Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17970/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 September 2019	**On 10 October 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

S R A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S A Salam of Salam & Co Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes before the Upper Tribunal as a consequence of remittal from the Court of Appeal following a challenge to the decision of a Deputy Judge of the Upper Tribunal who found no error of law in the decision of the First-tier Tribunal dismissing the appellant's appeal against the respondent's decision of 8 July 2016 refusing him further leave to remain in the United Kingdom. The terms of the remittal are that the hearing is limited to determining how the respondent's current policy in relation to qualifying children affects the proportionality exercise.

2. The case is one in which the appellant sought leave to remain in the United Kingdom on the basis of family and private life.

3. The appellant married his wife in Bangladesh in June 2008. His wife entered the United Kingdom in 2012 and became a British citizen by way of the right of abode. Their son was born in the United Kingdom on 10 May 2016 and like his mother is a British citizen. It seems that the appellant had joined his wife in the United Kingdom on a spouse visa on 16 July 2013.

4. The appellant sought to extend his leave to remain under the partner route, but his application was refused on the basis that it was not accepted that he had taken a TOEIC test himself, and as a consequence it was concluded that he could not meet the suitability requirements of Appendix FM of HC 395.

5. The judge upheld the refusal on the grounds of suitability, concluding that the respondent had adduced sufficient evidence to raise the issue of fraud with no innocent explanation so that the appellant's explanation should be rejected for reasons set out in the judgment. As a consequence, because the appellant had utilised deception he did not qualify for leave to remain under either the five or ten year partner route.

6. The judge noted in findings in respect of Article 8 that the appellant is the father of a British citizen child. It was also noted that the appellant's evidence was that he undertook the majority of the duties of caring for his son and wife. His wife's self-concerns related to a diagnosis of polio she had contracted within a month of her birth. It affected one of her legs and she was receiving treatment for it. The judge noted that there was no objective evidence presented to suggest that she would not be able to access similar medical treatment upon return if she decided to accompany her husband to Bangladesh. She had been aware there was no guarantee her husband would be allowed to enter the United Kingdom and remain for an indefinite period. The claim could not succeed under the Immigration Rules because of the failure to satisfy the suitability requirement, and the judge in her consideration of proportionality concluded that the decision was proportionate, taking into account a number of authorities and the evidence before her. She did not consider that the submission that the appellant's wife would not be able to cope with regard to a temporary separation was supported by objective evidence. She had family members in the United Kingdom, the judge found, with whom she had contact. She did not consider it to be unreasonable to expect the British child and his mother to accompany the appellant to Bangladesh. She noted that they all speak Bengali and both parents were fully familiar with the local traditions and customs, having both been born in Bangladesh. There was no evidence to suggest it would be unreasonable to expect the child to return with his parents if that was the decision they made.

7. As noted above, the matter comes back to the Upper Tribunal as a consequence of the judge's failure to take into account the respondent's current policy in relation to qualifying children. The reference to qualifying

children comes from section 117B(6) of the Nationality, Immigration and Asylum Act 2002. It is said in that sub-section that in the case of a person who is not liable to deportation, the public interest does not require the person's removal where the person has a genuine and subsisting parental relationship with the qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. A qualifying child is, for the purposes of this case, a child who is a British citizen. I should also note that it is accepted that the appellant has a genuine and subsisting parental relationship with his child. The question is therefore the one set out at section 117B(6)(b) as to whether it would not be reasonable to expect the child to leave the United Kingdom, and with regard to the specific issue which was the subject of the remittal in this case, how that is informed by the Secretary of State's current policy.

8. Mr Salam has set out helpfully in his grounds of appeal the relevant guidance, at paragraph 22(c) of the grounds. This states as follows:

> "A child is a qualifying child if they are a British child who has an automatic right of abode in the UK, to live here without any immigration restrictions as a result of their citizenship, or a non-British citizen child, who has lived in the UK for a continuous period of at least the seven years immediately preceding the date of application, which recognises that over time children start to put down roots and to integrate into life in the UK. The starting point is that we would not normally expect a qualifying child to leave the UK.
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> It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK. In the case law of KO and Others [2018] UKSC 53, with particular reference to the case of NS (Sri Lanka), the Supreme Court found that 'reasonableness' is to be considered in the real world context in which the child finds themselves. The parents' immigration status is a relevant fact to establish that context. The determination sets out that if a child's parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that it would not be reasonable.
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> There may be some specific circumstances where it would be reasonable to either expect the qualifying child to leave the UK with the parent(s) or primary carer or for the parent(s) or primary carer to leave the UK and for the child to stay. In deciding such cases, the decision maker must consider the best interests of the child and the facts relating to the family as a whole. The decision maker should also consider any specific issues raised by the family or by, or on behalf of the child (or other children in the family)."

9. In his submissions Mr Salam argued that little was said in the policy about British children, in contrast to what had been said in previous policies. He made the point that the particular cases considered in KO did not involve the scenario in this case of a British child and non-deportation case. In MA (Pakistan) it had been said that it was relatively rare to expect a British

child to leave the United Kingdom. The Home Office said it would be relatively rare that it was not unreasonable to expect a British child to leave the United Kingdom. There was no policy to say it was frequently reasonable for a British child to leave the United Kingdom.

10. He also made the point concerning the appellant's wife's disability and the fact that she was in receipt of disability allowance and the appellant received the carer's allowance in respect of her. His role therefore was in helping both of them and he was their source of support, so even if the child were not British or had not had seven years in the United Kingdom it would not be reasonable to expect the child to remain in the United Kingdom without the father.

11. Reference was also made to the decision of the Grand Chamber of the CJEU in Chavez-Vilchez C153/15, where it was said that if the other parent had a right to live, was willing and able to care for the child in the host state then they should not be removed if there was a relationship, a dependency or other emotional factors, and this expanded beyond the primary carer situation considered in Zambrano. The family should not be separated. It was not in the child's best interests.

12. In his submissions Mr Walker said it was clear that in his decision the judge had not fully considered the circumstances about the marriage, given the mother's disabilities, but it was still argued that the appellant had committed an offence which could undermine immigration control, with regard to the ETS issue, but it was conceded that the full aspects of the family situation had not been considered. With regard to what view the respondent took on reasonableness, he referred to the case law quoted by Mr Salam, in fact they were deportation cases, and the only aspect was the ETS point and there was nothing in the bundle about the reasonableness of a wife and child accompanying the appellant to Bangladesh and it did not include the information about the medical concerns. If the appellant had been and was her carer and she received disability allowance, then clearly that aspect of her difficulties had been assessed by another Government department.

13. By way of reply Mr Salam made the point that the refusal was on the basis of suitability and it was not a question of a criminal offence or a conviction. It was not very serious, taken in context. The matter had to be balanced. Section 117B contained a complete policy in sub-section (6). Criminality was addressed in section 117C. Criminality and suitability were only relevant where deportation was involved. There were factors not present here such as cheating and deception which were issues from paragraph 320(11). The appellant had no criminal convictions and it was a balancing exercise in the proportionality evaluation.

14. I reserved my decision.

15. The missing element from the judge's decision in this case was an evaluation of the situation in the context of the current policy of the Secretary of State. I have set out what is now the policy above. It is clear

under the policy that the starting point is that the respondent would not normally expect a qualifying child such as the appellant's child in this case to leave the United Kingdom, but that is qualified to a degree in the subsequent paragraph. There was in fact a detailed consideration by the judge of reasonableness, other than consideration of the policy, of the child and his mother to accompany the appellant to Bangladesh, as set out at paragraph 53 of the judge's decision which I have set out elements of above. She noted the fact that they all speak Bengali, that the parents were born in Bangladesh, the appellant's wife having come to the United Kingdom in 2012 and he in 2013. She considered it was unarguable to suggest that both had left all ties in Bangladesh. They had lived with the appellant's mother before coming to the United Kingdom and had frequent contact with family members in Bangladesh, the appellant speaking to his mother at least twice weekly. She also noted that the appellant's son has no health concerns and there was no evidence to suggest it would be unreasonable to expect him to return with his parents if that were the decision his parents reached.

16. There is nothing in the respondent's current policy which goes contrary to this. The starting point is no more than a starting point, and the judge gave full consideration, a consideration which I endorse, to the issue of reasonableness in this case. No fresh evidence has been adduced as to the reasonableness issue. The appellant's wife was treated for polio while she was in Bangladesh, and I endorse the judge's comment that there was no objective evidence presented to suggest that she would not be able to access similar treatment on return in Bangladesh. The fact that the appellant carries out various responsibilities for his son and wife is something that could just as easily be carried on in Bangladesh, in particular bearing in mind the clear closeness they have to the family there and the support it is reasonable to expect from them. The couple have spent most of their lives in Bangladesh, and the family all speak Bengali. In my view it has not been shown that it would not be reasonable to expect the child to leave the United Kingdom with his parents.

Notice of Decision

17. Accordingly I find that the proportionality balance falls in favour of the public interest in removal in this case, and as a consequence I find that the human rights claim falls to be dismissed.

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 Date 08 October 2019

Upper Tribunal Judge Allen

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 08 October 2019

Upper Tribunal Judge Allen