Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/25363/2016
HU/25353/2016
HU/25359/2016

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 29th October 2018	**On 19th December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MANDEEP [K]
(2) [M S]
(3) [A K]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S Khan (Solicitor)
For the Respondent: Mr D Mills (Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge O'Brien, promulgated on 15th March 2018, following a hearing at Birmingham Priory Courts on 27 February 2018. In the determination, the judge dismissed the appeal of the

Appellants whereupon the Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The First Appellant was born on 25th July 1985. The Second Appellant was born on 5th January 2007. The Third Appellant was born on 26th December 2011. All are citizens of India. The First Appellant is the principal Appellant, as she is the mother of the Second and Third Appellants. They arrived in the United Kingdom as visitors with the husband of the First Appellant, subsequently the First Appellant maintained that her husband had left her, and that she would be at risk of ill-treatment if she returned to India, and moreover her children, who she alleges do not speak Punjabi, would not find it easy to integrate back into Indian life.

The Judge's Findings

3. In an extensive and well-compiled determination, the judge referred to the case law, and reached clear findings of fact. He observed how the First Appellant and her husband came to the United Kingdom on 25th June 2008 as visitors. They never intended to leave. They have not left. The First Appellant's initial evidence was that her husband had not worked. However, it transpired that he had worked illegally as a gardener. She also had worked illegally as a cook and a cleaner. She had claimed that her family had disowned her because of a decision to separate from her husband. However, the decision to separate turns out to have been not one that was made by her but by her husband. There was also no communication of any disowning at all provided by the First Appellant (paragraph 35). The judge comprehensively disbelieved the First Appellant in her evidence.

4. However, a particular feature of this case related to the Second and the Third Appellants who were at the time aged 11 and 9 years respectively. At the date of the application they were 9 years and 4 years respectively. The Second Appellant had lived in the United Kingdom for just under seven years. The children, as the judge found, appeared to have been well settled and doing well at school (paragraph 38). There was also, as the judge found, a report from Diana Harris, a social worker, dated 25th August 2017. She had gone on to say that there was no possibility of the family or local community in India accepting or supporting the children because they would be considered as outcasts (paragraph 39).

5. The judge, however, went on to conclude that it would be reasonable to expect the Second Appellant to leave the United Kingdom. There was no evidence that returning to India would compromise his health. He would be returning with his mother, the First Appellant. There were no significant family ties in the United Kingdom (paragraph 40). Moreover, the public interest considerations in favour of immigration control weighed heavily against the First Appellant (see paragraph 41). It was reasonable to expect the Second Appellant to leave the United Kingdom for India with his mother and sister (paragraph 42) and the requirements of paragraph 276ADE did not assist the Appellant and there were no exceptional circumstances in the claim (paragraphs 42 – 43).

6. The appeal was dismissed.

Grounds of Application

7. The Grounds of Application state that the Second Appellant, at the date of the decision under review, had been in the United Kingdom for more than seven years. He arrived on 25th June 2008. The application was made on 9th June 2016. The judge's findings at paragraphs 40 and 41 did not properly assess the best interests of the Second Appellant.

8. On 19th June 2018 permission to appeal was granted by the Tribunal on the basis that the judge assessed the reasonableness of the Second Appellant's return to India (at paragraph 40) but did not assess whether it would be reasonable to expect him to leave the United Kingdom which is a relevant criterion in Section 117B of the NIAA 2002. There was an arguable error of law.

Submissions

9. At the hearing before me on 29th October 2018, Mr Mills, appearing on behalf of the Respondent Secretary of State, proceeded to say that he would have to concede that the decision by Judge O'Brien to refuse the appeal was misconceived and fell into error. This is because the decision is given as having been promulgated on 15th March 2018, but the recent judgment of the Supreme Court in **KO (Nigeria) [2018] UKSC 53**, is such that the Appellants would now succeed and invited me to allow the appeal outright. The Supreme Court had made it quite clear that "reasonableness" is not a balancing exercise. The youngest child in this case had chosen not to take Indian nationality and now had British citizenship. He, as a Third Appellant, was a British citizen. The Second Appellant also had been in the UK for over seven years and was a British citizen.

10. The judge was wrong, if one considers the latest jurisprudence from the Supreme Court, in coming to the conclusion that he did at paragraph 41. There he had said, at the end of his determination that,

> "it is appropriate in assessing reasonableness also to take into account the immigration history of the First Appellant. As noted above, I am satisfied that she came to the United Kingdom on a visit visa with the intention of overstaying for economic reasons and both she and her husband have worked illegally. I note in the latter regard that the Second Appellant told Ms Harris that he wished his mother 'didn't have to work so hard'. The First Appellant was put on notice, if such notice were necessary, that she should leave the United Kingdom in 2013, but did not."

11. Mr Mills submitted that the opening statement at paragraph 51 that "it is appropriate in assessing reasonableness also to take into account the immigration history of the First Appellant" was no longer viable.

12. For his part, Mr Khan submitted that he would have nothing further to add.

13. Given that it is conceded that there is error of law, I come to the same conclusion myself.

Error of Law

14. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside (see Section 12(1) of TCEA 2007). I set aside the decision of the First-tier Tribunal Judge.

Remaking the Decision

15. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today.

16. I am allowing this appeal for the reasons given by Mr Mills. The decision of **KO (Nigeria)** means that the Appellants in this appeal must succeed.

Decision

This appeal is allowed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 17th December 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have decided to make a fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 17th December 2018