



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05711/2015

THE IMMIGRATION ACTS

Heard at Field House
On 3rd August 2017

Decision & Reasons Promulgated
On 16th August 2017

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

NAEEM MUHAMMAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Jarvis, Home Office Presenting Officer
For the Respondent: Mr J Plowright of Counsel

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Munonyedi promulgated on 31 October 2016, in which the Respondent's appeal against the decision to refuse his application for leave to remain in the United Kingdom as a partner/parent/on the basis of private and family life dated 10 September 2015 was allowed. For ease I continue to refer to the parties as they were before the First-tier

Tribunal, with Mr Muhammad as the Appellant and the Secretary of State as the Respondent.

2. I found an error of law in Judge Munonyedi's decision promulgated on 31 October 2016 following the first hearing in this appeal on 25 May 2017. The background to this appeal is set out in the error of law decision contained in the annex and will not be repeated here. The re-making of the appeal on article 8 grounds follows.

The appeal

Applicable law

3. It is accepted in the present case that the Appellant cannot meet the requirements of the Immigration Rules for a grant of leave to remain, such that those provisions are not set out here. When considering an individual's right to respect for private and family life in accordance with Article 8, then the usual step-by-step approach set on in **Razgar [2004] UKHL 27**, applies as follows:
 - (i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
 - (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
 - (iii) If so, is such interference in accordance with the law?
 - (iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
If so, is such interference proportionate to the legitimate public ends sought to be achieved?
4. In making the proportionality assessment under Article 8, the best interests of the child, in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009, must be the primary consideration, as confirmed in the judgment of Lady Hale to that effect in paragraph 33 of **ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4**. She stated that "This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations" such as the need to maintain firm and fair immigration control and an individual's immigration history. The best interests of the child have been considered further in many cases, including, inter alia, by the Supreme Court in **Zoumbas v Secretary of State for the Home Department [2013] UKSC 74** and by the Upper Tribunal in **EA (Article 8 - best interests of child) Nigeria [2011] UKUT 00315 (IAC)**; **MK (Best Interests of the child) [2011] UKUT 00475** and **Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00107 (IAC)**.
5. The best interests of the child were considered by the Court of Appeal in **EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874**, wherein Lord Justice Clarke set out the factors relevant to an assessment of the best interests of children in paragraph 35 as follows:
 - (i) age;

- (ii) the length of time that they have been here;
- (iii) how long they have been in education;
- (iv) what stage the education has reached;
- (v) to what extent they have become distanced from country to which it is proposed that they return;
- (vi) how renewable their connection with it may be;
- (vii) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and
- (viii) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British Citizens.

6. Lord Justice Clarke went on in paragraphs 36 and 37 to state:

“[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 interest 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 interest 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 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-hypothesi, 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.”

7. When considering the public interest as part of the assessment of proportionality for the purposes of Article 8 of the European Convention on Human Rights, I am required by section 117A of the Nationality, Immigration and Asylum Act 2002 (introduced by section 19 of the Immigration Act 2014) to have regard in all cases to the considerations listed in section 117B of the same act. Section 117B provides as follows:

- (1) The maintenance of effective immigration control is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
 - (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
 - (a) a private life, or

- (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
 - (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
 - (6) In the case of a person who is not liable to deportation, the public interest does not require a 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.
8. The Court of Appeal considered the application of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 in **MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705**, holding that when considering the question of reasonableness, wider public interest considerations must be taken into account. The fact that a child has been in the United Kingdom for seven years would need to be given significant weight in the proportionality exercise, first because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes a starting point the leave should be granted unless there were powerful reasons to the contrary. The best interests of a child must be considered, with the same principles applying as those set out in **EV (Philippines)**, but are not determinative of the question of reasonableness.

Explanation for Refusal

9. The Respondent refused the Appellant's application on the basis that he did not meet the requirements of the Immigration Rules and there were no exceptional circumstances for a grant of leave to remain outside of the Immigration Rules. The Respondent took into account the best interests of the Appellant's eldest child pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009 and considered that the family could return to Pakistan together, the country of which they are all nationals and where they could exercise full rights as citizens, where their child would be able to enter education and where there was nothing to suggest that the family could not provide for his safety and welfare.

The Appeal

10. The Appellant appeals on the grounds that his removal from the United Kingdom would breach his right to respect for private and family life under Article 8 of the European Convention on Human Rights and that his removal would be contrary to the best interests of his eldest child which had not been fully considered under section 55 of the Borders, Citizenship and Immigration Act 2009.

The Written Statements

11. In his written statement signed and dated 24 August 2016, the Appellant set out his immigration history and described his relationship with his wife and son. His son's mother tongue is English and he has no experience of memory of living in Pakistan to the extent that he feels British in every way. It was in his son's best interests to

remain in the United Kingdom, where he is excelling at school and in circumstances where his removal would have a detrimental impact on his education as well as on his private life in the United Kingdom. The written statement from Bushra Khalid, also dated 24 August 2016, reiterated that it was in her son's best interests for the Appellant to remain in the United Kingdom as part of the family unit.

12. In his written statement signed and dated 24 July 2017, the Appellant expanded slightly upon his first statement, reiterating his son's best interests to remain in the United Kingdom with both parents, with particularly reference to his success at school, being at a critical stage of his education, the many good friends in the United Kingdom he has, taking part in regular after-school activities and his lack of experience of living in Pakistan. Again, a supporting statement was made by Bushra Khalid, dated 24th of July 2017.

The Oral Evidence

13. The Appellant attended the oral hearing, adopted his written statements dated 24 August 2016 and 24 July 2017 and gave oral evidence through a court-appointed Urdu interpreter. He gave evidence as to his family in Pakistan and his wife's family in the United Kingdom and elsewhere. He stated that his eldest son mostly speaks English but also Urdu and that he has never left the United Kingdom. The only reason given initially as to why he could not return to Pakistan together with his family was that his wife and children are living in the United Kingdom and do not want him to go.
14. In cross-examination the Appellant confirmed that he had never had any lawful leave to remain in the United Kingdom since his arrival in 1999 and that when he married his wife in 2007 she was fully aware that he was here unlawfully. It was an arranged marriage between cousins and not for the purposes of obtaining an immigration benefit. When asked if he could stay temporarily with his parents on return to Pakistan, the Appellant stated that he had been in the United Kingdom for about 18 years, had almost forgotten Pakistan and his children had no familiarity with the country. He then proceeded to claim that there was an ongoing property dispute with maternal family members in Pakistan, which formed the basis of his original asylum claim. That claim was refused and dismissed on appeal, although he maintained that for the same reasons he remains at risk on return to Pakistan. No direct answer was given to the question, which was repeated, as to whether he would be able to stay with his parents on return to Pakistan at least temporarily.
15. The Appellant claimed that his wife had been absent from Pakistan for a long period of time, as he had, and the whole family would not be able to adjust to life on return there. Further, his eldest son was very attached to his maternal grandparents in the United Kingdom and did not want to leave them. If the Appellant had to return to Pakistan alone to make an application for entry clearance, he stated that his wife would not be able to manage on her own given their young children and her employment. His wife's family would not be able to assist because they are all busy with their own lives.

16. In response to questions I asked, the Appellant stated that his eldest son was performing very well in school in the United Kingdom and would find it difficult to adjust to education in Pakistan in a new language and a new culture. He confirmed that his son has no special needs or medical conditions. If the Appellant was unsuccessful in his appeal, he did not think that his family would return to Pakistan with him.
17. In re-examination, the Appellant provided details as to the employment or otherwise of his wife's family members.
18. The Appellant's wife, Bushra Khalid attended the oral hearing, adopted her written statements dated 24 August 2016 and 24 July 2017 and gave oral evidence through a court-appointed Urdu interpreter. She stated that she had not returned to Pakistan since leaving there in 2001 for Italy has no family home in Pakistan and it would be very hard for her to return there. She is married and has children in the United Kingdom who are all used to the system here and her son is doing very well in school. Ms Khalid could not envisage the family being separated.
19. Ms Khalid is an employed administrator earning approximately £900 a month net.
20. In cross-examination, she confirmed that her and her elder son were resident in the United Kingdom lawfully pursuant to an EA residence card as the extended family members of her father, an Italian national exercising treaty rights in the United Kingdom. She also confirmed that her marriage was an arranged one at a time when she knew that the Appellant was in the United Kingdom unlawfully. Ms Khalid was aware of the Appellant's claim about a property dispute in Pakistan from the Appellant and from her mother-in-law, but nothing had been said about it recently.
21. Ms Khalid was asked if the family could stay with the Appellant's parents temporarily on return to Pakistan to which she responded that the Appellant could not survive in Pakistan as he has no source of income there and she is unfamiliar with the lifestyle that country given her long absence. She stated that if the Appellant were removed alone, her son would not be able to live without his father and her parents would not be able to assist with any childcare because of their age.

Closing Submissions

22. In closing on behalf of the Respondent, it was submitted that the Appellant could not meet the requirements of the Immigration Rules for a grant of leave to remain on the basis of private and family life. The matter fell to be considered outside of the rules under Article 8 of the European Convention on Human Rights and the considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002 were relevant to the balancing exercise required. As to these factors, the Appellant does not speak English; he is not financially independent; his time in the United Kingdom has been entirely unlawful; his relationships have been developed at a time when he had no lawful leave to remain and until relatively recently he did little to regularise his immigration status following refusal of his asylum claim. The

Appellant has a very poor immigration history and has shown a very serious disregard for immigration control.

23. The Home Office Presenting Officer submitted that section 117B(6) of the Nationality Immigration and Asylum Act 2002 was not applicable to the facts of the present case because the qualifying child, the Appellant's eldest son, had lawful leave to remain pursuant to an EEA Residence Card and there was therefore no expectation of him leaving the United Kingdom where he could stay with his mother, who also has a lawful basis for remaining here. This is different to the factual scenario in MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705 where no family members had any leave to remain in the United Kingdom and the outcome of all of their futures was dependent on the private life application of a qualifying child. It was submitted that some meaning has been given to the word "expect" in section 117B(6) to avoid an artificial consideration of a qualifying child leaving the United Kingdom where there is no expectation that they would do so.
24. In any event, it was submitted that if section 117B(6) was found to apply in the present case, that it was reasonable to expect the Appellant's eldest child to leave the United Kingdom. Although it was accepted that it was primarily in his best interests to remain with both parents and as a secondary point to maintain the status quo by remaining in the United Kingdom, giving weight to his seven years' residence here, it was still in any event reasonable for the family to return together, taking into account the immigration history of the Appellant and that his relationships were formed in the United Kingdom at a time when he was here unlawfully. An adverse effect on the children was acknowledged but it was not accepted to be so significant so as to make it unreasonable or disproportionate. The eldest child is not in a crucial phase of his education, not too old to adapt and has been brought up within Pakistani culture with his family. There is nothing to suggest that extended family members would not assist on return to Pakistan.
25. At the hearing, the Appellant raised concerns as to whether he would be at risk on return to Pakistan but this was not raised in his notice of appeal and there has been no recent protection claim by him. It was submitted that the Appellant was merely perpetuating an exaggerated or untruthful claim which was last dismissed in 2003.
26. In closing on behalf of the Appellant, Counsel firstly accepted that the Appellant cannot meet the requirements of the Immigration Rules and submitted that the key issue was whether it was reasonable to expect the Appellant's eldest child to leave the United Kingdom and if not his appeal should be allowed under section 117B(6) of the Nationality, Immigration and Asylum Act 2002. It was accepted that the Appellant's immigration history was poor, having been here illegally since 1999 with unsuccessful applications for leave to remain on a variety of bases. However, it was not very bad and there were no aggravating circumstances and in accordance with the Respondent's guidance, such that it would be inappropriate to separate the Appellant from his children without more.

27. Counsel for the Appellant submitted that it was clearly in the best interests of the eldest child to reside with both parents in the United Kingdom given that he has never been to Pakistan, has extended family support in the United Kingdom and there are no strong reasons in the present case to justify the removal of the child from the United Kingdom.

Findings and reasons

28. The sole issue in this appeal is whether the Appellant's removal would be contrary to his right to respect for private and family life under Article 8 of the European Convention on Human Rights. He has established family life in the United Kingdom, consisting of his wife, whom he married (in an Islamic ceremony) on 21 October 2007 and now two children, born on 30 October 2009 and 13 June 2017. The Appellant's family are all Pakistani nationals and his wife and eldest son are currently residing in United Kingdom with benefit of an EEA Residence Card as family members of the Appellant's father-in-law, an Italian national exercising treaty rights in the United Kingdom. The Appellant has been living in the United Kingdom since 1999 and it is accepted that during that time he has built up a degree of private life here as well, although no specific or substantive aspects of private life have been relied upon in the context of this appeal.
29. The Appellant's removal from the United Kingdom would be an interference with his private and family life established here and it is his and his wife's evidence that if this appeal is unsuccessful, she and the children would not return to Pakistan with him. The Appellant's removal would however be in accordance with the law and in pursuit of the legitimate aim of immigration control. The final question is whether the Appellant's removal would be a disproportionate interference with his right to respect for private and family life. When considering this, I take as the starting point the best interests of the children involved.
30. The Appellant's eldest son is seven years old, a Pakistani national who speaks both English and Urdu and who is doing well in full-time primary education in the United Kingdom. He was born in the United Kingdom and has spent all of his life here so far, without having had any direct personal experience of life in Pakistan. He has established friendships and some limited degree of private life appropriate to his age in the United Kingdom. As is generally the case, it is in his best interests to remain with both parents. The main factor supporting a view that it is in his best interests to remain in the United Kingdom rather than moving to Pakistan, is that it maintains the status quo of his living arrangements to date and allows weight to be attached to the length of his residence here. However, it is only marginally in his best interests to remain in the United Kingdom as opposed to being with his family in Pakistan for the following reasons. The Appellant's eldest son is not at a significant or critical stage of his education, he speaks Urdu and would be able to continue his education in Pakistan, enjoying the full benefits of his citizenship there. Given his relatively young age, with the support of his immediate family and extended family in Pakistan, there is no reason as to why he could not adapt to life in Pakistan, a culture with which he has some familiarity from his immediate family

members and where he could enjoy relationships with extended family members. The Appellant's eldest son has no medical or special needs, nor is there any reason to suggest that his health and welfare would not be provided for by his family in Pakistan.

31. The Appellant's youngest son is less than two months old and his focus is entirely on his immediate family such that his best interests are only to remain with both parents. Given his age he has not established any independent private life and no factors have been identified which would suggest that it is in his best interests to be either in the United Kingdom or in Pakistan.
32. I do not accept the submission on behalf of the Respondent that section 117B(6) of the Nationality, Immigration and Asylum Act 2002 has no application to the present appeal because the Appellant's wife and eldest son are lawfully in the United Kingdom and as such would not be expected to leave. There is nothing to suggest, either in the use of the word "expect" or otherwise, that section 117B(6) only applies to cases where no family members have a right to remain in the United Kingdom lawfully and there is no authority to support that proposition either. The question of whether it is reasonable to expect a qualifying child to leave the United Kingdom can be undertaken whether or not in fact it is likely that they would do so even if a parent were to be removed.
33. In accordance with MA (Pakistan), I consider the reasonableness of expecting the Appellant's eldest child, the only qualifying child in this case, to leave the United Kingdom taking into account his best interests as above, the fact that he has resided in the United Kingdom for over seven years and the wider public interest considerations. As to the latter, as is clear from the other parts of section 117B(6), the maintenance of immigration control is in the public interest and it is also in the public interest that persons who wish to remain here are able to speak English and are self-sufficient. Further, little weight should be given to private or family life established at a time a person is in the United Kingdom unlawfully.
34. The Appellant has been in the United Kingdom unlawfully since 1999 and has made a variety of applications for leave to remain which have all been unsuccessful. On any view, he has a very bad immigration history. The Appellant married and established family life here in the full knowledge that he had no right to remain, a fact which his wife also knew at the time of their Islamic marriage. The Appellant used an interpreter to give oral evidence in his appeal and there was no other indication that he could speak English, nor was there anything to suggest that he was self-sufficient in the United Kingdom - to the contrary, he had previously claimed to be dependent on his father-in-law.
35. The Appellant is a Pakistani national who has spent the majority of his life in Pakistan and who has immediate family members there. He would be returning to a country where he still speaks the language and where there is no reason why he could not reintegrate and use the benefits of his citizenship there to obtain

employment and accommodation. The Appellant's wife is also a Pakistani national who still speaks Urdu and although she has no immediate family members remaining in Pakistan, she has spent approximately half of her life there and no reasons have been put forward as to why she would not be able to reintegrate on return.

36. The Appellant claimed only in oral evidence before me that he was at risk on return to Pakistan because of a family land dispute, which was the basis for his original asylum claim after entering the United Kingdom. There has been no such representation to the Respondent since his appeal against refusal of his asylum claim was dismissed in 2003, nor has such a claim been included in the grounds of appeal or any written or oral evidence prior to the hearing on 3 August 2017. The Appellant has failed to establish that there is any risk on return to Pakistan to him and I find the very late claims made in this regard to be an attempt merely to bolster an otherwise weak claim for leave to remain on Article 8 grounds.
37. In all of the circumstances, I do not find that it would be unreasonable to expect the Appellant's eldest son to return with his parents and younger sibling to Pakistan such that section 117B(6) of the Nationality, Immigration and Asylum Act 2002 does not assist the Appellant in this appeal. In summary, the Appellant's eldest son is at an age where it would be reasonable for him to adapt to life in Pakistan with the support of his parents; where he can speak the language; where he could enjoy the benefits of his citizenship and where he can continue in his education. The strong reasons against the Appellant being granted leave to remain in the United Kingdom on human rights grounds in this case where his eldest son has been resident in the United Kingdom for over seven years, are the Appellant's very bad immigration history, his lack of English language ability, the fact that he is not self-sufficient and the fact that family life has been established while he was in the United Kingdom unlawfully, as well as that it is only marginally in the Appellant's eldest son's best interests to remain in the United Kingdom.
38. For the same reasons set out above, the Appellant's removal from the United Kingdom would not be a disproportionate interference with his right to respect for private and family life under Article 8 of the European Convention on Human Rights. His appeal is therefore dismissed on human rights grounds.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and re-make it as follows: Appeal dismissed on human rights grounds.

No anonymity direction is made.

Signed 

Date 7th August 2017

Upper Tribunal Judge Jackson

ANNEX – ERROR OF LAW DECISION



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU057112015

THE IMMIGRATION ACTS

**Heard at Field House
On 25th May 2017**

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**NAEEM MUHAMMAD
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr P Armstrong, Home Office Presenting Officer
For the Respondent: Mr R Singer of Counsel

DECISION AND REASONS

39. The Appellant appeals against the decision of First-tier Tribunal Judge Munonyedi promulgated on 31 October 2016, in which the Respondent's appeal against the decision to refuse his application for leave to remain in the United Kingdom as a

partner/parent/on the basis of private and family life dated 10 September 2015 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Muhammad as the Appellant and the Secretary of State as the Respondent.

40. The Appellant is a national of Pakistan, born on 12 December 1976 who claims to have first arrived in the United Kingdom on 17 July 1999. He claimed asylum on 28 July 2000 which was refused by the Respondent on 1 February 2001 and his appeal against that refusal was unsuccessful. The Appellant next made an application for an EEA Residence Card on 27 June 2013 which was refused on 9 November 2013 and a subsequent similar application was also refused on 26 March 2014. The Appellant appealed against the Respondent's refusal to issue an EEA Residence Card, which was allowed by First-tier Tribunal Judge Shamash to the limited extent that the matter should be remitted to the Respondent to consider Article 8. That decision was set aside by Deputy Upper Tribunal Judge Woodcraft on the basis that the Appellant was required to make a freestanding Article 8 claim for the Respondent to consider such. That application was made on 24 June 2015 relying on the Appellant's relationship with his wife and child.
41. The Respondent refused the application on 10 September 2015 under Appendix FM of the Immigration Rules both under the partner and parent route. That was on the basis that the Appellant's wife did not have settled status in the United Kingdom, nor was she a British citizen or in the United Kingdom with refugee leave or humanitarian protection, and because the Appellant did not have sole responsibility for his child. The application was further refused on private life grounds under paragraph 276ADE of the Immigration Rules on the basis that the Appellant had not been living in the United Kingdom for a sufficiently long period and there would no be very significant obstacles to his reintegration into Pakistan if required to leave the United Kingdom.
42. The Respondent further considered whether there were any exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules but found there were none. In particular, the Respondent considered the best interests of the Appellant's child, who was at the time of the decision six years old and had lived in the United Kingdom since birth. The Appellant's child is also a national of Pakistan and would be able to enjoy his full rights as a citizen if he accompanied the Appellant there, including being able to continue his education and there was nothing to suggest that his safety or welfare could not be provided for there. The Appellant's wife is also a national of Pakistan and they could all return there together is a family unit.
43. Judge Munonyedi allowed the appeal on 31 October 2016 on human rights grounds under Article 8 of the European Convention on Human Rights. The Judge referred to the unusual circumstances of this case and found that having taken into account the public interest considerations set out in section 117A and 117B of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"), the interference to the family

and private life of the Appellant, his wife and child would be disproportionate to the legitimate aim of maintaining effective immigration control in this case.

The appeal

44. The Respondent appeals on three grounds, first, that the Judge had failed to analyse the private and family life rights of the Appellant through the lens of the Immigration Rules and in particular fail to recognise that the Appellant's child had not been in the United Kingdom for seven years as at the date of the application and therefore could not meet the requirements set out in Appendix FM, paragraph EX.1(i)(cc). Secondly, although the Judge referred in her decision to the Appellant being dependent on his father-in-law and on his wife, she failed to apply the public interest provision in section 117B(3) of the 2002 Act. Thirdly, that the Judge had failed to apply section 117B(4) of the 2002 Act, that little weight should be attached to family life established when a person is in the United Kingdom unlawfully.
45. Permission to appeal was granted by Judge Grant-Hutchinson on 11 April 2017 on all grounds.
46. At the hearing, the Home Office Presenting Officer relied on the written grounds of appeal and expanded upon them. In particular, it was submitted that the Judge had failed to take into account the public interest factors in section 117B(1), (3) and (4) of the 2002 Act, by failing to attach weight to the Appellant's poor immigration history and that his relationship with his wife commenced at a time when he was in the United Kingdom unlawfully, his dependency on his father-in-law and the fact that he is not fluent in English. Further, the Judge had failed to attach weight to the significance of the Appellant's child being under the age of seven years as at the date of hearing and therefore not a qualifying child and not able to meet the Immigration Rules for that reason. There was in any event no consideration of the reasonableness of the child leaving the United Kingdom with the Appellant.
47. The Appellant's wife and child are lawfully in the United Kingdom with the benefit of an EEA Residence Card, valid to 2019, which was issued on the basis that they were dependent family members of the Appellant's father-in-law, an Italian national exercising treaty rights in United Kingdom. The Appellant's wife and child are Pakistani nationals and would have a choice as to whether to remain in United Kingdom without the Appellant, or to return to Pakistan with him as a family unit. Although the provisions of section 117A and 117B of the 2002 Act were cited by Judge Munonyedi in her decision, there were no findings of reasons given which showed that these were actually taken into account in the proportionality assessment under Article 8. Further, there were no findings as to the best interests of the child in this case.
48. Counsel for the Appellant submitted that when the decision was read as a whole and in the context the findings made throughout the decision, the conclusions reached in paragraphs 43 and 44 of the decision that the Appellant's removal would be a disproportionate interference with his right to respect for private and family life were sustainable and did not disclose any error of law. The Judge correctly directed

herself as to the factors to consider in application outside of the Immigration Rules and noted the unusual position of the Appellant and compelling features in this case. She correctly directed herself as to the public interest requirements in section 117B of the 2002 Act and the Respondent's grounds of challenge on this point amount to a disagreement of form rather than substance. It is clear from references throughout the decision that the Judge was aware of the Appellant's dependence on his father-in-law and relied on the undisputed evidence of family life and the best interests of the child.

49. In any event, it was submitted that any errors were not material because it was inevitable that a First-tier Tribunal would find that it was in the best interests of the Appellant's child to remain in the United Kingdom with both of his parents and without disruption to his education or relationships with wider family members. It would also be inevitable that it was not in his best interests to remain in United Kingdom without the Appellant. It was further submitted on the particular facts of this case that the same conclusion would be reached under section 117B(6) of the 2002 Act, that it would be unreasonable for the Appellant's child to leave the United Kingdom. In light of such inevitable findings, the only conclusion that could have been reached on this appeal would be that the Appellant's removal from the United Kingdom would be a disproportionate interference with his right to respect for private and family life contrary to Article 8 of the European Convention on Human Rights.

Findings and reasons

50. I find that there is a material error of law in the decision of Judge Munonyedi promulgated on 31 October 2016, in that there was an almost complete failure to make any relevant findings for the determination of the appeal and no proper reasons were given for the overall conclusion to allow the appeal. The Judge set out the evidence on behalf of the Appellant in the appeal in paragraphs 11 to 14 and then went on to set out in caselaw for consideration of the appeal outside of the Immigration Rules under Article 8 and gave reasons for doing so.
51. It was found that the Appellant was in an unusual position because he was dependent on a person who was herself dependent on an EEA national exercising treaty rights in United Kingdom, but could not at the relevant time establish his own dependency on an EEA national. In paragraph 24, it was Judge Munonyedi's view that if the Appellant were to return to Pakistan, he would be able to demonstrate that he was an extended family member of his father-in-law's household, therefore a dependent of an EEA national and the case of **Chikwamba v Secretary of State for the Home Department [2008] UKHL 40** therefore had application to him as he would be able to successfully seek entry clearance to return to the United Kingdom. That is an error of law as it only considers one part of the requirements for the issue of an EEA family permit to a person such as the Appellant as an extended family member under the Immigration (European Economic Area) Regulations 2006 and failed entirely to take into account that the issue of such a family permit would require continuing dependency from Pakistan and is in any event a matter of

discretion for the Respondent to issue such a permit in all of the circumstances. It is far from established in these circumstances that the Appellant would be able to return to the United Kingdom as found by Judge Munonyedi.

52. Judge Munonyedi then goes on to set out the requirements of section 117A and 117B of the 2002 Act, the five stage test for determining Article 8 cases set out in **Razgar [2004] UKHL 27**, the duty to consider the best interests of the child in section 55 of the Borders, Citizenship and Immigration 2009 and caselaw as to the same. Within the lengthy recitation of these provisions and authority, there is only one finding of fact, in paragraph 30, that the Appellant has established a family life in the United Kingdom and his removal to Pakistan would interfere without family life. Although on a very generous view it may be inferred from the case law cited that the general assumptions as to the best interests of a child contain therein apply in this appeal, there are no express findings at all in relation to the Appellant's child or his best interests.
53. In paragraphs 43 to 45, there is a bare statement that having taken into account the public interest consideration set out in section 117A and 117B of the 2002 Act, the Appellant's removal would be a disproportionate interference to his and his wife and child's right to respect of private and family life. There are no express findings whatsoever on the factors taken into account as part of the balancing exercise for Article 8 and no reference at all to any of the specific public interest considerations which would support the Appellant's removal to Pakistan. It is further not clear as to whether the Judge has considered the case on the basis that the Appellant's wife and child would remain in the United Kingdom or whether it would be reasonable for them to return to Pakistan with the Appellant. There are simply no findings either way.
54. This is not a case in which it could be said that the Judge had appropriately directed herself and should be given the benefit of the doubt that those directions have been applied in reaching the decision. There is not a difficulty in this case with form over substance but an almost complete failure to make any relevant findings of fact or give any reasons for the decision reached. I do not accept the submissions on behalf of the Appellant that such errors are immaterial in this case nor that the overall conclusions would inevitably be the same even if all of the relevant factors were taken into account. This is particularly so when there was only very limited evidence before the First-tier Tribunal as to the best interests of the child such that Counsel could only make general assumptions based on normal principles rather than any analysis of the circumstances of the child in this case. Further, as confirmed by the Court of Appeal in **MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705**, the best interests assessment does not automatically resolve the reasonableness of return and the concept of reasonableness requires regard to be had to the conduct of the applicant and any other matters relevant to the public interest.
55. For these reasons, the decision of the First-tier Tribunal must be set aside as it involves the making of material errors of law and the appeal must be re-determined.

56. There is a further error of law in the First-tier Tribunal's decision in this case, which was accepted by Counsel for the Appellant at the hearing. It is not one which was expressly raised by the Respondent in their grounds of appeal however it comes within the general failure to deal with the factors set out in section 117B of the 2002 Act, albeit through no fault of Judge Munonyedi in this case. Although the decision under appeal was signed off by the Judge on 9 October 2016, at a time when the Appellant's child was still six years old, there was a delay in the promulgation of the decision until 31 October 2016. By the date of promulgation, the Appellant's child had reached seven years of age and had become a qualifying child having been in the United Kingdom since birth, such that section 117B(6) of the 2002 Act should have been considered as at the date of promulgation. In accordance with the Court of Appeal decision in **NA (Libya) v Secretary of State for the Home Department [2017] EWCA Civ 143**, a failure to take into account matters or evidence such as country guidance decisions as at the date of promulgation is an error of law even if the Judges not, in fact, aware that the decision has not yet been promulgated. When the appeal is re-determined, section 117B of the 2002 Act will need to be considered to determine whether it would be reasonable for the Appellant's child to go with him to Pakistan.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

No anonymity direction is made.

Directions to the parties

1. **This appeal is adjourned to an oral hearing, to be relisted before UTJ Jackson to re-determine the appeal on human rights grounds.**
2. **Any further evidence relied upon by the parties shall be filed with the Upper Tribunal and served upon the other party no later than 14 days prior to the hearing of the appeal.**
3. **The Appellant is to confirm no later than 14 days prior to the hearing of the appeal which witnesses are to be called to give oral evidence and what, if any, interpreters are required.**

Directions to Administration

1. **The appeal is adjourned, to be relisted for an oral hearing before UTJ Jackson on the first available date after 26 June 2017.**
2. **The time estimate for the hearing is 1.5 hours.**

- 3. An Urdu interpreter is to be provisionally booked for the hearing on the assumption that the Appellant's wife is to give evidence - subject to confirmation from the Appellant of the need for an interpreter and in what language.**

Signed



Date

25th May 2017

Upper Tribunal Judge Jackson