



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

Appeal Numbers: HU/14366/2015
HU/14371/2015
HU/14364/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 31 January 2018**

**Decision & Reasons Promulgated
On 9 February 2018**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Kuljit [K]
Palwinder [S]
[L K]

(ANONYMITY ORDER NOT MADE)

Appellants

And

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellants: Mr Z Malik, of Counsel, instructed by Clyde Solicitors Ltd.

For the Respondent: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and background facts:

1. The appellants have been granted permission to appeal the decision of Judge of the First-tier Tribunal Coll (hereafter the "judge") who, following a hearing on 28 March 2017, dismissed their appeals against a decision of the respondent of 8 December 2015 by which she refused their applications of 19 August 2015 for leave to remain on the basis of their rights to their family and private lives under Article 8 of the 1950

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

2. The appellants are nationals of India. The first appellant, born on [] 1979, is the wife of the second appellant, born on [] 1975. They are the parents of the third appellant, born on [] 2002. The appellants arrived in the United Kingdom on 10 August 2009, aged (respectively) thirty years, thirty-four years and seven-and-a-half years.
3. The first appellant arrived with leave as a student, the second and third appellants with leave as her dependants, valid until 31 May 2013. On 28 May 2013, the first appellant applied for further leave as a student with the second and third appellants as her dependants. The application was refused because there were insufficient funds for the fee to be taken and the application was therefore invalid. The appellants re-applied on 22 June 2013, by which time their leave had expired. Their applications were refused. They did not have a right of appeal, although they did appeal. Their appeals were dismissed by the First-tier Tribunal in a determination promulgated on 16 March 2015. On 18 May 2015, permission to appeal was refused by the First-tier Tribunal. On 15 July 2015, permission to appeal was refused by the Upper Tribunal. A month later, on 19 August 2015, they made the application which was the subject of the appeal before Judge Coll. Two months after the applications were made, on 28 October 2015, a son was born to the first and second appellants. He is not a party to this appeal, although the judge (correctly) considered the circumstances of the entire family, including the son, in assessing the Article 8 claim outside the Rules.
4. The appellants had lived in the United Kingdom for six years as at the date of their applications (19 August 2015) and six years three months as at date of the decision (8 December 2015). However, by the date of the hearing (28 March 2017), they had lived in the United Kingdom for seven years seven months. This meant that it became necessary for the judge to consider s.117B(6) of the Nationality, Immigration and Asylum Act 2002 and the principle in R (MA (Pakistan) and others) v SSHD [2016] EWCA Civ 705, that the fact that a child has been in the United Kingdom for seven years or more should be given significant weight in the proportionality exercise, in assessing the Article 8 claims outside the Rules.
5. In MA (Pakistan), the Court of Appeal said that it was established as a starting point that leave should be granted unless there were powerful reasons to the contrary (para 49). However, at para 44, the Court of Appeal made it clear that it is not the case that leave to remain should be refused only in exceptional circumstances. What a court must do is to make “*a full and careful assessment of the best interests of the child before any balancing exercise can be undertaken. If that is not done there is a danger that those interests will be overridden simply because their full significance has not been appreciated. The court must not treat the other considerations as so powerful as to assume that they must inevitably outweigh the child's best interests whatever they might be, with the result that no proper assessment takes place.*”
6. The respondent has issued guidance to decision-makers considering whether it is reasonable to expect a child to leave the United Kingdom. The judge considered that guidance in her decision, referring to individual factors mentioned in the respondent's guidance. It may therefore be helpful to quote the relevant part of the guidance, as this is not set out in the judge's decision. The relevant part is para 11.2.4 of the respondent's Immigration Directorate Instructions (IDIs) entitled: “*Immigration*

Directorate Instruction Family Migration: Appendix FM Section 1.0b, Family Life (as a Partner or parent) and Private Life: 10-year route. August 2015". Para 11.2.4 reads:

"11.2.4. Would it be unreasonable to expect a non-British Citizen child to leave the UK?"

The requirement that a non-British Citizen child has lived in the UK for a continuous period of at least the *[sic]* 7 years immediately preceding the date of application, recognises that over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years.

The decision maker must consider whether, in the specific circumstances of the case, it would be reasonable to expect the child to live in another country.

The decision maker must consider the facts relating to each child in the UK in the family individually, and also consider all the facts relating to the family as a whole. The decision maker should also engage with any specific issues explicitly raised by the family, by each child or on behalf of each child.

Relevant considerations are likely to include:

a. Whether there would be a significant risk to the child's health

For example, if there is evidence that the child is undergoing a course of treatment for a life threatening or serious illness and treatment will not be available in the country of return;

b. Whether the child would be leaving the UK with their parent(s)

It is generally the case that it is in a child's best interests to remain with their parent(s). Unless special factors apply, it will generally be reasonable to expect a child to leave the UK with their parent(s), particularly if the parent(s) have no right to remain in the UK;

c. The extent of wider family ties in the UK

The decision maker must consider the extent to which the child is dependent on or requires support from wider family members in the UK in important areas of his or her life;

d. Whether the child is likely to be able to (re)integrate readily into life in another country. Relevant factors include:

- whether the parent(s) and/or child are a citizen of the country and so able to enjoy the full rights of being a citizen in that country;
- whether the parent(s) and/or child have lived in or visited the country before for periods of more than a few weeks. The question here is whether, having visited or lived in the country before, the child would be better able to adapt, and/or the parent(s) would be able to support the child in adapting, to life in the country;
- whether the parent(s) and/or child have existing family or social ties with the country. A person who has extended family or a network of

friends in the country should be able to rely on them for support to help (re)integrate there;

- whether the parent(s) and/or child have relevant cultural ties with the country. The caseworker must consider any evidence of exposure to, and the level of understanding of, the cultural norms of the country. For example, a period of time spent living mainly amongst a diaspora from the country may give a child an awareness of the culture of the country;
- whether the parents and/or child can speak, read and write in a language of that country, or are likely to achieve this within a reasonable time period. Fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice;
- whether the child has attended school in that country.

e. Any country specific information, including as contained in relevant country guidance

f. Other specific factors raised by or on behalf of the child.

Parents or children may highlight the differences in the quality of education, health and wider public services or in economic or social opportunities between the UK and the country of return and argue that these would work against the best interests of the child if they had to leave the UK and live in that country. Other than in exceptional circumstances, this will not normally be a relevant consideration, particularly if the parent(s) or wider family have the means or resources to support the child on return or the skills, education or training to provide for their family on return, or if Assisted Voluntary Return support is available.”

The grounds

7. Permission was sought on three grounds, i.e. (i) that the judge failed to follow a staged assessment of the third appellant's circumstances; (ii) that the judge unlawfully applied a test of exceptionality by requiring the third appellant to have shown “*extraordinary talents or unusual achievements*” and (iii) the judge failed to consider the “*near-miss’ background to this case*”.
8. Permission was granted by Judge of the First-tier Tribunal P J M Hollingworth. In summary, the permission judge considered that: (i) the judge arguably failed to apply MA (Pakistan) in that it was arguable that she gave insufficient weight to the third appellant’s integration in the United Kingdom and the impact of uprooting her as recognised by the seven-year rule, she arguably concentrated on the situation on return and arguably gave excessive weight to the immigration history; (ii) arguably, she made insufficient findings; and (iii) she arguably gave excessive weight to the actions of the parents in the proportionality exercise when considering the argument about delay.
9. At the hearing, Mr Malik confirmed that he only relied upon the following three grounds and that he did not wish to pursue any other grounds in the written grounds or the terms in which permission was granted:

- (i) (hereafter “ground 1”) The judge erred in law by failing to conduct a structured analysis of the best interests of the third appellant and her family’s Article 8 claim.

The judge should have considered the third appellant's best interests at the beginning of the balancing exercise and without taking into account the conduct of her parents. Having considered the best interests of the child, she should then have gone on to consider the public interest considerations and whether they override the best interests of the child.

- (ii) (hereafter “ground 2”) The judge erred in law in her assessment of the best interests of the child, in that, she took into account, at paras 84 and 86, the conduct of the parents. Mr Malik accepted that the judge was entitled to take into account the parents’ conduct in assessing the reasonableness of the child leaving the United Kingdom. However, he submitted that she erred in doing so when she considered the best interests of the third appellant.
- (iii) (hereafter “ground 3”) The judge erred in law by failing to recognise the significance of the fact that the third appellant had lived in the United Kingdom for seven years, as para 91 of her decision demonstrates.

10. The grounds did not challenge the judge's assessment of credibility, nor did Mr Malik raise this at the hearing before me.

The judge's decision

11. The appellants all gave evidence before the judge. In addition, a relative (an uncle) gave evidence.
12. It was accepted on the appellants’ behalf, that their appeals had little prospect of success under the Rules (para 17 of the judge's decision). The focus of their appeals was Article 8 outside the Rules (para 18). In particular, reliance was placed on the fact that the third appellant had lived in the United Kingdom for more than seven years. It was not reasonable for her to leave the United Kingdom and it was in her best interests to stay in the United Kingdom. Her parents should therefore also be permitted to remain in the United Kingdom (para 18).
13. The circumstances relied upon in relation to the third appellant were summarised by the judge at para 18 as follows:
- “18. ... She could not return to India because she could not speak Hindi, the language used at school. In addition, she could not speak Punjabi, the language of her parents. Furthermore, she would not be able to re-integrate herself in India, lacking Hindi and Punjabi. Moreover, she had a rich private life having developed a level of ties and attachments outside the family unit. If she had to return to India, she would be adversely affected educationally. She was in year 10 and was immersed in her GCSEs....”
14. At para 52, the judge said that the central strand of the appellants’ case was that they could not return to India because of the third appellant's lack of Hindi, which they said would cause considerable difficulties in her education.
15. The judge said at para 52 that she found the evidence of the appellants inconsistent and implausible on the following issues: the third appellant’s language capability, the

second appellant's work history in India and on the question of when the parents formed the intention to stay in the United Kingdom.

16. The judge's unchallenged findings of fact may be summarised as follows:
- i) On the subject of the third appellant's language capability, the evidence of the first and second appellants was inconsistent and the evidence of the uncle merited less weight (para 53). The judge rejected the evidence that the third appellant could only speak English. She found that the third appellant spoke Hindi at home and at school until the age of seven years six months and that she continued to speak Hindi at home once in the United Kingdom. She rejected the third appellant's evidence that she could not speak any language other than English (para 70).
 - ii) Having considered at paras 66 and 68 the evidence of the third appellant's performance in studying Spanish and French and having considered at para 69 the third appellant's evidence that she had only just started to learn English before her arrival in the United Kingdom but was able to speak, understand, read and write good English by being completely immersed in school in the United Kingdom the judge found (para 71) that the third appellant has good ability as a linguist and so could improve her Hindi if required for written work because she had shown that she learns a language well by immersion.
 - iii) At para 71, the judge noted that the second appellant had been educated for two years in India. She said that no reason had been given why the third appellant could not continue to be educated in Hindi in India on return.
 - iv) At para 86, the judge found that the third appellant would be able to adapt to living in India having lived there for seven years and her parents would be well placed to help her adapt. The judge also found that the third appellant's ability in "*the language of India*" met the requirement in factor d. of para 11.2.4 of the IDIs, i.e. she was able to communicate competently with sympathetic interlocutors or to achieve this within a reasonable time period.
 - v) At para 72, the judge found that the third appellant was in good health and is cared for by her parents without assistance or reliance upon anyone else.
 - vi) The judge found that the third appellant has a good academic performance and behaviour. She found that there was no evidence of extraordinary talents or unusual involvements inside or outside school (para 91). Her reasons in this respect are given at paras 65-68. She said that there was no evidence of the third appellant's private life outside her family apart from the fact that she had attended primary school for four years and secondary school for three years and two terms. The judge found that the third appellant's private life amounted to little more than that which would inevitably arise after a period of seven years in the United Kingdom and that the third appellant has an unremarkable private life. The first and second appellants also had unremarkable private lives.
 - vii) On the subject of the second appellant's work history, the judge noted that the first appellant said in oral evidence that the second appellant had had a car business in India before the marriage in 2001, whereas the second appellant denied it completely but, when confronted with the second appellant's evidence, he became evasive and appeared to be playing for time. The judge found that the second appellant had a longstanding car business in India which had been in existence for at least eight years (para 57).

- viii) The judge also found the second appellant evasive when asked why he could not find a job in India (para 58). At para 97(vi), the judge found that the first and second appellants could re-establish themselves in India and help the third appellant in her reintegration. At para 97(vii), the judge noted that the second appellant had said that his parents could support his family. The judge said that this would help tide the family over until the first and second appellants re-established themselves.
 - ix) The judge found the evidence of the first and second appellants about the timing of their decision to stay in the United Kingdom and the reasons given for it incredible. Her reasons are given at paras 59-63. She found that the first and second appellants never had the intention to return to India. She found it highly revealing that within a few weeks of arriving in the United Kingdom in August 2009, the second appellant had wound up his business in India. At para 97(iv) and in connection with the proportionality balancing exercise, the judge said that she found that the parents never intended to return to India and that they deliberately waited until the daughter was close to seven year's continuous residence in the United Kingdom before making their application in August 2015.
 - x) At para 73, the judge accepted that the parents and some siblings of the first and second appellants had left India for good. However, as she had found them to be evasive and less than truthful on important points in these appeals, she did not rule out that they may have some family members left in India and some friends.
17. In his submissions, Mr Malik focused on paras 84, 86 and 91 of the judge's decision. However, it is necessary to set out almost all of paras 51-99, which read:

“Findings of Fact and of Credibility

- 51. I have had the opportunity of hearing direct evidence from the Appellants and from the outset I must state that I did not find their evidence entirely credible about the daughter's ability in Hindi; it was abundantly clear that they were not giving the Tribunal the full picture. I consider compendiously the evidence of the First, Second and Third Appellant.
- 52. I find the evidence of the Appellants is inconsistent and implausible on the Third Appellant's language capability, on the Second Appellant's work history in India and on when the parents formed the intention to stay in the UK. The central strand of their case is that they cannot return to India because of the daughter's lack of Hindi, which would cause considerable difficulties in her education. I make the following findings of fact in relation to the credibility of the evidence.
- 53. First, I consider the subject of the Third Appellant's language capability. The First Appellant said that [*sic*] language spoken with the Third Appellant at home in India was Hindi. She was adamant that the language spoken at home in the UK was Punjabi not Hindi. She could not explain why the language used at home had switched on moving from India to the UK. Secondly, her account did not accord with that of the Second Appellant. He was clear that Hindi was the language spoken at home in the UK. I am aware that the Uncle said that Punjabi was spoken in the home and he could not speak Hindi. I place less weight on the Uncle's evidence in this respect as given that the parents could speak Punjabi, it would make sense for them to speak Punjabi in his presence. He would not have been in the

home all the time and would not know what language was spoken when he was not there.

54. The First Appellant said that she spoke Punjabi with her young son. She was not able to explain why she spoke to him in Punjabi when she had spoken to her daughter at the same (young) age in Hindi. I find therefore that Hindi is spoken in the home in the UK.
55. The First and Second Appellant were insistent that they spoke only in English to the Third Appellant at home. If this were correct, this would mean that the Appellant would be regularly excluded from conversations in the home. I find that regular exclusion in this way could have an adverse effect on a young girl and a teenager as the Third Appellant now is. The First and Second Appellant were not able to give a plausible explanation of why they would do this to their daughter. They blamed television and school.
56. If I had accepted that the First and Second Appellant had not spoken Hindi to the Third Appellant in the UK and had only spoken to her in the English (which I do not accept), I would have found that they had deliberately done this in order to minimise her proficiency in Hindi and thereby to construct an argument that she had lost her Hindi to such an extent that it could not be revived.
57. I now turn to the Second Appellant's job history in India. The First Appellant had made a passing reference in her witness statement on which she was probed. She then revealed that the Second Appellant had had a car business in India since before their marriage in 2001. The Second Appellant denied this completely. I note his manner in answering these questions was distinctly evasive. It took a number of questions to elicit any coherent information about his alleged work history. I prefer the oral evidence of the First Appellant because she would appear to have been taken by surprise with the questions about the meaning of "winding up everything" and I find that she spoke without thinking. With regard to the Second Appellant, I find that he appeared to be playing for time trying to produce a picture which had not existed. He first denied working at all. When pressed, he presented himself as a low level worker working irregularly first delivering second hand cars and afterwards delivering paper. He could give no reason as to why he knew nothing about the paper business; he had merely stopped speaking to the friend who allegedly owned it. He gave no details about the car delivery business. I find that he had a longstanding car business, which had been in existence for at least eight years. There was no reason for the wife to invent this. Furthermore, given the husband's reference to second cars, I find that it is more likely than not that his car business involved buying and selling second hand cars.
58. I also find the Second Appellant was evasive in answering why he could not find a job in India. He claimed not to understand the question and when asked again, claimed not to know. I find the Second Appellant to be a competent individual, one who owned and ran his own business. There is no plausible reason why he could not understand such a simple question or know anything about the job situation in India, having lived there for 34 years.
59. Finally, I turn to the First and Second Appellant's intention to stay and timing. The First Appellant said that the purpose of coming to the UK was to gain qualifications and to speak good English in order to get a good job in India. Having obtained an HND and BA and improved her English, there

was no clear reason why the Appellants did not return in January 2013. I accept that the First Appellant would have liked to study for a post graduate diploma but on her own evidence she had already achieved her work related goals with her BA.

60. I further accept that the First Appellant applied for an extension of her LIR to undertake the postgraduate diploma in May 2013 then June 2013 and the outcome of her appeals was not finally concluded until July 2015. Nevertheless, if she were being consistent in her avowed goals, at that point she would have returned to India with her family on the realisation that she would not be obtaining a post-graduate qualification in the UK. I find also that the First and Second Appellants showed considerable determination to stay. Even though the decision from the First-tier Tribunal made it clear that they had failed on two factual grounds (incomplete documentation and insufficient funds at the date of application) under the Points Based System (which is a strict system) and that they had no right of appeal, they applied twice for permission to appeal the decision. I do not seek to criticise them for this; I make this observation because it shows their absolute determination to stay in the UK (to which I refer to below).
61. Furthermore, the First Appellant admitted that once she had become pregnant (in early 2015) she had no time and no intention to do any more studying. On that basis, if consistent with her stated goals, they would have left as a family in early 2015, as soon as arrangements could be reasonably made.
62. The First Appellant was evasive about when she had decided not to return to India. Her answers varied between when her son was born (October 2015), no date and when her daughter started her GCSEs (September 2016). The Second Appellant said that they planned to return when their daughter had completed her studies. He did not indicate what he meant. On the basis that his daughter said she hoped and intended to study Medicine in the UK, the Second Appellant would have been anticipating staying until at least 2025. At that point someone of the Third Appellant's age would have completed her second MB and be about to undertake her F1 year.
63. I find that the Second and Third Appellants never had the intention to return. This is why they could not easily come up with a date when they decided to stay and did not give the same date. This is also why the business was sold. I find it highly revealing that within a few weeks of arriving in the UK (in August 2009), the Second Appellant had wound up his business. There is no evidence to suggest that it was not a viable business and could not have continued to provide the Second Appellant with a livelihood in years to come. The First Appellant said that the business had to be wound up because there was no-one to run it. As I find the evidence of the First Appellant lacks credibility in a number of key areas, I do not accept that. In any event, I find that if the Appellants had genuinely been intending to return after three to four years of studying (as they claim), I find that they would have made serious enquiries about finding a deputy to act in their absence or even a partner. They would have been keen to find a way to keep the business alive ready for their return. There was no evidence of any such enquiries.
64. Turning now to the issues in the appeals, I make the following findings of fact.

65. I have been provided with school reports, certificates and other documents from the Third Appellant's current school. The most recent school reports are for the three terms in each of Years 7 and 8. Although the Third Appellant is in Year 10 and could have provided reports for Year 9 and for at least the autumn term of Year 10, these were not supplied. I therefore base my conclusions about the Third Appellant's abilities and performance on her end of year reports for Year 7 (July 2014 [1001]) and for Year 8 (June 2015 [111]).
66. In the Year 7 report, the Third Appellant met or nearly met her end of year progress targets in all her subjects. In Spanish and French however she exceeded her targets such that she was four sublevels ahead. I note that a student is expected to progress by three sublevels in an academic year. In English she was five sublevels behind her end of year target. Her reading age was 15 years 10 months and she would have been 12 years 5 months at the time.
67. In the Year 8 report, the Third Appellant met her end of year targets in all subjects including Spanish save for Religious Education and Physical Education. In addition, she was four sublevels behind her target in English. She was significantly ahead of her targets in Technology and Art. Her reading age was 16 years 1 month and her actual age 13 years 4 months.
68. From these reports I make the following findings of fact. First the Third Appellant excelled in languages in Year 7 and continued to make good progress in Spanish in Year 8. She thus has a demonstrated ability in writing, reading, speaking and understanding foreign languages. Secondly, even though she did not make expected progress in English, her achievement at the end of year 8 (6b) was at the same level as her achievement in Mathematics and Science with 6b being the highest level attained in any subject. I find therefore that expectations for English were set higher than in any other subject (at 7c) (Mathematics and Science being set at 6b) and it is misleading to look at her progress score at the end. In any event, the failure to make expected progress in English did not affect results on other subjects. Furthermore, her reading ability was very good, being at least two years ahead of her chronological age. Thirdly, the Third Appellant is academically a good student overall but not at present outstanding.
69. With regard to her aptitude for languages, I note also that on her own evidence she was able to learn to speak, understand, read and write good English by being immersed in school. Before arrival, she had only just started to learn English.
70. Taking all of this into account, I find that the Third Appellant spoke Hindi at home and at school until the age of 7 years 6 months. She continued to speak Hindi at home once in the UK. I am aware that the Third Appellant herself denied being able to speak any language but English. I do not accept her evidence for the following reasons. She is still at an age where she would wish to please her parents and do what they ask and she knows that her parents are determined to stay in the UK. She also very much wishes to stay herself and so in that way, her own objectives are in tune with her parents.
71. Prior to coming to the UK, she was educated for two years in Hindi and no reason has been given why she could not continue to be educated in Hindi in India on return (it being one of the languages of education). She has good ability as a linguist and so could improve her Hindi should that be

required for written work. She has also shown that she learns a language well through immersion.

72. The Third Appellant is in good health. She is cared for by her parents without assistance or reliance upon anyone else.
73. The First and Second Appellants were concerned to make it clear that they had no relatives or friends left in India. Rather their parents and siblings (with the exception of Mrs. [K]) had emigrated to the USA or to Canada. I accept that their parents and some siblings have emigrated and thus left India for good. Nevertheless, I have found the First and Second Appellant to be evasive and less than truthful on important points in these appeals. I do not rule out therefore that they have some family members left in India and friends. In any event, the First and Second Appellants came to the UK without any friends and with few relatives. They say that they have made good friends in the UK. I find that they could use the same skills and attributes to make new friends in India.

Section 55

74. I consider the section 55 duty. In doing so I bear in mind the decision in TO and Others (section 55 duty) Nigeria [2014]1 UKUT 00517 which considers the section 55 duty in detail. As explained in TO, the section 55 duty was considered by the Supreme Court in ZH (Tanzania) [2011] UKSC4 in which it was held that the **best interests of the child** must be considered first when considering issues under Article 8 of the European Convention on Human Rights ("ECHR") and that although this was not a factor which would prevail over all other considerations it must rank higher than any other.
75. I bear in mind the requirement in section 55(3) to have regard to statutory guidance. The key points of this guidance were set out in TO. The most important point in the context of this case is that "ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family." Given the age of the child in this case there is scope for considering the child's own wishes.
76. I am aware of the case of EV (Philippines) [2014] EWCA Civ 874 in which it was held that the need to maintain immigration control can outweigh a child's best interests.

Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and MA (Pakistan) and Others v SSHD [2016] EWCA Civ 705

77. I am aware of section 117B(6) provides that in a case where a person is not liable to deportation the public interest does not require the person's removal where they have a genuine and subsisting relationship with a qualifying child (i.e. a child who has lived continuously in the UK for at least 7 years) and it would not be reasonable to expect the child to leave the United Kingdom. There is no dispute that the parents have a genuine and subsisting relationship with the Third Appellant their daughter.
78. I am also aware of MA (Pakistan) which deals with the case of persons exercising a parental role who may be entitled to stay with their child in the UK in circumstances where they would not qualify for leave in their own right, independently of their status as parents. They may be able to "piggy back" on the rights of the child; the child must be a qualifying child in order for the provision in Section 117B(6) "to bite" [§2 in MA (Pakistan)]. In considering the question in Section 117B(6) of whether it was reasonable to expect the child to leave the UK, under MM (Uganda) v SSHD [2016]

EWCA Civ 617, courts were obliged to take into account the wider public interest considerations including the conduct and immigration history of the parents. Furthermore, under MM (Uganda) it might be reasonable to require the child to leave where there were good cogent reasons (head note §1).

79. I remind myself also that under MA (Pakistan) "the fact that a child had been in the UK for seven years should be given significant weight in the proportionality exercise because of its relevance to determining the nature and strength of the child's best interests and as it established as a starting point that leave should be granted unless there were powerful reasons to the contrary".
80. Mr. Grigg has also provided me with a more recent Court of Appeal case, AM (Pakistan) & Others v SSHD [2017] EWCA Civ 180 and Kaur (children's best interests/public interest interface) [2017] UKUT 00014 (IAC) which is an Upper Tribunal decision of the President. I find that neither of these cases changes the position which I must adopt in the light of MA (Pakistan) (see §§ 21 - 23 in AM (Pakistan)).

Immigration Directorate Instruction Family Migration ("the IDI") and the determination of the reasonableness criterion

81. I am aware of the IDI in which it is recognised that after a seven year period of continuous residence children start to "put down roots and integrate into life in the UK to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK and strong reasons will be required in order to refuse a case with continuous residence of more than 7 years" [11.2.4].
82. The IDI identifies factors a - f which are likely to be relevant considerations.
83. In relation to factor a. the Third Appellant would not experience a significant risk to her health if returned to India. She is in essentially good health.
84. In relation to factor b. it is in her best interests to remain with her parents. I accept that the Appellants consider that it is in her best interests to remain in the UK for the sake of the superior educational and career opportunities offered (which could lead to a career in medicine in the UK). I do not accept this; the IDI makes it clear (as does EV (Philippines)) that the better quality of education available in the UK cannot be relied upon except in exceptional circumstances. I also acknowledge that Mr. Grigg refers to the need for continuity rather than upheaval at a sensitive stage of her education, the Third Appellant being in the first year of GCSEs. If the Appellants were so concerned about disruption to the Third Appellant's education at a critical stage, it was open to them, once the First Appellant realised that she was not going to study again (in early 2015), to apply then for LTR on the basis of the Third Appellant's private life in the hope of a resolution before much of the GSCE first year course had been covered. I note also that the Appellants have produced nothing about the public examination system in India (that is the equivalent of GCSEs etc), the syllabi or the Indian school year to show that the Third Appellant would be significantly disadvantaged. For example, they could have dealt [*sic*] whether there is a difference between syllabi in the two countries for example in English, Mathematics and the Sciences. They could have approached some schools to ask the head teacher whether the Third Appellant could join her age group without difficulty without or with extra coaching or would have to go down a school year.

85. In relation to factor c. she has a small number of relatives in this country; her maternal aunt and her father's uncle and aunt. There was no evidence that she is dependent upon or requires the support of any of these wider family members in the UK.
86. In relation to factor d. the Third Appellant and her parents are citizens of India and would be able to enjoy the full rights of being citizens in India. The First, Second and Third Appellants lived in India respectively until the ages of 30, 34 and 7 before coming to the UK. The Third Appellant would be able to adapt having lived there for seven years and her parents would be well placed to help her adapt. I have already found that the First and Second Appellant may have relatives and friends in India and have the ability to make new friends. The parents have relevant cultural ties with India, having lived there well into their adulthood, living with another family from India in their shared accommodation and having continued to speak Hindi at home. If the Third Appellant has not been exposed to Indian culture and cultural norms, which I doubt, I find that this would have been part of a deliberate policy by the parents to diminish her cultural ties and improve their immigration case. In terms of being able to speak, read and write in the language of India, the parents can. I note that the requirement is not fluency but an ability to be able to communicate competently with sympathetic interlocutors or to achieve this within a reasonable time period. I find that the Third Appellant meets this requirement basing that conclusion upon my findings above.
87. I find that there are no other relevant factors to take into account, for example under "e - country specific information..." or "f - specific factors". In conclusion, taking account of factors a - d above, I find that it would be reasonable to expect the Third Appellant to leave the UK and to return to India.

Article 8

87. I turn next to consider Article 8. The correct approach to Article 8 was set out in the case of R (on the application of Oludoyi and others) -v- SSHD (Article 8 – MM (Lebanon) and Nagre) [2014] UKUT 00539. In this case it was held that when considering whether Article 8 should be considered outside the context of the Immigration Rules what is required is for the Tribunal to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim.
88. I also bear in mind the very recent case of R (on the application of Agyarko) v SSHD [2017] UKSC 11. Where an applicant does not meet the requirement of the Rules, leave can be granted outside the Rules where **exceptional circumstances** apply. I find that there are no exceptional circumstances to warrant consideration of a grant of leave outside the Rules.
89. Mr. Grigg argued that the length of time during which the Third Appellant had been in the UK, the critical stage of her education (1st year of GCSE course), her total absence of Hindi, the failure of the First Appellant's applications for FLR as a student all being a near miss and the delay on the part of the Home Office constituted exceptional circumstances.
90. If Mr Grigg is correct that these aspects amount to exceptional circumstances, I make the following findings applying the five stage test in Razgar.

91. By way of preliminary, I find that the Appellants have family life together. I find that the Third Appellant has a good academic performance and behaviour. There is however no evidence of extraordinary talents or unusual achievements or involvements inside or outside school. In sum, there was no evidence of the Third Appellant's private life outside her family apart from the fact that she had attended primary school for four years and secondary school for 3 years and two terms. I was satisfied that her private life amounted to little more than that which would inevitably arise after a period of 7 years in the UK and I therefore find that the Third Appellant has an unremarkable private life. I have been given nothing about the First and Second Appellants' private life and I find accordingly that they too have an unremarkable private life.
92. With regard to the first aspect under Razgar, ...
93. Secondly, ...
94. Thirdly, ...
95. Fourthly, ...
96. With regard to the fifth aspect under Razgar, I consider the facts which will determine whether the interference is proportionate to the legitimate aim sought. This involves striking a fair balance between the Appellants' rights and the interests of the community at large. I bear in mind, as already explained, that in performing the necessary balancing exercise the best interests of the Third Appellant as a child had to rank higher than any other consideration.
- (i) Section 117B(3) is a factor which operates so as to weigh against the Appellants' private lives in the balancing exercise. I am required to consider whether they are financially independent. They are not at present and are reliant upon contributions from their relatives. The First and Second Appellant have not been permitted to work since 2013 and the Third Appellant is a minor. I bear in mind however that the mother and father worked respectively as a carer and milkman when allowed to work but I have no information about their level of earnings. I bear in mind also that they have not been dependant upon the taxpayer, relying on their relatives.
- (ii) Section 117B(2): they speak English. Whilst an appellant can obtain no positive right to a grant of leave to remain from the level of her fluency in English under Sections 117B(2) (AM (S117B) Malawi [20151 UKUT 260 (IAC)), this factor does not operate so as to weigh against their private lives in the balancing exercise
- (iii) Section 117B(4): little weight can be attached to the mother and father's private life which has been established by them when their immigration status in the UK has been precarious. This is not in dispute. The Third Appellant (together with the First and Second Appellants) had only ever had limited leave to remain and the First Appellant's own evidence was that she expected that they would have to return to India. I am aware that Mr. Grigg has argued under the most recent case law that the daughter as a minor cannot be responsible for the actions of her parents and as such, Section 117B(4) should not be a factor counting against her in the balancing exercise. MA (Pakistan) did not however depart from MM (Uganda) [§45] and therefore I may have regard to the mother and father's immigration history in considering the question of reasonableness.

(iv) Section 117B(6): I bear in mind the principles in MA (Pakistan) (and subsequent more recent case law) which will inform my analysis of the effect of Section 117B(6). I therefore need to consider whether it would be reasonable for the daughter to leave the UK as at the date of the hearing, she had been in the UK for at least seven years continuously. I found above that this question hinged on all the factors set out in the IDI and in particular the daughter's best interests and whether the daughter can speak and understand Hindi and read and write in Hindi. I have found that it would be reasonable for the daughter to leave the UK for the reasons set out above.

97. I further bear in mind that the mandated process does not require the Tribunal to dismiss the Appellant's appeal. The Section 117 factors constitute some but not all of the factors to be taken into account in the proportionality assessment (Dube (ss.117A – 117D) [2015] UKUT 90 (IAC)). I find that the balance goes against the Appellants as a result of the following factors:-

- (i) Failure to satisfy the Immigration Rules; this factor operates so as to weigh against their private life in the balancing exercise;
- (ii) The daughter's best interests: she is 15 years old. She has no special needs or health conditions. I have assessed this as part of the assessment of whether it would be reasonable for to expect her to leave the UK.
- (iii) The lack of credibility in the evidence of the First and Second Appellant: I set out above in what areas and ways their evidence lacked credibility.
- (iv) Delay: the mother and father (together with the daughter) have been in the UK unlawfully for over 3½ years. I bear in mind the mother and father's responses to the question about the date when they decided not to return to India (and thus to make another application to regularise their immigration status). In this connection, they referred to the daughter's education, the father indicating that it was at the commencement of the daughter's GCSE courses. I found above that the parents never intended to return. Moreover, they deliberately waited until the daughter was close to seven years' continuous residence in the UK before making their application in August 2015. From their experience of the refusal of the application for LTR as a student in 2013 and the appeals (which continued for two years) they would have known that by the date of the hearing, their daughter was very likely to have reached the seven year milestone (9 August 2016). They would have also have known of the significance of that milestone, having been legally advised throughout.
- (v) The son's best interests: he is very young (being under two years of age) and has no special needs or health conditions.
- (vi) Ability to obtain work in India: the First and Second Appellants could re-establish themselves in India and help the Third Appellant in her re-integration. Both the First and Second Appellants speak Punjabi and Hindi, the First Appellant has obtained a post graduate qualification and enhanced her English capability in the UK which in her view would assist in obtaining a good job. In addition, she has had work experience in the UK. The Second Appellant has also worked in the UK, and had run his own business in India. They would be both be able to find work in India, drawing on their qualifications

and previous experience. No reason was given why they could not work in India.

(v) Financial Support from the Second Appellant's parents: the Second Appellant agreed that his parents could support his family. This would help whilst they were job-hunting to tide them over until they had established themselves and enable them to obtain rental accommodation at the outset.

98. I find therefore that there is a public interest in the Appellants' removal beyond the general public interest in effective immigration control.

99. Given the above findings I find that the wife, husband and daughter (the First, Second and Third Appellants) have not discharged the burden of proof to show that their removal would be disproportionate to the legitimate public end sought to be achieved and I find that they have not discharged the burden of proof such that their removal would cause the United Kingdom to be in breach of our obligations under the 1950 Convention as regards to Article 8 thereof and therefore their appeals can only fail."

Submissions

18. In relation to grounds 1 and 2, Mr Malik relied upon paras (3) and (4) of the judicial head-note in Kaur (children's best interests / public interest interface) [2017] UKUT 00014 (IAC). In Kaur, Mr Justice McCloskey, the then President, said that: (i) in the proportionality balancing exercise, the best interests of a child must be assessed in isolation from other factors, such as parental misconduct; and (ii) The best interests assessment should normally be carried out at the beginning of the balancing exercise.
19. Mr Malik submitted that this meant the judge should have considered the Article 8 claim outside the Rules following the following staged process: first, consider the best interests of the third appellant at the very beginning of the balancing exercise. In addition, the best interests of the third appellant should have been considered in isolation from the conduct of the parents. Second, consider the public interest. Third, consider whether the public interest overrides the best interests of the child. By considering the conduct of the parents in assessing the best interests of the third appellant, the judge set the bar on the third appellant's side of the scale, insofar as this embodies her best interests, too low, so that it was more readily overridden by public interest consideration in the balancing exercise in relation to proportionality.
20. Mr Malik submitted that, whilst paras 74-76 of the judge's decision are under the heading "section 55" and paras 78-80 refer, inter alia, to MA (Pakistan) and the fact that significance should be given in the proportionality exercise to the fact that a child has lived in the United Kingdom continuously for a period of at least seven years, the judge merely quoted authorities at paras 74-76 and 78-80. She did not assess the evidence.
21. Mr Malik submitted that the judge's assessment of the third appellant's best interests began at para 84, where she began by saying that it was in the third appellant's best interests to remain with her parents. Mr Malik submitted that it was clear that the judge had taken into account the conduct of the parents in assessing the third appellant's best interests because she said as follows at paras 84 and 86:

“84. ... If the Appellants were so concerned about disruption to the Third Appellant's education at a critical stage, it was open to them, once the First Appellant realised that she was not going to study again (in early 2015), to apply then for LTR on the basis of the Third Appellant's private life in the hope of a resolution before much of the GSCE first year course had been covered....

86. ... If the Third Appellant has not been exposed to Indian culture and cultural norms, which I doubt, I find that this would have been part of a deliberate policy by the parents to diminish her cultural ties and improve their immigration case....”

22. In relation to ground 3, Mr Malik referred me to para 91 where the judge said that *“there was no evidence of extraordinary talents or unusual achievements or involvements inside or outside school”* in respect of the third appellant and paragraph 96(iv) where the judge said that she had in mind the principles in MA (Pakistan). Mr Malik submitted that, notwithstanding that the judge referred at para 74 to the principle in MA (Pakistan), her approach was inconsistent with the principle in MA (Pakistan) that significant weight should be given to the fact that a child has lived in the United Kingdom continuously for at least seven years and that the starting point was that leave should be granted unless there were powerful reasons to the contrary. He submitted that she did not in fact recognise the principle or apply it.
23. Ms Brocklesby-Weller submitted that the judge had not taken into account the conduct of the parents in assessing the best interests of the third appellant. In relation to the extract from para 84 relied upon by Mr Malik in his submission that the judge had so erred in law, Ms Brocklesby-Weller submitted that the judge was merely assessing the credibility of the first and second appellants' evidence. The extract from para 86 was a throwaway comment by the judge which is immaterial, in Ms Brocklesby-Weller's submission. Ms Brocklesby-Weller submitted that the judge had made a wealth of findings in her decision in a child-centric way and reached the conclusion that it was in the third appellant's best interests to remain with her parents.
24. Ms Brocklesby-Weller submitted that, contrary to ground 3, the judge had applied the principle in MA (Pakistan). She referred to it specifically at paras 79 and 81 and directed herself correctly. There was little more that she could have done.
25. Ms Brocklesby-Weller submitted that the judge's observation at para 91 that *“there was no evidence of extraordinary talents or unusual achievements or involvements inside or outside school”* should be read together with her earlier findings, in particular, para 84, where she said that the appellants *“have produced nothing about the public examination system in India (that is the equivalent of GCSEs etc), the syllabi or the Indian school year to show that the Third Appellant would be significantly disadvantaged.”*
26. In response and in relation to ground 3, Mr Malik submitted that para 87 shows that the judge's assessment of whether it was reasonable for the third appellant to leave the United Kingdom was limited to the factors in para 11.2.4 of the IDIs, i.e. her assessment at paras 83-86. In other words, the judge concluded that it was reasonable for the third appellant to leave the United Kingdom for the four reasons she gave at paras 83-86. Nowhere at paras 83-86 did the judge recognise the significance of the length of the third appellant's residence in the United Kingdom.

27. Mr Malik submitted that the judge should have explained what powerful reasons there were for saying that the public interest outweighed the significant weight to be given to the third appellant's residence of over seven years.
28. Mr Malik submitted that the judge considered the balancing exercise in relation to whether it is reasonable for the third appellant to leave the United Kingdom at paras 84-86 and she considered her best interests at para 84-86. It is clear from paras 84-86 (he submitted) that she took into account the conduct of the parents in her assessment of the third appellant's best interests.
29. Mr Malik asked me to record the fact that he reserves his position in relation to this appeal in view of the fact that the Supreme Court will be deciding whether MA (Pakistan) was correctly decided.
30. I reserved my decision, having agreed with Mr Malik and Ms Brocklesby-Weller that, if I were to conclude that the judge had materially erred in law and given the unchallenged findings of fact by the judge, the following paragraphs would stand: 51-73, 91, 96(i), 96(ii), 96(iii) (except for the last sentence beginning: "*I am aware that Mr Grigg...*"), 97(iii), 97(iv) and 97(v)-(vii), on which basis both agreed that any re-making should be undertaken in the Upper Tribunal.

Assessment

31. I shall deal with the grounds in the following order: ground 2, then ground 3 and finally ground 1.
32. Ground 2 is that the judge took into account the conduct of the first and second appellants in assessing the third appellant's best interests, at paras 84 and 86.
33. It is therefore necessary to consider whether the judge was considering the third appellant's best interests at paras 84 and 86 and, if she did, whether she took into account the conduct of the parents in assessing her best interests. Mr Malik accepted that, if the judge was considering reasonableness at paras 84-86, she was entitled to take account of the parents' conduct.
34. Mr Malik submitted that the judge's assessment of whether it was reasonable for the third appellant to leave the United Kingdom as well as her assessment of the child's best interests was limited to paras 84-86 and that she did not consider these issues anywhere else. In relation to the reasonableness issue, this was because (in Mr Mali's submission), the fact that the judge said, in the second sentence of para 87, that: "*In conclusion, taking account of factors a-d above, I find that it would be reasonable to expect the third appellant to leave the UK and to return to India*".
35. Since Mr Malik accepts that the judge was entitled to take account of the parents' conduct in assessing reasonableness, the submission that the judge only considered reasonableness at paras 84-86 does not advance the appellants' case in this appeal even if (which is not the case, for reasons explained at paras 40(iii) and 41 below) the judge took into account the conduct of the parents in the sentence beginning: "*If the appellants were so concerned ...*" in para 84.
36. Nevertheless, I should say that the fact that the judge said: "*taking account of factors a-d*" at para 87 does not mean that she was saying that she had taken into account

only those factors and no other factors. That would make no sense at all, especially given the care that the judge took to remind herself of the principle in MA (Pakistan) at paras 78 and 79 and again at para 81, of the importance of residence of seven years or more.

37. Likewise, in relation to the third appellant's best interests, it simply cannot be said that paras 84-86 were the only paragraphs in which the judge considered the best interests of the third appellant. She reminded herself of the relevant principles at para 74-76 and 80. Furthermore, even before setting out the relevant principles at paras 74-76 and 80, it is clear that her assessment of the third appellant's performance at school, at paras 65-69 and whether there were reasons on grounds of health for the third appellant to be allowed to remain in the United Kingdom, was part of the assessment of the third appellant's best interests.
38. It is not the case, as Mr Malik was essentially saying, that in referring to the relevant principles and authorities, the judge was merely going through the motions of setting out relevant principles and authorities and not applying them. Whilst it is not necessary for a judge to refer to relevant authorities provided the principles are applied, I am satisfied that, in setting out the relevant principles in her decision, including the principle in MA (Pakistan) concerning the significance of residence of seven years or more, the judge was demonstrating that she was applying these principles when assessing the best interests of the appellant and the question of reasonableness. There is simply no reason to think otherwise.
39. I therefore do not accept that there is any substance in Mr Malik's submission that the only paragraphs in which the judge considered both the reasonableness issue and the third appellant's best interests were paras 84-86.
40. In summary, when the judge's decision is read as a whole, I am satisfied that:
 - (i) The judge's assessment of whether it is reasonable for the third appellant to leave the United Kingdom was not limited to paras 84-86. Her assessment of the third appellant's linguistic abilities, and in particular, in the language of Hindi, as well as her assessment of the third appellant's school reports, was part and parcel of her assessment of reasonableness. Paras 78, 79 and 81, where she reminded herself of MA (Pakistan) and the importance of residence of seven years or more, was also part of her assessment of reasonableness.
 - (ii) The judge's assessment of the third appellant's linguistic abilities as well as her assessment of the third appellant's school reports, was also part and parcel of her assessment of the third appellant's best interests. Having made those assessments, she reminded herself of the duty under s.55 and relevant authorities (JO, ZH (Tanzania) and EV (Philippines) at paras 74-76 and AM (Pakistan) and Kaur at para 80), before stating her conclusion, in the first sentence of para 84, that it was in the best interests of the third appellant to remain with her parents.
 - (iii) I analyse para 84 as follows: In the first sentence of para 84, the judge stated her conclusion, that the best interests of the third appellant were to remain with her parents. The following sentences were also part of her assessment of the best interests of the third appellant because it is clear that this is where she considered the credibility of the evidence of the first and second appellants on

this issue, that it was in the best interests of the third appellant to remain in the United Kingdom

“I accept that the Appellants consider that it is in her best interests to remain in the UK for the sake of the superior educational and career opportunities offered (which could lead to a career in medicine in the UK). I do not accept this; the IDI makes it clear (as does *EV (Philippines)*) that the better quality of education available in the UK cannot be relied upon except in exceptional circumstances. I also acknowledge that Mr. Grigg refers to the need for continuity rather than upheaval at a sensitive stage of her education, the Third Appellant being in the first year of GCSEs. If the Appellants were so concerned about disruption to the Third Appellant's education at a critical stage, it was open to them, once the First Appellant realised that she was not going to study again (in early 2015), to apply then for LTR on the basis of the Third Appellant's private life in the hope of a resolution before much of the GSCE first year course had been covered.

The remainder of para 84, where the judge noted that the first and second appellants had not produced any evidence of the public education system in India, was part of her assessment of reasonableness. It was also relevant to her conclusion that it was in the best interests of the third appellant to remain with her parents, given the obvious link between what the judge was considering in the remainder of the paragraph and the issue immediately prior, i.e. the credibility of the evidence of the first and second appellants about their concerns about the disruption to the third appellant's education. The reason why both issues (reasonableness and best interests) fell to be considered was that factor b., which is part of para 11.2.4 of the IDIs which deals with reasonableness, specifically mentioned the best interests of a child.

41. I therefore do not accept that the judge took into account the conduct of the parents in assessing the best interests of the third appellant in the sentence beginning: *“If the Appellants were so concerned...”* in para 84. All the judge was doing in this part of para 84 is to explain why she did not accept the evidence of the first and second appellants that it was in the best interests of the third appellant to remain in the United Kingdom and to deal with the submission of their legal representative concerning the need for continuity rather than upheaval at a sensitive stage in the third appellant's education. My view is reinforced by the fact that the judge then went on to note, in the remainder of that paragraph, that there was no evidence about the public examination system in India. The impact of any such disruption was plainly relevant to a consideration of both the best interests of a child as well as the question of reasonableness.
42. I have therefore concluded that there is no error of law at para 84.
43. I turn to para 86, the sentence that reads: *“If the Third Appellant has not been exposed to Indian culture and cultural norms, which I doubt, I find that this would have been part of a deliberate policy by the parents to diminish her cultural ties and improve their immigration case”*.
44. Mr Malik submitted that this sentence in para 86 shows, again, that the judge had taken the conduct of the parents into account when assessing the third appellant's best interests.
45. In my judgement, the whole of para 86 concerned the judge's assessment of reasonableness. Whereas at para 84 she did mention the best interests of the third

appellant (because factor b of para 11.2.4 of the IDIs did so), the judge made no reference at all at para 86 to the third appellant's best interests, nor does factor d. in para 11.2.4 of the IDIs.

46. Given my conclusion that para 86 concerned the judge's assessment of reasonableness and that Mr Malik accepted that the judge was entitled to take into account the conduct of the parents in assessing reasonableness, there is no error of law at para 86.
47. However, even if I am wrong about this, it is clear from the words "*If ... which I doubt ...*" in the sentence in question that the judge did not accept that the third appellant had not been exposed to Indian culture and cultural norms. Accordingly, in the remainder of the sentence, beginning: "*I find ...*" the judge was answering a hypothetical issue that was not relevant to her decision on the appeal.
48. Accordingly, I have concluded that ground 2 is not established.
49. Before dealing with ground 3, I should say, although it was not suggested in the grounds or by Mr Malik that the judge erred in finding that it was in the best interests of the third appellant to remain with her parents, this finding was the only one properly open to her on any legitimate view, given her rejection of the claim that the third appellant does not speak Hindi, her unchallenged findings that the third appellant has good linguistic ability, that the third appellant has demonstrated that she learns a language well through immersion, that the third appellant has an ability to communicate competently with sympathetic interlocutors or to achieve this within a reasonable time frame, that the better quality of education in the United Kingdom cannot be relied upon except in exceptional circumstances, and that there was no evidence about the public examination system in India to show that the third appellant would be significantly disadvantaged.
50. I turn to ground 3.
51. Mr Malik submitted that the judge erred in saying, at para 91, that: "*there was no evidence of extraordinary talents or unusual achievements or involvements inside or outside school*" because, in his submission, this was inconsistent with the principle in MA (Pakistan) concerning the significance of residence of seven years or more.
52. It is plain that, at para 91, the judge was considering the strength of the private lives that each of the appellants had established in the United Kingdom. Her assessment of the strength of the third appellant's private life began from the second sentence of para 91 and ended immediately before the finding that "*the third appellant has an unremarkable private life*".
53. Whilst I accept that the principle in MA (Pakistan), that significant weight should be given to residence of seven years or more, is founded on the fact that children will have established stronger roots in the community the longer they have been in the United Kingdom and that residence of seven years is accepted as a significant point, the precise amount of weight to be accorded to a child's private life as a consequence of having lived in the United Kingdom for seven years or more is not a fixity, although it is clear that significant weight should nevertheless be attached to it such that there must be powerful reasons for not granting leave.

54. In the instant case, the judge had been very careful to remind herself that significant weight should be given to the fact that the appellant had lived in the United Kingdom for more than seven years, more than once. It was plainly relevant, nonetheless, for her to consider whether she was dealing with a child who, in the judge's words, had shown "*extraordinary talents or unusual achievements or involvements inside or outside school*". Not only was this relevant to deciding precisely what weight should be given to the third appellant's private life, albeit that it must be significant, but also the strength of the factors on the state's side of the balancing exercise in relation to proportionality in deciding whether there were powerful reasons for not granting leave.
55. I therefore do not accept that the judge erred in law at para 91.
56. I do not accept that there is any substance in the general submission that the judge failed to recognise the significance of the fact that the third appellant had lived in the United Kingdom for seven years. The fact is that the judge reminded herself of this principle more than once. The judge was required to identify powerful reasons for the third appellant not being granted leave. She did identify powerful reasons. It is clear from her reasoning that she found not only that the first and second appellants have a poor immigration history but that their actions in deliberating setting out to organise the circumstances of the third appellant such as to be able to exploit the seven-year rule for her and for themselves was a deliberate abuse of the system of immigration control. Plainly, she considered it telling that, within weeks of the appellants arriving in the United Kingdom in August 2009, the second appellant wound up his car business in India which, on the judge's findings, had been established for at least eight years. In my judgment, the judge identified this as a powerful reason. At para 98, the judge made it clear that she found that the public interest in the appellants' removal went *beyond* the general public interest in effective immigration control.
57. It is not the case that the third appellant was being punished for the actions of her parents but simply that the balancing exercise was being undertaken so as to give appropriate weight to the state's interests. As the Court of Appeal made clear at para 44 of MA (Pakistan), it is not the case that a child who has lived in the United Kingdom for seven years or more should be refused leave only in exceptional circumstances, in contrast to the position when the old DP5/96 policy was in force.
58. I turn to ground 1.
59. Ground 1 is a complaint about form over substance, in my judgement. Whilst I accept that the Upper Tribunal said at para (4) of the judicial head-note in Kaur, that the best interests assessment should "*normally be carried out at the beginning of the balancing exercise*", it does not follow that failure to do so will, *ipso facto*, amount to an error of law, much less a material error of law. There is no authority for such a proposition. There are authorities to the contrary. For example, at para 10 of Zoumbas v SSHD [2013] UKSC 74, the Supreme Court set out certain legal principles that Counsel for Mr Zoumbas said were derived from three decisions of the Supreme Court (namely ZH (Tanzania), H v Lord Advocate 2012 SC (UKSC) 308 and H (H) v Deputy Prosecutor of the Italian Republic [2013] 1 AC 338). The Supreme Court said that those principles were not in doubt. The fourth principle reads:

“(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;”

60. This specifically states that judges may approach the assessment of the best interests of a child in different ways but that it was important to ask the right questions in an orderly manner. It does not say that a failure to consider the best interests of a child at the beginning of the balancing exercise will be an error of law.
61. In the instant case, it is clear that the judge asked herself relevant questions in the assessment of the third appellant’s best interests in an orderly way. She considered the third appellant’s language capability (paras 53-56). She considered the third appellant’s performance at school (paras 65-71) which was also relevant to the child’s language capability. She considered her health (para 72). She reminded herself of the principles from relevant authorities in relation to the best interests of children (paras 74-76) and the significance of residence of seven years (paras 77-81). She then applied para 11.2.4 of the IDIs (paras 82-86) and as factor b. mentioned the best interests of children in the context of whether a child should leave the United Kingdom, considered this issue both in the context of best interests and reasonableness. She then turned to consider the staged approach in assessing Article 8 claims outside the Rules, at paras 87 onwards.
62. Ground 1 is therefore not established.
59. Overall, I agree with Ms Brocklesby-Weller that the judge’s decision is a very detailed assessment of the Article 8 claims of all the appellants, as well as the youngest child. She considered the best interests of the third appellant in a child-centred way. She plainly gave significant weight to the fact that the third appellant had lived in the United Kingdom for at least seven years. She identified powerful reasons for the third appellant not being granted leave.
63. Finally, I should say that I have noted that the First-tier Tribunal judge who granted permission did so in trenchant terms. Mr Malik (rightly) did not rely upon the terms in which permission had been granted as support for his submissions that Judge Coll had materially erred in law. However, given the terms in which permission was granted, it is appropriate for me to make some observations, less it be said that the conclusion I have reached in these appeals is wrong because it is inconsistent with the firmly held views of the permission judge notwithstanding that he used the words “arguable” and “arguably” several times.
64. Although the permission judge referred to it being arguable that Judge Coll had made insufficient findings, he did not explain how or in what way the findings of Judge Coll were arguably inadequate. Nor was this apparent from the grounds since this point was not raised in the grounds. This leaves, then, his view that Judge Coll arguably placed too much weight on certain matters and too little on certain others.
65. On a proper examination of the reasons the permission judge gave for granting permission, it is clear that he was concerned about the *weight* that Judge Coll gave to various factors. He said, for example, that it is arguable that she gave “*insufficient weight*” to the extent of the third appellant’s integration in the United Kingdom; she arguably gave “*undue emphasis to the factors bearing upon the situation on return in*

contradistinction to the extent of deracination given the application of the [seven-year] benchmark policy period”; that it was arguable that “the weight attached to the element of immigration history has been excessive”; that it was “arguable that the Judge has attached insufficient weight to the question of deracination”; and “arguable [that the Judge attributes] excessive weight ... to the timing analysis in relation to the actions of the parents in contradistinction to the question of the extent of the integration of [the third appellant]”.

66. The weight to be given to the various factors is essentially a matter for the first-instance judge and will rarely give rise to an error of law. The grounds did not contend that the weight Judge Coll placed on individual factors was unreasonable. Nor did Mr Malik, although he did suggest at one point that the judge had given excessive weight to the state's interest in the balancing exercise in relation to proportionality at para 97(iv). At the same time, he acknowledged that weight was a matter for the judge.
67. In my judgment, notwithstanding the trenchant terms in which permission was granted, the reality is that the permission judge simply disagreed with the decision of Judge Coll. Whilst another judge may have made a different decision, it simply cannot be said that the decision of Judge Coll was unreasonable. Mr Malik did not suggest that it was.

Decision

The decision of Judge of the First-tier Tribunal Coll did not involve the making of any error of law. Her decision stands. The appellants' appeals to the Upper Tribunal are dismissed.



Upper Tribunal Judge Gill

Date: 8 February 2018