Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03463/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 November 2018	**On 22 November 2018**

Before

Deputy Upper Tribunal Judge MANUELL

Between

Ms KULDEEP KAUR KAUR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Rai, Counsel
(instructed by Gills Immigration Law)
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Permission to appeal was granted by First-tier Tribunal Judge Beach on 12 September 2018 against the decision to dismiss the Appellant's Article 8 ECHR appeal made by First-tier Tribunal Judge R R Hopkins in a decision and reasons promulgated on 3 August 2018. The Appellant is a national of India, an overstayer

whose last leave to remain expired in 2014, but who has made a number of unsuccessful applications to Secretary of State for the Home Department since then. She relied on her relationship to her husband, a British Citizen by naturalisation of Indian heritage, who was born in Hong Kong. They have a daughter, also a British Citizen, who was born on 24 June 2016. (A further British Citizen child was born very recently.)

2. The Respondent accepted that the Appellant's relationship with her partner and child were genuine and subsisting. The Respondent refused the application on Suitability grounds, because (it was said) that the Appellant had submitted a fraudulent TOEIC certificate. The Appellant's partner could care for her child if the Appellant returned to India to make an entry clearance application.

3. Judge Hopkins found that Article 8 ECHR was engaged but that there were no insurmountable obstacles to the continuation of family life in India, and gave extensive reasons: see [50] of his decision and reasons. The judge found in the Appellant's favour on the TOEIC/Suitability issue. Nevertheless, the Appellant was unable to satisfy the Immigration Rules. The child's best interests were to remain with her parents, and it made little difference whether the child was in the United Kingdom or in India. It was reasonable for the Appellant to leave the United Kingdom and she could either take her child with her (by implication while entry clearance was sought) or the family could live in India. Hence the appeal was dismissed.

4. Permission to appeal was granted because it was considered arguable that the judge had not properly assessed the reasonableness of the child leaving the United Kingdom in the light of MA (Pakistan) [2016] EWCA Civ 705. There was no reference to the Respondent's policy.

5. Mr Rai for the Appellant relied on the grounds and submitted and the grant of permission to appeal. The judge had erred in his proportionality assessment. He had misdirected himself and had not applied the reasonableness test. Instead he had looked at the mother's conduct. He had gone on to conflate reasonableness with insurmountable obstacles, and had reached conflicting findings of fact. KO (Nigeria) [2018] UKSC 53, nevertheless clarified the law and had to be applied, decided after the judge's decision and so not available to him. "Reasonableness" was the test. The judge had not engaged sufficiently with the reality that family unity would be affected

if the Appellant had to return to India. The onwards appeal should be allowed.

6. Mr Jarvis for the Respondent opposed the onwards appeal. KO (Nigeria) (above) placed substance over form, and the determination showed that the judge had in fact addressed the central issue of reasonableness, without over elaboration. KO (Nigeria) emphasised that a "real world" approach was needed and that was what the judge had done. The judge had not conflated any relevant tests but had examined the whole of the facts when reaching a proportionate decision. Appendix FM was not the final word in all partner appeals but it indicated where the margin of appreciation normally lay.

7. Mr Rai in reply reiterated his earlier points which had been explored in dialogue with the tribunal. There was a problem of family separation and the judge had speculated about how it might be avoided.

8. The grant of permission to appeal was in the tribunal's view a generous one. The tribunal accepts the submissions made by Mr Jarvis. The determination was a notably full and careful one and the decision reached was open to the judge for the reasons he gave, notwithstanding clarification of the law since the determination was promulgated.

9. As Mr Rai recognised, KO (Nigeria) [2018] UKSC 53 had not been available to the judge, and the grant of permission to appeal had been based on MA (Pakistan) (above) which has been disapproved and superseded. Nevertheless the substance of KO (Nigeria) was applied. At [52] and [56] the judge examined the question of whether it was reasonable to expect the British Citizen child to go to India with her mother the Appellant. Obviously there was no compulsion as the judge recognised. The child is only 2 years of age when it would be expected to remain with its mother (contrary to the views expressed in the reasons for refusal letter). The judge also took into account the fact that another child was expected (now happily born), also to be a British Citizen. The judge had cleared the Appellant of the deception allegation made by the Respondent, and noted that her status had been precarious and, latterly, without leave to remain. This was in no sense held against the child/child to be, as it was simply a statement of fact: the mother had no form of leave to remain by the date of the hearing and indeed had in effect clung on in the United

Kingdom since the curtailment of her leave to remain in 2014. Earlier the judge had noted that her relationship with her partner had commenced while she had leave to remain: see [54] of the determination, but that relationship was not one recognised by the Immigration Rules, nor had compliance with Appendix FM been shown.

10. The tribunal cannot accept that the judge conflated any relevant tests, as the constant thread of his approach was to determine reasonableness, reflecting KO (Nigeria). The Appellant was a recent entrant to the United Kingdom (2011) and came to study. Like so many Tier 4 (General) Students of that period, her college licence was revoked. Her further history is set out at [6] onwards of the determination and need not be recited here. The fact is that her links with the United Kingdom were recent and tenuous.

11. As with so many similar appeals which come before the First-tier Tribunal and the Upper Tribunal in the Immigration and Asylum Chamber, this appeal was really about personal choice, a choice which does not exist under Article 8 ECHR absent compliance with the Immigration Rules or very compelling/exceptional circumstances. Had the overstaying Appellant returned to India long ago and applied for entry clearance, sponsored by her partner in accordance with the Immigration Rules (as a fiancée), she might have returned to the United Kingdom lawfully by now. The judge was entitled to find that family life could be continued reasonably in India, and that it would make no difference to the child, particularly given the presence of the Appellant's partner's family there, or that an entry clearance application could be made in due course to enable family life to be continued lawfully in the United Kingdom. It was almost too obvious for the judge to have stated that the Appellant's partner could accompany her while entry clearance is sought, for some or part of that period.

12. In conclusion, the tribunal finds that there was no error of law and the onwards appeal must be dismissed.

DECISION

The appeal to the Upper Tribunal is dismissed.

There was no material error of law in the First-tier Tribunal's decision and reasons, which stands unchanged.

Signed **Dated** 15 November 2018

Deputy Upper Tribunal Judge Manuell