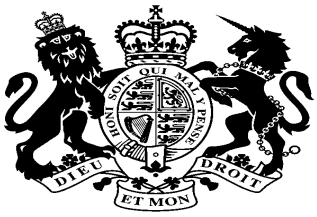

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07510/2018
HU/07512/2018, HU/07513/2018
HU/07514/2018, HU/07515/2018
HU/07516/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision and Reasons Promulgated**
On 11 January 2019	**On 16 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

N N
M M N
W N
M M N
M U N
U N
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Wilkins of Counsel, instructed by Sabs Solicitors.
For the Respondent: Mt Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1 These are the appellants' appeals against the decision of Judge of the First-tier Tribunal Mensah dated 8 October 2018 dismissing the appellants' appeals against the decision of the respondent dated 16 March 2018 refusing of their human rights claims.

2 The appellants are all nationals of Pakistan, the first appellant NN having arrived in the United Kingdom on 17 February 2010 with entry clearance as a Tier 4 student valid until 1 December 2011. NN was already married to the second appellant Mr MN in Pakistan in 2006. They already had one child at the time of the first appellant's entry into United Kingdom, their daughter WN, born in April 2009 in Pakistan.

3 On or around August 2010, the Mr MN and WN entered the United Kingdom as Tier 4 dependents of NN. NN had been pregnant on her arrival in the United Kingdom, and gave birth to the fourth appellant Ms MN in September 2010. On 1 December 2011 NN made a further application for leave to remain, as a Tier 2 migrant. This was refused without right of appeal on 29 February 2012. In NN's most recent application form for leave to remain, she does not assert that she has had any leave to remain in the United Kingdom since 31 November 2011.

4 The fifth and sixth appellants, Master RN and Master UN, were born in the United in April 2012, and September 2013 respectively.

5 An application for asylum was made on or around March 2014 which was refused in March 2015 and an appeal dismissed in July 2015. Two further sets representations, in January 2016, and March 2016, were refused without right of appeal, but further representations on family life grounds dated November 2017 were rejected in the decision under appeal dated 16 March 2018, with a right of appeal.

6 The respondent's decision was that none of the appellants met the requirements for leave to remain under Appendix FM, or paragraph 276 ADE(1) of the immigration rules, and there were no compelling circumstances outside of the rules to justify leave to remain being granted on family or private life grounds.

7 The appellants' subsequent appeals came before the judge on 6 September 2018. The judge held, in summary as follows:

(i) the appellants would all be returned by the respondent as a family unit and there would be no material interference in their family life together [6];

(ii) NN and Mr MN had not shown very significant obstacles to their integration into Pakistan, and did not satisfy the requirements for leave to remain on private life grounds under paragraph 276ADE(1) [6];

(iii) the judge acknowledged that WN and Ms MN had resided in the United Kingdom for at least seven years [7];

(iv) the evidence of NN and Mr MN regarding the languages spoken by the family was confusing and contradictory [9] and the judge approached their evidence with caution [10];

(v) NN and Mr MN 'are willing to do anything, including making a false asylum claim and overstaying, in order to keep their children in the UK to benefit from the UK education system and life in the UK. This behaviour and willingness to misuse the system in my view significantly increases the public interest in the entire family returning to Pakistan" [10].

8 The judge concluded her consideration as follows:

> "12. The two eldest children have been in the UK they have both been in the UK for 7 years. This is a significant period of time. For (WN) she has been in the UK from about aged 1 and a half years to now aged 9 years and for (Ms MN) he (*sic*) was born in the UK and is now aged 8. I agree with Mrs Fell neither child has spent what is often described as their most formative years in the UK and both are still very young when assessing their ability to adjust to life in Pakistan. Neither has started secondary school or is approaching important examinations. In fact as far as their education is concerned they are at an end where it is in my view reasonable to assume they have time to adjust to the Pakistan education system. I accept at those ages they would have some private life of their own through school and school friends etc, but I consider their private lives would still be very family centric and focussed. I have weighed up their private lives and the length of time they had been in the UK.
>
> 13. On the facts in this case I don't accept it would be unreasonable for the entire family, including all of the children to return together. I refuse their appeals under 276ADE. I also find that there are no exceptional circumstances which would make removal disproportionate under Article 8. The main appellants say they are not criminals and it is true they have not been convicted of any criminal offences but they have both been in the UK in breach of Immigration Laws and their conduct is not conducive to the maintenance of immigration control and the public good generally. Keeping children in the UK illegally for seven years is not a trump card to status despite what some people think. I have balanced the rights of the entire family and I am wholly satisfied it is in the best interests of all the children they remain together as a family unit and return to Pakistan with their parents who are very capable of caring and supporting them in Pakistan as mature adults in good health."

9 The judge then dismissed the appeals.

10 The appellants appeal to the Upper Tribunal on grounds dated 19 October 2018, arguing that the judge erred in law, in summary, as follows:

(i) failing to consider s.55 Borders, Citizenship and Immigration Act 2009, or to consider adequately the best interests of the four children;

(ii) failing to direct herself in law in accordance with MA (Pakistan) v SSHD [2016] EWCA Civ 705 para 49, that:

> "The fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise that you relate reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that the leave should be granted unless there are powerful reasons to the contrary";

(iii) failing to direct herself in law as to the application of s117B(6) NIAA 2002; to determine whether the two eldest children were 'qualifying children' and to determine whether it would be reasonable to expect them to leave the United Kingdom, and failing to have adequate regard to the children's integration into life into the UK (and reference was made to MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88(IAC) by way of example of how such issues should be considered);

(iv) erroneously penalising the children for the poor immigration history of their parents.

11 Permission to appeal was granted by Judge of the First-tier Tribunal Keane on 14 November 2018 on those grounds.

The hearing

12 I heard from the parties. Ms Wilkins relied on the grounds of appeal and argued that the judge failed to work in a structured way through the statutory scheme under Part 5A of NIAA 2002, and indeed did not refer to the provisions under that Part at all. There was some discussion as to the continued application the guidance given within paragraph 49 of MA (Pakistan). The decision in the present case was dated 8 October 2018, therefore predating the Supreme Court's judgement in KO (Nigeria) & Ors v SSHD [2018] UKSC 53 on 24 October 2018. Ms Wilkins argued that the Supreme Court has not explicitly overturned the guidance provided in paragraph 49 of the Court of Appeal's judgement in MA (Pakistan), and argued that it was still good law. Thus, the judge had erred in law in failing to identify powerful reasons to rebut the presumption that, WN and Ms MN having resided in the United Kingdom in excess of seven years, they should be granted leave to remain. Further, the judge's consideration of the children's integration into the United Kingdom was cursory, failing to have adequate regard to the documentary evidence in the appellant's bundle from their schools.

13 Further, following KO (Nigeria), Ms Wilkins argued that the judge had erred in giving significant weight to the adverse immigration history of the parents, which is contrary to the ratio in the Supreme Court's judgment at [16]-[17].

14 Mr Tan accepted that the judge's decision lacked some detail, but asserted that it contained an adequate consideration of the best interests of the children at [13] and the judge had held in the same paragraph that she did not accept that it would be unreasonable for the entire family including the children to return together. Even

though Part 5A of NIAA 2002 had not been referenced, the finding on reasonableness was adequate.

15 Further, Mr Tan argued that the judge had been entitled to take into account the parents' adverse immigration history, and their lack of credibility regarding the languages spoken within the family. The judge did make reference at [4] to having considered the appellant's bundle, which indicated that she had had regard to its contents.

16 Both parties confirmed that if the judge's decision were set aside, the rehearing of the appeal could take place before the Upper Tribunal. Ms Wilkins suggested that there were no significant factual issues which would require further oral evidence, and Mr Tan agreed that he would not have any cross-examination for the first two appellants if the matter proceeded to be reheard that day.

17 I ruled for reasons given below that the judge did materially err in law in making her decision, and I set the decision aside.

18 I heard submissions on the remaking of the decision in the appeal as follows. Mr Tan pointed out that there was no successful challenge to the judge's finding at [6] that there were no very significant obstacles to the first or second appellants returning to Pakistan. They both spoke relevant languages, and had significant roots in the culture of the country.

19 Mr Tan accepted that WN and Ms MN were qualifying children under Part 5A NIAA 2002 and that the question of whether it would be reasonable to expect them to leave the United Kingdom arose. Mr Tan referred to extracts from the Respondent's published guidance 'Family Migration: Appendix FM Section 1.0b; Family Life (as a Partner or Parent) and Private Life: 10-Year Routes' Version 2.0, dated 19 December 2018. At page 68 the guidance provided the starting point in the respondent's consideration of the position of children will be that the respondent would 'not normally expect a qualifying child to leave the UK.' However, Mr Tan referred to page 69, which set out further guidance said to have been provided in the light of the Supreme Court judgement in KO (Nigeria).

20 Notwithstanding the starting point above, the guidance provided that there may be some specific circumstances where it would be reasonable to expect a qualifying child to leave the UK. There were a number of bullet points said to be relevant to that question. Mr Tan suggested that the judge had held that the members of the family spoke relevant languages of Pakistan. A letter from WN's school at page [13] of the appellants' bundle suggested that she enjoyed telling her class about her background and sharing information about her religion with others, suggesting that she also had a cultural connections to Pakistan. A school report on Ms MN at [44] also suggested that she shared with the class in great detail why the Muslim creation story is important to Muslims, showing her religious and cultural connection with Pakistan. He argued that the children were not at any critical stage of their education. Mr Tan

made reference to the decision of the First-tier Tribunal dated 1 July 2015 dismissing the first appellant's asylum appeal. She had given evidence that she had four brothers in Pakistan, and her claim to have been in fear of them was rejected by the Tribunal. The appellant therefore had some family support in Pakistan. Mr Tan argued in summary that all the appellants were nationals of Pakistan; there was some family support there; they would have cultural familiarity with Pakistan; there were no language issues and no physical or medical problems of concern. It would be reasonable to expect the two older children to return to Pakistan, and thus the remaining appellants also.

21 Ms Wilkins relied on her skeleton argument. She argued that the parents' immigration history was not relevant to the assessment of whether it would be reasonable to expect the two older children to leave the United Kingdom. The guidance at paragraph 49 of MA Pakistan was still relevant authority, and there were no powerful reasons in the present case as to why the two older children should not be granted leave to remain. Where the children had spent more than seven years in United Kingdom, it would almost invariably be in their best interests to remain in the United Kingdom. WN, although born in Pakistan, left at the age one and a half would have no memory of that country. There was no finding that the children spoke fluent Urdu. It was not logical to argue that moving from a multifaith community such as the United Kingdom to Pakistan where is Islam is the predominant faith would necessarily be in the best interests of any of the members of the family; such a presumption would risk making a decision which was discriminatory on grounds of religion.

22 Any family support in Pakistan is doubtful at best. The fact that the children have spoken about their background and culture to their friends at school in fact represented evidence of integration. Ms Wilkins referred to her skeleton argument which referenced a number of documents within the appellants' bundle regarding the two older children's progress and integration at school.

Discussion

23 MK (best interests of child) India [2011] UKUT 475 (IAC) provides, regarding the assessment of best interests of children:

> "(i) The best interests of the child is a broad notion and its assessment requires the taking into account and weighing up of diverse factors, although in the immigration context the most important of these have been identified by the Supreme Court in ZH (Tanzania) [2011] UKSC 4, the Court of Appeal in AJ (India) [2011] EWCA Civ 1191 and by the Upper Tribunal in E-A (Article 8 –best interests of child) Nigeria [2011] UKUT 00315 (IAC).
>
> (ii) Whilst an important part of ascertaining what are the best interests of the child is to seek to discover the child's own wishes and views (these being given due weight in accordance with the age and maturity of the child) the notion is not a purely subjective one and requires an objective assessment.

> (iii) Whilst consideration of the best interests of the child is an integral part of the Article 8 balancing exercise (and not something apart from it), ZH (Tanzania) makes clear that it is a matter which has to be addressed first as a distinct inquiry. Factors relating to the public interest in the maintenance of effective immigration control must not form part of the best interests of the child consideration.
>
> (iv) What is required by consideration of the best interests of the child is an "overall assessment" and it follows that its nature and outcome must be reflected in the wider Article 8(2) proportionality assessment. Consideration of the best interests of the child cannot be reduced to a mere yes or no answer to the question of whether removal of the child and/or relevant parent is or is not in the child's best interests. Factors pointing for and against the best interests of the child being to stay or go must not be overlooked.
>
> (v) It is important when considering a child's education to have regard not just to the evidence relating to any short-term disruption of current schooling that will be caused by any removal but also to that relating to the impact on a child's educational development, progress and opportunities in the broader sense."

24 I find, with respect to the judge, that to the extent she considered the best interests of the children at all, this was cursory, appearing in the last three lines of the decision. It is not apparent that consideration was undertaken as a separate exercise to the proportionality balancing exercise required in the appeal.

25 In particular, I find that the judge failed, in the assessment of the children's best interests, to have any or adequate regard to the evidence of the ties of the qualifying children WN and Ms MN to United Kingdom. The following evidence was summarised in Ms Wilkins' skeleton argument:

> "a. In respect of the third appellant (WN) her head teacher comments that "It is clear that she works hard when at home as well as in school as she is achieving 10/10 on her spellings, weekly. (WN) is a good friend to her classmates and other children around the school. She always has a smile on her face and tries to make sure that everyone is okay. If they are not, she makes it purring to try and help. Her helpfulness is also clear in the classroom as she enjoys completing jobs for the teacher. Evident she does is with a smile on her face. She shows a real love for school. (WN) is extremely inquisitive and spends carpet time listening attentively and asking questions about things she does not understand. She also enjoys telling the class about her background and sharing information about her religion with others. Her great sense of humour alongside every else, makes a real pleasure to have in the classroom" (p.13). This is echoed by her Year 4 teacher, who says "(WN) often has a class giggling with her lovely sense of humour, she is a caring friend to all and she has a lovely heart!" (p.69). Her Year 3 teacher reported that she "Works cooperatively with other members of the class" and "is keen to share her ideas in class discussions" (p.76).

b. The Fourth Appellant's (Ms MN's) head teacher comments: "(Ms MN) is a model pupil with an excellent attitude to school and learning. (Ms MN) is a popular member of the class who has many friends, she is a kind, caring and exceptionally well-behaved member of the class" (p.12). Her Year 2 teacher Mrs (HB) also said she has "lots of friends and works well with everyone ... (Ms MN) loves sharing her knowledge, ideas and opinions with the class, she is also open minded, she understands that others have their own ideas and opinions to which she listens to carefully ... (Ms MN) has excellent general knowledge, this has meant that she has made some informative and sensible contributions to class discussions in science" (pp.28-29). (Ms MN) was awarded the Head Teachers Award, and her teachers commented that she "has also demonstrated how respectful, kind and caring she can be. (Ms MN) is always eager to help others in her class" (p.49)." (In fact that last reference should be to page 44 of the appellant's bundle).

26 Accepting that many pupils at school may well receive positive comments from teachers about their progress and participation in school life, I find that the above evidence represents significant integration by WN and Ms MN into their school. That Ms MN was awarded the Head Teachers Award was significant. However, none of that material was referred to by the judge, and, notwithstanding Mr Tam's efforts to persuade me that the judge's reference at[4] to her having had regard to the content of the appellant's bundle, I find that that was not, in the context of the present appeal, an adequate reference to the evidence from the school.

27 In the absence of an adequate finding as to what would be in the best interests of the children, the judge's brief conclusion that it would not be unreasonable the entire family to return to Pakistan is undermined.

28 Further, the following is provided in KO (Nigeria):

> "15. I start with the expectation that the purpose is to produce a straightforward set of rules, and in particular to narrow rather than widen the residual area of discretionary judgment for the court to take account of public interest or other factors not directly reflected in the wording of the statute. I also start from the presumption, in the absence of clear language to the contrary, that the provisions are intended to be consistent with the general principles relating to the "best interests" of children, including the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent" (see Zoumbas v Secretary of State for the Home Department [2013] UKSC 74, [2013] 1 WLR 3690, para 10 per Lord Hodge).
>
> The specific provisions
>
> 16. It is natural to begin with the first in time, that is paragraph 276ADE(1)(iv). This paragraph is directed solely to the position of the child. Unlike its predecessor DP5/96 it contains no requirement to consider the criminality or misconduct of a parent as a balancing factor. It is impossible in my view to read it as importing such a requirement by implication.

> 17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is "reasonable" for the child. As Elias LJ said in MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber) [2016] EWCA Civ 705, [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv)."

29 The assessment of whether it would be reasonable to expect child to who had lived in the United Kingdom seven years to leave the United Kingdom is thus to be considered in the same way under (276ADE(1)(iv)) and s.117B(6) NIAA 2002, and in neither case does that assessment contain any requirement to consider criminality or misconduct on the part of the parent as a balancing factor. However, it is with respect to the judge clear that the adverse immigration history of the parents was a significant factor in determining whether it would be reasonable for the children to leave the United Kingdom. The judge thus erred in law.

30 I find these errors material to the outcome of the appeal, and I set the judge's decision aside.

Remaking

31 KO (Nigeria) also contains the following:

> "18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in SA (Bangladesh) v Secretary of State for the Home Department 2017 SLT 1245, [2017] ScotCS CSOH_117:
>
> > "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …"
>
> 19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders,

Citizenship and Immigration Act 2009 in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874, para 58:

> "58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

To the extent that Elias LJ may have suggested otherwise in MA (Pakistan) para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves."

32 It is also instructive to consider in KO (Nigeria) paragraphs [46]-[52], in which Lord Carnwath gave his reasons for dismissing the appeals of NS and AR. Those appeals featured children who had resided in the UK for over 10 years at the time of a hearing before Upper Tribunal Judge Perkins on 5 November 2014, who dismissed the appeals. At [50], Lord Carnwath quoted from the Upper Tribunal's decision:

> "I do remind myself that one of the children, particularly, has been in the United Kingdom for more than ten years and that this represents the greater part of a young life by someone who can be expected to be establishing a private and family life outside the home. I remind myself, too, that none of the children here have any experience of life outside the United Kingdom and they are happy and settled and doing well. The fact is their parents have no right to remain unless removal would contravene their human rights.
>
> I remind myself of my findings concerning the need to maintain immigration control by removing the first, second and third appellants. Given their behaviour I would consider it outrageous for them to be permitted to remain in the United Kingdom. They must go and in all the circumstances I find that the other appellants must go with them." (paras 198-199)

33 At [51], Lord Carnwath continued:

> "51. Mr Knafler supports the other appellants in their challenge to the reasoning of MM (Uganda). He says that it is even clearer in the context of section 117B that parental misconduct is to be disregarded. I accept that UTJ Perkins' final conclusion is arguably open to the interpretation that the "outrageousness" of the parents' conduct was somehow relevant to the conclusion under section 117B(6). However, read in its full context I do not think he erred in that respect. He had correctly directed himself as to the wording of the subsection. The parents' conduct was relevant in that it meant that they had to leave the country. As I have explained (para 18 above), it was in that context that it had to be considered whether it was reasonable for the children to leave with them. Their best interests would have been for the whole family to remain here. But in a context where the parents had to leave, the natural expectation would be that the children would go

> with them, and there was nothing in the evidence reviewed by the judge to suggest that that would be other than reasonable."

34 In EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA Civ 874, the following guidance was given as to the assessment of best interests of children:

> "35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens."

35 In relation to those matters, I make the following findings, on the position of WM and Ms MN:

(a) WM is aged 10, and Ms MN is 8 ½.

(b) WM arrived in the UK in August 2010, shortly before Ms MN was born in the UK, and so both have been present in the UK for about 8 ½ years.

(c) They have presumably been in formal education since reception, and will now be in year 5 and 3 respectively.

(d) There is no evidence that WN has returned to Pakistan since she first arrived in 2010, and there is no evidence that Ms MN has ever been to Pakistan. To that extent, I find that they will have no direct experience of living in that country. However, bearing in mind the undisturbed finding of the judge that their parents had not told the truth about what languages were spoken in the family home, I find that the children will have some familiarity with Urdu and Punjabi. They have been brought up by Pakistani parents, and have familiarity with Pakistani culture; indeed it is recorded that they talk about their background and religion to their fellow pupils at school.

(e) It is difficult to assess how renewable their connections with Pakistan might be. Although the witness statements of NN and Mr MH assert it would be disastrous for the children to have to return to Pakistan, there is no discussion as to what connections the family still retain in that country or what their employment prospects might be. In the decision of the Tribunal in NN's asylum appeal, reference AA/05169/2015, her claim to fear serious harm from her family members as a result of marrying Mr MN (a man said to the outside of her cast), was found to lack credibility. NN has therefore not established that she fears and has no contact with her four brothers in Pakistan, as alleged in her asylum claim. Mr MN had given evidence to that Tribunal, recorded at [16], that he had previously been employed in Pakistan repossessing vehicles on behalf of various banks. It was said that he had been the proprietor of his own

business; he had had an office, and had worked throughout Punjab (paras [17], [8], [31]). With those findings are as a starting point, and in the absence of any other evidence, I am unable to find that there would be any significant difficulties experienced by the family in securing accommodation or employment in the medium to long term, even if there would be some disruption to their lives in the short term by returning to Pakistan. It is not asserted that there are no educational facilities in Pakistan that the children could attend.

(f) On the issue of language, I repeat what I have said at (d) above.

36 As to issues raised at para 35(g) in EV (Philippines), I find that there any proposed removal of WN and Ms MN from the United Kingdom would represent a significant interference with their private life that they have developed in the United Kingdom. I repeat the summary of the evidence from their schools, set out at [25] above. There is no specialist evidence, for example in the form of an independent social worker, setting out the extent of the effect on the children of any proposed removal from United Kingdom, but even in the absence of such evidence, I accept that the children will be upset about the prospect of them leaving their school, and the friends that they have, both within and outside of school. The evidence is that they are both very well settled into the education system in the United Kingdom, and participate fully in school life. I am able to assume, on the basis that they attend mainstream school, that they are fluent in English and may well identify as being as much of British origin as they do Pakistani.

37 I also appreciate that at the time that this decision is being produced, MRN will also have recently passed his 7th birthday and should also now be treated as a qualifying child. I take into account the evidence in the appellant's bundle about his progress at school; the letter from the Head Teacher of the children's school dated 13 July 2018 also describes that he had settled well in year 1, had made good progress, and had good friendships within the class, and engaged with his peers in class and on the playground. I also take into account the fact that UN will have a private life in the United Kingdom, although at aged five, this will be more closely tied with his immediate family and his home.

38 If the assessment of the qualifying children's best interests were to compare whether it would in their best interests (i) to remain living in the United Kingdom with all of the other members of the family, or (ii) to live in Pakistan with all the members of their family, I would have found that it would be in their best interests to remain in the United Kingdom, albeit by a fairly narrow margin. That margin would be narrow, as it should not be presumed that any specific hardship would result in the family returning to Pakistan, due to the parents' lack of candour about their likely situation there. On balance, however, I would have found that it would be in the children's best interests to retain the status quo.

39 Further, had this appeal been determined prior to the Supreme Court judgement in KO (Nigeria) I would have had no hesitation in finding that, applying the guidance in paragraph 49 of MA (Pakistan), there were not sufficiently powerful reasons justifying the removal of the qualifying children from United Kingdom, even taking into account, as the law then required, their parents adverse immigration history, in the final assessment of whether it would be reasonable to expect them to leave the United Kingdom.

40 However, it seems to me that the Supreme Court's judgement in KO (Nigeria) now requires the Tribunal to presume that parents without leave to remain will be removed, demanding the assessment of whether it would be in the children's best interests (i) to remain in the United Kingdom without their parents, or (ii) to be in the family's country of origin, with their parents (KO (Nigeria), paras [18], [51]). Given the fairly common sense view expressed in the Supreme Court judgement that it would normally be reasonable for children to be with their parents, the range of circumstances when it would be deemed to be in a child's better interests to remain in the UK without their parents, than to be with their parents in the country of origin, seems very small. Different considerations may well apply, no doubt, if one of the parents, or one or more children of the family was British or otherwise had a right to reside in the UK. However, that situation does not apply in the present case.

41 Given that NN and Mr MN have not established by evidence that any specific hardship would result to the family upon their return to Pakistan, I find it inevitable that I arrive at the conclusion that the presence of all of the family members in Pakistan would be in the best interests of the children, rather than some or all of the children remaining in the United Kingdom without their parents. There are no special considerations in the present case which would demonstrate that it would be in the children's best interests to be in that position, or that it would be unreasonable to require the children to leave the United Kingdom, notwithstanding their parents' departure.

42 Thus, although applying different legal considerations than did the original judge, I also find, applying s.117B(6) NIAA 2002, and current relevant authority relating to that provision, that it would be reasonable for the qualifying children to be expected to leave the United Kingdom. The parents' past immigration record is only relevant in this respect on the basis that they happen to be persons without leave to remain in the UK.

43 I accept that NN and Mr MN have genuine and subsisting parental relationships with their qualifying children. However, as it has not been established that it would be unreasonable for the qualifying children to be expected to leave the United Kingdom, NN and Mr MN are unable to establish that the public interest does not require their removal.

44 As far as I am required to apply other considerations on the part 5A NIAA 2002, I note that although the judge does not record whether an interpreter was used for the

hearing before her, the notices of appeal filed with the First-tier Tribunal suggested that an Urdu interpreter would be required. There is therefore at least doubt as to whether NN and Mr MN speak English fluently. Their witness statements are silent as to their income; it is doubtful that they have permission to work in the United Kingdom. There is no evidence in the appellant's bundle of any current income. I am not satisfied that they are financially independent. Much of the private lives of the appellants have been developed in the United Kingdom whilst here unlawfully, and little weight is to be attached to it.

45 I find, bearing in mind the maintenance of immigration control is in the public interest, and taking into account all the matters I have set out above, that the removal of all of the appellants from the United Kingdom would not represent a disproportionate interference with either their private or family lives.

Decision

The judge's decision involved the making of an error of law.

I set aside the judge's decision.

I remake decision, dismissing the appellants' appeals.

Signed: Date: 14.5.19

Deputy Upper Tribunal Judge O'Ryan

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

This appeal concerns the interests of minor children. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: **Date: 14.5.19**

Deputy Upper Tribunal Judge O'Ryan