Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08798/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 January 2018	**On 01 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

MR MANJIT SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Iqbal of Counsel
For the Respondent: Mr Naith, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India. He was born on 1 April 1977. He appealed against the respondent's refusal to grant him leave to remain on the basis of his family and private life here dated 13 March 2016.

2. The appellant's appeal against the respondent's refusal was dismissed by Judge Courtney (the judge) in a decision promulgated on 18 August 2017.

3. The grounds claim the judge arguably erred in her assessment of the weight to be attached to a child living in the United Kingdom for seven years. The grounds argued that both policy and case law dictates that

"significant weight" must be given to the fact that a child had resided here for more than seven years. There is no sliding scale. The observation of the judge to the effect at [28] that people who come here on a temporary basis and are not British can be expected to leave, cannot be true of a child because the purpose underlying the seven year Rule is that such reasoning ought not to be adopted. That is because the child cannot be blamed for the parents overstaying illegally such that the starting point is that the child's status should be legitimised unless there is good reason not to do so. The grounds claim that the judge lost sight of that starting point. Further, that the maintenance of immigration control cannot be a *"good reason"* not to legitimise the child's status because all such cases involve applications from those with unsettled status.

4. Further, the grounds claim the judge failed to give consideration and weight to the third appellant's total integration into UK society such that it was incumbent upon her to identify what would be appropriate to disrupt such integration. The compelling reason must be above and beyond the fact that none of the appellants have lawful status here.

5. At [29] the judge acknowledged that it would be disruptive for the child to go to live in India. The judge failed to consider or apply the guidance in **PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC)** and what the president had to say in that regard at [39]:

> *"We remind ourselves that the test to be applied is that of reasonableness. Other legal tests which have gained much currency in this sphere during recent years – insurmountable obstacles, exceptional circumstances, very compelling factors – have no application in the exercise we are performing. Self-evidently, the test of reasonableness poses a less exacting and demanding threshold than that posed by the other tests mentioned."*

6. Having found that moving to India will involve disruption, in failing to consider or apply the guidance, it was not properly open to the judge to conclude that such moving would be reasonable. The grounds claim the judge imposed an incorrect test as could be seen from [38] of **PD**.

7. Given at [28] of her decision, the judge found that it would be in the child's best interests to remain in the UK, it was not open to her to conclude that it would be reasonable for the child to leave. The judge recognised at [44] that nine years' residence was a significant factor and that she was a qualifying child. The error was exactly that referred to by the president at [39] of **PD**, that is, insurmountable obstacles have no application in the test of reasonableness.

8. Whilst the judge laid out the relevant law from **MA (Pakistan) [2016] EWCA Civ 705**, she failed to apply it.

9. Tribunal Judge Doyle considered the application and refused it. Tribunal Judge Doyle said that at [9] and [10] of her decision, the judge correctly directed herself to consider s.55 of the Borders, Citizenship and

Immigration Act 2009. She took correct guidance from case law at [10], [11] and [12]. Between [13] and [21] the judge focused on the impact of the respondent's decision on the qualifying child. At [27] to [29] the judge reached well reasoned and sustainable conclusions in relation to the qualifying child. At [34] the judge considered paragraph 276ADE(1)(iv) and between [37] and [46] the judge considered Article 8 outside the Rules. Tribunal Judge Doyle was of the view that the judge correctly directed herself in law. Her fact-finding exercise was beyond criticism and the grounds of appeal were no more than a disagreement with the facts as the judge found them to be.

10. The application was repeated. On 11 December 2017, Upper Tribunal Judge Bruce gave permission to appeal as follows:

> *"It is arguable that the First-tier Tribunal erred in its approach to whether it was 'reasonable' that the qualifying child in this family be expected to leave the UK. The respondent accepts, in line with her published policy, that it would normally be contrary to the best interests of qualifying children to expect them to leave the UK. The only task remaining of the Tribunal was to consider whether there were 'strong reasons' which outweighed that policy: see* ***MA (Pakistan) [2016] EWCA Civ 705****."*

11. The respondent filed a Rule 24 response. The judge identified and assessed the best interests of the child and adopted a "*reasonableness test*" in terms of return to India. The judge was entitled to balance private and family life against countervailing public interest factors.

Submissions on Error of Law

12. Ms Iqbal relied upon the grounds.

13. Ms Iqbal submitted that the judge erred at [29] as the appropriate test was that of "*reasonableness*". See [39] of **PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC)**. That test was confirmed at [46] of **MA (Pakistan) [2016] EWCA Civ 705**.

14. Mr Naith relied upon the Rule 24 response. The judge did not err in the analysis of the appropriate test. The judge gave detailed reasons for the decision and did not err in her analysis or findings.

Conclusion on Error of Law

15. The judge correctly set out the framework against which her analysis was carried out. She identified the "*reasonableness*" test in **MA** at [35]. I do not accept Ms Iqbal's submission that there was an error at [29] of the decision. All the judge was doing was to acknowledge the degree of hardship which the child might suffer. The judge was well aware of the need to identify the best interests of the child and set those against the reasonableness test and the public interest. The judge took into account that the child had lived here for nine years and that there needed to be strong reasons for refusing leave in terms of the respondent's guidance at

11.2.4. See decision at [35]. Nevertheless, the judge was entitled to take into account the child's parents' immigration history.

16. Whilst a child's best interests are a primary consideration, the private and family lives of parents and children developed during periods of precarious or unlawful residence carry little weight. That is not to penalise the child in this appeal as Ms Iqbal submitted but merely to reflect s.117 of the 2002 Act. See **Kaur (children's best interests/public interest interface) [2017] UKUT 00014 (IAC)**.

17. I do accept that the judge erred at [47] of the decision in referring to "*compelling circumstances*" but I do not find that to be material. It is clear from a close reading of the decision overall that the judge always had in mind the best interests of the child and the test of reasonableness, clearly setting the child's circumstances and those of the parents against the Immigration Rules, legislation and case law.

18. In summary, I conclude that the decision does not contain a material error of law, such that the decision of the First-tier Tribunal should be set aside.

Notice of Decision

19. The decision of the First-tier Tribunal contains no error of law and shall stand.

No anonymity direction is made.

Signed Date 25 January 2018

Deputy Upper Tribunal Judge Peart