Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05714/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th January 2019	**On 15th January 2019**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

VSP
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Singer (instructed by Paul John & Co Solicitors)
For the Respondent: Mr N Bramble (Senior Home Office Presenting Officer}

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Appellant, with permission, in relation to a Decision and Reasons of the First-tier Tribunal (Judge Davey) promulgated on 23rd July 2018.

2. The Appellant is a national of India born on 8th July 2010 and thus a minor. She had appealed to the First-tier Tribunal against a decision by the Secretary of State, taken on 22nd February 2018, to refuse her leave to remain in the UK on Article 8 grounds.

3. The Appellant was born in the UK to Indian parents. She has a younger sibling. The Appellant could not succeed under Appendix FM because neither of her parents had leave in the UK. Her parents had come to the United Kingdom in 2009 as a working holidaymaker and his dependant and overstayed when their leave expired.

4. The Secretary of State also considered the application under paragraph 276 ADE. The relevant part is paragraph 276 ADE (iv). The Secretary of State accepted that the child had been in the UK for a continuous period of seven years but, given that her parents had no leave to be in the UK, did not find it unreasonable to expect the Appellant to leave the UK with them.

5. The Judge dismissed the appeal finding it proportionate for the child to return to India in the company of her parents and not unreasonable to expect her to do so.

6. The grounds giving rise to the grant of permission to appeal argue that the Judge's assessment of "reasonableness" was flawed and that the decision did not make clear the powerful reasons for requiring the child, a qualifying child, to leave the UK as referred to in MA (Pakistan) [2016] EWCA Civ 705.

7. In a skeleton argument provided on the day of the hearing before me Mr Singer acknowledged that the Supreme Court had, since the First-tier Tribunal's decision, given judgment in the case of KO (Nigeria) [2018] UKSC 53. However, he argued that, notwithstanding that judgment, the Judge's reasoning was still flawed. He argued that the Judge had looked at whether the Appellant could live in India rather than whether it was in her best interests to do so. He did not assess the reasonableness of the child being removed to India with her parents but rather whether she could be so removed. He argued that nothing in KO overturns the findings contained in paragraphs 46 and 49 of MA and argued that, had the Judge properly considered the best interests of the child in this case he would have found it unreasonable for her to be expected to leave the UK. He also argued that the immigration history of the parents in this case was nowhere near as bad as that of the parents in KO and that there were no powerful reasons as stipulated by the Court of Appeal in MA to remove a qualifying child. Whilst he did not seek to argue that the immigration history of the parents was immaterial, he did argue that the Judge had not properly considered reasonableness and had he done so the outcome would have been different.

8. Mr Bramble argued that the Judge's decision was not flawed as suggested and that the Judge had carried out a holistic assessment and considered reasonableness as he was required to, giving appropriate weight to the best interests of the child which he took as his starting point. He argued that the way the Judge approached this case was in fact on all fours with the reasoning in KO.

9. Paragraphs 46 to 49 of MA read as follows:-

"46. Even on the approach of the Secretary of State, the fact that a child has been herefor 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.

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 (Phillipines)* 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."

49. Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."

10. At paragraph 40 of MA Lord Justice Elias said:-

> "It may be said that the wider approach can be justified along the following lines. It will generally be in the child's best interests to live with his or her parents and siblings as part of a family. That is usually a given especially for younger children, absent domestic abuse or some other reasons for believing the parents to be unsuitable. The approach of the Secretary of State means that the stronger the public interest in removing the parents, the more reasonable it will be to expect the child to leave. But it seems to me that this involves focusing on the position of the family as a whole. In cases where the seven year rule has not been satisfied, that is plainly what has to be done. As McCloskey J observed in *PD and others v Secretary of State for the Home Department* [2016] UKUT 108 (IAC) it would be absurd to consider the child's position entirely independently of, and in isolation from, the position of the parents given that the child's best interests will usually require that he or she lives as part of the family unit. But the focus on the family does not sit happily with the language of section 117B(6). Had Parliament intended to require considerations bearing upon the conduct and immigration history of the applicant parent to be taken into consideration, I would have expected it to say so expressly, not for the matter to have to be inferred from a test

> which in terms focuses on an assessment of what is reasonable for the child. This does not in my view mean that the wider public interests have been ignored; it is simply that Parliament has determined that where the seven year rule is satisfied and the other conditions in the section have been met, those potentially conflicting public interests will not suffice to justify refusal of leave if, focusing on the position of the child, it is not reasonable to expect the child to leave the UK. When section 117A(2)(a) refers to the need for courts and tribunals to take into account the considerations identified in section 117B in all cases, that would not in my view have been intended to include specific circumstances where Parliament must be taken to have had regard to those matters."

11. In KO the Supreme Court agreed with the views of Lewison LJ as expressed in EV (Philippines) [2014] EWCA Civ 874 at paragraph 58 where he said: -

> "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 remain to the country of origin?"

12. The Supreme Court went on to say that to the extent that Elias LJ may have suggested otherwise in MA at paragraph 40 it would respectfully disagree. It said 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

13. Mr Singer also referred me to the relevant section of the current IDI's, dated 19 December 2018 which follows the rationale of KO and states: -

> "the determination sets out that if child's parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that it would not be reasonable. The guidance then goes on to describe situations where it may be reasonable for a qualifying child to leave the UK with the parent or primary carer where for example:
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> (i) the parent or parents, or child, are a citizen of the country and so able to enjoy the full rights of being a citizen in that country
>
> (ii) there is nothing in any country specific information, including as contained in relevant country information to suggest that relocation would be unreasonable
>
> (iii) the parent or parents or child have existing family, social, or cultural ties with the country and if there are wider family relationships with friends and community overseas that can provide support:

(iv) removal would not give rise to significant risk to the child's health

(v) there are no other specific factors raised by or on behalf of the child."

14. The First-tier Tribunal Judge stated at paragraph 5 that the facts in this case where that the Appellant was born in the UK; had grown up entirely in the UK, albeit in the midst of a community which is based around Gujurati and India and that the Appellant had been in schooling and grown up and made friends, bearing in mind her age at the present time. He said that plainly to uproot her from what she has grown used to enjoying, including an English education system, is a matter of concern and certainly will be disturbing and to a degree one supposes likely to be in measure distressing. The fact was that she would be leaving with her family and there was no suggestion she would be left behind.

15. The Judge went on to indicate that the circumstances in which the family would find itself in India were presented as akin to poverty and very diminished from that which she currently enjoyed in the UK but he also bore in mind the fact that the life she enjoys in the UK is to a degree at public expense, in particular her education.

16. The Judge then concluded that the best interests of the Appellant lay in her relocating with her family back to India and that while the quality of life may not be the same that must be the case in nearly every case where someone is in the UK here as opposed to the Indian subcontinent.

17. The Judge went on to say that there was nothing to indicate that this child, who could speak some Gujarati, would be unable to integrate into the schooling system in India. He said that while it might take a little time to settle he could see nothing about her educational background or abilities that would suggest she could not get used to and benefit from the Indian educational system. He saw no reason to infer that education in India is inferior to that which can be provided in the United Kingdom.

18. It is clear therefore that the first matter that the Judge considered was the best interests of the child and he concluded that those best interests lay in going to India with her family.

19. In so doing he assessed her best interests "in the real world". The facts in this case were that none of her family had any right to be in the UK and should be expected to leave.

20. Her parents' immigration history was directly relevant to the real circumstances in which the Appellant found herself – a family which should return to India.

21. The Judge having found under the Immigration Rules that it was not unreasonable for the Appellant to go to India with her family, nevertheless considered Article 8 outwith the Rules. In that context and in accordance

with MA he did take into account the parents' immigration history which he found to be poor. He found that they chose to remain in the UK for obvious reasons, namely they prefer the benefits they can achieve of life in the UK to that which they may find in their home country. Secondly, the family prefer the education advantages, as they perceive it, to bring their children up in the UK and thirdly, he found that for understandable reasons they sought to play down the extent of family support and assistance they might receive on a return to India.

22. The Judge found the immigration history to be significantly poor. He noted that in overstaying the parents had chosen to remain when they had no basis to do so and decided deliberately to bring up a family in the UK and to relinquish some ties that they had with Gujarat in India. They did not see any incentive in maintaining those ties because, plainly, it would prejudice their claim of the difficulties of return to India.

23. Mr Singer's submission that the immigration history was not very poor was unattractive. It is a very serious matter to flout the immigration laws of this country; it is an offence.

24. The Judge did not find the father a credible witness as to the extent to which he had disconnected himself and his wife from India. He felt that this was part of a deliberate presentation of the case to emphasise the adverse effects of removal on the children. He found no reason why the Appellant's father, who had been able to work in UK, could not work in India as it was plain that he could do a variety of jobs and was a fit and healthy person. He took into account the factors he was required to do under section 117B(6) of the Immigration and Asylum Act 2002 and again found it not unreasonable to expect the Appellant to leave the UK.

25. I find myself in full agreement with Mr Bramble's submission that the Judge's assessment of the best interests of the child is unassailable and indeed his reasoning overall prescient as it was wholly in line with the wisdom of the Supreme Court as subsequently set out in KO.

Decision

26. The Decision and Reasons of the First-tier Tribunal does not contain any material errors of law and the appeal to the Upper Tribunal is dismissed.

27. The First-tier Tribunal made an anonymity direction because of the Appellant's minority status and I agree that it is appropriate to make one also.

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 their 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 4th January 2019

Upper Tribunal Judge Martin