**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number:** HU/16198/2018
HU/16200/2018, HU/16204/2018
HU/16206/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On Thursday 8 August 2019** | **On Wednesday 21 August 2019** |

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**(1) R N**
**(2) S G**
**(3) A N**
**(4) S N**

Appellants

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr S Mahmood, Counsel instructed by Greystone solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

**Anonymity**
*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*
An anonymity direction was made by the First-tier Tribunal Judge. I continue the anonymity direction because the case involves minor children. 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.

## DECISION AND REASONS

## BACKGROUND

1. The Appellants appeal against a decision of First-tier Tribunal Judge French promulgated on 11 April 2019 ("the Decision") dismissing their appeals against the Respondent's decision dated 16 July 2018 refusing their human rights claim made in the context of proposed removal to India.

2. The Second Appellant came to the UK first as a student in 2011 with the First Appellant (her husband) and Fourth Appellant (their daughter born in September 2004) as her dependents. Their son, the Third Appellant, was born in the UK in July 2013. As at the date of the hearing before Judge French, the Third and Fourth Appellants were aged five and fourteen respectively.

3. The family overstayed following the expiry of the Second Appellant's leave in December 2014. Their evidence is that they planned to return to India following the expiry of their leave and even went so far as to book flights in August 2016 but, having seen the upset caused, in particular to the Fourth Appellant, they decided not to go and have remained in the UK unlawfully.

4. The focus of the appeals is the position of the Fourth Appellant. Judge French found that there were no very significant obstacles to the family's integration in India. He found that their family life could be continued there. He was also satisfied that the welfare of the children could be maintained in India as well as in the UK. He concluded that it was not unreasonable for the family to return to their home country.

5. The Appellants raise two grounds. First, they say that the Judge has failed to consider the relevant public interest considerations, in particular Section 117B (6) Nationality, Immigration and Asylum Act 2002 ("Section 117B (6)"). Second, and allied to that first ground, they say that the Judge has adopted a flawed approach to the test of reasonableness as set out in MA (Pakistan) and others v Secretary of State for the Home Department [2016] EWCA Civ 705 ("MA (Pakistan)")

6. Permission to appeal the Decision was granted by First-tier Tribunal Judge Keane on 4 July 2019 in the following terms:

> "The appellants applied in-time on identical grounds for permission to appeal against the decision of Judge of the First-tier Tribunal French promulgated on 11 April 2019 in which the Judge dismissed the appeals on human rights (Article 8) grounds. The grounds

> disclosed arguable errors of law but for which the outcome of the appeal might have been different. The judge explicitly acknowledged at paragraph 8 of the decision that Miss [SN] was a qualifying child within the definition of Section 117D(1) of Nationality, Immigration and Asylum Act 2002 (the 2002 Act). However, the judge did not refer in his decision to Section 117B(6) of the 2002 Act nor was it possible to infer from the judge's decision that he took into account the public interest did not require [RN]'s removal from the United Kingdom. The judge arguably failed to take into account an important consideration. Further, the judge arguably did not adequately or at all consider whether it would be reasonable to expect Miss [SN] to leave the United Kingdom. The judge's assessment was to be found at paragraph 8 of his decision where he stated, "However in the present case, [SN] had lived the first half of her life in India. She still had ties in India, as evidenced by the fact that she spoke to her grandmother by telephone". Such was arguably not that comprehensive assessment of relevant considerations urged by the Upper Tribunal at paragraph 39 of **PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC)** to which the author of the grounds referred at paragraph 8 of the grounds. The judge did not explicitly or tacitly accord weight to Miss [SN]'s period of residence in the United Kingdom, a period of residence in excess of seven years at the date of the hearing. The application for permission is granted."

7. The matters come before me to consider whether the Decision contains a material error of law and if I conclude that it does, either to re-make the decision or remit the appeal to the First-tier Tribunal for redetermination.

## ERROR OF LAW DECISION

8. The criticism of the Decision made in the grant of permission that Judge French's consideration of the position of [SN] is limited to what is said at [8] is somewhat harsh. In fact, most of the consideration of her position and that of her brother is contained in [7] of the Decision where the Judge deals with the children's best interests. Those paragraphs read as follows:

> "[7] I was conscious of the requirement to ensure that s.55 of the Borders, Citizenship and Immigration Act 2009, had been adhered to. However I was satisfied that a return to India would not be detrimental to the welfare of the children. [SN] had lived in India until she was six and had attended school there. She had learned Hindi and Punjabi as her first languages. It was my view that she would be able to become in these [sic] languages again and it was likely that [SN] would have adequate knowledge of Hindi and Punjabi so as to be able to cope in a state school. I was satisfied that there was good quality education available in India. [SN] (the fourth appellant) was now 14 years old and therefore she might have some friends in the UK. I was aware of the various certificates which had been produced to show that [SN] was doing well at school, in the UK but as a bright child with supportive parents, she was likely to

> achieve academically wherever she went to school. It was also noted that [SN] had been active in a youth group at her church and was a good friend of Reverend [O]'s daughter. However there was no reason to suppose that she could not become involved in a similar group in India and make new friends. She had lived in India before, so it would not be totally unfamiliar to her and she would have the benefit of support from the wider family. There had been mention of [SN] having a health problem, but it transpired that her stress was because of the uncertainty of the family's situation. (This had been confirmed by the consultant psychiatrist in a letter dated 27/03/19). Once the situation had been resolved there was no reason to suppose that she would continue to be stressed. In that sense a refusal of this appeal would not jeopardise her health. However if she continued to experience mental health problems, after she returned to India, then I was satisfied that she would be able to receive appropriate treatment in India. As far as [A] was concerned, he was only 5 years old and would not have formed any close bonds outside his immediate family, who would be returning to India with him. At that young age, it was reasonable to suppose that he would learn the language quickly. Whilst being aware of the requirements of s.55, I was satisfied that the welfare of the children could be maintained in India as well as in the UK.
>
> [8] I was conscious that when the parents came to the UK, they knew that they had limited leave to remain. They had built a family in UK despite this. The applications for extended leave to remain had been refused in 2014, but yet they remained in the UK. Having said that however I was conscious that "a child must not be blamed for which [sic] he or she is not responsible, such as the conduct of a parent". I accepted that [SN] was a "qualifying child" because she had been in the UK for 7 years, and therefore consideration had to be given to 276ADE of the Immigration Rules. I noted that in MA (Pakistan) 2016 it was stated that the fact that a child has been here for seven years must be given significant weight. I was aware of the Upper Tribunal's emphasis on "reasonableness". However, in the present case, [SN] had lived the first half of her life in India. She still had ties in India, as evidenced by the fact that she spoke to her grandmother by telephone. In my view, it was not unreasonable to conclude that family and private life could be enjoyed outside the UK. Having weighed the merits of the public interest of managing immigration as against the individual rights of the Appellants to respect for family and private life, I was satisfied that the scales were in favour of confirming the decision of the Respondent and refusing the appeals."

9. Those findings also have to be read in the context of the other findings made at [6] of the Decision and the Judge's record of the evidence at [3] and [4] of the Decision particularly what is there said about [SN]'s language skills and medical treatment for her. The Judge did not accept the First Appellant's assertion that [SN] did not understand the languages spoken in India not least because the Second Appellant confirmed that she did and also confirmed that she would be able to

obtain medical treatment in India. That evidence is the foundation of the Judge's conclusions at [7] and [8] of the Decision.

10. Mr Mahmood sensibly and realistically focussed his submissions not on whether the Judge had adopted the right test but whether he had properly considered the evidence. He submitted first that there was no reference to the letter written by [SN] explaining why she does not want to go back to India. He also pointed out that, contrary to what is said by the Judge at [7] of the Decision, the psychologist did not say that [SN]'s mental health problems stemmed from the uncertainty about the family's immigration status but because that uncertainty meant that she might have to return to India. He also submitted that the Judge had failed to identify what are the strong reasons required to displace the weight to be given to the seven years which [SN] has spent in the UK.

11. Having heard Mr Mahmood's submissions, Mr Walker also sensibly and correctly conceded that there was an error of law, particularly in relation to the Judge's analysis of the psychologist's report. He accepted that this was a material error.

12. I accept that there is a material error of law in the Judge's analysis of whether it is reasonable to expect [SN] to return to India. The Judge accepted at [8] of the Decision that [SN] is a qualifying child and also that her period of residence must be given significant weight. He accepted that the relevant question is whether it is reasonable for [SN] to return. However, in considering that issue and by adopting reasoning taken from [7] of the Decision which is itself flawed, particularly in relation to the interpretation to be placed on the psychologist's report, the Judge did not take account of all the evidence when assessing whether it was reasonable for [SN] to return to India.

13. I therefore set aside the Decision. Mr Mahmood invited me to re-make the decision based on the documentary evidence. As he pointed out, the crux of the case is the position of [SN] who is a teenage child with some mental health issues. It would not be appropriate for her to give oral evidence. As he also pointed out, there was apparently no dispute as to the facts or evidence. It was a matter of assessment of that evidence against the law. I accept that to be the position. Since I am not hearing oral evidence from [SN]'s parents, however, I preserve [3] and [4] of the Decision which records their evidence. I now turn to re-make the Decision.

## RE-MAKING

14. As indicated above, the Appellants' cases stand or fall with the case of [SN]. It is therefore in that context that I consider the evidence.

### Legal Framework

15. Paragraph 276ADE(1) of the Immigration Rules ("the Rules")

"**Requirements to be met by an applicant for leave to remain on the grounds of private life**

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

…

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK;

…"

"Section 117B, Nationality, Immigration and Asylum Act 2002

…

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

16. The question of whether it is reasonable to expect a child to return to his or her home country was considered by the Supreme Court in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53. The relevant paragraphs are as follows:

> "[16]It is natural to begin with the first in time, that is paragraph 276ADE(1)(iv). This paragraph is directed solely to the position of the child. Unlike its predecessor DP5/96 it contains no requirement to consider the criminality or misconduct of a parent as a balancing factor. It is impossible in my view to read it as importing such a requirement by implication.
>
> [17] As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I wold infer that it was intended to have the same effect. The question again is what is 'reasonable' for the child. As Elias J said in *R (MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber)* [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors

relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. 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 of paragraph 276ADE(1)(iv).

[18] On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it wold not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd of Duncansby in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245, para 22:

> 'In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made'.

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

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

To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* [2016] 1 WLR 5093, para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to considered other than in the real world in which the children find themselves."

17. Reference is there made to the Court of Appeal's judgment in MA (Pakistan). In that case, Elias LJ giving the lead judgment had made clear that he would have wished to adopt the interpretation eventually favoured by the Supreme Court in KO (Nigeria) but considered that he

ought to follow the Court of Appeal's judgment in MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450. The approach in that latter judgment was overturned by the Supreme Court in KO (Nigeria). However, he went on to say the following about the correct approach to Section 117B (6) whichever interpretation of the reasonableness test was adopted:

> "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.
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> 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):
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> > '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."

## The Evidence

18. Although, as I have indicated, the Appellants' cases stand and fall with that of [SN], it is necessary for me first to say a few words about the position of the First and Second Appellants as, as was said in KO (Nigeria), the best interests of [SN] (and her brother) have to be considered in the "real world" which encompasses the immigration status of the child's parents. In this regard, I do not consider it necessary to reconsider the evidence.

19. I take into account the history of the First and Second Appellants' stay in the UK and circumstances in India as recounted in their evidence at [3] and [4] of the Decision which led to Judge French's conclusions on this aspect:

> "[3] In his oral evidence the first appellant [NG] said that he had come to the UK in 2011, together with his daughter [SN] as a dependent of his wife, who entered as a Tier 4 student take a business studies course at Bedford University. This was originally expected to be a one year course. He accepted that he knew that his expectation had to be that he would have to return to India at some stage. However at the end of his wife's original course, she had applied for further leave to remain to undertake a post-qualification studies. This was granted until 2014. He was asked as to why he had not returned to India with the family, after their visas had expired in 2013. He replied that he had been concerned that it would have caused [SN] distress. However at that stage [SN] had only been in the UK for 2 years, and might have found it stressful to return to India. The first appellant was then asked why, since they had not returned to India, at the end of his wife's first course, they did not return there after the conclusion of her post-qualification studies in 2014. He said that by then, the family was 'settled' in the UK. However when the visas were not expended [sic] in 2014, neither [RN] nor [SG] were permitted to work, and from then on had been reliant upon charity. It was in these circumstances despite the first appellant's expressed reluctance to return to India, the family had booked tickets to fly there on 30/08/16. It had taken that long, because of delays in obtaining new Indian passports. In the end they changed their minds, because of concern about how [SN] would be affected. He said that he was still in contact with his mother and sister in India, but claimed that if he returned to India, he would be unable to live with is mother because the former family home had been repossessed. He confirmed that he spoke Hindi and Punjabi but claimed that [SN] spoke only English, which as surprising because she had attended school in India and did not come to the UK until she was 6. He said that he had worked as a teacher in India, as had his wife, but she was a degree entrant into teaching. He conceded that his wife might be able to find employment in India, although he expressed concern that potential employers might query the gap in her work history. He said that aside from teaching, he had some IT knowledge. [RN], told me that his wife had a sister in India, but they were not on the best of terms, because his wife had converted from Hinduism to Christianity when she married him. He said that in the UK they had no association with the Indian community. All their friends were English. He was asked as to why his wife had chosen to come to the UK to study business studies, when she already had a degree in India, and bearing in mind that a business studies qualification would be unlikely to advance her career. He replied that he thought that a UK degree would have more status than one gained in India.
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> [4] [SG] (the second appellant) had a degree in India and had worked as a teacher. She agreed that she would be able to obtain a teaching job if she returned to India but said that she thought that

> returning to India would be disruptive for [SN]. However [SG] said that [SN] would be able to have appropriate medical treatment in India and would have access to good education. There was an issue about [SN]'s language skills. It was accepted by her however that [SN] had learned Hindi and Punjabi, when she lived in India. The First and Second Appellant had continued to speak to those languages within the household. [SG] conceded that [SN] might be able to become fluent in those languages again. She was asked what contact [SN] had with family in India and she replied that [SN] would speak with her grandmother on the telephone. There was also evidence from Reverend O'Neill, who said that the family had been attending his church for the past 3 years, and they had been involved in various community projects."

20. Judge French considered the parents' position at [6] of the Decision. That paragraph of the Decision was not challenged by the Appellants and I therefore adopt what is there said as follows:

> "I was satisfied there were not any insurmountable obstacles to the family returning to India. The first and second appellants had lived most of their lives in India and were familiar with life there. They both spoke the language. The first appellant admitted that he continued to have family living there, and that both he and his wife would be likely to obtain employment there. He had worked as a teacher and had expertise in IT. His wife had a degree and also her qualification in business studies. It was my view that both [RN] and [SG] would be able to obtain lucrative employment. In the circumstances I concluded that the first and second appellants could maintain and accommodate the children, whether or not their families could assist. I saw no reason why it would not be possible to continue family life in India. I reflected on the fact that Article 8 does not give an automatic right to pursue family life in the UK."

21. As is apparent from the foregoing, there are no obstacles to the First and Second Appellants returning to India. They would be able to find work. They both speak the languages spoken in India. They have at least some family members with whom they retain contact. There are certainly no very significant obstacles to their integration in their home country which would enable them to succeed. They have no basis of stay within the Rules independently of [SN].

22. I turn then to the evidence as to the impact of return to India on [SN]. As will be noted from the above extracts from the Decision, [SN] did not leave India until she was aged six years. She will therefore have some appreciation of the customs there. It was conceded that she speaks the languages spoken in India as she was educated there in her early years, she continues to speak to her grandmother who still lives in India (and I very much doubt speaks fluent English) and her parents speak those languages at home. It is however her early years of education and her experiences of the system in India which lie at the heart of the reason why she says that she cannot return to that country.

23. [SN]'s evidence is to be found in a handwritten letter from her at [AB/13-17]. She provides the following evidence about her transition from school in India to education in the UK as follows:

> "My first ever school was … lower school (Bedford …). I loved the school because everyone was so nice, kind and caring. I was really scared well because in India in my nursery all the teachers were very horrible to us. We had to bring 8-10 very heavy text books in our bags to carry to school every single day and if we ever did something wrong they would get a cane and hit our hands. But if we did something very bad they would send us out and would have to wait for these two ladies to come and they would take us away and beat us up and then take us back to lesson. We would be crying so much because of the pain we went through. I remember this because it was one of the most worst times in India school. I don't really remember anything else from school in India other than the fact I used to cry endlessly every morning in school. So my first day of England school was pretty terrifying because I didn't want to go through all that pain again but to my surprise it was my best school time every."

24. I appreciate that, at the young age that [SN] was before she came to the UK, she was probably impressionable and that bad experiences may have stayed with her and been exaggerated over time into something much worse than the reality. It may also be the case that she was simply unlucky enough to be put into a school with a strong disciplinary regime which went beyond what is acceptable. I do not suggest for a moment that I accept that all schools in India treat children in the way which [SN] describes. However, that is the memory which has stuck in [SN]'s mind and explains her reaction to possible return to India.

25. In that regard, [SN] describes in her letter how she felt when she was faced with return to her home country:

> "But before we moved to Luton. We were at Bedford…towards the end of the summer holidays my parents told me had to go back to India my heart stopped for a second making sure I heard the right things. I was shocked after all the things we did to stay here we had to go back to India. I didn't like that place at all the food, clothes and environment also the climate. That was the place I had to go. My heart sank to the bottom. I blinked a few times to check if it was a bad dream but it wasn't. Putting a child where they didn't like was like ripping wings of a butterfly so he/she can't fly or cutting of the lions mane to make him lose his pride or it felt like you were put into a horror movie that was never ending. My parents had tears in their eyes but were holding them back. Before I knew it tears started to tumble down my cheeks one by one. I had to leave the place that made me feel like home. The same place I actually learned things at school rather than crying my eyes out until they were sore. The place I made friends. The place

> where I would plan my future. The place that made me see good sides of things. The place that made me who I am today and that place was getting ripped away just shattered me like when a hammer just hit a glass hard as possible. Mostly I felt so bad for my brother because he was born here he didn't have to experience to schools in India and I'd do anything in my power to make sure he never went through a horrible time. He doesn't even know how to speak our language nor do I. He would have to start everything from scratch. I was crying and crying. I stopped eating. I had temperature and I was sick so many times."

26. I realise of course that this letter is written by a child aged thirteen years who is likely to be more affected by change than an adult in the same situation and is likely to react with more intensity and some exaggeration of her emotions. A child of that age may adapt over time and her instant reaction to what I accept would be a significant change for her is not necessarily any indicator of how she would fare if she was actually removed with her parents and brother. However, in this case, the impact of the threat of removal has manifested itself in mental health problems. The evidence of those problems is contained in two letters dated 6 December 2018 and 18 March 2019 written respectively by Natalia Switon, Systemic Family Psychotherapist, and Dr March Van Roosmalen, Consultant Clinical Psychologist.

27. I turn first to the letter of Natalia Switon which is the first in time. Her letter follows a meeting which she had with [SN] and her father on 29 November 2018. She records the following:

> "[RN] explained that the parents have been concerned about [SN]'s low mood for a few years, however particularly in the last year. They have noticed that she has lost concentration when she is studying. She has lost weight a few months ago due to appetite problems. She has been tearful often but she doesn't like to talk about the reasons for her distress. Also, they know that told her grandmother that she is questioning the purpose of her life and worries that she might be suicidal.
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> [SN] scored her mood at 5 out of 10, on a scale where 0 means low mood and 10 feeling happy. She said at school her mood goes up slightly, as she tries to forget about the family problems there. There are times when her mood is much lower. At those times she has had thoughts of taking her life. She said she has such thoughts rarely, maybe once in 2-4 months. She tries to avoid them. She said she doesn't think she would act on them as thoughts about her family would stop her. I understood that worries about the family future trigger these thoughts. She didn't want to elaborate on whether she has any plans of what she could do if she was feeling very low.
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> [SN] denied ever self-harming.

> She reported problems falling asleep. As learning is really important to her she tries to go to bed early – at around 8.45-9pm, however falls asleep around 10pm. She often lies in bed and thinks about her worries. She said during the day she imagines she is in a fantasy world where everything is ok and she is like her peers, but at night when it is quiet the worries come rushing back. [RN] said she at times needs parental 'counselling' to be able to fall asleep.
>
> [SN] said she often doesn't have appetite to eat. [RN] said a few months ago she lost some weight due to this, however put some back since. Now she has periods of eating less and periods of eating ok."

There then appears to be a page missing as the second page starts mid-sentence. Ms Switon then sets out her treatment plan which includes recommendations that sharp objects and medication are kept locked away in case [SN] should become suicidal and that she should be taken to A&E immediately if there are immediate concerns about her safety. Ms Switon recommends that [RN] seek support from Luton Wellbeing Service.

28. The letter from Dr Van Roosmalen indicates that CAMHS had been supporting [SN] and her family since late 2018. The service provides support for young people with moderate to severe mental health problems. He reports as follows:

> "[SN]'s mental health has deteriorated over the past year, and particularly since November 2018, when she was referred to our service. She has lost her appetite, is sleeping very poorly, and is experiencing suicidal thoughts and thoughts of self-harm. She has lost interest in her normal daily activities and has become withdrawn, quiet and listless, with low energy levels. She becomes frustrated and angry easily and becomes tearful quickly and regularly.
>
> The deterioration in her mental health seems directly related to the unresolved legal status of her and her family in this country over a considerable period of four years, which has had an insidious and cumulative impact on her mental health which over the four months has deteriorated significantly. She admits that her suicidal thoughts are related to the threat of her and her family being deported back to India. The constellation of mental health symptoms indicates the presences of depression, together with thoughts of self-harm and suicidal ideation. She is due to have a psychiatric assessment on 26th March 2019 with my colleague Dr Mahesh Kulkarni, Child & Adolescent Consultant Psychiatrist."

Although a follow-up appointment is there indicated, there is no further medical evidence and no application was made to adduce more recent evidence.

29. [RN]'s statement signed on 25 March 2019, says the following about [SN]'s condition from January 2018 onwards when it appeared that the family would have to return to India:

> "[24] After that day, [SN] started behaving strangely again. Even though we didn't mention it to her but she is fully aware now because of her age, as what is happening and sensed that in a few weeks time we could be going back to India. She has lost her appetite and has become very moody and temperamental as well. She has lost weight too, we have noticed. We are observing her now and might take her to the doctors soon. Her mental health is not good. She told her mum once that I can't see the purpose of my life. I want to go to Jesus. We are extremely worried about her physical, mental and psychological state. These suicidal thoughts have started creeping up in her mind. We really dread that refusal this time could really break her down and render severe psychological effect on her. Please refer to her letter.
>
> [25] On 7 Feb 2018, she fell off at school while getting off trampoline in the PE class and badly sprained her ankle thankfully no broken bones. She said that she is finding hard to focus and concentrate on her studies and other day-to-day activities because of the fear in heart all the time. She could not go to school for two days because of her physical and mental stress before they broke for half term. This grieved and frustrated her even more. She never misses her school in present or in past from her school, unless otherwise out of her control. It's very worrying and heart breaking to see our beautiful, young, so intelligent girl falling prey to our current situation. Seeing this is really so heart breaking for us parents."

30. In spite of her mental health problems, [RN]'s statement and other documents in the bundle suggest that, fortunately, those problems have not so far impacted on her educational achievements. [RN] says at [27] of his statement that [SN] wants to be a doctor and he believes she has the potential to achieve that goal. He says that her teachers "commend her for her sincerity, diligence and hard work". That is borne out by the certificates, reports, e-mails and commendations in the Appellants' bundle. As well as her academic work, the documents also show that she is talented at sports and participates in other extra-curricular activities. The reports in the bundle also indicate that she has a lot of friends and is a happy child. The evidence confirms her positive attitude to schooling. Those reports also show how [SN]'s academic performance has improved over time. The reports which report on her behaviour at school end, however, in 2014 and it is therefore difficult to assess from those whether and to what extent her attitude and performance have been impacted by the threat of removal more recently.

31. Even the letters from [SN]'s schoolfriends at [AB/93-99] comment on her commitment to her studies. They also indicate the extent to which [SN]

considers herself to be British – they say for instance that she speaks with a British accent and likes eating only British food. The letters also confirm the upset felt by [SN] about having to return to India.

32. Although [AN] is not a qualifying child, I also have to consider his best interests and it is therefore necessary to say something about the evidence in relation to him. His school progress reports also show that he is a bright child who is performing above expectations for a child of his age. Some of the letters also speak about his attachment to the UK and to his schooling.

33. The family are committed Christians and a number of letters in the bundle attest to their faith and contribution to church and other community activities. I also note what [RN] says in his statement about his and his wife's wish to work if they are permitted to stay and how, since they have been prevented from working here, they have committed to doing voluntary work.

34. The bundle contains a large number of letters of support with the common theme that the family make a valuable contribution to their community, are well-mannered and that the children are settled in the UK, doing well at school and would be upset by having to return to India. They would find it difficult to adjust to life there.

## Discussion and Conclusions

35. I begin with consideration of the children's best interests. [AN] is now aged six years. [SN] is aged nearly fourteen years. Both are still of an age where they require the care of their parents. It is therefore self-evidently in their best interests to remain with their parents. The issue is whether their best interests are served by a return to their country of nationality or by remaining in the UK.

36. [AN] was born in the UK. He has never lived in India. He apparently has never visited that country either. However, both his parents are of Indian nationality and could help him to adapt to what would be at first a strange country. Moreover, the family have other relatives in India including the children's grandmother who could help them to assimilate to the culture. The evidence is that the children continue to have regular telephone contact with her. I have found based on the previous evidence and findings that both children have some familiarity with the languages spoken in India via that contact and that their parents still speak those languages. [AN] is not yet at a crucial point in his education. The evidence shows that he is doing well at school but, I find, could do so if he returned to India. There is limited evidence as to any friendships he has formed independently of the family unit which is unsurprising given his age. His best interests are to remain in the UK as a country with which he is more familiar and where he has lived for the first six years of his life, but only marginally so.

37. The position in relation to [SN] is very different. Although she spent the first six years of her life in India and will therefore be more familiar with the culture and way of life there, she has bad memories of being in education there and the evidence shows that the thought of having to return to India is having a negative effect on her mental health. I accept that the evidence shows that, to some extent, it is the development of anxiety about return over time which has caused a deterioration in her mental health. I also accept that the reality of return may be different to her expectation. She was after all only six years old when she came to the UK. Her own personality as well as the situation in India is likely to have changed in that time. She may also be exaggerating the reality (although I do not suggest deliberately). The evidence particularly her letter indicates that she is an emotional and emotive child. However, there is no doubt that her mental health has been negatively affected by the prospect of return. Moreover, she is at a stage of her education which is critical to her future career plans as she will be selecting her course subjects for her first set of major examinations in a few years' time. She apparently wishes to become a doctor. She is doing well at school here and has also developed close friendships. Her best interests strongly favour her remaining in the UK.

38. The children's best interests are a primary although not the paramount consideration. I turn then to consider whether the decision to remove the family is proportionate. As I have already indicated, the answer to that question lies in the position of [SN] and whether it is reasonable to expect her to return to India. If it is not, then she would be entitled to remain applying paragraph 276ADE(1)(iv) of the Rules. Her parents would then be entitled to remain applying Section 117B (6).

39. I do not repeat what I say above about [SN]'s best interests which are strongly to remain in the UK. I have regard to what is said in KO (Nigeria) concerning the need to assess [SN]'s position in the "real world", that is to say by considering where [SN]'s parents would be if not for her. I have already adopted the findings made in the First-tier Tribunal concerning the family's situation. There are no very significant obstacles to their return to India. Indeed, leaving aside the effect of return on [SN], her parents accept that they ought to and probably would return to India. They have made arrangements to do so in the past, but then postponed that course because of the upset caused to [SN]. Neither parent has the right to remain in the UK. They have had the right to do so in the past but always on a precarious basis. The family has had no right to be in the UK for over four years. If I were considering only the position of the parents, therefore, there would be no question, but that removal is the appropriate course. The maintenance of effective immigration control weighs in favour of the public interest and against the First and Second Appellants as a result of their unlawful presence and inability to meet the Rules. As I have already indicated, the best interests of the children are to remain with their parents.

40. However, against that position, I have to weigh the reasonableness of [SN] returning to India. As was said in MA (Pakistan), the fact that [SN] has been in the UK for seven years must be given significant weight in the proportionality assessment and strong reasons are needed to refuse her leave.

41. Although the First and Second Appellants have a poor immigration history more recently, they came here lawfully with [SN] and had leave for the first few years. It is also to their credit that they gave serious consideration to returning to India after their leave expired. There was some delay after their leave expired and before they made plans to return. That was apparently caused by problems with passports. They did, however, go so far as to buy tickets to go back. It was only as a result of [SN]'s reaction to return that they cancelled those tickets and remained for a further period unlawfully.

42. Other than overstaying their leave, none of the Appellants has any criminal history. Although the public interest weighs against them due to their unlawful presence, there is no other reason to refuse them leave. They speak English. They have not had recourse to public funds. The First and Second Appellants have expressed a strong desire to work if given permission to do so. They have filled their spare time whilst not able to work by contributing to the community through voluntary work for charitable causes. There are no strong reasons to refuse [SN] leave on account of the family's immigration history.

43. In short, therefore, having regard to the best interests of [SN] which strongly favour her remaining in the UK, that she has lived in the UK for seven years from the age of six, has settled into life in the UK and her education here, is now at a critical point in her schooling and has been negatively affected mentally by the prospect of return to her home country, I conclude that it is not reasonable for [SN] to return to India. It follows that she is entitled to remain under paragraph 276ADE(1)(iv) of the Rules.

44. The First and Second Appellants have a genuine and subsisting parental relationship with [SN]. I have concluded that it is not reasonable for her to return to India. It follows that the First and Second Appellants are entitled to remain applying Section 117B (6).

45. It is in [AN]'s best interests to remain with his parents wherever they are living. At his young age, he needs their care. It follows that it would be disproportionate to remove him also.

## CONCLUSION

46. For the above reasons, the appeals succeed. The Fourth Appellant is entitled to leave to remain under paragraph 276ADE(1)(iv) of the Rules as she has spent seven years in the UK, and it is not reasonable to expect her to return to India. For that reason, the First and Second

Appellants succeed applying section 117B(6) as they are in a genuine and subsisting parental relationship with [SN]. The Third Appellant is their younger child, aged six years. His best interests are to remain with his parents. It would therefore be disproportionate to remove him. I therefore allow all the appeals.

**DECISION**

**I allow all appeals on the basis that removal of the Appellants would breach Section 6 Human Rights Act 1998 (based on Article 8 ECHR).**

Signed Dated: 19 August 2019
Upper Tribunal Judge Smith