Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/12928/2015**

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 28 April 2017	**On 9 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

AS
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person.
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Frankish sitting at Bennett House, Stoke on 29 June 2016) dismissing her appeal against the decision of the Secretary of State to refuse her a fresh asylum and human rights claim. The First-tier Tribunal made an anonymity direction, and I consider that the appellant should continue to enjoy anonymity for these proceedings in the Upper Tribunal.

Relevant Background Facts

2. The appellant is a national of Pakistan, whose date of birth is 7 September

1981. Her partner, N, is also a Pakistani national, whose date of birth is 1 April 1981. They have 3 children: L (born on 3 July 2007), Z (born on 28 January 2010 and M (born on 11 July 2014).

3. The appellant was a visitor to the United Kingdom in 2004 and 2006. In March 2007 she arrived in the UK as a visitor for a third time, but overstayed. As will be apparent from the chronology, the appellant was pregnant with L when she travelled to the UK. The appellant gave birth to L in the UK during the currency of her visit visa.

4. In November 2008 the appellant claimed asylum. The basis of her asylum claim was that her family in Pakistan objected to her relationship with N, a married man, whom she had met on her first visit to the UK in 2004, and who was the father of their daughter L. Her asylum claim was refused on 30 March 2009. The respondent did not accept that the appellant's family had assaulted her after learning of her adulterous relationship; and, in any event, on return to Pakistan with N and their child L, there would be sufficiency of protection for them, or they could safely and reasonably relocate to another part of Pakistan. The appellant was an educated adult woman who had spent most of her life in Pakistan and who had worked there as a teacher.

5. The appellant appealed against the refusal of asylum, and her appeal was dismissed. All her appeal rights, including judicial review, were exhausted on 28 February 2011. Her partner, N, was a dependant on the appellant's asylum claim. N also made an asylum claim in his own right, following the initial dismissal of the appellant's appeal in November 2009. His asylum claim, which was based on the same asserted facts as the appellant's, was refused on 5 April 2012.

6. N's immigration history was that he had first entered the UK in 2004 as a spouse. In her decision promulgated on 5 November 2010, Senior Immigration Judge Eshun (as she then was) said at paragraph [23] that his leave to remain as a spouse had expired at the end of 2006, and on 14 June 2008 N was arrested while working illegally at KFC. He was given reporting conditions, which he failed to observe. He became an absconder after a few weeks.

7. Judge Eshun made adverse credibility findings against both the appellant and her partner. She rejected N's claim that he could not obtain a divorce from his British wife, Na, so as to legitimise his relationship with the appellant through marriage. Judge Eshun found that the couple were deliberately preserving their current status in order to enhance the appellant's asylum claim. On the issue of risk on return, she found that N could live in "*his or the family property*" with the appellant and the children. He had qualifications, which he had obtained from his studies in the USA, which would enable him to obtain a job and to maintain his family.

8. When certifying N's asylum claim as being manifestly unfounded, the respondent noted that that N had confirmed at a Family Returns

Conference that both their children, L and Z, were equally proficient in English and Urdu.

9. Preliminary steps were taken towards effecting the removal of the family to Pakistan. On 8 April 2014 Thornhill Solicitors wrote to Solihull Asylum & Removals Centre to announce that they had come on the record for the appellant. On 1 September 2014 they made a fresh asylum claim on her behalf. They said that the appellant had come into the possession of a FIR which showed that her father in Lahore had made a formal complaint to the police in Lahore that she had been guilty of an extra-marital relationship with her long-term partner, and so she had committed the offence of *zina*, contrary to the Hudood Ordinance. They submitted that it was likely that the police in Lahore would advise the local police in Islamabad, from where N originated, as to the issue of this particular complaint.

10. The appellant had also commissioned a report from Doctor Roger Ballard, a Consultant Anthropologist. He gave evidence of the problems that the appellant and her partner would face in Pakistan with their three children, given that they would be returning without access to any family support of any kind. The appellant's oldest child, L, was born on 3 July 2007, and she had now been living in the country without interruption for a period in excess of seven years. So, she came within the scope of Rule 276ADE (iv), so long as it could be shown that it would not be reasonable to expect her to leave the UK. In their view, the report from Dr Ballard amply demonstrated that it would be unreasonable for her to leave the UK with her parents and siblings.

11. The solicitors made reference to **EV (Philippines) -v- SSHD [2014] EWCA Civ 874**. Among the factors to be considered was the extent to which the children would have "*linguistic, medical or other difficulties* (their emphasis)" in adapting to life in Pakistan. The expert report clearly showed the difficulties that the three children born out of wedlock would encounter whilst trying to adapt to life in the country of their nationality.

12. On 15 October 2015 the respondent gave her reasons for refusing the appellant's claim. On the topic of the best interests of L, it was noted that she was receiving an education in the UK. However, on her return to Pakistan, L would have access to education there. The appellant had not provided any evidence to demonstrate that it would be unreasonable to expect her children to return to Pakistan with each other and herself. The children were going to be returned together as part of a family unit, and there was no intention to separate the children from their parents. So, it was in their best interests to return to Pakistan with herself, their father and their siblings.

The Hearing Before, and the Decision of, the First-tier Tribunal

13. The appellant was legally represented before Judge Frankish, but there were no representation on behalf of the Secretary of State. The Judge received oral evidence from the appellant and N, who both gave evidence

in Urdu through an interpreter.

14. In his subsequent decision, Judge Frankish upheld the decision of the respondent not to treat the appellant as making a fresh asylum claim, as defined in paragraph 353 of the Immigration Rules. The Judge noted that the grounds of appeal made no reference to asylum, and that Dr Ballard made no reference to the appellant or her partner facing a risk of a *zina* prosecution. He characterised the key thrust of Dr Ballard's report as being that of bureaucratic obstacles to gainful employment.

15. Following **Devaseelan -v- SSHD [2002] UKIAT 00702**, the Judge said that the position of SIJ Eshun was his starting point. N was not found credible by SIJ Eshun, and the Judge found that N had now made matters worse.

16. At paragraph [19], he said that, in respect of the children and Article 8, considerable reliance was placed upon economic hardship. However, the report of Dr Ballard accepted the availability of private, as opposed to Government, work. For this, he concluded that N was well placed. He was, after all, a computer graduate from the United States of America. In paragraph [20], the Judge set out Rule 276ADE, underlining sub-paragraph (iv).

17. At paragraph [22], he said that, while the appellant herself did not fall within the Rules, her eldest daughter did under sub-paragraph (iv) - the issue being the reasonableness, or otherwise, to expect her to return. The Judge continued: *"However, the grounds of appeal are wrong to rely on this as she would need to apply. Nonetheless, similar principles apply under Article 8 outside of the Rules."*

18. At paragraph [23], the Judge said that, with the effluxion of time since the first determination of SIJ Eshun, he accepted that special circumstances may be said to have arisen to merit consideration outside the Rules.

19. At paragraph [24], he set out section 55, regarding the welfare of children. At paragraph [25], the Judge said that the key guidance was to be found in the case of **Zoumbas -v- SSHD [2013] UKSE 74**, together with **ZH (Tanzania) -v- SSHD [2011] UKSE 4**. He went on to set out in full paragraph [10] of **Zoumbas**. At paragraph [26], the Judge said that the seven year point was reiterated in **Azimi-Moyed & Others (Decisions affecting children; onward appeals) [2013] UKUT 00197**. The Judge went on in the same paragraph to set out the guidance given in **Azimi-Moyed**, underlining the entirety of sub-paragraphs (i) and (ii), and also underlining the following words at the end of sub-paragraph (iii): "*Seven years as a relevant period*".

20. The Judge continued in paragraph [27]: "*No doubt the children are doing well in the UK. They are part of a close and harmonious family. However, neither I nor the previous determination, have found particular difficulties to return. The children, including the eldest child, would be returning as part of that close and harmonious group. I do not find that the best*

interest considerations for the children serve to override the respondent's efforts at legitimate immigration control."

21. The Judge then turned to the appellant's own claim under Article 8, observing that she fell foul of Section 117B of the 2002 Act. The Judge went on to set out section 117B in its entirety, underlining various passages.

22. The Judge concluded by saying that, under the **Razgar [2004] UKHL 27** criteria, it could not be considered disproportionate for the appellant, with her immediate family, to have to return to a country in which they were all nationals, speak the language and were assimilated to the cultural norms. He continued: "*Of course, if the respondent allows another 14 years to pass, a different judicial view may arise.*"

The Reasons for Granting Permission to Appeal

23. The appellant's application for permission to appeal was refused by a First-tier Tribunal Judge, but on a renewed application permission was granted on a limited basis by Deputy Upper Tribunal Judge Symes on 7 February 2017. His reasons were as follows:

> The human rights ground of appeal, though somewhat unparticularised, shows more promise given the scarcity of reasoning in the First-tier Tribunal's decision below. It is not possible, from the reasoning of Judge Frankish, to be confident that the governing principles were applied: in particular a) the Judge appears to rely on the precarious nature of the mother's presence to wholly discount the connections of her elder daughter with this country, notwithstanding that L had lived in the UK since her birth in 2007; and b) as shown by *MA (Pakistan)*, a child's residence in the UK in excess of seven years should be given special attention in the balancing process albeit that it is of course not determinative: however there is no reasoning that shows that the Tribunal recognised this.
>
> I accordingly find that, whilst no error of law is identified in the approach of the First-tier Tribunal to the asylum dimension of the claim, the Article 8 ground of appeal is a viable one.

The Hearing in the Upper Tribunal

24. At the hearing before me to determine whether an error of law was made out, the appellant appeared in person, as she said that she could not afford legal representation. She had served a reply to the Secretary of State's Rule 24 response in which she submitted that the best interests of L, who was almost 10 now, had not been properly assessed, having regard to the Home Office policy guidance and also to what was said in **MA (Pakistan)** by Elias LJ at paragraph [49]. In her oral submissions, she added that her second child had now accrued over seven years' residence.

25. On behalf of the Secretary of State, Mr McVeety adhered to the Rule 24

response opposing the appeal. The best interests of a child were a primary, not a paramount consideration, to be balanced against the public interest in effective immigration control, taking into account factors such as the poor immigration history of the appellant and the father of L, and their failed asylum claim. The Judge was entitled to find that the children's best interest considerations in this case were overridden by the public interest. Seven years from the age of four is likely to be more significant than the first seven years of life. The Judge's conclusion was adequately reasoned in all the circumstances, and the grounds amounted to a disagreement with the Judge's findings.

Discussion

Best Interest Guidance

26. A useful summary of the learning on the best interests of children in the context of immigration is to be found in **Azimi–Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)**:

> 30. It is not the case that the best interests principle means it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:
>
> (i) As a starting point in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
>
> (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> (iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.

(iv) Apart from the terms of published policies and Rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than peers and are adaptable.

(v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic wellbeing of society amply justifies removal in such cases.

The Home Office Policy Guidance

27. The IDIs on Family Migration: Appendix FM state at paragraph 11.2.4 that the longer a non-British citizen child has resided in the UK, the more the balance swings in favour of it being unreasonable to expect the child to leave the UK,, and strong reasons are required to refuse a case where the child has accrued over seven years continuous residence.

The relationship between the Rule and Section 117B(6)

28. In **AM (S117B) Malawi [2015] UKUT 260 (IAC)** the Tribunal held that the duty of the First-tier Tribunal was quite clear. The First-tier Tribunal was required to have regard to considerations listed in Section 117B. It had no discretion to leave any of those considerations out of account, if it was a consideration that was raised on the evidence before it. The Tribunal continued in paragraph [13]:

> There is also in our judgment no requirement that the FtT should pose and answer the same question more than once, simply as a matter of form. Thus since both paragraph 276ADE(1)(iv) of the Immigration Rules, and s117B(6), both raise the same question in relation to a particular child, of whether or not it would be reasonable to expect that child to leave the UK: it is a question that need only be answered once

The question of reasonableness

29. In **MA (Pakistan) and Others, R (on the application of) v Upper Tribunal (IAC) & Anor [2016] EWCA Civ 705** at paragraph [45] Elias LJ said:

> In my judgment, the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the 'unduly harsh' concept under Section 117C(5), so should it when considering the question of reasonableness under Section 117B(6). ... The critical point is that Section 117C(5) is in substance a free-standing provision in the same way as Section 117B(6), and even so the court in **MM**

> **(Uganda)** held that wider public interest considerations must be taken into account when applying the 'unduly harsh' criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in Section 117B(6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case, I will analyse the appeals on the basis that the Secretary of State's submission on this point is correct and that the only significance of Section 117B(6) is that where the seven year Rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted.

30. At paragraph [46] Elias LJ said that the published Home Office Policy guidance merely confirmed what is implicit in adopting a policy [the seven year rule] of this nature:

> After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will to be remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.

31. At paragraph [48] Elias LJ cited with approval the explanation given by Clarke LJ in **EV (Phillipines)** at [34]-[37] as to how the Tribunal should apply the proportionality test where wider public interest considerations are in play, in circumstances where the best interests of the child dictate that he should remain with his parents. At [36] Clarke LJ said that if it is overwhelmingly in the child's best interests to remain, 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. Clarke LJ continued in [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.

32. In granting permission to appeal, Judge Symes observed that it was not possible to be confident that the Judge had applied the relevant governing principles. Although not cited to me, I have regard to the Guidance given by the Court of Appeal in **Muse & Others v Entry Clearance Officer [2012] EWCA Civ 10** on challenges to the adequacy of a judge's reasons. In **South Bucks District Council v Porter (2) [2004] UKHL 33**, cited with approval by the Court of Appeal at paragraph [33], Lord Brown said:

> The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as

> it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. *But such adverse inference will not readily be drawn* (my emphasis). The reasons need only refer to the main issues in the dispute, not to every material consideration.

33. I have set out the relevant background at some length, as this illuminates the approach taken by the Judge, and it explains why the primary focus in his consideration of the children's best interests was upon the prospects for their welfare and wellbeing in the event of the relocation of the entire family to Pakistan, as the central thrust of the appellant's case was that the children would face significant cultural and societal obstacles in Pakistan on account of her not being married to N.

34. The Judge was clearly aware of the significance of the eldest child, L, having accrued over seven years' residence in the UK, as he expressly recognises that she comes within the scope of Rule 276ADE (iv). He also clearly recognises that her period of residence potentially tips the scales in her favour in the weighing up of competing best interest considerations, as he underlines the reference to the seven year Rule which appears in the third principle propounded by the Upper Tribunal in **Azimi-Moyed.**

35. In order to resolve the question of whether it is reasonable to expect L to leave the UK and to go to Pakistan, the Judge has followed the approach approved by the Court of Appeal in **MA (Pakistan)**. He has considered best interests first, before going on to consider wider proportionality considerations, such as the immigration history of her parents.

36. The best interest analysis presents as unbalanced, as the Judge emphasises the advantages of relocation to Pakistan in line with the first and second principles of **Azimi-Moayed**, whereas there is no overt consideration of the countervailing advantages of L remaining in the UK. However, the absence of a discussion about the best interest considerations militating in favour of L remaining in the UK is not material, as the Judge reaches a conclusion in L's favour. For he finds that overall it is in her best interests to remain. In order to reach this conclusion, the Judge cannot have discounted L's connections with this country. He must have accepted by necessary implication that *on balance* L's best interests dictated that she should remain in the UK with her parents and siblings. For otherwise he would not have found that the best interests of the children were *overridden* by the very poor immigration history of their parents. If he had found that overall L's best interests lay in her going to Pakistan that would have been the end of the discussion. There would have been no need to consider whether wider proportionality considerations overrode the best interests' outcome.

37. At the same time. it is clear from the Judge's line of reasoning that this was not a case where he found that it was *overwhelmingly* in L's best interests to remain. He found that this was a case where it was in L's best interests to remain, but only on balance - *with some factors pointing the other way.* Accordingly, it was open to the Judge to find that the need to maintain immigration control tipped the balance against the appellant, so as to make it reasonable to expect L to leave the UK with the appellant, her father and her siblings, despite the fact that L had accrued over seven years' residence.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 9 May 2017

Deputy Upper Tribunal Judge Monson