Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00495/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 May 2019	**On 19 September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

M.A.
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Ali of White Horse Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION & REASONS

1. This matter came back before the Tribunal further to the adjournment hearing of 15 January 2019. The case was adjourned on that occasion because it was considered prudent to await the outcome of a pending appeal before the President. A decision in **JG (s.117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC)** has now been promulgated. Further, it is to be noted that the Court of Appeal has more recently expressed agreement with "*the interpretation given by the UT to section 117B(6)(b) in JG*" in **Secretary of State for the Department v AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661** (paragraph 72).

2. On 15 January 2019 I also considered and refused an application to amend the grounds of appeal. A combined written decision in respect of the adjournment and the refusal of the application to amend was promulgated on 1 May 2019. The background to the appeal is referenced therein, and is also apparent on the face of the documents on file, including - necessarily and in particular - the decision of the First-tier Tribunal. In such circumstances I do not propose to repeat here the relevant background, but make reference to it as is incidental for the purposes of this Decision.

3. The Appellant's application of 22 August 2017 – a human rights claim –was made with primary reference to his medical condition. This is manifest on the face of the FLR(HRO) application form signed on 21 August 2017 (Respondent's bundle before the First-tier Tribunal, Appendix A – see in particular at A3 and A7), and in the supporting evidence submitted with the application (Respondent's bundle Annex D). Be that as it may, reference was also made to the circumstances of the Appellant's wife and children, and their length of residence in the UK (A3-A6).

4. In this latter regard of particular relevance are the circumstances of the Appellant's youngest child – herein 'E' - because she is the only one still a minor. E was born in Bangladesh on 10 August 2002 and is a citizen of Bangladesh - as is the Appellant. She entered the United Kingdom as his dependant on 22 September 2008. She enjoyed leave to remain in the United Kingdom up until 1 September 2014 – i.e. just short of 6 years' residence in the UK with leave. She has not had any leave since

5. The notion that the primary focus of the Appellant's case as put by him was on his medical condition is reinforced by the contents of the Notice of Appeal, and the attachment thereto of two further medical letters. The matter is underscored yet further by a consideration of the Appellant's bundle before the First-tier Tribunal. Whilst it is clear that the Appellant also continued to place reliance upon the circumstances of his wife and daughter, the extent of the information and supporting evidence provided was relatively slight. In respect of E, I note the following:

   (i) There is brief reference to her circumstances in the Appellant's witness statement signed on 26 February 2018, in which it is related that E "*has been attending Reading Girls' School full-time. She enjoys her studies and has adapted life here in the UK. She integrated to the society here so uniquely that she foresees a bright and potential future in the UK*". Such generalised assertions contain little meaningful or specific information as to the quality of E's private life, or otherwise.

   (ii) It is also stated in the Appellant's witness statement that E's "*well-being is also involved with my well-being and any decision in this matter must encompass a child's best interest*". I pause to note that even in this context to a certain extent the relevance of these circumstances are emphasised as an aspect of the Appellant's case based on medical grounds. In so far as it was being argued that

the Appellant's return to Bangladesh would "*undoubtedly endanger [his] life*" (witness statement), and that this would adversely impact upon his dependants (including E), it is to be noted that the First-tier Tribunal found that the Appellant had not established his case in respect of any of prognosis, availability of treatment in Bangladesh, and cost of treatment (e.g. see paragraph 44).

(iii) Three documents were produced in respect of E's education. A letter dated 10 March 2016 from her primary school confirmed attendance from 30 April 2013 until 31 August 2013; an undated letter from her secondary school confirmed attendance from 1 September 2013, as did a second letter from the school dated 13 February 2018. None of the letters contained any further information.

(iv) No other evidence in respect of E was included in the Appellant's bundle before the First-tier Tribunal.

6. Further to the above, whilst it is clear that the First-tier Tribunal Judge identified at the outset of the hearing in discussing the issues with the representatives that E was a 'qualifying child' within the meaning of section 117D(1)(b) of the Nationality, Immigration and Asylum Act 2002 (Decision at paragraph 21(c)), and that it would be necessary to consider "*whether it would not be reasonable to expect [E] to leave the UK*" (paragraph 22(c)), it is also clear that there was little further by way of meaningful evidence in respect of E's circumstances. The Judge listed the documentary evidence (paragraph 17), and additionally noted the Appellant's oral testimony in respect of his daughter – in part uncontroversial confirmation of her attendance at school, in part a reassertion "*that she has adapted to life here*", and in part the additional information "*that she is sitting exams now*" (paragraph 50). (For completeness I note that the Judge also identified in preliminary discussions that irrespective of any issue as to 'reasonableness' in respect of E, it was also necessary to determine whether the Respondent's decision contravened Article 8 of the ECHR – paragraph 22(d).)

7. The Appellant's and his advisers' apparent elective preference for emphasising the medical circumstances of the Appellant continued into the proceedings before the Upper Tribunal, notwithstanding the limited scope of the grant of permission to appeal by Deputy Upper Tribunal Judge Saffer:

> *"The "medical" grounds amount to nothing more than a disagreement with findings FTT Judge Bristow was entitled to make on the evidence regarding the failure by the Appellant to establish that the "N" or "GS" thresholds [were met].*
> *However, it is arguable that despite a detailed s55 best interest assessment, the Judge has not articulated what the 'powerful reasons' are to make it proportionate to remove a 15 year old girl (the Appellant's dependant in the appeal) who has been here for 9 years and is at a crucial stage of her education".*

This is demonstrated by the Appellant's attempt at the last hearing to amend the grounds of appeal – rejected for reasons set out in my earlier written decision. And even at this latest stage Mr Ali placed emphasis in his opening observations and submissions on a supposed failure of the First-tier Tribunal Judge to take into account the Appellant's medical condition in considering the circumstances of E, submitting that the 'reasonableness' test (whether in respect of rule 276ADE(1)(iv) or section 117B(6)) should factor in all circumstances including the circumstances of E's father (i.e. the Appellant).

8. Indeed it seems to me that the core strategy of the Appellant's case before the Upper Tribunal was to continue to attempt to pursue arguments in respect of his health condition: the initial tactic was to seek to amend the grounds of appeal to permit challenge to the Judge's findings notwithstanding the basis of the grant of permission to appeal; when that tactic failed Mr Ali sought to pursue submissions in respect of the Appellant's medical circumstances as an aspect of reasonableness – notwithstanding that they did not feature in such a context in the grounds of appeal or inform the grant of permission to appeal.

9. I accept that in principle the medical circumstances of a parent could potentially impact upon the question of reasonableness. Indeed, I recognised as much in my decision refusing the application to amend the grounds of appeal when concluding my written decision with this observation:

> "*Of course in this context if the Appellant wishes to file any further medical evidence to address the real world situation of the likely circumstances upon return to Bangladesh with a view to rely upon such matters in the event that an error of law was found that is permissible*" (paragraph 25).

The reference to the 'real world' situation there is necessarily an echo of the observations of Lord Justice Lewinson in **EV (Philippines) [2014] EWCA Civ 874** referenced with approval by Lord Carnwath in **KO (Nigeria) and Others v Secretary of State for the Home Department [2018] UKSC 53**, and as such was an acknowledgement that if the 'reasonableness' test in respect of E were to be revisited in light of a finding of error of law then that might encompass a consideration of her father's medical circumstances were the family to be in Bangladesh. (In the event, no such further medical evidence has been filed since the last hearing.)

10. However, Mr Ali's submissions in this regard essentially constituted an attempt to traverse the Judge's consideration of the evidence relating to the Appellant's medical condition at paragraphs 25-44 in a manner that amounted to nothing more than an attempt to reargue the appeal. He repeatedly sought to take me to the materials in the Appellant's First-tier bundle as a means of challenging the Judge's evaluation and findings in respect of the Appellant's medical grounds. I indicated to him that I considered that this was inappropriate: at the error of law stage – and bearing in

mind the scope of the grant of permission to appeal - what was required was a consideration of whether or not the Judge had erred in the application of the 'reasonableness' test to E or 'proportionality' under Article 8, in the context of the findings made by the Judge; the refusal to grant permission to appeal to challenge the decision in respect of the medical grounds was such that it was not presently open to the Appellant to attempt to reopen such findings to establish a new premise from which to challenge the Judge's conclusions in respect of E's position.

11. In this context, and for the avoidance of any doubt, I note that I could identify nothing in Mr Ali's submissions, and cannot otherwise identify anything in the available materials, to suggest anything other than that the Judge in considering the Appellant's medical circumstances had full regard to the evidence and reached entirely sustainable findings for reasons that were readily apparent on the face of the Decision.

12. As per paragraph 24 of my ruling in respect of the application to amend the grounds of appeal, I in substance reminded Mr Ali that the permissible basis of the challenge was "*to the Article 8 aspect of the decision of the First-tier Tribunal, with particular reference to the circumstances of the Appellant's daughter against the framework of paragraph 276ADE(1)(iv) and section 117B(6) of the 2002 Act*", which in effect meant addressing me in respect of the First-tier Tribunal's decision from paragraph 49 onwards.

13. In my earlier decision herein I referred to Lord Carnwath's "*simpler and more direct approach*" to 'reasonableness' (per paragraph 14 of **KO (Nigeria)**), and suggested that pursuant to **KO (Nigeria)** what is required is

> an evaluation of what is reasonable for the child;
>
> bearing in mind best interests;
>
> and bearing in mind the **Zoumbas** principle, that the child is not to be blamed for matters for which she is not responsible;
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> but in the real world situation of where the parent or parents are expected to be;
>
> which usually mean that the ultimate question will be – is it reasonable to expect the child to follow the parent with no right to remain to the country of origin.

14. I can see no suggestion of a contrary approach in **JG**.

15. In my judgement the First-tier Tribunal Judge's method at paragraphs 49-54 was entirely in keeping with this approach. The sub-heading above paragraph 49 – "*Reasonable to leave the UK – [E]*" – and paragraph 49 describe the question being addressed. Paragraphs 50-52 entirely focus on the circumstances of E, and essay an evaluation of her best interests. At paragraph 53 the Judge refers to the circumstances of the Appellant, but in doing so is manifestly considering the claimed impact upon E of returning to Bangladesh in the company of her parents – and therefore the real world situation of E's likely circumstances in the event of return.

16. The criticism of these paragraphs in the Grounds in support of the application for permission to appeal – appearing as it does in a document focused in the main on the medical circumstances of the Appellant – is limited and essentially amounts to the following at paragraph 10:

> "*The Appellant further contest that although Judge J L Bristow was rightly mindful of [E]'s life in the UK and her best interest (Paragraph 50 and 51) was enunciated while determining Appellant's matter. But he contends that her private life and her best interest were not substantively taken into account. She started going to school since her formative life. She completed her primary and secondary education here and is waiting for her GCSE results to reveal. Such fact cannot be denied even though there were not sufficient documents to prove this notion which is raised by Judge J L Bristow. Her best interest also means to her basic right which is right to education. The Appellant contends that her best interest was not reflected and her insurmountable hardship was not even addressed in the determination. Therefore the Appellant strongly believes the determination of the First-tier Tribunal thus erred factually and legally.*" [sic.]

17. It may be seen that paragraph 10 of the Ground acknowledges that the Judge evaluated best interests, but disputes that evaluation. It does so with reference to E's education. I can see no substance to the challenge: the Judge expressly referred to the testimony of the Appellant in respect of E, including her education, and referenced the supporting evidence from the schools (paragraph 50); there is no suggestion on the face of the decision that the Judge did not accept such a commonplace circumstance of E being in state education in the UK; indeed he expressly found "*that she has been educated here*" (paragraph 51, and see also paragraph 52).

18. It is to be recalled that beyond the amount of time spent in the UK, and the fact that she was in school in the UK, nothing further was advanced in respect of E's circumstances, whether by way of supporting evidence or testimony. E's position and circumstances as advanced by the Appellant are fully reflected in the Judge's evaluation.

19. In all the circumstances I conclude that the pleading at paragraph 10 of the Grounds in substance amounts to no more than a disagreement with the outcome. No error of law is identifiable.

20. For the avoidance of any doubt I note that there is an additional pleading at paragraph 14 of the Grounds which references best interests. However, in context paragraph 14 has as its premise the assertion that the Appellant's life would be at risk in Bangladesh and that this was not taken forward into the best interests evaluation. This point is answered by the circumstance of the Judge finding that the Appellant had not made out his case in respect of his claimed circumstances in the event of return to Bangladesh. (See similarly paragraph 5(ii) above.)

21. Mr Ali's oral submissions did not advance the case much further. He criticised the Judge's use of the word 'many' in the following sentence: "*It is correct that many of her formative years have been in the UK and that she has been educated here*" (paragraph 51). Mr Ali submitted that the use of the word 'many' did not reflect that it was in fact 'most' of E's formative years that had been spent in the UK. I do not accept that the Judge lost sight of the facts recited in the immediately preceding paragraph – "*[E] came to the UK on 22 September 2008. She would then have been 6 years of age. She has been living in the UK for 9 years. She is now 15 years of age.*" - or that the choice of the word 'many' otherwise amounts to an error of law.

22. Mr Ali was also critical of the Judge's use of the word 'some' in the sentence "*She will have assumed some of the culture of the UK*" (paragraph 51). It was submitted that this underplayed the significance of the time spent in the UK, and that more generally the Judge had accorded too much weight to the initial 6 years lived in Bangladesh, and had not sufficiently balanced the subsequent approximately 10 years in the UK. In my judgement this was essentially to re-present arguments as to weight which were also matters for the evaluation of the Judge; the submission was rooted in disagreement and not in the identification of an error of law.

23. Mr Ali also sought to impugn the Judge's finding that E's parents would be able to facilitate her integration back into life in Bangladesh (paragraph 52). In this context he argued that there was no consideration of the Appellant's ability so to do in light of his medical circumstances. As already noted, the Judge rejected the Appellant's case in respect of his medical circumstances, and as such it was not established that either parent would be materially restricted in this context. The finding was open to the Judge. In respect of integration Mr Ali also made reference to a potential language problem on the basis of Sylheti being a spoken rather than written dialect; however he accepted that this was not a matter pleaded in the Grounds, and he was not able to identify that it was a factor that has been advanced before the First-tier Tribunal.

24. In all such circumstances I find no error of law in respect of the Judge's approach to the question of reasonableness under paragraph 276ADE(1)(iv) and section 117B(6).

25. The Judge went on to consider proportionality under Article 8: see paragraph 55-73. On the matters that focus upon the Appellant's medical circumstances, I can identify no express pleading in the written Grounds in support of the application for permission to appeal that challenge the evaluation in respect of E. Nonetheless, as noted above, it is with particular regard to 'proportionality' that it was considered appropriate to grant permission to appeal.

26. In seeking to develop the case in this regard – in the absence of any formal written ground of appeal – Mr Ali focused on the factors at paragraph 69(a) and (c) of the First-tier Tribunal's Decision. Paragraph 69 begins "*I find that the following factors weaken the Article 8 claim:*". At subparagraph (a) reference is made to section 117B(5) of the 2002 Act and it is observed that "*little weight should be given to the private lives of the Appellant [his wife] and [E] since 01 September 2014 because these were established when their immigration status was precarious*". Subparagraph (c) takes forward the Judge's earlier findings to the effect that the Appellant had "*not proved the prognosis of his medical condition*", and "*has not proved the seriousness of it… the necessity or otherwise of the bone marrow transplant [or] the cost of treatment in Bangladesh or whether the treatment is available or not*".

27. The submission in this latter regard constituted a yet further attempt to revisit the Judge's findings in respect of the Appellant's case on medical grounds. I find no substance in Mr Ali's criticisms of the Judge's reliance on the matters set out at paragraph 69(c).

28. In the abstract there is nothing objectionable to the Judge's observation at paragraph 69(a). Mr Ali sought to suggest that focus on this as an adverse factor that weakened the Article 8 claim demonstrated a failure to balance all the circumstances of the case. It seems to me that this submission fundamentally disregarded the positive matters identified by the Judge at paragraph 68 – "*I find that the following factors contribute weight to the Appellant's Article 8 claim*", which included expressly that "*the private and family life he has established in the UK with [his wife] and [E] is of around 9 years duration*" (paragraph 68(a)), and "*[E] has spent formative years here and has been in education here. She has been here for 9 years since the age of 6*" (paragraph 68(d)).

29. Indeed it is manifest that Judge undertook a 'balance sheet' approach in evaluating proportionality. The Judge had regard to the five **Razgar** questions (paragraphs 55-60), and in respect of proportionality identified that it was for the Respondent to demonstrate the decision was justified in the public interest (paragraph 63), before having regard to the public interest considerations under the 2002 Act (paragraphs 64-67), and then expressly setting out positive and negative factors (paragraph 68

and 69). The Judge Paul all these matters together at paragraph 70 and concluded that the Respondent "*has justified the decision*".

30. I cannot identify any fault or error in the approach of the Judge. In respect of E it is manifest that the Judge took fully into account the limited information provided in respect of her circumstances, including in particular the amount of time that she had been in the UK and the fact that she was in education here. The Judge recognised that the Appellant was a qualifying child, but sustainably concluded that it would be reasonable to expect her to leave the UK. The Judge went on to consider proportionality, again taking into account the private life established by E the UK, but balancing this against the public interest requirements in the context of all the circumstances of the case. Again, I find that the conclusion reached was adequately reasoned and is sustainable; it is not impugnable for error of law.

31. In all such circumstances I find that the Appellant's challenge to the decision of the First-tier Tribunal fails.

Notice of Decision

32. The decision of the First-tier Tribunal contained no error of law and stands.

33. The Appellant's appeal remains dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: Date: **18 September 2019**

Deputy Upper Tribunal Judge I A Lewis