Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/24117/2016
HU/24105/2016
HU/24108/2016
HU/24113/2016

THE IMMIGRATION ACTS

Heard at Field House
On 15 February 2019

Decision & Reasons Promulgated
On 05 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

(1) HP (INDIA)
(2) RP (INDIA)
(3) VP (INDIA)
(4) SP (INDIA)
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Gilbert, Counsel instructed by Tilson Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, who are a family comprising a mother and father and two qualifying children, appeal from the decision of the First-tier Tribunal (Judge C.A.S. O'Garro sitting at Hatton Cross on 15 October 2018)

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dismissing their appeals against the decision to refuse to grant them leave to remain on the grounds of family and private life established in the UK. The First-tier Tribunal did not make an anonymity direction. However, as the principal issue is whether the First-tier Tribunal Judge erred in law in finding that, despite the children having resided in the UK for seven years or more, nonetheless it would be reasonable to expect them to leave the UK with their parents, I consider that an anonymity direction is appropriate for these proceedings in the Upper Tribunal in order to protect the children from harmful publicity.

Relevant Background

2. The appellants are all nationals of India. The first and second appellants are married partners. The first appellant gave birth to their daughter, 'V', on 14 February 2008 in India, and to their son, 'S', in the UK on 1 July 2010. As the first appellant is the main appellant, I shall hereafter refer to her as 'the appellant', save where the context otherwise requires.

3. The appellant was born in India on 1 April 1979. She arrived in the UK on 31 January 2009 with valid entry clearance as a student. On 30 July 2009 she was joined in the UK by her spouse, 'R', and their child V. They were granted entry clearance as student dependants. The appellant successfully applied to extend her stay in the UK as a student on two occasions, and the rest of her family were granted limited leave to remain in line with her. The appellant last held valid leave to remain until 27 April 2015, and the remaining appellants held valid leave to remain as her dependants until the same date.

4. On 4 April 2015 the appellant sought further leave to remain as a Tier 2 migrant, but her application was refused on 24 June 2015, and the remaining appellants were all refused in line with her.

5. On 28 April 2016 Charles Simmons Solicitors submitted an application on behalf of the appellant and her husband for leave to remain on human rights grounds. The children joined in the application as *"non-applicant dependants*".

6. On 3 August 2016 the same solicitors served a statement of additional grounds relying on the fact that V had now accrued over seven years' residence in the UK since entering the UK with her father on 30 July 2009.

7. On 28 September 2016 the Department gave their reasons for refusing the appellant's application. Notwithstanding the fact that her daughter had been in the UK for seven years, it was reasonable to expect her to return to India with her, her husband and her son, and under such circumstances there would be no significant interference with her and their family life under Article 8 ECHR. Education services and access to health care were available for her children on return to India. Both children were at an age where they could be expected to adapt to life in India, and given that both she and her husband were educated to tertiary level, it is reasonable to expect her and her spouse to be able to obtain employment and earn

enough money to provide for their children in India. Under these circumstances, it was in the children's best interests to remain with her and her husband on their return to India. Furthermore, the children were both citizens of India "*with all that this implies for their right to know their own cultural identity and have contact with any extended family in India".*

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

8. Both parties were legally represented before Judge O'Garro. The appellant and her husband gave oral evidence, and they were cross-examined by the Presenting Officer.

9. In her subsequent decision, the Judge set out her findings at paragraphs [20] onwards. She began by considering the claim that there would be very significant obstacles to the reintegration of the appellant and her partner into life and society in India. At paragraphs [25]-[30] she gave her reasons for finding that the case under Rule 276ADE(1)(vi) was not made out. The reasons included the fact that the appellant had worked in India prior to coming to the UK, and that both parents had transferable skills. Her husband had worked in the UK as an IT Engineer. They had cousins in India who could assist them in finding accommodation to rent.

10. At paragraphs [31] to [49] (comprising three closely-typed pages) the Judge undertook a very detailed assessment of the best interests of the two children, making extensive reference to **Azimi-Moayad & Others [2013] UKUT, EV (Philippines & Others) [2014] EWCA Civ 874, MT & ET (Child's best interests; extempore pilot) Nigeria [2018] UKUT 00088 (IAC)**. She concluded at paragraph [49] that overall the children's best interests would be for them to remain in the UK "*because it will mean that ties in the United Kingdom formed through their residence would not be disrupted and they are likely to have better future opportunities, both educational and economically, by continuing to live in a first world country."*

11. However, she did not find this to be a case where the best interests of the children pointed overwhelmingly in favour of them remaining in the UK "*because of the factors I have already mentioned above which indicate that they would be able to form a connection with their country of nationality".*

12. At paragraph [50], the Judge directed herself that because it was in the children's best interests to remain in the UK this did not mean that it would not be reasonable to expect them to leave the UK.

13. At paragraph [51] she referred to the Home Office Guidance that had been quoted in **PD (Sri Lanka) [2016] UKUT 106** to the effect that the longer the child has resided in the UK, the more balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK. Nevertheless, the Judge observed, this Home Office Guidance had to be looked at as a whole. The Judge continued: "*The respondent considers that it is generally reasonable to expect a child to leave the UK with their*

parents, particularly if the parents have no right to remain in the United Kingdom."

14. At paragraph [52], the Judge said that it was apparent from the case of **MA (Pakistan) [2016] EWCA Civ 705** that, when considering whether it is reasonable to expect a child to leave the United Kingdom, regard must be had to the wider public interest in effective immigration control.

15. At paragraph [53], the Judge held that there were powerful reasons as to why leave should not be granted to the children: "*In this case the appellant has no right to remain in the United Kingdom. Her leave ended as long ago as 2015, but she deliberately remained, no doubt waiting until her eldest child had been in the United Kingdom for 7 years to make her application for leave to remain."*

16. At paragraph [54], she said that she was fortified in her findings that it was reasonable to expect the appellant's children to leave the UK with her and her partner by the judgment of Lord Carnwath in **KO (Nigeria) -v- SSDH [2018] UKSC 53**. The Judge went on to cite paragraphs [18] and [19] of his speech in their entirety.

17. At paragraph [56] the Judge held that it was reasonable, bearing in mind the public interests in the maintenance of immigration control, for the children to go to India with their parents, as they were all citizens of India and they had no right to remain in the UK. The children were not in their teens. They were fit and well. Schooling could resume in their home country before V reached a critical stage and their parents, who were bright and able, would be able to support their children in every way, as they wanted the best for their children.

The Application for Permission to Appeal

18. The application for permission to appeal was settled by Counsel who had not appeared at the hearing in the First-tier Tribunal. She pleaded that the Judge had failed to understand and apply correctly the ratio of **KO (Nigeria)** and had erroneously taken into account the appellant's immigration history in reaching a perverse decision that it would be reasonable to expect the two qualifying children to leave the UK.

The Reasons for the Grant of Permission to Appeal

19. On 27 December 2018 First-tier Tribunal Judge PJM Hollingworth gave lengthy reasons for granting the appellants' permission to appeal on a much broader basis than that pleaded by Counsel. He made no reference to **KO (Nigeria)**. His reasons included the following: "*The Judge saw no reason why they could not establish a connection with the country of their nationality. It is arguable that the Judge has attached insufficient weight to the benchmark policy period of seven years in relation to the question of integration across the social, cultural and educational spectrum. It is arguable that the Judge has attached insufficient to the effect of deracination. It is arguable that the Judge has attributed too much weight*

to factors in relation to integration in India...At paragraph 56 the Judge considered that even though it was in the children's best interests to remain in the UK, it was reasonable for the children to go to India with their parents. It is arguable that this conclusion had been diluted by the reference to best interests at paragraph 49 of the decision. It is arguably unclear what unequivocal conclusion is being applied in relation to the application of section 55. It is arguable that an insufficient analysis has been set out in relation to proportionality where the history of the first appellant is concerned in contradistinction to the wider public policy considerations arguably not relevant to the application of section 55 or to the question of reasonableness in relation to [V]."

The Hearing in the Upper Tribunal

20. At the hearing before me to determine whether an error of law was made out, Mr Gilbert developed both the case advanced in the permission application and the concerns raised by the Judge who granted permission. On behalf of the respondent, Ms Everett submitted that it was quite a challenge for any judge to accommodate the decision in **KO** within the earlier jurisprudence relating to the best interests of children and the 7-year Rule. However, having regard to paragraphs [46]-[52] of **KO**, in which Lord Carnwath gave his reasons for dismissing the appeals of **NS** and **AR**, she submitted that any error in the Judge's approach was not material, and that her conclusion on reasonableness was sustainable and entirely in line with **KO**.

Discussion

21. On 24 October 2018 the Supreme Court gave their judgment in the case of **KO (Nigeria) & Others -v- Secretary of State for the Home Department [2018] UKSC 53**. Lord Carnwath, with whom the other Justices agreed, said at paragraph [16] that, unlike its predecessor DP5/96, Rule 276ADE(1)(iv) contains no requirement to consider the criminality or misconduct of a parent as a balancing factor and that it was impossible in his view to read it as importing such a requirement by implication. At paragraph [17], he said that section 117B(6) incorporated the substance of the Rule without material change, but this time in the context of the right of a parent to remain. He inferred that it was intended to have the same effect. The question again was what was reasonable for the child.

22. In assessing what was reasonable for the child, Lord Carnwath endorsed as a highly relevant consideration the following guidance contained in an Immigration Directorate Instruction (IDI) of the Home Office cited at paragraph [10]:

> "It is generally the case that it is in a child's best interests to remain with their parents. Unless special factors apply, it is generally reasonable to expect a child to leave the UK with their parents, *particularly if the parents have no right to remain in the UK* (my emphasis)."

23. At paragraph [17], Lord Carnwath said:

> "The list of relevant factors set out in the IDI Guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as with paragraph 276ADE(1)(iv)."

24. At paragraph [18], he continued:

> "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 would 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."

25. Lord Carnwath went on to say that the point was well expressed by Lord Boyd in **SA (Bangladesh) -v- SSHD [2007] SLT 1245** at 22, and also by Lewison LJ in **EV (Philippines) -v- SSHD [2014] EWCA Civ 874** at paragraph [58]. Lewison LJ said, inter alia, as follows: "*If neither parent has the right to remain, then that is a background against which the assessment is conducted. Thus the ultimate question would be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?*"

26. Lord Carnwath said, at [19], that, to the extent that Elias LJ may have suggested otherwise in **MA (Pakistan)** at paragraph [40], he would respectfully disagree. There was nothing in the section to suggest that "reasonableness" was considered otherwise than in the real world in which the children find themselves.

27. At paragraphs [46]-[52], in which Lord Carnwath gave his reasons for dismissing the appeals of **NS** and **AR**. Both appeals featured blameless children who had resided in the UK for over 10 years at the time of the hearing in the Upper Tribunal on 5 November 2014.

28. Both claimants had entered the UK as students, on 19 February 2004 and 4 February 2003 respectively. NS's wife and older child had entered as dependants of NS in December 2004. AR's wife and child had entered as AR's dependants in February 2004. In October 2008, NS and AR had made separate applications for leave to remain as Tier 1 (Post-study work) migrants. In early 2009 the SSHD refused these applications on the basis that both NS and AR were involved in a scam by which they and numerous others falsely claimed to have successfully completed post-graduate courses at an institution called The Cambridge College of Learning.

29. NS and AR both appealed against the SSHD's decision, and their appeals were ultimately joined, and came before Upper Tribunal Judge Perkins. In his decision issued on 5 November 2014, he dismissed the appeals. With regard to the children, he had no difficulty in concluding that the best interests of the children required that they remain in the UK with their

parents. That, from their point of view, would be an ideal result. He reminded himself that one of the children, particularly, had been in the UK for more than 10 years, and this represented the greater part of her young life and she was someone who could be expected to be establishing a private and family life outside the home. He also reminded himself that none of the children had any experience of life outside the UK and they were happy, settled and doing well. But the fact was that their parents had no right to remain unless removal would contravene their human rights. Given their behaviour, it would be outrageous for them to be permitted to remain in the UK: "*They must go and in all the circumstances I find that the other appellants must go with them.*"

30. Mr Knafler QC, on behalf of the children, submitted that the decision of UTJ Perkins was erroneous in law as parental misconduct should have been disregarded. However, Lord Carnwath said at paragraph [51]:

> "I accept that UTJ Perkins' final conclusion is arguably open to the interpretation that the "outrageousness" of the parents' conduct was somehow relevant to the conclusion under section 117B(6). However, read in its full context, I do not think he erred in that respect. He correctly directed himself as to the wording of the subsection. The parents' conduct was relevant in that it meant that they had to leave the country. As I have explained (para 18 above) it is in that context that it had to be considered whether it is reasonable for the children to leave with them. Their best interests would have been for the whole family to remain here. *But in the context where the parents had to leave, the natural expectation would be that the children would go with them, and there was nothing in the evidence reviewed by the Judge to suggest that that would be other than reasonable* (my emphasis)".

The Pleaded Error of Law Challenge

31. The case advanced in the permission application is that the powerful reason identified by the Judge at paragraph [53] for expecting the children to leave the UK was their mother's absence of a right to remain in the UK since 2015, and her deliberately remaining here (unlawfully) with a view to waiting until the eldest child had been in the UK for seven years. The pleader acknowledges that the Judge gives further reasons as to why it is reasonable for the children to go back to India with their parents at paragraph [56], but submits that "*it is plain from paragraph 53 that it is the appellant's immigration history that forms the key basis of her decision.*"

32. The pleading overlooks the fact that between paragraphs [53] and [56] falls paragraph [54], in which the Judge explains why the speech of Lord Carnwath in **KO** fortifies her findings that it is reasonable to expect the appellant's children to leave the UK with her and her partner. By citing paragraphs [18] and [19] of **KO** in their entirety, the Judge identified the crucial ratio of **KO** which I have set out above. This includes the Supreme Court's endorsement of the policy guidance position of the Department that the Judge cites with approval at paragraph [51], namely that it is

generally reasonable to expect a child to leave the United Kingdom with their parents, particularly if the parents have no right to remain in the UK.

33. It was not an error of law for the Judge to bring into the equation the immigration history of the mother, as this was a necessary precursor to the real world assessment that was required. The immigration history of the mother and father led to their ceasing to have a right to remain here, and having to leave.

34. By citing paragraph [19] of **KO**, the Judge rightly identified that the background against which the assessment of reasonableness was to be conducted was that neither parent had the right to remain, and thus the ultimate question was: *"Is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"*

35. Given this starting point, there was nothing perverse in the Judge concluding that it was reasonable for the children to go to India with their parents. Such a conclusion was entirely consonant with Lord Carnwath's general line of reasoning in **KO**, and it is also congruent with his disposal of the appeals of **NS** and **AR**, whose children had objectively much stronger private life claims than the children in this appeal based on their length of residence.

Whether error in taking into account wider public policy considerations

36. Judge Hollingworth's concerns appear primarily to relate to matters lying outside the pleaded error of law challenge. The only point of intersection is his observation that it is arguable that an insufficient analysis has been set out relating to proportionality where the history of the first appellant is concerned in contradistinction to the wider public policy considerations arguably not relevant to the application of section 55, or to the question of reasonableness in relation to V.

37. Wider public policy considerations do not impact upon the question of reasonableness, following **KO**. The principle from **MA (Pakistan)** cited by Judge O'Garro at paragraph [52] of her decision is no longer good law. But insofar as the reasoning of Judge O'Garro on the question of reasonableness is at times contaminated by her incorrectly following earlier Court of Appeal jurisprudence which stated the contrary, this does not translate into a material error of law. To paraphrase Lord Carnwath, the parents' illegal status since 24 June 2015 was relevant in that it meant they had to leave the country. In the context where both parents had to leave the UK, the natural expectation would be that the children would go with them, and there was nothing in the evidence reviewed by the Judge to suggest that this would be other than reasonable in the real world, notwithstanding the fact they were both qualifying children under the statute at the date of the hearing. (Neither of them potentially qualified for leave to remain under Rule 276ADE (1)(iv) as neither had accrued seven

years residence at the date of application, although V had accrued seven years residence by the date of decision.)

Whether the finding that the best interests of the children lay in them remaining in the UK is inconsistent with the later finding that it is reasonable to expect them to leave the UK with their parents

38. There is no inconsistency in the Judge concluding at paragraph [49] that overall it was in the children's best interest to remain in the United Kingdom with the subsequent conclusion that it is nonetheless reasonable to expect them to leave the UK with their parents. The conclusion reached at paragraph [49] was the product of a best interests assessment conducted in an ideal world scenario, following **MA (Pakistan)**, whereas the conclusion of reasonableness reflects the real world in which the children find themselves, which is one where their parents have no right to remain, and there are no other family members who can step in to take care of them in the UK in their parents' absence.

Whether Judge erred in finding that the best interests of the children did not point overwhelmingly in favour of them remaining in the UK

39. Another asserted error raised by Mr Gilbert is that the Judge did not give adequate reasons for finding that the best interests of the children did not point overwhelmingly in favour of them remaining in the UK; and that the Judge did not adequately engage with the report of the Expert Psychologist who, as pleaded in Counsel's skeleton argument before the First-tier Tribunal, opined that removing the children from the UK would "*seriously affect them emotionally from their loss of identity"* and that they would *"suffer grief and depression arising out of the loss of the familiar, the loss of their friends and schooling."*

40. The permission application does not feature a complaint about not giving enough weight to a particular piece of evidence, or giving too much weight to another piece of evidence. Still less does it feature a complaint that the Judge has failed to take into account a particular piece of evidence.

41. On the topic of the report of Dr Kevin Wright, the Judge said as follows at paragraph [45]: "*I noted Dr Wright has looked at all the negative implications of the children moving, paying no regard to the fact that children are resilient and are able to adapt to change provided their parents are there to support and guide them as these children's parents will be. I find Dr Wright's report is not objective and for that reason I place limited weight on it."*

42. I consider that it was open to the Judge to place limited weight on Dr Wright's report for the reasons which she gave. More generally, I consider that the Judge gave adequate reasons for finding that the children could establish a connection with India, despite S having never lived there and V

not being able to recall living there. Her reasoning included the fact that they would have had contact with their parents' friends who formed part of the Indian community in the UK, "*which means that they have some knowledge and familiarity of the Indian culture.*" The Judge further observed that the children would have spoken and understood Gujarati prior to going to school, when they communicated mainly in Gujarati with their parents, whose main language remained Gujarati. So they would be able to speak Gujarati even if they were not able to read and write it. There was no reason to suppose that either of the children would have particular difficulty in learning to read and write in Gujarati. They would be educated in India and, to the Judge's knowledge, India had a good education system. Indeed, the appellant had her husband were educated to a high standard and had both qualified in India as Mechanical Engineers. In addition, the appellant's own father was a doctor, and her husband's father was an accountant.

43. For the above reasons, I find that no error of law is made out.

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

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

Signed Date 21 February 2019

Deputy Upper Tribunal Judge Monson