IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/33344/2014
IA/21184/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 February 2016	**On 3 May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAMAILA ASHRAF
MUHAMMAD BIN ASHRAF
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondents: Dr Morgan, instructed by Morgan Mark Solicitors

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-Tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

1. The Appellant in this appeal is the Secretary of State and the Respondents were the Appellants before the First-tier Tribunal. For the sake of clarity I refer to the Appellant in this appeal as the Secretary of State and the Respondents as the Claimants respectively.

2. The first Claimant is the mother of the second Claimant. She is a national of Pakistan as is her son. They arrived in the United Kingdom in March 2010 and she had entry clearance to accompany her parents valid from 11 June 2008 until 11 June 2010. The second Claimant had a visa to accompany her for two years. On 18 May 2010 the first Claimant made an application for further leave to remain. That application was refused and her appeal was heard by Immigration Judge Gillespie on 17 November 2010. The appeal was dismissed. On 11 May 2012 the first Claimant made a further application for leave to remain on the basis of her rights under Article 8 ECHR. On 19 May 2013 her application for judicial review was compromised by way of a consent order in which the Secretary of State agreed to reconsider her application. The application was refused on 19 August 2014.

3. The Claimants appealed against that decision and the appeal was heard by First-tier Tribunal Judge George who allowed their appeals in a decision promulgated on 1 April 2015. She allowed the appeals under Article 8 of the European Convention on Human Rights. The Secretary of State took issue with that decision and sought permission to appeal on the basis that the judge failed to consider the Immigration Rules as an expression of the views of the Secretary of State and adopted a haphazard approach towards Section 117. It was also said that the principles set out in **EV (Philippines) & Others v Secretary of State for the Home Department** [2014] EWCA Civ 874 were not properly applied and that the judge failed to have regard to the guidance of the Tribunal in **Azimi-Moayed & Others** with regard to the best interests of the child. The fourth ground is that the judge failed properly to make findings in accordance with the case of **Devaseelan v Secretary of State (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka** [2002] UKIAT 00702.

4. Permission to appeal was granted by First-tier Tribunal Judge Cruthers on the basis that arguable errors of law had arisen in relation to the alleged failure of the First-tier Tribunal to factor into the assessment whether the appeals could have succeeded pursuant to the new Rules. It was also considered arguable that the First-tier Tribunal had erred in disregarding the first Claimant's immigration history in the assessment in relation to the second Claimant.

5. The case came before the Upper Tier Tribunal in order to establish whether or not there was an error of law in the decision of the First-tier Tribunal. The hearing took place on 28 September 2015. I determined that there was an error of law in the decision of the First-tier Tribunal. My findings were at [26] to [30]:

"26. The first Claimant entered the UK on 6 March of 2010 and her visa was valid until 11 June 2010. The second Claimant also had a visa which was valid for two years. It is not clear from the papers when exactly it expired although I note the Judge Gillespie stated it was in mid-2012. The first Claimant made an application for leave to remain on 18 May 2010 which was refused on 6 August 2010. She appealed in time and her appeal was dismissed on 17 November 2010. She did not apply for further leave to remain until 11 May 2012. Hence since the expiry of her leave under section 3C of the 1971 Act on 18 January 2011 she has been here unlawfully. In AM (S 117B) Malawi [2015] UKUT 0260 the Upper Tribunal held that a person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave. It is clear therefore, that the Claimants private lives in the UK were established whilst they were here either unlawfully or precariously. The Judge was obliged therefore to have regard to the considerations in section 117B (4) and (5) and did not do so. The Judge did not identify and analyse the provisions concerned. It is not possible to infer that it was conducted. The Judge refers at paragraph 38 of the decision that the first Claimant was an overstayer but concludes that because she was actively seeking lawful leave this was not to be regarded as a "countervailing consideration of sufficient force to outweigh the detailed factors" to which she had already referred. There was no acknowledgement in this passage or otherwise that the entirety of the Claimants' private life in the United Kingdom was established during a period when their immigration status was precarious or unlawful. This was clearly a material error of law because had the Judge properly applied the relevant provisions and conducted the required exercise she would have been obliged to find that little weight should be accorded to the Claimant's private lives.

27. Grounds 2 and 3 can be dealt with together as they relate to the First-tier Tribunal's analysis of the best interests of the second Claimant. Ground 2 asserts that the First-tier Tribunal did not assess the best interests of the child in the context of the proper factual matrix, namely that the first Claimant did not have the right to remain in the UK. Ground 2 asserts that the First-tier Tribunal erred in failing to have regard to the young age of the second Claimant in the proportionality exercise.

28. It is clear from the consistent jurisprudence of the higher courts that the best interests of a child are an integral part of the proportionality assessment under article 8 ECHR and a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent (ZH (Tanzania [2011] UKSC4, Zoumbas v Secretary of State for the Home Department [2013] UKSC 74)). Further, the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent (EV (Philippines) and others v Secretary of State for the Home Department [2014] EWCA Civ 874).

29. The First-tier Tribunal stated at paragraph 37, in considering the second Claimant's best interests, "the fact that the second appellant is in the UK unlawfully is not his making and I have taken that into account when coming to this conclusion". I do not consider this to be a misdirection in the light of the case law summarised above. The Judge is, as I understand it, stating that the second Claimant is not to be blamed for his adverse immigration history in an assessment of his best interests. That is a correct statement of the law.

30. However, in failing to acknowledge that the new Rules should be given greater weight than as merely a starting point for the consideration of proportionality and in further failing to find that little weight should be accorded to the Claimants' private lives, the Judge did not give proper weight to the need to maintain immigration control in pursuit of the economic well-being of the country. The Judge did not assess whether it was reasonable to expect the second Claimant to follow the first Claimant to the country of origin applying the proper public interest considerations."

The Hearing

6. At the resumed hearing I received documentation in the form of a further bundle from the Claimants, a re-amended chronology and skeleton arguments from Dr Morgan and Mr Melvin. I heard evidence from the first Claimant and her mother which I summarise here.

7. Dr Morgan called Ms Ashraf and she adopted her witness statements in the Claimants' bundles. She said that she was aware that her family were hoping to settle in the United Kingdom in 2006 and 2007 and she did not want to come with them because she was in love and wanted to stay with her boyfriend. She met him in college and decided to marry but their families were against it and they decided to run away from home. Her boyfriend did not seek the approval of his family and it was hidden from both their families. She did not know anyone else in Pakistan who had done this. It was a love marriage. Her husband had his own business. She did not study after the marriage but got pregnant and gave birth to the second Claimant. Her husband was happy when the child was born but not so after that. The marriage went bad because there was fighting between them and things went downhill. He said he wanted to go back to his parents and his parents said that he had to leave her. Her husband had never said that he wanted to come to the United Kingdom. He arranged for the second Claimant's visa and there was no lawyer involved. They had agreed that he would say to the High Commission that he would support her and that she had sole responsibility for the second Claimant. She had advice from her uncle in the United Kingdom. There was no discussion about the divorce in Pakistan. When she came here her husband completely cut off. She was never interviewed by the High Commission but had seen the application before which included a court document which was at pages 7 and 8 of the bundle. Her husband did not say there that the relationship was over. Dr Morgan asked what the relationship was with her husband in the United Kingdom and she said she told him that she would go back if she did not get the visa. She had wanted him to say that the relationship could continue if they would went back but he said nothing. Her son needed a dad and her husband did not care about her when she came to the United Kingdom. There was no contact at all.

8. At the hearing in November 2010 she was represented by a barrister. She did not give evidence but there was a witness statement. If she had been

asked in 2010 how her marriage was she would have said that everything was fine. It was put to her that Immigration Judge Gillespie thought her husband was waiting for her in Pakistan to take her and the second Claimant back and she was asked whether that was correct. She said that was not right. When she gave evidence before Judge George she was represented by a barrister. She was asked about the marriage and she told that court what she told this court. Her barrister and the Home Office representative asked her about her husband. The second Claimant was 11 months old when she brought him here and he was now nearly 7 years old. She was living with her uncle and all her family were living with her uncle when they arrived. Since her mother got a house she was living there with her parents. She and her parents looked after the second Claimant. Her father was working in a factory. She was not permitted to work but would if she could. Her sister and brother were working in a factory. Dr Morgan asked if she was to return to Pakistan how she would see herself looking after second Claimant. She said if she did not have family it was not alright. All her mother's family were in the United Kingdom. She had lived in Faisalabad when in Pakistan but had not lived anywhere else. She had never lived away from her parents before and had never lived on her own.

9. Mr Melvin in cross-examination asked whether all of her mother's seven sisters and brothers lived in the United Kingdom and she said they did. She said her father was an only child and her father did not have extended family and her mother's family was all in the UK. They all lived in Thetford. There were five sisters and two had passed away and the brothers were still alive. Nobody had gone back to Pakistan and she said that her mother had returned last year for a holiday. Her father also went and they stayed at a hotel in Faisalabad visiting friends, maybe her dad's friends. They did no other travelling and she did not know whether they had visited any other friends.

10. She and her husband were married in a courthouse and her husband's friend was the only witness. Before marriage she was studying business and accountancy. She did not complete accountancy but did complete a computing course. She did not return to college after the marriage. After the marriage they lived in a rented room and the address was on the application. She was married for two years before coming to the United Kingdom and never met her husband's family. Her husband's family were not aware that they got married. When asked how he managed to keep that secret for two years she said it was only after they argued that he told them. He told them that they were married after her son was born which was after a year. She told her parents about the marriage in August and she had married in June. She was asked where she thought they were between June and August 2008 and she said that they did not know where she was and took her passport with them to the airport and sent it back to her. She was asked if her parents were not concerned and she said yes, they made a complaint to the police to look for her. She was asked whether her parents went to the college to ask about her boyfriend and she said that when she came to the United Kingdom her father told her

that he had made a complaint to the police. It was put to her that it was hard to believe that her parents would have gone to the United Kingdom whilst she was missing. She said that they decided to leave her and after two months they started searching again.

11. She had never worked in Pakistan and she had not spoken to her husband for five years. She had tried to contact him but his number went dead. It was a home number and that was answered and she was told that he had left and that was in January 2011. She had had no contact since then and could not contact his parents because she did not know where they lived or had their phone numbers. It was put to her she could have made enquiries and she said she did not know his friends. The person who had come to court as a witness, she did not have his number. It was put to her that her husband's friends could have given her the contact details and she said that she did not know his friends and whilst she was in Pakistan the only people who had been with the child were him and her. She was a housewife. She was asked what she had done since arriving in the United Kingdom and she said nothing, she just sat at home and had taken her son to school. Mr Melvin put it to her that she had "inserted" herself in the United Kingdom and she said she could not get a job because she had no visa. She could not continue with the accountancy training because she had not got a visa and had not gone back to college for the same reason. She done no voluntary work or had acquired no skills since coming to the UK.

12. When she came to the UK she came on a child dependent visa and it was put to her she was not dependent on them and had not been for two years. She agreed with that. It was then put to her that she deceived them or deceived the immigration authorities and she said that that was not right. When she came here the Immigration Officer saw everything. It was put again to her that she deceived the Immigration Officer and she said she did not know the law. It was put to her that the true situation was that she was dependent on her husband and she said when she applied for extension she was dependent on her husband. She was asked whether there was any reason her family could not assist her on return and she said that they had their own families and they had their own life here. She was asked why her father could not support her in Pakistan and she said because he had bills and expenses here. She could not work there because she had a son and she asked who could drop him off at school and bring him back. She said she could not do that, as a single mother in Pakistan she could not work, she had no skills and had not completed her studies. She had no medical difficulties.

13. In re-examination it was put to her that she said she was married in June 2008 and had told her friend and the judge that it was August that she telephoned. She was asked why she telephoned and she said it was because she was pregnant she thought her parents were worried about her. When she called Pakistan they were not there. She called her uncle. Her mother was angry at first and then after she told her what happened she said she was happy if the Claimant was happy. She had arrived in

Heathrow when she came to the United Kingdom and the Immigration Officer asked her where she was going but she was not asked any more questions than that.

14. Her mother, Mrs Noor gave evidence and said she was born in Kenya. She adopted her witness statement. Her family became connected to Kenya because her father married and that is how she came there. All her brothers and sisters were born in Kenya and she had British nationality as did her brothers and sisters and they all lived in Thetford. She brought her husband and children over when she gained British citizenship and only left the Claimant behind. She did know that the Claimant had a boyfriend at college and learnt that when they were about to come to the UK. The Claimant disappeared. They reported that to the police and she realised that she had gone to her boyfriend. She had told her that she got married after they arrived in the United Kingdom and that she was pregnant. Her view was that that was fine so long as she was happy. She had had a conversation with her husband on the phone but did not remember the date. They did not discuss anything except that they had married. The Claimant's passport was left with her aunt in Pakistan when the family came to the United Kingdom. It was her husband's sister in Faisalabad. The aunt then gave the passport to the Claimant. The Claimants came to live with in the United Kingdom. The Claimant applied for an extension of leave in the United Kingdom which was refused three times. She had not had contact with her husband and did not talk to him. If her husband had asked her to go back she would have said that she should go. The second Claimant was looked after by the first Claimant, her mother and her father. Mrs Noor dropped him off at school and collected him. Sometimes that was her and sometimes it was her daughter that did that. They both did the cooking and they both did the cleaning.

15. Mr Melvin asked how many brothers and sisters Mrs Noor's husband had and she said none. He asked who the aunt was with whom the passport was left with when they came to the United Kingdom and she said it was her sister. It was put to her that she had previously said it was her husband's sister. She said the relationship was like sisters. She was asked who she left the passport with when she came to the United Kingdom. She said it was her sister and before coming here she gave the passport to her daughter. She said that her whole family was here and there was only the Claimant in Pakistan but now she had arrived. Her sister came two years ago. Before coming to the United Kingdom she knew that her daughter had a boyfriend. They did not name the boyfriend when they contacted the police because they did not know his name. She could not recall her daughter studying in Pakistan and said that since she had arrived here she had done nothing. Mrs Noor had returned once to Pakistan on holiday. The dates were in her passport. It was last year. She thought it was for two weeks. It was put to her that her daughter had said a month. She said it was on the passport. She had stayed with a friend. It was put to her that her daughter said it was her husband's friend. She said a friend of a friend. When the Claimant came to the United Kingdom she lived at her sister's house and Mr Melvin said that he thought that her

daughter's husband rented the house. Mrs Noor said that she came first to her sister and then the property was rented. After leaving the sister's house she was living with her. She could not recall exactly when she moved in but it was when her son started going to school. Sometimes she lived with one sister and sometimes the other sister and then she came to her. She resided rent free. Now she lived with her and her grandchild. Whether she continued to live there would depend on the decision whether her son got status and if he did she would get a job and she would rent a property.

16. The first Claimant could not go to Pakistan because she had no one to live with. She could not survive in that environment. Mrs Noor's grandson was attached to her and the circumstances in Pakistan were not good. She did not want her grandson to go. She was worried about them. She had no contact with the husband in Pakistan and they tried their best to find the family's whereabouts but there had been no contact at all. Her daughter had been living in a rented house. They had not asked the lawyers to find their daughter's husband. They tried their best, they could not find him, he had disappeared and he had no connection with her. When she had arrived here she had a telephone conversation but after that there was no contact and the father heard the voice of her grandson crying and there was no connection after that. She was asked how many months after his arrival he stopped contact and she said when her daughter arrived she had a phone call but after that there was no contact, he did not know his whereabouts.

17. On re-examination she was asked what she meant when she had given evidence that she was not mentally present and she said she felt giddiness due to tension and when she was at home she had to lie on her bed and could not remember things that had happened in the past. They had left her daughter's passport in Pakistan. She said when asked it was her husband's sister because they called her sister and she had already said her husband was an only child. If the first Claimant's husband asked her to go back she would take the view that it was a matter between them.

18. In submissions Mr Melvin relied on the refusal letter of August 2014 and his skeleton argument. He said it was accepted that the Rules could not be met in relation to Appendix FM and if there were compelling circumstances outside the Rules only then should there be a consideration of Article 8 ECHR. He had grave concerns in relation to the claims made in this matter. Firstly, the first Claimant had given evidence that the passport was sent by her parents to Pakistan. That was untrue because the mother said it was with her sister. The other points he had concerns about was the contact with the husband and the evidence in that regard. It was unclear from the evidence if there was still contact when that contact ceased to exist and of greater concern was the apparent lack of interest. His submission was that it would be relatively straightforward to get hold of the husband as the Home Office were provided with full details of him in relation to a divorce which may take place. She had given evidence that she arrived with her mother. The first Claimant had resided

with various family members and when pushed on the point she said she had difficulties with memory. Her evidence was untruthful as to the facts of the case. The child was 6 years old and arrived at the age of 1 and attended primary school. The Tribunal should not consider the fact that the child was in reception class meant that the mother should be able to "piggy back" on the back of his education.

19. The first Claimant has attended computer classes and was fully educated up to the age of 19. Since arriving in the United Kingdom she had done nothing to better herself in terms of education or make efforts to contribute to the United Kingdom through charity work or assisting. She had installed herself in making an application and another application culminating in today's hearing. When presenting her passport to the Immigration Officer at Heathrow Airport she was supported by her husband and was not dependent on her parents when arriving in the United Kingdom. She had entered on a dependent visa. She was educated and could obtain work and live independently in Pakistan. He did not accept that all the family members were in the UK. He had great concerns in relation to her claim that her husband's family did not assist in the year after the birth of their child. Taking all those points into account he asked me to find that the facts of the matter were not sufficient to show that there were compelling circumstances and that discretionary leave should not be granted. With regard to Section 117 her leave had always been of a precarious nature and could not assist her. He asked me to dismiss the appeal.

20. Dr Morgan asked me to accept that she was entitled to protection under Article 8 and that the second Claimant could avail himself of the same rights and particularly in relation to Section 55. With regard to the mother's visits to Pakistan the dates in her passport were from 7 to 27 January and the witness should be believed. That was the view of the First-tier Tribunal Judge George and First-tier Tribunal Judge Gillespie never said that he did not believe her evidence. The grandmother could not understand why we could not understand that her sister was also her husband's sister. In Pakistan, for a young woman and a young man to defy their families was an exceptional thing to do and Ms Ashraf was an assertive person who made the decision as a young woman to defy her parents and convention and her husband did the same thing. It was not long before regret set in and he appeared to have regretted it and the appearance of the second Claimant played both ways. Ultimately he appeared to have abandoned his wife and child. There was one payment that he made that may be related to the visa application. Her grandmother said it was a matter for the first Claimant if she wanted to return.

21. The whole family was living in Thetford and they had retained connection with Britain from Kenya. They were Kenyan immigrants into the United Kingdom. He had not found a copy of the first Claimant's visa. It was valid in the sense it was open to her to be used from when it was granted on 11 June 2008 until 11 June 2010 and Mr Melvin was trying to stretch the

concept of fraud. If your father and mother obtained a visa for you why could you not seek to use it? He submitted that she could present it and then it was her duty to answer any questions and not to fill in the Immigration Officer with her whole life story. Mr Melvin relied on her husband's statement with regard to parental responsibility. She had access to money from her husband but it did not mean she was dependent on him. She defied them and asked to marry and went to her parents and contacted them and they told her where to get a passport or her passport. That was dependency and whatever the expenditure she was dependent on them. He thought this turned on what occurred at the point of entry. She did not seek to mislead, she presented a valid visa and her siblings' visas were accepted and she was not asked any detailed questions to which there may have been an opportunity to mislead. The allegation of deception did not stand up to proper examination. On the question of law he referred to the country guidance cases. She had been here since 2010 and she was living with her family of origin. They were under the authority of the grandfather and grandmother and the Secretary of State was asking them to return somewhere where there were no family members. She could not envisage that she could work and look after her child and that was the basis of the human rights claim. Both women should be believed. The second Appellant was not responsible for the fact that he had been brought up as a British child and it was not entirely due to a repetition of applications but the denial of appeal rights and a consent order based on the fact there was a child. The question of insurmountable obstacles was not one that was in Article 8, rather it was in the Immigration Rules.

Discussion and Findings

22. In coming to my conclusions in this appeal I have considered all of the evidence and the arguments as set out in the skeleton arguments of both representatives.

23. In **DK (Serbia) v Secretary of State for the Home Department** [2008] 1 WLR 1246 Latham LJ made the following observations in relation to the procedures then in place for reconsideration of a decision following the identification of an error of law in the decision:

> "25. Accordingly, as far as the scope of reconsideration is concerned, the tribunal is entitled to approach it, and to give directions accordingly, on the basis that the reconsideration will first determine whether or not there are any identifiable errors of law and will then consider the effect of any such error or errors on the original decision. That assessment should prima facie take place on the basis of the findings of fact and the conclusions of the original tribunal, save and in so far as they have been infected by the identified error or errors of law. If they have not been infected by any error or errors of law, the tribunal should only revisit them if there is new evidence or material which should be received in the interests of justice and which could affect those findings and conclusions or if there are other exceptional circumstances which justify reopening them."

24. I have set out the relevant paragraphs of my decision in respect of the error of law above. I found that the First-tier Tribunal had not given sufficient weight to the public interest for the reasons set out.

25. The First-tier Tribunal made the following findings of fact. She found as a fact that the first Claimant and her husband had separated [26]. She found it credible that she had not been on touch with her husband for five years [26]. She found that her parents would not be able to wholly support her by way of housing and living expenses if she returned to Pakistan [27]. She found that she had no family in Pakistan and no support from her husband's family and that it would be difficult to find accommodation as a single woman [28]. She found that she enjoyed family life in the UK and lived with her parents and siblings [29]. She found that the second Claimant had lived with his mother's family for four years and did not have close ties in Pakistan [30]. She then considered the best interests of the second Claimant on the basis of these factual findings and concluded that it would be contrary to his best interests to be removed from his supportive family to return to Pakistan [37].

26. Mr Melvin submits in his skeleton argument that it is in the best interests of the second Claimant to remain with his mother. It is not accepted that it would be unreasonable for the Claimants to return to Pakistan. It is submitted that there is no reason why the second Claimant cannot be assisted by his biological father and it is not accepted that he has become so integrated that return would have a detrimental effect on him. It is submitted that he has been brought up whilst in the UK in a household where the Pakistani language and culture is still prominent given that his mother's family only moved here in 2008. It is further submitted that he will be entitled to education and healthcare in Pakistan.

27. Mr Melvin makes a number of challenges to the first Claimant's evidence which implicitly request a departure from the findings of fact of the First-tier Tribunal. He submits in the skeleton argument that it is not accepted that there is no contact between the first Claimant and her husband or that he would not support the second Claimant. The Respondent does not accept that there are no extended family members in Pakistan. Further it is submitted that when the first Claimant entered the UK in 2010 her marriage had broken down which goes against her credibility.

28. Dr Morgan argues that the Claimant and her mother were found to be credible witnesses and that the findings of fact of the First-tier Tribunal should not be displaced.

29. My findings in relation to the error of law related to the weight given to the public interest and therefore not to the primary findings of fact made by the First-tier Tribunal. In principle therefore those findings should stand and should not be revisited unless "there is new evidence or material which should be received in the interests of justice and which could affect those findings and conclusions or if there are other exceptional circumstances which justify reopening them." (**DK**)**.** I have also taken

account of judgement of the Court of Appeal in **Rajaratnam v SSHD** [2014] EWCA Civ 8 in relation to when it is appropriate to depart from the findings of fact of the First-tier Tribunal.

30. Mr Melvin asserts that the first Claimant used deception when she entered the UK in 2010 as she entered on a visa to which she was no longer entitled due to a change of circumstances. The Appellant entered the UK on a settlement visa as her parent's dependent. It is not in dispute that she was married at the point of entry and therefore no longer dependent on her parents.

31. The Respondent has not taken a point thus far in relation to deception. No point was taken in the Refusal Letter dated 19 August 2014 and it does not appear that it was taken before the First-tier Tribunal. Whilst the First-tier Tribunal did not summarise the contents of the submissions, it does not appear to have been a point taken in cross-examination. The first Claimant's evidence before me was that she showed the immigration officer her visa and entered the UK. She says she was not questioned about her circumstances. The Respondent has produced no evidence to show that she was interviewed or questioned by an immigration officer and gave a false account. The burden of proving deception is on the Respondent and cogent evidence is required. I consider it to be uncontentious that the first Claimant knew when she entered the UK that the factual basis on which she had granted her visa for the UK no longer pertained. She did not disclose that on entry. Had she done so, she would have been likely to have been refused entry. As there is no evidence to show that she was questioned, I consider that it cannot be said that she actively deceived the authorities. However, she failed to disclose material facts. I consider that this is a matter that is relevant to the exercise of proportionality, but it is not new evidence or material that warrants departure from the findings of fact of the First-tier Tribunal.

32. Mr Melvin also argues that the first Claimant has changed her evidence regarding her relationship with her husband. On 28 June 2010 the Respondent refused her indefinite leave to remain and her appeal against that decision was heard and dismissed by Immigration Judge Gillespie in a decision promulgated on 2 December 2010. He records at paragraph 8 that she has made a statement showing that she is maintained by remittances from her husband and that she and the second Claimant lived with an uncle in the UK. He also notes that at the time of appeal decision in relation to her, her siblings and father, since she was married she was no longer entitled to entry as a dependant of her parents (11).

33. Immigration Judge Gillespie did not record whether the first Claimant gave evidence, but it appears from reading the decision that it is likely that she did not. There is no reference to oral evidence. I do not have a copy of the witness statement that was before Judge Gillespie. As her grounds for judicial review attest (C1 of the Respondent's bundle) it was her case that her husband had been financially supporting her and their son and that support stopped after her arrival in the UK. In her witness statement

before the First-tier Tribunal she states at paragraph 5 to 7 that when she arrived in the UK she and her husband were on good terms and had no marital problems and he supported her and her son financially. She states that it was during her stay in the United Kingdom they started to grow apart and as a result he not only cut off all form of contact with them but also stopped supporting both her and her son. She states that after their marital relationship broke down they separated and since being separated she and her husband had no form of contact.

34. She filed a further statement dated 3 December 2015 for the purposes of this hearing. Her account of her relationship with her husband is rather different. She states from paragraphs 5 to 18 that from the outset of her marriage she realised that the marriage would not work as they had nothing in common. She made many efforts to make her marriage work but he made it clear that he wanted to have nothing to do with her. She lived in a "lifeless and unhappy" marriage and due to this depressing situation decided to join her parents in the UK. He did not hesitate to support her son's entry clearance application and only remained in touch to see how his son was doing.

35. I note that the first Claimant has chosen to introduce evidence by way of her fresh statement that contradicts her previous statement before the First-tier Tribunal. She has not explained why she has changed her account from being on good terms with her husband on arrival in the UK and growing apart to having been in a loveless marriage since its inception. I consider that the only reasonable conclusion is that she is attempting to enhance her claim by asserting that she came to the UK to escape her marriage.

36. Whilst this evidence could entitle me to go behind the positive finding in relation to the Claimant's credibility (see paragraphs 22 and 23 of **Rajaratnam)**, I accept, nevertheless, that she has is no longer in contact with her husband and that they ceased to have contact after her arrival in the UK. Her evidence on this point was consistent before the First-tier Tribunal and consistent before me. Her mother also gave consistent evidence on this point. I therefore do not go behind the finding that she has not been in touch with her husband for five years.

37. The Claimants do not seek to argue that they can succeed under the Immigration Rules. They appeal under Article 8 only. In **R (Nagre) v Secretary of State for the Home Departmen**t [2013] EWHC 720 (Admin), Sales J (as he then was) stated at [29] that:

> "... the new Rules do provide better explicit coverage of the factors identified in case-law as relevant to analysis of claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision-makers applying the new Rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling

circumstances not sufficiently recognised under the new Rules to require the grant of such leave".

38. The two-stage approach has been approved by the Court of Appeal in a number of cases including **Singh and Khalid v SSHD** [2015] EWCA Civ 72. The decision-maker should adopt a two-stage process. The first question is whether the individual can succeed under the Rules and the second is, if not, can he or she succeed outside the Rules under Art 8. There is no threshold requirement of arguability before a decision maker reaches the second stage. However, the extent of any consideration outside the Rules will depend upon whether all the issues have been adequately addressed under the Rules. In **Singh and Khalid** the Court of Appeal, Underhill LJ opined at [64]

> "... there is no need to conduct a full separate examination of Art 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules."

39. In **SS (Congo)** [2015] EWCA Civ 387 at [32] Richards LJ in the Court of Appeal clarified the relationship between the Immigration Rules and the public interest considerations:

> "However, even away from those contexts, if the Secretary of State has sought to formulate Immigration Rules to reflect a fair balance of interests under Article 8 in the general run of cases falling within their scope, then, as explained above, the Rules themselves will provide significant evidence about the relevant public interest considerations which should be brought into account when a court or tribunal seeks to strike the proper balance of interests under Article 8 in making its own decision. As Beatson LJ observed in *Haleemudeen v Secretary of State for the Home Department* [2014] EWCA Civ 558; [2014] Imm AR 6, at [40], the new Rules in Appendix FM:
>
> > "… are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall, the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been."
>
> Accordingly, a court or tribunal is required to give the new Rules "greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights" (para. [47])."

40. At 33 Richards LJ further observed:

> "In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in *MF (Nigeria)* in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM."

41. At paragraph 44 the Court set out the proper approach:

> "The proper approach should always be to identify, first, the substantive content of the relevant Immigration Rules, both to see if an applicant for LTR or LTE satisfies the conditions laid down in those Rules (so as to be entitled to LTR or LTE within the Rules) and to assess the force of the public interest given expression in those rules (which will be relevant to the balancing exercise under Article 8, in deciding whether LTR or LTE should be granted outside the substantive provisions set out in the Rules). Secondly, if an applicant does not satisfy the requirements in the substantive part of the Rules, they may seek to maintain a claim for grant of LTR or LTE outside the substantive provisions of the Rules, pursuant to Article 8. If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules (cf *Nagre,* para. [30]), then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of section 6(1) of the HRA read with Article 8."

42. It is clear therefore, that in an appeal under the new Rules, where an applicant cannot satisfy the requirements of the Rules, the Rules are to be given greater weight than a starting point and will inform the proportionality assessment as an expression of the public interest.

43. The Claimants have lived in the UK for 6 years. At the date of the Respondent's reconsideration in August 2014 neither could therefore meet the length of residence requirements of Rule 276ADE having lived in the UK for only 4 years. It has not been argued that there are very significant obstacles to the First Claimant's integration into Pakistan. It has also not been argued that she could meet the dependent relative requirements of the Rules or could succeed under the parent route.

44. The First-tier Tribunal accepted that the Claimants enjoyed family life with the First Claimant's parents. The First-tier Tribunal also found it was in the second Claimant's best interests to remain in the UK. That finding is not infected by the identified error of law.

45. In **EV (Philippines) and others v SSHD** [2014] EWCA Civ 874_the Court held at [34] to [38]:

> "34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.
>
> 35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable

their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.

38. The need to carry out this sort of assessment is considered in the judgment of the Upper Tribunal in *MK India (Best interests of the child)* [2011] UKUT 00475 (IAC):

> *"23. There is in our view a fourth point of principle that can be inferred from the Supreme Court's judgments in ZH (Tanzania). As the use by Baroness Hale and Lord Hope of the adjective "overall" makes clear, the consideration of the best interests of the child involves a weighing up of various factors. Although the conclusion of the best interests of the child consideration must of course provide a yes or no answer to the question, "Is it in the best interests of the child for the child and/or the parent(s) facing expulsion/deportation to remain in the United Kingdom?", the assessment cannot be reduced to that. Key features of the best interests of the child consideration and its overall balancing of factors, especially those which count for and against an expulsion decision, must be kept in mind when turning to the wider proportionality assessment of whether or not the factors relating to the importance of maintaining immigration control etc. cumulatively reinforce or outweigh the best interests of the child, depending on what they have been found to be.*
>
> *24. The need to keep in mind the "overall" factors making up the best interests of the child consideration must not be downplayed. Failure to do so may give rise to an error of law although, as AJ (India) makes clear, what matters is not so much the form of the inquiry but rather whether there has been substantive consideration of the best interests of the child. The consideration must always be fact-sensitive and depending on its workings-out will affect the Article 8(2) proportionality assessment in different ways. If, for example, all the factors weighed in the best interests of the child consideration point overwhelmingly in favour of the child and/or relevant parent(s) remaining in the UK, that is very likely to mean that only very strong countervailing factors can outweigh it. If, at the other extreme, all the factors of relevance to the best interests of the child consideration (save for the child's and/or*

parent(s) own claim that they want to remain) point overwhelmingly to the child's interests being best served by him returning with his parent(s) to his country of origin (or to one of his parents being expelled leaving him to remain living here), then very little by way of countervailing considerations to do with immigration control etc. may be necessary in order for the conclusion to be drawn that the decision appealed against was and is proportionate.""

46. Whilst the First-tier Tribunal found that the best-interests of the second Claimant were to remain in the UK, she did not make a finding as to how emphatic the answer to the question was: is it was in his best interests to remain? She did not consider whether it was overwhelmingly in his best interests or whether it was, but only on balance. She did not take the relevant public interests considerations into account in the wider proportionality assessment and consider whether they cumulatively reinforced or outweighed the best interests of the child.

47. The second Appellant has lived in the UK since he was 11 months old. At the date of the hearing he had lived in the UK for nearly 6 years. His school report for 2013-2014, his reception year, is at pages B18 to 23 of the Claimants' bundle. He is clearly a happy and creative child who enjoys school. It is clear from the decision of the Upper Tribunal in **Azimi-Moayed and Others (decisions affecting children; onward appeals)** [2013] UKUT 197 (IAC) that in terms of length of residence seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

48. The second Claimant is not at a critical stage of his education. Whilst he will not remember having lived in Pakistan, he has grown up in a family who have recently moved here from Pakistan in 2008 and consequently will have a link with the culture and the language in his home environment. His mother has only lived in the UK for a relatively short time and retains cultural, linguistic and social ties to Pakistan. Therefore in view of his young age, and those ties his connection with Pakistan is likely to be reasonably easily renewable. He is not of course a British Citizen and has no right to enjoy education here.

49. I have also considered whether the consequences of his return would be deleterious. The First-tier Tribunal found that there would be a lack of accommodation, financial resources, societal disapproval of his mother and that his father's family had rejected him. The first Claimant's evidence before the First-tier Tribunal was that her family did not have sufficient funds to solely support her in Pakistan. The First-tier Tribunal did not have any objective material before it in relation to the question of the difficulties a single but married woman with a child could face in Pakistan. In **SM and MH (lone women-ostracism) Pakistan [2016] UKUT 00067** the Upper Tribunal considered the question of internal relocation for women who had a well-founded fear of persecution in their home area. The first Claimant in this case, does not of course, argue that she cannot return to her home area but **SM** is instructive as it explores the question of employment

opportunities, childcare and accommodation. Whilst the First-tier Tribunal accepted that the Claimants no longer have extended family in Pakistan, it is clear from her mother's evidence that they retain friends there and in view of their short absence it would be surprising if they did not. The first Claimant was educated up to the age of 19 and completed a computing qualification. Letters in her bundle attest to her employability as a shop assistant. The Upper Tribunal held in **SM** that it would not be unduly harsh to expect a single woman to internally relocate in Pakistan if she can access support from family members. It would also not be unduly harsh for educated, better off, or older women to seek internal relocation to a city and it helps if she has qualifications enabling her to get well-paid employment and pay for accommodation and child care.

50. There is of course, no question of the First Claimant relocating as she could return to her home area of Faisalabad. Whilst there may be a lack of accommodation and financial resources at the outset, her parents are able on their own evidence to offer her some support financially, her family have social ties as they visited recently and met friends there and she is likely to be able to find employment. Further, whilst education may not be of the same standard in Pakistan, it is available. Whilst the second Claimant, has since his arrival here, enjoyed family life with his grandparents and wider family and these are important relationships his focus at his age is likely to be on his mother. Whilst his best interests have been found to remain in the UK, I find that this is only on balance and not overwhelmingly so.

51. Since the impugned decision is in accordance with the law and in furtherance of a legitimate aim, namely the maintenance of immigration control, the next question to be addressed is whether it is proportionate. Where the question of proportionality is reached, the 'ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8' **Huang**.

52. Proportionality is the "public interest question" within the meaning of Part 5A of the 2002 Act. With regard to the factors in section 117B, I have taken account of the fact that the maintenance of immigration controls is in the public interest. It is also in the public interest that a person seeking to enter or remain speaks English. The first and second Claimants both speak English. It is in the public interest that persons who seek to enter or remain in the United Kingdom are financially independent. The first Claimant is not working and cannot be said to be financially independent. In any event, in **Forman (ss 117A-C considerations)** [2015] UKUT 00412 (IAC) the Upper Tribunal held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely.

The significance of these factors is that where they are not present the public interest is fortified.

53. According to section 117B, little weight should be given to— (a) a private life, or (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully. Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious. In **AM (S 117B) Malawi** [2015] UKUT 0260 the Upper Tribunal held that a person's immigration status is "precarious" if their continued presence in the UK will be dependent upon their obtaining a further grant of leave. I therefore can give little weight to the Claimants' private lives as they have been established whilst they were here either precariously or unlawfully. The first Claimant has also established her family life in the UK in the knowledge that the circumstances in respect of which she was granted a visa no longer pertained at the date of entry. She had established an independent life apart from her parents and chose to renew it despite knowing she had no lawful basis to be here. Further, I have found that in the light of her circumstances she would be not without support or employment in Pakistan.

54. In all the circumstances I conclude that it has not been shown that there are compelling circumstances which operate to elevate the Claimants' position to one which show that the application of the Rules does not provide an adequate answer to their circumstances. Whilst the best interests of the second Claimant may be on balance to remain in the UK, in the countervailing public interest considerations are such that this interest is outweighed. I find that it would be reasonable for him to follow his mother to Pakistan and that the Respondent's decision is a proportionate one.

Notice of Decision

The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge L J Murray