Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/09027/2018
HU/09033/2018
HU/09038/2018
HU/09040/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 April 2019	**On 08 May 2019**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

I W
K R B
A J W
A H W
(ANONYMITY ORDER MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms E Lagunju, of Counsel, instructed by Howe & Co Solicitors.
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

Anonymity

The First-tier Tribunal made an anonymity direction because the third and fourth appellants are children. For the same reason, I continue the anonymity direction under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellants.
No report of these proceedings shall directly or indirectly identify them. This direction applies to both the appellants and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.
The parties at liberty to apply to discharge this order, with reasons.

DECISION AND REASONS

1. The appellants appeal against the decision of Judge of the First-tier Tribunal E.M.M. Smith who, in a decision promulgated on 2 October 2018 following a hearing on 19 September 2018, dismissed their appeals against the respondent's decision of 3 April 2018 which refused their applications for leave to remain on the basis of their rights to their family and private lives in the United Kingdom.

2. The appellants are nationals of Senegal. The first appellant, born on 20 December 1975, is the husband of the second appellant, born on 3 April 1985. They are the parents of the third appellant, born on 6 September 2006 in the United Kingdom, and the fourth appellant, born on 1 December 2008 in the United Kingdom.

3. The respondent refused the appellants' applications because he was not satisfied on the balance of probabilities that they met the requirements of Appendix FM and para 276ADE of the Immigration Rules. Before the judge, it was accepted (para 20 of the judge's decision) that the appellants could not satisfy the requirements of Appendix FM. It was argued that para 276ADE(1)(iv) of the Immigration Rules was relevant because the fourth appellant had lived continuously in the United Kingdom since he was born in 2008 and that it was not reasonable to expect him to leave the United Kingdom.

4. The judge found that it was reasonable for the fourth appellant to leave the United Kingdom for the purposes of para 276ADE(1)(iv)). She gave her reasons at paras 20-22). She then considered the Article 8 claims of the appellants outside the Immigration Rules at paras 23-31 and concluded that the respondent's decision to refuse them leave to remain in the United Kingdom was not disproportionate (para 32).

5. On 7 February 2019, I granted permission to appeal to the Upper Tribunal because I considered it arguable that, notwithstanding that the judge had stated at para 29 of her decision that the minor appellants *"cannot be visited with the conduct of the parents"*, she may erred in law in taking into account the adverse immigration history of the first and second appellants and/or dishonest or other conduct on their part in reaching her finding that it would be reasonable for the fourth appellant to leave the United Kingdom, contrary to the guidance of the Supreme Court in KO (Nigeria) (Nigeria) [2018] UKSC 53. I did not limit the terms of the grant of permission and stated that all the grounds may be argued.

6. At the commencement of the hearing, Ms Lagunju and Mr Whitwell confirmed that they did not object to my hearing these appeals. I did not see any reason to recuse myself. In granting permission, I was only considering whether it was arguable that the judge materially erred in law, whereas I would now have to decide whether she did in fact materially err in law.

Application for permission to make an application at the hearing to amend the grounds

7. Ms Lagunju requested permission to make an application at the hearing to amend her grounds.

8. I asked Ms Lagunju to explain why I should entertain such a late application given that the appellants were notified of the hearing date by a Notice of Hearing dated 14 March 2019. Ms Lagunju informed me that she was able to take responsibility for two days of the period because she was only able to read the papers the day before the hearing although she received them two days earlier. Upon reading the papers, she noticed that she did not have the judge's decision which she then requested and which she received on the morning of the hearing.

9. Whilst I accept that the appellants ought not to be prejudiced for the two-delay for which Counsel had accepted responsibility, the fact remained that I was provided with no explanation for the remainder of the delay. Ms Lagunju suggested that it might be possible that there had been an oversight on the part of her instructing solicitors in instructing her late but this amounted to no more than speculation on her part. There was simply no evidential or other basis for Ms Lagunju's suggestion that the delay should not be attributed to the appellants. There was simply no explanation for the delay apart from the two-day delay for which Ms Lagunju took responsibility.

10. The judge's decision was promulgated on 2 October 2018. The appellants have therefore had from that time to lodge the grounds upon which they sought to rely. They were represented when they made their application of 8 October 2018 to the First-tier Tribunal for permission and their application of 17 January 2019 to the Upper Tribunal for permission. Permission was granted on 7 February 2019. The Notice of Hearing was sent to them on 14 March 2019. They have had ample time to lodge an application for permission to amend their grounds. I had no written notice in the form of a skeleton argument of the proposed grounds so that I could evaluate the merits of the proposed grounds without having to permit Ms Lagunju to argue them at the hearing. There were other cases in the list to be heard, including one by an unrepresented appellant which required a full re-hearing of the evidence.

11. Relying upon the Court of Appeal's judgment in Kaur [2018] EWCA Civ 411 and the overriding objective, I refused to allow Ms Lagunju to make an application at the hearing to amend the grounds.

Background

12. The first appellant entered the United Kingdom illegally on 1 December 2003. The second appellant entered the United Kingdom illegally in 2005. They met in the United Kingdom in 2005 and married later that year. Their two children were born in the United Kingdom.

13. In 2012, the second and third appellants returned to Senegal and remained there for two years. In 2014, they entered the United Kingdom illegally via France. The second appellant made use of forged documents to travel from France to the United Kingdom.

14. The first and second appellants have each worked illegally in the United Kingdom and made use of fraudulent identification documents whilst in the United Kingdom. On 14 June 2017, the first appellant was sentenced to a 6-month suspended sentence for possession of fraudulent documents. On 26 April 2017, the second appellant received the same sentence for similar offences.

The issues

15. I have already stated the reason why I granted permission (para 5 above). At the commencement of the hearing, I asked the parties to address me on the question whether, in essence, I had misread the judge's decision, in that, it appeared that para 29 of her decision, to which I referred when I granted permission, did not concern the judge's assessment of the requirement in para 276ADE(1)(iv) but her assessment of the Article 8 claims outside the Immigration Rules.

16. The appellants' written grounds contend that:

    (i) The judge erred in law by failing to provide powerful reasons why the fourth appellant's removal was reasonable. In this regard, the grounds rely upon the judgment of the Upper Tribunal (the President and Upper Tribunal Judge Lindsley) in MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC). In this regard, the grounds rely upon para 34 of MT and ET.

    (ii) The judge gave insufficient weight to the fact that the fourth appellant had lived in the United Kingdom for nine years nine months from birth.

Submissions

17. Ms Lagunju submitted that the judge failed to identify powerful reasons for leave to remain to be refused in the fourth appellant's case or state why, in the absence of such powerful reasons, para 276ADE(1)(iv) was not satisfied.

18. Ms Lagunju submitted that the judge had applied the wrong test at para 22, when she referred to it not being unreasonable for the fourth appellant to be refused leave whereas the correct test was whether it was reasonable for the fourth appellant to leave the United Kingdom. As I informed Ms Lagunju at that time, this was not in the appellants' grounds.

19. In relation to KO (Nigeria), Ms Lagunju submitted that it was unclear why the judge concluded that it was reasonable for the fourth appellant to leave the United Kingdom other than the adverse immigration history and criminal convictions of the first and second appellants. Ms Lagunju submitted that the judge must have relied upon the adverse immigration history and criminal convictions of the first and second appellants.

20. Ms Lagunju accepted that, in assessing the Article 8 claims of the appellants outside the Immigration Rules, the judge was entitled to take into account the immigration history and criminal convictions of the first and second appellants, at para 29 of her decision.

21. Mr Whitwell submitted that the judge did give reasons for finding that it would be reasonable for the fourth appellant to leave the United Kingdom, i.e. that he would be leaving with his parents (para 21) and therefore the family unit would be intact; that the fourth appellant had no health issues (para 22); that the fourth appellant was not at a critical juncture in his education (para 22); and that there was a lack of evidence

for a finding that it would be unreasonable for the fourth appellant to leave the United Kingdom (para 22).

22. Mr Whitwell referred me to the decision of the Supreme Court in the appeal of NS in the judgment in KO (Nigeria). He asked me to note that the Supreme Court had not disturbed the finding in the case of NS in the judgment in KO (Nigeria), that it was reasonable for NS' two qualifying children to leave the United Kingdom notwithstanding the length of residence of the children.

23. Mr Whitwell submitted that the requirement in R (MA (Pakistan) & Others) [2016] EWCA Civ 705 for "*powerful reasons*" to be given for a decision not to grant leave to remain in a case involving a child who has lived in the United Kingdom for seven years or more was inconsistent with para 18 of the judgment of the Supreme Court in KO (Nigeria).

24. In any event, Mr Whitwell submitted that the judge had considered the facts of the instant case and, given the lack of evidence, she was entitled to conclude that it would be reasonable for the fourth appellant to leave the United Kingdom.

25. Pursuant to his duty of candour, Mr Whitwell brought to my attention the current Home Office guidance where at page 64 of 104, it is stated that "… *we would not normally expect a qualifying child to leave the UK".*

26. Ms Lagunju submitted that para 49 of the Court of Appeal's judgment in MA (Pakistan) stating that powerful reasons were required for concluding that it is reasonable for a child who has lived in the United Kingdom in excess of seven years to leave the United Kingdom was not inconsistent with KO (Nigeria). In KO (Nigeria), the Supreme Court said that it was "*inevitably relevant … 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*" and that, it was 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. She submitted that the respondent's guidance stated the same thing and was not inconsistent with KO (Nigeria).

27. Ms Lagunju submitted that, in any event, KO (Nigeria) was not before the judge and therefore the judge had to follow MA (Pakistan) and explain what powerful reasons there were to conclude that it would be reasonable for the fourth appellant to leave the United Kingdom. She relied upon MT and ET which also involved the use of a false document by a parent and the parent's poor immigration history. The Upper Tribunal concluded that the parent's conduct was not so bad as to demonstrate powerful reasons for concluding that it was reasonable for the child to leave the United Kingdom. Ms Lagunju submitted that the facts of the instant case were similar.

28. I reserved my decision. I heard submissions from Ms Lagunju and Mr Whitwell concerning the appropriate disposal of the appeal following in the event that I concluded that the judge had materially erred in law.

Assessment

29. At paras 44 and 49 of MA (Pakistan), Elias LJ said:

> "44. … It seems to me that **there are powerful reasons why**, having regard in particular to the need to treat the best interests of the child as a primary consideration, it may be thought that once they have been in the UK for seven years, or are otherwise citizens of the UK, **they should be allowed to stay and have their position legitimised if it would not be reasonable to expect them to leave**, even though the effect is that their possibly undeserving families can remain with them. I do not accept that this amounts to a reintroduction of the old DP5/96 policy. As the Court of Appeal observed in *NF (Ghana) v Secretary of State for the Home Department* [2008] EWCA Civ 906, the starting point under that policy was that a child with seven years' residence could be refused leave to remain only in exceptional circumstances. **The current provision falls short of such a presumption,** and of course the position with respect to the children of foreign criminals is even tougher.
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> 49. … the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, **because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.**
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> (my emphasis)

30. The concluding words in para 49 should not be taken out of context. It is quite clear from the first sentence of para 44 that Elias LJ said that the child should be allowed to stay *if it would not be reasonable to expect the child to leave the United Kingdom*. In other words, the mere fact that the child has lived in the United Kingdom for seven years or more does not obviate the need to consider whether it would be reasonable for the child to leave the United Kingdom. It is also clear from the final sentence of para 44 that Elias LJ did not consider that there was any presumption that leave to remain should only be refused in exceptional circumstances.

31. However, I recognise that the panel in MT and ET said at para 33:

> "33. On the present state of the law, as set out in MA, we need to look for "powerful reasons" why a child who has been in the United Kingdom for over ten years should be removed, notwithstanding that her best interests lie in remaining."

32. I recognise that the panel in MT and ET may have considered it unnecessary to report the case for what it said at para 33 because it considered that the point was established.

33. Nevertheless, for the reasons given in paras 34-38 below, the proposition, in reliance upon MA (Pakistan), that there is a presumption or starting point that leave should be granted to a child who has lived in the United Kingdom continuously for seven years or more unless there are powerful reasons to the contrary is inconsistent with, and

cannot survive, the judgment of the Supreme Court in KO (Nigeria). I must therefore follow the judgment in KO (Nigeria).

34. At paras 17-19 of the Supreme Court's judgment in KO (Nigeria), Lord Carnwath said:

> "17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is "reasonable" for the child. As Elias LJ said in *MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber)* [2016] EWCA Civ 705, [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv).
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> 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:
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> > "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 …"
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> 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:
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> > "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?"
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> To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves.

(My emphasis)

35. MA (Pakistan) was considered at length by the Supreme Court in KO (Nigeria). Lord Carnwath did not quote para 49 or any part of MA (Pakistan) that referred to such a presumption or starting point. Nor did Lord Carnwath approve of any such presumption or starting point in terms. To the contrary, the fact that Lord Carnwath said in terms that "*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*" plainly indicates that there is no such presumption or starting point.

36. It is also relevant to take account of the Supreme Court's consideration of the appeal of NS in KO (Nigeria), at paras 46 to 51. There were two qualifying children in the appeal of NS. They were qualifying children by reason of their length of residence. One of the children had lived in the United Kingdom for ten years. Both parents had been involved in a scam by which they (and numerous others) falsely claimed to have successfully completed postgraduate courses at an institution called Cambridge College of Learning. At para 50 of the judgment in KO (Nigeria), the Supreme Court quoted from paras 198-199 of the decision of Upper Tribunal Judge Perkins where he said, inter alia, that:

> "Given [the behaviour of the parents] I would consider it outrageous for them to be permitted to remain in the United Kingdom. They must go and in all of the circumstances I find that the other appellants must go with them."

37. Lord Carnwath then said this:

> "51. Mr Knafler supports the other appellants in their challenge to the reasoning of *MM (Uganda).* He says that it is even clearer in the context of section 117B that parental misconduct is to be disregarded. I accept that UTJ Perkins' final conclusion is arguably open to the interpretation that the "outrageousness" of the parents' conduct was somehow relevant to the conclusion under section 117B(6). However, read in its full context I do not think he erred in that respect. He had correctly directed himself as to the wording of the subsection. The parents' conduct was relevant in that it meant that they had to leave the country. As I have explained (para 18 above), it was in that context that it had to be considered whether it was reasonable for the children to leave with them. Their best interests would have been for the whole family to remain here. But in a context where the parents had to leave, the natural expectation would be that the children

would go with them, and there was nothing in the evidence reviewed by the judge to suggest that that would be other than reasonable.

38. There was simply no mention of any presumption or that the starting point is that leave must be granted unless there are powerful reasons to the contrary.

39. I am grateful to Mr Whitwell who referred me to the current Home Office guidance. He said that page 64 of 104 states that "… *we would not normally expect a qualifying child to leave the UK".* A copy of the guidance was not submitted because the point only arose at the hearing, although both Ms Lagunju and Mr Whitwell had an opportunity to consider the relevant part of the guidance which Mr Whitwell was able to access on his laptop in court.

40. I accessed on the internet a copy of the Home Office guidance entitled: *"Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*", version 4.0, published 11 April 2019. The relevant page was page 68, not 64, of 104. It may therefore be that I was not able to find the same version of the guidance as the version that Ms Lagunju and Mr Whitwell considered at the hearing. Nevertheless, the relevant wording is the same. It is necessary to quote the following paragraphs from page 68 of the guidance:

> **"Will the consequence of refusal of the application be that the child is required to leave the UK?**
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> The decision maker must consider whether the effect of refusal of the application would be, or would be likely to be, that the child would have to leave the UK. This will not be the case where, in practice, the child will, or is likely to, continue to live in the UK with another parent or primary carer. This will be likely to be the case where for example:
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> - the child does not live with the applicant
> - the child's parents are not living together on a permanent basis because the applicant parent has work or other commitments which require them to live apart from their partner and child
> - the child's other parent lives in the UK and the applicant parent has been here as a visitor and therefore undertook to leave the UK at the end of their visit as a condition of their visit visa or leave to enter
>
> <u>If the departure of the parent or carer would not result in the child being required to leave the UK, because the child will (or is likely to) remain living here with another parent or primary carer, then the question of whether it is reasonable to expect the child to leave the UK will not arise. In these circumstances, paragraph EX.1.(a) does not apply.</u>
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> However, where there is a genuine and subsisting parental relationship between the applicant and the child, the removal of the applicant may still disrupt their relationship with that child. For that reason, the decision maker will still need to consider whether, in the round, removal of the applicant is appropriate in light of all the real-life circumstances of the case, taking into account the best interests

of the child as a primary consideration and the impact on the child of the applicant's departure from the UK, or them having to leave the UK with them. If it is considered that refusal would lead to unjustifiably harsh consequences for the applicant, the child or their family, leave will fall to be granted on the basis of exceptional circumstances.

Would it be reasonable to expect the child to leave the UK?

If the effect of refusal of the application would be, or is likely to be, that the child would have to leave the UK, the decision maker must consider whether it would be reasonable to expect the child to leave the UK.

Where there is a qualifying child

A child is a qualifying child if they are a British child who has an automatic right of abode in the UK, to live here without any immigration restrictions as a result of their citizenship, or a non-British citizen child, who has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, which recognises that over time children start to put down roots and to integrate into life in the UK. *The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain.*"

(my underlining and italicising)

41. It is plain from the words I have underlined that the Home Office guidance has not been updated to take account of the judgment of the Supreme Court in KO (Nigeria) notwithstanding that it was published on 11 April 2019 and the Supreme Court's judgment was delivered on 24 October 2018. In any event, the words I have both underlined and italicised above are inconsistent with the Supreme Court's judgment in KO (Nigeria) where Lord Carnwath said that it was "*inevitably relevant … 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."*

42. I turn to consider the instant case.

43. The first issue is whether the judge took into account the adverse immigration history and conduct of the first and second appellants in reaching her finding that it was reasonable for the fourth appellant to leave the United Kingdom for the purposes of para 276ADE(1)(iv).

44. The judge considered this issue at paras 20-22, which read:

> "20. Mr Azmi accepted that the appellants could not satisfy the provisions of appendix FM but argued that paragraph 27ADE(iv) was relevant in that the [fourth appellant] was born in the UK in 2008 and has lived his entire life here and it would not be reasonable to expect him to leave the UK. I have considered the numerous documents in relation to this appellant's schooling (AB p61-69) and his witness statement (AB p71). He is now 9 years of age and I have little doubt he is engaged with his friends at school and follows

the normal social pursuits of football with his friends. He is in good health and has been brought up in a family environment excluding the 2 years his brother and mother went to Senegal when he was 4 years of age.

21. I have taken note of the authorities referred to by Mr Azmi in his skeleton argument in regard to the best interest of children. I also take note that this appellant cannot be visited with the immigration and criminal conduct of his parents. I have of course considered section 55 of the 2009 Act in that the best interest of a child are a primary consideration. In R (on the application of Osanwenwenze) v SSHD 2014 EWHC 1563 the claimant's 14-year-old stepson from Nigeria had been in the United Kingdom for more than 7 years and had leave to remain in his own right. It was held that this was an important but not an overriding consideration and it was reasonable to expect the claimant's family including the stepson to relocate to Nigeria. The parents had experienced life there into adulthood and would be able to provide for the children and help them to reintegrate.

22. There are no health issues in regard to [the fourth appellant], he appears to be a normal 9-year-old child who has settled well into school but has not yet reached secondary school age. There is no evidence before me that should he with his family relocate to Senegal that it would be unreasonable for him to be included. He is at an early stage in his education and there is no evidence before me it cannot be continued in Senegal. Having considered all the material before me I am satisfied that it would not be unreasonable to expect [the fourth appellant] to relocate with his family, should they return to Senegal. There are no features in his case that would make it unreasonable to refuse leave under paragraph 276ADE of the Rules. The fourth appellant is therefore not a qualifying child.

45. Having reached her finding that it would not be unreasonable for the fourth appellant to leave the United Kingdom, the judge turned to consider the appellants' Article 8 claims in line with the five-step approach explained at para 17 of R (Razgar) v SSHD (2004) UKHL 27, at paras 23-32 which read:

"23. However, I am satisfied that as a whole these appeals should be considered outside the Rules under article 8.

24. …

25. …

26. …

27. Having considered the above authorities and the facts, it is for me to decide whether any interference is proportionate.

28. The 1st and 2nd appellants' conduct whilst in the UK is quite appalling. They have remained here illegally and did so well before their children were born. Each has used false documents at will for employment purposes. The

2nd appellant has used false documents to leave the UK and enter again via France. The Ist appellant secured employment in a school in the name of his cousin and the usual CRB checks that are carried out would not have been carried out against the Ist appellant but his cousin. Such conduct potentially undermines the safety of children at school and will be perceived by the general public as reprehensible. The Ist and 2nd appellant's private life of which there is no evidence before me would have been achieved during their time unlawfully in the UK. In regard to section 117B I must have regard to the public interest and I am satisfied that taking the 1st and 2nd appellants' conduct I have no hesitation finding that their removal from the UK is in the public interest.

29. However, this family must be considered as a single unit and not least the interest of the 3rd and 4th appellants who cannot be visited with the conduct of the parents. Each child is in school and each is doing well. I have read all the school material (AB p16-69) and the statements they each made (AB p70-72). I have already found that paragraph 276ADE does not apply to the 4th appellant but my assessment under article 8 is performed taking his and the entire families *[sic]* interests into account. The family life that exists, exists between them. The 1st and 2nd appellants spent many years in Senegal before coming to the UK. The 2nd and 3rd appellants returned to Senegal and lived there for 2 years during the ill-health of the 2nd appellant's mother. There was no concern for the return of the 3rd appellant to Senegal where he remained for 2 years.

30. Mr Azmi suggests in his skeleton argument that the appellants have integrated in the UK (para 17) however, the extent of the 1st and 2nd appellants' integration is to act in a dishonest way for many years. Indeed as Mr Smith argued it is possible the criminal courts when sentencing the 2nd appellant were unaware of the extent of her criminality (RB D12): In a letter to the 2nd appellant her solicitors indicated that if the Crown had been aware that the appellant had been using forged documents for work she would have been charged with a more serious indictable only offence which would have been dealt with at the Crown Court. Therefore the extent of these appellant's *[sic]* integration into the LJK is undermined by their dishonest actions. However, I accept that the 3rd and 4th appellants have integrated into the UK and each has developed a circle of friends and are doing well. None of the appellants' relatives gave evidence even though a relative drove them to court but did not come inside. However, if they do have relatives with whom they mix it serves to establish that the 2nd and 3rd appellants have been brought up in a Senegalese culture.

31. It is for this court to balance all the evidence it has both for and against the appellants. The public interest must be factored in. Having done so I am satisfied that they will return as a family unit and, therefore, there will be no disruption to their family life. I am satisfied that any private life in regard to the 1st and 2nd appellants has been achieved during their unlawful stay in the UK and in regard to the 3rd and 4th appellants any private life is in its

infancy and their return with their parents will not cause such disruption to be disproportionate.

32. I am satisfied that to refuse leave to these appellants to remain in the UK is not disproportionate."

46. As can be seen from the structure of the judge's decision that it was in connection with her consideration of the appellants' Article 8 claims outside the Immigration Rules in line with Razgar that she took into account the adverse immigration history and conduct of the first and second appellants at para 30, having made clear at para 29 that the third and fourth appellants could not be *'visited'* with the conduct of their parents.

47. Accordingly, having had the benefit of considering the judge's decision in greater detail than I may have done when I was considering whether to grant permission, I am satisfied that the judge did not in fact take into account the adverse immigration history and conduct of the first and second appellants in reaching her finding that it was not unreasonable for the fourth appellant to leave the UK for the purposes of para 276ADE(1)(iv).

48. Ms Lagunju submitted that it is difficult to see why else the judge concluded that it would not be unreasonable for the fourth appellant to leave the United Kingdom. This submission simply ignores the reasons the judge gave at paras 20-22 of her decision. As Mr Whitwell submitted, the judge's reasons were: (i) that the fourth appellant would be leaving with his parents and therefore the family unit would be intact (para 21); (ii) that the fourth appellant had no health issues (para 22); (iii) that the fourth appellant was not at a critical juncture in his education (para 22); and (iv) that there was a lack of evidence for a finding that it would be unreasonable for the fourth appellant to leave the United Kingdom (para 22).

49. I have already dealt with the submission that MA (Pakistan) requires powerful reasons to be given by a judge for finding that it would be reasonable for a child who has lived in the United Kingdom in excess of seven years to leave the United Kingdom. As I have said above, this is inconsistent with KO (Nigeria) which is binding on the Tribunal.

50. Ms Lagunju submitted that, given that the judgment in KO (Nigeria) had not been delivered at the time of the decision of the judge whereas MA (Pakistan) had been, the judge was nevertheless bound to have explained what powerful reasons there were for concluding that it was not unreasonable for the fourth appellant to leave the United Kingdom. The difficulty with this submission is that, as I have the benefit of the judgment in KO (Nigeria), I must apply it in order to decide whether or not the judge had materially erred in law notwithstanding that she did not have the benefit of the judgment in KO (Nigeria).

51. As I said at para 18 above, Ms Lagunju did not have permission to argue that the judge had applied the wrong test when she referred to it being not unreasonable for the fourth appellant to be refused leave when the test was whether it was reasonable for the fourth appellant to leave the United Kingdom. In any event, there is no substance in this submission, given that it is abundantly clear from the judge's

reasoning as a whole that she was deciding the question whether it would be in breach of Article 8 if the fourth appellant had to leave the United Kingdom if he lost his appeal.

52. Finally, Ms Lagunju sought to compare the facts of the instant case with the facts in MT and ET. However, as the courts have said on many occasions, it is unhelpful to make factual comparisons between cases. In MT and ET, the child ET had lived in the United Kingdom for over ten years, as at the date that the Upper Tribunal re-made the decision on the appeal, from the age of four years. She was fourteen years old at the date of the Upper Tribunal's decision. As the Tribunal (President, Blake J) and Upper Tribunal Judge Taylor) said in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197(IAC) seven years from age four is likely to be more significant to a child that the first seven years of life.

53. In contrast, as at the date of the decision before the judge in the instant case, the fourth appellant had lived in the United Kingdom for nine years nine months from birth. The parent in MT and ET had received a community order for using a false document to obtain employment. In the instant case, both parents had received suspended sentences for 6 months. More importantly, the first appellant had secured employment in a school in the name of his cousin. The judge said that the usual CRB checks would have been carried out against the name of his cousin and not the first appellant, that such conduct potentially undermines the safety of children at school and will be perceived by the general public as reprehensible.

54. This is the context in which it fell to be considered whether, on the hypothesis that the first and second appellants have to leave the United Kingdom because of their conduct and immigration history, it was unreasonable for the fourth appellant to leave the United Kingdom with his parents. The judge in the instant case took into account that the fourth appellant had lived his entire life in the United Kingdom since his birth on 2008; that he was 9 years old and had no doubt engaged with his friends at school and followed normal social pursuits (football). She took into account that he was settled well into school but also notified that he had no health issues, that he had not yet reached secondary school, that he was at an early stage in his education and that there was no evidence before her that his education could not be continued in Senegal.

55. I have concluded that the judge was fully entitled to reach her finding that there were no features in the fourth appellant's case that would make it unreasonable for him leave the United Kingdom.

56. I have noted that the judge said in the final sentence of para 22, having found that it would not be unreasonable for the fourth appellant to leave the United Kingdom, that he was "*therefore not a qualifying child*". Plainly, he was a qualifying child because he had lived in the United Kingdom continuously for at least seven years. As the judge was plainly aware of that fact and considered whether it was reasonable for him to leave the United Kingdom, the error in the final sentence of para 22 was immaterial.

57. For all of the reasons given above, I have concluded that the judge did not materially err in law in reaching her finding that it was not unreasonable for the appellant to leave the United Kingdom. His appeal to the Upper Tribunal is therefore dismissed.

58. No separate issues were raised in relation to the appeals of the first, second and third appeals. Their appeals to the Upper Tribunal are therefore also dismissed.

Decision

The decision of Judge of the First-tier Tribunal E. M. M Smith did not involve the making of any material errors of law. Accordingly, the decision of the judge to dismiss the appeals of the appellants against the decision of the respondent stands.

The appellants' appeals to the Upper Tribunal are dismissed.

Signed
Upper Tribunal Judge Gill

Date: 5 May 2019