Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/11922/2017
HU/11926/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 April 2019	**On 3 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

D.O.
A.O.
(ANONYMITY DIRECTIONS MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr M Sowerby of Counsel, instructed by Perera & Co Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These linked appeals come back before the Upper Tribunal to remake the decisions in the appeals, further to the 'error of law' decision made after a hearing on 15 January 2019, and the consequent setting aside of the decisions of First-tier Tribunal Judge Murray promulgated on 14 August 2018. (A copy of the text of the 'error of law' decision is annexed hereto.)

2. It may be seen that on 15 January 2019 the Tribunal did not immediately proceed to remaking the decisions in the appeals, but considered it prudent to await the outcome of a pending appeal before the President. A decision in **JG (s.117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC)** has now been promulgated. Further, it is to be noted that the Court of Appeal has more recently expressed agreement with "*the interpretation given by the UT to section 117B(6)(b) in JG*" in **Secretary of State for the Department v AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661** (paragraph 72).

3. As noted at paragraph 2 of the 'error of law' decision, the Appellants are father (d.o.b. 21 June 1980) and daughter (d.o.b. 22 October 2009). Whilst not parties, the position of the partner/mother and a second child are contingent upon the outcome of these appeals.

4. Just as was the case before the First-tier Tribunal, the appeals before me have again been pursued with primary focus on the circumstances of the Second Appellant. It is contended that the Second Appellant satisfies the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules, and/or that section 117B(6) of the Nationality, Immigration and Asylum Act 2002 applies to the benefit of the First Appellant. In essence, therefore, the primary issue was whether or not it was reasonable to expect the Second Appellant to leave the UK: i.e. –

> (i) as per paragraph 276ADE(1)(iv) "*it would not be reasonable to expect the applicant to leave the UK*"; and
>
> (ii) as per section 117B(6) "*the public interest does not require the person's removal [because] it would not be reasonable to expect the child to leave the United Kingdom*".

Facts

5. In respect of the Second Appellant's circumstances, the Judge made the following findings:

> *"The second Appellant is now 8½ years old. She has lived in the UK all her life. She is in year 3 at school. The Appellant states that the standards of education in Nigeria are not as good as in the UK. Whilst this may be so, I find that given her young age she will be adaptable to life in Nigeria, particularly in view of the fact that this is where both her parents are from. Further, she has not reached a critical stage of her education. I have taken account of the fact that 7 years residence is a pointer to where a child's best interests lie and accept that it may marginally be in her best interests to remain in the UK due only to education here."* (paragraph 20).

6. I noted in the 'error of law' decision that such findings essentially reflected the case as advanced by the Appellants – e.g. paragraph 12 of the Appellants' Skeleton Argument dated 10 July 2018: *"[A] is now 8½ years old. She has lived in the UK all her life. She has never left the UK. She has her own private life in the UK and strong connections in the UK and is in year 3 at St Patrick's Catholic Primary School. She predominantly speaks English."*

7. Although the decision of the First-tier Tribunal was set aside for error of law, there was no express challenge to the primary findings of fact, or the Judge's evaluation of 'best interests'. Neither party has urged me to go behind such findings. In all the circumstances it is appropriate that I take the Judge's findings as cited above as a starting point for my own consideration of the issues in the appeal.

8. Necessarily the passage of time means that the Appellants' case needs to be considered on the basis that the Second Appellant has now been present in the UK, from birth, for 9 years and 6 months.

9. In this context Mr Sowerby observed that the Second Appellant is approaching her 10th birthday, at which point upon application for registration she will be entitled to British citizenship pursuant to section 1(4) of the British Nationality Act 1981. Whilst this is correct, in my judgement it does not avail her in the current proceedings. Until such time as she may acquire British citizenship she remains subject to immigration control and therefore not in any way presently exempted from the regime of the Immigration Rules. Moreover, with regard to section 117B(6), the 'reasonableness' test would still apply in the context of the First Appellant's case even if his daughter acquired British citizenship. In any event, I must determine the appeals on the basis of matters as they stand presently.

10. Nonetheless, it is not entirely irrelevant that the structure of domestic immigration and nationality law is such that a period of 10 years residence in the UK is seen as significant enough for a child to warrant the grant of citizenship irrespective of status during that period. The Second Appellant's length of uninterrupted residence requires to be considered within such framework and by reference to such parameters.

11. Further to the proceedings before the First-tier Tribunal, the Appellants have now filed some further evidence by way of a bundle dated 4 April 2019. The bundle is entirely focused on the circumstances of the Second Appellant, containing a supporting letter from her Year 4 Class Teacher dated 4 April 2019, a school report card, various certificates of achievement (attendance, 'star of the week', times tables, gymnastics, 'out of hours' learning, reading, and choir), and various photographs

showing the Second Appellant in a school environment. I note that the certificates are not confined to the recent past but date back to 2015, and the photographs included photographs that show the Appellant at a younger age than now. There is some small element of repetition as between these documents and photographs and the materials that appeared in the Appellants' bundle and supplementary bundle before the First-tier Tribunal. For the avoidance of any doubt I have had regard to all bundles that have been filed on behalf of the Appellants in these proceedings, whether initially filed before the First-tier Tribunal or the Upper Tribunal.

12. The recent letter from the Second Appellant's class teacher describes her as "*an enthusiastic member of the class*", who "*has thrived on the curriculum set up which encourages partner talk to gather their ideas in a verbal sense*", and notes her excellent achievements in a new 'times-tables' initiative; it is said that the Second Appellant "*is where I expect her to be at for a Year 4 standard*", and observations are offered as to how she might maintain progress and improve standards. In my judgement the only matter of concern raised is done so in terms that suggest no major issues, referring to behaviour that is far from uncommon in children of the Second Appellant's age:

> "*Behaviourally, [the Second Appellant] is displaying only minor level disruptions in class. She should ensure she is on task and focusing when demonstrations and models are being given. She should use her partner and group discussions for her talk. She sometimes will become distracted and distract others by talking when I am giving instructions and communicate through body language gestures with other seated further away from her. If this continues it will become to impact of her learning and understanding.*"

13. The school report, dated 16 July 2018, portrays the Second Appellant as essentially an entirely normal student, for the main part either 'managing comfortably within the standard' or 'capable and competent within the standard' for the core subjects of the curriculum, generally able to listen attentively but at times distracted, sensitive to the needs and feelings of others, showing commitment to clubs including choir and gymnastics, and well presented. She is described as having made good progress through Year 3, and having matured and grown in confidence. Attendance was over 98% and she was only late once.

14. The First Appellant gave further oral evidence before me. He confirmed the contents of his witness statement of 22 June 2018 (Appellants' main bundle before the First-tier Tribunal, pages 3-5). In examination-in-chief he was invited to comment on the possible reasonableness of his daughter relocating to Nigeria. He said that the level of education in Nigeria could not be compared with that in the UK; he stated that his daughter had friends in the UK and they would have 'sleepovers'; she also has cousins in the UK, and most of his family is in the UK and not in Nigeria; he commented on her membership of a gymnastics club at school, and also her

involvement in the choir; he also stated that she was involved in a drama group at church where she attended Sunday School. In conclusion he stated "*This is the only life she knows*". He was not cross-examined.

15. The First Appellant also stated that in the last week "*we*" had visited the grave of another daughter who had died shortly after birth on 17 April 2012. He said that they had gone to say a few prayers, and "*we visit every year*".

16. The background to this latter matter is referenced in the materials on file, including the decision of the First-tier Tribunal. The First Appellant's partner, the mother of the Second Appellant, was delivered of a second daughter, Precious, on 15 April 2012. Unfortunately, there were complications at the time of birth: the baby was born at home, was unconscious and had breathing difficulties; she was taken to hospital where she died on 17 April 2012. (Some of the details of this are set out in a psychiatric report on the First Appellant dated 12 February 2015 prepared in the context of civil proceedings – Appellants' main bundle pages 8-15.) Precious's grave is at Camberwell New Cemetery. In his witness statement the First Appellant referred to feeling "*a great connection to my daughter when I go to visit her grave*", adding that the family "*regularly visit her grave on her birthday and special occasions to us*" (paragraph 5).

17. The psychiatric report dated 12 February 2015 refers to a diagnosis in respect of the First Appellant of Persistent Complex Bereavement Disorder, with an alternative diagnosis of a combination of Post Traumatic Stress Disorder and Abnormal Grief. Treatment by way of counselling is recommended. There is nothing before me as to what treatment if any has been received, and no further medical or psychiatric evidence. The psychiatrist notes "*It is my understanding that [the First Appellant's] Bereavement Disorder has not compromised his ability at work*".

18. The First Appellant and his partner brought a civil action for medical negligence, which was settled in 2017. In this context it is recorded in the decision of the First-tier Tribunal that the First Appellant stated that the settlement was in the sum of £27,000. He stated before the First-tier Tribunal at the hearing on 10 July 2018 that only £8000 was left, but the Judge noted that he had produced no bank statements to demonstrate his funds (paragraph 18). Nothing further has been produced before the Upper Tribunal by the Appellants in respect of the family's financial circumstances.

19. The evidence on file variously refers to the First Appellant as an electrical engineer (birth certificate of Second Appellant), and a handyman (e.g. birth certificate of First Appellant's son, and psychiatrist's report). The psychiatrist's report also refers to the First Appellant having worked on building sites since coming to the UK. The First

Appellant's witness statement says little about his employment and financial circumstances, save that he admits the fact that he was convicted for possessing a fraudulent Biometric Residence Permit, stating that he had obtained it in order to secure employment to support his family (paragraph 11). He also acknowledges that he receives support in the UK from family and friends, but expresses doubt that they would offer regular support in the event of his return to Nigeria (paragraph 14). In this latter context he also states that he does not have any family or property in Nigeria, where necessarily he has not lived since coming to the UK; he says he has lost ties and connections and asserts that he "*will be unable to obtain any employment*".

20. As noted above, the First Appellant and his partner now also have a son born on 11 October 2015.

Law: Discussion

21. On the issue of reasonableness, in his submissions Mr Sowerby emphasised: the Second Appellant was born in the UK; she had never been to Nigeria; she was doing well in school; she was now 9 ½ years old, and was approaching the date when she might apply to become a British citizen; that she had lost a sibling in the UK and it was clearly important to the family that there was a proximity to Precious's grave. He essentially argued that the combination of these circumstances rendered it not reasonable to expect the Second Appellant to leave the UK.

22. Mr Lindsay, on behalf of the Secretary of State, emphasised the Supreme Court's endorsement of passages in the Respondent's then applicable IDI's in **KO (Nigeria) [2018] UKSC 53**. In this context my attention was directed to the following passages:

> (i) "*The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv).*" (paragraph 17).
>
> (ii) "*The President also cited (para 16) relevant guidance contained in an Immigration Directorate Instruction ("IDI") of the Home Office entitled "Family Life (as a partner or parent) and Private Life: Ten Year Routes", published in August 2015, extracts of which were appended to the judgment (Appendix 2). They included a section headed "Would it be unreasonable to expect a non-British citizen child to leave the UK?", under which were set out a number of "relevant considerations", such as risk to the child's health, family ties in the UK and the likelihood of integration into life in another country and:*
>
> > *"b. Whether the child would be leaving the UK with their parent(s)*
> >
> > *It is generally the case that it is in a child's best interests to remain with their parent(s). Unless special factors apply, it will generally be reasonable to expect a*

> *child to leave the UK with their parent(s), particularly if the parent(s) have no right to remain in the UK."*
>
> *There was no reference in the list to the criminality or immigration record of the parents as a relevant factor."* (paragraph 10).

23. Mr Lindsay submitted that this was a clear endorsement by the Supreme Court – emphasising that in circumstances where Lord Carnwath gave a single judgement for the Court there was no qualification or caveat from any other Judge – of the notion that it will generally be reasonable to expect a child to leave the UK with his/her parent/s.

24. This submission precipitated a discussion as to the approach to be taken to the issue of 'reasonableness', and the significance of the 'powerful reasons' test referred to in **MA (Pakistan) [2016] EWCA Civ 705** at paragraph 49. Mr Lindsay argued that the endorsement by the Supreme Court of the IDIs was such that even where a child had been present in the UK for 7 years it would generally be reasonable to expect him/her to leave the UK with his/her parent/s unless the applicant/appellant could demonstrate special factors – i.e. the default position would be to expect the child to go, and it was for the applicant or appellant to demonstrate that the default position did not apply. Mr Sowerby submitted that any presumption went the other way: some powerful reason would require to be shown by the Respondent to justify the interference with the child's private life inherent in leaving the UK with his/her parent/s.

25. In support of Mr Lindsay's submission it may be noted that it was the approach of the Supreme Court in **KO (Nigeria)** to essay "*a simpler and more direct approach*" rather than attempt to analyse (and thereby reconcile and/or disapprove) "*impressive but conflicting judgement*" (paragraph 14). The intended adoption of a 'simple and direct' approach lends itself to a reading of the decision in **KO (Nigeria)** as an invitation to disregard the complexity of earlier jurisprudence. Mr Lindsay directed my attention to the seemingly cautionary reference to **MA (Pakistan)** at the end of paragraph 19. (However, in this context it is to be noted that there is also an approving reference at paragraph 17.)

26. In my judgement in expressing approval at paragraph 17 of the "*list of relevant factors set out in the IDI guidance*" the Supreme Court in **KO (Nigeria)** was not limiting itself to the single factor at sub-paragraph b quoted at paragraph 10. Additional relevant factors are paraphrased at paragraph 10 – "*risk to the child's health, family ties in the UK and the likelihood of integration into life in another country*" – and may be seen in fuller form in Appendix 2 of the decision in **PD (Sri Lanka) [2016] UKUT 108 (IAC)** being discussed.

27. It seems to me likely that sub-paragraph b was quoted at paragraph 10 of **KO (Nigeria)** because it makes express reference to the concept of reasonableness. Be that as it may, in **KO (Nigeria)** the context of the reference to the IDIs was primarily to highlight that "*the criminality or immigration record of the parents*" did not feature in the list of relevant factors – the issue of the extent to which the conduct of parents might impact upon 'reasonableness' under section 117B(6) being at the core of the consideration of the Supreme Court.

28. Accordingly, in my judgement a presumptive quality is not to be attributed to the policy represented by the IDIs considered in **PD (Sri Lanka)**, and in turn **KO (Nigeria)**, on the basis of the wording at sub-paragraph b – "*it will generally be reasonable to expect a child to leave the UK with their parent(s)*" – or otherwise. Sub-paragraph b is just one of a number of factors listed in the IDIs; it is not overtly asserted in the IDIs – and otherwise it seems to me that there is no justification for concluding – that it is to be accorded such significant weight that other factors are negated or significantly diminished in the event that departure would be in the company of a parent/s.

29. This is further illustrated by the following passage from the IDIs, (set out in a quotation from Appendix 2 of **PD (Sri Lanka)**), which I find cannot be reconciled with sub-paragraph b if that sub-paragraph is to be deemed to indicate a presumption in the policy.

> "*In a separate section, paragraph 11.2.4 of the IDI poses the following question:*
>
> *"Would it be unreasonable to expect a non-British citizen child to leave the UK?"*
>
> *The following moderately prolix answer, which invites consideration in all its fullness, is supplied:*
>
> > "*The requirement that a non-British citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, recognises that over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years.*
> >
> > *The decision maker must consider whether, in the specific circumstances of the case, it would be reasonable to expect the child to live in another country.*

> *The decision maker must consider the facts relating to each child in the UK in the family individually, and also consider all the facts relating to the family as a whole. The decision maker should also engage with any specific issues explicitly raised by the family, by each child or on behalf of each child.*"

30. There is no suggestion therein that the "*strong reasons… required in order to refuse a case with continuous UK residence of more than 7 years*" are provided by simple reason of departure from the UK being in the company of a parent or parents.

31. Nor would such a position be consistent with the history and development of policy in this area: see the 'ancestry' set out in **PD (Sri Lanka)**, referred to in **KO (Nigeria)** at paragraph 8) – e.g. there is no suggestion in the Ministerial statement quoted at paragraph 9 of **PD (Sri Lanka)** that where the ties established by a child over 7 or more years in the UK outweighed other considerations, departure from the UK was still appropriate if it were to be in the company of parents; rather, it was considered that in such circumstances the whole of the family should be allowed to remain in the UK. Similarly in respect of the development of domestic jurisprudence, where for the main part it is at the very least implicit and often explicit that the issue relates to a child whose parent or parents face removal from the UK and who will therefore be accompanying the child if unable to establish a basis to remain by reference to the child's length of residence and ties in the UK.

32. I was provided with a copy of the most recent IDI's: Family Migration: Appendix FM Section 1.0b, Family Life (as a Partner or Parent) and Private Life: 10-Year Routes (Version 4.0), published on 11 April 2019. The same 'tension' as between sub-paragraph b and other passages in the earlier IDIs, is again apparent. In referring to **KO (Nigeria)** it is stated "*The determination sets out that if a child's parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that it would not be reasonable.*" However, it is to be noted that this is preceded by this passage:

> "*A child is a qualifying child if they are a British child…, or a non-British citizen child, who has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, which recognises that over time children start to put down roots and to integrate into life in the UK. The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK.*"

33. The first of these passages broadly reflects sub-paragraph b of the previous IDI, and the submission advanced by Mr Lindsay. The second passage does not.

34. It is perhaps beyond the scope of this Decision – and certainly was not the subject of submissions – whether there is a legal requirement that policy be understandable (in the sense that its meaning be transparent and coherent). Ultimately, the appeals herein are to be determined by reference to legal principle irrespective of the Respondent's most recently drafted version of his policy.

35. Be that as it may, on balance it seems to me that both versions of the IDIs are essentially urging upon the decision-maker an evaluation of 'reasonableness' taking into account a number of relevant factors – including whether or not the child would be leaving the UK with a parent or parents; but neither version is suggesting a particular outcome is indicated by such a circumstance. In so far as individual passages within the IDIs might be interpreted as suggesting such an outcome, this is not reconcilable with the wider terms of the IDIs and/or otherwise does not reflect that such is the Respondent's policy with any degree of clarity or certainty.

36. In all the circumstances I am not persuaded that either the previous or the current version of the IDIs indicates that the Respondent's policy is to deem it generally reasonable for a qualifying child to leave the UK if he or she is to leave in the company of a parent or parents.

37. More particularly, I am not persuaded that the endorsement of the previous IDIs by the Supreme Court in **KO (Nigeria)** was in substance an endorsement of a general presumption that it will be reasonable to expect a qualifying child to leave the UK with his or her parent or parents.

38. For the avoidance of any doubt, I am unable to identify anything in either **JG (Turkey)** or **AB and AO** that would support a different view.

39. Further to this it is be noted that both in the context of paragraph 276ADE(1)(iv) and section 117B(6) a decision-maker is ultimately concerned with Article 8. In a case based on a period of 7 years residence by a non-British child it may readily be seen that the low threshold of the first two **Razgar** questions is likely to be met - there will almost inevitably be some element of private life upon which a decision resulting in departure from the UK will impact. To that extent the 'reasonableness' element in each of 276ADE(1)(iv) and section 117B(6) is essentially a manifestation of 'proportionality'. This is the more manifest under section 117B(6) where it is in terms provided that the Article 8(1) protected rights will outweigh other public interest considerations if the sub-section is satisfied. See similarly paragraph EX.1.(a) of Appendix FM, and recall that Appendix FM "*reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and*

family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedom of others (and in doing so also reflects the relevant public interest considerations as set out in Part 5A of the Nationality, Immigration and Asylum Act 2002)" (Appendix FM at GEN.1.1).

40. Indeed it seems to me that the concept of reasonableness in so far as it relates to the particular circumstances of the relevant qualifying child under each of paragraph 276ADE(1)(iv), paragraph EX.1.(a), and section 117B(6) is congruent with proportionality. If it is reasonable to expect a child to leave the UK, a decision to that effect or with that consequence is proportionate at least so far as the child is concerned; if it is not reasonable to expect the child to leave the UK, a decision to that effect or with that consequence is disproportionate. I cannot envisage a situation that falls between the notions of 'reasonableness' and 'proportionality'.

41. The jurisprudence of Article 8 is such that whilst it is for an applicant to demonstrate an interference, it is then for the public body – in this case the Secretary of State for the Home Department – to justify the interference as proportionate.

42. The reference in **MA (Pakistan)** at paragraph 49 to "*powerful reasons*" in so far as it suggests an onus on the Respondent is no more than a reflection of the jurisprudence that it is for the Respondent to justify the interference. In so far as it is suggested that such justification must be pursuant to powerful reasons, this is no more than a recognition of the strength of private life likely inherent in a child having spent at least 7 years in the UK. The extent to which interference will be justifiable as proportionate, will inevitably depend upon a combination of the strength of the family and/or private life, and the extent of the interference; necessarily the better the quality and/or the more extreme the interference, the stronger the justification for interference will require to be – i.e. the more powerful the reasons.

43. In this context it seems to me that the discussion in **Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)** remains valid. In particular it is to be noted that 7 years residence was not considered inevitably favourably determinative, but that a nuanced consideration of the particular age and experience of the child was required - the example being offered that 7 years from the age of 4 would likely be more significant than 7 years from birth.

44. Accordingly I consider that the reference to 'powerful reasons' in **MA (Pakistan)** is no more than a reflection of the established jurisprudence. I do not consider that it is necessary or helpful – or indeed that it was intended – that it be elevated to some sort

of legal presumption in favour of the qualifying child. Indeed the context of each of paragraph 276ADE(1)(iv), paragraph EX.1.(a), and section 117B(6) in the case of a non-British citizen child is that the question of 'reasonableness' only arises upon 7 years residence; plainly the gateway to the question cannot be in itself also the presumptive answer to the question.

45. In such circumstances I do not accept either: Mr Lindsay's submission to the effect that **KO (Nigeria)** is authority, and/or the Respondent's policy provides, that there is a presumption that it will generally be reasonable for a non-British child resident in the UK for 7 years to leave the UK with a parent/s who has no leave to remain; or Mr Sowerby's submission that there is a presumption in favour of such a child. Each case requires to be considered on the basis of its own particular facts within the framework of the established jurisprudence, such jurisprudence recognising that where Article 8 rights are engaged it is for the Respondent to justify any interference therewith as proportionate.

46. In this context, the 'simple and direct' approach adopted by the Supreme Court in **KO (Nigeria)** was in resolving the tension between previous cases as to the scope of the 'reasonableness' test – and in particular the issue identified by Lord Justice Elias in **MA (Pakistan)** at paragraph 36, e.g. see now **AB and AO** at paragraph 58. This was not to negate the earlier jurisprudence as to proportionality, either generally or in the context of children.

Law: Concluded Summary

47. Picking up from paragraph 14 of the 'Error of Law' decision – with which both representatives indicated broad agreement – and adding in my conclusions from the discussion set out above, I make the following observations as to the approach to the issue of 'reasonableness' in respect of a non-British citizen child resident in the UK for 7 years under any of paragraph 276ADE(1)(iv), paragraph EX.1.(a) of Appendix FM, or section 117B(6) of the 2002 Act:

    (i) The evaluation is one of what is reasonable for the child.

    (ii) 'Reasonable' is congruent with the concept of proportionality: is it disproportionate to expect the child to leave the UK?

    (iii) The child's best interests are a primary, but not paramount, consideration.

    (iv) Although there is in principle no reason to exclude the public interest considerations pursuant to section 117B in evaluating proportionality, bearing in mind the **Zoumbas** principle, that the child is not to be blamed for matters for which she is not responsible, and also bearing in mind that the focus is on

the child, any adverse factors arising from the conduct of the parent/s are not to be weighed in the balance as part of any justification interfering with the child's Article 8 rights.

(v) Nonetheless the 'real world' situation of where the parent or parents are expected to be is to be factored in to the overall consideration. This will usually mean that the ultimate question will be – is it reasonable to expect the child to follow the parent with no right to remain to the country of origin. (This is subject to the caveat identified in **JG (Turkey)** in respect of section 117B(6), that consideration of reasonableness of relocation of the child may avail an applicant with genuine and subsisting parental responsibility even if in practical terms the child is unlikely to relocate outside the UK.)

(vi) There is no presumption that it will generally be reasonable for a non-British child resident in the UK for 7 years to leave the UK with a parent/s who has no leave to remain.

(vii) There is no presumption in favour of a non-British citizen child resident in the UK for 7 years.

(viii) Each case requires to be considered on the basis of its own particular facts within the framework of the established jurisprudence, such jurisprudence recognising that where Article 8 rights are engaged it is for the Respondent to justify any interference therewith as proportionate.

Determination of the Appeal

48. I approach the question of reasonableness on the premise that the Second Appellant would be going to Nigeria in the 'real world' circumstance of her parents having no right to remain in the UK.

49. Further to this, I do not accept the assertion made by the First Appellant that he will be unable to obtain any employment, and will otherwise have significant difficulties in re-establishing himself in his country of nationality. In this context I note that the First-tier Tribunal found that he "*is likely to have sufficient funds to establish himself in Nigeria*" (paragraph 18); the Appellants have filed no evidence to contradict this finding or otherwise to show that the family has exhausted the court settlement, or any other funds they may have acquired.

50. I also essentially adopt the First Tier Tribunal's finding to the effect that those friends and family who are said to offer financial support in the UK will more likely than not be able and willing to continue to offer support until such time as the First Appellant is able to support his family by himself. No supporting evidence is offered from any

such persons declaring that they would not be willing to provide support, and no sustainable reasons is offered by the Appellants as to why such support would likely stop if they were to leave the UK.

51. In the circumstances I find that the Second Appellant would be relocating to Nigeria in the company of both of her parents who may reasonably be expected to be able to secure for her the means of support, and will be able to continue to provide her with a supportive family home and parental love and care.

52. It is uncontroversial that in general terms it is in the Second Appellant's best interests to remain in the care of both of her parents. As regards geographical location, in my judgement it is in the Second Appellant's best interests that she remain in the UK. The evidence suggests that she is well established in school; whilst any relocation to another school, including another school in Nigeria, may ultimately be effectively managed by the Second Appellant with the support of her parents, it will inevitably have some adverse impact, at least in the short term, on her. I also consider it a reasonable inference that any such impact will be exacerbated by the broader issue of relocation to an environment that is essentially alien to the Second Appellant - who has only ever known life in the UK. Again, whilst the impact will be ameliorated by the love, support, and care of her parents, the disruption will more likely than not be adverse to a significant extent.

53. In this context, and generally, although there is limited supporting evidence in relation to the Second Appellant's social life, I accept that it is more likely than not that she has developed the normal friendships of a girl of her age. I base this in part on the essentially normal and regular engagement in school activities (including gym club and choir), her church attendance (including involvement in the drama group), and the First Appellant's reference to his daughter enjoying sleep-overs with friends either at their homes or her own home. Necessarily such friendships will not be able to continue in their present form in the event of the Second Appellant leaving the UK, even if there is some facility to remain in contact through social media.

54. I have noted and taken into account what has been said by the First Appellant concerning the significance of visits to the grave of the Second Appellant's sister. It seems to me that such visits are made occasionally – quite literally on the occasion of the anniversary of Precious's birth - rather than frequently. I do not doubt the significance and importance to the First Appellant both of the fact of such visits, and of the fact that such visits are possible because of the proximity of the grave – a matter that would be lost in the event of relocation to Nigeria. However, I am not persuaded that this has the same resonance for the Second Appellant given her age at the time of Precious's death (approximately 2½ years), and that in the unfortunate circumstances she never developed a sibling relationship. As such, in considering the

circumstances of the Second Appellant, I attach only the most marginal of weight to this particular factor.

55. Be that as it may, the subjective significance of the Second Appellant's private life in the UK is pithily encapsulated by her father's observation that "*This is the only life she knows*". The objective significance is underscored by the circumstance emphasised by Mr Sowerby - that she approaches completion of the period of time at which Parliament has considered it appropriate that sustained presence in the UK be acknowledged by the grant of citizenship.

56. Against these elements of established private life, the Respondent by way of justification for interference only really offers the submission that there is some sort of presumption in law and/or fact that it is reasonable to expect the Second Appellant to accompany her parents to Nigeria. For the reasons explained above I do not accept that there is any such presumption.

57. I have had regard to the 'public interest considerations' so far as they relate to the Second Appellant. I acknowledge that the maintenance of effective immigration control is in the public interest, and that ordinarily this is achieved through the consistent application of a published set of rules. However, this is not inherently a matter to be weighed against the Second Appellant in circumstances where it is in substance her case that she meets the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules. The Second Appellant speaks English and is making good progress in the education system. As a child, the Second Appellant cannot be expected to be financially independent; the extent to which she might be a burden on taxpayers will be a product of the industry of her parents in the event that they be permitted to remain in the UK. Whilst it is to be acknowledged that the Second Appellant has not had any lawful basis to be present in the UK, this is not a matter of her devising.

58. In all the circumstances I find that the Respondent has not offered any good reason to justify interfering with the private life that the Second Appellant has established in the UK during the first 9½ years of her life. In my judgement any interference in the Second Appellant's private life would be disproportionate. In all of the circumstances I find that it would not be reasonable to expect the Second Appellant to leave the UK.

59. Necessarily, the implication for the First Appellant is that the public interest does not require his removal.

60. Both appeals are allowed on human rights grounds, with reference to Article 8 of the ECHR, accordingly.

Notice of Decision

61. Appeal HU/11922/2017 is allowed.

62. Appeal HU/11926/2017 is allowed.

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: **29 May 2019**

Deputy Upper Tribunal Judge I A Lewis

Fee Award

Although I have allowed both appeals, to a significant extent I am influenced in so doing by the total length of time that the Second Appellant has been present in the UK. This has accrued to some extent by virtue of the appeal process. In such circumstances I do not consider that a fee award is appropriate in respect of either Appellant.

Signed: Date: **29 May 2019**

Deputy Upper Tribunal Judge I A Lewis

ANNEX

ERROR OF LAW DECISION

(The following is the text of the reasons given in the 'Error of Law' Decision herein.)

1. There was an error of law in the decision of First-tier Tribunal Judge Murray promulgated on 14 August 2018 dismissing these linked appeals. In consequence, the decisions in the appeals require to be set aside and remade. After discussion with the representatives I am satisfied that the prudent approach to remaking the decisions in the appeals is to await any development or clarification of the approach to be taken in light of **KO (Nigeria) [2018] UKSC 53** further to an appeal presently listed before the President of the Tribunal on 13 February 2019. This matter accordingly stands adjourned.

2. The Appellants are father and daughter with the respective dates of birth of 21 June 1980 and 22 October 2009. There are other members of the family unit present in the UK, specifically the partner of the First Appellant (and mother of the Second Appellant), and a further child, presently aged 3. I am given to understand that only two members of the family have lodged appeals against decisions that affect each of them for reasons of cost. It is expected, at least by the family, that the position of the other family members will be considered and determined by the Secretary of State in light of any outcome in these proceedings.

3. The First Appellant arrived in the United Kingdom in 2005, entering pursuant to a 6 month visit visa. He has remained without permission thereafter. The Second Appellant was born in the United Kingdom.

4. The issues before the First-tier Tribunal which, given the circumstances of the disposal of the error of law issue and the requirement to remake the decision in due course, I do not presently set out or explore in any great detail, were in the main focussed on the circumstances of the Second Appellant. It was the Appellants' case that the Second Appellant satisfied the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules, and moreover that section 117B(6) of the Nationality, Immigration and Asylum Act 2002 applied to the benefit of the First Appellant. In essence, therefore, the key issue was whether or not it was reasonable to expect the Second Appellant to leave the UK.

5. In respect of the Second Appellant's circumstances, the Judge made the following findings:

> *"The second Appellant is now 8½ years old. She has lived in the UK all her life. She is in year 3 at school. The Appellant states that the standards of education in Nigeria are not as good as in the UK. Whilst this may be so, I find that given her young age she will be adaptable to life in Nigeria, particularly in view of the fact that this is where both her parents are from. Further, she has not reached a critical stage of her education. I have taken account of the fact that 7 years residence is a pointer to where a child's best interests lie and accept that it may marginally be in her best interests to remain in the UK due only to education here."* (paragraph 20).

6. It seems to me that these findings were essentially an acceptance of the matters advanced on the Appellants' behalf: see for example paragraph 12 of the Appellants' Skeleton Argument dated 10 July 2018: *"[A] is now 8½ years old. She has lived in the UK all her life. She has never left the UK. She has her own private life in the UK and strong connections in the UK and is in year 3 at St Patrick's Catholic Primary School. She predominantly speaks English."*

7. However, notwithstanding the apparent acceptance of the primary facts relied upon by the Appellants in respect of the Second Appellant's circumstances, it is common ground before me that the First-tier Tribunal Judge thereafter fell into error.

8. Paragraphs 21-23 of the Decision are in these terms:

> *"21. The Court of Appeal in **MA (Pakistan) & Ors v Secretary of State for the Home Department** **[2016] EWCA Civ 705** Elias LJ stated at paragraph 103 that the fact that the parents are overstayers and have no right to remain in their own right can thereafter be weighed in the proportionality balance against allowing the child to remain, but that is after a recognition that the child's seven years of residence is a significant factor pointing the other way.*
>
> *22. In relation to the public interest, therefore, the [First] Appellant has admitted fraud. This weighs heavily in the balance on the public interest side of the scales. He has been here without any form of leave since 2005 after he arrived as a visitor and did not return. He only attempted to regularise his status in January 2017 and has a poor immigration history. I heard evidence from … the Vicar from St Paul's Church who gave evidence to his attendance at church and to his role as an assistant church warden. I accept that he attends and helps in the church.*
>
> *23. Taking all relevant factors into account and weighing them in the balance, I find that the second Appellant's private life ties here are outweighed by the public interest in removal in view of the first Appellant's poor immigration history and fraudulent behaviour. I find that it would be reasonable for her to go to Nigeria in*

view of her young age, her parent's [sic.] connections with that country and her father's immigration history."

9. The approach evident therefrom, significantly the factoring in of the "*father's immigration history*" in assessing whether it would be reasonable for the Second Appellant to go to Nigeria is incompatible with the correct approach now identified in **KO (Nigeria)**. It is on this basis that it is common ground before me - and I accept – that the linked decisions of the First-tier Tribunal Judge were in error of law. (It is to be acknowledged that given the dates the Judge would not have had the benefit of consideration of the decision of **KO (Nigeria)**, but that is to no avail.)

10. The decisions in the appeals require to be remade, applying the correct law. Mr Kotas on behalf of the Secretary of State informed me that there is a case listed before the President on 13 February 2019 in which it is expected guidance will follow as to the approach to cases such as the instant case in light of the decision in **KO (Nigeria)**. He also suggested that there was a possibility that a further case was to be linked to it to allow a wider scope of consideration of potential issues. Although he was unable to furnish me with any greater particulars, I accepted what he said. On that basis, it is suggested that this Tribunal should not proceed to remake the decision forthwith.

11. Mr Georget, who adopts that approach too, further invited my consideration to the fact that the Appellants might thereby be afforded an opportunity to file further evidence in the appeal. When pressed on this he suggested that a report might be commissioned to say something of the impact on the Appellant of possible removal. However, no concrete steps appear to have been taken in this regard and I remind myself that in the ordinary course of events Appellants are expected to be in a position to proceed to remaking decisions in appeals immediately after the error of law. Otherwise, Mr Georget directed my attention to the passage of time since the previous decision which, given the age of the Appellant, he suggested was a more significant period of time than it might be for an older person - noting also that during this time she had commenced a new school year. However, no new specific event or new circumstance was otherwise identified.

12. In my judgement the matters raised by Mr Georget in respect of possibly obtaining further evidence were too vague and speculative to justify an adjournment in themselves.

13. I have given careful consideration to the appropriateness or otherwise of adjourning this matter to await guidance from another part of the Tribunal - albeit the most senior member of the Tribunal. In this context, I am mindful of the observations and

comments of Lord Carnwath giving the judgment of the Supreme Court in **KO (Nigeria)**, in particular at paragraph 14:

> *"It is profoundly unsatisfactory that a set of provisions which was intended to provide clear guidelines to limit the scope for judicial evaluation should have led to such disagreement among some of the most experienced Upper Tribunal and Court of Appeal Judges. Rather than attempt a detailed analysis of all these impressive but conflicting judgments, I hope I will be forgiven for attempting a simpler and more direct approach."*

14. Plainly, what is set out in **KO Nigeria** is intended to reconcile any conflict in the authorities by offering a simple and direct approach to 'reasonableness'. What is required is

> an evaluation of what is reasonable for the child;
>
> bearing in mind best interests;
>
> and bearing in mind the **Zoumbas** principle, that the child is not to be blamed for matters for which she is not responsible;
>
> but in the real world situation of where the parent or parents are expected to be;
>
> which usually mean that the ultimate question will be – is it reasonable to expect the child to follow the parent with no right to remain to the country of origin.

15. I hesitate to conceive of what might yet further be set out by way of simplification or clarification in any forthcoming decision of the Upper Tribunal.

16. However, during the course of discussion some doubt as to the correctness of such a straightforward approach was aired by reference to the issue of how - if at all - the very poor immigration history (or in some cases criminal conduct) of a parental applicant should be factored in, or whether it could never sound in a case once section 117B(6) was satisfied. There may also be scope for discussion as to where **KO** leaves the 'powerful reasons' test referred to in **MA (Pakistan)**.

17. On balance I was just persuaded that the more prudent approach was to await the outcome of any guidance from the President.

18. Accordingly, the appeal is adjourned to be listed in due course for a further hearing to remake the decision in the appeal with the benefit of any guidance from the President.

19. The parties are at liberty to file and serve any further evidence upon which they might wish to rely, and are at liberty to file and serve any written submissions upon which they might wish to rely in light of any guidance from the President or otherwise.

- End -