Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/07252/2016**

HU/07255/2016

HU/07258/2016

HU/07273/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th October 2018	**On 7th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MR S K (FIRST APPELLANT)
MRS R K (SECOND APPELLANT)
MR S K (THIRD APPELLANT)
MR S K (FOURTH APPELLANT)
(ANONYMITY DIRECTION MAINTAINED)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Litigant in person, no legal representative
For the Respondent: Mr S Walker, Senior Presenting Officer

DECISION AND REASONS

1. The Appellants appeal against the decision of First-tier Tribunal Judge Burns dismissing their appeals against the applications for leave to remain

on the basis of their private and family life under Article 8 ECHR promulgated on 10th April 2017. The Appellants appealed against that decision and were granted permission to appeal by Upper Tribunal Judge Grubb in the following terms:

> "2. The Grounds prepared by A1 are lengthy. Many of the 28 paragraphs (plus additional text) of the Grounds simply assert, in effect, the appellants' case and the weigh (sic) that should be given to facts or evidence relied upon by the judge in reaching his decision. Specifically, there is no merit in a number of the arguments: (1) that the judge was biased and/or pre-determined the appeal – the judge clearly brought an open mind to his decision and there is nothing to suggest otherwise in the material; (2) that the proceedings were unfair because the HOPO was unprepared and did not have one of the relevant files – importantly, however, the judge did have all the information and material (as was accepted) in order to make his decision; (3) that the judge erred simply by not referring to all the case law – providing he correctly directed himself in law it was not necessary to refer to, or cite, all or any of the cases and he did subject to one caveat (on which see below); (4) that the judge did not properly apply the public interest factors in s.117B of the NIA Act 2002 – he did, with the exception of s.117B(6) (see below). Further, and in particular, it was properly open to the judge to find that the adult appellants, given all the circumstances, had not established the requirements of para 276ADE(1)(vi), namely that there are 'very significant obstacles' to their integration on return to India. I am wholly unpersuaded that the judge failed to give proper and rational weight to all the evidence as it relates to A1, A2 and A4.
>
> 3. However, it is arguable that the judge failed adequately to assess A3's best interests and, in particular whether he could succeed under para 276ADE(1)(iv) in establishing it would be unreasonable to expect him to return to India where he had not been since he was 6 years' (sic) old. He was at the date of hearing 17 years old and about to take his A' Level examinations. It is arguable that he (sic) judge failed to apply the approach in *R, (MA (Pakistan) and others) v SSHD* [2016] EWCA Civ 705, in considering where his best interests lay and whether there were 'strong' reasons to outweigh them. The same issue arose for A1 and A2 under s.117B(6) of the NIA Act 2002 as A3 is a 'qualifying child' with whom they have a genuine and subsisting parental relationship. This may also have an impact upon A4's situation if the remainder of his family were not to leave the UK.
>
> 4. Consequently, I grant permission solely on that basis. I refuse permission on all other bases set out in the lengthy Grounds."

2. I was not provided with a Rule 24 reply from the Respondent but was given the indication that the appeal was resisted.

3. Before the hearing commenced I confirmed with the First Appellant that he was happy to proceed without a legal representative and that he was confident that he would be able to deal with the matters and present the appeal on behalf of his family and he indicated that he was content and confident to do so. On that basis, as is customary when dealing with a litigant in person, I discussed the issues openly and plainly with Mr Walker in the presence of the First Appellant in a manner that allowed him to engage with and fully understand the discussion between myself and the Respondent's representative, which the First Appellant confirmed he had fully understood both during and at the close of the hearing.

Error of Law

4. At the close of my decision I indicated that I did find that there were material errors of law in the decision, such that it should be set aside but that my reasons for so finding would follow. My reasons for so finding are as follows.

5. As discussed with the parties, and as is plain from Judge Grubb's grant of permission, the key point at stake here is whether the Third Appellant's qualification as a child under Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 or his eligibility for a grant of leave if he is able to meet the terms of paragraph 276ADE(iv) of the Immigration Rules were considered by the First-tier Tribunal or not. It is not in dispute that the Third Appellant at the time the applications for further leave to remain were made on 7th October 2015 was 17 years old and the Fourth Appellant was 22 years old. At the date of the appeal hearing before the First-tier Tribunal in April 2017 the Third Appellant was still 17 years of age whilst the Fourth Appellant was at that time 22 years of age. I am told that at present date the Third Appellant is 19 years of age and the Fourth Appellant is 23 years of age. For the sake of completeness the Third Appellant's date of birth is 20th November 1994 and the Fourth Appellant's date of birth is 27th August 1999.

6. Turning from those facts to the judge's consideration of the matter, Mr Walker pragmatically accepted that the judge had not considered paragraph 276ADE(1)(iv) and had also applied an incorrect approach to Section 117B(6), which I agree with given that the judge's appraisal of the reasonableness of the child's relocation to India in light of the Court of Appeal's judgment in *MA (Pakistan) & Ors* [2016] EWCA Civ 705 is flawed. I find that the consideration at paragraph 68 is flawed because the judge finds that the fact that the Appellant is a qualifying child having lived continuously in the United Kingdom for seven years is simply a factor of merely "some weight". In my view this does not reflect the entirety of the matter as the correct approach the judge should have taken should have been to consider whether there were any "powerful reasons" why the

Appellant's family should not be granted status in the United Kingdom having regard to the fact that the child had met the seven year continuous residence threshold pursuant to the approach taken by Elias, LJ in *MA (Pakistan)* that binds all lower courts and tribunals. On this note I take into account the decision of the Upper Tribunal in *MT and ET (child's best interests; ex tempore pilot) Nigeria* [2018] UKUT 88 (IAC) wherein the Appellant – mother of "qualifying children" held a poor immigration history and had overstayed (as could be said of the Appellant family here) but had also importantly been convicted of a criminal offence involving fraud. However, notwithstanding that criminal offending and fraud, the Upper Tribunal panel found that the immigration history was not a powerful reason and was described instead as "run of the mill" immigration offending.

7. Thus, given the fact that there is no assessment of whether there are powerful reasons or not to defeat the First and Second Appellants' ability to rely upon their parental relationship with the Third Appellant, given that he was a qualifying child at the date of the First-tier Tribunal hearing in April 2017, in my view the judge has materially erred in law in failing to take account of the starting point as to whether there are powerful reasons or not which make it reasonable for the child to leave the United Kingdom, notwithstanding that he has passed the seven year continuous residence threshold. This finding remains in harmony with the updated version of the Appendix FM 1.0b guidance published on 22nd February 2018 which maintains the parameter of the need for powerful reasons to make it reasonable for the child to leave the United Kingdom, notwithstanding that they have met the yardstick of seven years.

8. Thus this does in my view form a material error of law in the decision as if the judge had found in favour of the Third Appellant and had found that there were no powerful reasons warranting the First and Second Appellants removal, this will have equally had an important impact on the proportionality of the Fourth Appellant's appeal given that the question then for the Tribunal would have been whether it would have been proportionate to separate that adult child from his family from whom he appeared to still be dependent.

9. There is an added complication in this appeal however as time has moved on and now the Third Appellant is 19 years of age and the Fourth Appellant is 23 years of age, however the error remains a material one that still requires resolution *de novo* in light of the following facts. It is not in dispute and it is confirmed by the First Appellant that the Third and Fourth Appellants entered the United Kingdom on 14th October 2006 and at that time the Fourth Appellant was 11 years of age, and the Third Appellant was even younger still. Thus, in light of the fact that the Fourth Appellant and the Third Appellant are now adult children of the First and Second Appellants, notwithstanding that they cannot now at present rely upon paragraph 276ADE(1)(iv), they are able to rely upon paragraph 276ADE(1)(v) if they can establish that they have spent half of their life in

the United Kingdom and are aged between 18 and 25 years. Thus, in light of this premise it remains appropriate for this appeal to be remitted to the First-tier Tribunal for further consideration of the proportionality of whether the Third and Fourth Appellants are able to meet paragraph 276ADE(1)(v) of the Immigration Rules, and whether it is proportionate to remove their parents, the First and Second Appellants, in light of the error made by the First-tier Tribunal in that the Third Appellant may have been a qualifying child at the time of the hearing before the First-tier Tribunal in April 2017, and indeed the Third Appellant would have been a qualifying child also at the date of the application made to the Secretary of State on 7th October 2015 and at the date of the refusals of 26th and 24th February 2016.

10. In light of the above findings I set aside the decision of the First-tier Tribunal in its entirety.

Notice of Decision

11. The appeal to the Upper Tribunal is allowed.

12. The decision of the First-tier Tribunal is set aside in its entirety and this matter is to be remitted to be heard by a differently constituted bench.

Directions

(i) The appeal is to be remitted to IAC Taylor House.

(ii) No interpreter is required.

(iii) At present only the First Appellant proposes that he is called to give evidence, however he may wish to revisit this decision in light of his two children both being young adults and capable of giving evidence in their own right in relation to the proportionality of the separation between them and their parents should they establish they are able to meet paragraph 276ADE(1)(v).

(iv) The time estimate for this appeal is three hours.

(v) No special directions have been sought and, however, I maintain the anonymity direction made previously.

Caveat

13. At the time of hearing this appeal there is no indication as to when the judgment arising from *KO (Nigeria)* – which was heard by the Supreme Court earlier this year – will be handed down. However, needless to say, given that that judgment is likely to discuss the decision in *MA (Pakistan)* which has exercised my decision, it may be that guidance is given in this judgment which will impact upon the further hearing of this matter, however I say no more on this matter save for this *caveat*.

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

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

Signed Date 17 October 2018

Deputy Upper Tribunal Judge Saini