Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/01913/2018
HU/01920/2018
HU/02251/2018
HU/01928/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th December 2018	**On 15th January 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

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(ANONYMITY DIRECTIONS MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Raza of Counsel, instructed by Bukhari Chambers Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants appeal with permission against the decision of First-tier Tribunal Judge Obhi promulgated on 2 July 2018, in which their appeals against the Respondent's decisions to refuse their human rights claims dated 15 and 20 December 2017 were dismissed.

2. The Appellants are all nationals of Pakistan and form a family unit. The first and third Appellants are husband and wife, the second and fourth Appellants are their children. The third Appellant entered the United Kingdom in February 2007 with valid entry clearance as a student, initially valid to April 2008 and extended to April 2011, subsequent to which he was granted leave to remain as a Tier 1 (General) Migrant to 25 August 2012. He made a further application for leave to remain in the same category which was refused on 26 February 2013 and an appeal and subsequent application for Judicial Review were both unsuccessful. A further application on 23 June 2016 was rejected. On 27 June 2017, the third Appellant applied for indefinite leave to remain in the United Kingdom on the grounds of long residence under paragraph 276B of the Immigration Rules, which was refused by the Respondent on 20 December 2017 on the basis that he had not had any lawful leave to remain in the United Kingdom since 30 October 2013. In the alternative, he did not meet any of the requirements for leave to remain under paragraph 276ADE or Appendix FM of the Immigration Rules and there were no exceptional circumstances to warrant a grant of leave to remain outside of the Immigration Rules. The third Appellant appealed against that decision and his appeal was joined to those of his family members who had made a separate application as follows.

3. The first Appellant entered the United Kingdom in February 2010 as a student and was then granted leave to remain as a dependent of the third Appellant in line with his grants of leave to remain as a student and then a Tier 1 migrant to 25 August 2012. Subsequent applications for leave to remain in 2012 and 2013 were refused and an application on 23 June 2016 was rejected. The most recent application by the first Appellant, including the second and fourth Appellants as her dependents was made on 15 September 2017 on human rights grounds. That application was refused by the Respondent on 15 December 2017 on the basis that she could not satisfy the requirements for leave to remain as a partner under Appendix FM of the Immigration Rules because her spouse was not a British Citizen nor settled in the United Kingdom and she had overstayed here since 2012; in any event paragraph EX.1 was not satisfied because there were no insurmountable obstacles to family life continuing outside of the United Kingdom. In relation to the children, the Respondent accepted that the eldest child had been in the United Kingdom for over seven years but considered it was reasonable to expect both children to leave and the requirements for leave to remain as a parent in Appendix FM were not satisfied. In relation to private life, the Respondent did not consider that there were any significant obstacles to the Appellants reintegration into Pakistan where there were no language barriers and where there were continued ties.

4. Judge Obhi dismissed the appeals in a decision promulgated on 2 July 2018 on all grounds. Before the First-tier Tribunal, the third Appellant accepted that he could not meet the requirements of paragraph 276B of the Immigration Rules for a grant of leave to remain on the basis of long residence. The Appellant's appeal was focused on the eldest daughter's situation (the second Appellant), who had been resident in the United Kingdom from the age of four and was now 12 years old and in secondary school. In outline, Judge Obhi found that it was in the best interests of the children to remain with both parents and that their best interests were capable of being met either in the United Kingdom or in Pakistan and there were advantages to the children either way. The appeal was ultimately dismissed on the basis that it was not unreasonable for the eldest child to leave the United Kingdom and there were no insurmountable obstacles to the Appellants reintegration into Pakistan.

The appeal

5. The Appellants appeal on five grounds as follows. First, that the First-tier Tribunal failed to consider the importance of the claim to the children, in particular the eldest child and there were factual errors in the decision as to her age at the date of hearing, with references to her being seven and 11, although she was 12 at the date of hearing. There was a statement from her and letters of support, including wider community connections and significant achievements at school which were not fully taken into account by the First-tier Tribunal. Secondly that the First-tier Tribunal trivialised facts and unfairly summarised the evidence before it. Thirdly, that in paragraph 27 of the decision, there was a factual error as to the language ability of the child Appellants. Fourthly, that the First-tier Tribunal disregarded the social work report. Fifthly, the Appellants claimed that the general mindset of the First-tier Tribunal was to fit the facts to the desired conclusion without evidential basis.

6. At the hearing, Mr Raza on behalf of the Appellants focused on three specific grounds of appeal which differed from the written grounds of appeal upon which permission was granted, although in a way which did not require any permission to amend the grounds and which provided greater clarity and precision than the original drafting. The three grounds focused upon were as follows. First, that the First-tier Tribunal erred in fact as to the age of the eldest child which amounted to a material error of law infecting the assessment of whether it is reasonable to expect her to leave the United Kingdom. Secondly, the First-tier Tribunal erred in paragraph 48 of the assessment of best interests of the children. Finally, that the First-tier Tribunal's balancing exercise to assess the proportionality of removal was inadequate.

7. At the date of the hearing before the First-tier Tribunal, the eldest child was twelve and a half years old and in her second year of secondary education and the youngest six and a half years old. In paragraph 35 of the decision, the qualifying child, which can only be the eldest child as

only she had been resident in the United Kingdom for more than seven years, is referred to as being seven years of age. In paragraphs 47 and 48 of the decision eldest child is referred to as being 11 years of age and about to start secondary school. Also, it was submitted that the reference to school in paragraph 48 contains an odd conclusion that the eldest child will have to change schools in any event, although the change from primary to secondary education is not comparable to a move to Pakistan and entering a different education system there.

8. Mr Raza highlighted the reasoning given in paragraph 53 of the decision which focused on possible advantages for the children to return to Pakistan rather than whether their best interests were to remain in the United Kingdom.

9. It was further submitted on behalf of the Appellants that when considering the best interests of a child, a period of seven years from the age of four is more pertinent than from a younger age as found by the Upper Tribunal in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00107 (IAC) and that in accordance with the Court of Appeal's decision in MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705, strong and powerful reasons are needed to rebut the presumption that it would be unreasonable for a child who has resided in the United Kingdom for more than seven years to be expected to leave the United Kingdom. The First-tier Tribunal did not deal with this point nor identify powerful reasons in this case. Overall it was submitted that there was an inadequate assessment of the best interests of the children which infected the proportionality assessment.

10. Further to the recent decision of the Supreme Court in KO (Nigeria) the Secretary of State for the Home Department [2018] UKSC 53, handed down since promulgation of the First-tier Tribunal's decision, Mr Raza submitted that the requirement for strong and powerful reasons survives and even on the basis of this decision, on the facts it would be unreasonable to expect the eldest child to leave the United Kingdom.

11. Mr Raza accepted on behalf of the Appellants that the child Appellants could not meet the requirements of paragraphs 276ADE of the Immigration Rules in their own right and the sole issue is therefore whether the parents could benefit from section 117B(6) of the Nationality, Immigration and Asylum Act 2002, pursuant to which the child Appellants' appeals would then succeed under Article 8 of the European Convention on Human Rights.

12. The Appellants rely one further factual error in paragraph 48 of the decision, that in fact the majority of the Appellants' wider family are in the United Kingdom, not in Pakistan.

13. On behalf of the Respondent, Mr Avery submitted that there was no material error of law in relation to the age of the eldest child in the First-

tier Tribunal's decision. The reference to being seven years old in paragraph 35 was most likely to be a typographical mistake where reference should have been to the child being a qualifying child who had spent more than seven years in the United Kingdom. As to the later reference to her being 11 years old, at worst the error is a difference in a year and was submitted not to be material given the detailed assessment of the facts and circumstances.

14. Mr Avery submitted that further to the decision in KO, the First-tier Tribunal's decision was more difficult to successfully challenge given that what Judge Obhi is criticised for doing in this case is exactly what the Supreme Court now suggest is required – an assessment of the reality of the situation in the real world where none of the family have leave to remain and are expected to return to their country of origin. In this appeal, the adult Appellants are expected to return to Pakistan. The guidance set out by the Court of Appeal in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 854 applies to assess the real-world situation. In the present case the First-tier Tribunal gave detailed consideration as to what the position of the children would be in Pakistan and it was open to the Judge to find that in those circumstances as found, it was not unreasonable to expect the children to leave. It was submitted that there was no strict requirement for strong and powerful reasons to be identified and in any event, this took the appeal no further.

Findings and reasons

15. I do not find that the decision of the First-tier Tribunal, contained any errors of fact which amounted to material errors of law when considering the age and education of the eldest child. I consider the reference in paragraph 35 to the eldest child being seven years of age is a typographical error given the context of this paragraph being about whether either of the children are qualifying children within the meaning of section 117B(6) of the Nationality, Immigration and Asylum Act 2002. The reference to seven years of age, should have been a reference to being resident in the United Kingdom continuously for seven years and is not a mistake as to the eldest child's age. The later references to the eldest child being 11 years of age, when she was in fact 12 do not make any material difference to the findings given the detailed assessment and findings in relation to her educational and other circumstances. The references to her changing schools were entirely accurate given that she had started secondary school that academic year and was due to change school again to attend a grammar school in the next academic year.

16. The First-tier Tribunal's decision shows clear consideration of the evidence before it in the appeal, including the Appellants' clear wishes as to their future, wider community support and the educational achievements of the second Appellant in particular. It cannot be said that the evidence and context were not fully taken into account by the First-tier Tribunal.

17. In relation to the social work report, this is dealt with in paragraph 41 of the decision and little weight is attached to it for the reasons set out therein. The vast majority of the social work report sets out and records the feelings and wishes of the first to third Appellants and their views of what life would be like in Pakistan. The analysis and opinion extends to seven relatively short paragraphs, concluding that the eldest child's removal from the United Kingdom would represent a significant upheaval for her and may expose her to instability and uncertainty, including in future education and opportunities such that removal would not be in her best interests. As noted by the First-tier Tribunal, the author has no experience of childcare, education or culture in Pakistan and makes no reference to the wider circumstances and family there, nor that education would be available in English. The Independent Social Worker had also not been provided with a copy of the reasons for refusal letter. These are all lawful and sustainable reasons for attaching little weight to the report, which in any event provides little analysis of the family circumstances and the eldest child in particular, not taking the Appellant's case any further. As such I find no error of law in the weight attached to this evidence by the First-tier Tribunal.

18. The First-tier Tribunal's decision deals primarily with the best interests of the children and whether it is reasonable for the eldest child to be expected to leave the United Kingdom in paragraphs 43 to 48 of the decision. Therein the First-tier Tribunal finds that the second Appellant has not been totally detached from the culture, language or religion of her parents, the evidence being that she had basic proficiency in Urdu. It was noted that the parents were supportive of the children and that they could be educated in English as the first Appellant was in Pakistan. It was found that there were extended family members in Pakistan. In paragraph 46, it was noted that the only real reason given for it being in the second Appellant's best interests to remain in the United Kingdom is that she had been accepted at a grammar school and is very bright, but there was no reason why the educational facilities in Pakistan could not be taken advantage of in the alternative.

19. The First-tier Tribunal found that the circumstances were different to those in the case of MT and ET (child's best interests; extempore pilots) Nigeria [2018[UKUT 88 (IAC), in which case there was a finding that it was in the best interests of the child to remain in the United Kingdom and then concluded in paragraph 48 as follows:

> *"That is not a finding that I make in the present case. [The second Appellant's] best interests are met by remaining within her birth family. She is not of an age where her wishes and feelings can determine her welfare decisions. Weight should be placed on her wishes and feelings I need to be cautious in accepting what she says as she has been influenced by the family and it is clear from the report social worker that she is still closely attached to her family and their problems are her problems. I accept that her parents believe that she would be better off living in the UK because she has been offered a*

place at a grammar school. I accept that in an ideal world they should be able to choose the school for her. I also accept that stability for a child is important. However in this case she is about to change school in any event. Her best interests are capable of being met either in Pakistan or in the UK. In the UK she has no wider extended family, in Pakistan she does. She will not lose the rich culture of her origins if she is in Pakistan, whilst it appears that in the UK she is even beginning to lose the language."

20. The Appellants take a factual issue within this paragraph that the Appellants have no wider extended family in the United Kingdom, whereas it is said that the balance of their family are here rather than in Pakistan. Even if correct, I do not find that is material given that there is no dispute that there is wider family in Pakistan and numerous other reasons given for the assessment made of best interests and reasonableness.

21. Although the First-tier Tribunal did not have the benefit of the Supreme Court's decision in KO which had not been handed down when this appeal was initially heard, I find that the approach of the Judge in this case as to the question of whether it is reasonable to expect the eldest child to leave the United Kingdom, is entirely in accordance with that decision. The key findings in KO are as follows:

"16. It is natural to begin with a first in time, that is paragraph 276ADE(1)(iv). This paragraph is directed solely to the position of the child. Unlike its predecessor DB 5/96 it contains no requirement to consider the criminality or misconduct of a parent of the balancing factor. It is impossible my view to read it is 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 refer that it was intended have the same effect. The question again is what is "reasonable" for the child. As Eliza LJ said in MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705, [2016] one WLR 5093, Paris 36, there is nothing in this 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. List of relevant factors set out in the IDI guidance (para 10 above) seems to be wholly appropriate and sounding 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 whether 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 there 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 second only be one answer: 'because the parents have no right to remain in the UK'. To approach the question 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 854, para 58:

> *"58. In my judgement, therefore, the assessment of the best interests of the children must be made on the basis of the facts 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 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. In the present appeal, the First-tier Tribunal assessed very carefully the real world situation of these Appellants and made specific reference to the factors required for the best interests assessment as set out in EV (Philippines), approved by the Supreme Court in KO. All of the Appellants are nationals of Pakistan and all are expected to leave the United Kingdom as they have no lawful leave to remain and that is the background against which the best interests assessment and the question of reasonableness must be assessed. The First-tier Tribunal gave detailed consideration to the eldest child's circumstances in particular, including the likely circumstances for her on return to Pakistan with her family in that real

world context. This approach discloses no error of law, the findings and conclusions being entirely sustainable and in accordance with the approach confirmed by the Supreme Court in KO.

23. There is no separate or additional requirement for the First-tier Tribunal to identify strong and powerful reasons for the finding that it would be reasonable for a child who resided in the United Kingdom for a period of at least seven years to be expected to leave, even where those seven years occur after the age of four. Sufficiently strong and powerful reasons are in any event given by the First-tier Tribunal on the facts of this case, recognising the real world situation of the Appellants.

24. For all of these reasons I find no error of law in the First-tier Tribunal's decision on any of the grounds put forward by the Appellant's, those originally set out in writing those made orally at the hearing before me and the decision to dismiss the appeal therefore stands.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

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

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

Signed Date 7th January 2019

Upper Tribunal Judge Jackson