Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/22027/2018
HU/21980/2018
HU/21972/2018
HU/21986/2018

THE IMMIGRATION ACTS

Heard at Cardiff CJC	**Decision & Reasons Promulgated**
On 22 August 2019	**On 4 September 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

JAYANTHI [G]
GANESH KUMAR [N]
M G
R K
(ANONYMITY DIRECTION MADE ONLY IN RESPECT OF THE THIRD AND FOURTH APPELLANTS)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr E Waheed, Counsel, instructed by Lambeth Solicitors
For the Respondent: Ms S Rushforth, Home Officer Presenting Officer

DECISION AND REASONS

1. The appellants, all citizens of India, are a wife and husband and their two children. In a decision sent on 24 January 2019, Judge Solly of the First-tier Tribunal (FtT) dismissed their appeals against the decision made by the respondent on 8 October 2018 refusing them leave to remain

2. The appellants' written grounds of appeal are not well-drafted but appear to raise three main points, it being asserted that the judge erred in (1) failing to apply to the central issue of whether it was reasonable to expect the third appellant, who was a qualifying child, to leave the UK, the correct approach as set out in **KO (Nigeria)** [2018] UKSC 53 and **MA (Pakistan)** [2015] EWCA Civ 705; (2) failing to apply the guidelines set out by the Court of Appeal in **EV (Philippines)** [2014] EWCA Civ 874 in assessing the best interests of the two children aged 9 and 5; and (3) failing to recognise that in cases in which there are many positive factors in favour of the appellants the public interest can be outweighed. Integral to all three of these grounds was the contention that having made a finding at para 60 that it was in the best interests of M, the third appellant, to remain in the UK, the judge failed to apply this to her assessment of reasonableness.

3. As regards ground (1), I would accept that even though the judge did refer to **MA (Pakistan)** she does not anywhere identify the important principle established in that case, for example in [46]-[48] that when considering whether it is reasonable to expect a qualifying child to leave the UK, the decision-maker should ask whether there are strong or powerful reasons for refusing leave:

> *'Applying the reasonableness test*
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> 46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy 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 so 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 be to 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.
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> 47. Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child's best interests are in favour of remaining. I reject Mr Gill's submission that the best interests assessment automatically resolves the reasonableness question. If Parliament had wanted the child's best interests to dictate the outcome of the leave application, it would have said so. The concept of "best interests" is after all a well-established one. Even where the child's best interests are to stay, it may still be not

unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and in the country where it is proposed he should return. What could not be considered, however, would be the conduct and immigration history of the parents.

48. In *EV (Philippines)* Lord Justice Christopher Clarke explained how a 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 in the UK (paras. 34-37):

> "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.
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> 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.
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> 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.
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> 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." '

However, I am not persuaded that this error had a material effect on the outcome of the decision. That is for several reasons.

4. First, although she does not identify the aforesaid approach set out in **MA (Pakistan),** she does at para 57 cite with approval the headnote of **Azimi-Moayed** [2013] UKUT 00197 that:

> "… lengthy residence in a country other than 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."

This formulation identifies a very similar test.

5. Second, the judge clearly did attach significant weight to the fact that the third appellant had been in the UK for over seven years and was thus a qualifying child. Having noted submissions regarding the significance of the fact that she was a qualifying child and so satisfied para 276ADE(iv) and s117B(6) (see paras 25, 52 and 53), the judge noted at para 58, first sentence, that "M has been in the UK for just under 9 years" and at para 60 that "[s]he has been in the UK for many years" and in para 76 (in a paragraph which cites **MA (Pakistan)**) states that "I give significant weight to the length of time that M has been in the UK and the interests she has developed".

6. Third, as the last six words of the sentence just cited from para 76 indicate, the judge not only considered the length but also the quality of the third appellant's stay noting at para 59, that she is studying well in school and has been enjoying extra-curricular activities including ballet and swimming and that she is learning Welsh, noting in the same paragraph that if she returns to India "her links with her existing school and friends would be broken" (see also para 65). At para 66 the judge notes that:

> "66. I have a long a recent letter, [from M in which she] says she is 9 years and 10 months at the top, commencing on page A 12 in which she explains to me why she wishes to remain in the UK. She is most articulate in explaining that she does not want to return to India and says she has many friends and has many activities in the UK."

7. In light of Mr Waheed's emphasis on the passionate views expressed by the third appellant in her letter addressed to the judge, I would add the obvious observation that this paragraph shows that the judge clearly took full account of this letter.

8. Fourth, it is clear from the judge's treatment of the third appellant's circumstances why she considered there were strong or powerful reasons for refusing her leave in the UK. Focussing on the some of the ties this appellant had forged in the UK, the judge adjudged that even though she was doing well at school she had not reached a critical stage of her education, stating at para 59 that:

> "59. Section 55 of the Borders Citizenship and Immigration Act 2009 requires that the functions of the Secretary of State are 'discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'. As was held by Baroness Hale in **ZH (Tanzania) [2011] UKSC** 'this means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be in accordance with the law for the purpose of Article 8(2). The RFRL indicates that the Secretary of State has considered this duty."

She also noted in para 58 with reference to **Azimi-Moayed** that the third appellant had not been in the UK for seven years from aged 4.

9. The judge further assessed that the disruption in the third appellant's education would be significantly offset by the likely educational circumstances she would face on return. At para 65 she stated:

> "65. So far as education is concerned, I find that [MG] were she to return to India could opt to be taught in the English medium which would mean that all her lessons would be in English save for a compulsory subject of Tamil. The same would apply to [RK]. I accept that [MG] would be behind in the subject of Tamil and would face some difficulties in catching up given that a different alphabet applies. In considering how severe the [sic] I take into account the information before me of her ability. There is a letter from Mrs Jackson the headteacher of Kitchener primary school on a 25 [sic] saying that [MG] has been registered at the school since 2 September 2014, is making very good progress sin her learning and is very settled and happy in school with a good [sic]. Several school certificates are included in the bundle including reading challenges, doing her homework and I have read her school report dated July 2007 which includes the Welsh language A66. Her age standardised scores appear at 69 and show her to be in the main blue category of test results in line with most children of the same age which I accept."

10. The judge's assessment of the third appellant's extra-curricular activities was to similar effect. She attached significant weight to them (see para 68) but did not accept the appellants' submission that she would be prevented from pursuing such activities in India:

> "67. It is said by her father that there are no swimming facilities nearby in India and that she could not undertake ballet or other extracurricular activities in India. He also indicated that he had not relied on public funds since arrival in the UK however this is unlikely. The family have had another child in the UK and it is reasonable to suppose that this child was born through the facilities of the NHS as it was not suggested there was private care and both children are educated in state schools. They have thus had this reliance on public funds. Given I do not accept his evidence on the issue of public funds I have concerns with the evidence that [MG] could not undertake all her extracurricular activities in India particularly given the lack of objective evidence confirming this."

11. The judge also noted that there was no medical evidence produced that health would impact on the return of any of the appellants: see para 71.

12. It is clear that the judge also considered the state of the third appellant's family ties. Clearly, if she and her immediate family had other close relatives in the UK, that might potentially have helped show there were not strong powerful reasons for refusing her leave to remain. But the evidence was almost entirely the other way. The appellants had made mention of financial support from the second appellant's brother, but it was not submitted that the appellants had close family ties with him. On the other hand the lead appellant's evidence was recalled as being as follows at para 36:

> "36. She said she had a father and mother, father-in-law and mother-in-law, her husband has 2 sisters and she have an elder brother who was married with 2

children (aged 1½ and baby) in India. Prior to coming to the UK, they lived with her husband's family."

13. In the assessment of the evidence the judge found at paras 72-73:

> "72. The family have immediate family in terms of both parents and each has siblings in India. I heard evidence that Mr [N]'s father provided them with funds as did his brother. The lead appellant and her husband used to live with Mr [N]'s father in India. I find that family financial and practical support will be available to both children.
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> 73. I have taken into account all the evidence in considering whether it is not reasonable for her to leave the UK. I bear in mind that she has considerable family in India available to support her both emotionally and practically as there is no suggestion that they would not given the practical support in terms of finance they provide her parents. The family would have a home in India with Mr [N]'s parents and there is no suggestion that the family would be impoverished by return."

14. Hence, even though the judge did not expressly identify the key guidance given in **MA (Pakistan)**, it is entirely clear from her decision that she was not satisfied that there were strong powerful reasons for refusing the third appellant leave to remain.

15. Turning to ground (2), it will be apparent from the citation earlier of several passages from the judge's decision that, even though not referring to **EV (Philippines)** as such (albeit she did refer to **KO (Nigeria)** which endorses the approval in **EV (Philippines)**), she did address all of the relevant factors going to the best interests of the child assessment and then to the wider proportionality assessment in cases involving children, including age, length of residence; how long they have been in education; what stage their education had reached; to what extent they have become distanced from the country of return; how renewable their connection with it may be; to what extent they will have linguistic, medical or other difficulties in adapting to life in the country; and the extent to which the course proposed will interference with their family life (see **MA (Pakistan)** at [48].

16. Mr Waheed, in oral submissions far more articulate than those in the written grounds, submitted that the core of the judge's error was in not applying the clear findings, made at para 60 regarding the third appellant's best interests to the assessment of reasonableness that then follows at paras 61-74. The best interests of the child findings are only weighed in the balance, he submitted, in the judge's assessment of the appellant's circumstances outside the Rules, starting at para 75. In this connection he drew attention to paras 77, 80 and 83 in each of which there is reference to the best interests of the child considerations.

17. I would agree with Mr Waheed that the judge does not in paras 61-74 refer as such to the best interests of the child(ren). I would also agree that this stands in contrast to the judge's assessment of the appellants' circumstances outside the Rules (starting at para 75) where in para 76 she clearly followed a clear two-stage approach addressing the best interests of the children alongside other factors. However, I consider this omission to be

one of form, not substance. As already observed when analysing the judge's treatment of reasonableness in the context of the guidance set out in **MA (Pakistan**), the burden of paras 61-74 is in substance an assessment of the best interests of the children, the third appellant in particular. This assessment begins at para 62 by stating that:

> "62. I have then gone on to consider the issue of whether it would be reasonable to leave the UK. Again, in considering this when looking at both children I do not take into account parental misconduct."

18. Given that by implication ground (2) also criticises the judge's approach to the judge's best interests of the child assessment, I would observe that even though the judge does not follow a strict two stage approach (considering best interests of the child first and then assessing proportionality) that is not a legal necessity and in any event she made a clear finding at para 60 that it was in M's best interests to remain in the UK, albeit that was "only on balance" ; and her decision contains clear reasons for that conclusion and also for the conclusion that notwithstanding this it would be reasonable to expect her to leave the UK.

19. Before turning to the third ground, it is in order that I refer to two matters that relate to the drafting of the judge's decision. I pointed out to the parties that there were two passages in which there appeared to be typos: at para 58 in its second sentence the judge stated that the third appellant "has been in the UK for just under 5 years from the age of 4 years old". Having heard from the parties I am satisfied that this is not a typo. In it the judge was not denying that the third appellant had been in the UK for just under 9 years but was simply explaining that she had not been here 7 years since the age of 4. This observation clearly related to headnote 4 of **Azimi-Moaye**d cited in the paragraph before.

20. However, I take a different view of para 70. In its last sentence the judge's decision reads: "[g]iving this anxious scrutiny I have concluded that it is unreasonable that she [the third appellant] should be educated in India with Tamil as a compulsory subject". I am entirely satisfied that there is a missing "not" before "unreasonable" since the judge made very specific findings at para 65 and earlier in para 70 that M would be able to opt to be taught in the English medium which would mean that all her lessons would be in English, save for a compulsory subject in Tamil, but that given her proven ability (para 65), her "resilience and thirst for learning will stand her in good stead in facing this challenge" (para 70). Whilst the grounds did not seek to rely on either of these sentences as evidence of inconsistency, I have seen fit to consider them and have decided that one is consistent with the judge's analysis elsewhere and the other is a simple typo.

21. Turning then to ground (3), I see no error in the judge's weighing up of the factors in favour of the appellants being granted leave and those against and concluding that the factors weighing against carried more weight. It was evident from my earlier analysis of the third appellants' circumstances why the judge did not find that they weighed as heavy as was argued for by her representatives; and the judge had explained why the youngest child's circumstances did not add any significant weight when considering the children's circumstances together (see para 77). The judge properly attached significant weight to

the fact that the first two appellants had overstayed and no argument had been made to the effect that their private life ties in the UK should be accorded significant weight (paras 78-80). The judge noted that the appellants speak English and hence there was no weight to be attached to any linguistic shortcomings. The judge accepted also that the first two appellants were financially independent albeit it did not weigh against them to a certain extent that they have relied on public funds for education and medical care (neither education nor medical care are "public funds" within the meaning of the Immigration Rules, but the fact that the family had benefitted from the NHS and state education were relevant considerations; the grounds take no issue to the contrary).

22. It was entirely open to the judge to treat as a very weighty factor in this case that the appellants had strong family ties in India (Tamil Noru) and that they would be returning as a family unit (para 84).

23. It will be apparent from the above that I am not persuaded by Mr Waheed's submissions that the third appellant's circumstances were of an exceptional kind in the context of both the reasonableness and outside the Rules assessment. That is not at all to belittle her remarkable achievements in her school and extracurricular activities or to overlook her very articulate explanation of why for her remaining in the UK was an imperative. However, the judge's assessment both of the issue of reasonableness and the issue of Article 8 outside the Rules was within the range of reasonable responses and is not vitiated by legal error.

24. Accordingly, I conclude that none of the appellants' grounds of appeal is made out and hence the decision of the FtT judge to dismiss their appeals must stand.

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

Unless and until a Tribunal or court directs otherwise, the third and fourth appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. This direction applies both to these two appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 23 August 2019

H H Storey

Dr H H Storey
Judge of the Upper Tribunal