



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08158/2016
AA/09120/2015

THE IMMIGRATION ACTS

Heard at Field House
On 27 July 2018

Decision & Reasons Promulgated
On 23 August 2018

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

T S
S A
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Dr C Proudman, instructed by Krisinth Solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permission against the decision of First-tier Tribunal Judge Brookfield promulgated on 18 July 2017. For the reasons set out in my decision promulgated on 15 June 2018 (a copy of which is attached) the decisions in respect of both of the appellants are set aside. Although the decisions in those cases with respect to asylum were upheld, the Article 8 cases of the appellants which includes the

position of their two children, both of whom were born in the United Kingdom, is to be remade in this decision.

The Hearing on 27 July

2. I heard evidence from the appellants who both adopted their witness statements dated 23 January 2017 and 20 July 2018. Mr Walker declined to cross-examine them.
3. Mr Walker, in submissions, stated that the Home Office was not in a position to concede the cases but he accepted that there were exceptional circumstances in respect of the older child in the light of the evidence from her school and the independent social worker.
4. Dr Proudman relied on her skeleton argument submitting that in this case given that the older child has learning difficulties specifically with cognition and learning, communication interaction and is in receipt and receives 30 hours additional teaching support each week, some of that at a one-to-one level. She submitted that the child would not be able to cope with such a massive change in her life and certainly her special needs programme would not be available for her in Sri Lanka. As the children would lose all the progress they had made if deported to Sri Lanka and would not be educated further in a language in which they had until now been educated, and, as they are not fluent in Tamil, English being the language communication within the home, there would be severe effects on them and that on that basis, it was strongly in their best interests for them to remain in the United Kingdom.
5. Dr Proudman submitted, relying on **MA (Pakistan) and Others** that significant weight must be attached to the proportionality exercise here the fact the older child had lived here for seven years and that there were not, in this case, powerful reasons outweighing that interest given not least the strength of the factors in her favour. She submitted that the interests of the children and their welfare were primary considerations and were not in this case outweighed by the need to maintain immigration control.

The Law

6. In assessing the article 8 claims, I have regard to section s117A and 117B of the 2002 Act which provides as follows:

Section 117A

(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).

Section 117B:

(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.

"qualifying child" is defined in section 117D:

"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;

7. The relevant paragraph of the Immigration Rules is paragraph 276 ADE (1):

276. ADE (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 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

...

(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

8. It is necessary to consider what was held in *MA(Pakistan)* at [40] 0 [47]:

40. It may be said that the wider approach can be justified along the following lines. It will generally be in the child's best interests to live with his or her parents and siblings as part of a family. That is usually a given especially for younger children, absent domestic abuse or some other reasons for believing the parents to be unsuitable. The approach of the Secretary of State means that the stronger the public interest in removing the parents, the more reasonable it will be to expect the child to leave. But it seems to me that this involves focusing on the position of the family as a whole. In cases where the seven year rule has not been satisfied, that is plainly what has to be done. As McCloskey J observed in *PD and others v Secretary of State for the Home Department* [2016] UKUT 108 (IAC) it would be absurd to consider the child's position entirely independently of, and in isolation from, the position of the parents given that the child's best interests will usually require that he or she lives as part of the family unit. But the focus on the family does not sit happily with the language of section 117B(6). Had Parliament intended to require considerations bearing upon the conduct and immigration history of the applicant parent to be taken into consideration, I would have expected it to say so expressly, not for the matter to have to be inferred from a test which in terms focuses on an assessment of what is reasonable for the child. This does not in my view mean that the wider public interests have been ignored; it is simply that Parliament has determined that where the seven year rule is satisfied and the other conditions in the section have been met, those potentially conflicting public interests will not suffice to justify refusal of leave if, focusing on the position of the child, it is not reasonable to expect the child to leave the UK. When section 117A(2)(a) refers to the need for courts and tribunals to take into account the considerations identified in section 117B in all cases, that would not in my view have been intended to include specific circumstances where Parliament must be taken to have had regard to those matters.

...

42. I do not believe that this principle does undermine the Secretary of State's argument. As Lord Justice Laws pointed out in *In the matter of LC, CB (a child) and JB (a child)* [2014] EWCA Civ 1693 para.15, it is not blaming the child to say that the conduct of the parents should weigh in the scales when the general public interest in effective immigration control is under consideration. The principle that the sins of the fathers should not be visited upon the children is not intended to lessen the importance of immigration control or to restrict what the court can consider when having regard to that matter. So if the wider construction relied upon by the Secretary of State is otherwise justified, this principle does not in my view undermine it.

43. But for the decision of the court of Appeal in *MM (Uganda)*, I would have been inclined to the view that section 117C(5) also supported the appellants' analysis. The language of "unduly harsh" used in that subsection is not the test applied in article 8 cases, and so the argument that the term is used as a shorthand for the usual proportionality exercise cannot run. I would have focused on the position of the child alone, as the Upper Tribunal did in *MAB*.

44. I do not find this a surprising conclusion. It seems to me that there are powerful reasons why, having regard in particular to the need to treat the best interests of the child as a primary consideration, it may be thought that once they have been in the UK for seven years, or are otherwise citizens of the UK, they should be allowed to stay and have their position legitimised if it would not be reasonable to expect them to leave, even though the effect is that their possibly undeserving families can remain with them. I do not accept that this amounts to a reintroduction of the old DP5/96 policy. As the Court of Appeal observed in *NF (Ghana) v Secretary of State for the Home Department* [2008] EWCA Civ 906, the starting point under that policy was that a child with seven years' residence could be refused leave to remain only in exceptional circumstances. The current provision falls short of such a presumption, and of course the position with respect to the children of foreign criminals is even tougher.

45. However, the approach I favour is inconsistent with the very recent decision of the Court of Appeal in *MM (Uganda)* where the court came down firmly in favour of the approach urged upon us by Ms Giovannetti, and I do not think that we ought to depart from it. In my judgment, if the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the "unduly harsh" concept under section 117C(5), so should it when considering the question of reasonableness under section 117B(6). I recognise that the provisions in section 117C are directed towards the particular considerations which have to be borne in mind in the case of foreign criminals, and it is true that the court placed some weight on section 117C(2) which states that the more serious the offence, the greater is the interest in deportation of the prisoner. But the critical point is that section 117C(5) is in substance a free-standing provision in the same way as section 117B(6), and even so the court in *MM (Uganda)* held that wider public interest considerations must be taken into account when applying the "unduly harsh" criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in section 117B(6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case, I will analyse the appeals on the basis that the Secretary of State's submission on this point is correct and that the only significance of section 117B(6) is that where the seven year rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted.

9. It is appropriate to consider first the position of the two children. The older child was born in the United Kingdom nearly nine years ago. The younger child was born in 2013.
10. I accept that the elder child's difficulties appear to have begun to become apparent as she had not begun to speak when she was of 3 or 4 years of age. I accept also that there is in place in respect of her an Education, Health & Care Plan ("EHCP") it is evident from there that she has global development delay and it is evident that she has speech language and communication needs, severe learning difficulty and requires significant one-to-one assistance. It is evident from the material provided with regard to her from the school and the local authority that she is making progress both in writing and maths although her comprehension is poor. It is clear that she has communication needs which would impact on other areas of developmental skills and she continues to receive intervention on these areas and required clear instructions to be repeated by her one-to-one key worker.

11. There is no challenge to this evidence nor for that matter the report by the independent social worker, Ann Buckley.
12. I am satisfied from Miss Buckley's report first that she has the relevant expertise and second that she has considered all the relevant material and has adhered to the standards expected of an expert witness.
13. It is evident from the report that Miss Buckley has visited the family to watch them interact she has also been in contact with the school, having had discussions with the head, the deputy safeguarding and family support link worker and the assistant SENCO (Special Educational Needs Co-Ordinator). The school reports:

"Her strengths are that she joins in with the activities with adults and other children; she enjoys singing and musical activities; is happy when playing outside; and likes to take part in physical activities especially ones where she can run around or climb. However, she has moderate global development delay and significant learning difficulties. This means she has difficulties with her communication and interaction, literacy and numeracy, social, physical and sensory difficulties. T's EHC plan states that she needs at least 9.25 hours of additional teaching support combined with additional teaching assistance support for 20 hours. She is making good progress but this is an ongoing process which is essential for her successful development. Her school feel that the impact of her having to be deported to Sri Lanka where she has never been and does not speak the language, would be extremely detrimental to her self confidence and self-esteem peer relationships and friendship groups. T shows a huge willingness to learn, which in his very clear instruction she very much dislikes and does not cope well with change in her plans and routines.

14. It is also recorded that the younger child, although she is not officially a special educational needs child, may also have developing learning needs but she is not yet of an age where this can properly be assessed.
15. Assessing the best interests of the children, Miss Buckley states:-

"30. I propose to look at the relevant sections of the welfare checklist under Section 1(3) of the Children Act 1989. The principles apply to all children, and I have been greatly assisted by the staff at Christchurch CE Primary School. The school are of the opinion that these two girls would be unable to cope with such a massive change in their lives, and certainly T's special needs programme would not be available for her. Both girls chatted to me quite naturally and told me all about school.

31. Section 1(3)(A) the children's wishes and feelings? Both these young girls aged 4 and nearly 9 were born in the United Kingdom, have never been to Sri Lanka and do not speak the language, and they are being brought up as English school girls and mix with children from all different backgrounds. Their parents considered that it was best for the children not to be told about the situation as V is too young to understand and T does not need anything

that might worry her as she is a special educational needs child and it could well delay the good progress she is making. In my opinion both these are happy in their lives and such a massive change would be to their detriment. By observing the girls they are happy and content and the family interact in a loving manner ...

33. Section 1(3)(C) the likely effect of change in the children's circumstances. No child likes and copes well with change, and for these two girls it would totally disrupt their lives to move to a strange country, new school, a language they do not understand and leave behind their friends and a settled lifestyle. T in particular has taken two or three years to settle and her speech and learning has improved greatly. The school have made it clear that she would lose all the progress she has made. Sri Lanka do not have such modern sophisticated programmes for children with problems.
34. Section 1(3)(E) any harm the children have suffered or at risk of suffering. From my investigations it is clear to me when I met and spoken with the parents and the children and their school that to uproot these children and return them to Sri Lanka would be to their detriment both educationally, emotionally and possibly physical harm. Although I have no clear evidence there is a possibility that harm might be done to the parents and this will of course affect the two girls....

Miss Buckley also records [56] that the children's English is good and they have no knowledge of Tamil and their home life is happy and settled.

16. In the light of these observations I am satisfied that it would clearly be in the children's best interests, particularly in the case of the older child T, to remain in the United Kingdom. I consider that the effect on her as noted by Miss Buckley and also, importantly, by her school adds a particular strong weight to her remaining in the United Kingdom given the very great difficulty she would have in adjusting again to life in Sri Lanka as a result. Firstly, she does not speak Tamil or Sinhalese, second, that she would not get the educational support that she receives in this country and that this would have a severe impact on her, probably all the more severe given her learning difficulties and the fact that she is as a result more vulnerable and susceptible to the change.
17. It is less easy to quantify the effect of removal to Sri Lanka on the younger child, V, as she is only 4 years of age but nonetheless it is still evident from the unchallenged report of the social worker that it would be significantly in her interests to remain in the United Kingdom albeit that she does not meet the requirement of paragraph 276ADE of the Immigration Rules given that she is only 4 years of age.
18. With regard to the appellants, it is evident that they did not attend the hearing before Judge Brookfield. The explanation for that given in the statements is not disputed.
19. The second appellant arrived in the United Kingdom on 17 January 2008 and had leave to remain as a student and then as a post-study graduate until 12 January 2012. He

was joined here by the first appellant as his dependant and whilst they were here lawfully the children were born. The First-tier Tribunal found that it was unlikely that either was of current adverse interest to the Sri Lankan authorities dismissing as not credible the claim that the Sri Lankan authorities began to express an interest again in 2011. The judge noted also that there was close family living in Sri Lanka (paragraph 11(xxvii)). It was also found that there was a reliance on public funds both for the education of the children and for treatment of their mother by the time of their birth.

20. I bear in mind that as in **MA (Pakistan)** and particularly the cases of **NS**, **AR** and **CW** within that, not all children are in the same position. The circumstances of the children are still to be considered in assessing the reasonableness as set out in paragraph 276ADE(4) which includes the circumstances of the family as a whole. I consider it a starting point in these appeals is that the strength of the private life established here by T is stronger given the length of time she has spent here, nearly nine years. As is established in **MA (Pakistan)** once seven years has been reached that is a significant factor to be taken into account. I am satisfied also that T has had the entirety of her education here. She knows nothing other than life in the United Kingdom and I consider that much greater weight must be attached to her private life in the circumstances given not least the clear educational needs that she has, accepted by the respondent in submissions to be exceptional. I consider that little weight is to be attached to the younger child in comparison with her older sister. That is because her needs are currently primarily, and understandably, focused on her family. She may have special educational needs but that is as yet unclear. In comparison with that I accept the evidence that they would have difficulty on return to Sri Lanka in that there is no home to return to and there would be a significant period of adjustment. That is not least as they do not speak much of the language if any, either Tamil or Sinhalese, and whilst there are relatives still in Sri Lanka, there is no family "home" to return to, as was confirmed to me in submissions.
21. In assessing reasonableness of requiring the older child to go to Sri Lanka, it is also important to take into account the actions of the parents. I accept that they were here with leave for a significant period of time but equally they have remained here without leave who I found brought claims for asylum which were ultimately found to be unfounded. I bear in mind also that the children cannot be held responsible for the fact that they are living in the United Kingdom without leave. In assessing reasonableness in the context of paragraph 276ADE, I consider it is appropriate to apply the factors set out in Section 117B of the 2002 Act. There is thus the maintenance of effective immigration control which is significantly a factor in militating against the appellants as they have overstayed their leave. They speak some English but did require interpreters before the Tribunal although it is evident that they are able to speak English for most everyday purposes as is shown by their interaction with Miss Buckley and also with the school and thus I consider that overall this is a matter which is neutral. They are not however financially independent and that is a matter which counts against them and I accept that little weight could be given to the private lives of the appellants given that their life here has been precarious. Nonetheless, the situation at paragraph 276ADE is also subject to the effect of paragraph 117B(6).

22. I accept that there is a genuine and subsisting parental relationship between the appellants and their children.

23. I bear in mind what was said in **MA (Pakistan)** at 47:-

“In this case there are a number of significant factors which set it apart from **MA** albeit that this also is a case when reality of the case the appeal turns on the reasonableness of expecting the appellants to leave the United Kingdom.”

I consider that given what is expected to be the exceptional circumstances of the child T's situation that it would not be feasible to expect her to leave the United Kingdom and accordingly this is a case which may fall within 276ADE(iv). Further, and in any event, I am satisfied that it is not possible to expect her to be separated from her family. I accept as I must that significant weight must be attached to the interest in maintaining immigration control but nonetheless I find that there is significant weight in this case to be attached to the needs of the child and it follows given her age that it would be unreasonable and indeed unfeasible, for her to remain in the United Kingdom and removed from the support she receives from her family. The family must therefore be considered as a unit.

24. In summary, the points in favour of the appellants are as follows:-

- (1) It is clearly in the best interests of the older child to be allowed to remain here.
- (2) That the older child has spent all her life here and is nearly 9 years of age, again a significant factor to be borne in mind.
- (3) Whilst there is some family support in Sri Lanka, this would not be the same as exists here particularly with regard to the older child.

25. Militating against were the following:-

- (1) The breaches of immigration law in overstaying.
- (2) A dependence on public funds.
- (3) Little weight can be attached to the appellants' private life.

26. Significant weight must be attached to the public interest in removal, and I do so, but nonetheless, taking into account all the circumstances as a whole I consider that the particular facts of this case given the exceptional nature of the first child's needs (which the respondent accepted) and given the fact that some of the time had been spent here with leave, I do not consider it would be reasonable to expect the child to leave the United Kingdom on that basis and viewing the family as a whole, I consider that given the analysis that maybe it would be unreasonable to expect them to remain in the United Kingdom and thus be disproportionate in terms of fairness to require the family to go to Sri Lanka.

27. I therefore allow the appeals on article 8 grounds.

Notice of Decision

- (1) The decisions of the First-tier Tribunal involved the making of an error of law and I set them aside.
- (2) I remake the decision by allowing the appeals on human rights grounds.

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

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

Signed

Date 15 July 2018

A handwritten signature in black ink, appearing to read 'Jonathan Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW DECISION



IAC-FH-LW-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: AA/09120/2015
& PA/08158/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 31 May 2018**

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**S A (FIRST APPELLANT)
T S (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss C Proudman, instructed by Krisinth Solicitors
For the Respondent: Miss A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permission against the decisions of First-tier Tribunal Judge Brookfield promulgated on 18 July 2017. The first appellant, SA, is a citizen of Sri Lanka who arrived in the United Kingdom in 1998 with permission to remain as a student and remained here in that capacity until he claimed asylum on 12 January 2012. The first appellant's wife, who is the second appellant (the case reference in her decision being PA/08158/2016), having joined the first appellant here, the couple had two children born in the United Kingdom, the first on 24 October 2009, the second on 29 May 2014.
2. For reasons which I do not need to go into, given what later happened, separate asylum claims were made and appeals against these proceeded at the hearing on 10 July 2017 in the appellants' absence. Judge Brookfield, for reasons which I am at a loss to understand, decided to produce two separate decisions despite the fact that the issues were similar and with regard to the Article 8, effectively identical.
3. Judge Brookfield did not accept that either of the appellants had a well-founded fear of persecution in Sri Lanka and dismissed the appeals on asylum and humanitarian protection grounds. Although permission was sought to challenge the decisions on that issue, permission was refused by the First-tier Tribunal and on renewal by Upper Tribunal Judge Canavan who, however, granted permission in respect of the judge's approach and findings with regard to Article 8.
4. It is difficult to discern from the judgments what findings Judge Brookfield made with respect to Article 8 given the lack of structure. It is, to say the least, unhelpful for the judge to have written two decisions. It is equally unhelpful for Judge Brookfield to have used roman numerals going up to (xlvi).
5. The judge concluded that removal would be proportionate, having addressed herself at various passages to Section 117B of the 2002 Act and, it is fair to say, having recognised that the older of the two children was a qualifying child for the purposes of Section 117B.
6. Judge Canavan granted permission observing, as Miss Fijiwala accepted, that the decisions are not well-structured. The judge concluded that it was arguable that Judge Brookfield had failed to consider the best interests of the children as part of the holistic assessment of whether it would be reasonable to expect the children to leave the United Kingdom, it being apparent from the findings of the judge that she had made findings in relation to the proportionality of removal before going on to consider the welfare of the children. It was considered that the judge failed properly to consider **MA (Pakistan) [2016] EWCA Civ 705** and it may also be the case that the judge did not apply the correct legal case in apparently assessing the rationality of removal rather than conducting an evaluative assessment where a fair balance should be struck.
7. Miss Proudman raised a preliminary issue that there was a procedural defect in the decisions, the judge having failed properly to take note of the fact that there was at the time of the appeal still pending an application for leave to remain made by the appellants on the basis of the older child having spent seven years in the United

Kingdom. This was further developed into a submission that the judge had erred in failing to consider whether this was a new matter as defined in Section 85 of the 2002 Act as amended.

8. I am not satisfied that this is something raised sufficiently in the grounds of appeal to allow it to be pursued, even though it goes to jurisdiction and is thus a matter in which the court would have to be concerned in any event. Miss Fijiwala submitted that as far as the respondent is concerned the child achieving seven years of residence was not a new matter. I agree. Whilst the judge did not address the possibility of there being a new matter, equally I do not consider that this amounted to a material error given that there was no basis on which she could properly have concluded that this was so, and accordingly any error that could be identified in this manner would not be material and on that basis it would not have been appropriate at this stage to grant permission to appeal on that point, nor to permit an application to amend the grounds.
9. It is evident from the case law that a judge should first consider the best interests of the children, that analysis to be undertaken separately from the considerations of proportionality and the actions of the parents or other public interest matters. Having reached a conclusion as to the best interests of the children, it is then incumbent on the judge to consider other matters, which in this case would include in assessing proportionality, and on the facts of these appeals, Section 117B(6), as well as the other provisions of Section 117B of the 2002 Act. It would also have been helpful if the judge had referred herself to the leading case of **MA (Pakistan)** which. That is not to say that in all cases a failure to adopt the structure will amount to material error.
10. Despite Miss Fijiwala's submissions, I do not consider that the judge could properly have been said to have made an legally correct assessment of the best interests of the children. Whilst I accept that there may not have been a significant degree of evidence about that, equally Judge Brookfield did not identify what evidence she took into account when assessing the best interests. I accept that there is no requirement over her to have said that she was going to assess the best interests, although it would have been of considerable assistance had Judge Brookfield done so, but it was a requirement that she did assess them before taking into account issues of proportionality yet in both decisions the judge first directed herself as to proportionality. There is no proper indication that she appreciated that the best interests of the children ought to have been considered first, and indeed the only express consideration of the best interests of the children is at the very end of the decisions where it is seen first through the lens of **Azimi-Moayed** which is of limited relevance on the facts of this case in respect of the older child, and also has to be seen in the light of the decision in **MA (Pakistan)** to which I have already referred.
11. There is a clear misapprehension on the part of Judge Brookfield as to her role. When she focuses as to whether the Secretary of State's assessment of the best interests of the children by the Secretary of State is one in which she says:-

"I conclude that the best interests of the appellant's (sic) children are served by their continuing to live with both of their parents and there is no irrationality in

conclusion that it is in the children's best interests to accompany their parents to Sri Lanka. I find the respondent's decision does not fail to promote or safeguard the welfare of the appellant children by removing them from the UK with their parents. I find the respondent's decision does not violate Section 55 of the Borders, Citizenship and Immigration Act 2009."

12. There are a number of clear errors in Judge Brookfield's decision at this point. First, she has no jurisdiction to consider whether there was a violation of Section 55; second, in assessing the best interests of the children and in assessing the proportionality of the issue is not whether the Secretary of State's decision was irrational. It was for Judge Brookfield to reach properly reasoned findings of fact, which she did not do.
13. For these reasons the judge has not shown, even looking at both decisions holistically, that she considered the best interests of the children, and primarily the interests of the older child, before going on to consider the issues of proportionality. Whilst I do not accept Miss Proudman's submission that the judge was required expressly to refer to Section 117B of the 2002 Act when assessing the reasonableness of return, it would have been helpful had she done so. There is, I consider, a real possibility that the judge might not have come to the same conclusion had the correct questions been asked in the right manner, and in the correct weight being attached, that being the terms of **MA (Pakistan)**, significant weight to the fact that the child had been here for seven years. There is, in reality, no proper indication that this had been done. The decision is not helped either by the reliance on **EV (Philippines) & Ors [2014] EWCA Civ 874** which is not relevant to the facts of the older child and is at best an indication that the judge did not in fact properly consider the issues before her.

Notice of Decision

14. For these reasons the decisions are set aside insofar as they relate to the Article 8 findings. The decisions will therefore have to be remade in the Upper Tribunal on a date to be fixed.

Directions

15. Any additional material upon which the appellants or the respondent seeks to rely must be served at least 14 days before the next hearing.
16. The anonymity orders made in the First-tier Tribunal are maintained.

Signed

Date 12 June 2018



Upper Tribunal Judge Rintoul