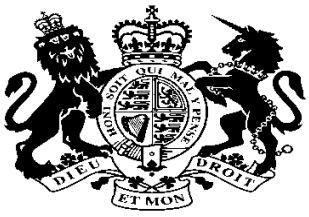

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/16232/2017
HU/16544/2017
HU/16548/2017
HU/16551/2017

THE IMMIGRATION ACTS

Heard at Fox Court
On 13 December 2018

Decision & Reasons Promulgated
On 10 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SYED [N]
MASOOMA [N]
[A N]
[S N]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms R Moffat (counsel) instructed by Wesley Gryk Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant.

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Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Lawrence promulgated on 05/9/2018, which dismissed the Appellants' appeals on all grounds.

Background

3. The appellants are all nationals of Pakistan. The first Appellant was born on 8/11/1974. The second appellant was born on 27/08/1981. The third appellant was born on 9/6/2009. The fourth appellant was born on 12/02/2014. The second appellant is the first appellant's wife. The first and second appellants are the parents of the third and fourth appellants.

4. The first appellant entered the UK as a student on 5 December 2003. He had leave until 31 October 2008. He made a number of applications for extension of that leave which were each refused, but he remained in the UK. He made a number of unsuccessful appeals and sought judicial review without success. His last application for leave to remain was made on 5 April 2017 and resulted in a refusal decision dated 16 November 2017 creating a right of appeal.

5. The second appellant joined the first appellant in the UK on 18 August 2008 as the first appellant's spouse. She was granted leave to remain in line with the first appellant. The third and fourth appellants were born in the UK. The appellants applied for leave to remain in the UK on article 8 ECHR grounds. At that stage the third appellant had been in the UK for more than seven years.

6. On 16 November 2017 the Secretary of State refused the Appellants' application.

The Judge's Decision

7. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge NMK Lawrence ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 25 October 2018 Judge Povey gave permission to appeal stating

> "1. The appellants seek permission to appeal against a decision of First-tier Tribunal Judge Lawrence, who in a decision and reasons promulgated on 5 September 2018, dismissed the appellants' appeals against the Secretary of State's decision to refuse their applications for leave to remain.
>
> 2. The grounds of appeal allege that the Judge erred in law in his assessment whether it was reasonable for the third appellant (as a qualifying child) to relocate with her family to Pakistan, erred in his assessment of the best interests of the third and fourth appellants and ignored relevant evidence.

> 3. In considering the issues of reasonableness and best interests, the Judge recited various extracts from caselaw (at [10]- [28]) before summarising his understanding of the applicable legal principles at [29]. The syntax of that paragraph was confusing and it was unclear what test the Judge concluded he was required to apply. It was arguable that the Judge misdirected himself in applying a test of "*strong reasons*" for granting leave, despite earlier citing the dicta in MA (Pakistan) [2016] EWCA Civ 705 that strong reasons were required to refuse a grant of leave. It was arguably unclear as to how the Judge treated the significance which the authorities required be given to the third appellant's 7-plus years in the UK.
>
> 4. As such, the application for permission to appeal disclosed arguable errors of law and permission to appeal is granted. All grounds may be advanced."

The Hearing

8. Mr Clarke told me that in light of the decision in KO (Nigeria) v SSHD [2018] WLR 5273 he could not argue that the Judge's findings in relation to section 117B(6) of the 2002 are sustainable. He and Miss Moffat, for the appellant, joined in asking me to find that the decision contains a material error of law. On joint motion, they asked me to remit this case of First-tier Tribunal to be determined of new.

Analysis

9. The third appellant is a qualifying child. At the date of application, she had lived in the UK for more than seven years. She is now lived in the UK for 9 ½ years. The Judge acknowledges that the third appellant is a qualifying child. He relies heavily on MA (Pakistan) [2016] and MT & ET [2018] in his analysis of whether or not it is reasonable for the third (and fourth) appellant to leave the UK. At [29] he appears to look for "strong reasons" for granting leave to remain. At [36] his analysis of s.117B(6)(b) rests almost entirely on consideration of the weight to be accorded to the best interests of the child and the search for "strong reasons" found between [16] and [29] of the decision.

10. Since the Judge's decision was promulgated, the Supreme Court decision in KO (Nigeria) v SSHD [2018] WLR 5273 has become available. That decision provides both focus and guidance on the application of section 117B(6) of the 2002 Act.

11. Parties are agreed that the Judges consideration of section 117B(6) of the 2002 Act is inadequate and no longer sustainable in light of the decision in KO (Nigeria) v SSHD [2018] WLR 5273 . The decision contains a material error of law. I set it aside. Parties' agents agree that I should not substitute my own decision and that a further fact-finding exercise is necessary, and that updated evidence is required.

Remittal to First-Tier Tribunal

12. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

13. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the Judge's findings are preserved. A complete re-hearing is necessary.

14. I remit the matter to the First-tier Tribunal sitting at Hatton Cross to be heard before any First-tier Judge other than Judge Lawrence.

Decision

The decision of the First-tier Tribunal is tainted by material errors of law.

I set aside the Judge's decision promulgated on 5 September 2018. The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed Date 21 December 2018

Deputy Upper Tribunal Judge Doyle