IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-003806
UI-2022-003807
First-tier Tribunal Nos:
HU/50422/2021
HU/51104/2021
IA/05428/2021 & IA/05429/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 06 April 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR JAVED IQBAL
MS SNOBER SADIQUE
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S Karim, Counsel instructed by Gordon & Thompson Solicitors
For the Respondent: Mrs A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 25 January 2023

DECISION AND REASONS

1. The appellants appeal against a determination of First-tier Tribunal (FtT) Judge Bart-Stewart (the judge) who dismissed the appellants' appeals against the Secretary of State's decision to refuse them leave to remain in the UK on human rights grounds dated 1st July 2021. The first appellant initially applied on 6th November 2019 for leave to remain outside the Immigration Rules on human rights grounds but on 31st December 2019 he applied to vary that application to one for indefinite leave to remain.

2. The first appellant entered the UK on a student visa on 23rd March 2010 valid until 25th March 2012. He remained as a student and then as a Tier 1 Highly Skilled Entrepreneur. He was refused an extension of leave on 7th February 2019

and his administrative review upheld the refusal on 29th March 2019. He was re-served with a decision on 24th October 2019 again refusing his application for further leave.

3. The second appellant entered the UK on 12th August 2014 on a Tier 1 Entrepreneur Partner visa valid from 25th July 2014 until 21st May 2017 and has been included in the applications. They have a son born in the UK on 1st July 2015.

4. The grounds for permission to appeal set out as follows:

Ground 1

5. The judge's analysis of whether it would be reasonable for the qualifying child to relocate was erroneous and flawed.

(1) The judge incorrectly stated at [19] that the Rules had now been changed to allow a direct application by a UK born child who had been here for seven years. This error failed to appreciate and recognise the weight that the respondent now attaches through the Immigration Rules on qualifying children who spend seven years from birth. Such children could apply for Indefinite Leave to Remain. This affected the reasonableness evaluation.

(2) At [26] of the determination the judge states the child is not at a stage in education that "might be significantly disrupted by a move". This imposed an incorrect and too high a threshold. The test was not "significant disruption" but whether it would be unreasonable. This language indicated an elevated threshold.

(3) The judge stated the child had recently started primary school. That was incorrect. A child aged 7 would have started education three or so years previously.

(4) The judge did not focus sufficiently on the ties and rights of the child and focused on the fact that the parents are returning. The respondent's guidance which the judge had not in principle followed was that in terms of Family Policy Family Life (as a partner or parent) and exceptional circumstances version 17.0, 20th June 2022, states at page 53: "The starting point is that we would not normally expect a qualifying child to leave the UK" ("the Family Policy").

6. The case law of **KO (Nigeria) & Others v Secretary of State for the Home Department [2018] UKSC 53** found that "reasonableness" was to be considered in the real world context in which the child found themselves.

Ground 2

7. At [21] the judge wrongly stated the first appellant has been lawfully in the UK for seven years and two months and that lawful residence expired on 19th May 2017 but in the refusal the respondent had accepted that the appellant had been here for nine years and two months.

8. At [24] the judge stated that the appellant's residence "has not been lawful for a significant period of time". The appellant submitted that the error as to when the first appellant's lawful residence ended infected the findings at [24], but also

in terms of reasonableness of the child's relocation and the overall Article 8 assessment, giving less weight to the child's ties and the appellants' private and family life because of the mistaken belief they overstayed since May 2017.

Ground 3

9. The judge erred in failing to provide adequate reasons for findings and generalised remarks. The judge did not undertake any questioning pursuant to the **Surendran** guidelines as there was no Presenting Officer in the hearing. The judge did not explain her comment at [26] that it was exaggerated to say that his education might be significantly disrupted by a move. This was contrary to **MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC)**. At [26] the judge stated: "I consider it unlikely that he has no familiarity with the home language of his two parents" but gives no reason why she reaches that conclusion despite the contrary evidence of the appellants.

10. At [30] of the determination the judge stated: "Other than the fact that the child is attending school, there is no evidence of any extensive links in the UK". However, this ignored and failed to make findings with respect to the first appellant's evidence at [13] and [14] of his witness statement which was not questioned. At [14] the first appellant stated with reference to the son: "He has established wider family ties in the UK and has built very close relationship with his friends; families and social network which make him feel more comfortable and social".

11. There appeared to be no credibility findings with respect to either appellant who provided statements and attended and gave live evidence.

Ground 4

12. The judge erred in her assessment of Article 8 and refers to there being no exceptional circumstances. However, that appears to be a reference to factually exceptional circumstances.

13. The errors identified in the grounds at 1 to 3 had infected Article 8.

The Hearing

14. Mr Karim relied on his written grounds and submitted in relation to each of those grounds that the judge had failed to recognise that the change in Rule related to an application for indefinite leave to remain in relation to the child who had been in the UK for seven years.

15. At]26] of the determination the judge used the phrase "significant disruption" but that imposed a higher threshold. The child had not merely recently started at primary school but had been there since 2000 or at least for three years.

16. The judge erred in failing to focus on the rights of the child and the fact that the parents had no leave was not the only consideration because it would not normally be expected that a qualifying child would be required to leave the UK in accordance with the Family Policy Family Life of the respondent. In ground 2 the judge had mistaken that the first appellant had been here for only seven years and two months when in fact the first appellant had lived in the UK for nine years and two months. It was evident that the longer one was here lawfully the stronger their case was.

17. In relation to ground 3 the judge had failed to provide adequate reasons and made generalised remarks without explaining those conclusions reached as to, for example, why it was an exaggeration of the appellants to state within their statements that the child's education would be significantly disrupted. The judge had ignored what the first appellant had stated in his witness statement. Mr Karim did confirm that the only evidence in relation to the disruption to the child was that of the witness statements of the parents.

18. Mrs Nolan submitted that the judge was merely stating that the first stage of the education of the child was not going to be significantly disrupted and reading [26] as a whole the judge had clearly assessed the circumstances. The judge does use the appropriate test and recognises that the child is 7 years old but goes on to deal with the fact that it was unlikely he had no familiarity with the language, bearing in mind the mother had lived in Pakistan more recently. There was no error of law. The judge had considered the best interests of the child at [29] and given adequate reasons as to why it was not unreasonable for the child to return with his parents. The judge made an analysis at [30] referencing the fact that there was no evidence of extensive links in the UK. On the evidence given the conclusions of the judge were open to him and there was nothing flawed in the analysis of whether the child could relocate despite reaching seven years at the date of the hearing. The issue of whether the child could obtain ILR or otherwise was not material to the judge's consideration.

19. In relation to ground 2 Mrs Nolan submitted that the findings in relation to the reasonableness of the child leaving were not infected by any consideration of the extent of the parents' unlawful stay. It was relevant to consider Section 117B of the decision and Mrs Nolan submitted that in fact it was the second appellant who did not have lawful leave until May 2017. Mr Karim contradicted this by referring me to [3] of the decision which showed that the second appellant's application had been dependent on the first appellant's and therefore they must have had leave in line.

20. Mrs Nolan reminded the Upper Tribunal that Section 117B(5) confirmed that little weight should be given to private life when the immigration status was precarious, and the judge had given cogent reasons at [31].

21. In relation to ground 3 the child was clearly young and adaptable, and it was not an error of law to have described the evidence as an exaggeration. The judge had looked at all the factors when considering Article 8.

22. Mr Karim submitted that if a child established private life while his parents were here lawfully that attracted a different level of weight compared with parents who had been here unlawfully. The fact that the child was now able to apply for leave to remain had to be a material consideration whether it was reasonable to expect a qualifying child to relocate. The judge had ignored the oral evidence which had addressed the issue on extensive social family links, and it was through the parents that the child had to be given a voice as he had none of his own.

Analysis

23. The grounds at [1] contend that the judge failed to the appreciate and recognise the weight that the respondent now attaches through the Immigration Rules to a child's position when incorrectly stating at [19] that the child was able to apply for leave to remain as opposed to ILR if born in the UK and spent the first seven

years here, and because of this misunderstanding, the judge failed to attach proper weight to this factor into the reasoning. I reject this contention, first because there was no indication that an application had been made by the child, or indeed granted. Section 117B(6) of the Nationality Immigration and Asylum Act 2002 (2002 Act) which was applicable, clearly sets out the provisions in relation to the public interest where a person has a genuine and subsisting parental relationship with a qualifying child. The qualifying child will include those with British citizenship and that cannot carry any more weight than a child with independent leave to remain. It is clear that the judge specifically considered Section 117B(6) of the 2002 Act at [31] and applied the correct test of whether it was reasonable to expect the child to leave the United Kingdom.

24. Secondly the immigration rules which were amended in June 2022 state at PL 3.1.

> *'Where the applicant is aged under 18 at the date of application the following requirements must be met:*
>
> > *(a) the applicant must have been continuously resident in the UK for at least 7 years; and*
> >
> > *(b) the decision maker must be satisfied that it would not be reasonable to expect the applicant to leave the UK'.*

25. This continues to employ the concept of whether it would be reasonable to expect the child to leave the UK. The judge explored the circumstances affecting the parents and those of the child in detail as can be seen from a careful reading of the decision and which I discuss below.

26. The Family policy referred to above states that 'the starting point' is that a qualifying child would not normally be expected to leave the UK but goes on in the next paragraph to identify that 'the Supreme Court [in KO] found that "reasonableness" is to be considered in the real-world context in which the child finds themselves'. There is nothing to suggest in this decision that the judge failed to apply **KO** and the 'real world' context.

27. The second point in ground 1 that the judge imposed too high a threshold in relation to considering whether the child would be "significantly disrupted by the move" is in fact not the judge applying too high a threshold but responding to the witness statement and the language used by the first appellant himself. The appellant at [13] of his witness statement stated: "My son's study in the UK will be completely disrupted and his education will be totally stopped if he is forced to leave the UK". At [15] he stated that there would be "great disruption to his progression and development". He added: "My son has no cultural ties with Pakistan. He is totally unknown to Urdu culture" [20], having stated in the next paragraph at [21] that he has "very limited understanding of Urdu. Our mother tongue is a foreign language for him".

28. The second appellant's witness statement largely mirrored that of the first, referencing "serious disruption in his integration in Pakistan since Pakistan is an alien country to him". The language used by the judge is merely that reflecting that of the appellants and not indicative of the judge applying the incorrect standard.

29. In relation to point 3 I note the evidence submitted was that submitted in relation to the child in Reception class and dated from 2019 to 2020. There was no recent evidence as to the primary education of the child and merely that in relation to the child being in Reception. "Recently" is a relative term and even if the judge, presented as he was with the limited evidence, concluded that the child was in Reception class that did not contribute to or constitute an error in assessing that the child could adapt because, as found, the child remained "young and at an age where he is adaptable, especially as the focus of his life would be his relationship with his parents". The judge in fact stated this at [26]:

> *"26. Having regards to section 55 of the Borders Act, I have regard to the age of their child. He recently started primary school. This is the first stage of his education. He not at a stage in his education that might be significantly disrupted by a move. I consider that is an exaggeration to suggest otherwise. I do not accept that it would be unreasonable to expect the child to leave the UK. He is young and at an age where is he adaptable, especially as the focus of his life would be his relationship with his parents. I consider it unlikely that he has no familiarity with the home language of his two parents. He would be returning to his parent's country of origin with them. With their knowledge and experience of the country and of the education system there, his mother's lived experience being more recent, and joining close family, including grandparents, there is no reason to believe he would not quickly form close bonds and settle after a period of adjustment".*

30. Point 4 of ground 1 is not borne out by asserting that the judge did not focus sufficiently on the ties and rights of the child. There is considerable assessment of the position and best interests of the child from [26] onwards including [30]. The judge considers the best interests of the child and gave full and detailed reasons why he considered that the child could adapt into Pakistan, and it would not be unreasonable for him to leave the UK.

31. Against the backdrop of the findings in relation to the appellants, it is unsurprising that the judge stated:

> *"Nothing else that has been said with regards to their circumstances and the difficulty they would have in reintegrating in Pakistan stands up to any scrutiny. Both have lived the majority of their lives in Pakistan. They were educated there. They will be familiar with the language, lifestyle and culture. The first appellant's claim to be detached from his country is not plausible. He made several visits. His wife remained there for a number of years after his departure. He has close family that continue to live in Pakistan".* [24]

32. In relation to the ground two, the judge had correctly set out the appellants' immigration history at [2] and again correctly at [7] stating: "The appellant's 3C leave ended on 7 May 2019 when the administrative review of the application dated 19 May 2017 was determined". The calculation of the length of residence in my view was a mere slip when referring at [21] to seven years and two months because the judge had already recognised that the appellant had lawful leave until May 2019. It did not therefore taint the remaining findings.

33. Even if I am wrong about that the judge clearly was correct when stating that neither of the appellants met the requirements of the Immigration Rules in terms of length of residence, either under paragraph 276B or 276ADE. As set out in **Hesham Ali** [2016] UKSC 60, the Immigration Rules set out the position of the Secretary of State and are a relevant and important consideration for tribunals determining appeals brought on Convention grounds. The fact is that the appellants could not comply with the Immigration Rules and there was no challenge to that in the grounds of appeal. That is the staring point for any assessment and balancing exercise.

34. The judge noted particularly that the appellants did not meet the exceptions at EX.1. at the date of application or the Home Office decision [22].

35. The judge found that the core of the claim is the length of time they had been in the UK and the child's education. As the judge pointed out, in respect of length of residence "it has not been lawful for a significant period of time" and "nothing else that has been said with regards to their circumstances and the difficulty they would have in reintegrating in Pakistan stands up to any scrutiny" [24].

36. It is uncontroversial that as at the date of the hearing both appellants had been in the UK unlawfully for over three years which indeed is a significant period of time. The overall circumstances were considered by the judge and any exaggeration of their unlawful time in the UK could not bear on the overall circumstances, in the light of paragraph 276ADE(1)(vi) and the judge's findings. It was open to the judge to find that the appellants had lived in Pakistan for the majority of their lives and were educated there and familiar with the language, lifestyle and culture. Additionally, the first appellant had made several visits and thus the judge specifically rejected the appellant's claim that he was "detached from his country" as being not plausible [24]. Contrary to the grounds the judge clearly did not accept that the appellants were alienated from their home language, culture and country and concluded that their connections to Pakistan remained 'strong'. The judge has added at [25] that the first appellant was highly educated and had business skills and also spoke English and did not accept that they would be unable to obtain employment, particularly as there were no serious ill health issues raised. Those findings were open to the judge on the evidence.

37. As I have set out in relation to ground 2, even if the judge miscalculated the length of residence when considering the statutory context of Section 117B(5) the appellant's private life had always been on a precarious basis and it is possible to construe even three years as being a "significant period of time". The assertion that this error infected the findings at [24] cited above is not sustainable in view of the overall findings of the judge and also not sustainable in terms of the "reasonableness" of the child's relocation and overall Article 8 assessment. The two years' miscalculation could not have a significant effect on the weight of the evidence in relation to the child's ties merely because there was a mistaken belief that they had overstayed since May 2017.

38. In relation to ground 3, the judge adequately reasoned her findings. WN (Surendran; credibility; new evidence) Democratic Republic of Congo [2004] UKIAT 00213 emphasises that the Surendran guidelines are not a straitjacket and are guidance and not rules of law. Further it is not for the judge to adopt an inquisitorial role. The judge does give reasons for her findings. Bearing in mind the very limited evidence save for the witness statements from the appellants

that was supplied, including the limited evidence in relation to the child's academic career, the fulsome assertions without more in the appellants' witness statements were open to be considered exaggeration. A bare assertion in terms of evidence will not suffice, as set out at [57] of R(Kaur) [2018] EWCA Civ 1423

39. I have already pointed out that the judge's comment at [26] that it was unlikely that the appellants' child had no familiarity with the home language of his two parents was indeed borne out by the witness statements of the appellants themselves which stated that the child had a limited understanding of Urdu although he could not read or write it. In view of the fact that both of the parents' mother tongues as they state is Urdu, that is not a surprising conclusion by the judge.

40. Further, at [30] of the determination a comment that the child is attending school but there was "no evidence of any extensive links in the UK" is also sustainable. A mere assertion at [14] of the first appellant's witness statement that the child "has established wider family ties in the UK and has built very close relationship with his friends; families and social network which make him feel more comfortable and social" is merely that and there is no further evidence of any extensive links with the UK. The judge was fully cognisant of the fact that the child is at school here but as stated at [26] found he was at a young age whether he was adaptable and "especially as the focus of his life would be his relationship with his parents". The judge was concluding that there was effectively no reason to believe he could not adapt and quickly form "close bonds and settle after a period of adjustment". That was open to the judge.

41. At [30] the judge stated as follows:

> *"30. The child was born in the UK and has never lived in Pakistan. Other than the fact that the child is attending school, there is no evidence of any extensive links in the UK. Both parents are from Pakistan with no independent right to stay in the UK. The child's extended family is in Pakistan. His mother lived there until 2014 and his father made regular visits. The parents were educated in Pakistan and there is no reason the child could not enrol in school and pursue his education there. He is not at a stage of his education where a move would be particularly disruptive. He would make new friends. His parents would be returning to Pakistan with him and would help him settle and acclimatise to new surroundings. The parents are able to earn a living and support their child. There is no evidence of any health, welfare or safety concerns. On the evidence before me, I find that it would not be contrary to the best interests of the child or unreasonable to expect him to go to Pakistan with his parents".*

42. It is clearly not the case that the evidence of the appellants was accepted by the judge and there need not be specific adverse credibility findings when the judge had dealt with the evidence throughout the decision. The judge, if a clear statement needed to be made, did so at [24] when stating that 'nothing else that has been said with regards to their circumstances and the difficulty they would have in re-integrating in Pakistan stands up to any scrutiny'. That is sufficiently plain.

43. I find ground grounds 1 to 3 are not sustainable challenges. Ground 4 also fails. There was no error in relation to the Article 8 assessment and this was not further pursued, rightly so in my view, by Mr Karim. The balance sheet approach is the preferable approach but not a legal requirement.

44. I find no error of law in the judge's decision and the decision shall stand.

Helen Rimington

Judge of the Upper Tribunal
Immigration and Asylum Chamber
20th February 2023