Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/02216/2017
HU/02258/2017
HU/02274/2017
HU/02280/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 January 2019	**On 21 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

D A (FIRST APPELLANT)
A O (SECOND APPELLANT)
S A (THIRD APPELLANT)
D A (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr D Olawanle, Del & Co Solicitors
For the Respondent: Ms L Kenny, Home Office Presenting Officer

DECISION AND REASONS

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1. The first Appellant is a national of Ghana born on 19 June 1973. The second Appellant is his wife born on 7 November 1977 and they have two children, the third Appellant born on 21 October 2009 and the fourth Appellant born on 24 July 2013.

2. They appeal against a decision by the Respondent dated 23 January 2017 refusing their applications for leave to remain on the basis of their private and family life. The Appellants appealed against that decision and their appeal came before Judge of the First-tier Tribunal Rayner for hearing on 13 April 2018.

3. In a decision and reasons promulgated on 20 June 2018, the judge dismissed the appeal, essentially on the basis that the best interests of the third Appellant, who was a qualifying child, were outweighed by the public interest, bearing in mind that the first and second Appellants are overstayers.

4. The Appellants sought permission to appeal to the Upper Tribunal, in time, on the basis that the judge had erred in law in concluding it would be reasonable to remove a child who would be 9 years old shortly and had always lived in the UK, even when it was not in the public interest to remove her. Reference was made to the fact the first Appellant runs a charity turning over about £900,000 a year attending to the underprivileged in society and that this charity would collapse if he were to be removed.

5. It was submitted that proper regard was not had to section 117B(6) of the NIAA 2002 and the policy guidance of the Respondent, and that the judge misdirected herself in respect of the judgment of Lord Justice Elias in MA Pakistan [2016] EWCA Civ 705 at [19], [20], [36], [44] to [46], [49], [52] to [53] and [100] to [104].

6. Permission to appeal was granted upon renewal to the Upper Tribunal in a decision dated 29 November 2018 by Upper Tribunal Judge Pitt who held:

> *"It is arguable that the FtTJ took a wrong approach in the assessment of whether it was reasonable for the older child to leave the UK, KO Nigeria [2018] UKSC 53 considered.*
>
> *All grounds are arguable".*

Hearing

7. At the hearing before the Upper Tribunal, Mr Olawanle sought to rely on the grounds of appeal and essentially reiterated what was contained therein. He submitted that the judge had not struck a fair balance when bearing in mind the Appellant had set up a successful charity, insufficient weight had been attached to the positive contribution of the Appellants who are contributing to the economic wellbeing of the country. He submitted it was not in the best interests of the children to go to Ghana given the absence of their parents for many years and the balance had not been struck fairly or properly thus it will be unreasonable or unduly harsh.

8. In her submissions on behalf of the Secretary of State, Ms Kenny stated that she struggled to see where the judge had gone wrong. The decision was thorough and well balanced and the submissions to the contrary were simply a disagreement with the judge's findings of fact.

9. At [22] the judge noted in respect of the charity that no testimonials had been provided as to the work done, the evidence was entirely based on what the Appellants had said and there was no evidence that the charity will be dismantled if they had to leave.

10. At [26] in respect of the eldest child, there were good school reports and good progress had been made by her, but it was not suggested she was at a particularly important stage of her education. She can speak English, she has no medical conditions and at [27] the judge examined her situation in further detail. She had no significant needs and her education and healthcare can be provided for and met in Ghana.

11. Ms Kenny submitted the judge considered all the relevant points in order to arrive at her conclusion, in particular that the third Appellant's parents are familiar with the customs and culture of Ghana. They are financially stable, well educated, highly adaptable and resourceful and will be able to set up something akin as to what they have done here in the UK in Ghana.

12. At [45] whilst it was marginally in the third Appellant's best interests to remain in the UK, this does not mean it is not reasonable for her to leave and at [47] in respect of the fact that the children have no experience of Ghana, she submitted the judge found that the public interest trumps the Appellants' case. She submitted that the judge's decision was in accordance with the judgment in KO (Nigeria) [2018] UKSC 53, as the judge had considered all the factors affecting the child's integration.

13. I put to both parties the judgment of Lord Justice Elias in MA Pakistan [2016] EWCA Civ 705, particularly at [49] where he held

> *"The fact that the child has been in the UK for seven years would need to be given significant weight in a proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary".*

14. I pointed out the judge had not considered this aspect of the judgment when assessing the reasonableness of expecting the third Appellant to return, having at [45] only considered [47] and [48]. My question was whether this is still good law in light of the judgment of the Supreme Court in KO (*op cit*). Ms Kenny submitted that [47] of MA Pakistan clearly ties in with KO (Nigeria). Mr Olawanle submitted there were no powerful reasons which would prevent the Appellants from being granted

leave in the UK apart from the overstay. He sought to rely on pages 224 to 275 and 276 to 287 regarding the charity.

Findings and Reasons

15. I find a material error of law in the decision of Judge of the First-tier Tribunal Rayner and that is the failure to fully apply the judgment of Lord Justice Elias in MA Pakistan (*op cit*), despite citing the relevant extract from his Lordship's judgment at [47] and [48] at [45] of her decision, *viz:* "*The fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed the Secretary of State published guidance in August 2015 in the form of the Immigration Directorate Instructions entitled family life as a partner or parent and private life ten year routes, in which it is expressly stated that once the seven years' residence requirement is satisfied there need to be 'strong reasons' for refusing leave (11.2.4). After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families but the disruption becomes more serious as they get older. Moreover in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit and that must rank as a primary consideration in a proportionality assessment*".

16. Whilst the Home Office guidance has subsequently been updated, I find that the principles set out in MA Pakistan have neither been overturned nor are inconsistent with the judgment of the Supreme Court in KO Nigeria and Others [2018] UKSC 53, which was in any event primarily concerned with the issue of whether, when considering whether it will be unduly harsh for a child of a foreign national criminal to leave pursuant to section 117C(5), the Tribunal is concerned only with the position of the child and not with the immigration history and conduct of the parents or any wider public interest factors in favour of removal [23].

17. Whilst the judgment of Lord Justice Elias in MA Pakistan (*op cit*) was before their Lordships in KO (Nigeria), the only point taken was in relation to [40] of the judgment of Lord Justice Elias, where his Lordship considered whether the wider approach to reasonableness should be adopted, which is not the point in issue before me. It is apparent from the evidence and from the judge's findings that the only issue relied upon in respect of the public interest was the fact that the Appellants have an unlawful or precarious immigration status.

18. The judge at [53] accepted with reference to the public interest considerations which she set out at [52] that all the Appellants speak English as their primary language, they are financially independent with reference to section 117B(3) but little weight could be given to their private life as it was established whilst they were here either unlawfully or precariously.

19. In respect of Section 117B(6) the judge found that the third Appellant was a qualifying child but relied on her reasons previously provided at [49] in respect of 276ADE(iv) of the Immigration Rules that it would be reasonable for her to return.

20. I find when considering the issue of the reasonableness of the third Appellant's return, the judge fell into error at [48], in that while she considered the judgment in Zoumbas [2013] UKSC 74 and EV Philippines [2014] EWCA Civ 874, the judge did not consider MA (Pakistan) in respect of that assessment.

21. In light of the Home Office guidance which was adopted by Lord Justice Elias at [49] of MA (Pakistan), I find thus that the judge materially erred in law. In the absence of powerful reasons or very strong reasons, which are defined in the Home Office guidance as a very poor immigration history or criminality, etc. and in light of the judge's finding at [41] that the first Appellant's immigration history is poor, I find that the word very is not mere surplusage.

22. The parties agreed that, were I to find a material error of law I should re-make the decision based on a consideration of the papers.

23. The relevant Home Office guidance was updated on 23 January 2019, to reflect the judgment in KO (Nigeria). Consideration of the issue of reasonableness is set out at [68]-[70], however, there is no reference therein to the judgment in MA (Pakistan). As set out above, I do not consider that the judgment in KO (Nigeria) has replaced the judgment of Lord Justice Elias in MA (Pakistan) not least because the appeal was brought on a different factual basis and their Lordships simply did not address that issue. Thus I do not find the guidance in its current manifestation to be of particular assistance.

24. Whilst it is not disputed that the first Appellant has been an overstayer since 30 November 2004 and the second Appellant has overstayed since 7 August 2008, no other adverse factors were identified by the Respondent in the refusal decision nor were any identified during the appeal hearing or in the Judge's decision and reasons. Consequently, I find that there is an absence of the types of behaviour such as criminality, or a very poor immigration history, that would amount to very strong reasons rendering removal of the family proportionate *cf.* MT and ET (child's best interests; *ex tempore* pilot) Nigeria [2018] UKUT 00088 (IAC) at [33]-[34].

25. I adopt the reasoning of Upper Tribunal Judge Plimmer in SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 00334 (IAC) where she held:

> *"55. The proper application of section 117B(6) when resolved in an individual's favour is determinative of the issue of proportionality. As Sales LJ made clear in Rhuppiah v SSHD [2016] EWCA Civ 803, [2016] 1 WLR 4204 at [45], sections 117A-117D of the 2002 Act provide a structured approach to the application of Article 8 which produces in all cases a "final result" compatible with Article 8. Where Parliament has declared that the public interest does not*

require a person's removal in specified circumstances, and those circumstances are present, that is the end of the matter."

26. I substitute a decision allowing the appeal, on the basis that it would not be reasonable to expect the third Appellant, who is a qualifying child, to leave the United Kingdom. Thus the requirements of section 117B(6) of the NIAA 2002 are met and the public interest does not require removal of this family unit.

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 their 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 *Rebecca Chapman* Date 20 February 2019

Deputy Upper Tribunal Judge Chapman