Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/13120/2018
HU/13126/2018
HU/13130/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 October 2019	**On 18 October 2019**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

M A (FIRST APPELLANT)
M A A (SECOND APPELLANT)
I A (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellants or members of their family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the Appellants: Mr M Sowerby, Counsel, instructed by Pioneer Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are all nationals of Pakistan. The first appellant is the mother of the other two. None of them have leave to remain in the United Kingdom. The second appellant was born in this country in March 2012 and the third in December 2015.

2. The first appellant's husband (the father of the two children) is also in this country without leave. It appears as though he has an application outstanding before the respondent.

3. This is the remaking of the decision in the appellants' appeals following the decision of Deputy Upper Tribunal Judge King, promulgated on 5 September 2019, in which he concluded that the First-tier Tribunal had materially erred in law when dismissing their appeals against the respondent's refusals of their respective human rights claims. Judge King's error of law decision is annexed to this remaking decision. In summary, it was said that the First-tier Tribunal failed to recognise the significance of the second appellant being a "qualifying child" by having accrued seven years residence in the United Kingdom. It was common ground that the first appellant had a genuine and subsisting parental relationship with her two children.

4. Judge King was of the view that little new evidence was anticipated in respect of the resumed hearing because the "details of the family situation as a whole and that of [the second appellant] in particular have been set out in the [First-tier Tribunal's] determination." The production of further evidence was not, however, ruled out.

5. In the event, a supplementary bundle of evidence was filed and served by the appellants. This consisted of an application form submitted to the respondent by the first appellant's husband (second and third appellant's father) on 1 October 2019, and a report from an Independent Social Worker, Ms Sally-Anne Deacon, dated 29 September 2019. This new evidence was admitted without opposition from Mr Clarke.

6. Notwithstanding the new evidence, there is no sound reason to disturb the First-tier Tribunal's findings of primary fact in respect of the appellants. I note that these findings were not the subject challenge in the grounds of appeal. Judge King said nothing in his error of law decision which would indicate that resumed hearing would be conducted on a clean factual slate, as it were. At the hearing before me, Mr Sowerby, quite rightly in my view, did not seek to argue that these findings were now irrelevant.

The issues in these appeals

7. As recognised by both parties, the core issue in these appeals is the circumstances of the second appellant and whether it would be reasonable

for him to leave the United Kingdom. The second appellant was not a qualifying child as at the date of the human rights claims in March 2017, but clearly is now. Thus, it is accepted that paragraph 276ADE(1)(iv) of the Immigration Rules cannot be met, and it is section 117B(6) of the Nationality, Immigration and Asylum Act 2002, as amended, which represents the applicable legal test here.

8. It has not been suggested that, absent a favourable conclusion on section 117B(6), the other two appellants would be able to succeed on Article 8 grounds.

Section 117B(6) of the 2002 Act

9. Section 117B(6) of the 2002 Act reads as follows:

> "(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."

The authorities and my approach to the reasonableness test

10. The question of reasonableness is to be assessed in light of the authorities, including KO (Nigeria) [2018] UKSC 53 and AB (Jamaica) [2019] EWCA Civ 661. By way of self-directions, I state the following:

    1) I assess the reasonableness question on the hypothetical basis that the second appellant would in fact leave the United Kingdom;

    2) the assessment must be made in a "real world" scenario, taking account of the current status of all relevant family members;

    3) a best interests assessment forms part and parcel of the reasonableness test and is a primary consideration;

    4) the parents' historical immigration record (in other words, matters going beyond the simple fact of an absence of status as of now) is irrelevant to the reasonableness test;

    5) reasonableness assessments are, by their nature, inherently fact-specific;

    6) if it would be unreasonable for the second appellant to leave the United Kingdom, the first appellant will succeed in her Article 8 claim.

11. The six points set out above are not, as I understand it, in dispute between the parties. However, there is an argument as to whether or not "powerful reasons" need to be shown for a conclusion that it would be reasonable for a qualifying child to leave the United Kingdom.

12. Mr Sowerby submits that the need to show "powerful reasons", elucidated by Elias LJ in MA (Pakistan) [2016] EWCA Civ 705, survives KO (Nigeria) and should be applied in respect of the second appellant. It is submitted that what was said by Elias LJ in paragraphs 46 and 49 of MA (Pakistan) was not overturned by the Supreme Court, either expressly or by implication. With reference to paragraph 84 of JG (s117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) and paragraph 33 of MT and ET (child's best interests; *ex tempore* pilot) Nigeria [2018] UKUT 88(IAC), Mr Sowerby submitted that the "powerful reasons" factor had been correctly applied by the Upper Tribunal, with the former decision post-dating KO (Nigeria).

13. Mr Clarke submitted that there was no scope for a "powerful reasons" requirement within the reasonableness assessment. It is clear, submitted Mr Clarke, that KO (Nigeria) had effectively overturned MA (Pakistan) in its entirety. The question of reasonableness was a straightforward one, and there was no room for a balancing exercise. In other words, it either was, or was not, reasonable for a qualifying child to leave the United Kingdom.

14. For the reasons set out below, I conclude that there is still a need to show "powerful reasons" as to why it would be reasonable for a qualifying child to leave the United Kingdom.

15. First, nothing suggests to us that in principle the seven-year gateway criterion contained within section 117B(6) and in the Rules holds any less significance in the post-KO (Nigeria) landscape as it did previously.

16. Second, there is nothing in the Supreme Court's judgment that casts any doubt, whether explicitly or otherwise, on the appropriateness of what Elias LJ said in paragraphs 46 and 49 of MA (Pakistan), although we recognise that the particular issue with which we are presently concerned did not appear to have been canvassed before the Court.

17. Third, a previous version of the respondent's guidance on Appendix FM and the reasonableness issue stated that "strong" reasons would be required in order for leave to remain to be refused in the case of a qualifying child (see paragraph 46 of MA (Pakistan)). The reference to "strong" reasons does not appear in the latest guidance, referred to earlier in our decision, nor did it appear in the previous relevant guidance on the 10-year route under Appendix FM, dated 11 April 2019. Whether or not this is a deliberate alteration is not a matter upon which we can comment. However, at pages 50-51 of the current document, we find the following passages:

> "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.
>
> …

> There may be some specific circumstances where it would be reasonable to expect the qualifying child to leave the UK with the parent(s). In deciding such cases you must consider the best interests of the child and the facts relating to the family as a whole. You should also consider any specific issues raised by the family or by, or on behalf of the child (or other children in the family)."

18. Taking into account the need to assess cases by reference to the "real world" scenario in which the qualifying child finds themselves, the approach set out in the passages cited above is in no way inconsistent with the need to show "strong" or "powerful" reasons that the departure of the child in question from the United Kingdom would be reasonable. The guidance is not of course binding, or even persuasive. It does however indicate that the respondent's current approach continues to recognise the importance of the qualifying criteria (British nationality or seven-year residence in the United Kingdom) and the need to provide specific evidence-based reasons for justifying a conclusion that a departure will be reasonable. The guidance also appears to sit somewhat uncomfortably with Mr Clarke's submission.

19. Fourth, our conclusion that the need to show "powerful" reasons remains valid does not inexorably lead to the respondent being effectively disabled from ever being able to identify such reasons in any given case. Following KO (Nigeria), the conduct of the parent(s), which had previously been available as a potential "powerful" reason for why it would be reasonable for the child to leave the United Kingdom, must now be left out of the equation. It remains the case that a combination of factors relevant to an assessment of reasonableness (including those set out in the Respondent's current guidance) may, depending on the facts of the case, be employed to show that a departure by the qualifying child will be reasonable. In saying this, we note that in KO (Nigeria), Lord Carnwath expressly approved the relevance of factors contained in a previous version of the respondent's guidance (see paragraphs 10 and 17).

20. Fifth, I disagree with Mr Clarke's submission that the need to show "powerful reasons" somehow imports a balancing exercise/proportionality assessment into the reasonableness test. In fact, all it does is form part of the need to justify a conclusion on what Mr Clarke described as a straightforward question.

The evidence

21. In remaking the decision is in these appeals, I have considered the new bundle from the appellants, referred to earlier, together with a bundle which appears to have been before the First-tier Tribunal (indexed and paginated A1-I2), a number of letters and documents relating to the second appellant's education, and the respondent's original appeal bundle.

22. Mr Sowerby was concerned that the first appellant had never given oral evidence (this is because she had chosen to have the appeals before the First-tier Tribunal determined without a hearing). However, in view of the preserved primary findings of fact from the First-tier Tribunal, the Independent Social Worker's report, and the applicable legal framework, he did not call the first appellant and the hearing proceeded by way of submissions only.

23. I shall deal with the Independent Social Worker's report in appropriate detail, below.

The parties' submissions

24. Mr Sowerby relied on his skeleton argument. He submitted that first appellant had a good immigration history. It was in the best interests of the second appellant to remain in the United Kingdom, as confirmed by the First-tier Tribunal. I was specifically referred to pages 14-16 of the Independent Social Worker's report. It was submitted that there were no "powerful reasons" as to why it would be reasonable for the second appellant to leave the United Kingdom at this time.

25. Mr Clarke placed significant emphasis on the findings of the First-tier Tribunal at paragraphs 15-21. The judge had found that the second appellant's health was improved, that he had made friends at school, had visited Pakistan on at least two occasions, and was able to speak Urdu. The judge had found that the first appellant had exaggerated aspects of her evidence in respect of the claimed difficulties of relocating to Pakistan. It was clear that children's parents would be able to find work. The First-tier Tribunal had concluded that it was only "just" in the second appellant's best interests to remain in the United Kingdom. This child was not at a crucial stage of his education. It was also significant that he was not yet in an older age bracket. In respect of the "real world" scenario, none of the appellants had leave to remain in this country.

Findings of fact

26. With reference to paragraphs 15-21 of the First-tier Tribunal's decision, I apply the following primary findings of fact to my reasonableness assessment:

    1) Whilst the second appellant has suffered from some health conditions, they have improved and cannot currently be properly described as significant;

    2) he has been to Pakistan on two occasions: the first between 1 December 2012 and 20 February 2013; the second between 22 January 2014 and 7 April 2014;

    3) there were no particular medical complications during either of the two visits;

    4) the second appellant speaks at least some Urdu;

5) the first appellant and her husband are both well-educated. In particular, the husband has obtained impressive qualifications and has employment record both in the United Kingdom and when he last resided in Pakistan;

6) both parents would be able to secure employment in Pakistan and care for the two children;

7) the first appellant's parents and sisters reside in Pakistan;

8) a number of cousins reside in the United Kingdom.

27. On the issue of the second appellant's ability to speak Urdu, I note that at page 35 of the FLR(FP) application form (page 116 of the respondent's appeal bundle) it is said that the second appellant is "familiar" with both English and Urdu. The Independent Social Worker's report states that the second appellant only has "limited ability to speak or comprehend" what is described as "the basic language of Urdu." It is unclear where the author obtained information on this particular issue.

28. On balance, and having regard to the findings of the First-tier Tribunal and what the first appellant herself said in the application form, I find that second appellant can speak Urdu to a reasonable standard. It is more likely than not that his ability to read and write that language is very limited, if he has any at all.

29. The Independent Social Worker comments that there are relatives residing in Pakistan from the paternal side of the family. There is no reason to doubt this, and I find that such relatives exist. There is no further detail about their circumstances, and there is no evidence to show that they, or any other relatives, would simply be unwilling and/or unable to provide whatever assistance they could.

30. I turn to consider the Independent Social Worker's report in more detail. I am satisfied that the author is suitably qualified to provide expert evidence on the subject of the second appellant's current familial, social, and educational circumstances in the United Kingdom, together with the possible impact upon him of having to leave this country.

31. I do, however, have concerns about certain aspects of the report. For example, at pages 10 and 11, the author refers to country information (in the form of a BBC article) relating to the parents' home area in Pakistan. At page 14 there is reference to aspects of the Pakistani educational system. Ms Deacon does not profess to be an expert on either the cultural and/or security and/or educational circumstances pertaining to Pakistan. With all due respect, I place little weight on this particular part of her evidence.

32. Ms Deacon also makes reference to possible psychological problems experienced by the second appellant in the United Kingdom and possibly arising where he to go to Pakistan. In fairness to the author, at page 15

she does, quite rightly, state that such matters are not within her area of expertise. Nonetheless, she has commented upon these issues in support of her overall conclusions as to the adverse impact of the second appellant leaving this country. Again, with respect, I am unable to place any material weight on this particular aspect of her evidence.

33. As a matter of fact, there is no medical evidence to indicate a diagnosis of, or even the suggestion of, an anxiety disorder.

34. On balance, I do not accept that the second appellant does suffer from an anxiety disorder.

35. The two issues discussed above do detract from the overall weight I attach to Ms Deacon's evidence, although the weight attributable to other aspects of it remains considerable.

36. I accept that it is likely that the second appellant would not have meaningful memories of his visits to Pakistan in 2012 and 2014, given his very young age at the time. It is likely that infrequent contact with family members in Pakistan through, for example, Skype, will not have resulted in particularly meaningful connections with those individuals. I accept that the second appellant is integrated into British life. Indeed, it may be somewhat surprising if he were not. The information contained in the report as provided by the second appellant's father, corroborated to an extent by the family GP, shows that the second appellant is a sensitive and reserved child. It is clear that he is well-settled in school and finds stability of the educational setting important. I find that the second appellant has established friendships, and I also accept that he has a best friend.

37. Within the report there is reference to "discussions" with the second appellant's former Year 2 teacher (at page 12). It is perhaps unfortunate that there is no direct evidence from this source. In any event, there is no reason to indicate that the views of the teacher have been anything other than accurately reflected. The teacher commends the second appellant's attitude towards school, confirms that he gets anxious if he does not understand something, but had nonetheless worked hard and reached good attainment levels (presumably, this must refer to Year 2. The child is now in Year 3). The involvement of the parents in school life is said to be excellent. In the teacher's opinion, it would be "catastrophic" for the second appellant to leave the school and the United Kingdom. He believes that given the second appellant's low levels of resilience, the adaptation required by such a move would be "above and beyond" his capabilities. I accept that the views expressed by the teacher were genuinely held. As a matter of primary fact, what he says supports other sources of evidence relating to the second appellant's reserve and sensitivity. I will consider the issue of the potential impact of a departure on the second appellant when setting out my conclusions, below.

38. Turning to the third appellant, there is no detailed information about her circumstances. Given her very young age, she will not have started formal education. It is highly unlikely that she would have formed any meaningful relationships beyond her immediate family unit. There is no evidence of any health problems, and I find that there are none.

39. As to the first appellant and her husband, I have already set out certain relevant findings of fact made by the First-tier Tribunal, which are preserved. There is no suggestion that either are estranged from their respective family members in Pakistan. Whilst there was an indication that the first appellant had suffered from some medical problems in the past, I find this does not currently represent a material issue.

Conclusions

40. The focus here, as with the findings of fact, is on the second appellant.

41. I conclude that it is in the best interests of the second appellant not only to be with his parents and siblings, but also to remain in the United Kingdom. He was born here and has resided in this country for the whole of his life. He is integrated into British life, both in terms of his social and educational spheres. I take full account of the fact that the second appellant is a sensitive and reserved boy who benefits from a stable environment. It is also the case that, other than the fact of his parental heritage, he does not have what may be described as meaningful ties with Pakistan. A departure from this country would represent a significant disruption in his life.

42. It would in fact be bordering on the perverse to conclude that his best interests did not lie, at least in part, in him continuing to live in the United Kingdom.

43. Having said that, I, like the First-tier Tribunal, conclude that those best interests are not very strongly in favour of him remaining in this country. Whilst the second appellant has met the gateway criterion of seven years residence, it is only by a matter of some four months. There is merit to Mr Clarke's submission that the second appellant has not lived here significantly in excess of the so-called younger age bracket referred to in cases such as Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC). This is not a case in which there are, for example, relevant medical and/or developmental difficulties. Nor is it a case in which the family unit is in any way dysfunctional or unsupportive. Further, Pakistan is not a country which raises, in general terms, particularly significant concerns as to the safety/well-being of children.

44. It will be recalled that the Year 2 teacher has said that, in his view, leaving the school and this country would be "catastrophic" for the second appellant. With respect, I do not agree that this would be the likely outcome, when all surrounding circumstances are taken into account. Those circumstances include the matters set out in the preceding

paragraph, together with those discussed below. In particular, the nature and support of his parents, combined with his obvious intelligence and aptitude and his reasonable linguistic ability in Urdu, would materially mitigate the disruption caused by leaving his school and this country. In addition, the teacher was basing part of his view on the second appellant leaving the particular school that he currently attends. It is the case that many children will move schools at or around the second appellant's age, albeit within the same country (for example, a family may have to relocate due to work). Such a move will cause upheaval and distress to the child concerned. However, it would, in the normal course of events, be very unlikely that this event would represent a significant factor accounting against the reasonableness of a move to a different school. Finally, and with respect to the teacher, he was not in a position to be able to comment on the educational possibilities in Pakistan.

45. The next step in the process is whether, notwithstanding the best interests assessment and the crossing of the seven-year threshold, there are "powerful reasons" as to why it would be reasonable for the second appellant to leave the United Kingdom.

46. On the facts of this particular case, and having viewed matters cumulatively, I conclude that such reasons do exist. My conclusion is based on the following.

47. My best interests assessment, whilst a primary consideration, does not overwhelmingly favour second appellant remaining in the United Kingdom. The reasons I have given for this conclusion bear relevance to the existence of "powerful reasons" in support of the reasonableness of a departure.

48. The second appellant, like his parents and siblings, is a national of Pakistan and would be able to enjoy all the rights of citizenship in that country.

49. The "real world" scenario in this case is that none of the family members have right to remain in the United Kingdom and all would, in the hypothetical situation I am obliged to consider, leave this country together (the father's application to the respondent remains outstanding and there has been no suggestion that I should proceed on the extremely speculative basis that he will be granted some form of leave).

50. The second appellant's parents clearly have significant ties to Pakistan. The father has worked there in the past. One both would be able to obtain employment there upon return. The parents, in particular the father, well-educated. Both parents have close relatives in the country, and it has not been shown by way of reliable evidence that at least some form of support would not be available.

51. The parents are clearly extremely supportive and capable in respect of the educational and overall well-being of their two children. I conclude that

this would represent a significant mitigating factor in respect of the appeal caused by a departure from the United Kingdom.

52. This is not a case in which it has been shown that there would be no realistic prospect of access to the educational system in Pakistan, whether that was on a publicly or privately funded basis. I appreciate that in respect of the former, the standard may well not be equivalent to that United Kingdom. However, that cannot be a factor of any real significance. In respect of the latter, there is no reliable evidence to indicate that the costs would be, in all circumstances, be prohibitive. In saying this, I bear in mind the finding that the father at least would be in a position to find reasonable employment. Further, there is a distinct possibility that at least some form of financial support would be forthcoming from other relatives, although I do not place a great emphasis on this particular possibility.

53. Part of the upheaval will relate to language. I have found that the second appellant speaks Urdu at a reasonable level. It is highly likely that with the support of his parents and through educational provision, his ability would increase. The reading and writing aspects would clearly require greater intervention, but this does not represent a factor materially undermining the cumulative effect of those to which I have already referred to in paragraphs 48-52, above.

54. In summary, I conclude that the second appellant's case falls far short of showing that it would be "unduly harsh" for him to go to Pakistan, contrary to the view of Ms Deacon at the end of her report. I conclude that it would, on the particular facts, be reasonable for the second appellant to leave the United Kingdom.

55. It follows that section 117B(6) of the 2002 Act is not satisfied. The first appellant cannot succeed on this basis.

56. As discussed previously, no alternative basis for the success of the appellants' appeals has been put forward. For the sake of completeness, I conclude that the third appellant's best interests clearly lie in remaining with her parents and siblings wherever they may be. Absent a conclusion that the second appellant cannot reasonably be expected to leave this country, the third appellant's best interests do not lie in her remaining in the United Kingdom. There are no exceptional or compelling circumstances in her case.

57. Nor are there any exceptional or compelling circumstances in the second appellant's case.

58. The first appellant cannot satisfy any of the relevant Article 8-related Immigration Rules: on any legitimate view of the facts, it cannot be said that there would be "very significant obstacles" to her integration into Pakistani society. On the evidence before me, it is also clear that there are no exceptional or compelling circumstances in her case such as to permit success outside the context of the Rules.

59. All three appeals must be dismissed.

Anonymity

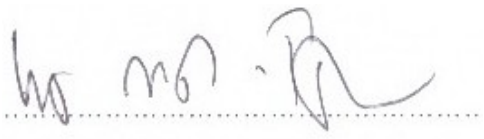
60. In view of the fact that these appeals concern to minor children, I maintain the order made by the Upper Tribunal previously.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal has been set aside.

I re-make the decision by dismissing the appeals of all three appellants.



Signed Date: 16 October 2019
Upper Tribunal Judge Norton-Taylor

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/13120/2018
HU/13126/2018
HU/13130/2018

THE IMMIGRATION ACTS

Heard at Field House
On 12th August 2019

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE KING TD

Between

MRS M A (A1)
MASTER M A A (A2)
MISS I A (A3)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs Uma Price of Counsel, instructed by way of Direct Access
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are mother and son and daughter. The second appellant being born on 5th March 2012 and the third on 11th December 2015.

2. The first appellant's husband came to the United Kingdom in 2007 and she joined him on a Tier 1 dependant visa. In June 2016 her husband's application was varied because he had completed ten years residence. Her husband's application was refused in December 2017 and he was noted as being appeal rights exhausted in November 2018.

3. The appellants made an application in March 2017, which was refused on 3rd June 2018. It was considered that none of the appellants fell within the Immigration Rules. Paragraph 276ADE was considered. No exceptional circumstances were found such as to invoke the protection of Article 8 of the ECHR.

4. The appellants sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Robertson for hearing on 18th April 2019. In a decision of 2nd May 2019 the appeal was dismissed in respect of all of the appellants.

5. The appellants sought to appeal against that decision and leave to do so to the Upper Tribunal was granted by Judge Storey on 3rd July 2019, on the basis that it was arguable that the judge failed to carry out a balanced best interests of the child assessment and failed to apply correct case law principles and establish whether, pursuant to Section 117B(6) of the 2002 Act it was reasonable to expect child A2, who had resided in the United Kingdom for over seven years ,to leave the United Kingdom, bearing in mind that strong or powerful reasons need to be shown for requiring such a child to leave the United Kingdom.

6. A2 was not a qualified child at the time of the decision, but had been in the United Kingdom for seven years as at the time of the hearing. The judge properly recognised that A2 fell to be considered as a qualified child for the purposes of the assessment.

7. In paragraph 3 of the determination the judge set out the following:-

> "However, the guidance in **KO (Nigeria) v SSHD [2019] UKSC 53** must also be borne in mind and this provides that it will normally be reasonable for the child to be where the parents are expected to be and: 'To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain' (paragraph 18)."

8. In paragraph 19 of **KO** the comments of Lewison LJ in **EV Philippines v Secretary of State for the Home Department [2014] EWCA Civ 874** were quoted, particularly as to paragraph 58 which provides:-

> "In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the

> background against which the assessment is conducted. Thus 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?"

9. The relevant findings of the judge in relation to **KO** could be seen in paragraph 24 of the determination in these terms:-

> "As provided in **KO**, I find that it is reasonable to expect A2 to leave the UK because he and all the other members of his family are nationals of Pakistan. Although his parents' immigration history is not poor (they did not go to ground and have a number of previous successful applications for leave to remain in the UK), they currently do not have leave to remain; and normally in such cases, it would be reasonable to expect the child to be with his parents (**KO**)."

10. It is contended by Mrs Price that such an assessment fails to acknowledge with sufficient clarity or give sufficient weight to the protection which being a qualified child gives to A2. Although the case of **KO** overturns paragraph 40 of the decision in **MA Pakistan [2016] EWCA Civ 705** by requiring the question of reasonableness to be assessed in the "real world", paragraph 49 of **MA** remains which provides:-

> "... the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."

11. In the present case the judge had found it was just in the best interests of A2 to remain in the UK. It is submitted that, given such findings, it was incumbent upon the Immigration Judge to clearly recognise that effect and to give cogent reasons why A2 should not benefit from the protection as provided. Mrs Price submitted that this was not a case where the public interest was clearly met so far as the removal of the parents were concerned. There was no adverse immigration history. They were not overstayers nor had they used deception to maintain their family in the United Kingdom, but rather had made all due applications.

12. She submits that it would render non-sensical the comments in **MA**. if interests of A2 could simply be swept aside because of a lack of status of parents in the United Kingdom.

13. The Upper Tribunal in **JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC)** expressly stated at paragraph 41 of that decision that paragraph 44 of **MA** survives the decision in **KO**. Paragraph 44 of **MA** provides:-

> "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."

14. In the self-directions at paragraph 9 of the determination it is said:-

> "In assessing proportionality, it is necessary to establish that there are compelling circumstances for the grant of leave under Article 8 ECHR (**SS (Congo) [2015] EWCA Civ 387**).".

It is contended that in the case of A2, as a qualifying child, that burden is somewhat shifted and for it to be demonstrated that there are strong or powerful reasons for requiring that child to leave the UK.

15. Mrs Price submits that the mere fact of having no leave to remain in the United Kingdom is not a proper basis to exclude the parents in the absence of any criminality or misdemeanour. I am by no means persuaded that that is an accurate indication of the current state of decision making. It is to be noted that so far as the father is concerned he had his appeals exhausted in November 2018, thus would seem to remain in the United Kingdom unlawfully. In fairness to the first appellant however, the particular circumstances of the husband have not been set out in any particular detail.

16. Mr Kandola submits that all the necessary ingredients are in the determination and that there was no error of law in the approach that has been taken by the judge.

17. It seems to me however that the analysis is unsafe. There is little recognition by the judge, if any, as to the significance of having the status of qualified person. Secondly, there is a lack of clear reasoning as to why the protection afforded to A2 should not apply in the final analysis. Although the matter may be a fine matter of balance and proportionality, it seems to me to be an important one. If the illegal status of the family members always trumps the benefits of being a qualified person, then that status would seem to lack relevance, contrary to Statute and Judicial decisions.

18. In terms of the husband he is not a party to these proceedings. I understand from Mr Kandola that he issued his application for leave to remain at the same time as the appellants. His case came for consideration upon refusal before the First-tier Tribunal Judge on 11th June 2018. A copy of the determination has been presented to explain why it was that his appeal came to be refused.

19. Although Mrs Price contends that the circumstances of the husband should be irrelevant for the purposes of this appeal, I do not agree. Clearly the context of family life as a whole needs to be considered.

20. In all the circumstances and given the concern that I have that a proper assessment was not carried out particularly as to the reasonableness of A2 to leave the United Kingdom.

21. The decision shall therefore be set aside to be remade focusing particularly upon the jurisprudence surrounding A2 and the proper considerations to be applied.

22. It seems to me, as I have indicated, that it would distort the proper context if the immigration history of the husband was to be ignored and leave is granted for the respondent and/or appellant to adduce any further evidence in relation to him.

23. It is clear that the details of the family situation as a whole and that of A2 in particular have been set out in the determination. I anticipate, therefore, that there would be little new evidence, but I do not exclude its production upon proper notice to the parties. If it is intended to give any further oral evidence then that should be a factor notified to listing as soon as possible.

24. Given that the issues would seem to be narrow, the matter is retained in the Upper Tribunal. This matter is to be reheard not before six weeks from today's date.

25. I do not reserve this decision to myself in the circumstances.

26. Thus for clarification the appeal before the Upper Tribunal is allowed to the extent that it falls for reconsideration at a resumed hearing in the Upper Tribunal.

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 August 2019

Deputy Upper Tribunal Judge