**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/18188/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 2nd August 2019** | **On 28th August 2019** |

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MS K V P**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr S Bellara, Counsel, instructed by Louis Kennedy Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

**DECISION AND REASONS**

The appellant, an Indian national born on 17th August 2009, and therefore a minor, appeals against a decision of First-tier Tribunal Judge Rowlands, who in a decision promulgated on 31st May 2019 dismissed the appellant's human rights appeal.

The First-tier Tribunal Judge set out the immigration history of the matter. The parent and litigation friend of the appellant came to the UK on 11th January 2007 to study.

The appellant was born in the United Kingdom on 17th August 2009. She is presently studying at Barham Primary School in Wembley, London. Her application for leave to remain as a dependant of a student was granted until 31st December 2010 but an application for an extension of that was refused on 21st February 2013 and on 2nd August 2013 her application as the dependant of her father on human rights grounds was also refused. On 11th October 2014 she was served with a notice concerning her removal and she lodged an appeal on 13th November 2014 which was dismissed on 26th August 2015. She was appeal rights exhausted on 28th January 2016 but did not relocate from the United Kingdom. She was served with further notice of removal but rather than leaving the United Kingdom submitted a further application on family and private life grounds which was refused on 29th August 2017. An appeal was lodged on 13th September which was withdrawn and she became appeal rights exhausted from that date. The present application was made on 16th March 2018.

The judge noted that there had been a previous hearing of this appeal which mistakenly dealt with the appeal without consideration of the appellant's bundle and a rehearing was ordered de novo and came before First-tier Tribunal Judge Rowlands, whose findings were as follows:

> *"13. I have considered all of the evidence in the case including that to which I do not specifically refer and reached the following conclusion. The facts are simple and uncontested. The Appellant is a nine-year-old girl who has lived in the United Kingdom all her life. To begin with she had leave to remain here as the dependant of her father who had a student visa but they have all i.e. her and her parents been without leave since 2010. They have been served several times with removal notices.*
>
> *14. Her father's evidence about her schooling is supported by letters and school reports. I am satisfied that she is now attending primary school having previously attended nursery school. I don't doubt that she has made school friends in her time and that she would miss them if she moved to India. She is making expected progress at school. She is also taking part in extra curricular activities which are linked to her culture such as Hare Krishna and Indian Classical dance. She does maintain links to Indian culture.*
>
> *15. I have noted the letter for the Principle of the school in Visnagar but do not accept that this is representative*

*of all schools in India. I have also noted that in her application at Q10.4 it is stated that she speaks English and Gujarati. I believe that the parents are, with respect, deliberately minimising her abilities. The affidavits from both sets of grandparents do not seriously reflect the situation. They say they cannot look after her but the suggestion that she would be removed alone is ridiculous. If removed it would be with her parents neither of whom have leave either.*

16. *I do not believe that, if this family were to emigrate to India voluntarily, there would be a huge protest because of her welfare. There is a functioning education system there as indicated by her own father's qualifications. The welfare of any child is best served by being with their parents and wider family amongst their cultural peers. She is young enough to adjust and pick up the language quickly even more than she already does, children do so all the time when their families relocate. The comments from the doctor are generalised, he hasn't even seen the Appellant. I believe there is no medical reason why she could not relocate to India. I am satisfied that her best interests lie in living with her parents in their home country, India."*

The application for permission to appeal set out the following.

The previous determination seemingly attached adverse weight to the immigration history of the appellants and classed them as buying time when there was no evidence to support such a finding. The same conclusion has been reached, in the present determination, albeit in less robust terms. The judge seems to have overlooked the established case law in relation to Section 117B(6).

The judge made a misdirection in law when applying the guidance in the relevant authorities. There was no consideration set out of the principles in **MA (Pakistan) [2016] EWCA Civ 705** and **Treebhawon and others (section 117B(6)) [2015] UKUT 674** and **PD and Others (conjoined family claims) Sri Lanka [2016] UKUT 00108**. Nor had the judge considered **AB (Jamaica) and Another [2019] EWCA Civ 661** and **JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72**. **JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72**. The judge's findings at paragraphs 13 to 15 were in conflict with the guidance set out in recent authorities regarding qualifying children. "It is not in dispute that the appellant is a qualified person as a result of residing in the UK for seven years." The judge set out important findings about the appellant's education and private life but failed to take them into

account and his conclusions were muddled. For example, there was no consideration of the current stage of academics and the importance of her preparations for her next stage of her academic career. "There is reference to a primary school. This is not correct considering there was oral evidence given in relation to the forthcoming 11 Plus exams and a secondary school had been selected."

**MA (Pakistan)** set out the proper staged test to assess Article 8 and the judge was required to look closely at the appellant's circumstances. The judge significantly erred by stating that the parents are "deliberately minimising her abilities". The findings were difficult to follow in the light of the established case law.

The appellant herself had provided a letter in support of her appeal which was a handwritten note and was highlighted as an important omission when considering procedural fairness and the judge failed to consider that. The father gave evidence and his oral testimony is set out in the determination. There was no formal assessment of his credibility.

As set out in **PD (Sri Lanka)**,

> *"the longer the child has resided in the UK the more the balance will swing in terms of it being unreasonable to expect the child to leave the UK and strong reasons will be required in order to refuse a case with continuous UK residence of more than seven years".*

It was submitted that the judge erred in trying to find a special or exceptional reason to justify the appellant in remaining in the United Kingdom. There was no need to do so. The test was whether the appellant could reasonably be expected to leave the UK. As held in **JG**, the court held that Section 117B(6)(b) is a statutory question which cannot be ignored or glossed over and the provision "is engaged whether the child will or will not in fact or practice leave the UK." The question is whether it is reasonable to expect the child to leave the UK. Even if the answer is obvious the question still needs to be asked.

In **AB (Jamaica)** the court found the immigration history of the parent to be irrelevant and therefore it was not reasonable to expect the applicant to leave the country. The judge had not properly followed **MA (Pakistan)**. The appellant and her family did not have a poor immigration history. The reason given by the judge is that the appellant had not left the UK and such a finding was wholly irrational and could not be sustained. There was nothing to suggest the appellant had a poor immigration history and this finding tainted the overall proportionality assessment. The sins of the parents in any event should not be visited on the child, **Kaur (children's best interests / public interest interface) [2017] UKUT 00014**. This held that the best interests of a child were an integral part of the

proportionality assessment, must be a primary consideration, that it could be outweighed by the cumulative effect of other considerations, it was necessary to have a clear idea of a child's circumstances and child must not be blamed for matters for which he or she is not responsible.

There was no reference to **KO (Nigeria) [2018] UKSC 53** and the judge had not given adequate findings in relation to important issues.

The Upper Tribunal in **Budhathoki [2014] UKUT 00341** confirmed that judges did not need to rehearse every detail or issue raised in a case but must identify and resolve any conflicts in the evidence and explain in clear and brief terms their reasons.

At the hearing before me Mr Bellara relied on the grounds of appeal and submitted that the judge had focused on the sins of the parents. The child had never been to India and he confirmed that the child would be entering year 6 of primary school in September, which was the 11 Plus year. The judge had failed to address the best interests of the child and had not taken into account the handwritten note. There was an error of law and the matter should be remitted.

Mr Walker submitted that the judge had found that the child was a qualifying child, the parents' immigration history was poor, and the judge effectively found that there were powerful reasons for the appellant to relocate to India. The judge had looked at the reasonableness of leaving.

## Analysis

That the determination was brief does not mean that it falls foul of **MK (duty to give reasons)** and indeed **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085** (IAC); reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge. The central issues were addressed.

The judge was well aware of the circumstances of the appellant and it is implicit in the decision that she was a qualifying child. Indeed, the judge acknowledged in the first line of the determination that the appellant was born in 2009 and that she was 9 years old.

The judge recorded the immigration history at the outset of the determination which is standard in many decisions; the appellant was dependent on her parents, that her application for an extension of leave, which had been previously granted to 31st December 2010, was refused on 21st February 2013. The immigration history was set out in relation to the appellant in neutral terms and nowhere in the determination is there any reference to the appellant's parents as "buying time". I am not persuaded that the previous determination,

which was set aside, was relied on or even reference in the findings, by First-tier Tribunal Judge Rowlands and has therefore tainted this decision. From a careful reading of the determination it is not evident that the judge has fallen into similar error. Simply, the appellant had no further leave after 2013. The judge recorded that the appellant had been served with notices of removal in 2014, albeit that it would be the parents who would be served with those notices, and that permission to appeal to the Upper Tribunal on human rights grounds had been refused.

That the judge recorded that the appellant did not leave the United Kingdom at all could be said to support the position that the child was indeed a qualifying child as she had remained in the UK for seven years rather than as criticism.

It is not arguable that the judge failed properly to consider whether it was reasonable for the child to leave the United Kingdom, albeit that she is a qualifying child, and indeed, the judge at paragraph 12 of the determination, in relation to submissions, notes, "I heard brief representations on her behalf. As a qualifying child there are no powerful reasons for her removal as would be required by the case law. There were no compelling adverse reasons either."

The determination demonstrates that the judge considered all of the evidence in the case, including that to which he did not specifically refer, and then reached his conclusion. As pointed out in the grounds of appeal the judge does not need to refer to every piece of evidence **Budhathoki (reasons for decisions)** [2014] UKUT 00341: judges needed to resolve the key conflicts in evidence and explain in clear and brief terms their reasons for preferring one case to the other so parties could understand why they had lost. The judge did that.

I do not accept the judge misdirected himself. He did consider the reasonableness of the appellant leaving the United Kingdom in its own terms and concentrating on the child. That the judge referred to the immigration history of the parents at the outset does not undermine the overall findings on reasonableness and does not demonstrate that the judge misdirected himself by visiting the sins of the parent on the child. This can be deduced from the treatment of the evidence.

As acknowledged in the application for permission to appeal, the judge made important findings about the appellant's education and private life and other matters including her residence in the UK and there is nothing in the conclusions of the judge at paragraph 13 onwards which suggests that they are muddled. The reference to the primary school is just that because the child *is* at primary school and indeed was in year 5 when the judge made the determination. The fact that she is going into the final year at her primary school to do 11 Plus exams does not place her in secondary education. As she is not at

secondary school and thus there would be no requirement to consider her as such. The judge did not consider the case with regard to the appellant being in the middle of a course of study because she is not; she is, as he recorded, at primary school.

The findings in this respect are not simply inadequate when considering the best interests of the qualifying child. The judge did look closely at the appellant's circumstances and was entitled on the evidence to find that the parents were "deliberately minimising her abilities". The judge set out the witness statement of the appellant's father, who asserted that she only had very little connection with India, as follows:

> *"she has completely adapted with UK system and culture. The only language she speaks is English and she is considering this as her mother tongue. She cannot read or write Gujarati. Therefore, her literacy in Gujarati is behind the level expected of a 9 year old in Gujarat State in India. Thus, if she was removed and returned to India, she would be behind children of her age group and thus likely to be put behind several years at school."*

As the judge concluded at paragraph 15, and which I have cited above, in her application at question 10.4 it is specifically stated that the appellant "speaks English and Gujarati". It was open to the judge to place weight on that application, which was filled in by the parents, and to conclude that parents were deliberately minimising the appellant's abilities and their evidence as to the reasonableness of the child leaving was unreliable. In the circumstances, the judge was entitled to do just that. As the judge also refers, the suggestion that the appellant would be removed alone is "ridiculous".

It was asserted that the judge failed to consider the evidence of the appellant's own handwritten note. There is no reference to the note in the index of the bundle supplied by the appellant's solicitors, nothing in the file and neither representative could provide me with a copy of the said handwritten note. As I have already recorded, the judge alluded to having considered all the evidence but without a copy of that note provided there can be no criticism of the judge for having failed to address a matter which was not on the file and could not be provided to me.

The judge noted the schooling of the child, that she was attending primary school and that she had made friends and that she would miss them if she was moved to India and that she was making expected progress at school. The judge also noted that she was taking part in extra-curricular activities which are linked to her Indian culture such as the Hare Krishna and Indian classical dances. This, again, contradicted the parental submissions that the appellant had no contact to Indian culture. The judge made a clear finding on the best

interests of the child that her welfare is best served by being with the parents and wider family amongst their cultural peers. The judge specifically stated she was young enough to adjust and pick up the language quickly even more than she did already. There was no medical reason why she could not relocate to England and the judge concluded and he was entitled to do so that he was satisfied that her "best interests lie in living with her parents in their home country, India". As pointed out in the Secretary of State's refusal the medical letter provided was not from a registered medical practitioner.

**AB (Jamaica) & Anor** [2019] EWCA Civ 661 does not specifically assist the appellant in this case because I am not persuaded that the judge materially departed from that which Underhill LJ reaffirmed at [59] in MA (Pakistan) at [36]

"*Looking at section 117B(6) free from authority, I would favour the argument of the appellants. The focus on paragraph (b) is solely on the child and I see no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest".*

**KO (Nigeria),** which was decided in the Supreme Court considerably after many of the authorities cited in the grounds, confirms that a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent, and which reflected **Zoumbas** (paragraph 15 of **KO**). **KO** confirmed at paragraph 17 that the question again was what is reasonable for the child and that there was nothing in the sub-section (Section 117(6)) to import reference to the conduct of the parent. **KO** continues, however, to state at paragraphs 18 and 19 the following:

> *"18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in SA (Bangladesh) v Secretary of State for the Home Department 2017 SLT 1245, [2017] ScotCS CSOH 117:*
>
> > *'22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be*

> *expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …'*

19. *He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874, para 58:*

> *'58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?'"*

In effect, the assessment of the judge in this matter was in accordance with the guidance given in **KO (Nigeria) [2018] UKSC 53**; the assessment of the best interests of the children must be made on the basis that they are facts as they are in the real world. Neither of the parents, as the judge set out, had leave to remain and the ultimate question will be, is it reasonable to expect the child, in this case the child who was in primary school with connection to India and being able to speak Gujarati, to follow the parent with no right to remain to the country of origin?

The judge specifically, as identified above, found that there was wider family in India and that in fact the welfare of any child was best served by being with their parents and the wider family amongst their cultural peers. There were no medical grounds to impede her relocation.

The judge here, however, directed himself appropriately and did specifically consider the reasonableness of the appellant's expected removal and separately from that of the appellant's parents' poor immigration history. The appellant's best interests were considered from paragraphs 14 to 16 and the judge noted that 'if removed it would be with her parents neither of whom have leave either'. That

is not visiting the '*conduct and immigration history of the parents'* on the child.

The final reference to **MA (Pakistan)** [2016] EWCA Civ 705 and the powerful reasons for not granting leave was after rehearsing the best interests of the child, the reasonableness of her leaving the UK and finally the reality of the immigration position of the parents. Simply, the parents only ever had precarious leave and subsequently no leave at all.

I find that the decision of Judge Rowlands contains no material error of law and as such shall stand.

**Notice of Decision**

The First-tier Tribunal made no error of law and the decision shall stand.

**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 her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Helen Rimington Date 22nd August 2019

Upper Tribunal Judge Rimington