Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/12224/2018
HU/12227/2018
HU/12232/2018
HU/12236/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 March 2019	**On 29 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

ANISHABEN [M] (FIRST APPELLANT)
SHIDDIKBHAI [M] (SECOND APPELLANT)
[Z M] (THIRD APPELLANT)
MOHAMMED [M] (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr P Richardson, Counsel instructed by Paul John & Co solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are nationals of India and are a family. The first Appellant was born on 11 March 1983 and is married to the second Appellant who was born on 19 November 1974. The third and fourth Appellants are their sons, born respectively on 6 September 2002 and 11 July 2000.

2. They entered the UK together on 30 September 2008 with visit visas. A subsequent application was made on 24 March 2009 for leave to remain outside the Rules but these applications were refused and despite reconsideration the decisions were maintained on 18 August 2010. On 10 December 2012, EEA residence card applications were made but these applications were also refused on 8 January 2014. On 28 February 2017, the Appellants submitted private life applications, which were refused in decisions taken on 24 May 2018.

3. The Appellants appealed against this decision on human rights grounds. Their appeals came before Judge of the First-tier Tribunal Pooler for hearing on 8 January 2019. In a decision and reasons promulgated on 23 January 2019, the judge dismissed the appeal. He noted that the second Appellant had a conviction for possession of a false identity document in respect of which he had been sentenced to six months' imprisonment and had failed to disclose this. Thus he did not meet the requirements of paragraph S-LTR 1.6 and 2.2(b) and that the first Appellant had an outstanding NHS debt of £862 and thus did not qualify pursuant to S-LTR 4.5 of Appendix FM of the Rules.

4. The issue before the judge was essentially the reasonableness in expecting the third and fourth Appellants to leave the UK given the length of residence. Also at [13] the judge held as follows in relation to the fourth Appellant:

> *"I find, however, that he was unable to meet the requirements of sub-paragraph (v) because of the requirement in the Rules that his circumstances must be considered at the date of application. On 28 February 2017 he was below the age of 18 and so could not fall within paragraph 276ADE(1)(v)."*

This refers to the fact that the fourth Appellant was 17 at the date of application but was 18 at the date of hearing and thus qualified under paragraph 276ADE(1)(v) of the Rules.

5. The judge proceeded to dismiss the appeals, finding that it was reasonable to expect the third and fourth Appellants to follow their parents to India.

6. Permission to appeal was sought in time on the basis of the following grounds. Firstly that the judge had materially erred in failing to follow the relevant guidance at [18], [20] and [22]. The guidance referred to being not only the Home Office guidance but the jurisprudence including MA (Pakistan) [2016] EWCA Civ 705 at [46].

7. It was further submitted at ground 2, that the judge had failed to consider all the relevant factors. In particular, the fourth Appellant is now 18 years of age and had lived in the UK for over ten years at the date of hearing and at that time qualified

pursuant to paragraph 276ADE(1)(v) of the Rules. It was submitted that this is a very significant factor which the judge should have considered in terms of the reasonableness of expecting him to leave the UK.

8. Permission to appeal was granted by First-tier Tribunal Judge Andrew in a decision dated 12 February 2019 on the following basis:

> *"I am satisfied there are arguable errors of law in this decision in that the Judge has not taken full note of the case law guidance in relation to a child who has been in the UK for over seven years and who is about to take GCSE examinations. Further, it is arguable that when coming to his conclusions the Judge did not give any weight to the fact that the older child had been in the UK for over half his life. Had he done so he may have come to a different conclusion as to the appeal of the children's parents."*

Hearing

9. At the hearing before the Upper Tribunal, Mr Richardson on behalf of the Appellants adopted the grounds of appeal in their entirety. He helpfully set out the immigration history and the relevant dates and submitted that the issue was the length of residence of the children. Mr Richardson also acknowledged that neither the first nor second Appellant could qualify under the Rules due to their inability to meet the suitability requirements and that following the Supreme Court judgment in KO (Nigeria) [2018] UKSC 53, this does count against them.

10. Mr Richardson submitted that at the date of the applications on 28 February 2017 both the third and fourth Appellants were minors and were both considered at the date of decision on 24 May 2018, i.e. fifteen months later, under paragraph 276ADE(iv), i.e. that they had resided for more than seven years and it would be unreasonable to expect them to leave the UK.

11. However, by the time of the appeal hearing before Judge Pooler, the fourth Appellant had attained his majority and was over 18. The consequence of that was that at the date of the appeal hearing he had been in the UK for more than half his life and had he made an application under paragraph 276ADE(1)(v) of the Rules this would have succeeded.

12. At [13] of the decision, the judge correctly noted however that at the date of application the fourth Appellant did not meet the requirements of paragraph 276ADE(1)(v) of the Rules. However, Mr Richardson submitted that where the judge fell into error, was in completely failing to factor in that the fourth Appellant was capable of satisfying the Rules and thus this was clearly material to an assessment of the proportionality of his removal pursuant to Article 8.

13. Mr Richardson further submitted that if it is right that the fourth Appellant succeeds under the Rules, that it would be an affront to common sense that the third Appellant should be treated less favourably. Given that he was due to undertake his GCSEs it would be even harder for him to relocate and he has been in the UK for the

same length of time as his brother, i.e. he is now 16 and he arrived in the UK at the age of 6.

14. In relation to the Supreme Court judgment in KO (Nigeria) [2018] UKSC 53, he submitted that the fact that one of the family members was entitled to remain under the Rules is a *"real world"* factor and that *KO (Nigeria)* encourages decision makers to look at the reality of the situation. He submitted that this is a factor of some weight but there is no mention of this by the judge in his assessment of reasonableness at [13].

15. In relation to the second ground of appeal, Mr Richardson submitted that we are dealing here with a child who is now an adult, having resided in the UK continuously for ten and a half years, and a 16-year-old who has been in education for the entirety of that period. The third and fourth Appellants cannot read or write in Gujarati and the judge expressly found at [18] that it would be in their best interests to remain in the UK. However he found at [20] *"I see no reason why they would be unable to learn that skill within a reasonably short period"* which Mr Richardson submitted was an unreasonable finding.

16. He submitted in terms of the best interests of the third and fourth Appellants that their case was very strong in terms of their ties with the UK, albeit he accepted that the real world factors, i.e. the parental conduct, were material. Even with those factors they could not reasonably be required to interrupt the education of the third and fourth Appellants.

17. Mr Richardson handed up copies of the recent presidential decision in JG (s117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC) where the Tribunal did consider the impact of *KO (Nigeria)* and real world factors at [84]. Mr Richardson reiterated that the primary consideration is still the best interests of the children to remain in the UK as found by the judge at [18] and their historic jurisprudence, e.g. ZH (Tanzania) [2011] UKSC 4 and that there were clearly material errors in the judge's decision.

18. In his submissions, Mr Bramble sought to defend the judge's decision stating that there was full consideration of the third and fourth Appellants at [16] to [22] of the decision; that the judge was fully aware of their circumstances and had those at the front and centre of his considerations. The judge accepted it would be unfortunate if the third Appellant would have to leave before taking his GCSEs at [18] and was fully aware that they had been in the UK for more than ten years and that their best interests lie in remaining in the UK.

19. Mr Bramble submitted that albeit he did not refer to KO (Nigeria) [2018] UKSC 53, the judge has applied it correctly; that there were two parents whose misconduct would not in their own right enable them to have any right to remain in the UK and this was dealt with by the judge at [19]. He submitted the judge could not ignore the factual situation and it was open to him to find it was reasonable for the third and fourth Appellants to return to India.

20. Mr Bramble did, however, accept that the fourth Appellant had become an adult by the date of hearing and was capable of satisfying the Rules. He also accepted that potentially there was an error in that the judge did not take that factor into account in the proportionality exercise. However Mr Bramble submitted that this was not material in the context of the appeal, because the cases had always been argued on the basis that the Appellants are a family unit and it was not indicated that the fourth Appellant wished to be treated as a separate independent person. Thus he submitted that this factor would not change the determination and was not sufficient to tip the balance in light of the background of the parents, the NHS debt and the conviction.

21. In reply, Mr Richardson submitted that the failure by the judge to factor in the half-life aspect of the case in relation to the fourth Appellant was material in two ways. Firstly, if a member of a family has a right to remain under the Rules this impacts on the reasonableness of relocation of his sibling and this is key to determining whether or not his parents stay. The second reason is that the Rules are set by the Secretary of State as to where his obligations lie in terms of Article 8 and if an individual satisfies the Rules then it follows that it is unlikely that removal would be proportionate and this impacts on the appeals of the family as a whole.

Findings and Reasons – error of law

22. I found a material error of law in the decision of the First-tier Tribunal Judge and announced my decision at the hearing. I found the second ground of appeal in particular has merit in that clearly the fact that the fourth Appellant qualified under paragraph 276ADE(1)(v) of the Rules was a material consideration in assessing the proportionality of the Appellants' Article 8 case as a whole. However, I also found that the Judge's impugned findings at [18], [20] and [22] in respect of the reasonableness of expecting the third and fourth Appellants to leave the UK were flawed due to the failure by the Judge to consider the Home Office guidance in force at that time and the judgment of Lord Justice Elias in MA (Pakistan) [2016] EWCA Civ 705, bearing in mind the recent judgment of the Upper Tribunal in JG (s117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC).

Submissions on the substantive appeal

23. I invited the parties to address me as to next steps and both parties agreed that there were sufficient findings for the Upper Tribunal to re-determine the appeal.

24. I then heard submissions from Mr Bramble on behalf of the Secretary of State, who submitted in line with his earlier submissions as to the error of law aspect that the question is whether the fact that the fourth Appellant meets the requirements of the Rules makes a material difference. Whilst he has turned 18, the extant appeals related to the family unit as a whole. Mr Bramble submitted that if the fourth Appellant wished to remain in the UK, it was open to him to make an application on his own and queried why the first two Appellants should benefit in light of their poor immigration history. He submitted that this does not necessarily impact on the

circumstances of the third Appellant and that they still stand and it was reasonable to expect the third Appellant to return to India with his parents.

25. In his submissions, Mr Richardson fairly accepted that the third and fourth Appellants are the only Appellants who are capable of succeeding. He reminded me that as this is a human rights appeal the relevant decision is today's date. However that regard should be had for the purposes of Article 8 to paragraph 276ADE(1)(v) in relation to the fourth Appellant, albeit the appeal could not be allowed under the Rules and the fourth Appellant has not, as yet, made an application for leave to remain in his own right. Mr Richardson also submitted that the parents, the first two Appellants, can only succeed outside the Rules and therefore the position was today that there was only one qualifying child, the third Appellant, and that Section 117B(6) of the NIAA 2002 applied in relation to assessing the reasonableness of expecting him to relocate to India.

26. In relation to the fourth Appellant, Mr Richardson submitted that his ability to meet the Rules is determinative of his appeal outside the Rules (cf. TZ (Pakistan)[2018] EWCA Civ 1109 at [34]

27. The fourth Appellant is now an adult, he has been in the UK for ten and a half years since the age of 8, all his formative years and almost all of his education has been in the UK and it is his intention to continue his education or undertake an apprenticeship. He is an English speaker, whilst he can speak Gujarati he cannot read or write it, as the judge accepted at [20] of his decision.

28. In relation to the third Appellant, he is now in the final year of his GCSE studies, having resided in the UK since the age of 6. He has grown up in this country and this is key to determining his appeal. At [18] the judge found he would not suffer harm if he were to leave the UK, but rather disruption. Mr Richardson submitted it was overwhelmingly contrary to his best interests for him to have to leave the UK and his best interests have to be assessed in the real world (cf. JG (Turkey) op. cit. at [27]). Mr Richardson accepted that parental conduct is relevant to the assessment of reasonableness and even if this produced unsatisfactory results, as was acknowledged in **GJ** at [41], this is the effect of the Rules that have been put in place by the Secretary of State.

29. I reserved my decision, which I now give with my reasons.

Findings and reasons – substantive appeal

30. I proceed to determine the appeal on the basis that there is no dispute of fact: the family have resided continuously in the UK since 30 September 2008; neither the first nor the second Appellant can meet the suitability requirements of the Rules; the third Appellant was aged 6 when he arrived in the UK and is now 16 and undergoing his GCSEs and the fourth Appellant was 8 when he arrived and is now 18. He would be eligible for leave to remain pursuant to paragraph 276ADE(1)(v) of the Rules if he

were to make an application, because he is 18 and has spent more than half his life in the UK.

31. Mr Bramble submitted that the fourth Appellant should be treated independently, due to the fact that he is now an adult. I do not accept that submission. The higher Courts have made clear on numerous occasions that there is no "*bright line*" in respect of young adults *cf.* Lord Justice Maurice Kaye in KA (Afghanistan) v Secretary of State for the Home Department [2012] EWCA Civ 1014 at [18]. He still lives as part of the family unit and I consider that he remains part of the family. Thus I proceed on the basis that the fact that he is eligible for the grant of leave to remain under the Rules is a factor relevant to the proportionality of removal.

32. The third Appellant's case is based on paragraph 276ADE(1)(iv) of the Rules. There is no dispute that he is under 18 and has resided continuously in the UK for at least 7 years, thus the question if whether it would be reasonable to expect him to leave the UK. This is the same test as that contained in the statutory public considerations set out in section 117B(6)(b) of the NIAA 2002. There is no dispute that the third Appellant has a genuine and subsisting relationship with his parents. Moreover, in light of the finding of the former President in Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 00013 (IAC) at [20]-[21] if the conditions set out in section 117B(6) are met, the public interest does not require the removal of the parent(s) from the UK and consequently, the public interests identified in section 117B (1) – (3) do not apply.

33. I find in light of the judgment in JG (s117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC) that it would not be reasonable to expect the third Appellant to leave the UK. He has resided in this country continuously for more than 10 years; all his education has taken place here and he is currently studying for his GCSEs exams. The Presidential panel held *inter alia* as follows:

> *"8. In October 2018, the Supreme Court gave judgment in KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53. The Court's judgment was given by Lord Carnwath.*
>
> *9. The first thing to note is that there is nothing in the judgment that overturns the conclusion of the Court of Appeal in MA (Pakistan) regarding the free-standing nature of section 117B(6), in the sense that where the application of that provision results in the public interest not requiring the removal of the person concerned, he or she must succeed under Article 8 on the basis that the proportionality balance contains nothing on the Secretary of State's side of the scales. The words "the public interest does not require the person's removal" mean what they say …*
>
> *27. We do not consider that paragraphs 18 and 19 of KO (Nigeria) mandate or even lend support to the respondent's interpretation. In those paragraphs, the point being made by Lord Carnwath and by the judges in the cases he cited is merely that, in determining whether it would be reasonable to expect the child to leave the United Kingdom, one must have regard to the fact that one or both of the*

> *child's parents will no longer be in the United Kingdom, because they will have been removed by the respondent under immigration powers. That, we find, is the extent of the "real world" envisaged by Lord Carnwath …*
>
> *40. … If, as we have found, Parliament has decreed a particular outcome by enacting section 117B(6), then that is the end of the matter.*
>
> *41. We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A of imposing greater consistency in decision-making in this area by courts and tribunals. The fact that section 117B(6) has such an aim was expressly recognised by Elias LJ at paragraph 44 of MA (Pakistan) …*

34. I have no hesitation in finding that it would not be reasonable for either the third or the fourth Appellant to leave the UK and that it would be entirely contrary to the third Appellant's best interests, given the stage he has reached in his education, coupled with his continuous residence for over 10 years. I accept in light of the findings of the First tier Tribunal, that the third and fourth Appellants are fluent English speakers.

35. In respect of the parents, the first and second Appellants, I note that in *JG*, which has some similarities to the extant appeal, it was determined on the following bases:

> *"80. Our assessment of the appellant is that she is both dishonest and unscrupulous, each to a high degree. She has flagrantly defied the law of the United Kingdom by overstaying her leave for a large number of years, without bothering to seek to regularise her status; by making entry clearance applications that she knew full well were predicated on an entirely false basis; and in gaining access to the United Kingdom by employing dishonesty…*
>
> *84. Applying the "real world" analysis of paragraphs 18 and 19 of KO (Nigeria), the assessment of whether it would be reasonable in terms of section 117B(6) to expect the children of the appellant and her partner to leave the United Kingdom falls to be determined on the basis that there are powerful reasons why the appellant should be removed by the respondent under section 10 of the Immigration and Asylum Act 1999."*

36. I find that similarly, given the second Appellant's conviction and sentence of 6 months imprisonment for possession of a false identity document there are powerful reasons why he should be removed. Further, the first Appellant is also unable to meet the suitability requirements at S-LTR 4.5. due to an outstanding NHS debt of £862. However, following *JG* I am required to determine section 117B(6) on the basis of whether it is reasonable to expect the child to follow the parent with no right to remain to the country of origin. Given that I have found, for the reasons set out at [34] above that it would not be reasonable to expect the third Appellant to leave, the appeals of his parents also succeed on the basis of section 117B(6) of the NIAA 2002.

37. I allow the fourth Appellant's appeal on the basis that his removal would be a disproportionate interference with his private and family life, given that, albeit no application has been made to date, if he made an application for leave to remain pursuant to section 276(ADE)(1)(v) of the Rules, that application would be likely to succeed and thus the judgment in TZ (Pakistan)[2018] EWCA Civ 1109 at [34] is applicable.

38. I allow the appeal of the third Appellant on the basis that he qualifies under paragraph 276ADE(1)(iv) of the Rules and in light of the judgment in TZ (Pakistan)[2018] EWCA Civ 1109 at [34] where the Rules are satisfied that is positively determinative of the appeal.

39. I allow the appeals of the first two Appellants pursuant to section 117B(6) of the NIAA 2002, in light of my finding that it would not be reasonable to expect the third Appellant to leave the UK .

Notice of Decision

The decision of First tier Tribunal Judge Pooler contained material errors of law. I set that decision aside and re-make it, allowing the appeals on human rights grounds (Article 8).

No anonymity direction is made.

Signed *Rebecca Chapman* Date 27 March 2019

Deputy Upper Tribunal Judge Chapman