Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/00473/2015**

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U/00476/2015

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 9 December 2019	**On 23 December 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MRS SAMINA KHALID
MR MIAN KHALID MAHMOOD
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr C Holmes of Counsel instructed by Thornhill Solicitors
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are wife and husband. They have a son born in September 1994 and a daughter born in September 1996. On 17 July 2019 Designated Judge McClure of the First-tier Tribunal allowed on human rights grounds the appeal of the appellants' son but dismissed the appeals of the two appellants against the decision of the respondent made on 20 May 2015 to refuse the first appellant's application made on 31 January

2014 for leave to remain on family and private life grounds, with her husband, son and daughter as dependants. Following a hearing on 24 September 2019, Upper Tribunal Judge Pickup and myself found an error of law in the decision of Judge McClure. We consider that the judge had erred by failing to take into account the past appeal history and the fact that in 2015 the judge had failed to apply the guidance given in **MA (Pakistan) [2016] EWCA Civ 705**.

2. Given that few facts were in dispute, we decided to retain the case in the Upper Tribunal.

3. We stated at paragraph 16 that we pointed out that the hearing before Judge McClure had taken place over eighteen months ago in March 2018 and, although not developed in any way before us, the appellants' grounds did contend that the credibility of the first and second appellants concerning re-establishing their lives in Pakistan and the willingness of family and friends was in issue. We concluded that on balance, in order to re-make the decision on the basis of the full facts and in the light of submissions properly focusing on the merit of the appeal, the case was to be adjourned.

4. I heard evidence from the son, Muhammad Waqar Khalid. He confirmed the truth of his witness statement dated 7 January 2019. He explained that he had had an accident with a chainsaw on 14 November 2019. Essentially his left middle ring and little finger had been amputated but then a replantation had been achieved He did not know at this point in time whether he would be able to regain full movement in his hand.

5. Mr Khalid said he still lived with his parents and his sister. During the five days he was in hospital, his parents and sisters were in constant attendance for all the period they were allowed. His parents had been very distressed by the accident. So far as concerns the financial situation of the household, his sister worked, his mother worked from home, his father did voluntary work and gets paid sometimes. He himself had been pursuing studies and sometimes working. Now he was looking to take up full employment when he was sufficiently recovered from his injuries. He was applying for full time work.

6. I then heard submissions. Mr McVeety submitted that the appellants were not dependent on their two adult children. He accepted that theirs was a close family unit and that there were strong emotional ties. The appellants were financially dependent on help from other family in the UK, so they were not financially independent. If they returned to Pakistan they would be able to work. They also had strong cultural connections with Pakistan. They had lived most of their life in Pakistan. They had linguistic ties with Pakistan. They had family there. They had overstayed in the UK and on the findings of the previous judge they had clearly come to the UK with the deliberate intention of staying and not complying with the terms of their visit. It was now accepted that the judge who dealt with the appeal hearing in 2015 had failed to apply the guidance given in **MA**

(Pakistan). However, it remained unclear whether if the judge had taken into account that guidance he would have allowed the appeal. Further on the basis of the guidance given by the Supreme Court in **KO (Nigeria)** [2018] UKSC 53, it was necessary now in the context of remaking the decision to have regard to the real world. Both the children were now adults. One, the daughter, was financially independent. The other was in a position to become financially independent in the near future. There was a strong public interest in the removal of the two appellants. There was no significant medical evidence regarding their own health circumstances. There was no evidence that either child needed their parents' long-term care nor that their parents needed theirs. In short, the appellants could not show that there were unjustifiably harsh consequences and their circumstances were not compelling.

7. Mr Holmes for the appellants submitted that it was important to take account of the significant delay in this case with regard to the principles set out by the House of Lords in **EB (Kosovo)** [2008] UKHL 41. The family had been trying to regularise their position since 2010. The respondent did not decide on their cases until 2014. It was the family that had been taking the initiative to try and resolve proceedings. The delay meant first of all that the family put down roots and secondly that the respondent showed no willingness to enforce removal.

8. A second important factor, submitted Mr Holmes, was that half of this four person family had now been granted leave to remain. First of all, the daughter had been granted leave to remain on 15 March 2017 on the basis that she had now lived in the UK for over half her life and was between the age of 18 and 25. It was this "half of his life" basis which had led Judge McClure to allow the appeal of the son who was a third appellant in the appeals before him. Accordingly, there was now a threatened disruption of the family which would not have taken place if all four appellants had been treated in the same way at the outset- all to go or all to stay. He emphasised that the family had pursued avenues lawfully and there was no suggestion of the family biding time. In total there had been two sets of appeals before the Tribunal system and also judicial review proceedings. These considerations mitigated the degree of weight that should be attached to the public interest. A third important factor was the nature of the family relationship. The two children although now adults were still residing together with their parents. It was clear that there was strong emotional support between the family members and an unusual degree of shared responsibility. If the case was being considered under the Immigration Rules relating to family units, the daughter and son would still be considered to be part of the family because neither were independent.

9. A fourth main point, submitted Mr Holmes, was that the son's accident clearly meant that he was going to have some kind of disability short or long term. It was particularly important that he had his family with him to help him through what was likely to be a difficult period in his life in the immediate future. The strength of the family ties had been demonstrated

in the close care they took of this son when he was in hospital. That is to say, the family's life ties in this case should be seen as ones of particular strength and quality.

10. In relation to the appellants' financial circumstances, although they were not financially independent, it was clear, he submitted, that they had not been a burden on public funds.

My Assessment

11. If I were to ignore the appeal history in this case, I would have no hesitation in concluding that the appellant's appeals should be dismissed. It is clear that the appellants came to the UK in 2006 and had overstayed. It is clear from the judge's unchallenged finding on this issue, that it was a deliberate move on their part to overstay the duration of their visit visas. It is not in dispute that the appellants cannot meet the requirements of the Immigration Rules and can only succeed, if at all, by showing that there are compelling circumstances outside the Rules. Both appellants have spent most of their life in Pakistan. It is clearly the case that they continue to have cultural and linguistic ties with Pakistan. They have family members in Pakistan. On the available evidence, they could look to other family members in the UK to continue to assist them with financial support whilst they were re-adjusting to life in Pakistan. Although the two children have made clear they wish to remain in the United Kingdom, and both now have leave to remain on the basis of the Immigration Rules applying to persons between the ages of 18 and 25 who have lived in the UK more than half their life, they are now both adults. The daughter is working. The son has obtained educational qualifications and is in a position to find work. The medical evidence does not indicate that he would be prevented by his unfortunate chainsaw accident from working in the future. There was no evidence to suggest that he will be permanently unable to work as a result of this injury. It is true that the family enjoys a particularly close relationship and that they live together and give each other strong emotional support. It is also true that there are signs that the family has become significantly integrated into the UK, as can be seen from the daughter and the son's educational activities. The daughter is now in the nursing profession. At the same time, the children are adults and it would not be unduly harsh for them to be separated from their parents.

12. However the above scenario ignores an important dimension to this appeal. This relates to the fact that the appeals of the appellants in May 2015 were refused by the judge without regard to the prevailing policy of the Home Office relating to the parents of children who had been residing in the UK for seven years or more. The policy at that time required powerful reasons to be shown for requiring the children to leave. The respondent's *refusal decision* in relation to the previous appeal clearly did take account of the seven-year qualifying period of the daughter, (as we have noted, it concluded that it would nevertheless be reasonable to expect her to relocate with her parents in Pakistan) but the same cannot

be said for the decision of the judge hearing that appeal, who failed to consider the seven-year issue at all in relation to reasonableness. It was this failure which, following a judicial review application led to the case returning to a different judge of the First-tier Tribunal (Judge McClure) who failed in turn to consider the potential significance of the previous failure by the judge to apply the guidance given in **MA (Pakistan)**, guidance which may well have been to the benefit of the appellants.

13. As was stated by Upper Tribunal Judge Pickup and myself in the error of law decision, it is by no means clear that the appeal in relation to the daughter would or should have succeeded back in 2015. It was not practical for the Upper Tribunal, several years later, to go back and reconstruct exactly how the judge should have viewed the facts and gone about applying **MA (Pakistan)** criteria to them, since the relevant assessment would have needed to traverse a diverse range of considerations However, paying regard to the real-world situation, the fact of the matter is that the respondent did subsequently grant leave to remain to the daughter. Further the fact of the matter is that Judge McClure concluded that the son should also benefit from leave to remain and the respondent has not sought to challenge that decision. In my judgment these developments indicate that the respondent has accepted de facto that powerful reasons existed for granting leave to two out of four members of the family. In light of those developments it is appropriate to consider with hindsight therefore that there was a viable basis for applying **MA (Pakistan)** criteria in favour of the appellants in 2015, namely the fact that the daughter had been in the UK for nine years. She was by then clearly well integrated into UK society.

14. A further factor leading me to consider it realistic to have expected the parents to benefit from the seven-year policy in 2015 is the fact that the respondent did not make any decision in their case until March 2014 (the appellants had applied for leave to remain on 13 April 2010). The complex procedural history of these appeals featured inter alia judicial review proceedings and then the granting of a right of appeal leading to the dismissal by the First-tier Tribunal of the appeals on 25 August 2015.

15. The core question I have to address is whether or not the appellants have demonstrated compelling circumstances outside the Immigration Rules. The question I have to ask is whether their being required to leave now would create unjustifiably harsh consequences. However, I have to ask this question by striking a fair balance between the appellants' circumstances and the weight of the public interest appropriate to this case. As was noted in **Hesham Ali** [2016] UKSC 60, the public interest is not a fixity and in this case, the failure on the part of the First tier Tribunal judge in 2015 to apply applicable law and policy and the subsequent action by the respondent in deciding to grant leave to remain to the daughter and, most recently, the decision of Judge McClure to allow the appeal of the son, are factors that taken together reduce somewhat the

public interest in removal of the remaining two appellants. Whilst as I have said, taking their facts of the family life circumstances in isolation, the appellants would not be able to show such circumstances (in part because their action in defying immigration controls by becoming overstayers in 2006 or shortly thereafter and that they do not meet the requirements of the Immigration Rules, added to the public interest in removal), I consider that when taking into account the appeal history and the significant change made by the respondent himself to the status of the two children of this family to seek to remove the two appellants now would be disproportionate and have unjustifiably harsh consequences. For the above reasons, the appellants' appeals are allowed.

No anonymity direction is made.

Signed: Date: 18 December 2019

H H Storey

Dr H H Storey
Judge of the Upper Tribunal