



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal numbers: HU/11162/2019  
HU /11173/2019, HU /11177/2019 (P)

THE IMMIGRATION ACTS

Heard at Manchester CJC  
On 28 July 2021

Decision & Reasons Promulgated  
On 17 August 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

JJ  
LJ  
NJ

(ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Mr M Murphy of Counsel, instructed by Krishmorgan Solicitors

For the Respondent: Mr A Tan, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote

hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

### **Appeal Chronology**

1. The appellants are husband, wife and son, each a citizen of India, with dates of birth given as 28.5.97, 13.12.83, and 5.7.09, respectively. They have appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 23.9.19 (Judge Lewis), dismissing their linked human rights appeals against the decisions of the Secretary of State, dated 14.6.19, to refuse their applications made on 2.1.19 for leave to remain in the UK on private and family life grounds.
2. The first appellant's application was refused on suitability grounds of S-LTR under paragraph 276ADE(1)(i) on the basis that he fraudulently obtained a TOEIC English language certificate in November 2012, by using a proxy to take his test, so that his continued presence in the UK was not conducive to the public good. The respondent further considered that there were no very significant obstacles to his integration in India pursuant to paragraph 276ADE of the Rules, and no exceptional or compelling reasons to grant leave to remain outside the Rules pursuant to article 8 ECHR. The second appellant's application was refused on the basis of no very significant obstacles under paragraph 276ADE or exceptional reasons. The third appellant's application was refused as his parents had no leave to remain and he could not meet the requirements of paragraph 276ADE, or demonstrate exceptional reasons to remain outside the Rules.
3. In summary, the grounds of application for permission to appeal complained that the judge erred in refusing an adjournment application to obtain a psychiatric report, erred in purporting he could make an assessment using his own "expertise", failed to consider the best interests of the child, and erred in his findings in relation to the TOEIC test.
4. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 6.2.20, on the basis that it was considered arguable that the judge erred in failing to make a distinct assessment as to the child's best interests. The judge granting permission considered that the First-tier Tribunal had used the correct criteria when deciding the adjournment application, and that the judge's reference to "expertise" related only to the fact that the Tribunal would make findings of fact as to the consequences of removal for the child. Nevertheless, permission was granted on all grounds.

5. In a decision made on the papers without an oral hearing, pursuant to Rule 34, promulgated on 2.7.20, Upper Tribunal Judge Jackson concluded that the decision of the First-tier Tribunal involved the making of a material error of law in relation to its assessment of the best interests of the child third appellant and on article 8 ECHR, such that it was necessary to set aside the decision. However, in doing so, Judge Jackson preserved the findings of fact made by the First-tier Tribunal between [43] to [52] inclusive of the impugned decision, as well as the findings on article 3 of the Convention on Human Rights.
6. Judge Jackson issued a number of directions to both the appellants and the respondent, addressing in particular paragraph 276ADE(1)(iv) and/or section 117B of the 2002 Act, and whether the respondent considered that this was a new matter for the purpose of section 85 of the 2002 Act and whether consent was given for such a new matter to be considered in the remaking of the decision in the appeal.
7. The appellants responded to the directions on 13.7.20, confirming that they sought to rely on paragraph 276ADE(1)(iv) and s117B, submitting further documentation relating to the third appellant.
8. The respondent's response to the directions, dated 20.7.20, accepts that the child third appellant had by then lived in the UK continuously for 7 years but contended that the appellants had not established that it would be unreasonable to expect the child to leave the UK with his parents, that it would be in his best interests to do so, and that there are no sufficiently compelling circumstances to justify a grant of leave outside the Rules.
9. The resumed hearing was listed as a remote hearing before Upper Tribunal Judge Jackson on 23.12.20. However, there were difficulties for the respondent in accessing the case file electronically and the appellants did not have access to sufficient IT facilities to be able to participate in the remote hearing. Judge Jackson adjourned the hearing, relisting the matter for a face-to-face hearing at Manchester Civil Justice Centre (CJC).
10. Pursuant to the Transfer Order made on 6.7.21, the remaking of the decision in the appeal has been allocated to me and listed at Manchester CJC on 28.7.21.

### **Documentary Evidence**

11. Outside of the time limits set by Judge Jackson and only a few days before the resumed hearing, the Upper Tribunal has received electronic copies of the following:
  - a. The First-tier Tribunal appeal bundle (203 pps), a paper copy of which is with the Tribunal's case file;

- b. A second bundle (62 pps);
  - c. A third bundle (22 pps), including further evidence and witness statements
12. I also have received copies of KO (Nigeria) [2018] UKSC 53, EV (Philippines) [2014] EWCA Civ 874, and, from Mr Tan, the recent Court of Appeal decision in NA (Bangladesh) v SSHD [2021] EWCA Civ 953.
13. I confirm that all documents now before the Upper Tribunal and relied on by either party, together with the oral evidence and submissions, have been carefully considered in the round in the context of the whole before reaching any findings of fact. That is so whether or not documents have been specifically referenced below.

### **Relevant Background**

14. The relevant background can be summarised as follows.
15. Each of the appellants was born in India. The third appellant is now 12 years of age.
16. The second appellant (wife and mother) came to the UK in 2009 with entry clearance as a Tier 4 student, later extended to September 2013. In April 2010, the first appellant (husband and father) was granted a Tier 4 partner visa, also extended to September 2013. The third appellant (son) was granted entry clearance as a visitor to join his parents for a 6 month period from July 2012. Although it was not clear from the documentary evidence, it transpired during the hearing before me that up until the visit visa when the second and first appellants were both in the UK, the third appellant lived with his grandmother in India.
17. Towards the end of 2012, though the precise date is not clear, the first and second appellant returned to India. However, in May 2013, the first appellant was granted entry clearance as a Tier 1 Entrepreneur valid to September 2016 and the second and third appellants were granted dependent visas in line with their husband/father. The three appellants entered the UK together on 17.6.13. In January 2014, they all returned to India for a family wedding, staying approximately two weeks before returning to the UK.
18. On the expiry date of their visas in September 2016, the appellants sought leave to remain outside the Rules, which was refused in October 2017. The first appellant attempted to judicially review this decision but permission was refused on the papers in May 2018 and orally in June 2018. A further application for leave to remain was refused in November 2018. There then

followed the application for leave to remain, the refusal of which on 14.6.19 is the subject matter of this appeal.

19. It follows from the above that the appellants' immigration status has always been precarious and they have been unlawful overstayers since the expiry of their visas in September 2016.

### **The First-tier Tribunal Decision**

20. In relation to the adjournment application made at the First-tier Tribunal appeal hearing for a psychological report on the impact on the third appellant of removal to India, this was refused on the basis that that application was made late, was speculative, and because the First-tier Tribunal considered that it had sufficient material upon which to fairly determine the appeals together with the Tribunal's own expertise of such matters.
21. The First-tier Tribunal dismissed the appeals, finding that the first appellant had used deception by using a proxy to take his test for an English language certificate and that the respondent had discharged the burden of proof of establishing this.
22. In relation to the article 3 ECHR claim, the first appellant relied on medical grounds of having previously been treated for a brain tumor, which in December 2018 required no further treatment. The First-tier Tribunal concluded that this was not a life-threatening condition, there was no planned treatment, and in any event the appellant could, if necessary, access India's functioning health system. In the premises, the circumstances did not reach the high threshold required under article 3.
23. The First-tier Tribunal found that there would not be very significant obstacles to the appellants' integration in India and also concluded that there were no exceptional or compelling circumstances outside the Rules which would render removal a disproportionate interference with the appellants' rights to respect for private and family life. In reaching this conclusion, the Tribunal noted that the parents had spent the majority of their lives in India, retaining a knowledge of the life and culture of their native country. The first appellant spoke Arabic, Hindi and English. There was no reason why the family could not continue to be supported by their friends in the UK. With his qualifications and employment history, the first appellant would be in a position to secure employment in India, and the second appellant was skilled and would also be able to secure employment.

### **The Upper Tribunal Error of Law Decision**

24. Judge Jackson's decision recorded that the respondent accepted that the decision of the First-tier Tribunal disclosed a material error in the failure of the Tribunal to assess the best interests of the third appellant child, and in consequence in relation to the article 8 assessment as a whole. Whilst the decision of the First-tier Tribunal asserted that the child's best interests had been considered, there were no express findings on that subject. Judge Jackson also observed that the Tribunal did not address the s117B public interest considerations.
25. For the reasons stated in her decision and summarised above, Judge Jackson concluded that it was necessary to set aside the decision of the First-tier Tribunal to be remade.
26. However, from [15] onwards, Judge Jackson concluded that it was unarguably open on the evidence available to the First-tier Tribunal to conclude that the respondent had discharged the legal burden to show that the first appellant had indeed used a proxy test taker in 2012. The finding was adequately reasoned, having taken all the evidence into account. In the premises, Judge Jackson specifically preserved the findings of the First-tier Tribunal between [43] and [52]. This included the First-tier Tribunal's rejection of the article 3 claim, for the reasoning summarised above, findings which had not been challenged.
27. It follows from the above that the first appellant's dishonesty in using a proxy to obtain an English language certificate and in using that to remain in the UK is a weighty factor against him in any article 8 proportionality balancing exercise.

### **The Limited Issues in the Remaking of the Decision**

28. It follows that the issues now before the Upper Tribunal in the remaking of the appeal are limited to the very significant obstacles to integration test under paragraph 276ADE, and, given that the third appellant child has lived continuously in the UK for over 7 years and is a qualifying child, the 276ADE(1)(iv) test, reflected in s117B(6) as to whether it is reasonable to expect the third appellant to leave the UK.
29. I bear in mind that whilst this is a human rights appeal, it is for the appellants to demonstrate that they meet the requirements of any relevant Rules, on the balance of probabilities. In relation to the article 8 ECHR consideration outside the Rules, I have followed the Razgar stepped approach, accepting that article 8 is engaged and that removal of the appellants from the UK would interfere at least to some degree with their rights to respect for private and family life. Given the legitimate and lawful reason for refusing further leave to remain, it

follows that the key question is the proportionality balancing exercise, taking into account the s117B public interest considerations and assessing the best interests of the third appellant child, to be taken as a primary consideration. In this regard, I bear in mind that once the appellants have demonstrated that article 8 is engaged, which I accept they have, it is for the respondent to demonstrate on the balance of probabilities that the removal of the family is proportionate. Whilst each appellant is entitled to and has been given individual consideration, there is no question in this case of individual family members being removed without the rest of the family. In short, the appellants will either all remain in the UK or all be removed together to India.

### **The Appellants' Circumstances**

30. In assessing the appellants' circumstances in the UK and the prospective situation on return to India, particularly for the third appellant, I have carefully read their witness statements and considered the oral evidence, in the context of the documentary evidence, their immigration history, and the case as a whole.
31. The third appellant's short witness statement, dated 20.7.21. He is now 12 years of age, having come to the UK at age 4, and is now in secondary schooling at Ripley St Thomas Academy. He speaks of his parents struggling and that their dream is to work in the UK without help from family and friends. His own dream is to continue to study in the UK and get a good job. He has many school friends, enjoys playing football, and has joined a club. He says he does not recall anyone in India. The July 2021 letter from the school's English teacher commends him on his consistent effort and fantastic progress in what is described as the Bedrock Vocabulary programme, for which he has won an award. From his overall grades, he is undoubtedly doing well at school in all subjects. The previous report from West End Primary School, dated 7.7.20, confirmed that the third appellant is committed to his education and had sought every opportunity to better himself. His learning is described as outstanding and he is an exceptional student who has engaged in many after school activities including representing the school in sports.
32. The first appellant's witness statement confirms that his son wants to continue with his education in the UK, and has lots of friends from Junior School with whom he retains contact despite moving on to secondary school. The first appellant suggests that his son has adapted to his "western style surroundings and environment" in the UK and his "ties of real substance are to his family and to the UK but not to India." He is said to be doing well academically and in particular mathematics. He is also involved in extra-curricular activities. It is said he adores British culture, preferring the country's food, clothes and language. It is submitted that returning him to India would adversely affect his

educational and psychological development. Although the parents' native language is spoken at home, his son sticks to speaking English. It is suggested that in returning to India the third appellant would feel unconnected and the change would lead to social isolation. The first appellant states that returning to India would be a "dead end with no hope with tremendously difficult financial situation." He asserts that given his medical circumstances, he would have no job prospects in India and would be without financial assistance or accommodation. The latest medical report from the consultant neurosurgeon confirms that he remains on radiological surveillance and that there have been some changes to be monitored but that "we are reassured by the fact that his pathology has shown a benign lesion."

33. The second appellant's short witness statement of the same date is largely a reflection of the information already set out in the statements of the other appellants.
34. The third appellant was at the hearing but remained outside and was not called to give evidence. I was satisfied that given that Mr Tan indicated that he did not intend to cross-examine the child, his statement could be taken as read.
35. I then heard oral evidence from the first and then the second appellants, both of whom relied on their updated witness statements.
36. I found both the first and second appellants poor and unreliable witnesses in their own cause. Their oral evidence was generally very vague and the facts difficult to ascertain despite my attempt to clarify the answers given to questions asked. I take into account that both were giving their evidence in English and I have made some allowance for language comprehension difficulties. However, to some degree their evidence was inconsistent with both their witness statements and the documentary evidence. I reached the conclusion that they were both prone to exaggerate or minimise where it suited them and that they were generally unreliable witnesses.
37. Although the first appellant maintained that if returned to India he would not be able to work because of his age and medical condition, he stated that he was in receipt of financial support from friends and family in the UK on the basis that he would repay the monies when he was able to work in the UK. He did not seem to appreciate the inconsistency between his intentions to work in the UK and his claim that he would not be able to work in India. He said that he received up to around £900 per month in financial support from unnamed friends and family, of which there was no documentary evidence in support of either the amounts or the claim that this was by way of loans. I found it incredible that allegedly having had an average of £900 per month in alleged financial support for some five years that there was any real prospect of being



able to repay such a sum and reject the claim that the support he has received has been as a loan. The first appellant maintained that he had not worked or operated any business since the Home Office told him in 2016 that he was not permitted to do so. I found this difficult to accept given that both his witness statements and in his Home Office application in 2019 he stated that the business were still operating "to date". He maintained that this was a mistake. However, I do not accept that he is not working in some way or to some extent. He confirmed to Mr Tan that he was qualified as an electrician and as an air conditioning technician. Considering the evidence, I am not satisfied that the first appellant has been truthful about his income or the source of his income.

38. The second appellant also claimed that she had not worked since late 2015 but was confronted by Mr Tan with her P60 from the 2017/2018 tax year, showing salaried income a little under £10,000 in that year. She was unable to explain the discrepancy. I am satisfied that she has worked more than she has been prepared to admit.
39. Whilst maintaining that they would have no employment, no accommodation and no financial support in India, the first and second appellants were difficult to pin down as to what relatives they had in the UK and in India. For example the second appellant stated she had only her parents and her grandmother in India but when pressed admitted that there were other family members. In cross-examination she initially maintained that there were no other relatives. However, when pressed, she admitted that she had an aunt, her father's sister, and three sisters outside of India, an uncle in Abu Dhabi, and several cousins in India. She accepted that when they returned for a visit in 2014 they had been accommodated by the first appellant's family. I am satisfied that they were deliberately minimising the extent of family support and contact with their family members in India. I reject the first appellant's account that he was "only very rarely" in contact with his own family. I do not accept that they would not receive support and help with accommodation from family members in India and am satisfied that continued financial support from friends or family in the UK will remain available to them on return.
40. I also found the first and second appellant entirely incredible in respect of their claim that their son does not understand at all their native language, which was said to be Malayalam. It was clarified that their son was 3 years and 11 months of age when all three came to the UK in June 2013. The first appellant suggestion that his son spoke barely a word of their language at that age is entirely incredible and I reject the claim. It took some time and questions from me to clarify that their son had not lived with them and lived some three years with his grandmother in India. Given that their native language is spoken in the home, I am satisfied that the third appellant must at the very least retain a reasonable understanding of their language, even if no longer fluent.

41. I also reject the claim made by the first appellant that his son would not be able to attend school in India. He said that the school would be taught in Malayalam and that the subjects are different. However, he confirmed that English and Maths would be taught. Although he was clearly evasive in his replies, he eventually admitted that all subjects would be taught and then admitted that he doesn't really know what differences there will be. He is not at a crucial stage in his education and will have a number of years before significant examinations and qualifications have to be taken, allowing him ample time to adapt to life and schooling in India. I am satisfied that there is an education system that the third appellant will be able to take advantage of. It may be different and less valued by the appellants than being able to continue his education in the UK, but that test is not of comparative quality or equality of standards or opportunity.

### **Best Interests of the Child**

42. Pursuant to s55, I have carefully considered the best interests of the third appellant child and taken this as a primary consideration in the article 8 ECHR proportionality balancing exercise and reasonableness test. In doing so, I have taken account of the EV (Philippines) principles that a best interests assessment will depend on a number of factors including, (a) age; (b) length of residence in the UK; (c) how long they have been in education; (d) what stage their education has reached; (e) to what extent they have become distanced from the country to which it is proposed they will be returned; (f) how renewable their connection with it may be; (g) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (h) the extent to which the proposed course will interfere with their family life or their rights (if they have any) as British citizens.
43. I bear in mind that the third appellant came to the UK at age 4, accompanying his parents. He was born in India and retains Indian nationality. He has been here over 8 years and all his formal education has been in the UK. Outside of the considerations in this appeal, like his parents, he has no entitlement to remain in the UK or to be educated or to settle here. His parents came first as a student (his mother) and then his father as a Tier 1 entrepreneur, but they can no longer bring themselves within the Rules. The third appellant is doing very well at school, has worked hard and is likely to excel in the future. He has also engaged in extra-curricular activities and developed friendships in Primary and, no doubt, will do so in secondary education. He speaks fluent English and has lost to some uncertain degree his ability in his national tongue.
44. In an ideal world, his best interests would obviously be to remain in the UK and continue his education, maintaining the status quo of a settled life in school and with friends and developing his social life outside the family unit.

45. However, whilst he has been here now in excess of 8 years, it will only be the latter part of his time in which he has had any significant interaction beyond the family unit, attending school and developing associations and friendships. Children are adaptable and there is no reason to consider that the third appellant, who appears to be very bright and hard-working, will suffer any significant long-term adverse effect on his mental health from relocating to India with his parents. He may be sad at leaving behind his friends and life generally in the UK. However, it is the common experience of many families to relocate within the UK and to change schools. Families increasingly also spend time living in different countries. On the facts of his case, nothing about such a move is itself so traumatic an event as to demand he be allowed to remain in the UK. I accept that he has little personal experience of life in India and in many ways has successfully integrated into life in the UK. However, I am satisfied that his connection with India is renewable and will be all the more so with parental support in adapting to life in India. He will have plenty of time to settle and integrate before crucial schooling and examinations come around in a few years' time.
46. Whilst there may be a short-term language challenge on return to India, he must be at the very least familiar with the native language of his parents and they will be able to assist him to learn and adapt on return to India. I am fully satisfied that he will within a short time be able to establish himself in India and to continue his education, developing his ties with his cultural heritage with full parental support.
47. In all the circumstances, I am satisfied that the best interests of the third appellant will be to remain with his parents and, if his parents are returning to India, to accompany them, thereby maintaining the integrity of the family unit. I find that it is not in his best interests to remain here in the UK alone when his parents are expected to return to India.
48. I have taken this best interest assessment into account as a primary consideration in both the reasonableness assessment and in the article 8 proportionality balancing exercise.

**Paragraph 276ADE & s117B of the 2002 Act**

49. Paragraph 276ADE provides 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 application, the applicant:

- (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and

- (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
- (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
- (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
- (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
- (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

### **Section 117B of the Nationality, Immigration and Asylum Act 2002**

50. Section 117B provides as follows:

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.

### **Very Significant Obstacles to Integration**

51. The appellants continue to argue that there are very significant obstacles to their integration in India. However, like the First-tier Tribunal, I find that there are significant factors in favour of integration, including that the parents have spent the majority of their lives in India, where their son was also born and lived until they returned to the UK in 2013. They have strong family and cultural ties to return to, with no language barrier at least for the first and second appellants.
52. It is asserted that the first appellant will be unable to work because of his health issues and that they will have no accommodation or financial support. However, for the reasons set out above, I reject that claim. Whilst there may be difficulties these are not very significant obstacles to integration. I note they are not financially independent and depend now on the significant support of friends and family, and as the First-tier Tribunal found, I also find that there is no reason why that support cannot continue in India. There will be no language, social or cultural barrier for either of the parents to overcome. Whilst the first appellant has some health concerns, there is no active treatment and no treatment or care that he will not be able to obtain in India within its functioning health care system. Nothing in the evidence placed before the Tribunal demonstrates that he will be unable to work, as claimed and I note that he intends to work in the UK, despite his health concerns. I do not accept that his condition will prevent him from seeking and obtaining at least some form of employment to support the family in India. As the First-tier Tribunal found, his wife is also skilled and with no health issues, there is no reason why she cannot also or alternatively obtain employment to support the family. Despite the length of time they have spent in the UK, and their desire to continue to do so, I cannot find any very significant obstacles to the parents' integration in India.

53. The third appellant may recall little of life in India. He has effectively been raised and educated in the UK, living here for some 8 years, though in a household with an undoubtedly strong Indian cultural heritage, where their native language is commonly spoken within the home. He was raised by his grandmother for three years and must have spoken the native language during that time. Whilst he may no longer be fluent in his native language, he must have been at least age-appropriately fluent when he came to the UK at the age of 4. As that language continues to be spoken in the home, he must therefore have some good familiarity with it, particularly before he started school. I have no doubt that, with the assistance of his parents, he will be able to develop a fluency sufficient to enable him to continue with and develop a reasonably fulfilling life in India including at school in India. Whilst he may wish to remain in the UK to continue his education and obtain employment here in the UK, his secondary school education is at an early stage and he is not at any crucial stage of study such as preparing for national educational qualification. In the premises, I am not satisfied that there are very significant obstacles to the third appellant's integration in India, the country of his birth, nationality and cultural background. I am, therefore, satisfied that none of the three appellants has been able to demonstrate that they meet the very significant obstacles test.

#### **Insurmountable Obstacles to the Continuation of Family Life**

54. This consideration, derived from Appendix FM of the Immigration Rules, was not argued before the First-tier Tribunal. When I raised this with Mr Murphy he said he wished to keep this claim open, but I declined to accept this was open to him, having never previously been pursued. In any event, as Mr Tan pointed out, the appellants could not meet the requirements of EX1 as neither is settled in the UK. I also note that in *TZ (Pakistan) v SSHD* [2018] EWCA Civ 1109, the Court of Appeal held that Agyarko made it clear that the scheme established by the Rules was lawful and compatible with article 8. The effect was that the secretary of state was entitled to apply a test of insurmountable obstacles to the relocation of the family within the Rules and a test of exceptional circumstances outside the Rules. I am satisfied that there are no insurmountable obstacles to family life continuing in India as defined by EX1 and Ex2 of Appendix FM.

#### **The Reasonableness Test**

55. This arises both within the Rules under paragraph 276ADE and outside the Rules under s117B in direction relation to the third appellant's length of residence in the UK, though the latter is one of the considerations for the article 8 proportionality assessment in relation to a parent with a genuine and subsisting relationship with their child.

56. In essence, the strongest argument for the appellants remaining in the UK is that the third appellant child is now a 'qualifying child', who has been in the UK since the age of 4 and for a period now exceeding 8 years. I recognise this is a significant period and a factor to be taken into account. Paragraph 267ADE(1)(iv) provides that he may remain under the Rules, if it would be unreasonable to expect him to leave the UK. In other words, whilst the period of time in which he has integrated into UK society is important, it is not alone enough to meet the qualification. Inevitably, whether it is reasonable for the third appellant to leave the UK turns in significant part on the situation of his parents, whom I am satisfied do not meet paragraph 276ADE and have no entitlement of their own to remain in the UK, and have not done so since their leave expired in 2016, some five years ago. The son is not to be blamed for his parent's immigration history, or his father's dishonesty and I disregard that in assessing reasonableness. I also take into account his best interests as assessed above.
57. Under s117B of the 2002 Act, the parents will not be required to leave and the public interest in enforcing immigration control in the article 8 ECHR proportionality balancing exercise will be outweighed if it would not be reasonable to expect their son to leave the UK, accepting that they have a genuine and subsisting parental relationship with him.
58. In the very recent case of *NA (Bangladesh) v SSHD* [2021] EWCA Civ 953, relied on by Mr Tan, the Court of Appeal held that where a child whose parents had no entitlement to leave to remain in the UK sought leave to remain under the Immigration Rules para.276ADE(1)(iv) on the basis that they had seven years' continuous residence and it would not be reasonable to expect them to leave, the starting point was that it would be reasonable to expect them to leave with their parents. In that case the child had been born in the UK. The Court of Appeal agreed with the Upper Tribunal that the "powerful reasons" doctrine had not survived the Supreme Court decision in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, which had overruled *MM (Uganda)*. It followed that the Upper Tribunal had been right to conclude that the "powerful reasons" doctrine was no longer good law. The seven-year provision did not create a presumption in favour of a child (and thus their parents) being granted leave to remain. That said, it was important to emphasise that the approach in *KO (Nigeria)* did not create a presumption in the opposite direction. It was still necessary to evaluate all the circumstances to establish whether it would be reasonable to expect the child to leave the UK with their parents. If it would not be reasonable, the family as a whole would be entitled to leave to remain.
59. That decision followed a line of earlier decisions, including *Runa v SSHD* [2020] EWCA Civ 514, where the Court of Appeal held that the focus of

s117B(6) had to be on the child, but the question had to be answered against the background of the relevant facts, which would include what was likely to happen to the family unit if the person seeking leave to remain was required to leave the UK.

60. Accordingly, I have carefully considered all relevant factors. Considering the facts of this case against the legal authorities, I am satisfied that the correct starting point for the reasonableness test is that the first and second appellants have no entitlement or legitimate expectation of being able to remain in the UK and that the third appellant should be expected to return with them. I have found that there are no very significant obstacles to their integration in India, for the reasons stated herein. Their only effective remaining claim is through the third appellant. However, there is no presumption that even 8 years of continuous residence should result in a grant of leave. Given the matters I have set out above in addressing the appellants' circumstances, individually and collectively, and particularly in relation to the third appellant, I am satisfied that it would be reasonable to expect the third appellant to leave the UK to return to India with his parents rather than to remain here in the UK. In India, the family unit can continue largely uninterrupted and the third appellant will have the assistance of his parents to settle and integrate, become more fluent in the local language, and will be able to attend school, continuing to work hard in his schooling towards an eventual career. In that regard, his fluency in English and life experience in the UK will stand him in good stead.
61. In summary and for the reasons set out above, I find that it is reasonable to expect the third appellant to leave the UK in the circumstances where his parents are expected to return to India.

### **Article 8 ECHR Proportionality Balancing Exercise**

62. Despite the above findings, it is necessary to go on to consider all of the facts and circumstances of this case in the proportionality balancing exercise between on the one hand the public interest in enforcing immigration control by removing the appellants from the UK and on the other the extent of private and family life they have developed whilst in the UK. I have also considered whether there are any exceptional or compelling circumstances that would render the removal of any or all of the appellants unjustifiably harsh, which would be disproportionate.
63. Article 8 is not a shortcut to compliance with the Rules, which are themselves the Secretary of State's proportionate response to article 8 private and family life rights. There is a route for those who meet the requirements of the Rules to remain. That none of the appellants can bring themselves within the Rules is a highly significant factor in the proportionality balancing exercise.



64. The public interest considerations set out in s117B are to be taken into account in all cases. On the one side of the balance sheet is the statutory provision that maintenance of effective immigration controls is in the public interest. The public interest in removing the first appellant is enhanced by reason of his proven dishonesty in using a proxy to obtain an English language test certificate in 2012. However, that disreputable conduct is not attributable to the second or third appellants and I disregard it when considering their circumstances in the balancing exercise.
65. I accept that all three appellants speak fluent English but no positive credit can be given for that fact. More significant is that they are not financially independent and depend on the kindness of friends and family for continued survival in the UK. Whilst all three will have developed a private life whilst in the UK, s117B provides that little weight is to be accorded to such private life where their immigration status is precarious, as it always was. Furthermore, since 2016 their immigration status has been that of unlawful overstayers. Neither is any credit due for the appellants claim to have lived a law-abiding life, when that is only what is expected of a resident of the UK. The claim itself rings rather hollow in the mouth of the first appellant, given his proven dishonesty.
66. On the positive side, in the appellants' favour is that over the length of time they have been in the UK, I accept that they have genuinely attempted to integrate in the UK. This is more clear on the part of the third appellant, whose schooling and life outside the family home will have developed perhaps more rapidly and in more significant ways than that of their parents who have been unable to work and for whom the home undoubtedly remains the centre of their lives. I recognise that all three appellants have genuine and understandable ambitions for their future lives in the UK and in particular for their son's future education and career. One may have some sympathy for their desire to remain here rather than return to India. I recognise that they and particularly the third appellant will be sad to leave behind friends and associates from school. I also accept there will be difficulties in returning to India after several years away. However, after carefully considering the entirety of this case, I find that there are no particularly compelling or exceptional circumstances, even including the third appellant's schooling and the first appellant's health concerns. As stated above, I am satisfied that they can expect financial support to continue on their return from friends and/or family in the UK, which will aid their settlement and integration.
67. Taking all factors into consideration and weighing matters in the rounds, I find that it would not be unjustifiably or unduly harsh for any and all of the appellants to return to India and find that the requirement to leave the UK, the effect of the refusal of the respondent to grant leave to remain, is not

disproportionate to the rights to respect for their private and/or family life, either individually or together as a family. I am satisfied that despite some initial difficulty, the third appellant will, with the support of his parents and wider family in India, be able to adapt in sufficient time to resume his education without detriment to his long-term education and career ambitions. I am satisfied that he will be able to attend school and that he will become fluent in the language he once spoke more fluently than perhaps he does now. In any event, given the history and circumstances described above, he will not be in the same position as a child who has never had exposure to his native language. I have also pointed to the advantages his English language and education will have for his further education and career.

68. In the circumstances and for the reasons set out above, I find that the appellants have each failed to demonstrate that they meet the requirements of the Rules for leave to remain and that the respondent has discharged the burden to demonstrate that the refusal of their applications for leave to remain is entirely proportionate and not unduly harsh. In reaching this conclusion, I have taken the third appellant's best interests into account and also considered that it is reasonable to expect him to leave the UK. I further find no exceptional or compelling circumstances so that removal would have an unduly or unjustifiably harsh effect so that the decision would be disproportionate to private and family life rights.

### **Decision**

The appeal of each appellant is dismissed.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 28 July 2021

### **Anonymity Direction**

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

*“Unless and until a tribunal or court directs otherwise, the appellants are each granted anonymity. No report of these proceedings shall directly or indirectly identify any*

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*appellant or any member of his/her family. This direction applies to, amongst others, both the appellants and the respondent. Failure to comply with this direction could lead to contempt of court proceedings."*

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 21 July 2021