Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/20266/2018**

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 30 August 2019	**On 06 September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

K. S.
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Cleghorn, Counsel instructed by Kingstons Solicitors
For the Respondent: Mr Bates, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of India, entered the United Kingdom legally in September 2009 with leave to remain as a student. His leave to remain was then extended so that it expired in April 2016. The Appellant then made, in time, an application for a variation of his leave to remain on the basis of his relationship with a British citizen partner, and, his British citizen children. This was only refused on 20 September 2018.
2. The Appellant's appeal against the refusal of his deemed human rights claim was heard and dismissed on Article 8

grounds by First Tier Tribunal Judge Arullendran in a decision promulgated on 12 February 2019.

3. The Appellant was granted permission to appeal by decision of 14 March 2019 of First-tier Tribunal Judge SH Smith on the basis it was arguable the Judge had failed to give weight to the citizenship of both children, and the health care needs of the eldest child, and, had applied the wrong test when considering section 117B(6).
4. No Rule 24 Notice was lodged in response to the grant of permission to appeal. Neither party has applied pursuant to Rule 15(2A) for permission to rely upon further evidence. Thus the matter came before me.

Error of law

5. On behalf of the Respondent, Mr Bates conceded that he could point to no passage in the decision in which the Judge had expressly considered the weight to be given to the fact that both of the Appellant's children are British citizens. It is accepted that this fact is mentioned in the decision, but at no point does the Judge consider the consequences for either child of their inability to exercise their rights as such, in the event the family are forced to relocate to India in order to stay together. Both children are in full time education, and the eldest child receives a significant level of medical treatment for her diabetes, a condition which in her case is life threatening.
6. Whilst the Judge did not have the benefit of the guidance to be found in either of the decisions of JG (s117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72, or, AB (Jamaica) [2019] EWCA Civ 661, I am not satisfied that her approach to the test set out in s117B(6) was consistent with that guidance, or indeed the guidance to be found in KO (Nigeria) [2018] UKSC 53. In the circumstances I set the decision aside and remake it.

The decision remade

7. Neither party made application to introduce further evidence, and so I heard submissions based upon the evidence that was before the Judge, and the findings of primary fact that she made.
8. Whatever sins the Appellant may have committed in relation to his TOEIC test, he is not liable to deportation. The Appellant's partner, and two children are all British citizens. There is no evidence to suggest that the Appellant's partner speaks any of the languages in use in India other than English, and the same is true of the two children. The two children are enrolled in full time education. The Appellant has at all material times been in a genuine and subsisting relationship with both of them, and with his partner, and as the Judge

correctly identified “family life” has existed between parents and children at all material times.

9. The decision under appeal clearly engages the Article 8 rights of the Appellant, his partner, and both children.

10. It is common ground that the eldest child, who is now eight years old, suffers from type 1 diabetes to an extent that those treating her condition have felt obliged to provide her with an insulin pump (with all that this entails over monitoring and hygiene). This eldest child’s condition and monitoring needs are such that she is unable to go on any school visit unless accompanied by a parent, and her parents have to check her condition and blood sugar levels throughout both day, and night. The family have immediate telephone access to a specialist care team 24hours a day should they have any concerns over her condition. Her mother, the Appellant’s partner, is her designated carer, and is in receipt of carers allowance as a result, assessed at the middle rate.

11. In the circumstances I am satisfied that the best interests of both children are to grow up in a household with both parents and each other. As British citizens they have a right to access the education and health care services available in the UK; it is unrealistic to expect the eldest child to travel to the UK from India to receive health care given the cost, distance, and time involved. This is not a case of health tourism. The eldest child was born in the UK and suffers from a serious congenital health condition; her best interests clearly lie in her being able to continue to access the health care available to her in the UK rather than to face an uncertain availability in a country and culture of which she has no experience.

12. As Mr Bates accepts, upon due reflection, the evidence readily permits the conclusion that it would not be reasonable to expect the eldest child to leave the UK for India, a country she has never visited. In the circumstances, and applying the guidance to be found in AB and JG, I am satisfied that the threshold test of reasonableness, set out in section 117B(6) is made out. The real world scenario is that in the event of the Appellant’s removal from the UK, the family would be separated, since the couple would be bound to place the interests of their eldest child first. In these circumstances Parliament has declared that the public interest does not require the Appellant’s removal from the UK, notwithstanding his immigration history and resort to deception to obtain a TOEIC test result.

13. Looking at the evidence in the round I am therefore satisfied that on the facts of this case the decision under appeal was a disproportionate interference in the Article 8 rights of the Appellant, his partner, and his two children. In the circumstances I allow the Article 8 appeal.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 12 February 2019 is affected by material errors of law in the decision to dismiss the Appellant's human rights appeal which require that decision to be set aside and remade.

I remake the decision so as to allow the human rights appeal.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed

Deputy Upper Tribunal Judge JM Holmes
Dated 30 August 2019