Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/45551/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th July 2017	**On 4th August 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FI
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Jarvis, Senior Presenting Officer
For the Respondent: The appellant in person

DECISION AND REASONS

1. The Respondent is a citizen of Pakistan.

2. Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I make an anonymity direction as this case concerns minor children. 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 the children. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The procedural history and background:

3. The Secretary of State, with permission, appeals against the decision of the First-tier Tribunal (Judge Walker) who, in a determination promulgated on 5th May 2015 allowed FI's appeal on human rights grounds (Article 8).

4. Whilst the Appellant in these proceedings is the Secretary of State, for the sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal.

5. The Appellant's immigration history and the basis of his claim is set out within the determination at paragraph 3 of the FTT determination and in the decision letter issued by the Secretary of State. It can be summarised briefly as follows.

6. The appellant is a national of Pakistan. He applied for entry clearance to the United Kingdom as a Tier 4 (dependent) of his partner, N, from 21 September 2010 until 30 November 2011. The appellant entered the United Kingdom on 21 September 2010. The appellant had a daughter, H, born on 26 January 2010 who entered the UK with her parents.

7. On 30 November 2011 he applied for an extension of leave to remain as a dependent of his partner, as part of her Tier 4 application. He was granted leave to remain on 25 May 2012 until 1 June 2013. Whilst the appellant and his partner were in the United Kingdom, she gave birth to a further child, A, born March 2011.

8. On the First of June 2013 he applied for leave to remain under Appendix FM on the basis of his family and private life. That application is set out in the respondent's bundle. In a corresponding letter dated 1 June 2013 he stated that he would be sending supporting statements in support of the application from his family "all of whom are British citizens".

9. The respondent refused that application and a notice of immigration decision refusing to vary leave to enter or remain in the decision to remove was made on 6 November 2014. It was accompanied by a reasons for refusal letter.

10. The respondent gave consideration to the application under the Partner Route, however, the appellant and his partner were no longer in a genuine and subsisting relationship and thus the application could not be considered further under that route. As to consideration under the Parent Route, whilst it was accepted that he had children with his partner, he had failed to provide evidence to show that he qualified under the rules of R-LTRP 1.1. The decision letter noted that the Secretary of State had written to him on 13 August 2014 to request evidence of the children's nationalities, as well as evidence that he had access rights to the children. He was also asked to provide birth certificates for the children. It was

recorded that the appellant did not respond to the letter. A further letter was sent requesting the same information and on 19 September 2014, the applicant submitted further documents including both children's birth certificates and also letters to explain that he was currently attempting to exercise access rights to the children as he was separated from his spouse. It was not accepted that he was the parent of a child who was either British or settled. Nor was it accepted that he was the parent of a child who had lived in the United Kingdom for seven years preceding the application and that EX1 applied as the children were three years and four years respectively. Thus he had failed to show that he met the requirements of E-LTRP2.2.

11. As to the evidence of parental access to the children, it was accepted that whilst he had access to the children, confirmed by letters from his estranged partner in a letter from the GP, the primary carer of the children was not British nor was she settled in the United Kingdom. She had limited leave to remain until January 2016 and thus the appellant could also not meet E-LTRP 2.3 of the Immigration Rules under Appendix FM.

12. As to consideration under the private life route, the Secretary of State set out the requirements under paragraph 276ADE of the rules. The appellant entered the United Kingdom on 21 September 2010 and had not lived continuously in the UK for at least 20 years therefore he could not meet the requirements of paragraph 276 ADE (1) (iii). As he was 32 years old at the time of the application and not between the ages of 18 years and above and under 25 years at the time of the application, and had spent 28 years in Pakistan prior to coming to United Kingdom, the secretary of state was not satisfied that he could meet the requirements of paragraph 276 ADE (1) (v). The Secretary of State also considered whether he could meet the requirements of paragraph 276 ADE (1) (iv) which referred to there being significant obstacles to his integration into Pakistan. The Secretary of State concluded that he could not based on the following factors; he was 32 years old at the time of application and had resided in the UK for four years. He had lived in Pakistan the 28 years prior to this which significantly outweighed the time he had spent United Kingdom. He had family relatives (his mother) resided in Pakistan and it provided no evidence to show that she would be unable to support or accommodate him on return; he had cultural ties to Pakistan which demonstrated that he would be able to re -establish a life there given that he spoke Urdu and Punjabi. He was aware also the social and cultural norms of the country due to the lengthy period that he spent living in Pakistan.

13. Consideration was given to section 55 of the Borders, Citizenship and Immigration Act 2009 relating to the best interests of the children concerned. The Secretary of State concluded that as the children were currently in the care of their mother it would be assumed that the care arrangements would be continued on his return to Pakistan. It would be at the discretion of the children's other parent as to whether she would wish to return to Pakistan with him at the children or whether they would remain in the United Kingdom until the expiry of their leave to remain

(January 2016) or, if granted further leave to remain indefinitely. The children were cared for a regular basis by their mother whilst he had sought access, it would be in the best interests of the children to be cared for by their mother. As he was not the sole care of the children it was not considered that his removal from the United Kingdom would breach the children's rights under section 55. Furthermore he would be able to continue contact with the children via other methods such as telephone calls, video calls, emails and letters. It would also be open to him to return to Pakistan and seek the correct entry clearance should he wish to visit the children in the future.

14. The secretary state also considered whether there were any grounds for a grant of leave outside of the rules but concluded on the evidence provided that there were no such grounds. Thus the application was refused.

15. The appellant sought to appeal that decision on 24 November 2014 by issuing grounds of appeal. Those grounds asserted that the decision made was not accordance with the law and incompatible with his rights under the ECHR. He claimed that he was in contact with his daughters and that the contact arrangement would not continue if returned to Pakistan as "my wife does not allow me to and I will be unable to enjoy my family life with my daughter and my daughters have a right to have contact with their father and it is in their best interest."

16. The appeal came before the First- Tier Tribunal (Judge Walker) at a hearing on 27 March 2015. In a determination promulgated on 5 May 2015 he allowed the appellant's appeal on human rights grounds (having dismissed the appeal under the Immigration Rules).

17. The Secretary of State sought permission to appeal that decision and permission was granted by the First-tier Tribunal Judge Lambert) on 15 July 2015. In particular, the grant of permission made reference to the failure to take account of the children's own lack of settled status in the United Kingdom.

18. The appeal was therefore listed before the Upper Tribunal on 9 October 2015 before a Deputy Judge of the Tribunal. I have no details as to the proceedings that took place on that date however it is plain from a letter in the bundle addressed to both parties that subsequent to the hearing of the appeal, the judge was unable to complete a written decision therefore the Resident Judge, exercising his delegated powers, made an order for the transfer of the appeal to a differently constituted Tribunal. That was attached to a notice served on the parties on 10 February 2017.

19. The appeal was then listed before Deputy Upper Tribunal Judge Taylor on 30 March 2017. In a determination promulgated on 7 April 2017 DUTJ Taylor found errors of law. The judge recorded those errors as follows:-

    (1) "I am satisfied that the judge added law by failing to have regard to a material fact, namely that as at the date of the decision and the hearing, the children, on the evidence

before him, had no settled status here. There is no reference to the fact that they would be expected to return to Pakistan in due course. Indeed, the judge appears to have basis decision upon the assumption that contact would not exist in any form if the claimant were to be returned there.

(2) Furthermore, there is no reference to section 117B of the 2002 Act. Accordingly, the judge did not take into account the factors which he was required to consider by virtue of that Act when reaching his decision. The decision is set aside."

20. Having set aside the decision, the duty of every Tribunal is to remake it. It appears from paragraph 13 of the determination that when the appellant gave further evidence, it emerged that he could be a British Citizen. It was recorded that the appellant had said that his father was British and be granted citizenship in 1974. He said he had been born in 1982 and that he could provide all of the relevant documentation. The judge also made reference to an assertion in the presenting officer's file that the appellant's children were British. Thus the appeal was adjourned to be relisted before the same DUTJ. The judge made a direction for the appellant to file all documents related his father, enclosing a copy of his birth certificate to the Secretary of State to be recorded within seven days. Secretary of state was to undertake to consider those documents thereafter and to inform the Tribunal what the position of the Secretary of State is after that consideration.

21. On 24 April 2017 a further transfer order was made by the Resident Principal Judge so that the appeal could be heard by a differently constituted Tribunal.

22. Thus the appeal came before the Upper Tribunal on 25 May 2017. On that day the appellant, as he has been throughout, appeared unrepresented. At the hearing he had not provided any further evidence in relation to the children and his relationship/contact with them and he also stated that there was evidence that he did not have with him to demonstrate that he was entitled to British citizenship. There appeared to be some ambiguity as to whether he had received the skeleton argument produced by Mr Jarvis concerning the issue of citizenship relating to his family relatives and thus the appeal was adjourned with further directions for the appellant to file and serve on the Tribunal and the respondent a written statement setting out his full family details and the basis upon which he stated he had British citizenship and for any evidence relating to contact has with the children.

<u>The hearing before the Upper Tribunal:</u>

23. At the hearing the appellant appeared in person. He was accompanied by his brother. The Secretary of State was represented by Mr Jarvis, senior presenting officer.

24. At the outset of the proceedings, I ensured that the appellant was able to understand the court interpreter and vice versa. I confirm that throughout the proceedings there was no difficulty in either the appellant understanding the court interpreter or the interpreter understanding the appellant. I also ensured that each stage of the hearing I explained to him the procedure so that he understood and gave him the opportunity to ask questions if there was any issue that he did not understand.

The evidence:

25. Having checked the court file, it did not appear that the appellant had complied with the directions given on the last occasion relating to provision of documentary evidence. However the appellant stated that he had brought that evidence with him. The court therefore took copies of that documentation which are on the court file. For the avoidance of doubt those documents are summarised as follows: –

    (1) Letter from the appellant's brother, NJ dated 30 June 2017.

    (2) Letter from the appellant's brother SI dated 30th of June 2017 and extract of passport.

    (3) Application for registration as a citizen of the United Kingdom and Colonies in the name of the applicant's father MI (not complete or dated).

    (4) Letter from the Home Office dated 11/7/74 acknowledging receipt of two passports from MI.

    (5) Document entitled "statement of facts relating to family history" dated 30th of June 2017.

    (6) Extract of UK passport for MI (appellant's father.

    (7) Death certificate of the appellant's father.

    (8) Copy photographs of the appellant and the children.

    (9) Birth certificate copy of appellant's brother SI.

    (10) Birth certificate of the appellant

    (11) Certificate of registration as a British citizen for the appellant's father, MI, dated fifth of July 1988.

    (12) Birth certificate of appellant's brothers.

26. The respondent had produced a copy bundle of documentation which had been before the First-tier Tribunal (which included the original decision in 2014 and the documentation provided by the appellant). Furthermore, further to the directions made by DUTJ Taylor there was a skeleton argument dealing with the issue of British citizenship and an

accompanying set of documents relevant to that issue. Those documents had been served upon the applicant at the time of the earlier hearing and he confirmed he had been given the opportunity to consider them. They replicated some of the documentation at the appellant himself relied upon.

27. I heard oral evidence from the appellant. In relation to the arrangements to contact to the children since the FTT decision in October, the appellant stated that he met them during “school times”. When asked how often he had seen the 2015 he said that he had “met them frequently”. As to the arrangements that he had made with the children’s mother, he said that he took the children to school about 3 to 4 times per month. When asked where he picked them up from, he said that he did so “outside school”. Therefore the evidence was further clarified as to the arrangements and he said that the children’s mother would leave the children in the park, which is a park outside the school, he would go to the park and pick them up. His wife would leave the children in the park. He confirmed that this was the arrangement made with his wife. When asked if he saw them at any other times he said that sometimes he took them outside in “special circumstances”. He described taking the children to McDonald’s and that he would ask his wife to bring them to McDonald’s and that he would spend approximately 1-2 hours with them. When asked how many times he had had that type of contact he thought that there had been “many times” and gave a figure of about 15-20 times in the year.

28. He was asked about the photographs that he produced. Photograph one showed a woman a child and the appellant. He said that this was a picture of his daughter H aged about seven with a teacher and the photograph was taken in July 2017. It was taken at a school assembly.

29. Photograph three was a picture of the appellant and his two daughters are McDonald’s celebrating the festival of EID.

30. The other photographs appear to be taken on the same occasion.

31. When asked if there were any other forms of contact with the children the appellant stated “no”.

32. As to the children’s circumstances he confirmed that both children were in good health and that they were still living with their mother. When asked if he knew anything about his ex-wife’s current circumstances the appellant replied “I don’t know – she does not tell me anything.”

33. He stated that the two children had been at their schools for three years and two years respectively.

34. He stated that he did not have any qualifications in English but that he understood English but did miss important words which is why he required an interpreter. When asked how he was living in the UK (financially) stated that he did not have a proper job because he did not have status and that he had been doing repair jobs.

35. As to family in Pakistan, he confirmed that his mother resided there and he had married sisters who lived in their own homes.

36. When asked if there was any further evidence he would wish to give about the children or his relationship with them, he said “I’m sure that they don’t hate me but love me”.

37. Dealing with the issue of British citizenship, in his written statement he set out his family history. That his father MI arrived in the UK in 1962 and that his father was joined by his mother in 1966. He stated that his father had been granted indefinite leave to remain and in 1974 his father applied for British nationality. He stated that his parents had three children while settled in the UK, his brothers SI born in 1967, MJ born in 1970 and SI born in 1971. He stated that although his father was a British citizen naturalised in 1988 he actually had indefinite leave to remain in 1973 which entitled him to claim British citizenship. In his oral evidence he confirmed that that written statement was true.

38. When asked if he had ever made an application for British citizenship himself, he stated that he had not. When asked why he had not made such an application, he stated “I did not know about this but told by the judge if my father was British I should apply.”

39. The appellant was asked questions in cross examination by Mr Jarvis (senior presenting officer). He confirmed that he saw the children approximately 15 to 20 times over the last year. He further confirmed that when preparing to meet the children in the park he did speak to his wife to arrange where and when to meet. The appellant agreed with the suggestion that he had a fairly friendly relationship with his wife and that he had “given financial help to the children to his wife”.

40. He was asked if he had requested his former wife to give evidence at court. The appellant said that he had not. It was suggested to him that this was an important hearing concerning his relationship with the children and he wanted to stay in the UK. In those circumstances he was asked why he had not asked his wife to attend court to provide information about his relationship with the children. The appellant replied “she does not tell me anything about her case and I do not tell anything about my case.” He further stated “she does not inform me about her case I do not want to tell about my application and in particular my citizenship.” When asked why he would not tell her about his citizenship case, the appellant replied “my relationship with my wife is just about the children.” When asked if there was any reason why she should not know about any British citizenship claims, he replied “there is no agreement she does not tell me anything and I don’t tell her. He stated that it was not necessary for her to support his claim because he had evidence which he could bring to court. It was suggested to him that the evidence provided consisted of photographs of him with the children and that there was no evidence of his wife, there was nothing from the children about how often they saw him or their relationship with him. He was asked why the children had not been providing letters or notes in support of his claim. The appellant stated “I

did not think about this. I have brought evidence which is appropriate according to my thinking.

41. It was put to him that in reality he had not been seeing the children regularly and had not been acting as a father to them. In reply the appellant stated "I cannot support the children because I do not have status and no financial means. If I had the money I would have the opportunity to meet them." He confirmed that he lived approximately 20 minutes' drive away from the children's address.

42. He was asked if he had requested the children school to provide evidence to demonstrate that he played a part in their lives. The appellant replied "last time I was asked if I had a letter. I went to school but they did not provide me with one. I provided a letter from the GP (this referred to a letter dated November 2014).

43. He was asked about his wife's friend who sometimes dropped the children off in the park and whether he had a friendly relationship with her. The appellant stated that it was not more than hello but that she knew that he was the father of the children.

44. He was asked about his brother N and whether he had been with the appellant and the children? The appellant stated that he had not seen the children with the appellant since the appellant and his wife separated (the date of separation was approximately 2013).

45. He said he last saw the children the day before the hearing when they finished school.

46. He stated that his brother did not have any contact with his estranged wife.

47. The appellant was then asked questions about his family history. The Home Office evidence suggested that the appellant's father was living in the UK in 1975 and that at the end of 1975 he travelled back to Pakistan. The appellant agreed that that was the position. He was referred to page 17 of the bundle and that there was evidence that his father applied to re-enter the United Kingdom in 1977 and was refused permission on 30 September 1979 and that his appeal against this decision was rejected in 1980. The appellant agreed that was the position.

48. He further agreed that he was born in 1982 in Pakistan. He further agreed that his father had written to the Home Office (or someone on his behalf had done so) in 1987 (see page 53 of the bundle) asking the Home Office to look into MI's status and nationality in the UK and that his father completed an affirmation and allegiance to the Queen in 1987 (page 57).

49. He confirmed that in 1988 his father was living in Pakistan and that he was recognised as possessing a right of abode and registered in this regard on 14 July 1988. He was asked if he had ever re-entered the UK? The appellant stated that his father lived with his brother. When asked again

when his father had left Pakistan he stated that it was “approximately 1988 – 1990” but that he was “just guessing”.

50. I asked the applicant if he had received any school reports and he said that he did not. He also said that he received no information from the school but that when he went there he would ask about the children. When asked what they had told them about the children’s welfare he said “they are doing well”. When asked if he was aware of anything else significant in their lives? He said “nothing more than they are well and intelligent.”

51. The Tribunal then heard evidence from the appellant’s brother NJ. He had provided a letter setting out his circumstances which made reference to his British citizenship. In his oral evidence he was asked about his relationship with his brother. He said that his brother had lived with him since coming to the United Kingdom in 2010. He described the circumstances stating that “initially they were both supported by us and living with us as a family between the years 2010 – 2013. He stated that they lived at his home and he accommodated both of them. When asked why she had left in 2013 he said “because the parties separated”. He confirmed that he had not seen her since that time. When asked if he knew that the appellant was in touch with his wife and whether he had a good relationship with her, the witness replied “I don’t know if he has regular contact with his wife. When asked what this was based on he said it came from the appellant, he does not talk about his wife.

52. He confirmed that he had seen the Home Office documents relating to his father and that it had given him an “insight into the information”. When asked if he had spoken to his brother about British citizenship, he stated “no – only of late it has never been an issue.”

53. He was asked a number of questions by Mr Jarvis in cross examination. In relation to the children; he confirmed that he had not seen his brother with the children since the parties separated in 2013. When asked if he knew the circumstances in which his brother had seen the children, the witness replied that he was “not a hundred percent sure it could be where they live I’ve never been present.” It was suggested to him that if the children were important to him, it is not clear where he has seen them and he was asked if the appellant talked about the children? The witness replied “I know that he sees them doesn’t talk about them.” He confirmed that his brother had always lived with him. It was suggested that the Home Office concern was that he only saw the children in order to stay in the UK and he was asked to give his opinion. The witness replied “I think that he is close I know he sees them. I don’t know the arrangements he’s often lost in thought it has affected him”. He did not know his brother had asked his wife to come to court.

54. As to his father’s citizenship, he was asked about the chronology in accordance with the documents. They demonstrated that his father had left the UK at the end of 1975 to go to Pakistan later he tried to come back to the UK via an application for entry clearance which was refused and that he had appealed but had lost the appeal. Eventually he had made

representations in the late 1980s and was recognised with a right of abode. The witness was asked when did his father come back to the UK? He replied "my father left the UK because grandfather was ill and he was close to father circumstances changed and he died and he became bogged down. Money ran out and he did not have a good time. He had more children in Pakistan. He stated that his father came back in 1989. In answer to a question from the Tribunal, he was asked if his father had left Pakistan in 1989. He said that he came in January/February 1982 and not at the same time and that he had come First United Kingdom and that he had come afterwards.

55. I then heard a summary from each of the parties. Mr Jarvis relied upon the skeleton argument that dealt with the issue of the appellant's claim to be entitled to British citizenship through his father. It is not necessary to go through that document as it is a matter of record. He then made submissions relating to the appeal against the decision to refuse to vary leave. In this regard he made the following submissions:-

(1) The appellant cannot meet the requirements of the Immigration Rules under Appendix FM or under paragraph 276 ADE for the reasons set out in the decision letter. The appellant's former partner is not a British citizen nor settled in the United Kingdom nor of the children "qualified children" under the rules. They are not British citizens (although the appellant asserted that they may be) nor are they settled in the United Kingdom.

(2) As to private life, his length of residence was from 2010 and in the light of his circumstances could not demonstrate very significant obstacles to his reintegration to Pakistan.

(3) When looking at the matter outside of the rules on Article 8 grounds, the starting point was the findings made by the judge in 2015 who found that there was a genuine and subsisting relationship with the children. However under section 117D (1) (b) he was required to demonstrate that there was a "parental" relationship. He had failed to demonstrate this on the evidence. There are pictures of the appellant and the children but there was little evidence of contact in 2015 and little contact two years later. There was a significant absence of evidence relating to his relationship with the children. There was nothing from the appellant's wife despite the appellant stating it was amicable relationship and enough to see the children 15 to 20 times last year. However she had not attended court and there was no further information from his wife.

(4) In reality, the appellant occasionally saw the children but did not have a "parental" relationship of any significance given the lack of evidence to corroborate this. The evidence of his brother was limited and could not corroborate the

relationship or intensity of the relationship. Looking at the history, in 2013 the parties separated and in absence of evidence, the Home Office say that the appellant had not discharged the burden to show that he had a subsisting parental relationship with either of the children. Looking at the best interests of children, it would not be in their interest to be used for a fabricated claim. Therefore could not demonstrate he satisfied S.117B (6) (a).

(5) As to S117B (6) (b), the word "expect" in the Act has a meaning that there is no expectation for a qualifying child to leave the UK at the date of the hearing. Thus he submitted the reasonableness test did not apply the facts.

(6) The appellant's removal is proportionate applying the section 117 considerations. He is not financially independent and whilst he can understand English is unclear about the level of that ability and has no qualifications. His private life was established in the UK precariously. The children have no leave or status United Kingdom thus any contact can be re-established if necessary in Pakistan.

56. I also heard a summary from the appellant. He had the opportunity to make any notes and his brother was also present next to him to assist. He made reference to the following matters:-

(1) He had not had any details about his father but had learnt more from the documents and that from 1962 to 1974 he had indefinite leave to remain in the UK and after that applied for citizenship. In 1975 he left Pakistan. If in the UK 1974 he would have been given UK citizenship at that time. It was given on the basis of his previous stay in the UK.

(2) In answer to suggestions made by the presenting officer that he was unable to work legally, he stated that he had learned from other resources that he would be able to work in the UK. He stated that it was his understanding that he could work in the UK and the before his expiry of his leave to remain he had applied for permission on the basis of his family life and he was advised that he could work until a decision had been made.

(3) In relation to the children he said that he was a very caring person and cared for the welfare of his daughters. He said that it may not look genuine but at the end of the day he was their father and that they are his daughters. He said he would use level best for their betterment that their daughters and of learned from experience about being a father. He said that he was happy to play with the children and to go out and happy to bring both food and clothing his daughters.

(4) He stated that it would be impossible to settle back in Pakistan having been in the United Kingdom since 2010 and that there was a lack of family and friends. He is now 35 years of age. If he was not entitled to British citizenship, he would request further leave to remain. The lifestyle of the UK was better than in Pakistan and that he could adapt to life here work hard.

(5) His brother, reiterated at the conclusion of the appellant's summary, that the appellant just wanted to be with the children and see them again.

57. At the conclusion of the hearing I reserved my decision which I now give.

The issue of Citizenship:

58. The appellant's claim is that by virtue of his father's citizenship he is entitled to be recognised as a British Citizen as had other members of his family. Whilst the appellant claimed that he only realised that this might be a prospect when the judge referred to this at the hearing, I do not think that that is correct as when he made his application for further leave to remain in 2013 he made reference to his family members being British Citizens. Notwithstanding that, he and his brothers have provided information concerning their family circumstances. Having considered that information, I am satisfied that the documentation provided by the respondent which in part replicates the information provided by the appellant, but provides more detailed documentation, sets out the accurate chronology of events. I shall refer to that in due course.

59. The relevant extracts of law are replicated below.

60. Section 6 of the 1948 British Nationality Act sets out the following;

"6. Registration of citizens of countries mentioned in section 1 (3) or of Eire and wives of citizens of the United Kingdom and Colonies

(1) subject to the provisions of subsection (3) of this section, a citizen of any country mentioned in subsection (3) of section 1 of this Act or a citizen of Eire, being a person of full age and capacity, shall be entitled, on making application therefore to the Secretary of State in the prescribed manner, to be registered as a citizen of the United Kingdom and Colonies if he satisfies the Secretary of State either –

(a) that he is ordinarily resident in the United Kingdom and has been so resident throughout the period of 12 months, or such shorter period as the Secretary of State may in the special circumstances of any particular case accept, immediately preceding his application; or

(b) That he is in Crown service under his Majesty's government in the United Kingdom."

61. This was amended by Schedule 1 of the 1971 Immigration Act (in force from 1 January 1973). It reads as follows;

"Schedule 1 registration as citizen by reason of residence, Crown service, Etc.

1. the law with respect to registration as a citizen of the United Kingdom and Colonies shall be modified as follows:

(a) in the British Nationality Act 1948, immediately before section 6, there shall be inserted as section 5A the provisions set out in Appendix A to this Schedule, and no person shall be entitled to be registered under or by virtue of section 6 (1) of that Act except in the transitional cases allowed for by paragraph 2 below: and

(b) in section 8 of the British Nationality Act 1948 (registration outside United Kingdom) –

(i) after the words "foregoing sections" there shall be inserted in subsection (1) the words "or, subject to subsection (1A) of this section, under section 5A "and in subsection (2) the words "or under section 5A of this Act": and

(ii) there shall be omitted in subsection (1) the words from "and as if" onwards (except for purposes of registration by virtue of paragraph 2 below), and there shall be inserted as subsections (1A) and (1B) the provisions set out in Appendix B to this Schedule; and

(c) For section 9 of the British Nationality Act 1948 there shall be substituted the provisions set out in Appendix C to this Schedule (which insert in the section a reference to the new section 5A and add a requirement for the taking in certain cases of an oath of allegiance).

2. Notwithstanding anything in paragraph 1 above or any repeal made by this Act (but subject to paragraph 3 below), a person who would but for this Act have been entitled under or by virtue of section 6 (1) of the British Nationality Act 1948 to be registered as a citizen of the United Kingdom and Colonies shall be entitled to be so registered in the United Kingdom if he satisfies the Secretary of State that at the date of his application to be registered he had throughout the last five years or, if it is more than five years, throughout the period since the

> coming into force of this Act been ordinarily resident in the United Kingdom without being subject, by virtue of any law relating to immigration, any restriction on the period for which he might remain."

62. From the information that I have before me I set out the chronology of events as I have found them to be. The appellant's father (MI) was born in Pakistan in 1934. There is no dispute that he arrived in the United Kingdom in 1962 (see page 3 and statement of family history) and that he was joined by his wife in or about 1966. In or about 1973 MI was provided with a stamp granting leave to enter the UK and on 3 July 1974, M I made an application whilst in the United Kingdom to the Home Office under section 6 (1) of the BNA (see partial application form in appellant's bundle and pages 1-9).

63. The file notes reveal that there was some discussion as to whether absences from the UK (during the preceding five-year period) which took place in 1972 – 1973 and 1972 – 1974 may provide reasons for refusing to register the appellant's father MI as a Citizen of the UK and Colonies (under the provisions of section 6 the 1948 BNA as amended by the 1971 Act).

64. However from the evidence it appears that attempts to communicate with MI took place but that he requested the return of his passport on 9 December 1975 so that he could return to Pakistan. The enquiries made by the Home Office make reference to the reasons the return being that his wife and children were sick. The evidence from the appellant's brother was that that their grandfather was ill and subsequently died. On 9 December 1975, MI attended the public enquiry office was given his current passport so that he could travel to Pakistan. However MI left the UK on 14 December 1975. There had been further attempts to contact MI at his address in the United Kingdom between 1975 and 1977 but no response was received. The case was therefore sent to a hold file and treated as outstanding.

65. On 29 December 1977 M I applied for entry clearance as a returning resident. At page 17 of the bundle there is a copy of the refusal of the entry clearance officer on 30 September 1979. Entry clearance was refused because the applicant had been away from the United Kingdom the longer than two years. This was the subject of an appeal but was dismissed by adjudicator Asher on 18 May 1981 (see copy determination exhibited at pages 49 – 51). The appellant's father could not satisfy Rule 46 of "statement of immigration rules to control on entry/EEC and other non—Commonwealth nationals (HC 81) which required the applicant to demonstrate that he was settled in the United Kingdom when he left and that he has not been away for longer than two years.

66. Thus the indefinite leave to remain to enter provided for in 1973 lapsed because he was out of United Kingdom for more than two years and therefore he did not have ILR as it had lapsed at the end of 1977.

67. Indefinite leave to remain was also not relevant for other reasons when considering the chronology; the appellant was born in 1982 but his father did not have indefinite leave to remain as it had lapsed at the end of 1977. However as I understand it indefinite leave to enter/remain was not the basis of his citizenship but it was based on him as a citizen of the UK and Colonies(hereinafter referred to as "CUCK") under the 1948 Act therefore indefinite leave to remain was only partially of relevance. At the time the appellant was born his father was a citizen of Pakistan and had not been recognised as a CUCK and only for the recognition of right of abode under the 1971 Act by nationality. It appears that it was not recognised until MI made representations (see page 53) whereby an advice service wrote to the Home Office stating that the appellant's father had told them of the 1974 application for registration and requested information in this regard. It is not clear what happened in the interim but thereafter the appellant signed and sent back an oath of allegiance document (see page 57). At the time of that document the appellant was in Pakistan. This is consistent with the evidence given by the appellant and his brother.

68. Looking at the evidence at page 66 which is a file note, M I was registered by the Home Office as a British citizen on 14 July 1988. I accept the submission made by Mr Jarvis that that was presumably on the basis of section 11(1) of the BNA 1981; the transitional power in Schedule 8 of the 1981 BNA and section 1 (2) relating to applications for naturalisation registration pending commencement, read with section 6 (1) of the BNA 1948 (read with schedule one of the 1971 Immigration Act).

69. The documents also appear to demonstrate that MI received two endorsements of certificates of entitlement to the right of abode in his Pakistan passport in 1993 and 1997.

70. Therefore applying the chronology and the documentation in the light of the provisions, MI was not a British citizen on the commencement of the BNA 1981 which was 1 January 1983, because he was not registered as a CUCK which did not happen until 14 July 1988. Whilst the appellant makes reference to the application made in 1974, it did not happen until 1988. This meant that the appellant was born in 1982 was not a British citizen at birth because at that date MI was a citizen of Pakistan who was in the process of applying to register as a CUCK under the 1948 Act and the 1971 modification. He could not have benefited from section 7 of the BNA 1948 in respect of his descent from MI on the date of his birth because the BNA 1981 did not come into force until 1 January 1983 which was after the birth of the appellant.

71. Consequently the appellant has not demonstrated that he is entitled to British citizenship.

<u>The appeal under Appendix FM and Paragraph 276ADE:</u>

72. I now consider the appeal based on the applicant's private and family life under Appendix FM, paragraph 276 ADE and Article 8 outside of the rules.

73. My starting point is the determination of the FTT and the findings made in 2015.

74. They can be summarised as follows:

(1) The appellant could not meet the requirements of paragraph E-LTRP or EX1 because the children are not seven years of age. Similarly and because the appellant cannot meet the long residence requirements of paragraph 276 ADE he cannot qualify under the rules with regard to that paragraph.

(2) Thus the applicant's case was considered under Article 8 (outside of the rules).

(3) The judge found the appellant to be a truthful witness. The letters provided demonstrated that the appellant had sought to have contact with the children. He was satisfied that the appellant went to considerable lengths in order to locate the children and then to persuade the sponsor to allow him to see the children. It is clear from the letters and the oral evidence of the appellant that the sponsor had been very reluctant to allow contact but at the same time she did not mention in the letters any reason why that might be. The judge considered it "highly likely" that if the sponsor had any potent reason to refuse contact that stage she would have mentioned it in the letter. Instead she simply stated that she did not want to see him. Later letters speak of the children missing the applicant for that reason the sponsor has allowed contact. The conditions she has insist upon or not conditions the family court would expect to maintain in the long term in the absence of some very good reason for doing so.

(4) The judge was satisfied that the appellant did not realise that he could take proceedings in the court without the assistance of a lawyer and that he had spent some money on a lawyer but could no longer afford it.

(5) The judge was satisfied that the appellant and the children "are at the beginning stages of re-establishing contact. The allowance of contact on the part of the sponsor was a very fragile consent on her part. She is clearly reluctant to allow contact which seems to me to be figured on her own desire not see the appellant, to be able to control the situation completely (hence the desire that the contact is fully supervised) and to be able to impose conditions upon him such as the payment of money. To her credit she has allowed some contact at the request of effect of the children."

(6) "Against these findings I do not consider it likely that the sponsor would facilitate contact with the appellant from the UK if he was in Pakistan. In addition the appellant would not be able to enforce such contact from Pakistan. The judge considered it "highly likely" the contact will not exist in any form in the appellant were to be returned to Pakistan.

(7) The judge also considered that it was "highly likely" that inevitably the appellant will have to resort the court in order to achieve a sensible level of workable contact from the sponsor who was the primary carry of the children.

(8) The judge found that the children had a relationship with the appellant and want to see him. He reached that conclusion from the letter allowing contact which the sponsor wrote (see paragraph 32).

(9) The judge found that there were no outstanding childcare proceedings. He found that there were no compelling public interest reasons to exclude the appellant irrespective of the childcare situation and that the situation with regard contact not been brought about the straight the appellant's removal from the UK. The judge found the appellant had shown "considerable commitment" in establishing contact and attending contact sessions "albeit short in nature and fraught with conditions imposed by the sponsor."

(10) Taking into account the requirements of section 55 the judge considered that to remove the appellant would be contrary to the interests and welfare of the children who need to maintain a relationship with him. "They have already expressed a sense of loss and they did not see the appellant are set out by the sponsor in her letter it would also breach the appellant's rights under Article 8 if you were removed from the UK".

75. I make the following findings of fact from the evidence before me. There is no dispute from the evidence of the appellant and that of his brother that the appellant and his former wife lived together in the United Kingdom from September 2010 until their separation in 2013. Their child H was born in Pakistan in 2010 and accompanied them to the United Kingdom. In 2011 a second child was born of the relationship.

76. The First-tier Tribunal judge set out his findings as to the duration and quality of contact in March 2005 which was two years after the parties separated. The findings of fact made in 2015 made reference to the fact that the appellant had located the children and that there had been conditions of contact imposed by the children's mother, which I assume made reference to supervised contact. The judge found that the appellant did not realise that he could take court proceedings and that he had instructed a lawyer to assist him (see paragraph 35]. Importantly he found

that the father and children were at the beginning stages of contact. He described the contact in March 2015 as "short and fraught with conditions" (see paragraph 33).

77. It is therefore clear that in March 2015, two years after the parties separated, that the father had re-established contact but that it was short in duration and frequency and subject to conditions imposed by the children's mother and that he had sought a lawyer to take steps to improve that contact. The judge made reference to a commitment shown by the appellant to establish more contact.

78. The circumstances in 2017 demonstrate that the position has not changed. There is little evidence as to the nature and quality of the contact between the children and the appellant and what evidence there is comprises of the oral evidence of the appellant and some photographs. There was no information from the children's primary carer to support his account of having "frequent contact" nor from any other source, including from the children themselves. His brother, with whom he lives a short distance away from the children's residence, had not seen the appellant with the children since separation 2013 did not know the details of the contact visits.

79. The appellant's explanation for the lack of evidence from his former wife I find to be wholly unconvincing. It must have been plain to the appellant that his own case to remain in the United Kingdom was based on his relationship with the children and therefore it would be necessary to demonstrate the nature and quality of that relationship with them. He has had a number of opportunities to provide evidence before the Tribunal including before the DUTJ in 2015 and in 2017 but has not taken that opportunity.

80. The appellant's evidence is that the current arrangements made are that he meets the children in the park which is opposite the school and that he takes the children to the school. He confirmed that this had taken place approximately 15 to 20 times in the year. He confirmed that the only other contact was when he had taken the children to McDonald's as seen in the photographs that he had produced. Therefore contrary to the position outlined before the First-tier Tribunal in 2015, the appellant has not sought to re-establish any further meaningful contact then that he had in 2015. Whilst the judge had found that he was committed to re-establishing contact (paragraph 33) it does not appear that any further steps have been taken.

81. There is no up-to-date or recent evidence as to the relationship between the children and their father from any other source than the appellant. There is no extraneous evidence from others who are in close contact with the children, for example their primary carer, family friends or evidence from school to evidence the nature of the relationship and importantly the parental relationship that he has had with the children since separation. He does not have any information by way of school reports and beyond

stating that they are in good health he has been unable to give little information about them.

82. At its highest and based on the oral evidence of the appellant, I am able to accept that he has continued to see the children but that it is by way of short infrequent visits that do not go beyond the level of contact that he had in 2015 and that has not increased in either frequency or quality. He has not taken the steps to increase that contact despite his claim made before the First-tier Tribunal judge in 2015.

83. Mr Jarvis submitted that there was no evidence of a "parental relationship" between the appellant and the children. Whether a person is in a parental relationship with the child must depend on an individual's circumstances. It will include what role it plays in caring for and making decisions for a child alongside the nature and quality of contact (if not living with the children). On the evidence, he has not demonstrated that beyond the infrequent level of contact, that he has been discharging any parental duties for the children.

84. As to the nature of the relationship between the appellant and the children there is no supporting evidence from any source including the primary care of the children, families and friends or those who are in close contact with the children themselves. I would accept that given the ages of the children and that they had lived together as a family before separation when the children were approximately two and three years of age, that they are aware of their father and are likely to enjoy the infrequent contact visits that have taken place. The appellant pointed to the photographs which show the children enjoying a meal in McDonald's. Photographs are only a snapshot in time but it is likely that they do enjoy the time that they have with their father. However it is not possible on the evidence to find that there is any parental relationship beyond the short infrequent contact. There is no evidence that he takes any active role in their lives or makes any active contribution to it. The evidence demonstrates that the children are residing with their primary carer largely independently of the appellant. I do not doubt that he loves and cares for those children as he stated in his evidence but I have set out the nature of the relationship as it is demonstrated by the evidence before the Tribunal.

85. I am satisfied from the evidence that there has been some change in the attitude displayed by the appellant's former partner relating to contact. Whilst the judge found in 2015 that it was unlikely that she would facilitate contact and the inference is that she has been reluctant contact that is not the position on the evidence before me. He accepted in cross examination that he had a fairly friendly relationship with his wife and was able to make the practical arrangements for contact. Therefore whilst I have found the contact to be infrequent, it is not the case that his wife is obstructing contact or has not facilitated the contact between the children and the appellant.

86. There is no up-to-date material concerning the circumstances of the children. The appellant has not sought to obtain information from his former partner in any form or from any other external source despite having had the opportunity. The position relating to the appellant's children has not changed. Whilst they are now older, they have not resided in the United Kingdom for at least seven years and neither are they British citizens or settled in the United Kingdom. The appellant's for partner also has no leave to remain. The present position as I understand it is that they were granted leave to remain from 9 July 2013 until 2 January 2016. On 31 December 2015 she applied for further leave to remain outside of the rules on the basis of Article 8 of ECHR. This was refused in a decision letter dated 6 April 2017 and it is recorded in the skeleton argument that in that letter the Home Office made it plain that the previous grant of leave had been predicated upon a misunderstanding of the facts of the case. It had been assumed incorrectly that the youngest child who was born in the UK was a British citizen. As she is a Pakistani national and not resided in the UK the seven years or more the appellant's former wife had not been able to meet the relevant eligibility criteria for leave as a parent. She has lodged an appeal against that refusal.

87. As to the appellant's private life, he arrived in the United Kingdom in 2010 as a dependent of his wife. Following their separation in 2013 he has had no other basis of stay in the UK other than that based on his family life with the children. It is not suggested that he could meet the immigration rules as a student or in any other capacity. He knew at the time of his arrival that his status was that of a dependent of his wife and that it was for temporary purposes only and could not have any expectation of permanent settlement on that basis.

88. There is little evidence as to the nature of his private life other than he has undertaken some employment post separation. There was some discussion as to whether he was entitled to work but I make no adverse findings of fact against the appellant as it is not been demonstrated that any work that he did carry out was done in breach of any conditions. He has not passed any qualifications in English but can speak and understand English. He has family members in the United Kingdom including his brothers with whom he lives. However there is no evidence that the relationships that he has with them goes beyond that of normal emotional ties between adult siblings.

89. As can be seen in the determination of the First-tier Tribunal judge, he dismissed the appeal under the immigration rules (Appendix FM and Paragraph 276 ADE as the appellant could not satisfy the requirements for the reasons amply set out not only the decision letter but as set out in the determination of the judge. The judge had allowed the appeal on human rights grounds (outside the rules) based on the appellant's family life with the children. That was the subject of appeal to the upper Tribunal and was the decision which the DUTJ set aside

90. Whilst the appellant in his summary submitted that he would find it impossible to return to Pakistan given the time that he had spent in the

United Kingdom and that he had no family or friends in Pakistan, on the evidence before this Tribunal, it could not reasonably be said that the appellant has demonstrated very significant obstacles to his reintegration to Pakistan under paragraph 276 ADE (1) (vi). His length of residence is from 2010 when he entered the United Kingdom as a dependent of his wife. He had spent the previous 28 years living in Pakistan and contrary to his account, he retains family ties to Pakistan, namely his mother and sister and also retains his knowledge of both Urdu and Punjabi.

91. His appeal is based on Article 8 outside of the rules. I therefore deal with that appeal in the light of the findings of fact that I have set out in the preceding paragraphs.

Conclusions:

92. More recent cases indicate a departure from the requirement to find some additional factor before Article 8 can be considered outside the rules. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality and said what has now become the established method of analysis can therefore continue to be followed in this context.

93. That approach was also endorsed in MM (Lebanon) [2017] UKSC 10 (in particular paras 66 and 67) and in Agyarko [2017] UKSC 11 where Lord Reed in explaining how a court or Tribunal should consider whether a refusal of leave to remain was compatible with Article 8 made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the Article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered.

94. The question I have to decide is whether, in terms of this appellant's private and family life, it would be disproportionate to the public interest to remove him, and I need to consider that in terms of the provisions of s. 117B of the Nationality, Immigration and Asylum Act 2002.

95. It is now clear from Agyarko and Ikuga [2017] UKSC 11 that there is no separate test for exceptional or compelling circumstances to be satisfied; but that one would expect to find such circumstances, if it were to be decided that it was disproportionate to remove somebody who could not satisfy the provisions of the Immigration Rules as on the facts of this appeal.

96. I am satisfied that Article 8 (1) is engaged as the appellant’s removal will interfere with family and private life of the appellant and that the decision is in accordance with the law. As set out earlier in the determination, the appellant cannot succeed under the immigration rules. His removal will be for the legitimate aim of affective immigration control.

97. Consequently the issue relates to that of proportionality and it requires a fair balance to be struck between the public interest and the rights and interests of the appellant and others protected by Article 8 (1) (see Razgar at [20]).

98. In R(MM and others) (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10, the Supreme Court at [43] set out the central issue as follows:

> "whether a fair balance has been struck between the personal interests of all members of the family in maintaining family life in the public interest in controlling immigration."

99. When assessing the proportionality of the removal decision I am obliged to consider firstly the best interests of the children who are affected by the decision and those best interests are assessed without reference to the parents' circumstances. In making the assessment of the best interests of the children I have also taken into account ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 where Lady Hale noted Article 3(1) of the UNCRC which states that "in all Actions concerning children, whether undertaken by courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

100. Article 3 is now reflected in section 55 of the Borders, Citizenship and Immigration Act 2009 which provides that, in relation, among other things, to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom". Lady Hale stated that "any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of Article 8(2)". Although she noted that national authorities were expected to treat the best interests of a child as "a primary consideration", she added "Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration."

101. I have set out earlier in this determination my findings of fact concerning the nature of the relationship between the appellant and his two children. As I have found, there has been no increase in any meaningful contact between the appellant's children since that established in 2015 and that he has not demonstrated any parental relationship beyond that infrequent contact for the reasons that I have set out. I accept that the children know their father and are likely to enjoy the contact that has taken place as evidenced by the photographs. There is however, no evidence as to the nature and quality of that relationship from any other source than the appellant, most notably from their primary carer and people who are in close contact with the children or form the children themselves. As I have found, the appellant has had a number of opportunities to provide

evidence concerning the children's welfare and their present circumstances but has not done so. In those circumstances and in the light of the lack of evidence it is difficult to make any assessment of the best interests of the children as evidenced-based. It is clearly in their best interests for them to remain in the care of their primary carer where ever she may live, whether in the UK or in Pakistan; she has looked after them and ensured their well-being since the separation of the parties. There is no evidence before the Tribunal concerning the children's general circumstances other than their length of residence which at the date of the hearing is not seven years, their ages and that they are in education. There is no evidence for the Tribunal that if they were to leave the United Kingdom and reside in Pakistan that that would be unreasonable or cause any detrimental harm to their welfare. In general terms I would also accept that it is in the best interests of children to maintain a relationship with the non-residential parent and that would apply to the relevant children of this appeal. However how that relationship is maintained, whether by direct or indirect contact or the frequency of that contact is a matter to be considered.

102. In carrying out the balancing exercise and reaching a finding on proportionality, the Tribunal must "have regard" to the considerations set out in section 117B of the Nationality, immigration and Asylum Act 2002 (section 117A). Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in section117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that 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).

103. 117BArticle 8: public interest considerations applicable in all cases

(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.

104. I am required to consider whether there are any "sufficiently compelling" circumstances to outweigh the public interest because the refusal of leave would result in "unjustifiably harsh consequences" (see decision in Agyarko at [48]).

105. The public interest in this appeal, includes that the appellant cannot meet the requirements of the immigration rules and that is entitled to have "considerable weight" attached to it (see decision of MM and others at [75] and Ali v secretary of state for the home Department [2016) UK CPSC 60 at [46] and R (Agyarko) v Secretary of State for the home Department at paragraphs [46]48]).

106. Applying the section 117 factors, the public interest in effective immigration control is engaged in this appeal (see s. 117B (1). Whilst the appellant has no qualifications in English, I am satisfied that he can speak English and has an understanding of it so that the public interest in s. 117 B(2) is not engaged but the fact that the appellant has an understanding and can speak English does not provide a positive right to leave to remain and is essentially, a neutral factor (see decision of Ruppiah v Secretary of State for the home Department [2016) EWCA Civ 803 at paragraphs [59] – [61]). The appellant, on the present evidence, is not financially

independent for the purposes of section 117B (3). I also take into account that his private life has developed whilst his presence was precarious and is therefore entitled to “little weight” (s 117B (5)) although the claim made is on the basis of his family life with his children.

107. S117B(6) provides that 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. On the findings of fact that I have made the appellant cannot meet the criteria because the relevant children are not “qualifying children”.

108. 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;"

109. It is not been demonstrated that either child has lived in United Kingdom for at least seven years. H was born in January 2010 but on the evidence before the Tribunal the appellant was granted leave to enter on 21 September 2010. A was born in the UK in November 2011 and this has not been resident for seven years. Neither child is a British citizen nor has any settled status.

110. Even if they were qualifying children and consideration was given to this issue, whilst the appellant has a subsisting relationship with them it is on the basis of infrequent contact and in the light of the findings of fact set out earlier he does not discharge any parental role in their upbringing beyond that and therefore cannot on the evidence satisfy the requirements of (a).

111. In those circumstances it is not necessary to consider whether he can satisfy (b) that it would not be reasonable to expect the children to leave the United Kingdom. Even if it were in MA(Pakistan) it was held that in determining whether it would “not be reasonable to expect” the children leave the United Kingdom not only their circumstances must be taken into account, but also the public interest. It was explained that the concept of reasonableness is not limited to a focus on the child and that it brings back into play all potentially relevant public interest considerations, including the conduct of a child's parents. See MA (Pakistan) at [88]: "the conduct of the parents is relevant to their own situation which bears upon the wider public interest and does not amount to blaming the children even if they may be prejudiced as a result".

112. The judgement requires a balancing exercise taking into account the public interest to be carried out in determining whether it is reasonable to expect a child to leave the United Kingdom. As is plain from this determination, the appellant has chosen not to provide evidence about the children’s present circumstances beyond that of their length of residence, and their age. Both children are nationals of Pakistan and the eldest child

has lived there albeit at a very young age. Nothing is known of their ties to United Kingdom but neither they nor their primary carer have any status presently in the United Kingdom. Whilst the appellant's former partner has an appeal pending, the decision of MA demonstrates that the practicality of, or even legal prohibition upon leaving the UK is not a determinative factor in reaching a conclusion on whether it is "not reasonable" expect a child to do so. There is no evidence before me to demonstrate that it would be unreasonable for the children to return to their country of nationality.

113. Even if they were to remain in the United Kingdom, I am satisfied that in the light of the mother's facilitation of contact that there is the continuing possibility of contact being maintained between the appellant and the children. This may be in the form of direct or indirect contact and equally it is open to the appellant, if returned to Pakistan to maintain the relationship either in that country or by visits made to the United Kingdom.

114. Therefore taking the circumstances as a whole, as I have set out above, I find that the appellant's removal is proportionate having regard to all of those circumstances. The appellant entered the United Kingdom as a dependant of his wife and did so in a temporary capacity and had no expectation of any further leave when her status as a student had ended. He has spent his formative years in Pakistan and has family relatives remaining there. Given his continuing linguistic and cultural and family links, it is likely that he will be able re-establish his life there and remain in contact with his family members and nay friends he has made in the UK using modern methods of communication. I have taken into account the best interests of the two children and the public interest in effective immigration control which is engaged in this case and the weight attached to the fact that the appellant cannot meet the immigration rules. If removed, then indirect contact could be maintained with the assistance of the mother as could the possibility of direct contact given the level as it stands presently and it is not been demonstrated that such contact that may take place would be excluded as the children grow up. I have given primary consideration to those interests whilst acknowledging that some contact at the present time even if indirect could be maintained from UK. However having taken into account the impact upon the children and the appellant which will result upon the opponent's removal I find it is to be outweighed by the public interest. Consequently I am not satisfied that there are any "compelling" circumstances that produce unjustifiably harsh consequences to outweigh the public interest in effective immigration control in the light of the appellant's individual circumstances.

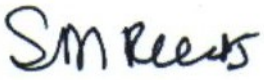
115. Consequently the appeal is dismissed on human rights grounds.

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. The direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed



Date: 31/7/2017

Upper Tribunal Judge Reeds