



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08900/2018 (P)
HU/08904/2018 (P)
HU/08929/2018 (P)
HU/08932/2018 (P)

THE IMMIGRATION ACTS

Decided under Rule 34 without a hearing
On Monday 15 June 2020

Decision & Reasons Promulgated
On Tuesday 23 June 2020

Before

UPPER TRIBUNAL JUDGE SMITH

Between

- (1) N D
- (2) C I
- (3) C I
- (4) C D

[Anonymity direction made]

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Although an anonymity order was not made by the First-tier Tribunal, it is appropriate to make one as the appeal involves minor children. Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any members of their family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

FACTUAL BACKGROUND

1. The Appellants appeal against the decision of the First-tier Tribunal Judge N M Paul promulgated on 7 October 2019 (“the Decision”). By the Decision, the Judge dismissed the Appellants’ appeals against the Respondent’s decisions dated 29 March 2018 refusing their human rights claims (under Article 8 ECHR).
2. The Appellants are nationals of Nigeria. The First and Second Appellants are in a relationship as partners. The Third and Fourth Appellants are their two minor children. The First Appellant came to the UK as a student in 2008 with leave as a student to May 2010. She then sought to remain as the spouse of an EEA (Czech) national in July 2010 and she was given a residence permit valid to January 2016. She divorced her husband on 14 July 2015. She submitted a further application for a residence permit in June 2016 which was refused. She appealed that decision but later withdrew her appeal. She became appeal rights exhausted on 15 November 2017.
3. The Second Appellant also came to the UK in 2008 with an EEA family permit to accompany his EEA (also Czech) national spouse. He was granted a further permit in that connection to December 2014. He divorced his wife on 8 August 2014 and his further application was also refused. He also appealed but withdrew his appeal. He became appeal rights exhausted by 31 October 2016.
4. The Third and Fourth Appellants were born in 2010 and 2014 respectively and are currently aged nine years and five years. They were aged just over seven years and just under three years at date of application, nearly eight years and four years at date of the Respondent’s decision and over eight years and four years at date of the hearing before Judge Paul. The First and Second Appellants are parents of both children even though both were married to other persons (EEA nationals) when the children were conceived and born. The First Appellant says that she became pregnant by the Second Appellant whilst still with her Czech husband. It is said that the Second Appellant subsequently moved in with them, following a stroke, by which time his relationship was over. It is said that the First Appellant’s husband then moved out and she became pregnant with the Fourth Appellant.
5. At the heart of the Appellants’ human rights claim is the position of the Third Appellant who was aged over seven years (by about two weeks) when the application was made to remain. The primary issue, as the Judge recognised, was whether it was reasonable to expect the eldest child (the Third Appellant) who is a “qualifying child” under the Immigration Rules (“the Rules”) and Section 117B (6) Nationality, Immigration and Asylum Act 2002 (“Section 117B(6)”) to leave the UK.

The Judge concluded that the Respondent's decision did not breach Article 8 ECHR and therefore dismissed the appeals.

PROCEDURAL BACKGROUND

6. The Appellants raise three grounds of appeal. First, they say that the Judge has failed to make clear findings as to the best interests of the Third and Fourth Appellants. The second ground asserts that the Judge has failed to consider relevant case-law, in particular MA (Pakistan) and others v Secretary of State for the Home Department [2016] EWCA Civ 705 ("MA (Pakistan)") which is said to be to the effect that "leave should be granted unless there are powerful reasons to the contrary". By the third ground, the Appellants submit that the Judge has failed to have regard to other factors in Section 117B, particularly that they had leave to remain for some of their time in the UK, that they both speak English and are integrated and that they would be financially independent if given the right to work. It is also said that the Judge has ignored evidence as to the Second Appellant's ill health, the employment situation in Nigeria and the integration of the family with their church group.
7. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on 5 February 2020 in the following terms so far as relevant:
 - "... 2. The grounds requesting permission to appeal to the Upper Tribunal lodged 18 October 2019 argue that the judge has failed to make clear findings on what is in the best interests of the children. There is arguably some confusion in paragraph 28 of the decision which may lead to an arguable error of law.
 3. Furthermore, it is arguable that the judge has failed to apply jurisprudential authority in relation to the qualifying child.
 4. Lastly, it is argued that the judge has failed to take material factors into account when conducting a proportionality exercise under Article 8. It is arguable that the judge has failed to take into account appropriate factors including those under section 117B.
 5. I grant permission on all grounds."
8. By a Note and Directions dated 26 March 2020 and sent on 24 April 2020, having reviewed the file, I reached the provisional view that it would be appropriate to determine without a hearing (pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 - "the Procedure Rules") the following questions:
 - (a) whether the making of the First-tier Tribunal's decision involved the making of an error of law and, if so
 - (b) whether that decision should be set aside.

Directions were given for the parties to make submissions in writing on the appropriateness of that course and further submissions in relation to the error of

law. The reasons for the Note and Directions was the “present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules”.

9. On 6 May 2020, the Appellants, via their Counsel acting pro-bono, filed further submissions. Those further submissions include a further ground which was not directly raised in the original grounds, namely that there was a delay in the promulgation of the Decision which constituted a material error of law, having regard to the analysis applied to that issue by the Court of Appeal in SS (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 1391. No application was made to amend the Appellants’ grounds. Instead, the author of the grounds sought to link this issue to the grounds previously pleaded on the basis that the Judge has failed to understand or properly to record the evidence and therefore that the delay has materially affected the fairness or safety of the Decision.
10. Somewhat confusingly, in relation to the procedure by which the appeals could be determined, the Appellants submitted first that the grounds disclosed a material error and that, since credibility was not in issue, the Decision could be re-made on the basis of legal submissions alone, but taking into account some additional evidence but, second, that procedural fairness demanded that there be an oral hearing in relation to the error of law so that a Judge could raise any matters of concern. In relation to the additional evidence, although the further submissions refer to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, no explanation is given for the failure to adduce the evidence earlier. I accept that, insofar as the evidence post-dates the previous hearing and is intended to deal with the position, in particular of the children, at the present time, it could not be included before. That may be an explanation for the first ten pages of the additional bundle but not for the subsequent twenty-two pages. I accept however that, if I were to set aside the Decision for material error, I would need to re-decide the appeals based on the up-to-date position.
11. On 6 May 2020, the Respondent filed written submissions seeking to uphold the Decision. She agreed that this case was suitable to be considered without an oral hearing. The Tribunal forwarded those submissions to the Appellants for comment. The Appellants responded to the Respondent’s submissions on 14 May 2020, expanding upon the grounds as originally formulated by reference to what is said by the Respondent.
12. The Appellants have now had three opportunities to set out their case – in the original grounds of appeal, the further submissions and the submissions in reply to the Respondent’s submissions. As they point out, credibility is not in issue in this case. The challenge is based on the Judge’s assessment, having regard to case-law which is now relatively settled. Indeed, the Appellants accept that the appeals could be re-determined based on legal submissions only. Their only objection to the error of law being determined based on legal submissions made only in writing

is that the Appellants would lose the opportunity to make oral representations on any matter of concern to a Judge. It is not explained why the grounds which are fully pleaded and expanded upon by way of written submissions do not cover each and every matter which needs to be considered. Nor is it explained why the Appellants are denied “the quality and effectiveness of representation” merely because that representation is made in writing rather than orally. Indeed, it might well be argued that they have had a greater opportunity to put forward their case than is available to them in the normal course of events via a ninety minutes’ hearing.

13. Having regard to the detailed nature of the grounds and the submissions, I have reached the view that the issues can fairly be determined on the basis of the pleadings put forward. I proceed to determine the error of law issue on the papers. At this stage, the issue for me is whether the Decision contains an error of law. If I so conclude, I will need to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

14. I begin my consideration with the issue raised somewhat belatedly in the Appellants’ further submissions, namely the delay between the hearing in December 2018 and the promulgation of the Decision in October 2019. That is a period of about ten months. I begin by repeating that this issue was not raised in the original grounds of appeal. It appears from the face of the Decision that there was a delay in promulgation. However, what the grounds fail to mention is that the delay was not in the writing of the Decision but in its promulgation to the Appellants. The Tribunal’s file shows that the Decision was originally promulgated on 8 January 2019. It is also evident from the face of the Decision that it was written by Judge Paul much earlier; it is dated on 22 December 2018 – that is to say some two days after the hearing. It appears from the Tribunal’s file that, on 28 September 2019, the First Appellant contacted the Tribunal to say that she had not received the Decision and was unaware of it until she received a letter from the Respondent seeking to enforce the family’s return to Nigeria. Her e-mail triggered the re-promulgation of the Decision on 7 October 2019. The Decision however remains dated December 2018. There is therefore no conceivable merit in the Appellants’ attempt to rely on any delay in the writing of the Decision, as indeed they should have known both based on the date as shown on the Decision and on the background to the re-promulgation, triggered by their own contact with the Tribunal. I therefore need say no more about this issue.
15. Turning then to the grounds as pleaded, at the heart of the appeals and therefore also the grounds of appeal is the position of the Third Appellant in particular. However, it is appropriate to start with the third ground of appeal concerning the other factors in Section 117B which might be relevant to these appeals.

16. As the Respondent points out, the fact that the Appellants speak English (which is also the language largely spoken in Nigeria), and are said to be financially independent (or would be if permitted to work), are neutral factors (see in particular Rhuppiah v Secretary of State for the Home Department [2018] UKSC [58] at [57]). Indeed, the Appellants' reply to the Respondent's submissions recognises as much. It is asserted that those factors "should properly have been afforded neutrality in the proportionality exercise" and that "another Judge, taking these neutral factors into account, could have come to a different conclusion when considering the other factors submitted to weigh heavily in the Appellants' favour".
17. The question whether the Decision contains a material error of law is not whether another Judge could have reached the opposite conclusion but whether this Judge reached a conclusion by appropriately directing himself as to the relevant law and assessing the evidence on a rational and lawful basis. It is also difficult to understand how factors which are neutral can be afforded weight as such. The fact that those factors are neutral means that they are not afforded weight, whether positive or negative in the balancing exercise.
18. The Appellants' real complaint in this regard appears mainly to be directed at the weight which it is said should have been given to other factors, such as the family's ties to their local church, the children's integration in the UK and lack of integration with their Nigerian heritage and family. Those factors are properly to be considered in relation to the other grounds.
19. The Judge was clearly aware of the immigration history of the First and Second Appellants from what is said at [2] and [3] of the Decision. However, as he noted at [29] of the Decision, both had overstayed since 2016 and their position had been unlawful since then. As the Judge there observed "that is an important factor in terms of the SSHD's responsibility to maintain proper immigration controls". That reference is to Section 117B (1).
20. Although I accept that the Second Appellant makes mention in his witness statement of having had a stroke in 2011 which he says "still has serious ramifications for [him] now" (at §7, [AB/C2]), the medical evidence does not support that position. The letter from his GP dated 11 March 2015 ([AB/73]) says only that "[p]atients may suffer from communication problems due to stroke in certain cases" and the sickness notes at [AB/74-76] cover only a period of one month and one week respectively in 2016 and refer only to the Second Appellant being unable to work for short periods because he was unwell and tired and having back pain. A letter dated 20 November 2018 ([AB/241]) from the Second Appellant's GP indicates that he is taking medication for his earlier medical problems, that he has some regular reviews but that he is "compliant with his medication" and that bloods were "also normal". There is no up to date medical evidence which suggests ongoing medical concerns arising from the stroke. There is further evidence in the Appellants' supplementary bundle dated February 2020

([ABS/8-9]) which refers to a further MRI but does not disclose any current medical concerns; the MRI appears to be purely precautionary and relates to a possible prostate condition. Neither does it appear from what is said at [19] to [21] of the Decision that the Appellants' representative placed any reliance on this aspect of the Appellants' case.

21. The Judge was entitled to proceed based on the case put forward by the Appellants. Even if it were an error to fail to mention the Second Appellant's medical condition (which I do not in any event accept), such error is immaterial given the paucity of evidence on this point. Similarly, the relevance of the family's integration into their Church community is noted at [12] of the Decision and there is limited if any evidence in support of this contention in the Appellant's bundle. I deal with this aspect below in more detail when looking at the first and second grounds. For now, I note that the Judge recorded the evidence about that issue and the lack of any direct reference to it other than the reference to there being "precious little to justify the appellants' case for remaining in the UK" when conducting the balancing exercise is not an error or is immaterial. For those reasons, I reject the third ground.
22. It is appropriate to take the first and second grounds together as both concern the position of the minor Appellants. In essence, those grounds are to the effect that the Judge failed to consider the best interests of the Third and Fourth Appellants and failed to have regard to caselaw, in particular, MA (Pakistan) when considering whether it was reasonable to expect the Third Appellant to leave the UK, having regard to her age and the length of time that she has been in the UK. The Appellants rely in particular on the following passage from MA (Pakistan):

"49. ...the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related 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 leave should be granted unless there are powerful reasons to the contrary."
[my emphasis based on the Appellants' submissions]

The Appellants say that no powerful reasons have been identified. The Respondent says that such reasons are evident from what is said at [17] and [23] of the Decision. I accept that [17] of the Decision record the Presenting Officer's submissions on this issue. Nonetheless, as with the evidence recorded earlier in the Decision, and the Appellants' submissions, the Judge must be taken to have considered those submissions when reaching his conclusions.

23. The Judge dealt with the best interests of the Third Appellant in particular at [23] to [28] of the Decision as follows:

"23. The critical issue therefore relates to the best interests of the third appellant. It is trite to observe that the best interests of that child are served by being with the

family. In this context, it seems to me proper to take into account her wider family. The first and second appellant are Nigerian nationals, and both in their evidence and in the materials provided it seems to me that they are clearly people whose culture and background is important to them. They come from a culture in which the extended family is an important feature. They are living in relative isolation in the UK, unsupported by family. As already stated above, they are living in very modest circumstances.

24. The third appellant clearly had the benefit of good education and has demonstrated that she is a lively and bright young child. She has all the qualities necessary and commensurate with children of that age, to adapt to the environment in which she finds herself, so long as she is in a secure environment with her parents. The benefits of her education are such that she has not yet reached the level where she is entrenched within the UK educational system, by reference to exams necessary to proceed to higher education. She has all the benefits of an English education which would assist her in her transition to education in Nigeria. The same goes for her younger sibling for whom it is perhaps even more obvious to say that the transition would be of little detrimental effect.

25. In this respect, I have regard to the factors set out in **EV Philippines**, and in my view they have not been here so long and/or so established in the educational system that they would find any move disruptive. Moving country and education is a common feature within a modern world, and in this context they would be moving to a culture and environment with which their parents will be familiar, and from which they will benefit.

26. In my view, the first appellant's evidence and the second appellant's witness statement do not disclose, in my view, that there are not strong family ties with Nigeria. Furthermore, there are no obvious linguistic or medical difficulties in any of the parties adapting to life in Nigeria. The language of commerce and professional life is English in Nigeria and as bright, young children, they would be expected to aspire to a life in which that would probably be the language of their adult life.

27. Finally, it is plain that a critical factor here is that they would be returning with their parents in the context of a family unit.

28. Applying the criteria set out in the case of section 55, in my view adopting the analysis as set out in that case [sic], there is no question that the strength of a child's relationship with her parents or other family members would be severed if the child was to move to Nigeria with her family."

24. Contrary to the submission at [5] of the grounds, it is far from unclear what are the Judge's findings as to the children's best interests. The children would be returning with their parents to their and their parents' country of nationality. I accept, as the Appellants say in their reply to the Respondent's submissions, that there is no issue of a family split in this case. I do not understand the Respondent's assertion that the Judge has missed out a "not" at [28] of the Decision. The point there made, as reflected in the earlier paragraphs, is that the family have no support network of other family members in the UK. They have extended family in Nigeria. The children's best interests are, in the Judge's view, served by remaining in the family unit and returning with that family unit. There would be "no question" that the

strong family relationship of the unit would be severed if the family moved as a whole.

25. The Judge did not accept the evidence that the adult Appellants do not have strong family ties with Nigeria ([26]). It is asserted that this finding was not open to the Judge on the evidence. That evidence is recorded at [8] to [11] of the Decision. Even accepting that the family do not have contact with some siblings in Nigeria, it is worth noting that the First Appellant accepted that she retains some contact with her family in Nigeria and indeed her brother has provided written evidence that he would be unable financially to support and accommodate the family if they returned to Nigeria. The Second Appellant has family members even though his evidence is that he has not maintained contact.
26. Whilst it may well be the case that the minor Appellants have not yet formed a relationship with their extended family members because they have not met them and have not visited Nigeria, that does not undermine the Judge's findings that they have no family members here and could form ties with their relatives and culture in the country of their nationality.
27. As to integration in the UK and preservation of cultural ties with Nigeria, the Respondent asserts that the evidence is that the Appellants attend a church which "is in fact a Nigerian church with its headquarters in Nigeria and attended by the Nigerian community in the UK". The Appellants say in reply that the church is "[a multi-national Church, not a 'Nigerian Church', as would be recorded in the note of live evidence] in the UK, which happened to have a branch opening in Nigeria at the time of the First Tier hearing [not a headquarters in Nigeria, as would be recorded in the note of live evidence]". The parts in square brackets are, as I understand it, targeted at the issue of delay in writing the Decision and alleged impact on the Judge's understanding of the evidence. As I have already explained, that issue is a non-starter on the facts here. It is not explained why the evidence about the nature of the church (if relevant) was not contained in the written evidence. Nor is Counsel's note of the oral evidence included with those submissions. Notably, although the First Appellant has provided an updated statement in the supplementary bundle, where she says that she is trying to get a further letter from the Church but could not do so due to lockdown, she does not give evidence herself as to the status of that church which she could easily do if, as Counsel says, this formed part of her oral evidence.
28. In any event, whilst I accept that the Respondent's assertion in her submissions may overstate the position in relation to the base of the Church, that is not relevant to the findings of the Judge nor the evidence which was presented to him (as recorded at [12] of the Decision). In that regard, the Judge's record of evidence shows the following. In relation to the First Appellant's evidence, she was taken to [AB/240] which is the updated letter from the Church (which merely describes itself as "a multi-national evangelical church"). Her evidence in this regard in

response to what was apparently a question whether the church was also in Nigeria was that it had “just recently opened in Nigeria – Abuja”. Leaving aside that even a cursory search of the internet suggests that the church had a branch in Lagos prior to the more recent opening of that in Abuja and that its founding member comes originally from Nigeria, the Appellants’ own evidence was that there was at least one branch of that church in Nigeria and therefore, by implication, that they could continue to practise their religion in Nigeria. I can find no reference by the Judge to the Church being a Nigerian one. He says at [12] of the Decision that “the Church has an international branch, and they had recently opened a Church in Nigeria, in Abuja” which is consistent with the evidence as presented to him. It is for the Appellants to evidence the interference that they say there would be with their private and family lives. There is no arguable error made by the Judge in relation to the practising of the family’s religion when viewed against the evidence put forward by the Appellants.

29. As to circumstances in Nigeria, the Judge had evidence that the Appellants were able to find work in the UK and the First Appellant in particular has an accountancy qualification. The circumstances of their family members in Nigeria is therefore of less significance. In any event, the letter at [AB/12] from the First Appellant’s brother confirms only that he is unable to support or accommodate the Appellants. It says little about his own circumstances. That letter in any event stands in some contrast with the account of the First Appellant’s evidence at [11] of the Decision that her brother is still running the family business.
30. The Judge has considered the impact on the Third Appellant in particular in terms of her education. As I have already pointed out, her position was the primary focus of the appeal given her age but it is not right to say that the Judge did not also consider the position of the Fourth Appellant (see in particular [24] to [26] as cited above).
31. The Appellants’ grounds rely on one paragraph of the First Appellant’s statement as to the children’s integration as follows ([AB/B6]):

“41. My children literally could not imagine life outside the UK, daughter says to me, ‘I am not from Nigeria’ and my son says ‘I am from England’ – they see themselves as truly British. Our children could not cope with such a huge change and upheaval to their lives; even the prospect of moving back to Nigeria has been extremely distressing for them. I am concerned about their stress levels as children as even the thought of leaving our lives here causes them to be extremely upset.”

The Judge has however considered that point in what he says at [24] and [25] of the Decision. That passage has to be read moreover in the context of what other evidence there is as to the children’s integration. As would perhaps be expected at the age of these children, that concerns their health, development and education (see in particular [AB/85-171]). Those are the very factors which the Judge

considered. As would be expected from a child of her age, the Third Appellant in her letter at [AB/237] expresses her wish to stay in the UK but the question is what is in her best interests and reasonable in the “real world” situation in which she finds herself.

32. The Judge has therefore adequately considered the children’s best interests. There is no error of law in that regard. The question which then arises is whether he has properly understood the weight to be given to those interests and the way in which Section 117B (6) in particular operates.
33. I begin with the caselaw in this regard. The case of MA (Pakistan) is clearly relevant. However, the Supreme Court had cause to deal also with Section 117B (6) and to review MA (Pakistan) in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53 (“KO (Nigeria)”). The following passage is of particular importance:

“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).

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] Scot CS 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.”

34. I take into account also what was said by this Tribunal when dealing with the way in which Section 117B (6) is to be applied in Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC) (“Younas”):

“110. Section 117B(6)(b) requires a court or tribunal to assume that the child in question will leave the UK: *Secretary of State for the Home Department v AB (Jamaica) & Anor* [2019] EWCA Civ 661 and *JG (s 117B(6): “reasonable to leave” UK) Turkey* [2019] UKUT 00072 (IAC). However, once that assumption has been made, the court or tribunal must move from the hypothetical to the real: paragraph 19 of *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53. The length of time a child is likely to be outside the UK is part of the real world factual circumstances in which a child will find herself and is relevant to deciding, for the purpose of section 117B(6)(b), whether it would be unreasonable to expect the child to leave the UK.

111. A court or tribunal must base its analysis of reasonableness on the facts as they are (having assumed, for the purpose of this analysis, that the child will leave the UK with his or her parent or parents). The “real world” context includes consideration of everything relating to the child, both in the UK and country of return, such as whether he or she will be leaving the UK with both or just one parent; how removal will affect his or her education, health, and relationships with family and friends; and the conditions in the country of return. The conduct and immigration history of the child’s parent(s), however, is not relevant. See *KO* at paras. 16 – 18.”

35. Although I accept that what is there said arises in a different factual context as the child in that case was expected to leave the UK only for a temporary period, the approach to the issue is nonetheless the same. A Judge has to consider the position of the child based on the facts and evidence which apply to that issue and

determine the impact on the child. As the approach adopted in that judgment also makes clear, the best interests of the child are a primary consideration and as such will inform consideration of the Section 117B (6) issue.

36. I accept that, perhaps unusually, the Judge does not refer to Section 117B (6) in terms. Nor indeed does he refer to any other provision of Section 117B expressly. Nonetheless, he does so in form. By way of example, I have already referred to the Judge's reference to the maintenance of effective immigration control which is a significant feature of that section.
37. In relation to Section 117B (6), the way in which the Judge self-directed himself on that issue appears at [19] to [21] of the Decision in his record of the submissions of the Appellants' Counsel as follows:
- "19. Ms Gherman relied on her skeleton argument, which put at its very forefront the basic question as to whether or not, having regard to the third appellant having been born in the UK and having lived in the UK for more than 7 years, it would not be reasonable for her to return to Nigeria. She relied on the well known authorities and skeleton, to make the following points:
20. Lengthy residence in a country of origin was a relevant and significant factor in determining whether or not it would be appropriate to disrupt that. Following the case of KO, it was clear that the conduct of the parents could not form part of the assessment of reasonableness, but could be considered in the real world analysis of what the children should do, and also with regard to the overall proportionality of the proposed removal. She also relied on section 11(b)(v) of the 2014 Act to point out that the statutory provision was to the effect that there was no public interest in requiring a person's removal where they had a genuine and subsisting parental relationship with a qualifying child and it would [not] be properly reasonable to expect the child to leave the UK.
21. She also referred to other authorities which are applicable to the situation in this case, including section 55 of the 2009 Act."
38. Whilst as I accept there is no direct reference there to MA (Pakistan), the Judge did direct himself in accordance with what is said in KO (Nigeria) and in accordance with the approach of this Tribunal in Younas. The approach there set out is also consistent with what is said by the Court of Appeal in Runa v Secretary of State for the Home Department [2020] EWCA Civ 514 at [36] (although that case post-dates the Decision). The mere failure to make direct reference to MA (Pakistan) cannot amount to an error provided the correct approach has been followed. I do not understand the Appellants to contend otherwise.
39. The question then is whether the Judge has adopted the right approach. Coming back to where I began, the Appellants say that the Judge has erred because he has not identified the "strong" or "powerful" reasons to outweigh the best interests of the Third Appellant.

40. There are two difficulties with that submission. The first is that, contrary to the Appellants' position, I have concluded that the Judge did identify where the Third Appellant's best interests lay. Those are to be with her parents wherever they are. Since they have no leave to remain, the "real world" means that they would return to Nigeria. The Judge has determined that it would be in the children's best interests to return with their parents and therefore no question of "strong" and "powerful" countervailing reasons arises. As the Court of Appeal made clear in MA (Pakistan) at [47], even in a case where a child's best interests are found to favour remaining in the UK, it will not necessarily follow that it is unreasonable to expect that child to leave. The resolution of that latter issue involves "a careful analysis of the nature and extent of the links in the UK and in the country where it is proposed [he] should return". In this case, based on the evidence, the Judge concluded on the evidence that the best interests of the children were to remain with their parents wherever they were and did not require them to remain in the UK. He did so by analysing the case based on links with the UK and links which could be forged in the children's country of nationality.
41. The second difficulty is that the way in which the Judge approached this issue is entirely consistent with the Supreme Court's approach in KO (Nigeria). The consideration of the best interests of the child and whether it would be reasonable to expect the child to leave the UK has to leave out of account any wrongdoing on the part of a parent (provided it is not a deportation case). There is nothing in paragraphs [23] to [28] of the Decision which indicates that the parents' immigration history was taken into account in this context.
42. I accept that the Judge does not in terms state in his conclusion in the section I have set out that it is reasonable to expect the Third Appellant to leave the UK. However, that is plain when the first sentence of [23] of the Decision is read with what is said at [22] that "the central issue in this case is whether or not the third appellant - a child born and raised in the UK - could be reasonably expected to leave the UK" and when read with the way in which the Judge directed himself when summarising the Appellants' Counsel's submissions at [19] and [20] of the Decision.
43. For those reasons, there is no error of law identified by the first and second grounds of appeal. For the sake of completeness, I note that, having found what the best interests of the children required and, by implication, that it was reasonable to expect the Third Appellant to leave the UK, the Judge went on at [29] and [30] to consider the overall proportionality of the Respondent's decision to remove the family. At that point, it clearly was appropriate for the Judge to take into account the immigration history of the First and Second Appellants. I do not understand the Appellants to take issue with what is there said (other than in relation to the points raised by the third ground with which I have already dealt). In any event, the approach taken is consistent with the case-law and the conclusions reached are ones which were open to the Judge on the evidence.

44. The Appellants rely in their written submissions on the changed position of the children. The Third Appellant in particular has now reached the age where an application can be made for British nationality as she has been in the UK for ten years. That is not and could not be relevant to whether there is an error of law in the Decision which relates to a hearing over eighteen months ago. If the circumstances of the family have materially changed in the interim, it is for the Appellants to make a further application to remain based on those circumstances.
45. In conclusion, the Decision does not contain an error of law. I therefore uphold the Decision.

DECISION

The Decision does not involve the making of a material error on a point of law. I therefore uphold the Decision of First-tier Tribunal Judge N M Paul promulgated on 7 October 2019 with the consequence that the Appellants' appeals remain dismissed.

Signed *L K Smith*

Dated: 15 June 2020

Upper Tribunal Judge Smith

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email