Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16420/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25th April 2019	**On 15th May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

M H H I
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Rehman, Mayfair Solicitors
For the Respondent: Mr Walker, Senior Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction is made. I consider it appropriate to do so as part of the evidence in this matter relates to the Appellant's minor child.

DECISION AND REASONS

1. The Appellant, H.H.I., is a national of Pakistan born 31st December 1985. He entered the UK on a Tier 4 Student visa on 11th February 2011. Further leave was granted until 15th April 2015 but in August 2014 his leave was curtailed and he became an overstayer.

2. In December 2015, he met his British partner, U.S. They entered into a religious marriage at the Manchester Central Mosque on 12th May 2016. On 7th April 2017 their daughter H was born. Following the birth of H, the Appellant applied to the Respondent for leave to remain as the partner of a British citizen. The Respondent refused that application in a decision dated 26th July 2018. The main grounds for refusal centred on the suitability requirements under both Appendix FM and paragraph 276ADE to the Rules.

3. Firstly the Respondent did not accept that the relationship with U.S. came within the Rules in that they had contracted an Islamic marriage only. (The relationship issue now appears to have fallen away). However the main thrust of the Respondent's refusal centred on an assertion that the Appellant had used deception by engaging a proxy text taker to complete a TOEIC test taken by him on 3rd April 2013. This formed the basis for the curtailment of leave dated August 2014.

4. The Appellant appealed the refusal to the First-tier Tribunal (Judge Young-Harry) on the only ground available to him, stating that the decision interfered with his Article 8 private/family life rights. The FtTJ heard evidence from both the Appellant and U.S. He noted that the evidence showed that the Appellant had established a family life with U.S. and their child and that article 8 was engaged. He made sustainable findings that the Appellant had indeed used deception by employing a proxy test taker for the TOEIC test on 3rd April 2013. The FtTJ correctly noted that the Respondent's decision was silent on the financial requirements of the Rules [14]. (Apparently no issue was raised on this point).

5. The FtTJ then turned his attention to the position of H. He accepted that H is a qualifying child for the purposes of S.117B(6) of the 2002 Act. In considering S.117B(6) the FtTJ said, in what appeared to be a cursory consideration only, the following:

> "... I find the appellant's child is a qualifying child and I accept the appellant has a genuine and subsisting parental relationship with her. I find, given the child is still under 2 years old, it would not be unreasonable for her to leave the UK, under the care of both parents. In all the circumstances, given the appellant's willingness to use deception in an attempt to deceive the UK's immigration authorities, I find the public interest does require the appellant's removal."

6. The FtTJ dismissed the appeal and the Appellant appealed to the Upper Tribunal. Permission was granted in the following terms:

"It is arguable that the Judge did not give adequate reasons for concluding that the Appellant's British spouse and child could live in Pakistan and, particularly, that it would be reasonable to expect the child to leave the United Kingdom. The decision also appears to give no consideration to the Article 8 rights of the Appellant's spouse and only cursory consideration of the best interests of the child without reference to **ZH (Tanzania)**.

The Judge does, however, appear to have given adequate consideration to the finding of fraud in relation to the Appellant's TOEIC test bearing in mind the shift in burden of proof specified in **Shehzad and Chowdhury [2016] EWCA Civ 615**."

Onward Appeal

7. By a decision promulgated on 29th March 2019 I set aside the FtTJ's decision. My reasons for doing so were set out in my decision as follows:

"10. Before me Mr Rehman appeared on behalf of the Appellant and Miss Cunha for the Respondent. At the outset of the hearing, Miss Cunha accepted that the FtTJ had failed to give proper reasons for his finding that it would not be unreasonable for the Appellant's child to leave the UK with her parents. In this respect she accepted that the proper course would be for the decision to be set aside and for it to be remade at a further hearing.

11. Following that concession by Miss Cunha, I heard from Mr Rehman. I indicated to him that I was satisfied that the concession made by Miss Cunha was a proper one requiring the decision to be set aside. I also indicated my preliminary view that, so far as the TOEIC fraud was concerned and looking at the grounds and the FtTJ's decision, I could see no good reason to disturb the judge's findings regarding his assessment of the issue of the TOEIC fraud. Those findings are fully reasoned and sustainable. The judge has properly applied the shifting burden of proof as set out in **Shehzad**. Mr Rehman had nothing further to add other than to address me on disposal.

12. I discussed with the representatives the disposal of this matter. In view of the lack of findings made by the FtTJ, I was satisfied that it will be necessary to hear short evidence from the Appellant and his partner. The Appellant requires an interpreter. Ms Cunha was of the view that this matter should be retained in the Upper Tribunal because the issues had been narrowed down from those originally heard. Mr Rehman tended towards a hearing in the First-tier Tribunal.

13. My initial view was that this was a matter which should be returned to the First-tier Tribunal. However on reflection, I agree that Miss Cunha was correct to say that this is a matter which should more appropriately be retained in the Upper Tribunal. I come to this decision in consideration of my view that there is no good reason to disturb the judge's findings regarding the TOEIC issue. I find that the matters upon which the FtTJ has erred materially in law are in

failing to give adequate reasons with regard to the S.117B(6) "reasonableness test" in respect of the Appellant's child and failing to make proper findings in respect of the Article 8 rights of the Appellant's spouse. Thus the resumed hearing will deal with the issues.

14. The remaking of the decision will take place in the Upper Tribunal before me on a date to be fixed. Both the Appellant and his partner should attend the re-hearing in order to give short evidence and to give the Respondent the opportunity to cross examine them. The findings made by the FtT on the assessment of the TOEIC fraud are preserved. In preparation for the resumed hearing, the parties should focus on the Article 8 rights of the Appellant's spouse and child, in particular S.117B(6) of the 2002 Act."

Resumed Hearing on 25th April 2019

8. Before me Mr Rehman appeared for the Appellant and Mr Walker for the Respondent. The Appellant and U.S. both attended. Both representatives drew attention to two decisions which had been handed down following the hearing before me on 13th March 2019. It was agreed, that both decisions are material to the matter before me; the first in the Upper Tribunal **JG (s117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC)** and the second **AB (Jamaica) and Another [2019] EWCA Civ 661**.

9. Additionally the following documents were served on behalf of the Appellant:

   (1) a witness statement signed by the Appellant (but undated); and

   (2) a witness statement from U.S. signed but also undated. In the event Mr Walker accepted that there was no challenge to these statements and they therefore stand as evidence.

Discussion

10. Mr Rehman in his submissions drew attention particularly to paras. 58 and 59 of **AB (Jamaica)**. It is accepted that the Appellant has a subsisting and genuine relationship with H, who as a British citizen, is a qualifying child for the purposes of S117B(6). He pointed out that the Appellant's wife U.S. is presently pregnant with their second child. U.S. confirms that H is in a deep-rooted relationship with her father. It was also confirmed by both the Appellant and his partner, that any removal of the family as a whole to Pakistan would place an unreasonable strain on their relationship, not least because of U.S.'s fear of her grandparents who had made threats against the Appellant as they did not approve of the marriage. There would be problems of a financial nature, issues of where they would live, and language and health difficulties. These difficulties would undoubtedly impact not only on the relationship between the Appellant and U.S. but also upon H. It would not be in H's best interests to relocate to Pakistan with her parents.

11. Mr Walker accepted that there is a genuine and subsisting parental relationship between the Appellant and H. There was no challenge to the evidence in the form of the witness statements which has been submitted on behalf of the Appellant. He accepted that **AB (Jamaica)** is authority for saying that absent deportation considerations the "reasonableness test" is solely a child focused one.

12. At the end of submissions, I announced my decision that I was satisfied that the Respondent's decision refusing him leave to remain in the UK, was contrary to the Appellant's Article 8 family/private life. I now give my reasons for this decision.

Consideration

13. It is accepted that the Appellant has a genuine and subsisting relationship with his daughter H, who is a British citizen. It is also accepted that the Appellant, albeit that he has been found to engage in deception by using a proxy test-taker in the TOEIC test, is not liable to deportation. Thus the question before me is simply, is it reasonable to expect H to leave the UK? In assessing that question I must take into account as a starting point H's best interests. (**ZH (Tanzania) [2011] UKSC 4** and **MA (Pakistan) & Ors [2016] EWCA Civ 705)**. I have no hesitation in finding that H's best interests require her to remain in the UK, by a wide margin. Although she is of a young age (3 years now), she is a British citizen. She was born in the UK as was her mother. She has resided in the UK, nowhere else, together with her parents and members of her wider family including her grandmother. The evidence from her parents, which has been accepted, is that her father has a close loving relationship with her.

14. The Appellant's evidence is that he has no job to return to in Pakistan and thus there would be financial constraints which would necessarily have an impact upon H. Her mother reports that she fears that H would lose the cultural advantages to which she is entitled, namely a British education, language and the presence of appropriate medical facilities.

15. In **KO (Nigeria)** the Supreme Court made it clear that it is relevant to consider where the parents are expected to be since it will normally be reasonable for the child to be with them. This brings into the equation the question of whether it can be properly said that H's mother, a British citizen, should be expected to follow the Appellant to Pakistan. In answering that question, it is relevant to consider the "real world" in which H and her parents find themselves. In **JG** the Upper Tribunal carefully considered **KO (Nigeria)** and concluded that Section 117B(6) requires a Tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect her to do so.

16. In the present case, H's mother is a British citizen having been born here and lived all her life here. She is clearly unwilling to relocate to Pakistan with the Appellant and her reasons for this are understandable. She is presently pregnant with her second child. She suffers from asthma and fears that the dust and heat will exacerbate her condition. Importantly she has a fear that if she relocates to Pakistan, she and her

husband will be harassed by her grandparents because her relationship formed with the Appellant is unacceptable to them.

17. I find that the question of whether it would be reasonable to expect H to leave the United Kingdom must be viewed not only in the context of her mother's unwillingness to follow the Appellant to Pakistan but also by following the approach set out in **AB (Jamaica).** The position is that in an appeal where Section 117B(6) is argued, the concept of reasonableness does not include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest, as set out in [58 -59] and reproduced below:

> 58. Subsequently, the series of cases known in this Court as *MA (Pakistan)* became *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53; [2018] 1 WLR 5273 in the Supreme Court. That Court held that the approach taken by this Court in the *MM (Uganda)* case was wrong. The Supreme Court endorsed the approach which Elias LJ would have taken at para. 36 of his judgment if the matter had been free from authority: see para. 17 in the judgment of Lord Carnwath JSC; and generally the discussion by Lord Carnwath at paras. 12-19. It is clear that the approach taken by Laws LJ in *MM (Uganda)*, referred to by Lord Carnwath at paras. 26 and 31 of his judgment, was considered by him to be wrong: see para. 32 in the judgment of Lord Carnwath.
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> 59. Accordingly, the position has now been reached in which this Court is not only free to depart from the approach taken by Laws LJ in *MM (Uganda)* but indeed is required to do so in order to follow the binding decision of the Supreme Court in *KO (Nigeria)*. That can be done by following the preferred approach of Elias LJ in *MA (Pakistan)*, at para. 36, where he said:
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> "Looking at section 117B(6) free from authority, I would favour the argument of the appellants. The focus on paragraph (b) is solely on the child and I see no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest. I do not deny that this may result in some cases in undeserving applicants being allowed to remain, but that is not in my view a reason for distorting the language of the section. Moreover, in an appropriate case the Secretary of State could render someone liable to deportation, and thereby render him ineligible to rely on this provision, by certifying that his or her presence would not be conducive to the public good."

18. Thus the public interest in maintaining immigration control falls away. Therefore, drawing all these strands together, I find that it would not be reasonable to expect H to relocate with her parents to Pakistan.

19. It follows that the Appellants meets the requirements of Section 117B(6) of the 2002 Act. I therefore allow the Appellant's human rights appeal.

Notice of Decision

The First-tier Tribunal decision promulgated on 13th December 2018 is set aside. I remake the decision allowing the Appellant's appeal on human rights grounds.

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 C E Roberts Date 11 May 2019

Deputy Upper Tribunal Judge Roberts

TO THE RESPONDENT
FEE AWARD

Although I have allowed this appeal, I make no fee award. No application was made for a fee award. I formed the view in any event that a fee award would not be appropriate in this case.

Signed C E Roberts Date 11 May 2019

Deputy Upper Tribunal Judge Roberts