Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19078/2018

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 1st July 2019	**On 23rd July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

FAKHR-E ALAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Caswell, instructed by Reiss Solicitors
For the Respondent: Mr Diwnycz, HOPO

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Cox made following a hearing at Bradford on 10th January 2019.

Background

2. The appellant is a citizen of Pakistan born on 11th September 1976. He entered the UK on 3rd March 2008 with entry clearance as a student valid to 2009 and subsequently extended until 31st December 2011. He was then granted further leave to remain as a Tier 1 Highly Skilled (Post-Study) Migrant until 20th January 2014. His subsequent application for Tier 1

leave was refused on 3rd July 2014 and his appeal rights became exhausted later that year. He made a further application for Tier 1 leave in August 2015 which was refused and on 16th May 2016 he was served with removal papers.

3. On 6th April 2018 he applied for leave to remain on the basis of his private life in the UK, and it was this refusal which led to the decision before the Immigration Judge.

4. The appellant has three children, the eldest born on 12th April 2006 and the second born on 19th July 2008. They joined him in the UK in May 2011 and a third child was subsequently born here in March 2012.

5. The appellant has obtained an MBA in innovative management and planned to set up a consultancy business in human resource and strategic management. He worked as a manager for a 99p store until 2014 but has not been able to work since.

6. This appeal turned on the issue of the appellant's older two children.

7. The judge set out the relevant case law and said at paragraph 40

> "Clearly it is in the children's best interests that they live with their parents. As such my starting point is that the children should leave the UK with the appellant and their mother."

8. He considered the situation to which they would be returning to in Pakistan and at paragraph 53 said

> "On the totality of the evidence I accept that the children have inevitably established some ties to the UK but in the absence of any cogent evidence to show that their welfare or development is likely to be significantly harmed if they return to Pakistan, I am driven to conclude that the appellant failed to discharge the burden of proof. On balance I find that the children can reasonably be expected to leave the UK. As such they do not meet the requirements of paragraph 276ADE and are not qualifying children for the purposes of Section 117B(6)."

9. On that basis he dismissed the appeal.

The Grounds of Application

10. The appellant sought permission to appeal, in essence, on the grounds that the judge had approached the question of the children's best interests from the wrong perspective, a line of argument developed by Mr Caswell at the hearing.

11. Permission to appeal was initially refused in the First-tier but subsequently granted by Deputy Upper Tribunal Judge Doyle on 2nd May 2019.

Submissions

12. Mr Caswell submitted that the judge had approached the question of whether it was reasonable for the children to return to Pakistan quite wrongly, having concluded that their father should go to Pakistan, it was therefore in the best interests of the children to go there with him. He had therefore diminished their Section 55 rights. He ought to have decided whether their best interests lay in remaining in the UK and, if they did, to then decide whether those best interests were outweighed by any other factors. He had also made an error in stating that the children were not qualifying children when they clearly were.

13. Mr Diwnycz did not seek to defend this determination and did not make any submissions on behalf of the Secretary of State on the merits of this case.

Consideration as to Whether There is a Material Error of Law

14. The judge erred in law in his assessment of the best interests of the children, for the reasons set out above, and made a factual error in stating that they were not qualifying children when they were. His decision is set aside.

Findings and Conclusions

15. I am required to apply Section 117B of the 2002 Act which sets out the public interest considerations applicable to all cases.

16. The maintenance of effective immigration controls is in the public interests. The appellant has not had leave to remain in the UK since 2014 but which is clearly a strong argument in favour of his removal.

17. Section 117B(2) states that it is in the public interests that persons who seek to enter or remain in the UK are able to speak English. The appellant's ability to do so is not disputed.

18. Section 117B(3) states that it is in the public interests and in particular in the interests of the economic wellbeing of the UK that persons who seek to enter or remain in the UK are financially independent. The appellant worked in the UK between 2011 and 2014 after he obtained his MBA as a shop manager. He has not been allowed to work since and the family have been in receipt of public funds. However Mr Diwnycz did not seek to argue that the appellant would not be able to support the family since he is highly qualified with a masters degree in innovative management and hopes to set up his own consultancy business.

19. His status has always been precarious and, in recent years unlawful.

20. The real issue here is paragraph 117B(6) which states that 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 UK.

21. In this case there are two qualifying children now aged 13 and 10. The family come from a Pashtu speaking area, which borders Afghanistan and the schools use either Urdu or Pashtu until a child is 15 or 16 when they are taught in English. It was accepted that whilst the children can speak Pashtu they can neither read nor write in it and do not speak Urdu.

22. The children are doing well in school in the UK. Their school reports are exemplary. The oldest child in particular is at an important stage of his education, having completed two years of secondary education here. His best interests clearly are served by remaining in school in the UK and his education would be significantly disrupted if he had to return to Pakistan. The evidence, which is not disputed, is that he cannot read or write the language in which he would be educated in the Khyber area which is his home province. Whilst he spent his earliest years in Pakistan his formative years have been in the UK. His education would be significantly disrupted by his inability to read and write in the language in which he would be taught. It is overwhelmingly in his best interests that he should not return. The same is true of his younger brother, who is also a qualifying child.

23. The appellant's immigration history is flawed, in that he should have left the UK when he was served with a notice of removal in 2016. On the other hand he did come to the UK lawfully, as did his family, complied with the terms of his student visa, in that he obtained his MBA and subsequently worked as a Tier 1 (Entrepreneur). Accordingly I conclude that the best interests of the qualifying children in this case tip the balance in favour of the appellant being granted leave to remain. Indeed Mr Diwnycz did not seek to argue otherwise.

Decision

24. The original judge erred in law. His decision is set aside. It is remade as follows. The appellant's appeal is allowed.

No anonymity direction is made.

Deborah Taylor

Signed Date 13 July 2019

Deputy Upper Tribunal Judge Taylor