Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/25423/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 November 2019	**On 14 November 2019**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

AH
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Syed-Ali, Counsel, instructed by Immigration Aid
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal V A Cox (the judge) who, in a decision promulgated on 5 February 2018, dismissed the appellant's appeal against the respondent's decision of 3 November 2016 to refuse his Article 8 based human rights claim.

Background

2. The appellant is a national of Bangladesh born in March 1986. He entered the UK on 15 February 2010 pursuant to a grant of leave to enter as a Tier 4 (General) Student. He was granted further leave in

the same capacity, but this was curtailed on or around 18 September 2014 on the basis that he fraudulently obtained a TOEIC English language test certificate from Educational Testing Services (ETS) in respect of a test taken on 18 September 2012 by using a proxy tester. Permission to proceed with a judicial review challenge to the curtailment decision was refused on 30 October 2014, and then by the Court of Appeal on 30 March 2015.

3. The appellant married FA, a British citizen, on 19 November 2014. He made a human rights application based on his relationship with FA on 22 May 2015, which was refused on 16 July 2015. The appellant did not exercise his right of appeal in respect of this decision. He made a further application for leave to remain on human rights grounds on 18 December 2015. His first child with FA was born on 5 August 2016. The respondent refused the further human rights claim on 3 November 2016. The decision relied on the appellant's use of a proxy tester to obtain his TOEIC certificate. This decision was appealed to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002. The appellant's second child with FA was born on 9 September 2017.

Decision of the First-tier Tribunal

4. The judge had before her a bundle of documents containing, inter alia, witness statements from the appellant and FA, copies of their children's birth certificates and medical documents relating to the appellant, his wife and children.

5. In his oral evidence before the First-tier Tribunal the appellant confirmed that his parents remained in Bangladesh, that he had a sister who was studying in Bangladesh and a brother who, at that stage, was due to enter the UK as a student. His wife had no family in Bangladesh. The appellant stated that FA would not relocate to Bangladesh and he did not want to take any risks is taking his children to Bangladesh (Although the risks were not identified). In her oral evidence FA stated that she visited Bangladesh when she was 15 or 16 years old, that she did not like the country, and that she would not return to Bangladesh as it was too warm. The appellant stated that his wife's family did not initially accept him but that he had now been accepted. In her oral evidence FA stated that, although her parents loved her, they provided little practical assistance, they were not happy that she married the appellant and that they do not accept the appellant. When asked about her parent's relationship with her two children FA said that her parents do not give them attention. "She said that they would say hello to the children from far away and that it was quite sad." In his oral evidence the appellant claimed that his wife had back pains, that she could not lift things and that she received a strong version of paracetamol. He stated that their second son had been hospitalised for 7 or 8 days and that he had seizures caused by hormone difficulties and vitamin D problems. His older son was said to have eczema. In her oral evidence FA said she had regular

appointments with her doctor regarding her back problems and that she forgot things. At the time of the First-tier Tribunal hearing she was not working and received social entitlement benefits. She claimed to have received physiotherapy and that the appellant undertook the cooking, cleaning and looked after the children.

6. The judge summarised the appellant's immigration history, the respondent's decision, and the submissions from both representatives. The judge considered the ETS deception issue at [46] to [68] and found that the appellant had obtained his TOEIC certificate by deception. Although this aspect of the decision was subsequently challenged it was not the subject of a grant of permission to appeal and this was confirmed by the order made by Lord Justice Males sealed on 12 March 2019. Mr Syed-Ali did not seek to argue that the judge erred in law in his approach to the ETS deception issue. In reaching her conclusion on the use of a proxy tester the judge made other findings based on or relating to the credibility of the appellant and FA. The judge found there was no evidence that FA had suffered a "critical illness" during her pregnancy [56], that the evidence relating to the relationship between the appellant and FA's parents was inconsistent [57] & [58], and that the evidence relating to FA's backpain had been exaggerated [59] & [60].

7. At [69] the judge found that there were no very significant obstacles to the applicant's reintegration in Bangladesh under paragraph 276ADE of the immigration rules, and at [71] she reminded herself that the best interests of the children were a primary consideration. At [73] & [74] the judge stated that the best interests of the children were to live with both their parents given their young age and that the appellant's conduct did not impact on the best interest's assessment. At [75] the judge noted that the best interests of the children could be outweighed by the cumulative effect of other factors, and at [76] she stated that the best interests of the children to be with their parent did not mean that the family unit had to remain in the UK.

8. At [77] the judge found that the appellant's children were generally healthy and that, although there had been some infant illness that included a hospital admission, there were no serious health issues. In reaching this conclusion the judge specifically referred to the medical documentation relating to the vitamin D issue and the hormone concerns in respect of the appellant's youngest son.

9. At [80] judge stated that she had regard to the considerations set out in s.117B of the Nationality, Immigration and Asylum Act 2002, and at [81], with specific reference to s.117B(6), the judge reminded herself that the public interest did not require the appellant's removal as he was not the subject of a deportation order.

10. At [83] the judge noted FA's evidence that she and her children would not leave the United Kingdom.

> There is no question the mother tells me that she and the child [*sic*] will leave the United Kingdom and whilst that is a matter for her I have considered the matter on the basis that the Respondent's decision will she tell me mean the family will be separated.

11. At [84] the judge stated,

> Strong or powerful reasons are required to outweigh a child's best interests. It does not equate to blaming the child to make a decision that means the father will leave the United Kingdom and the mother and children may choose to remain. They are I remind myself both British citizens.

12. At [85] the judge considered that contact maintained between the appellant and his children and wife by visits and electronic means of communication did not equate to life with their parent and that there would be an inevitable burden on the appellant's wife if she became a single parent. At [87] and [88] the judge took into account, when undertaking her proportionality assessment, the fact that the appellant was unable to meet the Suitability requirements of the immigration rules and his use of deception. Then at [89] the judge concluded,

> I find that the decision of the Appellant [sic] is proportionate and that the best interests of the children are outweighed by the cumulative effect of the other factors.

13. The judge then found that there were no factors outside of the immigration rules that could constitute compelling circumstances sufficient to allow the appeal outside the immigration rules [90]. At [91] the judge considered the decision in **SF and others (Guidance, post–2014 Act) Albania** [2017] UKUT 00120 (IAC) but concluded that the facts of the present case were materially different given that FA would remain in the UK to care for her children. At [92] the judge accepted that the appellant and his wife were in a genuine and subsisting relationship and that he played an active role in the lives of his children. The judge however found that the respondent's decision did not place the UK in breach of its obligations under Article 8 and dismissed the appeal.

The appeal to the Upper Tribunal and the remittal from the Court of Appeal

14. The appellant obtained permission to appeal to the Upper Tribunal. In granting permission Judge of the First-tier Tribunal Scott-Baker found that the judge was entitled to her findings relating to the use of a proxy tester to obtain the TOEIC certificate, but that the judge arguably gave insufficient reasons to depart from the principles in **SF** (which relied on guidance issued by the Secretary of State - Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10

year Routes" - when assessing the reasonableness of expecting British citizen children to leave the EU).

15. In a decision promulgated on 17 September 2018 Deputy Upper Tribunal Judge Grimes dismissed the appeal. Lord Justice Males however granted the appellant permission to appeal to the Court of Appeal in a decision dated 8 March 2019 and sealed on 12 March 2019. The Order read, in material part,

> 1. The FTT was entitled to find that the applicant had used deception in obtaining his English-language certificate. There is no error of law here in the UT's dismissal of his appeal on this issue and certainly none which would justify a 2nd appeal to this Court.
>
> 2. However, the FTT found that the applicant is married (albeit he married in 2015, at a time when his immigration status was known to be uncertain) to a British citizen, with 2 young sons who are also British citizens, that his relationship with his wife is genuine and subsisting, that he and his wife live together, he plays an active role in the life of his children, that his wife and children will remain in this country if he is required to go to Bangladesh, and that contact by means of modern electronic means of communication does not equate to life with a parent. Moreover this is not a deportation case where the applicant has committed criminal offences.
>
> 3. Although the FTT said that it had taken account of the children's best interests (which were to be with both their parents) as a primary consideration, it is arguable that it gave no real reasons why those interests were outweighed by the appellant's deception in obtaining his English-language certificate, not least as there appears to be no issue as to his current fluency. That was despite a recognition by the FTT that strong reasons were required to outweigh a child's best interests.
>
> 4. The UT held that the FTT had taken all relevant considerations into account and that the decision reached was open to the FTT of the evidence. However, the UT did not explain why the children's best interests were outweighed and if it is correct that no such reasons are contained in the FTT decision, that does not take the matter further.
>
> 5. In these circumstances the question arises whether on the facts summarise in para 2 above it was open to the tribunal to find that the children's best interests were outweighed by the applicant's deception with the consequences of that decision are that the family will be broken up contrary to the best interests of the children who are British citizens.
>
> 6. I give leave limited to this issue which in my view merits a second appeal.

16. In a consent order sealed by the Court of Appeal on 25 September 2019 the appeal was allowed and the decision of the Deputy Judge was set aside for the reasons set out in the Court of Appeal's grant of permission. The matter was remitted to the Upper Tribunal for an error of law hearing limited only to issues that led to the First-tier Tribunal granting the appellant permission to appeal to the Upper Tribunal.

Submissions at the remitted hearing

17. Mr Syed-Ali produced a skeleton argument for the remitted 'error of law' hearing. That skeleton made no reference to the decision in **SF** and Mr Syed-Ali did not rely on that decision in his submissions. He invited me to consider the Supreme Court decision in **KO (Nigeria)** [2018] UKSC 53 and submitted that the judge erred in law in considering the appellant's own behaviour when determining whether it was reasonable to expect his children to leave the UK. Given that FA said she would not relocate to Bangladesh, and given that the children were both British citizens, Mr Syed-Ali submitted that it was not reasonable, in a real-world context, to expect the children to leave the UK as they would forego the benefits of their British citizenship and they would be separated from their mother. Mr Syed-Ali further submitted that there had been no consideration of the children remaining in the UK in the assessment of their best interests. Mr Melvin accepted that the judge made no specific reference to the issue of reasonableness with respect to s.117B(6) of the Nationality, Immigration and Asylum Act 2002, although mention had been made of s.117B(6) at [81]. Mr Melvin submitted that the judge's proportionality assessment covered all the issues that would have been considered in the reasonableness assessment under s.117B(6), but he accepted that, following **KO**, there was no scope for the judge to have accorded weight to the appellant's deception when assessing the issue of reasonableness.

18. There had been no application to adduce new evidence pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and Mr Syed-Ali informed me that there had been no material change in circumstances relating to the appellant, his wife and their children other than the fact that FA was now in employment and was in receipt of funds sufficient to meet the financial requirements of Appendix FM, and that the children were now older, the oldest child now being at school. Both parties were content from me to remake the decision based on the evidence before me should I find a material error of law. I reserved my decision.

Discussion

19. I am satisfied that the judge's decision does contain a material error of law. I am guided in this conclusion by reference to the grant of permission by Lord Justice Males and the terms of the agreed consent order. Whilst the judge was demonstrably aware of the need to

identify the best interests of the children, and whilst she identified the relevant public interest factors at play, she failed to give any clear or legally adequate reasons why she found that the children's best interests were outweighed by the appellant's deception. Entwined with the inadequacy of the judge's reasoning was her failure to consider whether it would be reasonable to expect the children to leave the UK. Nowhere in her decision does the judge consider whether it would be reasonable to expect the children to leave the UK as a separate assessment from the general public interest factors, most particularly the conduct of their father. Whilst the judge does make brief reference to s.117B(6) at [81], nowhere in her decision does she undertake the reasonableness assessment required by that section. To the extent that the judge may have, by means of necessary implication, undertaken a reasonableness assessment, she has done so as part of a full and wide-ranging Article 8 proportionality assessment that included relevant public interest factors such as the appellant's conduct ([82] *et seq*, and particularly at [87] and [88]). The Supreme Court have however clarified that this is the wrong approach in law when assessing reasonableness under s.117B(6). Following **KO**, the assessment of whether it is reasonable to expect a child to leave the UK, both with respect to the immigration rules and s.117B(6), must be considered without reference to the conduct of the parent and is, on its face, free-standing ([17] of **KO**). To the extent that the judge failed to undertake the reasonableness assessment pursuant to s.117B(6), and to the extent that she took into account irrelevant factors even if she did, by implication, undertake a reasonableness assessment, the decision contains a material error of law requiring it to be set aside.

Remaking the decision

20. There has been no challenge to the judge's primary factual findings, and, as stated in paragraph 17 above, there has been no application to adduce further evidence by either party. I therefore proceed to remake the decision based on the facts found by the judge and in light of the further points identified by Mr Syed-Ali at paragraph 17 of this decision relating to FA and the appellant's children. In remaking the decision I remind myself that the burden of proof in respect of Article 8 human rights appeals rests on the appellant and that the standard of proof is the balance of probabilities.

21. It was not suggested by Mr Syed-Ali that the judge erred in her approach to and findings in respect of paragraph 276ADE(1)(vi) of the immigration rules. Given that the appellant was 23 years old when he entered the UK, has family members including his parents still living in Bangladesh, has no language issues and is in good health, there is clearly no basis upon which I could conclude that he would encounter very significant obstacles to his integration. Given that the appellant and FA are in a genuine and subsisting relationship the appellant could not meet any of the requirements of Appendix FM as the parent of a child in the UK. Given that the appellant could not meet the

Suitability requirements of Appendix FM, he could not be granted leave to remain under either the 5-year route to settlement or the 10-year route to settlement as a partner under Appendix FM.

22. Section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) provides:

> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

23. The appellant's two children are now 3 years old and 2 years old. In **EV (Philippines) & Ors v Secretary of State for the Home Department** [2014] EWCA Civ 874 (at [35]) the Court of Appeal explained that a decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been

in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

24. The first head note of **Azimi-Moayed and others (decisions affecting children; onward appeals)** [2013] UKUT 00197 reads, "*As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary*." Headnote (ii) reads, "*Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.*" Headnote (iv) of the same case indicates, "*Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life.*"

25. I consider and apply the principles enunciated in the above decisions in assessing the best interests of the appellant's children under s.55 of the Borders, Citizenship and Immigration Act 2009. Both children are British citizens. They are consequently entitled to a plethora of rights and benefits including access to the NHS, free primary and secondary education, the support, if needed, from local and central authorities, and the assistance of the British Embassy if they are outside the UK. The children's nationality remains a significant factor, as does that of their mother.

26. Both children are very young. There is no evidence that they have establish sperate private lives outside of their immediate family unit. Mr Syed-Ali informed me that the oldest child is at school, although he is only 3 years old. I am nevertheless prepared to accept that the oldest child does attend some type of schooling. There is however nothing before me to indicate the nature and extent of any private life established by the oldest son as a result of his schooling.

27. Whilst accepting that the youngest son had some illness involving Vitamin D and hormone concerns that required hospital admission the judge found, having considered the medical evidence, that the two children were generally healthy. I have independently considered the medical documents and concur with the judge's assessment. The youngest son was admitted to hospital 16 days after his birth suffering from seizures that were attributed to a Vitamin D deficiency. He was discharged a week later following treatment and with a follow

up appointment. There is no significant further evidence suggesting that either of the appellant's two sons suffers from any significant medical issues. There is no medical evidence relating to the absence of adequate medical treatment in Bangladesh for the youngest son.

28. It is in the best interests of the children to remain with both their parents. Given that the children were both born in the UK and are familiar with their current accommodation and location, and given their entitlements arising from their British citizenship, I find that their best interests are to remain in the UK with both their parents. Whilst the best interests of the children are a primary consideration, they are not a paramount consideration.

29. I now consider whether it would be reasonable to expect the children to leave the UK. The headnote of **JG (s 117B(6): "reasonable to leave" UK) Turkey** [2019] UKUT 00072 (IAC) Rev 1, considered in light of the guidance provided in **KO (Nigeria)** [2018] UKSC 53, states that section 117B(6) requires a court or 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 the child to do so. I remind myself that FA's accepted evidence was that neither she nor her two children will actually leave the UK (see [83] of the judge's decision; see also paragraph 2 of the Order made by Lord Justice Males and sealed by the Court of Appeal on 12 March 2019, setting out the First-tier Tribunal's findings of fact). The First-tier Tribunal therefore found as a fact that FA, who is a British citizen, and who therefore has a right of abode, will remain in the UK. I must therefore determine whether it would be reasonable for the children to leave the UK in circumstances where their mother will, on the accepted evidence, remain in the UK, even though this is a matter of choice for her, and even though this will lead to the fracturing of the family unit (see **GM (Sri Lanka) v SSHD** [2019] EWCA Civ 1630, at [43] and [44]).

30. On the hypothetical basis that the children leave the UK I am satisfied that it would be unreasonable to expect them to do so. This is because it would lead to the separation of two very young children from their mother in circumstances where the First-tier Tribunal has already found (and it is, in any event, readily apparent) that contact by electronic means of communication "does not equate to life with a parent" ([85] of the judge's decision; paragraph 2 of the Order made by Lord Justice Males). There is no question that there exists family life between the two young children and their mother, or that there is likely to be a significant negative impact on the emotional well-being of the children if they are separated from their mother. If the appellant's two children were to accompany him and relocate to Bangladesh the emotional bonds of love and dependency between the children and their mother could not be replicated remotely. I am mindful that the appellant is someone who has used deception in obtaining his TOEIC certificate. He is not however someone who liable to deportation, and the reasonableness test in **KO (Nigeria)** [2018]

UKSC 53 requires me to focus on the position of the children and not the conduct of the appellant.

31. Having found, applying s.117B(6), that it would not be reasonable to expect the appellant's two young children to leave the UK because this will result in the separation of a mother and her children, and given that s.117B(6) is self-contained (**KO (Nigeria)** [2018] UKSC 53, at [22]), I find that the appellant's removal from the UK would constitute a disproportionate interference with Article 8. I consequently allow the appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and requires the decision to be set aside.

I remake the decision by allowing the appellant's Article 8 human rights appeal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal 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.

D.Blum 12 November 2019

Signed Date

Upper Tribunal Judge Blum