



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/12189/2018

THE IMMIGRATION ACTS

Heard at North Shields
On 8 January 2020

Decision & Reasons Promulgated
On 15 January 2020

Before

UPPER TRIBUNAL JUDGE REEDS

Between

TH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Raza of Counsel

For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan.
2. **Rule 14: 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, his partner or child. This direction applies both to the Appellant and to the Respondent.

3. In a determination promulgated on the 26th February 2019, the FtTJ (Judge Hanbury) dismissed his appeal against the decision of the Respondent made on the 9th August 2018 to refuse his protection and human rights claim.
4. Grounds of appeal were submitted on behalf of the appellant which principally challenged the FtTJ's assessment of the nature of the relationship between the appellant and his partner and the failure to make findings on material evidence which went to the issue of family life, some of which had been unchallenged evidence.
5. Permission to appeal was granted by First-tier Tribunal Judge Beach on the 2nd April 2019.
6. At the hearing before the Upper Tribunal on the 30th October 2019 the advocates agreed that the decision of the FtTJ involved the making of an error on a point of law. Ms Petterson, in her submissions highlighted the inconsistent evidence given by the parties and set out at paragraph 19 of the decision but accepted that the issue of whether the appellant and his partner were in a genuine and subsisting relationship was not a point taken in the decision letter and that there was other evidence available relevant to that issue which the FtTJ had not taken into account and that this was a material error.
7. I set out in my decision the reasons why there was an error of law in the decision of FtTJ Hanbury as follows:

“20. It is plain from the decision letter that the respondent's decision was based on the acceptance that the appellant had a genuine and subsisting relationship with his partner and expressly made reference to their Islamic marriage and that the relationship could continue in Pakistan. It is right to observe that there had been no consideration of family life and no real analysis of the issue of insurmountable obstacles beyond the reference made to the Islamic marriage at paragraph 87.

21. Whilst it was open to the judge to find that the appellant and his partner has given inconsistent evidence about when the relationship began and made reference to the lack of documentary evidence concerning cohabitation, to reach the overall conclusion that this was not a genuine relationship and a “manufactured” one, it is necessary to take account and analyse all of the material evidence that was before the Tribunal.

22. As the grounds set out, there was no reference within the decision to the evidence presented to the Tribunal which related to C's pregnancy. There was evidence before the Tribunal demonstrating that the appellant's partner was in the later stages of pregnancy as set out in the pregnancy notes (page 81 onwards, the ultrasound scans and the correspondence of the hospital). There was reference to her due date of delivery being 10 March 2019, a date shortly after the hearing itself. That written material was supported by further written evidence in the witness statements produced on behalf of the appellant and C that she was eight months pregnant with her first child. None of that evidence was referred to in the assessment of whether the parties were in a genuine relationship or the

strength of that relationship rather than a “manufactured one”. This evidence went to the strength of family life.

23. It is correct to observe that the pregnancy notes do not expressly refer to the appellant by name but as the FtTJ appeared to accept that they were living together, this was strong inferential evidence that he was the father when seen in the light of the evidence the parties, the written documentation, the evidence of C’s mother and the evidence of the social worker.

24. The grounds also identify other relevant evidence which was not taken into account in the form of C’s mother. She provided a witness statement and also gave oral evidence before the Tribunal. It is recorded at [10] that she did give oral evidence which was unchallenged and set out some of that evidence. Beyond the reference made at [10] there is no analysis of her evidence in the context of the issue of the relationship. This evidence was arguably corroborative of C’s evidence that they were in a long-term relationship, that C was pregnant, and the father of her child was the appellant (see witness statement filed). It is right that the witness statement does not give great detail, but the important aspects related to the genuineness of the relationship, her daughter’s pregnancy, the appellant being the father of the child and also that this was unchallenged evidence. Consequently, it was incumbent upon the FtTJ to make some assessment of that evidence alongside the evidence as a whole when reaching a conclusion on the issue of the relationship of family life.

25. There was also evidence of a social worker relevant to this issue which the judge gave little or no weight to. The grounds make reference to this as a “mischaracterisation” of the evidence and challenges the assessment of that evidence.

26. I would agree that the weight given to a letter when the author is not present would not be as great for the obvious reason that there is no opportunity for the other party to test that evidence and to deal with points that may require clarification. However, the contents of the letter did deserve to be given greater weight in the overall assessment of the issue of the nature of the relationship. I accept the submission made that contrary to the assessment made, the contents of the letter demonstrate that the social worker was expressing a professional opinion when she set out her knowledge of the parties and particularly C. The contents of that letter sets out that she had undertaken direct work with both C and her partner and that the work undertaken as expressed in that document was clearly material in reaching an overall decision on the genuineness of the relationship and the strength of the family life.

27. Drawing together those issues, in my judgement there was material evidence which is either not taken into account or given any weight in the overall conclusion reached as to the genuineness of the relationship and consequently the strength of family life. As a result and having found that there was no sufficiently strong family life, there was no further assessment of the relevant Article 8 issues.

8. For those reasons, the Tribunal was satisfied that the decision of the First-tier Tribunal judge involved the making of an error of law and therefore the decision reached on the Article 8 (human rights grounds) could not stand and was set aside.

9. Having heard the submissions of the advocates, both agreed that this was an appeal which would require further evidence and findings made upon that evidence and that as the circumstances had changed in the interim, I therefore reached the decision that the appropriate course to take was for the appeal to remain in the Upper Tribunal to be re-made in accordance with the directions accompanying the error of law decision.
10. The grounds do not challenge the findings made by the FtTJ relating to the protection claim and the decision to dismiss the protection appeal and I preserved those findings and decision made upon his protection claim which was dismissed.

The remaking of the appeal before the Upper Tribunal:

11. The background to the appeal can be summarised as follows. The Appellant entered the United Kingdom on the 17th September 2010 with leave as a student and following an extension, his visa was curtailed to expire on the 16th November 2011. It is claimed that he left the UK voluntarily in or about June 2014. When in Pakistan, the appellant became engaged in an argument with a preacher. It was stated that he had been accused of blasphemy by the preacher and that a fatwa had been pronounced against him. On various occasions he stated that he had been followed and subject to threats and had been beaten and later arrested.
12. He left Pakistan in or about June 2015 using his own passport and arrived in Cyprus with a valid visit visa where he stayed for four months and then travelled to the UK via Ireland arriving in or about October 2015. He remained in the UK illegally and married his partner, C, on the 4 November 2017. After being encountered by the authorities, he made a claim for asylum on the 9th February 2018. He is in a genuine and subsisting relationship with his partner and they have a child born, A, in 2019.
13. His protection and human rights claim was refused in a decision dated 9th August 2018. The protection claim was addressed at paragraphs 26-53 with the respondent rejecting the appellant's claim that he had been blasphemous and had been attacked. In the alternative, it was considered that there was sufficiency of protection for him or that he could internally relocate (see paragraphs 60-68).
14. As to Article 8, there was no assessment under Appendix FM or as to family life under the Rules.
15. As to private life under Paragraph 276ADE, he could not meet the requirements given his length of residence since September 2010. As to whether there were any very significant obstacles to his integration into Pakistan, it was not accepted that there would be such significant obstacles given that he had spent his earlier life in Pakistan and would be able to find and sustain work by using the qualifications he had obtained in the UK.
16. At paragraphs 84-87 the decision letter made reference to whether there were any "exceptional circumstances" for a grant of leave to remain outside of the Rules, taking into account his relationship with his partner and that they had been married

in an Islamic marriage in November 2017. In the light of the marriage, it was considered that there were no reasons to suggest he could not maintain his marriage in Pakistan and that there was no evidence that there would be any form of persecutory harm to them based on that marriage.

The evidence:

17. I have a bundle of documents submitted on behalf of the appellant which includes witness statements from the appellant, his partner and family members and friends. There is also evidence from the local authority pages 25-29 that relates to work undertaken previously and recently.
18. Both parties filed witness statements which stood as their evidence in chief. No further questions were asked of the appellant. There was limited cross examination and the appellant was asked if there was any reason why his partner could not relocate to Pakistan? The appellant stated that she could not live in Pakistan due to cultural differences and being unable to speak the language as well as the environment. When asked to be more specific, he made reference to the general circumstances including the people and that she would be a focus of interest. He confirmed that he had taken part in the parenting assessment and that he knew the reason for such work, which he articulated as being the problems that C had in relation to her upbringing. Similarly the appellant's partner, C, adopted her to witness statements dated 1/2 19 and 5/11/19 as her evidence in chief. She was not asked any additional questions. The only question that she was asked in cross-examination was whether there were any reasons why she and her baby could not relocate to Pakistan. She stated by way of reply that she did not think it was safe there and that they should be in the United Kingdom. She said she had concerns as to her children being raised and that she had all her family in the United Kingdom. She said in her evidence that she could not cope without support that she has in the United Kingdom.

The submissions:

19. At the conclusion of the evidence I heard submissions from each of the advocates. Mr Diwnycz on behalf of the respondent accepted that there was a genuine and subsisting relationship between the appellant and his partner C and that there was a child born of that relationship who was a qualifying child as a British citizen. He accepted also that the DNA evidence demonstrated that the appellant was the father of child A. He also did not challenge the evidence which demonstrated that she was pregnant with a second child. He submitted that it was a matter for the appellant to argue that there were no insurmountable obstacles to relocation or that it would be unreasonable for child A to leave the United Kingdom. No further submissions were made.
20. Mr Raza on behalf of the appellant relied upon the decision of the Upper Tribunal in JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC) in addition to the policy guidance set out at page 9 of the appellant's witness statement that the

starting point for a qualifying child would be that it would be unreasonable to leave the United Kingdom. He submitted that there were no strong or powerful reasons which would indicate that the starting point should not be applied. When it was pointed out that the guidance relied upon in the witness statement had been updated, he was able to make reference to the latest guidance published on 10 December 2019. By reference to page 48 of the guidance, he submitted that it again set out the starting point and that the decision of the Supreme Court had been referenced in the guidance.

21. He submitted that the decision in JG made reference to the requirement of powerful and strong reasons to rebut the starting point and no such reasons had been advanced by the Secretary of State. The factual matrix concerned a British citizen child and that the relationship was genuine and subsisting. When looking at the specific considerations, the marriage between the appellant and his partner was an interfaith marriage and her witness statement made reference to her being an atheist and under Pakistani law the marriage would likely to not be accepted (see page 153 – 154 of the bundle at 2.21 and 3.1.4). Even if the marriage would be accepted, he submitted that the respondent's guidance made reference to mixed marriages being the subject of harassment. Furthermore, as the appellant set out in his witness statement there were issues with his family who did not accept the marriage and that it was likely that the appellant's partner would experience practical day-to-day issues as a result and that this would not be in the best interests of the child.
22. Mr Reza placed weight and reliance upon the evidence from the social worker that was in the bundle at pages 25 – 29 and highlighted the benefit and support that the appellant provided for the appellant but also the support for his partner and the child that had been provided in the UK. He submitted that it was significant as set out at page 26 that child A would lose the benefit of the safeguards in place if she were to leave the United Kingdom and this was an issue relevant to her best interests. He therefore submitted that removal would be disproportionate on the particular factual circumstances of the appellant, his partner and child.
23. As to the issue of insurmountable obstacles, he submitted that the practical issues should be considered as outlined in the most recent decision of the Court of Appeal in Lal v SSHD [2019] EWCA Civ 1925. There was no dispute that the appellant had no connections to Pakistan, that she did not know the culture and was not a Muslim. There were concerns about the legality of the marriage, she was not able to speak the language and that she would be likely to attract attention. These were the very clear practical issues identified on the factual matrix in addition to the fact that she would be without the support of her family and friends and importantly the social services support which was relevant given the history. He supported that all of those when taken together cumulatively demonstrated that there were insurmountable obstacles for family life continuing outside of the UK.

Findings of fact and analysis:

24. There is no dispute between the parties that the appellant married his partner in an Islamic ceremony on the 4th November 2017 and that there is a genuine subsisting relationship between the appellant and his partner and that they live together as a functioning family unit. There is also no dispute that the appellant is the father of A, born in 2019 in the light of the DNA evidence and that his partner is due to give birth in March 2020.
25. I heard little oral evidence from the appellant and his partner as there was little cross-examination of them and I therefore rely upon the written documentation provided including the accompanying statements which were unchallenged. The written evidence of the appellant's partner which was adopted as her evidence was that she is in a genuine relationship with the appellant and that she would not go to Pakistan to live with him and therefore his removal would split the family. It has not been challenged by the respondent that his partner has lived in the UK all of her life and this is where her family is. She has never been to Pakistan indeed she has never left United Kingdom, nor does she speak any other language.
26. In her witness statement she makes reference to how she would be perceived in Pakistan. Mr Raza on behalf of the appellant places weight and reliance upon this evidence and that as she is a white atheist female she would be viewed as an outsider and that in the light of the objective material, there would be obstacles to their marriage in Pakistan. In addition, both the appellant and her partner make reference to the disapproval of the appellant's family of the relationship. The appellant's partner also makes reference to the state of affairs in Pakistan and its relatively lack of safety for her and their child. Given the lack of challenge to that evidence, I proceed on the basis of this factual matrix.
27. There is also evidence in the appellant's bundle relating to the appellant's partners early years. It is not necessary for me to set out the contents of the letter from the social worker at page 25 or the child/young person in need review and its contents which is set out at page 26. Those documents have been in the possession of the respondent and they have not been the subject of any challenge by the respondent or during the hearing. It indicates that there has been social work input with the appellant's partner during her life and that as a result when her pregnancy was known, a child in need plan has been formulated. The letter at page 25 is supportive of the relationship between the appellant and his partner and that it has had a significant impact on her in a positive way and he has provided a protective factor for her. At pages 26 - 31 the review plan makes reference to the plan being in place to support them with parenting and carry out further parenting assessment work. The concerns set out at page 28 have all said to have been achieved. At page 29 of that document there is reference to post-birth parenting support for the appellant's partner and the completion of work done with other agencies. I would accept the submission made by Mr Raza that this evidence demonstrates that she has had the benefit of safeguarding support and that that also extends to child A to ensure that

she is safely cared for and that this would not be available to her if she left United Kingdom.

28. By virtue of section 55 of the Borders, Citizenship and Immigration Act 2009, in making decisions on removal, the Secretary of State must have regard to the need to safeguard and promote the welfare of children who are in the UK.
29. The House of Lords, in ZH (Tanzania) v Home Secretary [2011]2 AC 166 , held that, in the application of article 8(2), the children's best interests should be treated as "a primary consideration", to give effect to article 3.1 of the UN Convention on the Rights of the Child. Nationality and the rights of citizenship are of particular importance in assessing the best interests of any child. Thus, the decision-maker must ask whether it is reasonable to expect the child to live in another country, and to be deprived of the opportunity to exercise the rights of a British citizen. However, even if it is found to be in the best interests of the child to remain in the UK, that factor can be outweighed by the strength of "countervailing considerations" in favour of removal (per Lady Hale at [29] - [33]).
30. In Zoumbas v Secretary of State for the Home Department [2013] UKSC 74, Lord Hodge, delivering the judgment of the Court, summarised the principles to be applied, at [10]:
 - "(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
 - (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
 - (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
 - (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
 - (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
 - (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
 - (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."
31. I have carried out an assessment of the best interests of the child A based on the evidence and in accordance with Section 55 of the 2009 Act. There is no dispute that the best interests of A must be considered and assessed in isolation from other

factors, such as parental misconduct (see Kaur (children's best interests/public interface) [2017] UKUT00014 (IAC).

32. In the light of my assessment that appellant has a genuine and subsisting relationship with his child, it would plainly be in the best interests of the child A for their current stable environment, in which both parents are present playing their respective parts, to continue. I take her best interests into account as a primary consideration. It would not be in her best interests for the child to be parted from the appellant, either on a temporary basis or on a permanent basis given the difficulties outlined in the documentation that refers to the previous social work involvement with his partner and the support that he is currently providing. It would also not be in her best interests to not have the safeguarding support that is available to her in the United Kingdom.

Discussion:

33. There is no dispute that the appellant cannot not meet the requirements under Paragraph 276ADE concerning his private life. The appellant is over 18 years of age and has not continuously resided in the United Kingdom for 20 years given his arrival in the UK unlawfully in 2015. Therefore, he cannot meet paragraph 276 ADE (1)(i)-(v).
34. As to whether there were very significant obstacles to his reintegration to Pakistan, the appellant had spent the majority of his life in Pakistan where he has family. It has not been suggested that he has lost any connection to his country of origin that would suggest any significant obstacle to his integration there; he continues to have linguistic, cultural and family ties to Pakistan.
35. The appellant cannot meet the requirements under Appendix FM as a parent as he is not the sole care of the qualifying child concerned. Mr Raza advances the appellant's case based on his family life with his partner and child under Appendix FM and EX1(a) and Article 8 of the ECHR.
36. There is no right of appeal to the Tribunal on the ground that the Secretary of State's decision was not in accordance with the Immigration Rules. The only relevant right of appeal under section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) in a case of this kind is from the decision of the Secretary of State to refuse a "human rights claim" - defined in section 113 of the 2002 Act as a claim made by a person to the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998. Nonetheless the Immigration Rules and associated guidance are highly relevant to the tribunal's task because they reflect the responsible Minister's general assessment of when interference with the right to respect for private and family life is justified under article 8(2) on the basis of legitimate public interests. As explained by the Supreme Court in *R (Ali) v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799, paras 44-46, 50 and 53, and *R (Agyarko) v Secretary of State for the Home*

Department [2017] UKSC 11; [2017] 1 WLR 823, paras 46-47, the European Court has acknowledged that national authorities have a wide margin of appreciation in relation to immigration control; under the constitutional arrangements of the UK, the national authorities responsible for determining policy in relation to immigration, within the limits of this margin of appreciation, are the Secretary of State and Parliament; and courts and tribunals in dealing with cases therefore have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the rules by Parliament, and have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case.

37. Applying the test set out in *Razgar* [2004] UKHL 54, I find that the appellant has formed a family life with his partner and his British child. His removal to Pakistan would be an interference with the family life they share, but would be in accordance with the law, given that the appellant is in the UK unlawfully. The issue is whether his removal would be proportionate.
38. Part 5A applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches article 8 and as a result would be unlawful under section 6 of the Human Rights Act 1998. Section 117A(2) requires the court or tribunal, in considering whether an interference with a person's right to respect for private and family life is justified under article 8(2), to have regard in all cases to the considerations listed in section 117B. Sections 117A - D NIAA 2002.
39. Sections 117A-D NIAA 2002 have set out public interest considerations which a court or tribunal must take into account in an appeal based upon article 8:

"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

- (1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-

- (a) are less of a burden on taxpayers, and
- (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons-

- (a) are not a burden on taxpayers, and
- (b) are better able to integrate into society.

(4) Little weight should be given to-

- (a) a private life, or
- (b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(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.

40. **117D Interpretation of this Part**

(1) In this Part-

"Article 8" means Article 8 of the European Convention on Human Rights;

"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;

"qualifying partner" means a partner who-

- (a) is a British citizen, or
- (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see section 33(2A) of that Act).

41. Both advocates agree that the issue that I have to decide relates to the issue of reasonableness, either under EX1 or s.117B(6)(b) of the 2002 Act is satisfied, i.e. whether it is reasonable for the appellant's child to leave the United Kingdom. If it is satisfied, I would allow the appeal on human rights grounds on the basis that s.117B(6)(b) is satisfied. If not, I would be required to consider the overall proportionality balance.

42. I have therefore considered the decisions relevant to the consideration of EX1 (a) and S 117B (6).
43. Mr Raza has referred me to the decision of JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC) where a Presidential panel of the Upper Tribunal held *inter alia*:

"33. We have seen how, in KO (Nigeria), the Supreme Court had regard to the respondent's IDI in its examination of section 117B (6). In his submissions, Mr Malik drew our attention to the latest relevant publication of the respondent; namely "Family Migration: Appendix FM Section 1.0b"...

36. There are a number of things to say about this IDI. First, it cannot override ordinary principles of statutory construction. If, applying those principles, a court or tribunal determines that a statutory provision falls to be interpreted in a particular way, the fact that the IDI may take a different view is irrelevant.

37. Second, the IDI does not cite KO (Nigeria) in support of the proposition that it is only where the child would be required to leave the United Kingdom that EX.1. (b) or section 117B (6) falls to be considered. The citation of KO (Nigeria) merely recognises that, in deciding what would be reasonable, one must have regard to the fact that one or both parents is liable to removal under immigration powers (see paragraph 27 above).

38. Third (and relatedly), a previous version of the IDI, pre-dating KO (Nigeria), contained statements to the effect that if the departure of a parent would not result in the child being required to leave the United Kingdom, the question of whether it was reasonable to expect the child to leave would not arise. This was noted by Upper Tribunal Judge Plimmer in SR (subsisting parental relationship - s117B(6)) Pakistan [2018] UKUT 334 (IAC) . At paragraph 50 of her decision, Judge Plimmer said that "This aspect of the 2018 IDI provides an untenable construction of the plain and ordinary meaning of EX.1. and section 117B (6)". At paragraph 51, she held that "Self-evidently, section 117B (6) is engaged whether the child will or will not in fact or practice leave the UK". For the reasons we have given, nothing in KO (Nigeria) affects the correctness of her conclusion.

39. We do not consider our construction of section 117B(6) can be affected by the respondent's submission that, in cases where - on his interpretation - the subsection does not have purchase (i.e. because the child would not in practice leave the United Kingdom), there would nevertheless need to be a full-blown proportionality assessment, compatibly with the other provisions of Part 5A of the 2002 Act, with the result that a person with parental responsibility who could not invoke section 117B(6) may, nevertheless, succeed in a human rights appeal.

40. Such an assessment would, however, have to take account of the immigration history of the person subject to removal; so there could well be a very real difference between the outcome of that exercise, and one conducted under section 117B (6). But the real point is that this submission does not begin to affect the plain meaning of subsection (6). If, as we have found, Parliament has decreed

a particular outcome by enacting section 117B (6), then that is the end of the matter.

41. We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A of imposing greater consistency in decision-making in this area by courts and tribunals. The fact that section 117B (6) has such an aim was expressly recognised by Elias LJ at paragraph 44 of MA (Pakistan) ...

80. Our assessment of the appellant is that she is both dishonest and unscrupulous, each to a high degree. She has flagrantly defied the law of the United Kingdom by overstaying her leave for a large number of years, without bothering to seek to regularise her status; by making entry clearance applications that she knew full well were predicated on an entirely false basis; and in gaining access to the United Kingdom ...

96. We therefore conclude that, on the facts of this case, it would not be reasonable to expect the appellant's children to leave the United Kingdom, in the event of her removal. This means the appellant's appeal succeeds. It does so because Parliament has stated, in terms, that the public interest does not require her removal, in these circumstances. It does so despite the fact that, absent section 117B (6), the appellant's removal would be proportionate in terms of Article 8 of the ECHR."

44. I have not been provided with the guidance by either of the advocates but when asked to provide details, Mr Raza was able to confirm that the most up to date guidance entitled: "*Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*", version 4.0, published 10th December 2019. The relevant part of the guidance states as follows:

“Is it reasonable for the child to leave the UK?

Where you decide that the answer to this first stage is yes – there is a genuine and subsisting relationship to a child, then they must go on to consider secondly, whether, taking into account the child’s best interests as a primary consideration, it is reasonable to expect the child to leave the UK. In doing so you must carefully consider all the information provided by the applicant, together with any other relevant factor and information of which you are aware.

In accordance with the findings in the case of *AB Jamaica (Secretary of State for the Home Department v AB (Jamaica) & Anor* [2019] EWCA Civ 661), consideration of whether it is reasonable to expect a child to leave the UK must be undertaken regardless of whether the child is actually expected to leave the UK.

The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child’s best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK.

In the caselaw of *KO and Others* 2018 UKSC53, with particular reference to the case of *NS (Sri Lanka)*, the Supreme Court found that “reasonableness” is to be considered in the real-world context in which the child finds themselves. The parents’ immigration status is a relevant fact to establish that context. The determination sets out that if a child’s parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that that it would not be reasonable.

This assessment must take into account the child’s best interests as a primary consideration.

You must carefully consider all the relevant points raised in the application and carefully assess any evidence provided. Decisions must not be taken simply on the basis of the application’s assertions about the child, but rather on the basis of an examination of all the evidence provided. All relevant factors need to be assessed in the round.

There may be some specific circumstances where it would be reasonable to expect the qualifying child to leave the UK with the parent(s). In deciding such cases you must consider the best interests of the child and the facts relating to the family as a whole. You should also consider any specific issues raised by the family or by, or on behalf of the child (or other children in the family).

It may be reasonable for a qualifying child to leave the UK with the parent or primary carer where for example:

- the parent or parents, or child, are a citizen of the country and so able to enjoy the full rights of being a citizen in that country
- there is nothing in any country specific information, including as contained in relevant country information which suggests that relocation would be unreasonable
- the parent or parents or child have existing family, social, or cultural ties with the country and if there are wider family or relationships with friends or community overseas that can provide support:
 - you must consider the extent to which the child is dependent on or requires support from wider family members in the UK in important areas of their life and how a transition to similar support overseas would affect them
 - a person who has extended family or a network of friends in the country should be able to rely on them for support to help (re)integrate there
 - parent or parents or a child who have lived in or visited the country before for periods of more than a few weeks. should be better able to adapt, or the parent or parents would be able to support the child in adapting, to life in the country
 - you must consider any evidence of exposure to, and the level of understanding of, the cultural norms of the country
 - for example, a period of time spent living amongst a diaspora from the country may give a child an awareness of the culture of the country
 - the parents or child can speak, read and write in a language of that country, or are likely to achieve this within a reasonable time period
 - fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice
- removal would not give rise to a significant risk to the child’s health
- there are no other specific factors raised by or on behalf of the child

The parents' situation is a relevant fact to consider in deciding whether they themselves and therefore, their child is expected to leave the UK. Where both parents are expected to leave the UK, the natural expectation is that the child would go with them and leave the UK, and that expectation would be reasonable unless there are factors or evidence that means it would not be reasonable.

45. Therefore, I determine the Appellant's appeal on the basis of the facts set out at above, the guidance in *KO* and *JG*, the guidance and the best interests of the Appellant's child, who is a "qualifying child" as a British Citizen. My assessment of the best interests of the children is set out earlier in the decision. They are a primary consideration and not a "trump card".
46. The relevant jurisprudence relied upon by Mr Raza makes it plain that the Tribunal should consider the "real world analysis". At paras 18-19 of *KO (Nigeria)* the following is set out:

"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 at (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."

47. Para 19 of the judgment in KO (Nigeria) approves of para 58 of the Court of Appeal's judgment in EV (Philippines) where Lewison LJ said that "the best interests of a child must be assessed on the basis that the facts are as they are in the real world" and that "If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted".
48. I therefore conclude that any assessment of the facts "*as they are in the real world*" must include consideration of whether it is reasonable for the parent who is entitled to remain in the United Kingdom to leave the United Kingdom with the parent facing removal. This is likely to include an assessment as whether it would be reasonable for a British citizen parent of a qualifying child to enjoy family life with the child and the parent facing removal outside the United Kingdom in reaching its conclusion whether it would be reasonable for the qualifying child to leave the United Kingdom for the purposes of s.117B(6)(b) of the 2002 Act.
49. In his submissions Mr Raza has reminded the Tribunal that when considering the circumstances of A, the fact she is a British citizen which is an important factor.
50. I have already made reference to the decision of ZH (Tanzania) and remind myself of paragraph 30 of that decision which I take into account and which reads as follows:
- "30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8). In *Wan*, the Federal Court of Australia, pointed out at para 30 that, when considering the possibility of the children accompanying their father to China, the tribunal had not considered any of the following matters, which the Court clearly regarded as important:
- (a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle' (*Vaitaiki v Minister for Immigration and Ethnic Affairs* [1998] FCA 5 , (1998) 150 ALR 608, 614);
- (b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;
- (c) the loss of educational opportunities available to the children in Australia; and
- (d) their resultant isolation from the normal contacts of children with their mother and their mother's family."
51. Whilst child A is of tender years presently, if she were to leave the UK and live in Pakistan, she would lose out on the opportunity of growing up in the United Kingdom, the country of her nationality, the loss of educational opportunities and any medical services available and importantly the safeguarding and support provided in the United Kingdom.

52. Whilst the guidance makes reference to the starting point being that the respondent would not normally expect a qualifying child to leave the United Kingdom, this is only a starting point. In any assessment it is important to consider the specific circumstances of the family members as a whole and in the light of the best interests of the child concerned. I have set out that assessment earlier in this decision.
53. There has been no challenge to the evidence that the appellant and his partner will be unlikely to have the support of his wider family. The appellant's family are said to have not accepted the relationship. This is underscored by her circumstances as an atheist and the material relied upon by Mr Raza is that it is unlikely that their marriage would therefore be accepted in Pakistan.
54. The appellant's partner has not experienced life out of the UK and as a result of her previous life experiences has required the support and assistance of the social services. The sources of support that have been identified as necessary for the appellant's partner would not be available in Pakistan nor would it be likely that she could access such support even if it were available given the difficulties with both language and culture. She has not lived in the UK nor has she ever left the country and whilst I recognise that she would have the assistance and support of the appellant, she would be away from all of the sources of support that she currently has in the United Kingdom which provide for the ongoing safeguarding for the appellant's partner and also child A.
55. It is accepted that the appellant has a genuine and subsisting relationship with both his partner and child A and that his partner is pregnant with their second child. The specific issue that requires determination, however, is whether it would be reasonable to expect the appellant's child to leave the UK: s117B (6) of the NIAA 2002. I find that *JG* requires a hypothesis that she would leave. I find, for the reasons set out in *JG* and *KO (Nigeria)* that the issue has to be determined separately from any conduct of the appellant. As Mr Raza points out, whilst his immigration history is a poor one, having entered the UK unlawfully and having remained, there are no other aspects of his conduct which is adverse, or any such conduct identified by the respondent or like that of the appellant in *JG*.
56. It has not been submitted on behalf of the respondent that the appellant could leave the United Kingdom and apply for entry clearance from abroad or suggested in cross examination or otherwise that the appellant's partner could travel with the appellant along with their child to live in Pakistan on a temporary basis. Given the difficulties faced by the appellant's partner relocating to a country where she would have no support other than her partner and in the context of the unchallenged evidence of her partner's family who do not support the relationship, I do not consider that it would be reasonable to expect child A to leave the UK .
57. Taking account of the assessment made, I find that on balance that it would be contrary to the best interests of A but I also find that it would be unreasonable to expect her to leave the UK.

58. It follows, therefore, that the public interest does not require the appellant's removal as set out in the decision of JG at paragraphs [39-41]:

“39. We do not consider our construction of section 117B(6) can be affected by the respondent's submission that, in cases where - on his interpretation - the subsection does not have purchase (i.e. because the child would not in practice leave the United Kingdom), there would nevertheless need to be a full-blown proportionality assessment, compatibly with the other provisions of Part 5A of the 2002 Act, with the result that a person with parental responsibility who could not invoke section 117B(6) may, nevertheless, succeed in a human rights appeal.

40. Such an assessment would, however, have to take account of the immigration history of the person subject to removal; so, there could well be a very real difference between the outcome of that exercise, and one conducted under section 117B (6). But the real point is that this submission does not begin to affect the plain meaning of subsection (6). If, as we have found, Parliament has decreed a particular outcome by enacting section 117B (6), then that is the end of the matter.

41. We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A of imposing greater consistency in decision-making in this area by courts and tribunals. The fact that section 117B (6) has such an aim was expressly recognised by Elias LJ at paragraph 44 of MA (Pakistan).”

59. In the light of my assessment, then paragraph EX.1. applies without the need to show insurmountable obstacles to continuing family life outside the UK. However on the basis of my assessment and in the light of the relevant jurisprudence, I would be satisfied that on the particular facts of the appellant's partner that there would be insurmountable obstacles to family life continuing in Pakistan. For the purposes of paragraph EX.1.(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner." The Supreme Court considered insurmountable obstacles and Article 8 in the decision of R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11.
60. At paragraph 43 the court considered the European jurisprudence and that the “words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned”. In the light of the factual circumstances of the family, the obstacles here when realistically viewed properly seen as insurmountable obstacles. They include the lack of family support and the lack of any other support that has been identified as necessary for the appellant's partner and child, which even if available, would be unlikely to be accessible due to language and cultural differences.

61. I therefore conclude that it is unreasonable to expect the child to leave the UK and I am therefore satisfied that the decision to refuse his human rights claim would be disproportionate with reference to Article 8(2) of the European Convention and therefore unlawful under Section 6 of the Human Rights Act 1998.

Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point, the decision to dismiss the appeal on Article 8 grounds is set aside and is re-made as follows: the appeal is allowed.

Signed

Date: 9 January 2020

Upper Tribunal Judge Reeds