband and wife. They are the parents of the third appellant, who was born on 18 May 1999. They are also the parents of his older sister, who was the other appellant before the First-tier Tribunal. She is about two years older. There is also another member of the family, an older brother.

4. All five entered the United Kingdom with leave on 23 August 2019. The eldest child returned to Pakistan in 2012, studied medicine there, and is now qualified as a doctor, working in Pakistan. The other family members remained in United Kingdom. In November 2013, during the currency of existing leave, they applied for an extension of leave. That application was refused. They appealed but were unsuccessful. Their appeal rights were exhausted by 24 April 2015. They have subsequently been remaining in the United Kingdom without leave. They were served with notices of liability to removal in September 2016, which prompted an application for leave to remain on 4 October 2016. That was rejected, and there appears to have been no appeal against that decision.

5. The present application was made on 2 May 2017. It was made by the parents; the third appellant and his sister were encompassed within it as dependant children. It was, as we have said, refused. The appeal hearing was before Judge Doyle on 31 July 2018. He took into account the documentary evidence. The first and second appellants gave no oral evidence before him, and the appellants' representative said that "the focus of the case rests on the third and fourth appellants" (that is to say, the children). The judge noted the history as set out above. He noted the absence of particular evidence about the parents' life or attachment to the United Kingdom. He noted the history of the children's education in the United Kingdom. They both had outstanding careers at school. Both had the prospect of studying medicine at university in Scotland. The third appellant had not begun his course. His sister, despite her lack of leave, had already completed two years at Glasgow University. Amongst the other relevant facts that he found was that the appellants before him had no source of income and relied on the charity of friends and family for support.

6. Concentrating, as he was invited to do, on the position of the children, the judge concluded that because, and, as he made clear, only because of the daughter's current educational history, being well established on her degree course, it would be unreasonable to expect her to leave the United Kingdom. So far as concerned her brother, however, the judge was not persuaded that it would be unreasonable to expect him to leave the United Kingdom. Whilst allowing his sister's appeal, therefore, he dismissed the third appellant's appeal, and dismissed the appeals of his parents, as they were said to raise no additional issues.

7. The appeal of the third appellant before us depends on the terms of, and the relationship between, two separate provisions that share some vocabulary. Paragraph 276ADE of the Immigration Rules provides as follows:

> **"Requirements to be met by an applicant for leave to remain on the grounds of private life**
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> 1. 276ADE (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:
>
> 1.(i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (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; or
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

8. Part 5A of the Nationality, Immigration and Asylum Act 2002 provides, so far as relevant to this appeal, as follows:

> "**117A Application of this Part**

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
(a) breaches a person's right to respect for private and family life under Article 8, and
(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B

117B Article 8: public interest considerations applicable in all cases
…
(6) 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."

9. The point raised by Mr Forrest about the interaction between these two provisions is that they both depend on whether it is reasonable to expect a person to leave the United Kingdom, but the judge dealt with them in different ways. In relation to paragraph 276ADE (and remembering, as always, that his reference to the "fourth appellant" is a reference to the third appellant before us), he said this:

"11. (a) The first, second and third appellants accept that they cannot meet the requirements of the immigration rules. It is argued that the fourth appellant meets requirements of paragraph 276ADE(1)(iv). The respondent accepts that the fourth appellant was under 18 years of age at the date of application and at the date of application had lived in the UK for more than seven years. That concession is not sufficient to meet the requirements of paragraph 276 ADE(1)(iv). It is for the fourth appellant to establish that it is not reasonable for him to leave the UK.

(b) What is argued for the fourth appellant is that because he has had the benefit of primary and secondary education in the UK and because he is an intelligent young man with great potential, he cannot return to Pakistan. In oral evidence it was argued that the fourth appellant's removal would prevent him from pursuing a qualification as a doctor.

(c) The first appellant qualified as a doctor in Pakistan. The fourth appellant's brother left the UK in 2012 and qualified as a doctor in Pakistan. The fourth appellant has sufficient secondary school qualifications to obtain an offer of a place at university to study medicine in the UK. There is no reliable evidence placed before me to suggest that the appellant cannot pursue tertiary education in Pakistan. On his own evidence the fourth appellant speaks Urdu and Punjabi as well as English.

…

(e) What is pled for the fourth appellant does not engage the test of reasonableness. What is pled is that the fourth appellant wants to pursue tertiary education in the UK. He has not started tertiary education. His case is different to that of the third appellant because he is not engaged in education at the moment. He is at a junction in his life where he can embark on tertiary education, either in the UK or in Pakistan, but removal does not interrupt a course of education."

10. In relation to s 117B, the judge said this:

"(a) The appeals for the first and second appellants are pled as if they are dependent upon the appeals of the third and fourth appellants. I am referred to MA (Pakistan), PD (Sri Lanka), and MT & ET. In the simplest of terms, what is pled is that the third and fourth appellants should succeed because they had been in the UK for more than seven years and are immersed in the UK education system. If I allow the appeals for the third and fourth appellants, then the appeals for the first and second appellants must be allowed – but there is a flaw in that argument.

(b) The flaw in the argument is that the third and fourth appellants are adults. There is no reliable evidence of a degree of dependency which would create family life between the first and second appellants and the third and fourth appellants. The third and fourth appellants are gifted, intelligent, young adults capable of independent living. Neither the third nor the fourth appellant is a qualifying child. Notwithstanding the length of time that they have been in the UK, they are not children; they cannot therefore be qualifying children.

(c) The first and second appellants cannot succeed because the third and fourth appellants are not children. Family life within the meaning of article 8 of the 1950 convention is not established for any of these appellants. Even if I am wrong and family life exists between the four appellants, then the respondent's decision is not a disproportionate breach because all four appellants can return to Pakistan together and adhere to each other."

11. It can thus be seen that, in relation to paragraph 276ADE, the judge treated the third appellant as a child, but for the purposes of s 117B, he treated him as an adult. In detail, Mr Forrest's perfected grounds are as follows:

"Errors in law: the FTT erred:-

2.1 FIRST: in concluding that the appeal "…did not engage the test of reasonableness…" (paragraph 11(e) in decision dated 6/8/18) because it has not identified the applicable test for reasonableness since (a) it did not apply the correct test or if it did (b) it gave no reasons why it applied this test:-

(a) Correct test:

- as at the date of the application (17th May 2017) the fourth appellant satisfied two of the requirements in Immigration Rule 276 ADE(1)(iv)

(having lived in the UK for more than 7 years and being under the age of 18). Whether it was reasonable to expect him to remain in the UK (the third requirement of IR 276ADE(1)(iv)) was clearly engaged;

- Section 85(4) NIAA 2002 did not entitle the FTT to take into account matters arising after the date of the decision (such as the fact that the fourth appellant by that time was over 18) because its terms are not consistent with other primary legislation (eg Section 117B(6)(b) NIAA) which deal with whether it would be reasonable to expect a child to leave the UK.

(b) No/insufficient reasons:

- *Esto* (which is denied) the FTT applied the correct test to the assessment of reasonableness, it erred in not stating why it did so. Its reasoning consists of one paragraph (paragraph 11(f)) in which it says the fourth appellant "…has failed to establish that it is unreasonable to expect him to leave the UK…" (even though it earlier (paragraph 11(e)) says he does not "…engage the test of reasonableness…") because he has family in Pakistan who are doctors and he has been educated in the UK.
- That it was necessary to state reasons why it applied the test it did was particularly important because (a) applying the approach it did meant that the best interests of the fourth appellant as a child (as at 17th May 2017) were not considered; and (b) there have been several recent authorities from the Supreme Court (KO (Nigeria) v SSHD [2018] 1 WLR 5273) and the Court of Appeal (MA (Pakistan) v Upper Tribunal [2016] 1 WLR 5093; Runa v SSHD [2020] EWCA Civ 514) about what is reasonable in relation to expecting children to leave the UK (considerations in each of which included discussion of IR276ADE(iv)). It is clear from these that a detailed fact sensitive enquiry is called for in every case.
- The FTT did not carry out such an enquiry. It did not need to if the fourth appellant was not a child – at the relevant time – but since it is not clear why or on what basis it concluded that the test for reasonableness was not engaged, and what the correct test was, it erred in law.

2.2 SECOND: in concluding that the appeal fails for the reasons set out in paragraph 16 (in particular16(b)) because it has treated the fourth appellant as an adult on the basis that as at both the date of the respondent's decision and the date of the Hearing before the FTT, he was over 18 years old:-

- Although such an approach *may* be consistent with Section 117B(6)(b) NIAA 2002, it is inconsistent with the issue of when it becomes reasonable to expect a child to leave the UK.
- There is an inherent inconsistency between the provisions of Section 117B(6)(b) and IR 276ADE(1)(iv): at least the Immigration Rule identifies a time as at which the person is a child in relation to his/her DOB as at the date of the application. There is no equivalent qualification/explanation as to how Section 117B(6)(b) is to be interpreted.

- On that basis, the fourth appellant could be treated as a child for the purposes of IR276ADE(1)(iv) but not Section 117B(6)(b)."

12. In his oral submissions, and in the skeleton arguments supporting them, Mr Forrest expanded at some length on a different matter, that is to say the demands of article 8 outside both the Rules and s 117B. But we must first look at the points actually raised by his grounds.

13. So far as concerns paragraph 276ADE, Mr Lindsay accepted that the third appellant fell to be considered as under the age of 18 years, because he was under that age when the application was made. As we understand it, the same position was taken by the Presenting Officer before Judge Doyle, and it is perfectly clear that Judge Doyle applied the paragraph in that way. He regarded the third appellant as a person under the age of 18, who had spent more than seven years in the United Kingdom. As he said, the only question was whether it was reasonable to expect him to leave the United Kingdom.

14. He analysed the evidence before him on that issue. He reached the conclusion that it did not point to the third appellant's departure being unreasonable. Even if it be argued (and it was not argued, either before us or before the First-tier Tribunal) that at the particular point of application or of the Secretary of State's decision, different factors ought to be taken into account in assessing reasonableness than applied at the date of the hearing before the judge, there was no evidence before the judge supporting the conclusion he sought. It seems to us that for all the reasons the judge gave, the third appellant simply failed to establish his case. The evidence did not show that it was unreasonable to expect him to leave the United Kingdom: on the contrary, the evidence showed that it was wholly reasonable to expect him to leave the United Kingdom.

15. Turning to paragraph 117B(6), the judge declined to enter into the apparently identical question of reasonableness, because that subsection did not, in his view, apply. Although, as we noted at the permission hearing, the treatment of the third appellant as a child for the purposes of the Rules and an adult for the purposes of the Statue might raise an arguable issue, we are satisfied that the judge applied both provisions correctly. The difference between them arises because, whereas the Immigration Rules are the provisions by which the Secretary of State makes decisions on application, s 117B applies, as s 117A makes clear, not to the Secretary of State but to "a court or tribunal". Inevitably, in an immigration appeal, a court or tribunal will be reaching a conclusion later in time than that reached by the Secretary of State by the application of the Immigration Rules. Section 117B is phrased in the present tense. There is no suggestion that what is to be considered is an issue of reasonableness at some date previous to that on which the court or tribunal is applying Part 5A. The judge was therefore right to treat the third appellant as not a child for the purposes of s 117B(6). The third appellant failed under the rules, because the evidence did not support his case; and he failed under the Act because the provisions in question did

not apply to him. The judge made no error in either of those aspects of the appeal.

16. We turn finally to the more general arguments raised by Mr Forrest at the hearing, despite the particularity of his perfected grounds. They are to the effect that the judge erred in not taking a holistic approach to article 8, looking at all the circumstances of the family, determining whether family life existed between the members of the family that were appellants before him, and assessing whether article 8 demanded that they all be allowed to remain in the United Kingdom. Mr Forrest submitted that the allowing of the elder sister's appeal had an impact on whether the other appellants' appeals should have been allowed for these reasons.

17. Quite apart from the point that that argument is not contained in Mr Forrest's grounds of appeal, it faces formidable difficulties because of the way in which the appeals have been conducted throughout. An argument that, despite the provisions of the Statute and the Immigration Rules, article 8 requires that members of a family be allowed to remain in the United Kingdom, needs to be based on a full treatment of the circumstances of all the members of the family, whether in the United Kingdom or not. The First-tier Tribunal was presented with four family members, and told about a fifth. There was evidence about the circumstances of the two younger appellants. There appears to have been no evidence about the circumstances of the parents, other than that they were without means of financial support. There was no evidence of the nature of the relationship between them, beyond the assumptions that can be made arising out of their membership of the same family. In particular, there was no reason for supposing that the parents needed to be with their younger adult children rather than with their older adult child in Pakistan; there was no evidence that difficulties would be caused if the three appellants before us went to Pakistan leaving their capable and highly educated daughter in the United Kingdom for as long as she remained here; and there appears to have been no evidence at all of any personal or other contacts that any members of the family have made during the considerable period of time that they have been in the United Kingdom, other than with educational establishments. Certainly, Mr Forrest pointed to no evidence in any of these categories in making his submissions. Indeed, the absence of evidence from the parents was to an extent underlined by his making an application under Rule 15(2A) to adduce such evidence before us. As Mr Lindsay pointed out, nothing in the new proposed evidence could help to establish an error of law by the judge. We entirely agree.

18. The truth of the matter is that even if the judge had devoted a section of his decision to this issue, which had not featured in evidence or argument before him, he would have been bound to reach the conclusion that there was no basis for saying that any member of the family had article 8 rights going beyond those for which provision had been made by the Statute and the Rules.

19. For the foregoing reasons we find that Judge Doyle made no error in law in reaching his conclusions. There is no basis for interfering with his decision. The appeals of the three appellants before us are dismissed.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 21 September 2021