Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09502/2017**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 3 January 2019	**On 8 March 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

KK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hussain
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a female citizen of Pakistan who was born in 2001. By a decision dated 18 August 2017, the appellant was refused leave to remain in the United Kingdom on human rights grounds. She appealed to the First-tier tribunal which, in a decision promulgated on 23 January 2018, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The First-tier Tribunal was concerned with two appeals, one brought by the appellant KK will appeal brought against a refusal of human rights application by the appellants brother, WK. The renewed grounds of appeal state that WK has been granted additional nationality and has withdrawn his appeal to the Upper Tribunal.

3. The appellant has been living in the United Kingdom for more than seven years and is, therefore, a 'qualifying child' for the purposes of section 117 of the 2002 Act (as amended). The appellant has been living in the United Kingdom more than 11 years.

4. The judge concluded that, 'on a balance of probabilities, interference in the family and private life of the appellants by the decision not to allow them to remain in the United Kingdom is proportionate when weighed against the legitimate aim of immigration control by the implementation of the immigration laws of the United Kingdom' [51]. The judge was aware that the parents of the children are citizens of Pakistan and have no right to remain in the United Kingdom. The family had first come to United Kingdom for a holiday of only one week but the appellant been registered in school very soon after arrival. An appeal brought by the father of the appellants had been dismissed in August 2017. I am told that an older brother of the appellant has now been granted leave to remain.

5. The appellant complains that her status as a qualifying child was effectively ignored by the judge in her analysis. The judge had failed to follow the requirements of Secretary of State's own guidance (IDI Family life; August 2015) which provided that 'strong reasons' would be needed to show that it was reasonable to expect a child who had lived in the United Kingdom for more than seven years to leave. The judge had also ignored *MA (Pakistan)* [2016] EWCA Civ 705 in which the Court of Appeal had likewise indicated the importance of the seven-year qualifying period. The Court of Appeal had found that 'the fact that child has been here for seven years must be given significant weight when carrying out the proportionality exercise'.

6. The First-tier Tribunal reached its decision before the Supreme Court gave its judgement in *KO (Nigeria)* [2018] UKSC 53. The effect of that judgement is declaratory. At [18-19], Lord Carnwath stated:

> On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in SA (Bangladesh) v Secretary of State for the Home Department 2017 SLT 1245, [2017] ScotCS CSOH_117:
>
> "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question,

'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …"

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

"58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

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

7. Mr Bates, who appeared to the Secretary of State, submitted that the First-tier Tribunal decision is 'absolutely compliant' with the judgement of the Supreme Court in *KO*. I agree. I am aware that this appeal has been brought by a child of this family and not the parents; the parents have very poor immigration history having arrived as visitors but having never left. The father's own application to remain was unsuccessful as was his subsequent appeal. I am in little doubt that this human rights application has been brought with a view to securing the status of every member of the family who has not yet achieved leave to remain and not just that of the appellant. I am aware that the question of the 'reasonableness' of expecting the appellant to leave the United Kingdom addressed by First-tier Tribunal was in the context of paragraph 276ADE of HC 395 (as amended) rather than section 117B(6) of the 2002 Act. Notwithstanding that fact, *KO (Nigeria)* is a highly relevant guide to consideration of reasonableness and proportionality in this appeal.

8. I find that the First-tier Tribunal judge has correctly focused upon the circumstances of the child appellant. She has not, in my opinion, fallen into the trap of visiting the immigration misdemeanours of the parents upon the child; the judge's observation at [44] regarding the immigration history of the parents does nothing more than to place the circumstances of the appellant in a proper context. The judge has considered the strength of the private life ties which the appellant has within the United Kingdom and the maintenance of family ties in Pakistan. Ultimately, the judge has addressed (albeit in the context of paragraph 276ADE) the

question posed by Lord Boyd in *SA (Bangladesh)* (see above), that is, 'Why would the child be expected to leave the United Kingdom?' In this instance, the answer is 'because her parents and sole carers have no right to remain in the United Kingdom' and, on the evidence, it would not cause disproportionate interference to such private life ties as the child has in the United Kingdom for her to return to Pakistan with her primary carers. In my opinion, the judge has given clear and cogent reasons for concluding that there are good reasons for expecting the child to leave notwithstanding the length of time she has lived in this jurisdiction. The judge has, quite properly, addressed the relevant questions within the 'real world' approach approved of by the Supreme Court in *KO (Nigeria).* At [35] the judge wrote:

> Consideration has to be given to [the appellant's] education health, the whereabouts of [her] parents, [her] ability to integrate into life in another country… And to enjoy the full rights of that country, whether the child is lived in or visited the country or is able to adapt to life there with the support of [her] parents, if the parents and/or the child have existing family and cultural ties with that country, where the child and all the parents can speak the language of the country and whether the child had attended school in the country.

In my opinion, those were the correct questions to ask and the judge has answered the questions by reference to relevant evidence. She has reached an outcome available to her on that evidence. Given that the child's parents have no right to be in the United Kingdom, it was open to the judge to conclude, having due regard to the appellant's own private life ties to the United Kingdom, that it was reasonable for her to return with her parents and sole carers to Pakistan despite having lived in the United Kingdom for 11 years. Another judge faced with the same facts may have reached a different conclusion; however, that is not the point. In the light *KO*, I do not agree with the appellant that the only outcome on the facts was for the judge to have allowed the appeal. The judge's decision is not flawed in law for the reasons given in the grounds of appeal or at all.

Notice of Decision

This appeal 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 2 February 2019

Upper Tribunal Judge Lane