Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/26256/2016
HU/26259/2016
HU/26261/2016
HU/26264/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 22 January 2019	**On 12 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

UZMA [R] – 1st Appellant
MUHAMMAD [Z] – 2nd Appellant
AR – 3rd Appellant
IR – 4th Appellant
(Anonymity order not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Brown of Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are all citizens of Pakistan. The first Appellant who I shall refer to as the Appellant was born on 1 January 1977. She is married to the 2nd Appellant who was born on 3 December 1978 and they are the parents of the 3rd and 4th Appellants who were born on 3 October 2007 and 11 January 2010 respectively. They appeal against a decision of Judge of the First-tier Tribunal Telford sitting at Hatton Cross on 8 March 2018 in which he dismissed the Appellants' appeals against decisions of the Respondent dated 21 November 2016. Those decisions were to refuse the Appellants' applications for leave to remain under Appendix FM, paragraph 276 ADE of the Immigration Rules and Article 8 (right to respect for private and family life) of the Human Rights Convention.

2. The Appellant entered the United Kingdom on 4 February 2008 with entry clearance as a dependent to join her husband the 2nd Appellant. The Appellant made 2 unsuccessful applications first as a dependent on her husband's Tier 1 application on 10 July 2009 and secondly for an EEA residence card on 3 July 2012. A further application for an EEA residence card made on 21 January 2014 was refused on 17 March 2014. On 19 May 2016 the Appellant applied for leave to remain in the United Kingdom on an FLR(FP) application form. It was the refusal of this application which led to the present proceedings.

The Appellants' Case

3. The Appellants' case at first instance was that it was unreasonable to remove the children who had been in the United Kingdom for more than 7 years and were in education. The adults had entered the United Kingdom in order to remain temporarily only while their visa for study was utilised. The Appellant joined her husband the 2nd Appellant in 2008 accompanied by the 3rd Appellant. The Appellant expressed concerns that the 3rd Appellant would suffer upon return to Pakistan with migraine problems because of the heat in that country. Sadly, the family lost a child and removal, they argued, would affect their ability to visit the grave of their child every week. They did not have many links to Pakistan and they relied on the report of an independent social worker Mr Charles Musendo who had visited the family.

The Decision at First Instance

4. At [10] of his determination the Judge set out what he understood to be the issues in the case. Could the Appellants satisfy the 10-year route for private life based on the unreasonableness of removing qualifying children? Were the children's best interests only served by remaining in the United Kingdom? Was the decision to remove proportionate and properly made? Were there any very compelling and compassionate circumstances which could cause the appeal to be allowed outside the rules?

5. At [20] Judge Telford indicated he did not find the Appellants entirely credible. He found there had been a great deal of exaggeration and hyperbole employed by both adult Appellants. The claim not to have many links to Pakistan was false. The family had relatives and many friends. They had a history of hard-working in education and employment. The adults had admitted that they planned to remain unlawfully in the United Kingdom in order to advance the case so that their children could obtain the benefit of a United Kingdom education.

6. The Judge was not impressed with the report of the social worker analysing it at [23] to [28] noting that there were three visits in the space of six days totalling 7 ½ hours. This was too short a time span for the expert to present his findings as reliable (see [27]). The Judge was also concerned about the nature of the questions put to the expert in instructions indicating some were not appropriate. It was not the expert's job to decide whether it was in the best interests of the 3rd and 4th Appellants to be removed from the United Kingdom. That was a matter for the Judge.

7. Analysing how the children would cope upon relocation he found that the parents could explain to the children that their homeland was in Pakistan and the parents could conversed with the children in their mother tongue. The family were able to move around the world with relative ease and there would be no insurmountable obstacles to the family thriving in Pakistan (see [30]). Whilst it was very sad that the family had lost a child there was no any evidence of any of the Appellants suffering morbid grief or any psychiatric report dealing with a high level of psychological harm. Whilst this was a personal tragedy the children seemed able to work well in school. The Appellants could not meet the rules but when considering the matter outside the rules the public interest did not require that the Appellants be granted leave. He dismissed the appeals.

The Onward Appeal

8. The Appellants appealed against this decision arguing that the Judge had misunderstood what the issues were. The starting point where there was a 7-year qualifying child case was the Court of Appeal decision of **MA Pakistan [2016] EWCA Civ 705**. It was not reasonable to expect that child to leave the country unless there were strong reasons why it was appropriate to do so. In this case the length of residence was more extensive as the 3rd Appellant had lived in the United Kingdom for more than 10 years and the 4th Appellant was born in the United Kingdom and had spent more than 8 years here. There was no legitimate public interest in removing the parents of a child who had spent more than 7 years in the United Kingdom if it was not reasonable to expect that child to be returned to Pakistan.

9. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Parkes on 8 August 2018. In refusing permission to appeal he wrote: "The grounds argue that the Judge had not considered the question of integration and had not addressed section 55 [of the Borders Citizenship and Immigration Act 2009] adequately. For example, it is argued that the children would

have to pass tests in Urdu to enter a school in Pakistan, there is no evidential basis for that assertion and it is not clear why the children have not or could not learn what is their parents' first language to that standard. As drafted the grounds are a lengthy disagreement with the decision, long on assertions but without engaging with the decision that the Judge made. As drafted they do not disclose any arguable errors".

10. The Appellant's renewed their application for permission to appeal to the Upper Tribunal on similar grounds to the application made to the First-tier. Deputy Upper Tribunal Judge Hutchison granted permission to appeal on 30 November 2018 noting that although the Supreme Court had now given guidance on the correct approach in **KO Nigeria [2018] UKSC 53** was arguable that the Judge had failed to address the salient issues in the appeal including that the 2 minors were qualifying children. The Judge arguably did not apply the correct tests as identified in the grounds including failing to adequately identify where the best interests of those children lay. The consideration at [12] and [31] was arguably approached from the wrong standpoint and inadequate. The Judge had not considered whether it was reasonable to expect the children to leave the United Kingdom taking into account the length and quality of their private lives here.

The Hearing Before Me

11. In consequence of the grant of permission the matter came before me to determine in the first place whether there was a material error of law in the decision at first instance. If there was the decision would be set aside and I would make directions for the rehearing of the appeal. If there was no material error of law then the decision at first instance would stand.

12. At the outset the presenting officer argued that the skeleton argument now put forward by counsel (who had not appeared below) was seeking to raise matters which were not argued in the grounds of onward appeal. Counsel for the Appellant disputed this (see paragraph 23 below for example). She relied on her skeleton argument which began with an application for an anonymity order (which had not been made at first instance).

13. The skeleton submitted that the two children were qualifying children and relied on the decision in **MA Pakistan.** It was a factor of some weight leaning in favour of leave to remain being granted that the children could satisfy the 7-year rule. The Judge had failed to make a lawful public interest assessment under section 117B (6) the 2002 Act. It was relevant that all the Appellants could speak English and were not financially dependent on the state. **KO Nigeria** had made clear that the question was what was reasonable for the child. There was nothing in section 117B(6) to import a reference to the conduct of the parent. To the extent that the Judge had taken into account wider public interest considerations and/or the conduct of the 1st and 2nd Appellants the determination was legally erroneous.

14. The 2nd ground argued that the Judge's conclusion that all Appellants would travel together to Pakistan might not be incorrect, but it was demonstrative of a legally erroneous starting point. [35] of the determination was difficult to understand.

15. The 3rd ground argued that the Judge had failed to make an adequate best interests' assessment. Those best interests were a freestanding factor and should properly be assessed before the proportionality balancing exercise was carried out. Powerful reasons were required to support a decision which was made contrary to a child's best interests. Relevant evidence had not been considered by the Judge which included a letter from the Deputy Head Teacher at the children's primary school. There were other letters of support which noted the children would be deeply shaken and psychologically affected if they had to leave the United Kingdom.

16. Citing the factors listed in the case of **EV Philippines** the grounds argued the children had become distanced from Pakistan since the 3rd Appellant had arrived in the United Kingdom at age 4 months and the 4th Appellant had never been to Pakistan. There were letters from the children which the Judge failed to give due weight to. The Judge had failed to provide any adequate reasons powerful or otherwise as to why the best interests of the children did not lie in them remaining in the United Kingdom.

17. In oral submissions counsel repeated the contents of her skeleton argument. I queried with counsel what weight should be placed on the observation in **KO Nigeria** that the natural expectation where parents remained in the United Kingdom without leave would be that they would leave the United Kingdom and the children would be expected to go with them. Counsel argued that this was to take the observation of Lord Justice Carnwath out of context. If the argument about natural expectation was correct it would lead to every child leaving the United Kingdom when their parents did not have leave to remain. **KO** had post-dated the decision of the First-tier Tribunal, but Judge Hutchinson had referred to it when granting permission to appeal.

18. Judge Telford had stated that all the Appellants would travel together but in the case of an overstayer they would always be travelling together. It was a misdirection by the Judge to say the children were not so integrated they could not travel to Pakistan. Very significant obstacles or hardships were not part of the relevant test when assessing the impact on the children of removal. Counsel referred to the letters in the Appellants' bundle which were referred to in the grounds. Whilst it was not argued that whatever the children said was determinative, the Judge should have taken the letters into account. Whilst not every single piece of evidence had to be referred to, in this case none of that evidence was referred to. There was thus not a lawful assessment of the children's best interests.

19. I observed at this point that the Appellant had submitted a 535 page bundle for the hearing at first instance and it was somewhat impractical for the Judge to be expected to refer to each and every document in that bundle in his determination.

Counsel replied that there was an index to the bundle which could reference the relevant documents.

20. For the Respondent it was argued there was no material error of law, the Appellants were simply seeking to reargue the appeal. The parents had had no leave since 2009. They had arrived in the United Kingdom on a temporary basis with the expectation that they would leave but they did not. What was being argued now in the onward appeal was not what was argued before the First-tier Tribunal. What had to be considered was a real-world scenario. The family would be removed as a unit. The Appellant argued that she wished to have a good education for the children, but the United Kingdom could not be expected to educate the world as had been pointed out in **EV Philippines**. The Judge had not found the parents to be credible regarding the situation that would await them upon return to Pakistan.

21. The Judge had acknowledged the ages of the children and their best interests. The argument put forward in the First-tier Tribunal was whether the children would enjoy the level of education in Pakistan they could have in the United Kingdom. Relevant evidence regarding the impact on the health of the children had not been put forward. At [19] the Judge said even if a rules-based claim had been made on the basis of lawful residence in the United Kingdom the family would still not have been able to succeed. That had not been challenged. There had been no criticism of how the Judge has assessed the expert's report.

22. It was not a material error if the Judge did not refer to each and every piece of evidence. The submission being made by the Appellant was simply that the Judge should have given more weight to some of the documents in the bundle than had been given. At [31] the Judge had referred to section 55 of the 2009 Act and dealt with best interests. There was nothing wrong with that paragraph. The Judge had made findings which were open to him on the evidence.

23. In conclusion counsel argued that [2] of the determination referred to paragraph 276 ADE (1) (vi), insurmountable obstacles to return but that was not relevant in this case. In only applied to adults. There was no reference to qualifying children in the determination. The skeleton had not referred to the expert's report because it limited itself to what was in the grounds which permission had been granted. In the event that the determination was set aside the case should be remitted to the First-tier to be heard again.

Findings

24. This is a reasons-based challenge to the Judge's determination that it was reasonable to expect the 3rd and 4th Appellants to leave the United Kingdom with their parents. The core of the Appellant's argument is the Court of Appeal decision in **MA Pakistan** that absent criminality on the part of the parents, powerful reasons are required before it could be reasonable to expect a qualifying child to leave the United Kingdom. In this case both children are qualifying children since both have been here

for more than 7 years although neither are British citizens. The Supreme Court gave guidance on the application of the reasonableness test when considering the position of qualifying children in the case of **KO**. The Supreme Court emphasised the need for "a straightforward set of rules" and that the purpose of their approach in **KO** was "to narrow rather than to widen the residual area of discretionary judgment".

25. There were three appeals before the Supreme Court, one of which **NS** is particularly relevant to the issues raised in the instant appeal before me. It was not a deportation case and thus the public interest did not require the adults' removal because they had a subsisting parental relationship with the qualifying children (one of whom was more than 10 years old as is one of the children in this case). The Upper Tribunal had recognised that the children would lose much if they and their parents were removed and further the children had no knowledge of life outside the United Kingdom. Their best interests were to remain in the United Kingdom. Nevertheless, the Upper Tribunal considered it outrageous for the parents to be permitted to remain in the United Kingdom.

26. At [51] of **KO** Lord Justice Carnwath (giving the judgment of the whole Court) did not consider that the Upper Tribunal's disapproval of the parents' conduct was relevant to its conclusion under section 117B (6) of the 2002 Act. The parents' conduct was only relevant to the extent that it meant that they had to leave the country. It was in that context that it had to be considered whether it was reasonable for the children to leave with them. The children's best interests would have been for the whole family to remain in the United Kingdom but in a context where the parents had to leave, the natural expectation would be that the children would go with them. Importantly he added: "there was nothing in the evidence reviewed by the Judge to suggest that [removal] would be other than reasonable". As a result, the appeal of NS was dismissed.

27. In the light of the decision in **KO** it is clear that the appropriate test in this case is whether there is a natural expectation that the 3rd and 4th Appellants should go with their parents neither of whom have leave to remain. The poor immigration history of the adults, overstaying by several years, is only relevant to the extent that it sets the scenario in which the reasonableness test is to be assessed. It is clear from a fair reading of the determination that the principal issues in the case at first instance were the reliance by the Appellants on the expert's report that had been commissioned, the concern at the effect on the health of the 3rd Appellant if he were to return to Pakistan and whether there were significant links to Pakistan which would enable the parents to relocate without insurmountable obstacles and would enable the children to adapt to life there.

28. The Judge considered whether the 3rd and 4th Appellants would suffer harm if the family relocated to Pakistan, see [13] for example. He noted that there was no right to an absolute level of education in the United Kingdom a point which had been made in **EV Philippines**. The need for the children's education to continue in this country

was considered but rejected by the Judge for the cogent reasons he gave. Whilst it is correct he did not refer in terms to the letters of support in the unwieldy bundle supplied by the Appellant's previous representatives at first instance, it cannot be said that the Judge was unaware of the points being made.

29. Although it was submitted to me that powerful reasons were required before it could be said to be reasonable that the children should travel to Pakistan, had the Judge decided the case on that basis it would have been a material error of law. This is because **KO Nigeria** rules out a balancing of the adults' poor immigration history and the best interests of the children. **KO Nigeria** adopts a simpler approach which is to look at the real-world scenario. The Supreme Court were concerned in **KO Nigeria** that different decisions were being taken by appellate Courts and Tribunals when assessing the reasonableness test. There was a need for consistency. The Judge heard this case on 8 March 2018 before **KO Nigeria** was promulgated. It nevertheless applies because the common law applies retrospectively.

30. Neither of the adults had leave to remain and would be expected to return. The Judge was well aware that the children had been resident in the United Kingdom for seven or more years (and thus by implication were qualifying children) making a number of references to that very point at [4] and [10] for example. At [16] the Judge referred to it being reasonable for the family to return as a whole unit to Pakistan. That was the real-world context in which the assessment of reasonableness had to be carried out.

31. It was not necessary for the Judge to set out each and every piece of evidence although if there was correspondence which was considered to be of particular importance, it would have been of assistance if the bundle had been made smaller and more emphasis on those documents had been made. It is not correct that the fact that the Appellants speak English and are not financially dependent on the state are factors in their favour. The jurisprudence on the point is clear, they are factors against Appellants if Appellants do not speak English or are financially dependent they are not a positive factor if they are satisfied.

32. At [35] the Judge stated that the public interest required that the Appellants should not be granted leave. Whilst this might be questioned on a stylistic basis, the import of the paragraph is clear, there was a legitimate aim in the removal of the Appellants because the adults had overstayed and that was relevant to the Razgar questions when assessing the proportionality of the claim outside the Rules.

33. The grounds argued that the psychological effect on the children of leaving the United Kingdom would be serious. The reference to the children being deeply shaken and psychologically affected was contained in the adults' witness statements. The Judge no doubt had this point in mind when at [20] he referred to "a great deal of exaggeration and hyperbole employed by both the 1st and 2nd Appellants". The Judge rejected the claim that the Appellants should remain in order to grieve and there was no specific appeal against that finding.

34. A fair reading of the determination indicates that the Judge was aware of the issues raised by the Appellants and dealt with them. The grounds of onward appeal in this case as amplified by the skeleton argument and counsel's oral submissions amount to no more than a lengthy disagreement with the findings of the Judge which were open to him on the evidence. I do not find there was any material error of law in the First-tier Tribunal determination and I dismiss the Appellant's onward appeals.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellants' appeals

Appellants' appeals dismissed

I make no anonymity order as there is no public policy reason for so doing. The application for an anonymity order was made on the basis that the 3rd and 4th Appellants who are minors should have their identities protected. In my view this can be adequately achieved by referring to them by initials and by reference to them in the body of the determination as 3rd and 4th Appellants.

Signed this 4th February 2019

…….
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeals and therefore there can be no fee award.

Signed this 4 February 2019

…….
Judge Woodcraft
Deputy Upper Tribunal Judge