Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/17025/2017
HU/17023/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 16 January 2019	**On 07 February 2019**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

SW
WA
(Anonymity Orders Made)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Maqsood of Counsel
For the Respondent: Ms Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Pakistan born in 1976 and 1967. They are a married couple, SW being the wife. They have a son born in 2009 and a baby born in early 2018, also Pakistani citizens.

2. Their application for leave to remain based on family and private life which was made on 30 July 2016 was refused in a decision made on 21 November 2017.

3. The basis of the refusal was that SW failed to meet the suitability requirements of S-LTR of paragraph R-LTRP.1.1(d)(i) because she failed to meet paragraph S-LTR 1.6 of Appendix FM of the Immigration Rules. In an application made in November 2012 she submitted a TOEIC certificate from ETS which was fraudulently obtained by the use of a proxy test taker.

4. Also, they failed to satisfy paragraph 276 ADE(1).

5. They appealed.

First-tier Hearing

6. Following a hearing at Hatton Cross on 9 August 2018 Judge of the First-tier Tribunal NMK Lawrence dismissed the appeal.

7. In summary, he found that SW had used a proxy.

8. Moving on to consider best interests of the son, the judge noted that he had been in the UK for almost nine years but considered that such was not determinative in favour of granting status in the UK. His conclusion was that it would be reasonable for him to leave the UK. He also concluded that there would not be "*very significant obstacles*" to the family returning to Pakistan.

9. They sought permission to appeal which was granted on 19 September 2018.

Error of Law Hearing

10. At the error of law hearing Mr Maqsood adopted the four points raised in the grounds. First, the judge made no reference to the second child and as such failed to consider her best interests.

11. Second, he misdirected himself in law in considering the reasonableness test in respect of the older child who has been in the UK for nearly nine years and is therefore a "*qualifying child*" (section 117D(1)(b) of the Nationality, Immigration and Asylum Act 1982) repeatedly elevating the threshold set out in case law from "*strong reasons for refusing leave*" to "*strong reasons for grant of leave*."

12. Third, for no apparent reason the judge had erred by interposing a paragraph dealing with serious and compelling reasons for a grant of leave under entry clearance case law.

13. Fourth, the analysis of the ETS matter, a mere two short paragraphs, was inadequate.

14. Ms Cunha's response was that failing to refer to the baby was not, in light of her age, material. As for ground two whilst it was clear that the judge had misdirected him at times on the law, he considered the older child's best interests and reached a decision which was open to him, particularly in light of the decision in ***KO (Nigeria)*** and ***Ors_v SSHD*** **[2018] UKSC 53** where it was held that it is normally reasonable for children to be with their parents; and the assessment is to be made (at [18,19]) "*in the real world in which the children find themselves*."

15. As for ground three the reference to irrelevant case law was not material. On the fourth ground, although brief, the judge's conclusions were adequate.

16. I reserved my decision.

Consideration

17. I do not find merit in grounds one and three. The judge concentrated on the one "*qualifying child*" because the reasonableness of expecting the child to leave formed the essence of the appellants' case. The failure specifically to deal with the best interests of the appellants' seven month old baby could not have had material impact on the outcome.

18. As for ground three the judge referred to a surfeit of case law. After discussion Mr Maqsood agreed that the reference to an entry clearance case was simply irrelevant and not material to the decision. That ground was not pursued.

19. The main problem with the decision is ground two which I consider has merit. The judge referred to ***MA (Pakistan)*** **[2016] EWCA Civ 705.** He set out the test at [31] namely, that the fact that a child has lived in the UK for seven years or more must be given "*significant weight*" when assessing proportionality and there must be "*strong reasons"* for refusing leave.

20. The problem is, as Ms Cunha acknowledged, he did not consistently indicate that he had applied that test.

21. Thus, at [24] he stated: "*I do not find that there are 'strong reasons'* (MA (Pakistan) *for a grant of leave*."

22. Also, at [29]: "*My conclusion is that the appellants have not adduced any evidence amounting to 'strong reasons' for a grant of leave for* (the older child)." In addition, at [32].

23. Moreover, [34] is contradictory. It reads: "… *It is for the appellants to demonstrate, on balance, that it is not reasonable to expect* (the older child) *to leave the UK after having lived here for at least 7 years, because the circumstances in Pakistan are likely to be detrimental to his development and life chances. Namely not his 'best interests.' Therefore, it follows that there are 'strong reasons' for granting him leave to remain in the UK. In the instant appeals the appellants have done demonstrated this, on balance."*

24. A decision is of course not meant to be a work of literature. Occasional typographical errors or infelicities of language, whilst regrettable, are not fatal. However, the convoluted reasoning at [34] which on the face of it appears to contradict the conclusion ultimately reached by the judge and the other incidences when he applied the wrong test, in my view fatally flaw the decision such that it must be set aside.

25. I would add that I also find merit in the fourth ground. The judge's analysis of the TOEIC issue amounts to two short paragraphs [13, 14] the sole point apparently taken by the judge being that the appellant was wrong by a month in her recollection of the date of the test in 2012. The judge's conclusion is inadequately reasoned.

26. In light of the errors the decision must be set aside. It was agreed that in the event of material error being found the appeal should be remitted with no findings preserved.

Decision

27. The decision of the First-tier Tribunal is set aside. The nature of the case is such that it is appropriate under section 12(2) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2 to remit to the First-tier Tribunal for an entirely fresh hearing on all issues. No findings stand. The member(s) of the First-tier Tribunal chosen to consider the case are not to include Judge NMK Lawrence.

28. An anonymity order is made. Unless and until a tribunal or court directs otherwise, the appellants are granted anonymity. Failure to comply with this order could lead to contempt of court proceedings.

Signed Date 31 January 2019

Upper Tribunal Judge Conway