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

Appeal Numbers: HU/13635/2016
HU/22899/2016
HU/22900/2016
HU/22901/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision Reasons Promulgated** |
|---|---|
| **On 21 December 2018** | **On 18 January 2019** |

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**MANSOOR [A]**
**FAKHRA [B]**
**[R A]**
**[D A]**
**(NO ANONYMITY ORDER MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellants: Mr W Rees of Counsel instructed by Marks & Marks Solicitors
For the Respondent: Mr T Melvin, a Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants appeal with permission against the decision of the First-tier Tribunal on 2 October 2017 dismissing their appeals against the decision

of the Secretary of State to refuse them leave to remain in the United Kingdom on human rights grounds.

2. The appellants have permission to appeal against the decision of the First-tier Tribunal dismissing their appeals against the respondent's decision on 2 November 2016 to refuse them leave to remain on family and private life grounds under the Immigration Rules HC 395 (as amended) or Article 8 ECHR outside those Rules.

3. The appellants are four Pakistani citizens, a husband and wife and their two minor children, the elder of whom is now a British a dual national Pakistani/British citizen. The first and second appellants are the parents: at the date of decision, the third appellant was a qualifying child but not yet a British citizen, and the fourth appellant, his younger sister, was a baby. She is now nearly 4 years old and has Pakistani citizenship only.

4. The First-tier Tribunal considered the guidance given by the Upper Tribunal in *Azim*i-*Moayed & Ors* (decisions affecting children; onward appeals) Iran [2013] UKUT 197 (IAC), by the Court of Appeal in *EV (Philippines) & Ors v Secretary of State for the Home Department* [2014] EWCA Civ 874, and by the Supreme Court in *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74. The Judge had regard to the best interests of the children, in particular the oldest child who is a British citizen now.

5. The First-tier Judge found that, contrary to the evidence given, it was most unlikely that the children spoke no Urdu because the parents speak Urdu to each other in the home even now and the older child's school report said he was developing a good understanding of the English language and that his spoken English was progressing. The judge found as a fact that the first language of the child was Urdu.

6. The First-tier Judge also found that, despite a claimed family rift about the marriage, the second appellant had returned to Pakistan in 2008 or 2009 (before her leave to remain expired) to visit her family, and had taken the third appellant with her. The first appellant had been unable to accompany them, because by that time he was not lawfully in the United Kingdom. The first appellant is not currently working but he is a butcher and that is a transferrable skill. The first appellant has a number of uncles and aunts in Pakistan and the second appellant has a brother and sister there who are the uncle and aunt of the third and fourth appellants. At paragraph 40 the judge concluded that the transition to life in Pakistan however great an upheaval at first would be manageable both practically and financially.

## Permission to appeal

7. The grounds of appeal are almost incomprehensible: to the extent that anything can be derived from them it is summarised in the grant of permission at [3]:

> "2. The appellants are citizens of Pakistan the first and second appellants are husband and wife and the remaining appellants are their children. As noted in the determination the child R was born in the UK and was a qualifying child who had been in the UK for over seven years and the issue under Section 117B(6) was the issue of reasonableness.
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> 3. … However the point that can be gleaned from the grounds is that the judge failed properly to apply the correct test relating to reasonableness of return set out in *MA (Pakistan*), where the Court of Appeal recognised that when a child was a qualifying child because he or she had been in the UK for seven years or more that was a matter which must be given significant weight (at [49]). Furthermore whilst at [45] Elias LJ made reference to the court having regard to the conduct of the applicant and any other matters relevant to the public interest, when considering the question of reasonableness under Section 117B(6) he pointed out that in order to outweigh a child's best interests in determining whether it would be reasonable to expect the child to leave the UK if the child's best interests were such that there must be a 'powerful' or 'strong' reasons [sic] why leave should not be granted for the reasons set out by him at [46]. It is arguable that the judge failed to apply that in the circumstances of the appellants. Also see *MT and ET* (child's best interests: extempore pilot) Nigeria [2018] UKUT 88 (IAC)."

8. That is a relatively generous grant of permission. The basis of the appeal to the Upper Tribunal is limited to the reasonableness of removing these children with their parents, given that they are young, that they speak Urdu, that they have family members in Pakistan, and that their parents are removable, but for the children's best interests.

## ***KO (Nigeria)***

9. The First-tier Judge did not have the benefit of the guidance given by the Supreme Court in October 2018 on the proper approach to the reasonableness test: see *KO (Nigeria*) *v Secretary of State for the Home Department (respondent)* [2018] UKSC 53, in particular at paragraphs [17]-[19] in the judgment of Lord Carnwath JSC (with whom Lord Kerr JSC, Lord Wilson JSC, Lord Reed JSC and Lord Briggs JSC concurred):

> "17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is 'reasonable' for the child. As Elias LJ said in *MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber)* [2016] EWCA Civ 705, [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. …

18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. 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. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245:

> "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …"

19. He noted (para 21) that Lewison LJ had made a similar point in considering the 'best interests' of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, para 58:

> "58. 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?"

To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves."

10. The 'real world' in this case is that the first appellant, the children's father, has not had leave to remain since 2007 at the latest, that the second appellant, their mother, has not had leave to remain since 2010 and that absent the question of the children's best interests, they are both in the United Kingdom without leave and are removable.

11. There is no evidence of any particular difficulty for any of the children, nor any indication that on the facts found, it would not be reasonable for these children to travel to Pakistan and live there with their parents.

**Decision**

12. Professor Rees accepted at the hearing that in the light of *KO (Nigeria),* the First-tier Judge's approach was unarguably correct. There is no material error of law in his decision.

13. Accordingly, the appellants' appeal is dismissed and the decision of the First-tier Tribunal upheld.

**Conclusions**

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Signed Judith AJC Gleeson
Upper Tribunal Judge Gleeson

Date: 10 January 2019