Upper Tribunal
(Immigration and Asylum Chamber)

MK (best interests of child) India [2011] UKUT 00475 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 31 October 2011	
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Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE KEBEDE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MK

Respondent

Representation:

For the Appellant: Ms M Tanner, Home Office Presenting Officer
For the Respondent: Ms T White, Counsel, instructed by Ali Sinclair Solicitors

i) *The best interests of the child is a broad notion and its assessment requires the taking into account and weighing up of diverse factors, although in the immigration context the most important of these have been identified by the Supreme Court in ZH (Tanzania) [2011] UKSC 4, the Court of Appeal in AJ*

(India) [2011] EWCA Civ 1191 and by the Upper Tribunal in E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 00315 (IAC).

ii) *Whilst an important part of ascertaining what are the best interests of the child is to seek to discover the child's own wishes and views (these being given due weight in accordance with the age and maturity of the child) the notion is not a purely subjective one and requires an objective assessment.*

iii) *Whilst consideration of the best interests of the child is an integral part of the Article 8 balancing exercise (and not something apart from it), ZH (Tanzania) makes clear that it is a matter which has to be addressed first as a distinct inquiry. Factors relating to the public interest in the maintenance of effective immigration control must not form part of the best interests of the child consideration.*

iv) *What is required by consideration of the best interests of the child is an "overall assessment" and it follows that its nature and outcome must be reflected in the wider Article 8(2) proportionality assessment. Consideration of the best interests of the child cannot be reduced to a mere yes or no answer to the question of whether removal of the child and/or relevant parent is or is not in the child's best interests. Factors pointing for and against the best interests of the child being to stay or go must not be overlooked.*

v) *It is important when considering a child's education to have regard not just to the evidence relating to any short-term disruption of current schooling that will be caused by any removal but also to that relating to the impact on a child's educational development, progress and opportunities in the broader sense.*

DETERMINATION AND REASONS

1. The respondent [hereafter "the claimant"] is a citizen of India. On 22 June 2004 he applied in Mumbai for entry clearance as a visitor to the UK for just one week, to be accompanied by his wife and daughter, H. They were subsequently granted six months' leave as visitors arriving in the UK on 25 August 2004. They did not leave the UK by the date their leave expired but overstayed. On 9 September 2005 the claimant's wife gave birth to their second daughter, T. On 30 April 2009 the claimant applied for indefinite leave to remain. On 8 July 2010 and then again on 21 January 2011 the appellant, the Secretary of State (hereafter "the SSHD") refused that application. The claimant appealed. In a determination notified on 8 April 2011 the First-tier Tribunal (Immigration Judge Hedworth) decided to allow his appeal on Article 8 ECHR grounds. The SSHD was successful in obtaining a grant of permission to appeal, bringing the matter before us.

2. The judge's reasons for allowing the appeal are set out at paragraphs 35-59. At paras 35-44 he explained why he considered the parents to have a poor immigration history and why he considered that they could re-establish their life in India at a reasonable standard of living. At para 44 he turned to the issue of the children's best interests in the light of the guidance given in LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (IAC) and in ZH (Tanzania) [2011] UKSC 4. At para 51 he stated that the youngest child, T, would have no difficulty in readjusting to life and school in India. At para 53 he found that the claimant's children would have access to good education in India and that it was "frankly unlikely" that they knew little or no Gujerati but in any event there would be no linguistic barriers for them in India. Having at para 52 given his own assessment of H as a "bright, enthusiastic girl, well-liked in school and an asset to it" and in para 54 having noted the contents of H's own letter to the court, he then turned to the letter of 16 March 2011 from the head teacher of H's primary school and to the family GP's letter of 24 February 2011. At paras 56-59 the judge stated:

> "56. I bear in mind that both these men are professionals and therefore do not and can not lightly set aside their views. Both may be said to have the parent's interests at heart too as much as those of the children. But the reality is that both men who have known [H] for a long time fear that her best interests would not be served if she was taken out of the system and life in which she has now become imbedded. [The head teacher] uses the words 'highly detrimental', Dr Sinha 'very detrimental', when referring to the education and development of [H] and her sister.
>
> 57. My reluctance not to immediately adopt the view that removal of [H] would be detrimental is perhaps tainted by what I find with regard to her parents' immigration history and behaviour. But this innocent child cannot be held responsible. To some extent the delay by the respondent in processing the application made in April 2009 does not help either.
>
> 58. I answer the first four questions framed in Razgar in the positive. The ultimate question is proportionality. With some hesitation, which I must resolve in favour of the best interests of [H], I find on balance that it would be disproportionate for [H] to have to leave the UK as a consequence of her parents and her younger sister being removed in order that the Secretary of State's legitimate prerogative and right to regulate and control immigration to the UK be maintained and achieved.
>
> 59. The UK would be in breach of its obligations under Article 8 (private life) with respect to H] if she was removed at this time. Her situation and circumstances of family life under Article 8 would be breached if her parents and younger sister were removed. The realty is that [H's] father, the appellant, and mother both with a

deceitful and dreadful immigration history benefit from their daughter's Article 8 rights to private life."

3. The SSHD's grounds of appeal contended that the judge had failed to show he considered the significance for his assessment of the best interests of the child of his finding that none of the family were lawfully settled or are British citizens; the fact that there would be no linguistic barriers to the children obtaining education in India; the fact that he had found the claimant and his wife would have no difficulty in re-establishing their family life in India; and the fact that their youngest daughter would have no problem in re-adjusting to life and school in India. In addition it was submitted that in attaching great weight to the assessments by H's head teacher and GP that it would seriously disrupt her education in the UK if she were required to return to India, the judge had failed to take into account that the right to education under Protocol 1 of the ECHR is a qualified right or to factor in his own acceptance that the Indian education system was good. It was also argued that in conducting the proportionality exercise the judge had failed to weigh in the balance the claimant's "appalling immigration history".

4. In advance of the hearing the claimant's solicitors submitted further documents including further letters from H's head teacher, dated 21 July 2011 and 20 October 2011 respectively, a letter from the head teacher of T's school and school reports for 2010/2011 for both H and T.

5. At the hearing Ms White did not call any oral evidence but submitted a skeleton argument.

6. The crux of Ms Tanner's submissions for the SSHD was that the judge had erred in treating the eldest child's educational circumstances in the UK as effectively a "trump card" when deciding the Article 8 claim. So far as the likely position of the claimant and his family on return to India was concerned, they were a middle class family, there was no suggestion that the two children would not receive a good education in India: language was not a problem. As regards the judge's finding about disruption to H's education, he had failed to explain why the disruption would be detrimental to her educational development. The contents of the eldest child's private life in this case was essentially confined to school activities and friends made in or through school. H was not yet a teenager with a developed social life outside school or family. Although she had lived here six years, she had spent her first five years in India. The judge had erred by failing to attach weight to the fact that the claimant and his family were neither in the UK with lawful permission nor British citizens.

7. In amplifying her skeleton argument Ms White for the claimant submitted that the judge had not made any material error. His

reasoning was consistent with the principles outlined by the Tribunal in E-A (Nigeria) [2011] UKUT 315 (IAC). He had looked at the evidence as a whole. He had conducted a fact sensitive enquiry and in relation to H was clearly impressed by the fact that she was a very bright child who had benefited enormously from her UK education. He had properly attached weight to the two reports on H by her head teacher and GP. It was open to the judge to find that it would be detrimental to uproot her "from the system and life in which she has now become embedded". The judge had applied the guidance given by the Supreme Court in ZH (Tanzania) and by the Tribunal in LD. In EM (Zimbabwe) CG [2011] UKUT 98 (IAC) at paragraph 308(vi) the Tribunal had made clear that the key ZH (Tanzania) principles applied even when there was no British citizen or settled person involved. Contrary to the SSHD's assertion, the judge had not treated the best interests of the child as "the" as opposed to "a" primary consideration. The judge had clearly ascribed negative weight to the claimant's "appalling immigration history". The judge had addressed the significance of the known facts about the Indian education system and had carefully refused to consider there would be any linguistic obstacles to the two children continuing their education in India. The judge was also careful to differentiate between the situation of the two children, clearly regarding the elder child's greater maturity as making a significant difference. By identifying a serious disruption in the oldest child's education the judge made plain he meant her being uprooted from her current schooling.

8. In her skeleton argument Ms White said that the judge submitted, inter alia, that the oldest child's best interests pointed one way, that other factors pointed the other but that balancing "one against the other he came down in favour of her best interests". In sum, Ms White submitted, the SSHD's grounds were a complaint about respective weight the judge attached to various factors whereas matters of weight were for the judge.

9. The panel asked Ms White what it was to make of the fact that one of the two professionals whose opinion the judge appeared to rely on, namely the family GP and Dr Sinha, had appeared, at least in part, to attribute the likely detrimental effect on the two girls' studies if they were returned to India to the claimant's family having come to the UK to escape "enormous family strife" and "very hostile and confrontational relationships with their families in India." In his determination the judge had found that the claimant's claims about such family hostilities to be without foundation. She submitted that the judge had based himself first on the head teacher's reports and so the doctor's letter was not the only source and it was only one of many things he weighed in the balance. There was no reason to think that the judge had failed to differentiate between what Dr Sinha attributed to family strife and what

he saw as the children's best interests. The judge's assessment stood independently of the doctor's concern about family strife.

10. The panel also asked Ms White to identify what the judge considered to be the factors relevant to the best interests of the child assessment and whether he had shown he had made an "overall assessment" in line with the guidance given in ZH (Tanzania). Had the judge reduced almost everything to the factor of educational disruption? Ms White replied that it would be wrong to demand of a judge's determination a formal structured approach; one had to look at the determination as a whole, not just the last two paragraphs. It was sufficiently clear that the judge had considered in the round a range of factors when making the best interests of the child assessment and in the case of the eldest child, "education" was in fact a broad umbrella covering not just her schooling but her social ties with fellow pupils and outside groups. The judge had rightly focussed in H's development of her own personality and identity: H was a gifted child. The determination was not perverse or otherwise flawed in law.

11. We asked the parties to address us on their respective positions in the event that we decided the judge had materially erred in law. Ms Tanner asked us to proceed to re-make the decision and dismiss the appeal. A proper assessment of the best interests of the child and consideration of the Article 8 proportionality assessment pointed strongly to dismissal of the appeal. It appeared the children had grandparents in India. The further elapse of time since the judge had heard the appeal in March did not significantly impact on the Article 8 assessment. The seven years policy was no longer in existence.

12. Ms White urged us to take cognisance of the further documentary evidence relating to both children's schooling and excellent educational progress and to find that to consider removing the family now, when both children were embarking on a new school year was plainly disproportionate, especially given that the judge had found in March that their appeal had been successful and they had got on with their lives on that basis.

Relevant cases

13. In deciding this case we have been greatly assisted by a number of recent decisions. The most important is the Supreme Court judgment in ZH (Tanzania) [2011] UKSC 4 published on 1 February 2011. Other decisions include: Lee v SSHD [2011] EWCA Civ 348; SSHD v Rahman [2011] EWCA Civ 814; MD (Ivory Coast) [2011] EWCA Civ 989; AJ (India) and others v SSHD [2011] EWCA Civ 1191; and a number of Tribunal decisions including LD (Article 8 best interests of the child)

Zimbabwe [2010] UKUT 278 (IAC); EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC), and E-A (Article 8–best interests of child) Nigeria [2011] UKUT 00315(IAC. We have also looked at R (on the application of TS) v SSHD [2010] EWHC 2614 (Admin) 26 October 2010) and Tinizaray, R (on the application of) v Secretary of State for the Home Department [2011] EWHC 1850 (Admin). We also take account, as we are obliged to do by s.2 of the Human Rights Act, of Strasbourg jurisprudence dealing with best interests of the child questions in the context of expulsion and exclusion cases; in particular Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, § 135, ECHR 2010 and Case of Nunez v Norway no.55597/09 [2011] ECHR 1047 (28 June 2011). This is not an exhaustive list and in the nature of the subject-matter it is likely there will be new cases relatively frequently.

14. In AJ (India), which reflects the Court of Appeal's most recent analysis of the subject, Pill LJ wrote:

> "43. Before expressing final conclusions I make the following general comments, in addition to those made in paragraphs above.
>
> (a) As Baroness Hale stated at paragraph 33 in ZH, consideration of the welfare of the children is an integral part of the Article 8 assessment. It is not something apart from it. In making that assessment a primary consideration is the best interests of the child.
>
> (b) The absence of a reference to section 55(1) is not fatal to a decision. What matters is the substance of the attention given to the "overall wellbeing" (Baroness Hale) of the child.
>
> (c) The welfare of children was a factor in Article 8 decisions prior to the enactment of section 55. What section 55 and the guidelines do, following Article 3 of UNCRC, is to highlight the need to have regard to the welfare and interests of children when taking decisions such as the present. In an overall assessment the best interests of the child are a primary consideration.
>
> (d) The primacy of the interests of the child falls to be considered in the context of the particular family circumstances, as well as the need to maintain immigration control.
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> 44. The facts in the present case were considered by the Immigration Judge, in a manner whereby he was treating the best interests of the child as a primary consideration. D's age was such that there could be no consultation with him, as required in the guidance with older children, nor are other considerations suggested to be relevant. It is not suggested that there are medical

or other needs which point towards continued residence in the United Kingdom. "

15. In LD (a case predating ZH (Tanzania) but cited with approval in AJ (India)) Blake J referred to Article 3 of the UNCRC and also stated in paragraph 26:

> "26. Very weighty reasons are needed to justify separating a parent from a minor child or a child from a community in which he or she had grown up and lived for most of her life. Both principles are engaged in this case."

16. In EM the Tribunal wrote at para 308(vi): "Even where neither the children nor the parents has the status of a British citizen, the welfare of the children is a primary consideration in administrative action affecting their future and accordingly the balance of competing interests under Article 8 must reflect this factor as a consideration of the first order, albeit not the only one (see LD… and ZH (Tanzania) …."). At para 308(viii), in the context of considering the Article 8 proportionality assessment, the Tribunal added that:

> "In the absence of any other policy guidance from the Secretary of State, it remains legitimate for Immigration Judges to give some regard to the previous policy that seven years residence by a child under 18 would afford a basis for regularising the position of the child and parent in the absence of conduct reasons to the country, in making a judicial assessment of whether removal is proportionate to the legitimate aim having regard to the best interests of the child."

17. In E-A (Article 8 –best interests of child) Nigeria [2011] UKUT 00315(IAC) the head note to the decision states:

> *(i) The correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication. Where it is in the best interests of a child to live with and be brought up by his or her parents, then the child's removal with his parents does not involve any separation of family life.*
>
> *(ii) Absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case.*
>
> *(iii) During a child's very early years, he or she will be primarily focused on self and the caring parents or guardian. Long residence once the child is*

likely to have formed ties outside the family is likely to have greater impact on his or her well-being.

(iv) Those who have their families with them during a period of study in the UK must do so in the light of the expectation of return.

(v) The Supreme Court in ZH (Tanzania) [2011] UKSC 4 was not ruling that the ability of a young child to readily adapt to life in a new country was an irrelevant factor, rather that the adaptability of the child in each case must be assessed and is not a conclusive consideration on its own.

Legal principles: best interests of the child

18. At this juncture we need to clarify several points concerning cases involving best interests of the child consideration/assessment in the context of Article 8 expulsion cases. The jurisprudence of the European Court of Human Rights (ECtHR) has long treated the best interests of the child as a primary consideration in the assessment of proportionality, but the UK's lifting in 2008 of its general reservation relating to immigration matters under the UN Convention on the Rights of the Child (UNCRC), the coming into force of s.55 of the 2009 Act, the guidance given by the Supreme Court in ZH (Tanzania) and the Court of Appeal in AJ (India) have combined to lend the principle more prominence in our country; and courts and tribunals are perhaps only at the beginning of mapping in more detail its consequences for different types of immigration situations involving children and expulsion measures. That said, in addition to the guidance already to hand, it is possible to identify several matters of principle.

19. First of all it is clear from the judgments of their lordships in ZH (Tanzania) (Lords Hope, Brown, Mance and Kerr expressing full agreement with the reasoning of Baroness Hale) that whilst consideration of the best interests of the child is an integral part of the Article 8 balancing exercise (and not something apart from it), it is a matter which has to be addressed first and as a distinct stage of the inquiry. The decision maker has first to make a decision on what is in the overall best interests of the child and only then to assess whether those interests are outweighed by countervailing factors such as those concerned with the rights and freedoms of others, the effective maintenance of immigration control, prevention of crime, etc (Baroness Hale, para 33, Lord Hope, para 44, Lord Kerr para 46). The underlying rationale must be that unless, when children are concerned, the Article 8 proportionality assessment is conducted in this way there is a risk of the best interests of the child consideration wrongly taking into account extraneous factors such as the parents' poor immigration history.

20. Second, whilst an important part of ascertaining what are the best interests of the child is to seek to discover the child's own views, these

being given due weight in accordance with the age and maturity of the child (Article 12 UNCRC), this notion is not a purely subjective one and the decision-maker has to come to an objective view as to what it is reasonable to expect of a child (Baroness Hale, paras 29, 34); This is reflected in the UKBA statutory guidance (cited in AJ (India) at para 16) that "Children should be consulted and the wishes and feelings of children taken into account wherever practicable when decisions affecting them are made, even though it will not always be possible to reach decisions with which the child will agree…". The need for an objective approach arises not simply because a child's interests will not always be the same as their parent(s), but also because the consideration of their best interests requires a judgement to be made on a rational basis taking into account all relevant factors and not just on the basis of how these matters are perceived by the child and/or parent(s).

21. Third, the initial stage - the best interests of the child consideration - is not to be approached as a simplistic or reductionist exercise. Baroness Hale refers approvingly to the position taken by the UNHCR in para 1.1 of its Guidelines on Determining the Best Interests of the Child (May 2008) that "[t]he term 'best interests' broadly describes the well-being of the child". Para 1.1 goes on to state that "such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences". In this UNHCR document and other sources on which it draws, the best interests of the child consideration is to be seen to require a broad-ranging inquiry and to encompass multifarious factors including the child's need for security, continuity of care and affection and the opportunity to form long term attachments based on mutual trust and respect. As stated by the same UNHCR Guidelines at para 3, "[t]he result of the best interest of the child determination must take account of the full range of the child's rights, and hence consider a variety of factors. The best interests of the child are rarely determined by a single, overriding factor". We are aware there have been suggestions that decision-makers might benefit from a checklist relating to the welfare of the child akin to that family court judges are required to take into account under s.1(3) of the Children Act 1989. However, it seems to us that the guidance given in ZH (Tanzania) has already accomplished the task of identifying the factors which require particular attention in cases in which children are affected by expulsion measures. At para 29 Baroness Hale says this about best interests of the child consideration in the immigration expulsion context:

> "Applying, therefore, the approach in Wan [Wan v Minister for Immigration and Multi-cultural Affairs [2001] FCA 568] to the assessment of proportionality under Article 8(2), together with the factors identified in Strasbourg, what is encompassed in the "best interests of the child"? As the UNHCR says, it broadly means the well-being of the child.

> Specifically as Lord Bingham indicated in EB (Kosovo), it will involve asking whether it is reasonable to expect the child to live in another country. Relevant to this will be the level of the child's integration in this country and the length of absence from the other country, where and with whom the child is to live and the arrangements for looking after the child in the other country; and the strength of the child's relationships with parents or other family members which will be severed if the child must move away."

22. At para 30 Baroness Hale adopts the identification in Wan of the following matters as relevant: the intrinsic importance of citizenship of the host country (where the child has this) and its connection with lifestyle; the degree of social and linguistic disruption of children's childhood as well as loss of homeland; the loss of educational opportunities; resultant isolation from the normal contacts of children with their other parent and that other parent's family. She sees these considerations as particularly important "in assessing the overall well-being of the child", as does Lord Hope who refers at para 40 to the "overall assessment of what was in the child's best interests".

23. There is in our view a fourth point of principle that can be inferred from the Supreme Court's judgments in ZH (Tanzania). As the use by Baroness Hale and Lord Hope of the adjective "overall" makes clear, the consideration of the best interests of the child involves a weighing up of various factors. Although the conclusion of the best interests of the child consideration must of course provide a yes or no answer to the question, "Is it in the best interests of the child for the child and/or the parent(s) facing expulsion/deportation to remain in the United Kingdom?"', the assessment cannot be reduced to that. Key features of the best interests of the child consideration and its overall balancing of factors, especially those which count for and against an expulsion decision, must be kept in mind when turning to the wider proportionality assessment of whether or not the factors relating to the importance of maintaining immigration control etc. cumulatively reinforce or outweigh the best interests of the child, depending on what they have been found to be.

24. The need to keep in mind the "overall" factors making up the best interests of the child consideration must not be downplayed. Failure to do so may give rise to an error of law although, as AJ (India) makes clear, what matters is not so much the form of the inquiry but rather whether there has been substantive consideration of the best interests of the child. The consideration must always be fact-sensitive and depending on its workings-out will affect the Article 8(2) proportionality assessment in different ways. If, for example, all the factors weighed in the best interests of the child consideration point overwhelmingly in favour of the child and/or relevant parent(s) remaining in the UK, that

is very likely to mean that only very strong countervailing factors can outweigh it. If, at the other extreme, all the factors of relevance to the best interests of the child consideration (save for the child's and/or parent(s) own claim that they want to remain) point overwhelmingly to the child's interests being best served by him returning with his parent(s) to his country of origin (or to one of his parents being expelled leaving him to remain living here), then very little by way of countervailing considerations to do with immigration control etc. may be necessary in order for the conclusion to be drawn that the decision appealed against was and is proportionate.

25. We would add a further point, in the light of Ms White's reliance on EM (Zimbabwe). Her submission sought to argue that the Tribunal had made clear in that case that British citizenship and issues of leave to remain in the UK were not relevant to the best interests of the child consideration. We do not understand the Tribunal in EM to be enunciating any such proposition. Rather they seek to remind the reader that such factors do not negate the need for a best interests of the child consideration. Whilst ZH (Tanzania) makes clear that factors relating to immigration control are extraneous to such an assessment and whilst factors relating to citizenship and stay are clearly relevant to immigration control, the attributes of citizenship (in this case Indian citizenship) and permission to stay (in this case wholly lacking) may well be relevant to assessment of the best interests of the child as well. Thus in the claimant's case the fact that he and the children are Indian citizens demonstrates that they have another country to go to and one in which, absent special circumstances, they can legitimately expect to enjoy the benefits of that country's citizenship. As regards permission to stay in the UK or lack of it, the fact that a parent or child has had lawful permission to remain in the UK may well be relevant in assessing the extent to which the parent and/or child is to be regarded as integrated. Care needs to be taken to ensure that consideration of such factors is not elided with concerns about the public interest in the maintenance of effective immigration control, but it is quite clear from leading cases, including ZH(Tanzania), that factors such as citizenship and immigration status can sometimes strengthen, sometimes weaken, the argument that the best interests of the child lie in remaining in the UK. That indeed appears to be at the heart of Pill LJ's assessment of the appellant SP in the AJ (India) case at para 41:

> "The facts in the present case were very different from those in ZH. The child was two years old at the time of the decision. He had not started school or formed ties with anyone other than his parents. He had no leave to remain in the UK nor was her or his parents of UK citizenship. He would be moving with his parents to a country with which his parents were familiar. His best interests would clearly be served by remaining with his parents wherever they may be."

Our assessment

Decision to set aside

26. We must first address whether the FTT judge materially erred in law. We have no hesitation in finding that he had. It is clear that in a number of paragraphs leading up to para 53 the judge identified several factors relevant to consideration of the best interests of the child, including that there was no reason to think that the family would face difficulties on return or that the children would not be able to access good and easily available schooling in India and that the youngest child's education would not be disrupted. The judge had also identified that there were no cultural or linguistic obstacles in the way of the children adapting to life in India. Thus up to this point in his determination (i.e. immediately prior to para 53, where he addresses the letters from the head teacher and family GP), on his own analysis all the factors considered pointed to the best interests of the children being, in Pill LJ's words in AJ (India) "remaining with [their] parents wherever they may be". Yet in what then follows there is nothing to indicate that these factors were weighed in the overall balance. Having noted that the head teacher felt that to remove the children would be highly detrimental to their education and development, the judge simply states that nevertheless, as regards H, "this innocent child cannot be held responsible" and that "[t]o some extent the delay by the respondent in processing the application made in April 2009 does not help either". There is nothing to indicate that he factored into the equation his earlier finding that there was good education readily available in India to both children or that there were no linguistic or cultural barriers to their living back in India with their parents. In other words, instead of an overall assessment the judge reduced his balancing to consideration of two factors which were treated as decisive in themselves.

27. Further, when one turns to the judge's apparent conduct of the wider Article 8 balancing exercise in para 53 onwards, whilst properly identifying the Secretary of State's "legitimate prerogative and right to regulate and control immigration" there is again nothing to indicate that the judge kept in mind several other highly relevant factors pointing to the children's best interests being unimpaired by return to India: the accessibility of good schooling there, the lack of any obstacles to the parents re-establishing their own working lives there, the lack of any accepted evidence as to family difficulties and the lack of any linguistic and cultural barriers. The assessment was reduced in stark terms to one simply about the importance of not disrupting the present education of H versus the public interests in immigration control. The judge was perfectly entitled to consider H's situation in terms of her right to respect

for private life, but without any reasoning to indicate at least in outline why none of the factors previously identified as being relevant to the proportionality of interference with that private life mattered, it is impossible to safely conclude that the judge properly carried out the wider proportionality assessment either.

28. An additional error, not insignificant in our view, was the judge's decision to attach clearly significant weight to the report by Dr Sinha, without noting that he had earlier rejected the doctor's premise that the family were likely to face family strife on return. This rather highlights the judge's general failure to follow through on his own earlier findings. We shall return to this matter below, but in short we are unable to accept Ms White's submission that somehow the GP's evaluation of the issue of disruption to H's schooling was severable from his evaluation of the existence of family strife back in India. The judge clearly attached significant weight to this GP letter (as well as to the report from the head teacher) yet that letter treated the family strife context as relevant to its own evaluation of the children's best interests.

Re-making of the decision

29. Having found that the judge materially erred in law we set aside his decision. Both parties indicated that in the event we found a material error of law they were content for us to re-make the decision on the basis of the evidence and submissions now before us, including of course the further evidence submitted relating to the children's schooling.

30. Neither party disputes the judge's primary findings of facts and, as regards his rejection of the claimant's claim that he and his family faced a real risk on return of adverse attention as a result of family hostilities, the claimant did not seek to cross-appeal that, nor did Ms White seek before us to re-open this matter. Subject to that proviso, the issue for us is what legal assessment we are to make of the facts as found, supplemented as they are by further documents relating to the children's schooling.

31. Like the FTT judge we accept that the claimant has shown the existence of an Article 8(1) protected right. Since the claimant and his family faced removal to India together there was no disruption of their family life and the principal right affected was the claimant's and his family's right to respect for private life. It was not in dispute that the decision under appeal amounted to an interference with that right. Hence we can move straightaway to consider the Article 8(2) assessment.

Best interests of the child consideration

32. We consider first as an integral part of the Article 8 (2) assessment the best interests of the two children involved. We note that whilst this consideration must focus on factors specific to each of the children (encompassing obviously the family context) the order in which we deal with factors is not crucial - see AJ (India), para 31 - although we think it sensible, before going on to consider other factors, to begin with the evidence we have of what the children themselves think and feel and then move on to the family context.

Children's perspective

33. H, the eldest child, was born on 1 November 1999 and so has just turned 12. She has been in the UK since 25 August 2004. The younger daughter, T, was born here in the UK on 9 September 2005 and has never lived anywhere else. We do not have in this case much by way of direct evidence from either of the children and Ms White did not seek to call them to give evidence before us. H had written a personal letter to the First-tier Tribunal in which she said: "I have been told by my parents that we may have to return to India. However, I do not want to return to India. I will miss my friends. Back home I have no friends and will take a very long time to settle in. Also I will not able to cope up in Indian studies as they are very strict. So please can we stay here in England with my BFFs and school." [We are unclear what "BFFs" means but we understand it may stand for "Best Friends Forever".]

34. Ms White was content otherwise that we should understand H's and T's wishes and feelings concerning the decision under appeal to have been conveyed by what their parents and their school and health professionals have said about them (subject to the proviso noted above at para 30).

35. Whilst considering the best interests of the child as an integral part of the Article 8 assessment we are mindful of the fact that it requires an "overall assessment" and in that context it is of particular importance that this excludes extraneous factors relating to immigration control and the immigration history of the child's parent(s): the latter are not to be taken into account in the best interests of the child assessment: see above, para 19.

Family context

36. In this case we would observe that, like the SP and E-A cases, this case is one in which it can clearly be said to be in the best interests of both children to live with and be brought up by their parents (that was also what the FTT judge found at para 51). There is no issue of separation: the whole family goes or the whole family stays; that is fully agreed by the SSHD and the claimant. That means in this case that if removed, the return of the claimant and his family would not involve any disruption

of their family life. Further, the unexceptionable finding of the judge, with which we fully agree, is that the parents themselves would not face any significant difficulties on return to India (which might impact on their children's well-being). As the judge noted at para 44, "[b]oth are sufficiently well educated and urban enough to achieve a reasonable standard of living in India, even without, if that is really so, sibling or parental support. Both are in their mid-30s and have spent all their lives in India until arrival in the UK in 2004". Noting what Baroness Hale states in para 29 of ZH (Tanzania), we observe that there is no evidence either of there being any other family members in the UK (whose ties with the children might be severed).

Citizenship etc

37. Like their parents, both children are Indian citizens, and, if they return to India, have a legitimate expectation of being able to enjoy the benefits such citizenship confers on those who live in India.

Cultural, religion, traditions

38. It is not suggested in this case that the children's upbringing has divorced either of them from the culture, religion or traditions of their parents. The primary school report for 2010/2011 notes that "T is aware of her culture and beliefs, and enjoyed talking to the rest of the class about them. She also has a developing respect for the culture and beliefs of others, and enjoys celebrating the differences". The claimant's claim that he and his family would face family strife has not been accepted. And he has not suggested that they have broken with the type of life they lived when in India They appear to be a family, like many other ethnic minority families, seeking to strike a balance between maintaining their home country (Indian) values and adjusting to British culture and traditions.

Health

39. Regarding health, it is not suggested that any member of the family has any health difficulties and indeed Dr Sinha's letter of 24 February 2011 confirms as much.

Language

40. Regarding language, Ms White did not ask us to take a different view from that of the FTT judge who stated at para 53 that "The claim by the [claimant] that his daughters know little or no Gujerati I find frankly unlikely. In any case there need be no linguist[ic] barriers as the medium of instruction in large numbers of schools in India is English. The claimant's wife, a Hindu, benefited from a Convent education; it accounts for her good standard of English".

Education-related matters

41. When it comes to the subject of education in the context of Article 8 we must consider a child's educational development and also the issue of any "loss of educational opportunities" (para 30 of ZH (Tanzania)), so as to pay proper regard to how his or her educational progress is likely to be affected in a broad sense and not just in the short-term. That entails in this case having regard not only to the children's past and present educational setting but also to the educational setting likely to confront them if returned to their country of origin (in this case, India).

42. Regarding education in India, it is not suggested that the children would not be able to receive a proper education there. Although the eldest daughter said she had found her school there strict, neither she nor her parents on her behalf suggested that this meant that the quality of the education there was wanting. And in any event we see no reason to take a different view from the FTT judge in considering that for the claimant and his family there would be ready access to good standard education.

43. So far as education in the UK is concerned, it is clear that if the children were to be allowed to remain they would have every prospect of continuing to receive an excellent education. It is H's (and we assume T's) and her parents' view that to remove her to India would cause significant disruption to her education. Other evidence we have includes the two reports from Head Teacher and Dr Sinha, two further letters from the head teacher reiterating his previous view and further school reports relating to both children.

44. Dealing first with Dr Sinha's assessment of the children's best interests in relation to schooling, we are unable to attach any significant weight to it. Ms White has sought to persuade us that Dr Sinha's assessment that both children's education would be significantly disrupted was made independently of concerns he expressed about the children and their parents being likely to face family strife back in India. We are unable to accept that submission. The doctor's letter of 24 February 2011, which explains he has been the family GP for 6 years, stated:

> "On a personal note, I am aware that the family came to this country from India amidst enormous family strife from respective parents due to personal and cultural differences between the families. This has resulted in a very hostile and confrontational relationship with their families in India. This has resulted [in] enormous mental strain and generalised anxiety in [the] parents which has affected their general mental state.
>
> By returning to India they are extremely concerned for both their own and their children's safety – as a result of imminent threats and possible violence from their own families in India. Both children, T and H are both attending local schools. I understand they are excellent in their studies and are amongst the top in the class. Returning to India at this stage

> would have a very detrimental effect upon their studies in a culture that is largely alien to them."
>
> Further to this, it would be very difficult for them to cope with the family strife that waits the family in India. These children have no contact at all with their [grand] parents and returning home at this stage (in these circumstances) is most likely to affect their mental state."

45. It seems to us that the doctor's concerns about the danger from exposure to family strife were closely linked to his finding of significant disruption to the children and that, since his concerns about the former were properly found by the judge to be without foundation, this significantly lessens the weight we can attach to his opinion about the latter.

46. The other main independent assessment we have of the children's best interests comes from professionals involved in their schooling.

47. In a letter of 21 July 2001, which is in very similar terms to the letter he wrote on 16th March 2011 (which was before the FTT judge) the head teacher notes that H had been at her primary school since October 2004 and is a popular child who has a wide circle of friends. She is a high achiever, a member of the school council and has attended numerous after-school clubs including the debating society where she has represented in borough wide events. At the start of the present academic year she had been appointed as school ambassador – responsible for showing visitors around the school. His letter further describes T as being currently a reception pupil who like her sister is a popular child and a hard worker. Both girls, he states, are well settled in school and have excellent attendance records and both have achieved above national expectations. "As a school, who knows the family well, we feel that to remove them from everything they know, are familiar with and have contributed to would be not only highly detrimental to the education and development of H and T but would impact negatively on a family that are clearly very settled and achieving so much". We note, however, that as is the nature of children's schooling H has now moved on from primary to secondary school. A 20 October letter from that school confirms that H has been a student with them from 5 September 2011.

48. There is also a letter from Melanie Watkins, Young Artists Programme Coordinator, the Prince's Drawing School dated 2 March 2011 noting that H was nominated for only one of a few places by her primary school to join this club, which she attends once a week, receiving tuition from professional artists as well as attending holiday courses throughout the past year. The latter describes H's excellent progress and positive presence in class.

49. We also note that when H attended the FTT hearing in March the judge said that H "struck me as being a composed, polite and well behaved child. From the multitude of school reports and certificates copied in the [claimant's] bundle it is clearly a fact that H is a bright, enthusiastic girl well liked in school and an asset to it."

50. Drawing the various items of evidence relating to the children's education together, we would observe first of all that the head teacher also considered that to remove T, the younger daughter, would be highly detrimental to her education and development, which is of course a finding that was not accepted by the judge and is one that on the evidence we do not accept either. She is of an adaptable age and, as already noted, will not find education in India to pose any linguistic or cultural obstacles.

51. Secondly we observe that the head teacher's letters focus very much on the impact of H's removal from the point of view of her current school situation [as it then was] and his appraisal of how that would impact on H. He seeks to identify the position for a child who has been in an English school for a number of years who has become familiar with English-style curricula and has also begun to develop some ties outside the family, such ties having relevance to the child's own identity and development. That is not a criticism; indeed it would have been odd if he had sought to give his opinion about education in India, as he does not purport to have any expertise about the standards of schooling in that country. Given, however, that we know that in fact H and her younger sister would be able to receive (in the FTT judge's words) education that was "good and readily available, be it at some cost", the head teacher's references to "disruption" and "detriment" have to be read in context. We do not seek to suggest that the head teacher would say the same thing about every pupil of similar age. We can envisage he might take a different view of a child the same age as H who, let us say, had not progressed or settled well in school; but the fact that he is prepared to make such an evaluation irrespective, it seems, of the relative degree of likelihood of the children being able to continue with education at a good standard abroad, lessens its value to us as evidence of their best interests. Of course (in answer to Ms White's point), the head teacher is not expected to have to make a rounded assessment, looking at factors overall. However, we do. Our own assessment is that whilst there would be disruption in the children's education caused by removal to India, it would be temporary. We appreciate that H herself thinks it would take a long time to settle back there - that is a very understandable reaction - but viewed objectively all the evidence indicates that she is a bright, enthusiastic girl who would find it relatively easy to adapt and adjust, and to make new friends, as she has

Residence –links outside family

52. We next look at residence and links outside the family. In E-A the Tribunal noted that:

> "(ii) [*A]bsent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case.*
>
> *(iii) During a child's very early years, he or she will be primarily focused on self and the caring parents or guardian. Long residence once the child is likely to have formed ties outside the family is likely to have greater impact on his or her well being."*

53. In this case it is clear that both children, although H much more than T, have begun to develop links with the community outside the family, albeit in both cases such links are confined to ones formed in the context of school life. We would accept that whilst H is still of an age where her primary focus is on her parents, the ties she has developed through school have gone beyond the school gate and have involved her in meeting school students and teachers from elsewhere and for the past year she has attended a debating society which is involved in borough-wide events and she has also been attending drawing classes which have brought her into contact with local professional artists. Nevertheless such ties as H has formed cannot be said to be deep or extensive and have essentially been school-based.

Conclusion on best interests of the children

54. Considering these factors overall we do not find that the best interests of either of the children would lie in remaining anywhere else than with their parents and that their parents can reasonably be expected to return to India. The family are Indian citizens and have cultural, religious and linguistic ties with India. We recognise that both girls have adapted well to school life (and in T's case she has never known life in a different society) but equally we recognise that both appear to be bright, outward-going and adaptable and there is every reason to consider that the qualities nurtured in them by the primary school would again come to the fore once they commence education in India. We recognise that H much more than T has formed ties beyond the school gate but they have

been formed either as a school pupil or they are of relatively limited scope. Even her participation in drawing classes is part of a programme open to pupils of her school and whilst we do not underestimate the value to her of contact with professional artists there is again no reason to consider that, if she and her parents so wished, similar contact could not be made with professional artists in India. We do not find that it would be contrary to their best interests to have to return to India with their parents.

55. Even had we considered that H's best interests lay in remaining in the UK, that would not have been an unqualified conclusion. It would have been in the context of a balanced assessment in which there were many factors pointing to her best interests being to return to India but the balance of competing factors pointing to her staying. Our assessment, that is to say, would have been relatively finely balanced and we would have had to reflect that when moving on to the wider balancing exercise within Article 8.

The wider proportionality assessment

56. We now turn to that wider Article 8 assessment. We carry over the result of our findings on the best interests of the child, which, as we have explained, saw little other than some short-term disruption of the children's education as a factor pointing in favour of their remaining, this being outweighed by several factors, including the availability of good education in India, the family's Indian nationality and their cultural, religious and linguistic links with India.

57. The further factors that have to be considered in the wider balancing exercise are concerned, of course, with the claimant's immigration history and the unlawful immigration status of his wife and children. We take as our starting point the judge's own findings on that history. The FTT judge did not simply find them to be overstayers (deliberate overstaying is a criminal offence under the Immigration Act 1971); he also considered there were aggravating circumstances relating to their intentions: "With hindsight it is quite clear that the [claimant] and his wife had from the outset no genuine intention merely to visit the UK for a week and then return to their native India." The judge was satisfied that the couple were persons who had "financial means and the stability of a settled life in India – career and family life" (para 36). In addition the judge did not accept the claimant's account that he had come to the UK against a backdrop of his having been disowned by his family for having married without parental consent into a different caste and, shortly after their arrival in the UK, when his father passed away, his mother having disinherited him. Nor did the judge accept that the claimant's father had been ill for some time before he came to the UK or

that that was a reason for the visit. In each claim he and his wife have made to the authorities they have sought to maintain the same fiction as to their family circumstances. In the judge's assessment these considerations meant that the claimant and his wife have a "deceitful and dreadful immigration history".

58. On the other hand, there is no issue in this case of any other criminal conduct on the part of the claimant or his family. Nor do we see any reason to differ from the head teacher's assessment that the family have made and continue to make a positive contribution to their school and local community. There is no evidence that they have had recourse to public funds in order to maintain and accommodate themselves. The claimant has worked to ensure he made ends meet and would, if allowed to stay, be offered a job at a local supermarket.

59. We note that there was a delay of sorts in the respondent arriving at a decision on the claimant's case: he had applied on 30 April 2009 for ILR based on long residence and the former 7 year policy. The respondent did not refuse this application until 8 July 2010 and again on 21 January 2011. However, bearing in mind the guidance given in EB (Kosovo) [2008] UKHL 41 we do not consider this period - 13 months for the first decision - to add much to the overall balance of relevant factors, especially as the claimant's representatives wrote on more than one occasion submitting further evidence and further representations (see e.g. letter of 7 June 2010 and 1 July 2010).

60. A further factor to be considered is the family's situation in the light of the former Home Office policy DP/069/99 (and before that DP5/96), which was withdrawn with effect from 9 December 2008. It has been a consistent part of the claimant's submission that the whole purpose of the policy was not to uproot families with children who had spent a formative part of their life in the United Kingdom and identifies that a child who has spent a substantial part of his life in the UK should not be removed. In refusing this application the SSHD highlighted the fact that the children were still young enough to adapt to life in India and the fact that the family had remained in breach of immigration control and the 5 and 6 years spent in the UK was insufficient.

61. It is not in dispute – and in any event it is a matter of law - that the SSHD was entitled to withdraw that policy, on the basis that its maintenance was inimical to her immigration policy: see SSHD v Rahman [2011] EWCA Civ 814 para 43. Nor (leaving aside exceptions such as the 14 year along residence rule) do we consider it arguable that where there is ordinary evasion or avoidance of immigration rules a claimant can establish a legitimate expectation of qualifying under a policy, certainly in respect of one that has been withdrawn (ibid, para

45).We take into account as well that the guidance given at para 308 (viii) in EM (Zimbabwe) contains an important proviso relating to "conduct" reasons.

62. Considering matters in the round, whilst we accept that the children are not to blame for their parents' conduct, we view the latter's poor immigration history as adding significant weight to the factors weighing against the family's claim to remain in the UK. Even had we accepted the judge's view that in the years since 25 August 2004 the parents and their children had become "embedded" in the UK, we would still have attached very significant weight to the fact that on the given facts both parents sought to make their family life here, and to school their children here, in full knowledge that their immigration status was precarious and that they had no legitimate expectation of being allowed to integrate. They are not British citizens nor have they ever been settled within the meaning of the Immigration Acts.

63. For the above reasons:

The FTT materially erred in law and its decision is set aside.
The decision we re-make is to dismiss the claimant's appeal.

Signed H H Storey

Upper Tribunal Judge Storey
Immigration and Asylum Chamber