Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/22646/2015**
IA/19327/2015
IA/22105/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reason Promulgated**
On 12 June 2017	**On 12 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

V D C
D R
N R
(ANONYMITY DIRECTION MADE)

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Jayfoelly, Callistes Solicitors
For the Respondent: Mr Singh, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellants are Mauritian nationals who were born on [ ] 1976, [ ] 1981 and [ ] 2007. The first two Appellants are the parents of the third Appellant. On 4 March 2015 they made an application for leave to remain on the basis

of their family and private life in the United Kingdom. The third Appellant was born in the United Kingdom. The Respondent refused their applications under the partner route, parent route and under paragraph 276ADE of the Immigration Rules. It was accepted that the third Appellant had lived continuously in the United Kingdom for 7 years at the date of the decision but the Respondent concluded that it would be reasonable for him to leave the United Kingdom.

2. The Appellants appealed against this decision under section 82 of the Nationality, Immigration and Asylum Act 2002 (NIAA) and their appeal was heard on 2 March 2016 and dismissed by First-tier Tribunal Judge Hussain in a decision promulgated on 20 July 2016. He found that the Appellants did not meet the requirements of the Immigration Rules and concluded that the Respondent's decision would not breach Article 8 of the European Convention on Human Rights (ECHR).

3. In a decision promulgated on 24 April 2017 I found that there was an error of law in the decision of the First-tier Tribunal. The core reasons for this finding are recorded at paragraphs 14 to 16 and 20 of my decision. The Appellants argued that the First Appellant had accrued 10 years lawful residence because a curtailment notice had not been properly served. I made the following findings in respect of that argument:

> "14. It is clear that the First-tier Tribunal did not consider this argument. Whilst this may have been a procedural error I find that it cannot have been material for the following reasons. The Appellants relied in their skeleton argument on the case of **Syed (curtailment of leave-notice)** [2013] UKUT 00144. Until 2013, there were no specific regulations dealing with notice in respect of non-appealable immigration decisions. In **Syed** the Upper Tribunal concluded, applying **R (Anufrijeva) v SSHD** [2003] UKHL 36 that a non-appealable curtailment decision did not take effect until it was communicated to the person concerned.
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> 15. The Appellants in this case did not dispute that the curtailment decision was communicated to them. It is acknowledged both in the skeleton argument and in the first Appellant's witness statement at p7 of the Appellants' bundle before the First-tier Tribunal that the curtailment notices were received on 31 March 2012. Those letters, save for the first Appellant's letter which she acknowledges she received, are at pages 36 and 37 of the Appellants' bundle. The Respondent informs the Appellants therein that their leave is due to expire on 26 May 2012. I have been provided with no authority which holds that the 60 day period starts to run on the date the notice of curtailment is received rather than the date of the curtailment letter. The Respondent's 'Patel' policy in relation to the 60 day period to allow applicants to obtain a new CAS when their sponsor's license is revoked is appended to the case of **Kaur (Patel fairness: respondent's policy)** [2013] UKUT 344 which is on the court file and appears to have been relied on by the Appellants before the First-tier Tribunal. According to that policy the caseworker needs to calculate the end of the 60 day period as it needs to be included in the letter being sent to the applicant. This of course ensures that the applicant knows by which date an application should be made. Any other course would lead to uncertainty. In the absence of any authority or having heard any cogent argument why the contrary should be the case, I

conclude that the curtailment decisions were lawfully communicated to the Appellants and the 60 days expired on 26 May 2012. The Appellants were clearly aware of the need to make the application because the first Appellant sets out in her witness statement at paragraph 6 that she instructed someone to apply for further leave on her behalf and was provided by him with a delivery slip dated 5 May 2012.

16. I therefore find that although the First-tier Tribunal did not consider the argument raised in the skeleton argument that the first Appellant satisfied the requirements of paragraph 276B, the Appellants' leave was lawfully curtailed on 26 May 2012 and the application of 11 June 2012 was therefore made out of time. The first Appellant's claim to have accrued 10 years lawful residence from 6 December 2004 could not have succeeded. Further, even if on the Appellants' own construction the 60 days were to run from 31 March 2012 the application of 11 June 2012 would still have been out of time. Any procedural error in the decision of the First-tier Tribunal was therefore not material."

4. I found, however, that the First-tier Tribunal Judge had erred in law in his assessment of proportionality under Article 8:

"20. There is no recognition in the decision of the First-tier Tribunal that, despite the fact that the First-tier Tribunal was aware of the third Appellant's age, living in the UK for 9 years from birth was a significant factor weighing in favour of the child remaining in the UK. The fact therefore that the Judge did not recognize that the third Appellant was a qualifying child and then give this weight in the proportionality exercise was an error of law. Whilst the First-tier Tribunal Judge may, had he properly directed himself, have reached the same conclusion, it cannot be concluded that he would have. In the circumstances I find that the error was material."

The Re-making of the decision in the appeal

The Appellants' submissions

5. The Appellants relied on their skeleton at pages 1 to 6 of their bundle. Mr Jayfoelly also relied on his notice under Rule 15 (2A) asking the Tribunal to take into consideration that the third Appellant was entitled to be registered as a British Citizen under section 1 (4) of the British Nationality Act 1981. He had applied to be registered as such and a decision was awaited from the Home Office.

6. Mr Singh acknowledged that the age of the child was a factor of significance and made no further submissions.

7. I reserved my decision.

Legal framework

8. Paragraph 276ADE(1) sets out the requirements which, if satisfied, lead to the applicant being granted leave to remain. The provision is as follows:

> 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. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (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
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK".

9. Sections 117A and 117B are found in part 5A of the 2002 Act and apply in all cases where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's rights under Article 8.

Section 117A is as follows:

> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), *"the public interest question"* means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

10. The considerations referred to in section 117A(2)(a), which are said by that provision to be applicable in all cases where the public interest question is under consideration, are as follows:

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

> (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.

11. The definition of "qualifying child" is found in section 117D:

> *"qualifying child"* means a person who is under the age of 18 and who-
>
> (a) is a British citizen, or
>
> (b) has lived in the United Kingdom for a continuous period of seven years or more;

Discussion and Findings

12. The first Appellant entered the United Kingdom on 6 December 2004 with leave to enter as a student which was extended on successive applications until 31 May 2013. On 26 March 2012 the Respondent purported to curtail the Appellants' leave to 26 May 2012 as the first Appellant's sponsor's licence was revoked. On 11 June 2012 the first Appellant submitted an application for leave to remain in the UK on human rights grounds with the other Appellants as her dependents. On 12 February 2013 this was refused with no right of appeal. She submitted a further application on the same grounds on 27 February 2013 which was refused on 5 June 2013 with no right of appeal. On 5 September 2013 she lodged a Judicial Review against the decision dated 5 June 2013. On 11 August 2014 the third Appellant submitted an application for leave to remain in the UK under the family and private life route. This was refused on 14 October 2014 with no in country right of appeal. On 14 November 2014 the application for Judicial Review was refused. On 4 March 2015 the Appellants made a human rights which was refused on 11 May 2015. That decision is the subject of this appeal.

13. The Respondent refused the applications for the following reasons. The first two Appellants applications were refused because they did not meet the requirements of paragraph D-LTRP.1.3 with reference to R-LTRP.1.1 (d) (ii) and (iii) of the Immigration Rules. Consideration was given to their applications for leave as a parent. Although it was accepted that the third Appellant had lived in the United Kingdom for 7 years immediately preceding the date of the application it was not accepted that it would be unreasonable for him to leave the UK as he would be returning as part of the family unit and would be supported in his integration into Mauritius.

The application was refused under paragraph D-LTRPT.1.3 with reference to R-LTRPT.1.1 (d) (iii) of the Immigration Rules.

14. The Respondent refused the first and second Appellants' applications under the private life route because they had not met the requirements of length of residence and the Respondent concluded that there were not very significant obstacles to their integration into Mauritius. The Respondent also concluded that the third Appellant did not meet the requirements of paragraph 276ADE (1) (iv) because it was reasonable to expect him to leave the United Kingdom.

15. The Respondent considered her duties under section 55 of the Borders, Citizenship and Immigration Act 2009, the circumstances of return and their private life ties here and concluded that there were no exceptional circumstances in their case.

16. The Appellants rely on their rights under Article 8 ECHR both within and outside the Immigration Rules. The appeal is against the refusal of their human rights claims and by virtue of section 84 of the Asylum, Immigration and Nationality Act 2002, they can only succeed by showing that, at the date of the hearing, their Article 8 rights would be breached. The jurisdiction of the Tribunal in relation to appeals on Article 8 grounds only was considered in respect of visit visa cases and by analogy the approach here should be the same. In **Kaur (visit appeals; Article 8)** [2015] UKUT 00487 was held that (i) in visit appeals the Article 8 decision on an appeal cannot be made in a vacuum. Whilst judges only have jurisdiction to decide whether the decision is unlawful under s.6 of the Human Rights Act 1998 (or shows unlawful discrimination) (see **Mostafa (Article 8 in entry clearance)** [2015] UKUT 00112 (IAC) and **Adjei (visit visas – Article 8) [**2015] UKUT 0261 (IAC)), the starting-point for deciding that must be the state of the evidence about the appellant's ability to meet the requirements of the immigration rules.

17. In addressing the questions in **Razgar [2004] UKHL 27** I accept that the Appellants due to their length of residence here are likely to have established a private life and the proposed interference is of sufficient gravity to engage the operation of Article 8, the interference is in accordance with the law and necessary in a democratic society. The remaining question is therefore whether the interference is proportionate to the legitimate public end sought to be achieved.

18. My starting point in terms of proportionality is whether the Appellants can satisfy the Immigration Rules. The Appellants did not advance an argument either in the skeleton argument or in submissions before me that the first and second Appellants meet the requirements of paragraph 276 ADE (1) (vi) of the Immigration Rules. Instead, they seek to rely on the rights of the third Appellant. In **PD and Others (Article 8 – conjoined family claims) Sri Lanka** [2016] UKUT 00108 (IAC) the Upper Tribunal held that considering the conjoined Article 8 ECHR claims of multiple family

members decision-makers should first apply the Immigration Rules to each individual applicant and, if appropriate, then consider Article 8 outside the Rules. This exercise will typically entail the consideration and determination of all claims jointly, so as to ensure that all material facts and considerations are taken into account in each case. In **PD** the Upper Tribunal concluded that given that, of the three Appellants, only the third could conceivably succeed under the Immigration Rules, and turned their attentions to his claim at first. I conclude similarly, that given that only the third Appellant can succeed under the Rules I should consider his claim first.

19. In view of the fact that he had been in the United Kingdom for over 7 years at the date of the application I have considered whether it would be reasonable to expect him to leave the UK (paragraph 276ADE (1) (iv)).

20. The Court of Appeal gave the following guidance on the application of the reasonableness test in **MA (Pakistan) and Ors v SSHD [2016] EWCA Civ 705**:

"Applying the reasonableness test

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.

47. Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child's best interests are in favour of remaining. I reject Mr Gill's submission that the best interests assessment automatically resolves the reasonableness question. If Parliament had wanted the child's best interests to dictate the outcome of the leave application, it would have said so. The concept of "best interests" is after all a well established one. Even where the child's best interests are to stay, it may still be not unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and in the country where it is proposed he should return. What could not be considered, however, would be the conduct and immigration history of the parents.

48. In *EV (Phillipines)* Lord Justice Christopher Clarke explained how a tribunal should apply the proportionality test where wider public interest considerations are in play, in circumstances where the best interests of the child dictate that he should remain in the UK (paras. 34-37):

> "34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.
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> 35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
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> 36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.
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> 37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hypothesi, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

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

21. I have considered the best interests of the third Appellant as a primary consideration. In **Zoumbas v Secretary of State for the Home Department** [2013] UKSC 74; [2013] 1 WLR Lord Hodge, with whose judgment Lady Hale and Lords Kerr, Reed and Toulson agreed, approved the following seven principles which need to be borne in mind when considering the interests of the child in the context of an Article 8 evaluation (para.10):

(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;

(2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

22. The third Appellant was born in the United Kingdom on 7 April 2007 and has therefore been in the United has been in the UK for over 10 years at the date of the hearing. He has travelled outside the United Kingdom twice for two months in 2007 and one month in August 2007. Consequently I must give the length of residence significant weight because it is relevant to determining the nature and strength of his best interests. He has a close and loving relationship with both parents and it is in his best interests to remain with them. He has spent a number of years in primary school in the UK and has not yet reached a critical stage of his education. I bear in mind that the Upper Tribunal has held that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable. At the age of 10 the third Appellant has started forming a private life outside his immediate family and I accept that he has started to establish friendships in this country and will have developed social and cultural ties. Further, having reached to age of 10, he is entitled to be registered as a British Citizen. There is no suggestion by the Respondent

that he is not of good character or would for any other reason not meet the requirements for citizenship. I accept that this is a factor of significant weight in assessing his best interests.

23. The First-tier Tribunal's findings, which I have not found were infected by an error of law, were that the third Appellant would not have any language difficulties given that English was one of the official languages of Mauritius and the prime medium of instruction in public schools. Further, he found on the evidence before him that Mauritian citizens enjoyed free state education to tertiary level attaining consistently high results in examinations. The third Appellant has visited Mauritius but has no experience of living in that country. However, the renewability of his connections there must be considered in the context of the fact that his parents lived there until 2004, would return after having spent a number of years gaining an education in the UK and have family in Mauritius.

24. I accept that the Appellant has no current connections with Mauritius having never lived there. I also accept, having taken account of the evidence relating to his education in the Appellant's bundle that he has settled into school life here. Whilst there are no medical or linguistic factors which would cause him difficulty in Mauritius, in view of his length of residence here and the recognition of the importance of 10 years residence enshrined in the British Nationality Act I find that it would be strongly in his best interests to remain in the UK.

25. As acknowledged in **MA (Pakistan)** 7 years residence is establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary. I have taken account the words of Lord Justice Elias at paragraph 103 of **MA (Pakistan)**:

"103. In my judgment, the observation of the judge to the effect that people who come on a temporary basis can be expected to leave cannot be true of the child. The purpose underlying the seven year rule is that this kind of reasoning ought not to be adopted in their case. They are not to be blamed for the fact that their parents overstayed illegally, and the starting point is that their status should be legitimized unless there is good reason not to do so. I accept that the position might have been otherwise without the seven years' residence, but that is a factor which must weigh heavily in this case. The fact that the parents are overstayers and have no right to remain in their own right can thereafter be weighed in the proportionality balance against allowing the child to remain, but that is after a recognition that the child's seven years of residence is a significant factor pointing the other way."

26. At paragraph 42 of **MA** Lord Justice Elias stated:

"As Lord Justice Laws pointed out in *In the matter of LC, CB (a child) and JB (a child)* [2014] EWCA Civ 1693 para.15, it is not blaming the child to say that the conduct of the parents should weigh in the scales when the general public interest in effective immigration control is under consideration. The principle that the sins of the fathers should not be visited upon the children is not intended to lessen the importance of immigration control or to restrict what the court can consider when having regard to that matter. So if the wider

construction relied upon by the Secretary of State is otherwise justified, this principle does not in my view undermine it."

27. Having established that it is the third Appellant's best interests to remain, I now consider whether it would be unreasonable to expect him to return to Mauritius taking into account the wider public interest considerations.

28. The first Appellant was here lawfully as a student from 2004 until 26 May 2012. Thereafter she has remained without leave. The second Appellant has been here as a student dependent since January 2005 and similarly has been without leave since May 2012. Since that point they have attempted on a number of occasions to regularize their status. When they had leave their stay was precarious because it depended on a further grant of leave. Because their private live has been established whilst they have been here first precariously and then unlawfully I must therefore give it little weight.

29. Neither the first or the second Appellant can succeed under the Immigration Rules as there are not very significant obstacles to their integration as required by paragraph 276 ADE (1) (vi). I accept that the first and second Appellant can speak English having passed the life in the UK test. There is no evidence before me to show that they are financially independent but they can in any event obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of fluency in English, or the strength of their financial resources as these are neutral factors (**Rhuppiah** [2016] EWCA Civ 803). I also take account of the fact that the maintenance of immigration control is in the public interest.

30. Nevertheless, despite the public interest in removal, I find that given the fact that it is strongly in the best interests of the third Appellant to remain here, the balance in the proportionality exercise has not been tipped against him by the public interest. I have born in mind also what the Mr Justice McCloskey has recently said in the case of **Kaur (children's best interests / public interest interface)** [2017] UKUT 00014 (IAC), namely that the "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case. In view of his length of residence here and the strength of his ties to the UK and the lack of connections to Mauritius I find it would not be reasonable for the third Appellant to return to Mauritius and that he has proved his case under paragraph 276 (1) ADE (iv). It follows that the firsts and second Appellants are the parents of a qualifying child and the public interest does not require their removal under section 117 B (6) and that the private and family life factors advanced by the Appellants outweigh the public interest to the extent that the impugned decision is disproportionate in respect of all three Appellants.

Conclusions:

I re-make the decision in this appeal by allowing it on Article 8 grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

This appeal concerns a child and I consider it appropriate to make an anonymity direction to protect his interests. 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 Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Dated 8 July 2017

Deputy Upper Tribunal Judge L J Murray