Upper Tribunal
(Immigration and Asylum Chamber)

Kaur (children's best interests / public interest interface) [2017] UKUT 00014 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Given orally on 10 October 2016, promulgated initially**
on 10 October 2016, followed by written submissions	**on 19 October 2016 [Part 1] and on 10 January 2017 [composite]**

Before

THE HON. MR JUSTICE MCCLOSKEY, PRESIDENT

Between

SATINDER KAUR

Appellant

And

TEH SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr A Alam, of counsel, instructed by Immigration Advisory Services (UK) Ltd (Derby)
For the Respondent: Ms C Patry, of counsel, instructed by the Government Legal Department

(1) The seventh of the principles in the Zoumbas code does not preclude an outcome whereby the best interests of a child must yield to the public interest.

(2) This approach has not been altered by Part 5A of the Nationality, Immigration and Asylum Act 2002.

(3) In the proportionality balancing exercise, the best interests of a child must be assessed in isolation from other factors, such as parental misconduct.

(4) The best interests assessment should normally be carried out at the beginning of the balancing exercise.

(5) The "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

(6) In every balancing exercise, the scales must be properly prepared by the Judge, followed by all necessary findings and conclusions, buttressed by adequate reasoning.

DECISION

Preface

This is the composite, final decision of the Tribunal, encompassing its earlier decision and directions dated 14 October 2016.

PART 1

Initial Decision (given orally on 10 October 2016)

1. This appeal has its origins in a decision made on behalf of the Secretary of State dated 30 June 2015. By that decision the Secretary of State refused an application for leave to remain in the United Kingdom based on Article 8 of the Human Rights Convention. That application was made by the Appellant (the mother in the relevant family unit), who is a citizen of India now aged 37 years.

2. The second member of the family unit is the Appellant's partner, who has been in the United Kingdom since 2010. Between the period 2008 and 2011 the couple gave birth to two children. These children are now aged five and seven years respectively. The Appellant appealed to the First-tier Tribunal ("FtT") against the Secretary of State's refusal decision. The FtT dismissed the appeal. Permission to appeal was granted on a relatively narrow ground relating to the interplay between Section 117B(6)(a) and Section 117D(1) of the Nationality, Immigration and Asylum Act 2002.

3. The question which arises is whether the FtT fell into legal error in the following way. It is quite clear in my judgment that these provisions contemplate a two stage exercise. The question of whether the second stage is reached depends upon the answer posed to the first question. That question is: is the child in question a qualifying child? The answer to that question is provided by applying the definition that is enshrined in section 117D (1) of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"). This section makes provision for two possibilities. One is that the person, who must be under the age of 18, is a British citizen. The second is that the person has lived in the United Kingdom for a continuous period of seven years and is, of course, under the age of 18.

4. If neither of those possibilities applies there is no second stage. If either does apply the second stage involves giving effect to the test contained in Section 117B(6)(b) of the 2002 Act. This provision, which, notably, does not apply to those liable to deportation, is another which expresses "*the public interest*", in this instance in negative terms:

> "*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.*"

Also notable is the absence of any accompanying list of factors to which regard must be had in determining what is "*reasonable*". In principle, therefore, decision makers and Judges have a wide margin of appreciation in this respect.

5. On one view the grant of permission to appeal resolves to the arguability of the contention that the FtT arguably erred in law by conflating these two stages: that is one way in which the grant of permission may be viewed. The fundamental question is whether the two separate stages were properly appreciated and applied by the Tribunal. The answer to this fundamental question turns on this Tribunal's consideration and construction of the relevant passages in the decision. These begin at [48] and they continue through to [75].

6. It is trite that the decision must be considered as a whole and not in isolated fragments. Approached in this way I am satisfied that no error of law has arisen. I conclude that the FtT was aware of and gave effect to the two separate stages. The Judge's consideration of the question of British citizenship regarding the two children was in substance confined to the second stage. This was supported by the authority of the decision of the Supreme Court in ZH (Tanzania)* and that of EV (Philippines)*. It matters not as a matter of the correct observance of the doctrine of precedent that, most recently, the Court of Appeal has given effect to EV (Philippines) in the decision of MA (Pakistan)* as it would have been bound in any event by the decision in ZH (Tanzania).

[* full citations *infra*]

7. I conclude therefore that no error of law within the terms of the grant of the permission to appeal has been demonstrated. That would be sufficient to dispose of the appeal and give rise to an order affirming the decision of the FtT but for one consideration. Mr Alam on behalf of the Appellant has canvassed the possibility of seeking permission to apply to amend the grounds of appeal to introduce a new ground. Ms Patry, I will assume, is implacably opposed to that application.

8. Giving effect to the overriding objective and taking into account that there are children involved I consider that the fair and reasonable way of dealing with this is to require Mr Alam to formulate the amended ground in writing. That will be done by 16.00 tomorrow. It will be emailed to the Tribunal and directed to Ms Patry, who will then have the opportunity to respond in writing on, first of all, the question of whether permission to amend the grounds should be granted and secondly responding to the substance of the ground in any event: by 18 October 2016.

9. On this scenario the Tribunal will then, in purely written mode, approach the matter in the following way. First it will decide whether permission to amend should be granted at all. If that yields a negative answer that would be the end of the matter. If the Tribunal is minded to grant permission to amend then I shall consider the amendment on its merits and that will include Ms Patry's full submission. The possibility of a further oral hearing will, in this eventuality, be considered by the Tribunal.

PART 2

Decision Continued (following further written submissions)

10. The additional ground of appeal which has now been formulated is to the effect that the FtT, in focusing on the precarious immigration status of the children, erred in law having regard to the statement of the Supreme Court in Zoumbas v SSHD [2013] UKSC 74 that a child should not be blamed for matters for which it is not responsible, such as the conduct of a parent.

The FtT's Decision Examined

11. In its decision, the FtT, in the context of considering the best interests of the children, stated at [51]:

> *"The best interests of the children are a primary consideration in this case but may be outweighed by the cumulative effect of other matters that weigh in the public interests"*.

The Tribunal then considered the decision in ZH (Tanzania) [2011] UKSC 4 in a passage which includes the following:

> *"The Tribunal should take into account the fact that the children should not suffer as a result of the behaviour of their parent, but in*

certain cases the cumulative effect of other factors might still outweigh the best interests of the children. A child's interests are a primary consideration but they are not paramount".

Continuing, the Tribunal stated at [53]:

"Applying both Section 55 [of the 2009 Act] *and the guidance in ZH, it is clear that the safety and welfare of the children are of primary consideration. However, that does not mean that the family necessarily must be given the right to remain living in the UK.* [The children] *were born in the UK but they have no right to remain here and this is an important consideration. They are also not British citizens".*

In a later passage, the tribunal refers to the decision of the Upper Tribunal in AM (Section 117B) Malawi [2015] UKUT 0260 (IAC), noting the analysis that in section 117B of the 2002 Act Parliament clearly distinguished between those who have formed a private life in the United Kingdom during an unlawful sojourn and during any period when their immigration status is precarious.

12. The Tribunal next gave consideration to the strength of the children's ties with the United Kingdom, noting in particular that the older child had lived here for the seven years of her life. The Judge made the conclusion – in my judgement both unavoidable and unremarkable - that the best interests of these two young children lie in remaining with their parents. The question of whether it would be reasonable to expect the children to accompany the parents to the country of origin was then examined. Following an outline of material aspects of the evidence, this yielded the conclusion, at [65]:

"Having considered all the evidence in the round I do not find that it would be unreasonable to expect the children to leave the UK with their parents".

Finally, in considering the issue of proportionality, the Tribunal recognised the established private life in the United Kingdom of all four family members. In concluding that the impugned decision represented an interference with the private life protected by Article 8 ECHR, the Tribunal stated at [73]:

"Any private life the Appellant has established in the UK should be given little weight because it was established at a time when she remained as an overstayer and the children have no rights to remain".

["She" refers to the mother]

The 'Sins of the Parents' Principle

13. The decision of Supreme Court in Zoumbas is especially noteworthy for the code of seven principles formulated by Lord Hodge, giving the unanimous judgment of the court at [10]. The first six are as follows:

> (1) The best interests of a child are an integral part of the proportionality assessment under Article 8 ECHR
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant.
>
> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play.
>
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations.
>
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment.

The seventh principle is expressed in the following terms:

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

14. Zoumbas was preceded by ZH (Tanzania) where Baroness Hale stated the following, at [33]:

> *"We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as Edore v Secretary of State for the Home*

> *Department [2003] 1 WLR 2979, where Simon Brown LJ held that "there really is only room for one view" (para 26). In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer".*

The two children concerned were aged nine and twelve years respectively, were British citizens by virtue of having been born to a British citizen father and had lived in the United Kingdom all their lives. Lord Hope added the following, at [44]:

> *"The fact that the mother's immigration status was precarious when they were conceived may lead to a suspicion that the parents saw this as a way of strengthening her case for being allowed to remain here. But considerations of this kind cannot be held against the children in this assessment. It would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible".*

In short, the error of law committed by both the Tribunal and the Court of Appeal was a failure to accord primacy to the best interests of the children. This is also the central theme in the short concurring judgment of Lord Kerr. See [46]:

> *"It is a universal theme of the various international and domestic instruments …that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors".*

15. Zoumbas concerned a family unit consisting of two foreign national parents whose presence in the United Kingdom throughout the relevant period, some ten years, was at all material times unlawful. Equally, the presence of the three children born to them in the United Kingdom - aged seven and four years and six months respectively – had been unlawful throughout the entirety of their short lives. The main ingredients in the factual matrix included the dismissal of the mother's asylum claim, an unsuccessful ensuing appeal to the Tribunal, further representations on behalf of the family by the father and, ultimately, a decision by the Secretary of State that the further representations did not generate a realistic prospect of success in an appeal to a Tribunal and, hence, did not constitute a fresh claim under paragraph 353 of the Immigration Rules. This stimulated a judicial review challenge.

16. It is of some significance that, ultimately, the decision of the Secretary of State in Zoumbas withstood challenge, notwithstanding that the parents had chosen to conduct themselves in such a manner that their presence and that of all three children in the United Kingdom was at all times unlawful during the whole of the period of some ten years under scrutiny. Whither and of what impact the "sins of the parents" principle in this decision?

1. The answer must lie, firstly, in the elementary, established dogma that general legal principles are not to be equated with absolute legal rules. They do not have the status of *"hard-edged or bright-line rule*s": EB (Kosovo) v SSHD [2009] AC 1159, per Lord Bingham at [12]. This is especially true in cases where the sometimes elusive and always challenging Article 8 ECHR lies at the heart of the judicial decision making. Secondly, in every proportionality balancing exercise under Article 8 ECHR the context is unavoidably fact sensitive. This approach is readily identifiable in [13] of the judgment of Lord Hodge.

2. Secondly, the assessment of a child's best interests must focus on the child, while simultaneously evaluating the reality of the child's life situation and circumstances. Factors such as parental immigration misconduct must not intrude at this stage. See EV (Phillipines) (*infra*) at [33]. This requires care and discipline on the part of decision makers and Judges. The child's best interests, once assessed, are an important component of the overall proportionality balancing exercise. However, they have a free standing character. Avoidance of error is likely to be promoted if the best interests assessment is carried out first. Parental misconduct typically takes the form of illegal entry, unlawful overstaying or illegal working. Factors of this kind may legitimately enter the equation at a later stage of the overall proportionality balancing exercise as they are clearly embraced by the public interest in the maintenance of immigration control. This is the stage at which a child's best interests, though a consideration of primary importance, can potentially be outweighed by the public interest. I shall revisit this issue *infra* in the context of a more detailed examination of Part 5A of the 2002 Act.

3. Thirdly, in every case of this kind, there is an Article 8(2) proportionality balancing exercise to be performed. At the outset of the exercise, the scales are evenly balanced. The exercise is then performed by identifying all material facts and considerations and attributing appropriate and rational weight to each. The best interests of an affected child feature in the balancing exercise. It is incumbent upon the court or tribunal concerned to make an assessment of those interests. The balance must then be struck, treating the child's best interests as a primary consideration. As these do not have the status of the primary consideration they are capable of being outweighed by other public interest factors, singly or cumulatively, in any given case. If the "sins of the parents" principle has the unwavering potency which the Applicant's amended ground of challenge in substance advances, Zoumbas would have been decided differently.

Enter the 2002 Act

4. ZH (Tanzania) and Zoumbas were both decided prior to the advent of the Immigration Act 2014 and, with it, the commencement of the new Part 5A of the Nationality, Immigration and Asylum Act 2002 ("*the 2002 Act*"). In the present context, it is appropriate to highlight certain provisions and features of the new statutory regime. The legal landscape has now

altered. Sections 117A and 117B, in tandem, mandate courts and tribunals which are determining proportionality issues under Article 8(2) ECHR to attribute little weight to a private life established by a person during any period of unlawful or precarious residence in the United Kingdom. The statutory injunction is framed in uncompromising language:

> "*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.*"
>
> Per section 117B(4). Section 117B(5) continues:
>
> "*Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.*"

I shall explore *infra* the extent to which these two provisions have greater elasticity than at first blush appears.

5. Subject to considering certain recent authority of the Court of Appeal (*infra)*, the aforementioned provisions of the 2002 Act, viewed in the abstract, invite the following analysis. The legislative instruction to attribute "*little weight*" to a person's private life established or developed during a period of unlawful or precarious residence in the United Kingdom is unambiguous and unqualified. This legal rule appears to have the effect, in the not untypical case, that while the child's best interests have the status of a primary consideration, the private lives of parents and children developed during periods of precarious or unlawful residence in the United Kingdom are automatically and compulsorily given little weight.

6. Notably, neither section 117B (4) nor (5) makes any special prescription for children. In particular, Parliament has made no distinction between adults and children. These statutory provisions embrace any person, irrespective of age, whose private life falls to be considered in any given case. This is not without significance not least because, in practice, it is the conduct of parents which gives rise to unlawful and precarious periods of private life developed by children.

7. This particular feature of the legislation was highlighted in the decision of this Tribunal in Miah (section 117B NIAA 2002 – children) [2016] UKUT 131 (IAC) at [23] – [24]. There it was held that since the list of statutory considerations in Part 5A is not exhaustive, having regard to the words in parenthesis in section 117A (2) – "*(in particular*)" – factors such as an affected child's age, vulnerability and other personal circumstances may in principle be legitimately considered. Factors of this kind are clearly capable, in principle, of counter balancing the ascription of little weight to private life developed during periods of precarious or unlawful immigration status. In this way the apparently blunt impact of section 117B(4) and (5) can be softened in an appropriate case.

8. What is the relationship between section 117B(4) and (5) and the uncompromising policy statement resting at the apex of the new statutory regime? Section 117B(1) provides:

> "*The maintenance of effective immigration controls is in the public interest.*"

This statement of the public interest previously belonged to the realm of Government policy. It has now been given statutory effect. While this has occurred in an Article 8 ECHR context, this public interest, with its various ingredients, clearly applies to every case in which any question of immigration control arises. I consider the correct analysis to be that in the new Part 5A regime, Parliament has clearly expressed the view that the efficacy of immigration controls would be undermined if a private life formed or developed during periods of unlawful or precarious residence in the United Kingdom were to attract anything other than little weight. Section 117B(4) and (5) are to be viewed in this light.

9. The phrase "*little weight*" is unsophisticated, perhaps deceptively so. It invites reflection. It does not denote an absolute measurement or concept. While the intention underlying these statutory words is evident, "*little weight*" is not to be confused with "no weight". Furthermore, I consider that the measurement of "*little weight*" is unlikely to be the same in every case. It will, rather, vary according to the particular context. Thus there is a spectrum the existence of which may not be entirely obvious at first glance. In the abstract, at the upper end of this spectrum lie cases qualifying for the attribution of a quantum of weight approaching the notionally moderate, while at the lower end there will be cases deserving of virtually no weight.

10. At this juncture, I turn to consider some of the recent Court of Appeal authority and, in doing so, I broaden the analysis somewhat. In NA Pakistan v Secretary of State for the Home Department [2016] EWCA Civ 662, the Court of Appeal observed at [26] that Part 5A of the 2002 Act –

> "*… is framed in such a way as to provide a structured base for application of and compliance with Article 8, rather than to disapply it.*"

In considering the "Exception 1" and "Exception 2" provisions in section 117C(4) and (5), the Court drew attention to the importance of context at [31]:

> "*In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2 will apply with greater or lesser force depending on the specific facts of a particular case.*"

11. The Part 5A library of jurisprudence welcomed its latest addition recently. In Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803, the Court of Appeal examined the interaction of section 117A(2) and section 117C. Sales LJ observed:

> *"It is possible to conceive of cases falling within section 117B(4) (unlawful presence in the UK) or section 117B(5) (precarious immigration status in the UK) in which private or family life (as appropriate) of an especially strong kind has been established in the host country such that it should be accorded great weight for the purpose of analysis under Article 8 : Jeunesse v Netherlands is a prime example."*

The Court acknowledged the correctness of the argument that Part 5A "*... had to be construed in such a way as to accommodate this sort of case*". Next, the Court noted that sections 117B(1), (2) and (3) and 117C(1) have the status of Parliamentary statements of public policy which are "*definitive as to that aspect of the public interest*": [49]. Sales LJ continued:

> *" But it should be noted that having regard to such considerations does not mandate any particular outcome in an Article 8 balancing exercise: a court or tribunal has to take these considerations into account and give them considerable weight, as is appropriate for a definitive statement by Parliament about a particular aspect of the public interest, but they are in principle capable of being outweighed by other relevant considerations which may make it disproportionate under Article 8 for an individual to be removed from the UK."*

12. The Court then turned its attentions to the "*little weight*" provisions in section 117B. Sales LJ categorised these "*normative statements*" which are "*less definitive*" than those found in other provisions and continued at [53]:

> "*Although a Court or Tribunal should have regard to the consideration that little weight should be given to private life established in such circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question, where it is not appropriate in Article 8 terms to attach only little weight to private life. That is to say for a case falling within section 117B(5) little weight should be given to private life established in the circumstances specified, but that approach may be overridden where the private life in question has a special and compelling character. Such an interpretation is also necessary to prevent section 117B(5) being applied in a manner which would produce results in some cases which would be incompatible with Article 8, ie is necessary to give proper effect to Parliament's intention in Part 5A; and a similar interpretation of section 117B(4) is required, for the same reasons.*"

> It is necessary also to consider the following passage, in [54]:

> "*In my view, reading section 117A(2) and section 117B(5) together in this way, as is appropriate, means that considerable weight should be given to Parliament's statement in section 117B(5) regarding the approach which should normally be adopted.*"

The critical word, I venture to suggest, is "*normally*". The passage continues:

> "*In order to identify an exceptional case in which a departure from that approach would be justified, compelling reasons would have to be shown why it was not appropriate.*"

Finally, Sales LJ, pointedly, distinguished the test of "*compelling circumstances*" from that of "*very compelling circumstances*", applicable in relation to foreign criminals.

17. The effect of the analysis which I have developed in [25] above, considered in tandem with the decision in Rhuppiah, is that, through the medium of permissible judicial statutory construction, there is some flexibility in the "*little weight*" legislative instructions contained in section 117B (4) and (5) of the 2002 Act. Tribunals must be alert to this in their conduct of proportionality balancing exercises, in particular in considering whether the factors on the public interest side of the scales outweigh those on the other side, especially where the tribunal's assessment of a child's best interests points to a course other than the removal or deportation of the person or persons concerned.

18. Next I turn to the question of whether the "*sins of the parents*" principle acknowledged by the Supreme Court in both ZH (Tanzania) and Zoumbas has survived the advent of Part 5A of the 2002 Act. I consider an affirmative answer appropriate for three reasons. The first is that, taking into account the entirety of the relevant context – historical, juridical and jurisprudential – within which there is a clearly discernible Parliamentary intention and of the executive (via the Immigration Rules) to introduce maximum prescription in the field of immigration law, the burial, or adjustment, of this principle, which would have been achievable by a simple drafting mechanism, is nowhere reflected in the legislative language. The second is that, as emphasised in the decisions of this Tribunal in Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) and Miah (*supra*), the words in parenthesis in Section 117A(2) – "*(in particular)"* – have the clear effect that courts and tribunals are at liberty to take into account, where material, considerations other than those enumerated in Sections 117B and 117C. The third reason is that in the Part 5A regime there is a clearly discernible legislative intention to confer on children special levels of protection.

19. Developing the third of these reasons, section 117B (6) makes some contribution to this debate. It provides:

> *"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".*

Part 5A of the 2002 Act reflects the ever increasing prescription in Article 8 cases which has become one of the stand out features of modern immigration law, in both primary legislation and the Rules. It is evident that both Parliament and the executive have focused intensely on the Article 8 jurisprudence in their attempts to establish maximum codification. As the recent decision of the Supreme Court in Ali v Secretary of State for the Home Department [2016] UKSC 60 makes clear, the notion that a complete Article 8 code has been thus established is fallacious: per Lord Reed at [51] – [53] and Lord Wilson at [80]. The significance in the present context of Part 5A of the 2002 Act and section 117B (6) in particular is that Parliament, in enacting the new regime, focused special attention on children and, in doing so, had the opportunity to make explicit provision for the weight to be attached to the parental immigration misconduct issue embedded in the seventh of the principles compromising the Zoumbas code: it did not do so.

20. As the decision in Hesham Ali makes clear, the fundamental task for tribunals in appeals involving recourse to Article 8 of the Convention is, having made appropriate findings of fact, to identify the public interest engaged, to correctly measure its strength and, ultimately, to determine whether the private and family life factors advanced by the appellant outweigh the public interest to the extent that the impugned decision is disproportionate. While this is the general approach, in the particular context of deportation the public interest is especially potent and will be outweighed only by an Article 8 claim which is "*very strong indeed – very compelling*": per Lord Reed at [50]. Furthermore, in all cases the tribunal will give appropriate weight to the decision maker's reasons for the proposed course of action: per Lord Reed at [44], reaffirming Huang v Secretary of State for the Home Department [2007] UKHL 11, per Lord Bingham at [16].

21. Given the recent vintage of the decision in Hesham Ali and having regard to the recurring challenges encountered by judges at the first tier of decision making in immigration appeals, it is appropriate to highlight the short concurring judgment of Lord Thomas LCJ. In a welcome contribution, the Lord Chief Justice, echoing the jurisprudence of this Tribunal, emphasises the importance of making clear findings on material issues of fact. The next requirement on Judges is to "*set out in clear and succinct terms their reasoning*", with particular reference to [37] – [38], [46] and [50] of the judgment of Lord Reed. Lord Thomas then advocates the adoption of the "balance sheet" approach. This is a self-evidently important stage in the judicial decision making. It involves the identification of the material facts and factors belonging to the two basic sides of the equation. This serves as a timely reminder to First-tier Tribunal Judges to continue doing what one already finds in the strongest judgments. The final element of this exercise requires the Judge to -

> *"… set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders."*

22. In the judgment of the Lord Chief Justice there are clear echoes of the decision of the Upper Tribunal in Forman (Sections 117A–C considerations)]2015] UKUT 412 (IAC), at [20]:

> *"The rigid, prescriptive nature of sections 117A - 117C of the 2002 Act invites reflection on the topic of judgment design and structure. Where the decisions of tribunals list, explicitly and sequentially, each of the obligatory statutory considerations, accompanied by the Tribunal's evaluation and application thereof, there should be no scope for debate. Adherence to this discipline will have the supreme merit of reducing the possibility of error of law. This is illustrated in MK (section 55 - Tribunal options) [2015] UKUT 223 (IAC), at [41] - [43]. Furthermore, tribunals are well used to having to craft their decisions in accordance with the dictates of discipline and structure, in the light of decisions such as Razgar v SSHD [2004] UKHL 27, at [17]. The same exhortation is made in relation to the Tribunal's exercise of evaluating and applying the related provisions of the Immigration Rules: see MK, at [45] - [49]. Fundamentally, the decision must be crafted in such a way as to demonstrate that the statutory requirements have been given full effect."*

The proposition that adherence to these disciplines in judgment writing will enhance the end product and, simultaneously, comply with the principles rehearsed in MK (Duty to Give Reasons) [2013] UKUT 641 (IAC) is incontestable. The resulting benefits will include not only higher quality judgments. They should, in principle, extend to fewer grants of permission to appeal to the Upper Tribunal and fewer remittals to the First-tier Tribunal.

23. While the decision in Hesham Ali does not, of course, apply directly to the new Part 5A regime, its impact in this particular sphere will, predictably, become clearer with the passage of time. While some adaptation may conceivably prove necessary, harmony will be achievable with such calibration which may from time to time, in the light of concrete cases, emerge as appropriate.

24. I finish by making brief reference to two further recent decisions of the Court of Appeal. In MM (Uganda) v SSHD [2016] EWCA Civ 450 the Court of Appeal decided that the application of the "*unduly harsh"* provision in Section 117C(5) of the 2002 Act involves a balancing of the wider public interests, encompassing all the circumstances including in particular the immigration and criminal history of the parent concerned. In MA (Pakistan) [2016] EWCA Civ 705. a different constitution of the Court of Appeal held, with significant reservations, that the effect of being bound by MM (Uganda) was that the correct approach to Section 117B(6) should mirror the approved approach to Section 117C(5). Thus the Secretary of State's argument that Section 117B(6) does not focus exclusively on the best interests of an affected child but embraces also the public interests prevailed. This argument, notably, acknowledged that the fact of seven years' residence in the United Kingdom of an affected child qualifies for significant weight: see [28]. Thus, the court held, at [45]:

> *"… The only significance of Section 117B(6) is that where the seven year Rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted".*

Elias LJ repeated this in [49].

25. Digressing momentarily, in EV (Philippines) v SSHD [2014] EWCA Civ 874, Christopher Clarke LJ stated at [33]:

> "*The best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.*"

In MA (Pakistan), Elias LJ, having quoted this, stated:

> "*Accordingly, when making that assessment, it would be inappropriate to treat the child as having a precarious status merely because that was true of the parents.*"

I consider that each of these statements invites a little further analysis. The best interests of any affected child constitute a free standing factor and should properly be assessed before the proportionality balancing exercise is carried out. This exercise will be vulnerable to challenge if the child's best interests have not, first and foremost, been adequately and correctly assessed. Any issues of unlawful or precarious immigration status or parental misconduct have no role to play in this assessment. Such issues do, however, arise at the stage of completing the "balance sheet" advocated by Lord Thomas (*supra*). Issues of this kind are plainly relevant and they belong to the public interest side of the balancing equation. It is at this later point in the exercise that they enter the stage: see [20] *supra.* I consider this analysis to be harmonious with the formulations of both Christopher Clarke LJ and Elias LJ. Furthermore, this analysis is active proof of the wisdom – and necessity – of the structured approach advocated by Lord Thomas in Ali. And as Elias LJ stated in MA (Pakistan) at [57]:

> "*… It is vital for the court to have made a full and careful assessment of the best interests of the child before any balancing exercise can be undertaken. If that is not done, there is a danger that those interests will be overridden simply because their full significance has not been appreciated. The court must not treat the other considerations as so powerful as to assume that they must inevitably outweigh the child's best interests whatever they may be, with the result that no proper assessment takes place.*"

I would suggest that this passage repays careful reading in all cases where issues of this kind arise.

26. The analysis must, however, take one step further, for the following reasons. In MA (Pakistan), at the time when the Secretary of State made the final decision refusing leave to remain, the two parents concerned, having initially resided lawfully (though precariously), in the United Kingdom for some four years, had not possessed any form of residence

authorisation during the subsequent period of approximately five years and their two children, both born in the United Kingdom, were aged seven and four years respectively. Referring to the decision of the Upper Tribunal, Elias LJ examined the two grounds of appeal. His evaluation of the first ground, at [87], was as follows:

> *"The Appellants submit that the UT's consideration of Article 8 contained material errors of law. First, the UT's consideration of s. 117B(6) was unlawful. Once the judge was satisfied that the parents were not liable to deportation and had a genuine relationship with their children, the only question was whether it would not be reasonable for the child to leave the UK. The judge answered that question by focusing on the conduct of the parents, which was an illegitimate approach. For reasons I have given above at some length, the judge was adopting the proper approach to the interpretation of the section when he had regard to the conduct of the parents. If that is the right test then given the dishonesty of these appellants, the decision to refuse leave to the children was manifestly proportionate even though it was in their best interests to remain in the UK. This was a very careful judgment in which all relevant factors were considered, and in my view the judge was well entitled to strike the proportionality balance as he did."*

Thus the best interests of both children were considered to be lawfully outweighed by the public interest in the maintenance of firm immigration control. The court made clear that in the particular case of a "qualifying" child [see sections 117B (6) (a) and 117C (5)] "strong" or "powerful" reasons are required to outweigh the child's best interests, as assessed: see [ ].

27. Turning to the second ground of appeal, Elias LJ stated, at [88]:

> *"The second ground was this: having established that it would be in the children's best interest to stay in the UK, the judge's findings are entirely contrary to the guidance in the Supreme Court case of Zoumbas at para.10.7 that a "child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent." I would accept that the judge did contradict that principle when he treated the children's status as precarious, but reading the judgment as a whole it is plain that this was not a significant element in his reasoning. He focused on the very powerful public interest in removing the fathers, and their precarious status certainly was material to the proportionality analysis. For reasons I have explained above (paras.41-42) 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."*

I would make three observations. First, I recognise that the analysis which I have offered in [17] - [19] above does not equate precisely with that of Elias LJ. However, I discern no mutual incompatibility. Second, the Court of Appeal did not consider the decision of the Upper Tribunal in AM (s

117B) Malawi [2015] UKUT 260 (IAC) relating to "precarious" immigration status. Where a person does not possess leave to remain, the juridical reality is that their immigration status is, as a minimum, precarious and may in certain circumstances be unlawful. Thus it may be that the first instance judge in MA (Pakistan) was compelled to treat the children's immigration status as precarious bearing in mind the dictates of sections 117A and 117B of the 2002 Act, subject of course to (a) the Rhuppiah qualification that the outcome produced must be harmonious with Article 8 ECHR and (b) the requirement, highlighted above, that this factor be ignored in assessing a child's best interests.

28. My third observation is that an outcome for a family which has a prejudicial impact upon a child member is not incompatible with the seventh principle of the Zoumbas code. Where, in any given case, the evaluation of parental immigration misconduct in the balancing exercise contributes to a conclusion which will involve the entire family unit departing the United Kingdom, this does not (per Elias LJ) "*amount to*" blaming the children. Critically – absent some other vitiating factor – the assessment of the best interests of the children, always most aptly carried out at the beginning of the overall exercise, will be unassailable in law provided that the factor of parental misconduct has not intruded at that stage.

Conclusion

29. Ultimately, I accept the submission of Ms Patry that, properly and fairly analysed, the decision of the FtT neither infringes the seventh principle of the Zoumbas code nor contravenes the approach espoused in MA (Pakistan). As the passages quoted in [11] – [12] above make clear, the judge focused particularly on the issues of where the children had been born, their lack of British citizenship, the strength of their ties with the United Kingdom and whether it would be reasonable to expect them to accompany their parents upon departing the United Kingdom. There is no identifiable blemish in this approach. The burden of the argument underpinning the draft amended ground of appeal is expressed thus in Mr Alam's written submission:

> "*It is submitted that the* [FtT] *focused heavily upon the precarious immigration history of the children which in effect penalises the children for … their parent's behaviour.*"

For the reasons explained above, I consider that this analysis of the decision of the FtT is untenable. In the judicial exercise being conducted, the principal error of law to be avoided was that of permitting the issue of parental misconduct to intrude at the stage of assessing the children's best interests. I consider that this error was indeed avoided. The remainder of the balancing exercise, reading the decision as a whole, seems to me unimpeachable.

42. For the reasons elaborated above, I conclude that the proposed amended ground of appeal has no merit. As it possesses a certain degree of novelty and importance, I have considered it appropriate to address it

at some length. Taking this into account, I grant permission to amend, bearing in mind also that this ground, if advanced originally, would in my estimation have been considered sufficiently arguable to warrant the grant of permission to appeal.

DECISION

43. There being no error of law in the decision of the FtT, same is hereby affirmed and the appeal is dismissed.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 21 December 2016