



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
IA/00223/2017

Appeal Number:

IA/00224/2017  
IA/00225/2017  
IA/00226/2017  
HU/07440/2018

**THE IMMIGRATION ACTS**

**Heard at Field House by  
video conference 09 March 2021  
(V)**

**Decision & Reasons Promulgated  
17 March 2021**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**A B & OTHERS  
(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

Anonymity was granted at an earlier stage of the proceedings because the case initially involved child welfare issues and protection issues. I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellants are 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.

**Representation:**

For the appellant: Ms L. Mair, instructed by ASR Legal Solicitors

For the respondent: Ms S. Cunha, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants are a family comprising of mother (AB), father (VB) and two daughters (IB and AKB). IB's case forms part of the same linked appeals but it was agreed before the First-tier Tribunal that her case involved confidential issues which should be dealt with in a separate decision (IA/00225/2017). I have decided that it is now appropriate to deal with all the cases in a single decision. It is not necessary for the purpose of this decision to go into the sensitive issues that justified a separate decision in relation to the case of IB.
2. The background to the case is summarised in my earlier error of law decision relating to AB, VB and AKB (annexed). There has been a series of directions and further case management following the start of the Covid-19 pandemic. It is not necessary to set out the procedural history save to say that during the course of these proceedings the appellants' situation has changed. At the hearing before the Upper Tribunal on 09 March 2021 the parties are now in agreement on the following matters:
  - (i) Whether or not the Upper Tribunal is bound by section 85(5) of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002') the respondent gives consent for the current circumstances to be considered: *Birch (Precariousness and mistake; new matters)* [2020] UKUT 86 referred.
  - (ii) If the appellants applied for leave to remain at the date of the hearing, it is accepted that they meet the requirements of paragraph 276B of the immigration rules ('continuous lawful residence'). All four have 10 years continuous lawful residence, there are no public interest considerations, and they meet the requirements of Appendix KoLL. It is agreed that the appeals should be allowed on human rights grounds in light of the decision in *OA & Others (human rights; 'new matter'; s.120) Nigeria* [2019] UKUT 65.
  - (iii) In the case of AKB, she met the requirements of paragraph 276ADE(1)(iv) of the immigration rules ('unreasonable to expect the child to leave the UK') at the date of the application. At the date of the hearing, she also meets the requirements of paragraph 276ADE(1)(v) ('18-25 years and spent half her life living in the UK').

In any event, the respondent accepts that it would be disproportionate to remove her in all the circumstances of the case.

(iv) In the case of IB, the respondent does not accept that her circumstances would meet the requirements of paragraph 276ADE(1)(vi) of the immigration rules ('very significant obstacles to integration'). The appellant does not seek to pursue the point in light of the respondent's other concessions. In any event, the respondent accepts that it would be disproportionate to remove her in all the circumstances of the case.

3. In light of the agreement between the parties I conclude that the appellants' removal in consequence of the decision would be unlawful under section 6 of the Human Rights Act 1998.

## DECISION

The appeals are ALLOWED on human rights grounds

Signed M. Canavan                      Date 09 March 2021  
Upper Tribunal Judge Canavan

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### NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

**5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**

**6. The date when the decision is "sent" is that appearing on the covering letter or covering email**

**ANNEX**



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/00223/2017  
IA/00224/2017  
IA/00226/2017  
HU/07440/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 24 July 2019**

**Decision Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**A B AND OTHERS  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

Anonymity was granted at an earlier stage of the proceedings because the case involves child welfare issues. I find that it is appropriate to continue the order. 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.

**Representation:**

For the appellants: Mr Z. Jafferji, instructed by Lawfare Solicitors  
For AKB (HU/07440/2018): Miss L. Mair, instructed by ASR Legal Solicitors  
Ltd  
For the respondent: Mr E. Tufan, Senior Home Office Presenting  
Officer

**DECISION AND REASONS**

1. The appellants are a family comprising of mother (AB), father (VB) and two daughters (IB and AKB). IB's case forms part of the same linked appeals but it was agreed before the First-tier Tribunal that her case involved confidential issues which should be dealt with in a separate decision (IA/00225/2017).

*Decisions dated 22 December 2016 (the whole family)*

2. AB ("the appellant") is the main applicant who entered the UK on 20 November 2009 with entry clearance as a Tier 4 (General) Student Migrant that was valid until 30 July 2012. Her leave to remain was extended in the same category until 07 June 2014. On 05 April 2013 the appellant applied for leave to remain as a Tier 1 (Entrepreneur) Migrant. She was interviewed on 11 March 2016.
3. The respondent refused leave to remain as a Tier 1 Migrant in a decision dated 22 December 2016. The other appellants were refused leave to remain as her dependents. The decision that is the subject of the appeal was a decision to refuse leave to remain as a Tier 1 Migrant and did not include a decision to refuse a human rights claim.

*Decision dated 12 March 2018 (AKB)*

4. On 24 January 2018 the appellant's daughter (AKB) made a separate application for leave to remain on human rights grounds. The application was refused in a decision dated 12 March 2018. The respondent concluded that she did not meet the private life requirements of paragraph 276ADE(1)(iv) of the immigration rules. Although the respondent accepted that she had lived in the UK for a continuous period of seven years, having entered in November 2010, it was reasonable to expect her to leave the UK with her family who had no basis of stay in the UK. Her appeal against the respondent's decision to refuse a human rights claim (HU/07440/2018) is linked to the original appeal in which she is also an appellant (IA/00226/2017).

*First-tier Tribunal decision*

5. First-tier Tribunal Judge S.H. Smith (“the judge”) dismissed the appeals in two separate decisions promulgated on 10 April 2019. The first decision dealt with the applications made by the whole family and included a decision in respect of AKB’s human rights claim. The second decision dealt with discreet issues arising from human rights issues raised for the first time at the hearing by IB. In this decision, I will only deal with the judge’s findings relating to the first decision. Consistent with Judge Smith’s approach, I will deal with the issues relating to IB in a separate decision.
6. The judge noted that the appellant did not pursue any arguments relating to the original application for leave to remain as a Tier 1 (Entrepreneur) Migrant and concluded that the appellant and her dependents could not succeed on that basis under the immigration rules [36-40].
7. The judge went on to consider whether he had jurisdiction to determine human rights grounds given that the decision dated 22 December 2016 did not include a decision to refuse a human rights claim. By virtue of saved provisions relating to Part 5 of the Nationality, Immigration and Asylum Act 2002 (“NIAA 2002”), the appeal was to be determined according to the provisions in place before the changes introduced by way of amendments to Part 5 by the Immigration Act 2014 (“IA 2014”). The first decision related to a Tier 1 application made before 06 April 2015: see Article 1(2)(e) and Article 9(b) (SI:2014/2771) (as amended SI:2015/371). The judge was satisfied that by virtue of the saved version of section 85(4) NIAA 2002 he had jurisdiction to consider any matters relevant to the substance of the decision, including matters arising after the date of the decision [41]. AKB’s appeal was against a decision to refuse a human rights claim and was to be determined with reference to the amended appeal framework [42].
8. The judge was satisfied that the appellants had established private lives in the UK and that removal in consequence of the decision would infer with their private lives in a sufficiently grave way to engage their rights under Article 8(1) of the European Convention [44]. In assessing whether removal would be justified and proportionate, the judge considered whether any of the appellants met the private life requirements contained in paragraph 276ADE(1)(vi) of the immigration rules. He concluded that the first and second appellants (AB and VB) could not show that there would be ‘very significant obstacles’ to their integration in India given that they were born and brought up there and remained familiar with the language, culture and customs. The appellants had skills that they could use to re-establish themselves in India [47].
9. In relation to AKB, she did not meet the requirements of paragraph 276ADE(1)(vi) at the date of the application on 24 January 2018 because she was not 18 years old, although she was by the date of the hearing.

However, having considered the concerns raised by AKB, and the evidence contained in the independent social worker's report, the judge concluded that she would not face 'very significant obstacles' to integration in India because she lived there until she was 10 years old and her parents would be able to support her to re-integrate [48-51].

10. The judge went on to consider whether AKB met the requirements of paragraph 276ADE(1)(iv) at the date of the application. If she could show that it was unreasonable to expect her to leave the UK at the relevant time it would be a matter that should be given weight in the balancing exercise [53]. The judge then conducted an analysis of relevant case law in *KO (Nigeria) v SSHD* [2018] UKSC 53 and *MA (Pakistan) & Others v SSHD* [2016] EWCA Civ 705. The judge took as his starting point the fact that AKB's parents had no leave to remain and it would generally be reasonable to expect the child to leave the UK with her parents [57-58]. At the time of the application return to India would have disrupted AKB's A level studies, the judge found that it would have been in her best interests to continue to pursue her education while living with her family "in whichever country her family were living in [at] the time". He concluded that her best interests, "in light of the fact her parents did not enjoy a right to reside here, would have been to return to India with the family, as a family unit." [60]. The judge concluded that, at the date of the application, it would not have been unreasonable to expect the child to leave the UK and that she did not meet the requirements of paragraph 276ADE(1)(iv) [61].
11. The judge went on to weigh various competing factors, including the public interest considerations contained in section 117B NIAA 2002, before concluding that the appellants' removal in consequence of the decision would not be unlawful under section 6 of the Human Rights Act 1998 ("HRA 1998").

#### *Grounds of appeal*

12. AKB appeals the First-tier Tribunal decision on the following grounds:
  - (i) The judge failed to consider the fact that the appellant was under 18 years of age at the date of the application for the purpose of the assessment under paragraph 276ADE(1)(iv).
  - (ii) The judge failed to take into account relevant considerations in assessing whether it would be reasonable to expect her to leave the UK.
  - (iii) The judge erred in beginning his assessment from the view that it would generally be reasonable to expect a child to leave the UK with her parents.

- (iv) The judge erred in finding that the parents were did not have leave to remain in the UK and were liable to removal. At the date of the application they were remaining lawfully by virtue of section 3C of the Immigration Act 1971 ("IA 1971") awaiting the outcome of the appeal.
- (v) The best interest assessment was flawed. The judge failed to conduct an evaluative assessment giving appropriate weight to the fact that the child had been continuously resident in the UK for a period of seven years.

13. AB and VB appeal the First-tier Tribunal decision on the following grounds:

- (i) The decision in respect of their claims was unsustainable as a result of the flawed assessment of their daughters' claims.
- (ii) It is asserted that the judge failed to conduct an adequate balancing exercise of all the factors that were relevant to a proper assessment of Article 8 and failed to give adequate weight to the respondent's delay in decision making and further delays during the appeal process.

### **Decision and reasons**

#### *Error of law*

14. The first point raised in the grounds has no merit. The judge made clear at that, even if AKB did not meet the requirements of paragraph 276ADE(1)(iv) at the date of the hearing because she was an adult, if he found that she met the requirements at the date of the application, it was a matter that would be given significant weight that may well be determinative of the appeal [53].
15. The fourth point is equally unarguable. It mattered not whether the first and second appellants were remaining in the UK lawfully pending the outcome of the appeal. Their immigration status was still precarious. They did not, as it turned out, have any prospect of success in relation to the original application for leave to remain under the immigration rules. Then and now their human rights claims rely largely on the success of their daughters' claims. It light of his finding that the parents did not meet the requirements of the immigration rules either in relation to the Tier 1 application, or under the private life provisions contained in paragraph 276ADE(1)(vi), it was open to the judge to conclude that the 'real world' situation was one where the parents had no leave to remain and would be expected to leave the UK.



16. However, the arguments relating to the judge's analysis of the best interests of the child (AKB) and whether she met the 'reasonableness' test at the date of the application are more persuasive. The decision in *KO (Nigeria)* does not obviate a judge from conducting a structured approach to the assessment of the best interests of a child before assessing whether it would be reasonable to expect that child to leave the UK. The first assessment is needed to inform the second.
17. The Supreme Court in *ZH (Tanzania) v SSHD* [2011] UKSC4 made clear that the best interests of a child must be considered first. They are a primary consideration, which must be given appropriate weight although they can be outweighed by the cumulative effect of other public interest considerations. In *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874 the Supreme Court and the Court of Appeal gave further guidance as to the factors that might be relevant to the assessment. Neither *ZH (Tanzania)* nor *Zoumbas* were considered by the Supreme Court in *KO (Nigeria)*, but are equally binding.
18. Even then, the policy that was only partially quoted in *KO (Nigeria)* cited at [57] of the judge's decision made clear that strong reasons would be needed to justify refusing an application in a case involving children who had been resident in the UK for a continuous period of seven years.

"The requirement that a non-British Citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, recognises that over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years." [11.2.4]
19. The case law relating to section 117B(6) has come full circle to the position first outlined by Elias LJ in *MA (Pakistan)*. His favoured approach was to interpret the wording of section 117B(6) to focus solely on the child (albeit he went on to find that he was bound by a previous decision of the Court of Appeal at the time). What *MA (Pakistan)* makes clear, is that the chosen threshold of seven years has significance. Elias LJ emphasised that the Secretary of State's policy recognised that after seven years a child is likely to have set down roots and developed social, cultural and educational links in the UK such that it would be highly disruptive if the child is required to leave. This may be less so when a child is very young, but the disruption becomes more serious as the child gets older. The fact that a child has been resident for a period of seven years should be given "significant weight" in the balancing exercise. He went on to say: "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, that must rank as a primary consideration in the proportionality assessment.”[46]

20. The fact that the respondent’s policy has changed since then matters not. The Upper Tribunal in *JG (s 117B(6): “reasonable to leave” UK) Turkey* [2019] UKUT 72 expressly rejected the argument that changes to the IDI made any difference to a proper assessment of the statutory wording (in that case section 117B(6)). The provisions contained in paragraph 276ADE(1)(iv) or section 117B(6) are said to comply with Article 8 of the European Convention and must be interpreted according to the relevant principles. The statement made in the earlier policy, endorsed by the Court of Appeal in *MA (Pakistan)*, is broadly consistent with the general principles relating to the weight that should be given to the best interest of children outlined in earlier Supreme Court decisions.
21. In this case, the judge began his assessment with reference to the respondent’s policy statement rather than conducting an initial assessment of the best interests of the child at the date of the application. Although it was open to him to consider the fact that AKB could continue her education in India, nowhere in his assessment did he give weight, let alone significant weight, to the fact that she had been continuously resident in the UK for a period of seven years. No evaluative assessment was undertaken as to the strength of the ties that the child might have established during that time. No assessment was undertaken as to whether it was in her best interests to return to India in light of his later findings that moving to India would have a detrimental impact on AKB’s education and that both girls would have fewer opportunities there than in the UK and are more likely to experience discrimination on account of their gender [66(iv)-(v)]. To simply rely on the respondent’s statement that it would generally be reasonable to expect the child to leave the UK with her parents was insufficient and failed to consider a number of relevant factors that were material to a proper assessment of whether it would be reasonable to expect the child to leave the UK at the date of the application. For these reasons I conclude that the First-tier Tribunal decision relating to AKB’s appeal against the decision dated 12 March 2018 involved the making of an error on a point of law.
22. In relation to the parents, it is not arguable that the delay in decision making or the delay in hearing the appeal would have made any material difference to the outcome of the First-tier Tribunal decision. The appellants did not meet the requirements of paragraph 276ADE(1)(vi) of the immigration rules. Despite the delays the appellants still fell far short of the requirements for leave to remain on grounds of long residence either under paragraph 276B or 276ADE(1)(iii) of the immigration rules. I was not referred to anything in the evidence to show that the appellants had established any significant let alone compelling ties during the period of delay.

23. On behalf of the first and second appellants Mr Jafferji accepted that their appeals depended to a large extent on the outcome of the appeals of their children. It is not arguable that they could rely on section 117B(6) at the date of the First-tier Tribunal hearing because neither daughter was a 'qualifying child'. At the date of the hearing IB was 20 years old and AKB was 18 years old. To the extent that the parents could still rely on an overall assessment of Article 8 they needed to show a sufficiently strong family life with their adult children of the kind that would still engage the operation of Article 8 of the European Convention. Although the grounds relating to the parents are significant weaker, in so far as the evidence suggests that at least one of their daughters does not appear to have established an independent life away from her parents, their family life with their daughters is a matter that might be relevant to a proper assessment of the balancing exercise under Article 8. If there is an error of law in the judge's finding relating to the assessment of AKB's appeal it is likely to have affected the assessment of the parents' claim to some extent. To this end it is pragmatic to set aside the judge's findings relating to the first and second appellants as well in order to remake the decision with a few to a holistic assessment of the family circumstances.
24. The First-tier Tribunal decision relating to the appeals of AB, VB and AKB involved the making of an error of law.
25. I have also found, in a separate but linked decision, that the First-tier Tribunal decision relating to IB involved the making of an error of law.
26. The normal course of action would be for the Upper Tribunal to remake the decision. I see no reason to depart from that course in this case. The factual background relating to the appellants' length of residence and immigration history does not appear to be disputed. The judge's findings relating to the less favourable conditions IB and AKB would face as women in India have not been challenged and should be preserved. The judge's findings relating to the Tier 1 application and the parents' failure to meet the requirements of paragraph 276ADE(1)(vi) are also preserved.
27. It is possible that the Article 8 claims relating to AB, VB and AKB could be remade and determined on the papers already before the Upper Tribunal. However, it seems to me that there might be some difficulty in remaking the decision relating to IB without a further hearing and to that extent it seems appropriate to relist the matter for a resumed hearing. However, it will be assumed that nothing more in the way of evidence is needed from these three appellants unless there has been a significant change in circumstances. It is anticipated that those appeals can be dealt with by way of submissions only. Further directions have been made in relation to IB.


**DIRECTION**

28. The parties are granted permission to serve any up to date evidence in support of the appeals, which must be served at least **14 days** before the resumed hearing.

**DECISION**

The First-tier Tribunal decision involved the making of an error on a point of law

The appeals will be listed for a resumed hearing for the decision to be remade

Signed   
Upper Tribunal Judge Canavan

Date 24 October 2019