



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/13118/2018
HU/13025/2018

THE IMMIGRATION ACTS

Heard by Skype Hearing
On 8 July 2020

Decision & Reasons Promulgated
On 01 December 2021

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

SANUNI SHARILA DHARMASENA WADUMESTHRIGE DONA
SAJITH DARSHANA VITHANAGE

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

Respondent

Representation:

For the Appellants: Ms C Bayati, instructed by S Satha & Co Solicitors
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are nationals of Sri Lanka. They appealed to the First-tier Tribunal against the decisions of the respondent on 31 May 2018 refusing their applications for leave to remain on human rights grounds. Judge Housego dismissed their appeals.

They sought permission to appeal against that decision to the First-tier Tribunal and to this Tribunal, but permission was refused. The Upper Tribunal's refusal was challenged in the High Court by judicial review, and permission having been granted, the decision of the Upper Tribunal was set aside under the usual procedure. Permission was then granted, the parties being reminded that the Upper Tribunal's task remained that set out in s 12 of the 2007 Act. The primary question before this Tribunal is whether the First-tier Tribunal's decision contains an error of law such that it should be set aside.

2. This determination is, I regret, gravely delayed. At the hearing, an early one undertaken by Skype following the resumption of hearings during the Covid-19 pandemic, a procedural issue arose from the fact that Miss Bayati made her submissions from Italy. That issue was resolved, but unfortunately, following this resolution, instead of a determination being issued, the file was put away. When it was discovered that that had happened, I arranged for the parties to be contacted in order to ascertain whether they had any further submissions to make in view of the delay. Neither party had any further submissions of law to make. That response was not reported immediately to me, and in the mean time, the file had again been put aside. The only point raised by the appellant at that stage was that the appellants' daughter had applied for naturalisation as a British citizen. I have since been informed that that application has been granted. It makes no difference to the question whether the First-tier Tribunal judge erred in law. The issues in this appeal are no less clear as a result of the delay.
3. The appellants were born on 2 August 1988 and 26 November 1988 respectively. They married in Sri Lanka on 22 January 2010. The second appellant (the husband) arrived in the United Kingdom three days later, with entry clearance as a student. The first appellant (the wife) entered the United Kingdom on 10 June 2010 with entry clearance as a student. On 29 March 2011 the appellants applied for further leave, the wife as a student and the husband as her partner. Those applications were made during the currency of existing leave; they were refused on 13 April 2011, still during the currency of existing leave, and therefore with no right of appeal. Meanwhile, on 16 April 2011 the appellants' daughter was born. The wife made a further in-time application for leave to remain as a student on 27 June 2011. That was granted on 6 March 2012, with leave valid until 30 October 2014; but on 17 March 2014 her leave to remain was curtailed to 16 May 2014. On 27 October 2014 she applied for leave to remain outside the rules on compassionate grounds: that application was refused on 8 January 2015 with no right of appeal.
4. The husband's leave had expired on 23 August 2011, following which he remained without leave. On 29 January 2015, both appellants applied for EEA residence cards. Those applications were refused on 10 August 2015. They appealed, and their appeals were dismissed; applications for permission to appeal were refused. On 12 June 2017 the present application was made. It was made on the basis that the appellants should not be removed because that would disproportionately interfere with their daughter's life. At the time the application was made, the daughter was aged under 7, but by the time of the decision, on 31 May 2018, the daughter was a

little over 7 years old. The applications were refused, on the basis that the appellants did not meet any of the requirements of the rules, and had not shown that it would be unreasonable to expect their daughter to leave the United Kingdom. There were no significant obstacles to the return of the parents to Sri Lanka, where their daughter could accompany them, and there were no circumstances giving them a right to remain in the United Kingdom despite not meeting the requirements of the rules.

5. Summarising the position as it was at the date of the decision on 31 May 2018, the wife had been in the United Kingdom without leave since 16 May 2014, and the husband without leave since 23 August 2011. The daughter, born in the United Kingdom on 6 April 2011, was just over 7 years old. The applications had been made by the husband and wife on the basis of their private and family life, and their life with their daughter. It had been refused for the reasons I have indicated. Each of the appellants of course had a right of appeal.
6. The appellants both lodged appeals against the decision. Both were received by the First-tier Tribunal on 14 June 2018. The parties were separately represented. The husband was represented by S Satha and Co, who had previously represented both husband and wife. The wife acted in person, but was subsequently represented by London Black Women's Project. The husband's application is accompanied by grounds of appeal signed by Ms Bayati, and the appeal form is signed by the husband's solicitor indicating that the notices of appeal are in accordance with the husband's instructions and that the husband believes the facts stated are true. The grounds of appeal reassert the position that it would be unreasonable for the appellants' daughter to leave the United Kingdom. They add, however, a further factual matter, which is reflected also in the documentation accompanying the wife's appeal. The family's position is now said to be that the husband and wife are separated. The wife left the family home on 21 May 2018, with her daughter, as a result of eight years of domestic violence. The wife's grounds essentially indicate that the wife's social worker has advised her to put in grounds of appeal based on these new circumstances. The husband's grounds say that he is in the course of making an application for contact with his daughter through the family courts and that as he wishes to maintain contact with his child despite the separation of the family his removal will constitute an unlawful interference in their family life.
7. In these circumstances, the judge was somewhat surprised when at the hearing on 14 February 2019, the parties both appeared to be represented by Ms B Jones, instructed by S Satha & Co. On the ground that it was usual for witnesses to give evidence sequentially in the absence of the other, he arranged for the husband to leave the hearing room and enquired what the position was. The judge's decision sets out what happened in the following terms:

"41. ... I raised with the 1st appellant her undated 3 page letter (in her own handwriting) to the Tribunal which was attached to her appeal. It asked that the Tribunal not deal with S Satha and Co, as her appeal had been submitted by 'Housing for Women' of PO Box 71108 London SE18 9LD. That letter stated that she was

separated from her husband “because of domestic violence [that] happened in the last 8 years”. It stated “I came out with my 7 year old daughter from my husband’s house on last 21 May 2018... I had so many physically, mentally, emotional violence in last 8 years. Because of this problem I took this decision for sake of my daughter’s and my safety.” There is also an email dated 28 September 2018 on file from London Black Women’s Project of 661 Barking Road Plaistow London E13 9EX stating that they were not representing her, but supporting her in their capacity as a domestic violence organisation.

42. I was concerned for her safety. Counsel was taken by surprise by this letter and by any suggestion of domestic violence. I explained that present in the room was only the 1st appellant, myself and Counsel, and that while Counsel also represented her husband, Counsel owed her a duty as well, and would not share with her husband anything she did not wish him to know.

43. The appellant said that she and her husband had disagreements, and had separated on 21 May 2018. She had sought advice from the women’s refuge. They had told her that she had to put in such a claim in order to succeed in her appeal, but that none of it was true. There had never been any domestic violence. She had only written that because she had been told to do so. After a couple of months she and her husband had reconciled (on 02 August 2018). She was happy to have the same solicitor.

44. I indicated that Counsel might need to take some instructions. I adjourned the hearing so that she might do so, and asked the interpreter to enable Counsel to take instructions from the 2nd appellant, who spoke no English. After a period Counsel returned to say that she was content to represent both appellants, whose interests aligned.

45. Both appellants gave evidence. Neither wished to make any alteration correction or amendment to his or her witness statement, which each had read recently, and each adopted it as true. They based their claim on the fact that their daughter was now 7 years old and had always lived in the UK.”

8. There was no Presenting Officer, so there was no cross-examination; but the judge asked a number of questions in order to elaborate on the appellants’ evidence. In response to questions from the judge, the wife repeated “that she had only referred to domestic violence because her caseworker had told her to do so, and that it was not true”. The other facts in evidence before the judge I do not need to set out in detail, because they form the basis of the judge’s conclusions, which I will set out. The present appeal depends on the balancing process, not on any alleged error in the assessment of individual facts. The judge had set out in some detail the leading authorities and the parts relevant to the assessment of a case of this sort. His findings of fact and his conclusions on the appeal have to be set out at length. They are as follows.

“Facts found

70. The 1st and 2nd appellants came as students, intending to stay, and made multiple applications so to do. Their history is as above. They are in contact with and supported by their families, and also supported by a Buddhist Centre and by a relative

in the UK. Their child is now 7 years old, fully conversant with Sri Lankan culture and who speaks Sinhala. Her father speaks no other language. It is reasonable for the family of 3 to go to Sri Lanka, as developed below. There is no medical impediment to the daughter going to Sri Lanka.

Reasons for findings of fact and conclusion

71. There is no merit in the application of the 2 appellants without the additional factor of their daughter, as they accept. They are simply long term overstayers with no legitimate expectation of being able to remain in the UK. All depends on their daughter, born in the UK over 7 years ago. While she had not made an application and so technically could not fall within Paragraph 276ADE (1)(iv), and is not an appellant as no application was made for her, and so there is no refusal (and no appeal) in her case, the situation is as if there had been such an application and refusal.

72. The credibility of the evidence of the 1st appellant is undermined by her letter stating that she was a victim of domestic abuse violence, which she admitted was an untruth told to try to advantage her immigration appeal. The appellants said that they came to the UK as a couple never having worked in Sri Lanka, and they were able to live here and to undergo education for some years. I do not find it credible that they had no parental support to access that education and to live in the UK. Given that the 1st appellant will say anything to get to stay in the UK (and I note the EEA application also), I find that the appellants' account of estrangement from families is not true.

73. There is every reason to think that they would return to their families. That would be an advantage to their child who will see her grandparents.

74. There is no reason to think that a Sri Lankan (Sinhalese) child is better off in the UK than in the country of which she is a citizen. There is no culture shock to the appellants' child in going to Sri Lanka.

75. The appellants' child has been in the UK for 7 years, but the years to age 4 are of much less weight than the years from school age. Any move is disruptive, and the more so when it is to a different country. Children are versatile, and many children move to different countries by reason of parental work. It is not always a bad thing.

76. The appellants' child is at primary school. There is no critical or important point in her education to mean that it is in her best interests to remain. Sri Lanka educates its children.

77. The appellants' daughter has no serious health issues, so there is no medical reason why she should remain in the UK. Her condition appears somewhat resistant to treatment, and is less comfortable in a hot moist climate, but there is no reason to think this is a very long term condition – it is a fungal infection – nor anything to suggest that it is so serious that it has substantial weight in the Article 8 proportionality assessment. No medical evidence was provided to show any real impediment to the child in going to Sri Lanka, and the treatment is usually over the counter cream and shampoo.

78. The ability to speak English will be of use to the appellants' daughter. As the 2nd appellant (the father) speaks little or no English (this was clear from the hearing) it is inevitable that the child speaks Sinhala. I do not accept the evidence of the father that he speaks to her in Sinhala but she answers in English, and that the mother translates

for them. The parents can only converse in Sinhala. It is the language of the home. The child inevitably speaks Sinhala.

79. The best interests of the appellants' daughter are to be with her parents, including in Sri Lanka.

80. The appellants' child will not return to destitution. Even if there is no parental support the evidence of the appellants is that they are supported to the extent of £600 a month by the Buddhist Centre and by the husband of the 1st appellant's aunt. It is to be expected that they would be supported on return until they were able to find work. There is no reason to think that either of the appellants would find it difficult to get work.

81. For the reasons given I find that the appellants' daughter's best interests are not strongly in favour of remaining in the UK.

82. I find that it is reasonable for the appellants' daughter to go to Sri Lanka, partly as her best interests are not a strong factor indicating that she should stay, and partly from a holistic view of all the circumstances. I have borne in mind paragraph 35 of EV (Philippines).

83. As it is reasonable for the appellants' child to go to Sri Lanka, the appellants do not fall within (the spirit of) paragraph 276AD(1)(iv) of the Immigration Rules nor within EX.1. S117B(6) does not assist them.

84. It is also relevant (as set out in EV (Philippines)) that the appellants expressly stated in the hearing that they want the UK taxpayer to educate their daughter.

85. I have set the law out at length above, and have considered carefully the fact that the appellants' daughter is now approaching 8 years of age. She is the only reason advanced by his parents as to why they should be granted leave to remain. Their own case is of no merit at all.

86. The balance sheet of the proportionality assessment has to include the public interest in effective immigration control. It must also include the fact that the appellants do not meet many of the provisions of S117B(6). The 2nd appellant is not integrated, as he speaks little or no English. They are not self sufficient, relying on their Buddhist Centre and a relative. I reject Counsel's submission to the reverse. That they are not reliant on state benefits does not make them self sufficient. Their adverse immigration history is part of the balance sheet, and the Article 8 rights of the child are to be with her parents provided that it is reasonable for her to go to Sri Lanka. There has never been any legitimate expectation of being able to remain. Rhuppiah means that the private life of the appellants has little weight. Rajendran likewise for family life. In any event they do not put forward their own private life as a reason to allow the appeal: they put their own appeals as fully reliant on their daughter. Their daughter has a private life in the UK, and Beoku-Betts (FC) (Appellant) v SSHD (Respondent) [2008] UKHL 39 is relevant, but interference with that right is proportionate. Children often move schools, move areas and move back home. Many children move with their parents who work abroad for some years and return.

87. Article 8 rights to family life are not engaged, as the family will remain together, and Article 8 rights are enhanced not diminished as there is family to whom to return,

and none in the UK, save one aunt. There has been no delay by the Secretary of State. There has been a cynical abuse of the immigration system by the appellants in that they have overstayed for years, submitting their application soon after [sic] the 7th birthday of their daughter, and by reason of that birthday.

88. I bear fully in mind the Home Office guidance that after a child has been in the UK 7 years there have to be strong reasons to refuse both parents and child leave to remain, and that it must be reasonable for the child to go to Sri Lanka. That consideration must involve the prior consideration of her best interests, which is a matter which must not only be considered first and is a (but not the only) primary consideration, and no other consideration has greater weight.

89. Having considered all this I find that the decision does not interfere disproportionately with the Article 8 rights of either the appellants or their daughter. The duty of the Secretary of State under s 55 is not breached by the decision under appeal.

90. I expressly do not visit the immigration history of the appellants upon their daughter. I am applying the principle, most recently set out in KO (Nigeria), that all the circumstances have to be considered when deciding an appeal of a child present in the UK for 7 years or more. I have considered the Home Office policy. The strong public interest in effective immigration control is a statutory provision. In a case such as this where there is a sustained effort to thwart that public interest, and where there is no merit in the parents appeals and it is reasonable for the child to go to the state of which she is a citizen I find there is a good reason to require her to do so, with her parents."

9. Miss Bayati took me through the evidence. She reminded me of the dictum of Elias LJ in MA (Pakistan), which I discuss below. She accepted that in KO (Nigeria), the Supreme Court had accepted that, at any rate in a deportation case, the position of a child had to be considered in context, but nevertheless emphasised that the question was whether it was unreasonable to expect the child to leave the United Kingdom, not whether it was unreasonable to expect the family to leave the United Kingdom. The judge's error, she submitted, shone out from paragraph 70, where the treatment is specifically of the family, rather than of the child. The judge had in essence made four separate errors: the first was that just mentioned; the second was that the judge had taken into account the conduct of the parents in assessing the reasonableness of the child's leaving; the third was that the judge had failed to take as a starting point the principle that it would be unreasonable for a child who had been in the United Kingdom for more than seven years to be required to leave; the fourth was that the judge had slipped from considering whether it was reasonable to expect the child to leave into considering whether it was reasonable to expect the child to live in Sri Lanka. Mr McVeety submitted in contrast that the judge's approach, as set out from paragraph 72 onward, was entirely, and correctly, child-centred. The judge had considered what evidence there was of the child's circumstances in the United Kingdom; at paragraph 90 the judge had specifically not taken the appellants' immigration history into account in assessing the interests of the child. There was nothing inherently unreasonable in the child being expected to leave the United Kingdom despite having spent the first seven years of life here: the questions want to

be determined on the evidence, and in the present case there was, in truth, no substantial evidence for the judge to analyse. He asked me to say that the judge had made on error of law.

10. The grounds of appeal to this Tribunal are signed by Ms Bayati, who, as the heading to this decision indicates, represented both appellants before me. Evidently no professional embarrassment is caused to her by the fact that she was involved in the false assertions upon which the appeal to the First-tier Tribunal was based, supported as those appeals were in part by her detailed grounds. In any event, her grounds of appeal to this Tribunal are as follows:

“3. It is submitted that the FTTJ erred in law in his consideration of whether it would be “reasonable” for the qualifying child to leave the United Kingdom.

4. The FTTJ set out at some length what he considered to be the relevant caselaw in relation to this Article 8 appeal (from paragraphs 8-38 at pages 4 to 17 being the majority of his Decision and Reasons). However, despite setting the caselaw out at length, it is submitted that the FTTJ’s approach to this appeal contains a number of errors and reveals a failure to apply the SSHD’s own guidance and the caselaw applicable.

5. The Applicants’ daughter is now nearly 8 years of age, having been born in the UK. She is currently at school and a number of documents relating to her education and her extra curricular activities were provide to the FTTJ.

6. It is submitted that it is settled law that the question that the FTTJ was required to consider was whether it would be reasonable for the Applicants’ daughter, a qualifying child, to leave the United Kingdom, that the assessment of reasonableness is “child focused” and that conduct or misconduct of the parents is not a factor to be taken into account. This much was confirmed in the judgment of KO (Nigeria) & Others. It is concluded that it is unreasonable for the child to leave the UK it follows applying s.117B(6) that it would be disproportionate for the parents to leave.

7. In MA (Pakistan) & Others v SSHD it was made clear by Elias LJ that there would need to be powerful reasons for concluding that it would be reasonable for a qualifying child to leave the United Kingdom.

8. It is submitted that, in line with the spirit of the “7 year rule”, namely a recognition that by the time that a child has lived in a country for 7 years the child will have laid down roots, have commenced in establishing their own relationships, and it would be disruptive to their own lives and their well being to expect them to leave, the starting point is that unless there are powerful reasons it will be unreasonable for the child to leave the United Kingdom. This approach is entirely in line with the UKVI Casework guidance.

9. In the instant case, the FTTJ erred in his failure to take as the starting point the fact that it would be unreasonable for the child to leave the United Kingdom absent powerful reasons.

10. It is further submitted that the FTTJ erred in his failure at any stage in his Decision and Reasons to give consideration to the life that the Applicants’ daughter has

established and build up in the UK, her achievements, and in his failure to consider the impact upon the child of being expected to leave the only life that she knows and in particular whether it would be reasonable for her to leave that life, noting in particular that the starting point is that unless there are powerful reasons it will be unreasonable for a qualifying child to leave the UK. Nowhere within his Decision does he address or consider the life she has established in the UK or any of the evidence to which he was directed in support [see skeleton argument].

11. The entire focus of the Decision of the FTTJ is upon the fact that there is an education system in Sri Lanka, that the child has no serious health issues and there would be “no culture shock” in her going to Sri Lanka. However, this completely fails to give consideration to the effect upon the child herself in light of the life built up here in the UK over almost 8 years. Further, to suggest that there would be no culture shock fails to take into account adequately or at all the fact that the child was born in the UK, has lived only in the UK, is at school in the UK, has friends and is engaged in extra curricular activity, all in the UK whereas she has never been to Sri Lanka.

12. The entire focus of the FTTJ’s Decision is upon whether it would be reasonable for the family to leave the UK as opposed to whether it would be reasonable for the child to do so. Nowhere within his Decision does the FTTJ identify any powerful reason why the child should leave the UK and thus his entire approach reveals a failure to apply the relevant caselaw and/or the casework Guidance despite stating that he has done so.

13. In the premises, it is submitted that the FTTJ’s entire assessment of whether it would be reasonable for the qualifying child to leave the United Kingdom contains material errors. Despite setting out at length the applicable caselaw the FTTJ did not in fact apply it.

14. In refusing permission to appeal the FTT states that the grounds amount to a disagreement with the findings made. With respect, that is not the case. It is the approach to the issues that the FTTJ was required to determine which is challenged and his failure to ask himself the correct question when determining whether it is reasonable for the qualifying child to leave the UK. In reality, the FTTJ assessed this Article 8 appeal as if it was a traditional proportionality assessment looking at the whole family whereas s.117B required him to consider whether specifically it would be reasonable for the qualifying child to leave the UK. Such an approach was fundamentally flawed.”

11. Paragraph 276ADE(1) reads as follows:

“276ADE(1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of the application, the applicant:

...

(iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK;

...”

Part VA of the Nationality, Immigration and Asylum Act 2002 reads, so far as relevant to these appeals, as follows:

“117A. Application of this Part

- (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –
 - (a) breaches a person's right to respect for private and family life under Article 8, and
 - (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
- (2) In considering the public interest question, the court or tribunal must (in particular) have regard –
 - (a) in all cases, to the considerations listed in section 117B, and
 - (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
- (3) In subsection (2), “the public interest question” means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

...

- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
 - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.

117D Interpretation of this Part

- (1) In this Part –
 - ...
“qualifying child” means a person who is under the age of 18 and who –
 - (a) is a British citizen, or
 - (b) has lived in the United Kingdom for a continuous period of seven years or more”

12. Paragraph 276ADE(1)(iv) is relevant where the child is an applicant for leave and an appellant; s 117B(6) is relevant where the child is not an applicant, or not an appellant. It is clear, however, that, in determining the position of the child, there is no difference to be drawn between cases where the child is, and is not an appellant; see R (MA Pakistan) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 7015 at [2], [13] and [22]. The judge was concerned, and I am concerned, with s 117B(6). There is no doubt that the appellants have a genuine and subsisting parental relationship with their daughter, who is a qualifying child for the purposes of that provision.

13. In the light of Ms Bayati's submissions, I have examined the evidence relating to the daughter with the greatest of care. There is nothing in it to cast any doubt on the conclusions of fact reached by the judge. She is said to be making progress "as expected" as a lively and interested child. There are pictures of her at a party. She is active in dance and in the study of Buddhism; she has passed at least one test in the Sinhala language. There appears to be no sign in her school reports that her skin condition affects her or affects her relationship with other children. Although there are pictures of her with other children, there is no other evidence of her of having any particular friendships or any particular reliances or alliances.
14. Although the appellants' case was based firmly by them and by their professional legal advisors, on their daughter's asserted best interests and the parallel assertion that it would not be reasonable to expect her to leave the United Kingdom, there is no evidence of what her best interests would be, and there is no evidence indicating that it would not be reasonable for her to leave the United Kingdom: conclusions in favour of the appellants on those issues could only be on the basis either of some unexpressed field of judicial notice or on *a priori* considerations. But it clearly cannot in general be said that it is unreasonable to expect a Sri Lankan child of Sri Lankan parents to leave the United Kingdom where the consequence will be that she will be with her parents in Sri Lanka. Further, it cannot in general be said that it is in the best interest of a child who has been born in the United Kingdom and has lived in the United Kingdom even for over 7 years, to remain in the United Kingdom. It is often considered to be in the best interests of a child to have a wide experience during her or his years of growth. If the child's parents wanted to leave the United Kingdom for Sri Lanka, there is no basis upon which it could be said that they should not be allowed to do so because it would not be in their daughter's best interests. Further, it does not appear to me that there is any question that her travelling with her parents to the country of which they are all nationals amounts to some sort of punishment for her parents' immigration history. The situation is exactly the same as if she was considered as an individual without any family in the United Kingdom. (Not having a benefit that you might have had if your parents were different is not a punishment: a moment's thought will show that it cannot be.)
15. So far as the authorities are concerned, the position seems to me to be as follows. There is no doubt that the assessment of the issue of whether it is reasonable for a child to leave the United Kingdom is to be "child-centred"; though it is not clear whether that general principle adds anything to the considerations I have already listed, that is to say that the child is not to be punished for its parents' acts, and that the decision is to be based on the child's best interests and whether it would be reasonable for the child (as distinct from the family) to leave the United Kingdom. As Singh LJ put it in Runa v SSHD [2020] EWCA Civ 514 at [36]:

"I would emphasise again as the Supreme Court did in KO (Nigeria) and this Court did in MA (Pakistan) and AB (Jamaica) that, once all the relevant facts had been found, the only question which arises under s 117B(6) is whether or not it would be reasonable to expect the child to leave the UK. The focus has to be on the child."

16. Secondly, the essential question underlying the phrase “reasonable to expect” is simply whether it would be reasonable for the child in question to have to leave the United Kingdom: SSHD v AB (Jamaica) [2019] EWCA Civ 661 at [73] and [116].
17. As is apparent from the grounds and my summary of her submissions, Ms Bayati relied heavily on the dictum of Elias LJ in R (MA (Pakistan) and others) v Upper Tribunal and another [2016] EWCA Civ 705 at [49] that:

“The fact that the child has been in the UK for 7 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.”

18. As Judge Housego noted, the Secretary of State’s guidance is to similar effect. Despite that, however, there are a number of difficulties about acting on that dictum alone and out of context.
19. The first of those difficulties is that, as the context shows, those remarks were made in relation to a case where the best interests of the child had been established as to remain in the United Kingdom: see the opening sentence of paragraph [48]. The assessment of a child’s best interests is not a concept with which the law is unfamiliar. There is no suggestion in MA (Pakistan) that a child’s best interests are to be ascertained *a priori*, by speculation or by presumption. In the present case the judge did not find that the best interests of the daughter were to remain in the United Kingdom, and there is in the grounds no challenge to that conclusion.
20. Secondly, despite what might appear by taking Elias LJ’s dictum out of context, s 117B(6) does not reverse the burden of proof. Any doubts about that proposition are laid to rest by the judgment of Burnett LJ (as he then was) in R (Behary v SSHD) [2016] EWCA 702 at [23-4], where the trial judge’s conclusion was based (in a deportation case, but applying the same principles and wording as here) on the following analysis:

“A parent who seeks to resist deportation on the basis that he has a “genuine and subsisting parental relationship” with a child must establish first, that the child has lived continuously in the UK for at least 7 years but also that it would not be reasonable to expect the child to leave the UK. Likewise, in Appendix FM, exception EX applies where the applicant has a “genuine and subsisting parental relationship” with a child who has lived continuously in the UK for at least 7 years but also it must be shown that it would not be reasonable to expect the child to leave the UK.”

The conclusion was characterised by Burnett LJ as “unassailable”. It is clear that the elements of s 117B(6) need to be “established” by the appellant.

21. Thirdly, the remarks of Elias LJ at paragraph [49] appear to inconsistent with paragraphs [18]-[19] of the judgment of Lord Carnwath, giving the unanimous view of the Supreme Court in KO (Nigeria) and others v SSHD [2018] UKSC 53:

“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:

“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.”

22. It is clear following KO that, in circumstances in which the parents have no right to remain, the question of whether it is reasonable for the child to leave is not to be considered in isolation from the parents’ position but, broadly speaking, becomes the question whether, if the parents leave, it is reasonable to expect the child to leave with them. Perhaps that is best expressed, adapting Lord Boyd’s view, by pointing out that the parents’ departure is the context in which the question is asked and therefore the starting point for its answer.
23. None of these issues were the subject of detailed submissions by Ms Bayati, who, as can be seen from her written grounds, treated KO (Nigeria) only insofar as it confirmed that the inquiry was child-centred and ignored its discussion of what precisely that means.
24. In my judgment the dictum upon which Ms Bayati relied could not bear the weight she placed upon it. No other authority suggests that in a case such as this, the

parents' appeals ought to be allowed simply because of the existence of a child born in the United Kingdom and now aged over 7, about whom there is no evidence specifically indicating that the child's best interests are in the United Kingdom, and no evidence showing other than that the child should be with the parents, wherever they are.

25. The sweeping approach of Ms Bayati contrasts with the detailed approach taken by the judge to the actual evidence that was before him. He noted the content of the evidence about the daughter; he noted also that supplementary material produced by the parents, in particular by the mother, was unworthy of credit because she was prepared to say anything which she thought would help her to stay in the United Kingdom. Contrary to Miss Bayati's submissions, in my judgment it is clear that the judge concentrated on the position of the appellants' daughter and undertook a "child-centred" approach. It is true that in paragraph 70 there is reference to the family, but that, as the wording of paragraph 70 and its context makes clear, is a summary of the detailed conclusions about the child that occupy the following paragraphs of the judgment. As it appears to me, Judge Housego's assessment of the position under s 117B(6) was an entirely lawful one and, in particular, did not suffer from the errors asserted by Ms Bayati on the basis of the authorities either at the time of the hearing before Judge Housego or at the time of the hearing before me.
26. As I have indicated, the parties were asked in May 2021 whether, in view of the delay since the hearing, they wished to make any further submissions. Neither had any submissions of law to make. Evidently neither party was aware that on 23 February 2021 the Court of Appeal had heard argument in NA (Bangladesh) and Others v SSHD. The judgment was published on 24 June 2021: [2021] EWCA Civ 953. The judgment of Underhill LJ (with which Singh and Warby LJ agree) is to the effect that the "powerful reasons" doctrine apparently enunciated by Elias LJ in MA (Pakistan) does not survive KO (Nigeria): "To put it more plainly, the 7 year provision does not create a presumption in favour of the 7 year child and thus their parents, being granted leave to remain" (at [29]). The following two paragraphs explore some of the limitations and consequences of that conclusion. I do not need to examine them here. Nothing in NA (Bangladesh) gives any additional reason to consider that Judge Housego made any error of law: on the contrary, it simply confirms the position based on the existing authorities that I have already set out.
27. For the foregoing reasons my conclusion is that Judge Housego made no error of law and there is accordingly no basis to set aside his decision. The appellants' appeals stand as dismissed.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 28 October 2021