Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/22834/2018
HU/24079/2018; HU/24082/2018
HU/24084/2018; HU/24086/2018

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre
On: 22nd October 2019

Decision & Reason Promulgated
On: 3rd March 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SS
SSG
C1
C2
C3
(ANONYMITY DIRECTION MADE)

Respondent

For the Appellants: **Mr Gazzain, Counsel instructed by United Solicitors**
For the Respondent: **Mr McVeety, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellants are all nationals of Pakistan. They are respectively a mother, father and their three minor children. They appeal with permission against the decision

of the First-tier Tribunal (Judge Malik) to dismiss their linked human rights grounds.

2. It was common ground that the outcome of these linked appeals turned on the position of the two eldest children, both of whom were accepted to be 'qualifying' as defined by s117D(1)(b) Nationality, Immigration and Asylum Act 2002. If these two children could demonstrate that it would not be reasonable to expect them to leave the United Kingdom, and so succeed on 'private life' grounds under paragraph 276ADE(1)(iv) of the Immigration Rules, then the rest of the family would succeed on Article 8 'family life' grounds pursuant to s117B(6).

3. In addressing that issue the First-tier Tribunal had regard to the following matters:

    i) The long residence of the children in question. The eldest had been here since the 19th January 2011 and so at the date of the hearing had been in the United Kingdom 7 years and 5 months. The second was born here, on the 19th April 2011, and so had been here 7 years and 2 months at the date of hearing;

    ii) Both children are in full time education and are doing well academically;

    iii) Both children could continue their education in Pakistan;

    iv) Both children have a wide circle of friends at school and church;

    v) The family generally are integrated in the United Kingdom with close connection to their local church;

    vi) There is nothing to suggest that the family would be unable to continue their church activity and worship in Pakistan;

    vii) English is their main language and that is the language used in the Pakistani school system. Contrary to the evidence of their mother they do speak some Punjabi at home. With the assistance of their parents they could improve their proficiency in that language;

    viii) Although neither child has any experience of life in Pakistan, they have grown up in a Pakistani household and so have "some awareness of some cultural norms and traditions in Pakistan";

    ix) Both parents are healthy and able to work. They both had good jobs whilst living in Pakistan;

    x) The children have extended family in Pakistan including a grandmother, aunts, uncles and cousins;

    xi) None of the children have any health issues of note.

4. Having weighed all of those factors the Tribunal concluded that it would not be unreasonable to expect the children to go to Pakistan with their family. Consequently the children could not qualify for leave under paragraph 276ADE(1)(iv) and all of the linked appeals fell to be dismissed.

5. The appeal before me, although elaborated in detailed grounds, turns on one point. Did Judge Malik fail to give the qualifying children (and so their family members) the benefit of the Respondent's published policy on how such claims should be addressed? That policy, approved by Elias LJ in MA (Pakistan) & Ors [2016] EWCA Civ 705, and by the Upper Tribunal in MT & ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88 (IAC), was that there must be "strong reasons" to expect such children to leave. It is Mr Gazzain's submission that there is nothing in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 to change that position. Had Judge Malik asked herself whether there are "strong" or - as Elias LJ puts it - "powerful" - reasons to refuse this family leave, her decision may have been different.

6. For the Secretary of State Mr McVeety agreed that if the presumption endorsed in MA (Pakistan) continued to operate in the Appellants' favour, then it would be difficult to identify what 'strong reasons' there might be for requiring these children to leave the United Kingdom today. He further agreed that it was not evident from the First-tier Tribunal decision whether Judge Malik had framed her enquiry in these terms. As to whether this element of the *ratio* in MA (Pakistan) survived the decision in KO (Nigeria), that was a matter for me, but Mr McVeety candidly acknowledged that the latest Home Office guidance continued to operate in the children's favour: "the starting point is that we would not normally expect a qualifying child to leave the United Kingdom"(see page 50 of the September 2019 Family Policy *Family life (as a partner or parent), private life and exceptional circumstances* (Version 3.0)).

Reasonableness, Strong Reasons and the Private Lives of Children

7. The state has long recognised, at least since the policy 'DP3' was published in 1993, that children are a particular class of applicant for immigration leave. Unlike their parents, children cannot be held responsible for their presence in the United Kingdom, nor for the fact that they may be here unlawfully. Unlike their parents, they go about their business - learning, exploring and making friends - ignorant of the possibility that they may be asked to give it all up at any point. That policy set, somewhat arbitrarily, a marker of 'seven years long residence' as the point at which the state recognised that a child would normally be permitted to remain here. Successive governments have endorsed that approach.

8. In 2012 the government made significant changes to the Immigration Rules relating to 'long residence'. Reframing such applications in terms of the right to private life protected by Article 8 ECHR, the new rule set out a series of alternative tests by which applicants could qualify for leave to remain. Anyone could qualify for leave after 20 years; young adults could qualify if they had spent half of their life here; adults who fell into neither of these categories could only succeed by demonstrating that removal would – in effect- result in a nullification of, or flagrant interference with, their private lives. Children, however, had a test all of their own. In its original form this rule, paragraph 276ADE(1)(iv), stipulated simply that the child demonstrate that at the date of application he had lived in

this country for seven years. The explanatory memorandum that accompanied the introduction of the new rules explained that this was in recognition of the fact that for a child, seven years is a long time. In such a period the child will have put down substantial roots, and the government recognised that it would not generally be in the child's best interests to interfere with that stability.

9. On the 13th December 2012 a statement of changes to the Immigration Rules amended paragraph 276ADE(1)(iv) to its present form. It now stipulates:

> 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 1.2 to S-LTR 2.3. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; 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; or

10. What might 'reasonable' mean in this context?

11. The first point to note is that the test does not, as some had hitherto thought, import a proportionality balancing exercise into the rule: KO (Nigeria) [at §16]. The paragraph, as the heading in the Immigration Rules suggests, is concerned *solely with the private life of the child*: there is therefore no cause to weigh against that child any criminality or misconduct on the part of his or her parents.

12. The second point to note is that the present scheme, set out in Part 5A of the Nationality, Immigration and Asylum Act 2002, contains three different tests pertaining to children: reasonableness, undue harshness, and very compelling circumstances over and above undue harshness. The threshold imposed by each test becomes increasingly higher according to the demands of the public interest.

13. Where the public interest lies in determining whether a child applicant under 276ADE(1)(iv) should be granted leave is a matter addressed by the Secretary of State in her published policies. In MA (Pakistan) [2016] EWCA Civ 705 Elias LJ considered and approved the terms of the then Immigration Directorates' Instruction 'Family Migration: Appendix FM Section 1.0b *Family Life (as a Partner or Parent) and Private Life: 10-Year Routes'* in which decision makers are instructed as follows:

> 11.2.4. Would it be unreasonable to expect a non-British Citizen child to leave the UK?
>
> 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**.
>
> The decision maker must consider whether, in the specific circumstances of the case, it would be reasonable to expect the child to live in another country.
>
> The decision maker must consider the facts relating to each child in the UK in the family individually, and also consider all the facts relating to the family as a whole. The decision maker should also engage with any specific issues explicitly raised by the family, by each child or on behalf of each child.
>
> (emphasis added)

14. That same guidance was described in KO (Nigeria) as "wholly appropriate and sound in law" [at §17] although the court there emphasised that it will generally be reasonable to expect a child to live with his or her parents; if those parents have no right to remain in the United Kingdom, this is the 'real world' in which that child is living, and what is 'reasonable' must be assessed accordingly. Although not cited by directly by First-tier Tribunal Malik in her decision, it seems likely that it was this part of the *ratio* in KO that she had in mind; I say this because her reasoning is wholly concerned with an assessment of where the children's *parents* should be, i.e. Pakistan. She considers whether the children will be able to communicate there, attend school, adapt and be reunited with parents. As the parties before me agree, all of that was relevant, but the Tribunal's decision nowhere addresses whether there are "strong reasons", nor indeed any other operative presumption in the qualifying child's favour. Was this an error of law?

15. The decision in KO (Nigeria) has created a peculiar impasse. Decision makers are at once told that the fate of the child must be determined in line with the 'real world' circumstances of the parents, whilst at the same time endorsing Home Office policy which clearly indicates that it is the child who comes first. For the avoidance of doubt, Mr McVeety was quite right in his submission that the revised guidance, although it uses a different form of words, remains the same in substance:

> The **starting point is that we would not normally expect a qualifying child to leave the UK.** It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK.

Family Policy *Family life (as a partner or parent), private life and exceptional circumstances* Version 5.0 (page 94).

16. To my mind this impasse can only be successfully navigated by reading the decision in KO to do no more than endorse the proposition that the real world position of the parents is *a* relative consideration. The primary focus of the rule is, and has always been, the private life of the qualifying child, established and developed over long years' residence in this country. If it is reasonable to interfere with that private life simply because the parents have no leave, it is difficult to see what the point of the rule might be, since where adults have extant leave their

children are invariably granted in line. Unlike the child applicant in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874 - who had only been in this country four years - parliament has specifically legislated for the private lives of qualifying children, and by extension those of their family members, to receive a measure of protection under the Rules. I accept Mr Gazzain's submission, unopposed by the Secretary of State, that the extent of that protection is bounded by the public interest, and that the demands thereof can best be discerned by reference to the Secretary of State's published policy. In this case that policy, for over 25 years, has been that the starting point is that we should not normally expect a qualifying child to leave, since by the nature of that 'qualification' that child has established a substantial private life and it would be wholly contrary to his or her best interest for that to be brought to an end. I note that this interpretation is consistent with the current version of the Secretary of State's guidance (emphasis added):

> In the caselaw of KO and Others [2018] UKSC 53, with particular reference to the case of NS (Sri Lanka), the Supreme Court found that "reasonableness" is to be considered in the real-world context in which the child finds themselves. The parents' immigration status is **a** relevant fact to establish that context. The determination sets out that if a child's parents are both expected to leave the UK, the child is normally expected to leave with them, **unless there is evidence that that it would not be reasonable**. **This assessment must take into account the child's best interests as a primary consideration.** You must carefully consider all the relevant points raised in the application and carefully assess any evidence provided. Decisions must not be taken simply on the basis of the application's assertions about the child, but rather on the basis of an examination of all the evidence provided. All relevant factors need to be assessed in the round. **There may be some specific circumstances where it would be reasonable to expect the qualifying child to leave the UK with the parent(s)….**

17. I therefore accept that the First-tier Tribunal decision in this must be set aside. Although the Judge conducted a careful analysis which took in a number of factors relevant to the re-establishment of a private life in Pakistan, what it did not do was attach any weight to the private life which already exists in the United Kingdom, and then assess whether there were any "specific circumstances" which meant that interference with that private life would be reasonable.

18. Mr McVeety accepted that applying the guidance approved in both MA (Pakistan) and KO (Nigeria) the appeals, upon re-making, would be allowed, since there is nothing in the evidence about this family to indicate that there are "strong reasons" or even "specific circumstances" to require these children to leave the United Kingdom contrary to their best interests.

19. The provisions of Part 5A , read together, are intended to provide a structured approach to the application of Article 8 which produces in all cases a final result compatible with Article 8 : see CI (Nigeria) v Secretary of State for the Home Department [2019] EWCA Civ 2027 [at §20], NE-A (Nigeria) v Secretary of State for the Home Department [2017] EWCA Civ 239 [at §14] and Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 [at §36]. This decision is

concerned with the private lives of two children who have lived in this county for approximately nine years. They go to school here, have friends and a home here. They have put down "strong roots" and it would, the Secretary of State accepts, be contrary to their best interests for that to be interfered with. I have given some weight to the findings of the First-tier Tribunal and I accept that it would be *possible* for these children to relocate to Pakistan. It would not however be reasonable. It follows that I allow the appeals of the qualifying children and by extension those of their family members.

Decisions

20. The determination of the First-tier Tribunal contains material error of law and it is set aside.

21. I remake the decision in the appeal by allowing it.

Upper Tribunal Judge Bruce 20th February 2020

POST-SCRIPT

This decision was prepared on the 24th December 2019 but due to my own administrative error it was not promulgated. The parties have my apologies for the delay that this has caused.