Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14400/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th June 2019	**On 25th June 2019**

Before

DISTRICT JUDGE MCGINTY
SITTING AS A DEPUTY UPPER TRIBUNAL JUDGE

Between

MR F.J.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Z Harper, Counsel, instructed by Wimbledon Solicitors (Merton Rd)
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

This is the Appellant's appeal against the decision of First-tier Tribunal Judge S J Clarke promulgated on 22nd February 2019.

At the appeal before the Upper Tribunal today the Appellant has been represented by Miss Harper of Counsel and the Secretary of State has been represented by Mr Bramble, Senior Home Office Presenting Officer.

Permission to appeal in this case has been given by First-tier Tribunal Judge Hollingworth on 30th April 2019. He found it was arguable that insufficient weight had been attached to the conclusion that it was in the child, T's best

interests to remain living in the UK with her parents and siblings as a family unit in the UK and had attached insufficient weight in the benchmark policy of seven years in relation to the issue of integration and that the references by the judge to the daughter having started to integrate into life in the UK with her friends detracted from the significance of that benchmark period. He also found that it was arguable that insufficient analysis had been given in respect of whether there were strong reasons for outweighing her best interests, when applying Section 117B(6).

The Grounds for Appeal to the Upper Tribunal dated 6th March 2019 argue two grounds. Firstly, it is argued that the judge failed to treat the child's best interests as a primary consideration following the Supreme Court's case in **ZH (Tanzania) v SSHD [2011] UKSC 4**. It is said that there is no reference to the best interests of the child being a primary consideration and no indication that the judge did treat the child's best interests as a primary consideration.

The second ground argues that the judge failed to recognise that there would have to be strong reasons for the child's best interests to be outweighed following the judgment of Lord Justice Elias in the Court of Appeal decision of **MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705**.

I am grateful to Miss Harper for having prepared a brief note of her submissions dated 9th June 2019, which I have carefully considered, together with the oral submissions both of herself and Mr Bramble on behalf of the Secretary of State. I remind myself, as was previously stated in the case of **MA (Pakistan) and Others v The Upper Tribunal and Asylum Chamber** in 2016, **EWCA Civ 705**, paragraph 74, that it may be that other judges would have struck the balance differently and the question is whether this judge reached a conclusion which was not open to her.

The first ground essentially argues that the judge has failed to treat the child's best interests as a primary consideration. When one looks at the judgment of First-tier Tribunal Judge Clarke, when making her findings of fact and conclusions at paragraph 8, she stated:

> *"The best interests of the child must be to remain living in the UK with her parents and siblings in the family unit and this would preserve the status quo. She has two siblings who are SF born 3rd August 2015 and MH born on 14th November 2012."*

She went on at paragraph 10 to note the effects of refusal of the application would be that the children would have to leave the UK and that the children must not be punished for the sins of the parents by overstaying and that at the date of the hearing she found that both parents were liable to removal. She approached the case on the basis. She noted that there was one qualifying child in this case who had started to put down roots and to integrate into life in the UK.

The judge went on then at paragraph 11 to incorporate into her judgment the guidance given in the case of **KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53** and stated that:

> "*The guidance of the Respondent was approved in* ***KO (Nigeria)*** *reads that the starting point is that they would not normally expect a qualifying child to leave the UK and it is normally in the child's best interests for the whole family to remain together, which means that if the child is not expected to leave, then the parent or parents of the child will also not be expected to leave the UK. The Supreme Court found that the question of 'reasonableness' is to be considered in the real world and the immigration status of the parents is of relevance to establish that context. It may be reasonable for a qualifying child to leave the UK with the parents and siblings*."

Thereafter, the judge went on to consider the situation of the oldest daughter, T, in this case and the fact that she was at Junior School and the letter from the school confirming she had attended there since 8th December 2016 and there had been some change in her life by moving schools, but her mother confirmed that she had made new friends. She has found that there is no evidence that she enjoyed a family life with extended family in the UK and found she had extended family in Pakistan with whom she and her other siblings could forge new ties. She found that the children spoke "easy Urdu" in that the parents speak Urdu, sometimes mixed with English and found that Urdu is the language spoken between the Appellant and his wife.

The judge found that there was no evidence that the eldest daughter and her other siblings could not adapt and learn to read and write Urdu and in time improve their spoken Urdu. The judge also in paragraph 13 went on to consider how the oldest child had been born in Pakistan, but came to the UK aged 9 months and spent the majority of her life in the UK and significantly now she was 9 years old and had started to integrate into life in the UK with her friends. The judge stated that she had taken account of how the eldest child had never visited her country since she came to the UK and her siblings were born in the UK. She found that the children had knowledge of the various customs of their country and the children presented with no medical difficulties.

The judge also went on to consider that the Appellant still owned a shop in his home country and that there would not be any repercussions opening up in the manner suggested. She considered the Appellant's hypertension and found that the family could be accommodated and maintained until the Appellant's own shop was up and running, or the parents found alternative forms of employment. At paragraph 17 the judge stated:

> "*Drawing the strands together, I find the parents have to leave, and the natural expectation would be that the children would go with them, there is nothing in the evidence that I have considered and set out to suggest it would be other than reasonable for a qualifying child to return to her country with her parents and siblings in a family unit*."

In respect of the argument that the judge has not considered the child's best interests as a primary consideration, when one reads the decision as a whole it is quite clear that in fact the judge has considered the child's best interests as a primary consideration, in fact, obviously the judge has realised the importance of it by dealing with it first, and not as an afterthought. In

paragraph 8 the judge states that the best interests of the child must be to remain living with her parents and siblings in the family unit in the UK and this would preserve the status quo and noted she had two siblings in the UK. As Miss Harper says, there is no need specifically for a judge to set out that "I take this as a primary consideration" but in fact, that is what the judge has done, and I find that in this case the judge has clearly considered it of such importance to actually consider it as the first matter that she has addressed her mind to and has borne it in mind when considering the question as to whether it is reasonable to expect the qualifying child to leave the United Kingdom for the purposes of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

As Miss Harper agrees, the question of what is in the child's best interests for the purposes of Section 55 is a primary consideration. It is not the paramount consideration, as the courts have made clear throughout the years. As a primary consideration it can be outweighed by other factors. It is not a case that one individual factor has to outweigh it. It can be the case that a judge concludes that the other factors taken as a whole mean that the balance should be struck in terms of it being reasonable to expect a qualifying child to leave the United Kingdom, as in this case.

The first Ground of Appeal therefore fails.

In respect of the second ground, it is argued that the judge has failed to recognise that there would have to be strong reasons why the child's best interests should be outweighed. In that regard, Miss Harper relies upon the judgment of the Court of Appeal in the case of **MA (Pakistan)** and the fact that Lord Justice Elias at paragraph 46 held that:

> "*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 the Immigration Directorate Instructions entitled 'Family Life (as a partner or parent) and Private Life: Ten Year Routes' in which it was expressly stated that once the seven years' residence requirement is satisfied there will need to be strong reasons for refusing leave. 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 exercise*."

She went on to argue that Lord Justice Elias at paragraph 49 stated that as a starting point that leave should be granted unless there are powerful reasons

to the contrary. Miss Harper quite correctly conceded that the First-tier Tribunal Judge although havng to consider what those powerful strong reasons might be does not have to specifically highlight the point by saying, “these are strong and powerful reasons” but the court has to take account of whether or not there are sufficient strong reasons to outweigh the child’s best interests.

When conducting the assessment in this case First-tier Tribunal Judge Clarke quite properly noted not only what was it in the qualifying child’s best interests to remain in the UK with her parents and siblings but also went on to consider what the effects of refusal upon her would be in that she would be required to leave the UK with her parents and noted that she had started to put down roots and to integrate into life in the UK, reflecting obviously the significance of the seven year test set out within Section 117B(6) and the fact that it is likely at that age when children are likely to start to have developed such strong private ties to the UK.

The judge also recognised in paragraph 11 that the guidance given in **KO (Nigeria)** that as the starting point one would not normally expect a qualifying child to leave the UK and normally a child’s best interest is for the whole family to remain together, which means that if the child is not expected to leave, then the parent or parents of the child will not be expected to leave the UK. As she quite rightly quoted from **KO (Nigeria)**, the question of reasonableness is to be considered in the real world and the immigration status of the parents is of relevance to establish that context. First-tier Tribunal Judge Clarke went on in the judgment to consider the eldest qualifying child’s schooling and the fact that she had attended her present school since 8th December 2016. There had been some change in her life by moving schools, but she made new friends, as mother stated. The judge had read the annual report and other documents in relation to her schooling, noting that she had extended family in Pakistan, that she spoke easy Urdu and can improve her written and oral Urdu.

The judge also went on to note how she although born in Pakistan had come to the UK just aged 9 months and spent the majority of her life in the UK and significantly now she was 9 years old and had started to integrate into life in the UK with her friends. The judge also took account of the fact that she had never visited her country and her siblings were born in the UK. At this stage, the judge found that the children did have knowledge of the various customs of their country and noting in that regard also the extent to which the parents could actually work and be accommodated and maintain themselves in Pakistan.

Mr Bramble points out that in **MA (Pakistan)** itself, the eldest qualifying child at that stage was aged 8 and said to be able to adapt to life elsewhere and was said to be halfway through his primary education and there would be no safeguarding issues and no risk factors if he was to return to Pakistan and that in that case return was to be with his parents to a country where he had a number of other close adult relatives. In that case the judge at found that also the eldest child had been brought up in the Islamic faith as was his younger brother and there was no reason why it would be unreasonable to expect either of them to accompany their parents to Pakistan.

At paragraph 74 of the judgment in **MA (Pakistan)** it was argued that the judge had not given sufficient weight to the fact that the Appellant had resided here for over seven years and that his best interests were to remain with his family. The court also found that they did not accept that submission and that judge made specific reference to the seven year rule and its significance and it may be that other judges would have struck the balance differently but the question is whether this judge reached a conclusion which was not open to him but, having regard to the wider pubic interest in effective immigration control, in that case he had not done so. It is clearly, as Miss Harper says, not a case of balancing one case against the other.

Obviously, the court has to consider each case on its facts but the point simply being made by Mr Bramble is that the factors stated in **MA (Pakistan)** as far as the older child was concerned were simply factors that the court can take into account as being potentially strong sufficient reasons to outweigh the best interests of the child. It is not a comparison of one case with the other. He is just saying that these are factors which the court is entitled to take into account, and Miss Harper does not challenge that.

In my judgment, in this case the judge has gone through the specific circumstances of the elder, qualifying child, in particular in the effect upon her in terms of her schooling, her friends, her ability to speak Urdu and read and write Urdu and improvements she can make in that, the fact that she has significantly spent the majority of her life in the UK and noting specifically that significantly she was now 9 years old and had started to integrate into life in the UK with her friends. The judge also took account of the fact that the oldest child had never visited Pakistan since the time at which she left, as a 9 month old baby. The judge has properly taken account of all the factors in the case and has given sufficiently strong reasons in the circumstances of this case as to why it was that the child's best interests should be outweighed and it would be reasonable to expect the qualifying child to return to her with her parents. This was a finding open to the judge on the evidence before her.

The judge has quite correctly applied the law in the case and the arguments on behalf of the Appellant simply amount to a disagreement with the findings. The decision of the First-tier Tribunal Judge does not reveal a material error of law. The fact that other judges may have reached a different decision does not mean that there is a material error of law in this case.

I therefore dismiss the Appellant's appeal.

Notice of Decision

The appeal is dismissed

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 his 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 DJ McGinty Date 23rd June 2019

District Judge McGinty sitting as a Deputy Upper Tribunal Judge