Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16665/2018

THE IMMIGRATION ACTS

Heard at Field House
On 24 September 2019

Decision & Reasons Promulgated
On 26 September 2019

Before

UPPER TRIBUNAL JUDGE PITT

Between

JA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Khan, Counsel, instructed by S H Solicitors Ltd
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. This decision is the remaking of the Article 8 ECHR appeal of A. In a decision dated 9 July 2019, Deputy Upper Tribunal Judge Lever found an error of law in the

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decision of First-tier Tribunal Judge Graham dated 11 March 2019 which refused the appellant's Article 8 ECHR claim.

2. As in the error of law decision of Judge Lever and the accompanying direction, the limited issue to be to be addressed here is the assessment of whether there would be a disproportionate breach of Article 8 ECHR outside the Immigration Rules, that assessment being informed by the provisions of paragraph 117B(6), in particular, where the appellant has a 4 year old British child.

3. Deputy Upper Tribunal Judge Lever correctly identified that the case of KO v SSHD [2018] UKSC 53 is authority for the proper approach to the Section 117B(6) assessment. In KO the Supreme Court identified as follows in paragraphs 17 to 19:

> "17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is "reasonable" for the child. As Elias LJ said in *MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber)* [2016] EWCA Civ 705, [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv).
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> 18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245:
>
>> "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …"
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> 19. He noted (para 21) that Lewison LJ had made a similar point in considering the 'best interests' of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, para 58:
>
>> "58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as

> they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus 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?"
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> To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that 'reasonableness' is to be considered otherwise than in the real world in which the children find themselves."

4. The appellant in this appeal is a national of Pakistan, born on 4 May 1987. He came to the UK on 24 April 2011 as a Tier 4 Student. He obtained a further grant of leave to remain until 5 December 2013. However, in a decision dated 27 September 2013, the respondent sought to curtail his leave as of 29 November 2013. This was in connection with a TOEIC certification said to have been obtained by using a proxy. On 26 November 2013 the appellant applied for leave to remain under Article 8 ECHR but, after refusal, an appeal was struck out on 16 April 2014 and the appellant became appeal rights exhausted on 16 April 2014.

5. The appellant made a further Article 8 ECHR application on 3 June 2014 which was refused on 8 July 2014. On 21 July 2014 the appellant made a further Article 8 ECHR application which was refused on 27 February 2015.

6. Meanwhile, on 6 October 2014 the appellant submitted another application for leave to remain on Article 8 ECHR grounds. That application was refused on 1 April 2015. The matter proceeded to an appeal which was dismissed on 14 June 2016. The appellant became appeal rights exhausted on 22 November 2016.

7. The appellant made a further application under Article 8 ECHR on 20 September 2017. That application was refused on 11 July 2018 and it is that refusal which forms the basis of these proceedings. The respondent refused the application on the basis of the appellant not meeting the suitability requirements of Appendix FM where he had exercised deception in relying on a TOEIC certificate obtained using a proxy. That matter is no longer live as it has been conceded for the appellant that the First-tier Tribunal's findings against him on the issue must stand. The respondent also considered that the appellant's partner and child, both British, could be expected to relocate with him to Pakistan.

8. The appellant maintains that it would not be reasonable for his son, M, born on 29 January 2015, to be expected to go to Pakistan. It is not disputed that M suffers from speech delay. This has caused him to become withdrawn from interaction with other children and his nursery have advised that he is exhibiting some traits of autism, shown by his lack of personal, social and emotional development. M has always lived in the UK.

9. Further, it was not disputed that the appellant's wife has experienced difficulties in recent years because of M's condition and as a result of two miscarriages in 2018 which were, understandably, very traumatic experiences. The appellant's wife, although from a Pakistani background, has always lived in the UK and has limited experience of Pakistan. She speaks only a little Urdu and cannot read or write the language. She is very concerned about having to relocate to Pakistan, considering that it would be "incredibly difficult" for M and that she was vulnerable because of her anxiety about how he would cope and because of the ongoing grief following her miscarriages.

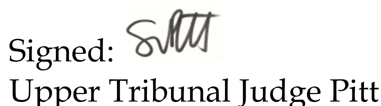
10. In all the circumstances, it is my conclusion that the evidence here is sufficient to show that it would not be reasonable for M to be expected to leave the UK, albeit this would be with his parents. He is currently receiving specialist support for his developmental difficulties which he could not expect to receive in Pakistan. The change of country would be a serious matter for him because of his developmental problems. M's British nationality is a factor attracting weight. In addition, his mother would herself be struggling to adapt to life in Pakistan because of her limited experience of the country and has additional vulnerabilities because of her anxiety about M and her experiences over the last few years. I accept that her difficulties if she went to live in Pakistan would have an additional negative impact on M.

11. For these reasons, I find that it is not in the public interest to remove the appellant where it is not reasonable to expect his British child to leave the UK. I therefore allow the appeal under Article 8 ECHR.

Notice of Decision

The decision of the First-tier Tribunal disclosed an error on a point of law and was set aside.

The appeal is allowed under Article 8 ECHR.

Signed:  Date: 24 September 2019
Upper Tribunal Judge Pitt