Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/25685/2016
HU/25686/2016
HU/25687/2016
& HU/25688/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 November 2018	**On 21 January 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

GE (FIRST APPELLANT)
PS (SECOND APPELLANT)
SE (THIRD APPELLANT)
DE (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Miah instructed by Del & Co. solicitors
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal against the decision of the Secretary of State made on 28 October 2016 refusing their private and family life human rights claims. Their appeal against that decision to the First-tier Tribunal was

dismissed by First-tier Tribunal Judge Graves in a decision promulgated on 15 March 2018. For the reasons set out in the annexed decision, I set that decision aside at hearing on 14 August 2018. Given the subsequent decision in of **KO (Nigeria)** [2018] UKSC 53, I would not now have found an error of law. Nonetheless, I have proceed to remake the decision.

2. In re-making the decision I have taken into account the additional evidence supplied by the first and second appellants who adopted their witness statements.

3. I then heard submissions from Mr Miah on behalf of the appellants and Ms Everett on behalf of the Secretary of State. I do not accept the thrust of Mr Miah's submission that the decision in **KO** assists the appellants, bearing in mind that this is a case where, as in one of the cases in **KO**, NS, neither parent has a right to remain.

4. The starting point in this case is the findings of fact reached by Judge Graves. It is, as he noted, not submitted that the appellants fall within Appendix FM and the issue here is whether removal is proportionate given that the children have in the case of one of them, lived here for more than seven years. That in turn requires a careful analysis of the provisions of Section 117B(6) of the 2002 Act in light of the decision of **KO [2018] UKSC 53**. As the Supreme Court noted at [7] to [8] the substance of the provision in paragraph 276ADE(1)(iv) appears identical to that in Section 117B(6) taken with the definition of "qualifying child". Of particular note is what is said at 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) v 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).
>
> 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, [2017] ScotCS CSOH_117:

> '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 …'

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?'

20. 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"."

5. I note in passing that at [18] it is stated that "it will normally be reasonable for the child to be with [the parents]". Thus it is inevitably relevant to consider where they will be. Again, it is important to note what was said in **EV (Philippines)**.

6. When applying this reasoning to the facts in NS, one of the cases heard with **KO (Nigeria)**, as here, the parents had no right to be in the United Kingdom and at paragraph 51 the judgment of the court reads as follows:-

> 51. Mr Knafler supports the other appellants in their challenge to the reasoning of *MM (Uganda).* He says that it is even clearer in the context of section 117B that parental misconduct is to be disregarded. I accept that UTJ Perkins' final conclusion is arguably open to the interpretation that the "outrageousness" of the parents' conduct was somehow relevant to the conclusion under section 117B(6). However, read in its full context I do not think he erred in that respect. He had correctly directed himself as to the wording of the subsection. The parents' conduct was relevant in that it meant that they had to leave the country. As I have explained (para 18 above), it was in that context that it had to be considered whether it was

> reasonable for the children to leave with them. Their best interests would have been for the whole family to remain here. But in a context where the parents had to leave, the natural expectation would be that the children would go with them, and there was nothing in the evidence reviewed by the judge to suggest that that would be other than reasonable. The starting point in this case must be that the first and second appellants, that is the parents of the children, do not have the right to be in the United Kingdom. That is because they have overstayed and have no right to be here.

7. It should be borne in mind also the error found in the First-tier Tribunal decision although the judge appears not to have considered properly the best interests of the children as noted in my error of law decision at [5]. There is nothing in **KO** which suggests that a best interests consideration is not to be done in the real world analysis put forward by **EO** identified in **KO**.

8. I accept that the children are settled in school and are happy there, doing well and, as was noted by Judge Graves, will have made positive relationships there. They speak English and they will now have spent a number of years in school in the case of the older child. He has, however, been here for nine and a half years. I accept, as the judge found, that they had been raised with close cultural and social connections to Ghanaian diaspora and had contact with extended family in this country and that they are educated in this country.

9. In the case of the younger child it is inevitable that she will be focused primarily on her parents and I find nothing such that I should not follow and it is of note that, as the judge found, the children do not have significant relationships with adults other than their parents. It was open to him to conclude, as I do, that they will be able to access education and healthcare in Ghana and that there would be no real obstacles to their integration into the country of which they are citizens, not least as their mother and father would be with them and could help them adapt. It was also found that, and I accept, they have some family who could assist with integrating and with whom to develop with positive relationships. There is nothing of a particularly significant nature in terms of their connections to this country over and above what one would expect for children of their age. There are no significant health problems and whilst there would be disruption, there does not appear to be evidence that the education system or the healthcare system would be significantly inferior such as to prejudice the children.

10. The reality is that in this case, as with **KO** in particular and **NS** the reason why the children will have to leave the United Kingdom is because their parents have no right to be here. That is not punishing the children for the actions of their parents, it is simply an observation of the reality of the situation. I do not consider, having undertaken a best interests analysis of the children, that there is anything such as would take this out of the situation of their having to return to Ghana with their parents to be

unreasonable, and accordingly the requirements of the Immigration Rules are not met.

11. Turning then to consider whether the removal of the appellants would be disproportionate, I bear in mind first that they do not meet the requirements of the Immigration Rules, and that there is a strong public interest in maintaining immigration control. I accept that the appellants all speak English, but that, and an ability to support themselves is at best neutral. The private lives of the parents have been developed as indeed has their family life, at a time when their presence was precarious. Taking all of these factors into account, and bearing in mind the best interests of the children, I am satisfied that the decision to remove the appellants is proportionate, given the strong public interest in maintaining immigration control. I therefore dismiss the appeal.

Summary of Conclusions

1. The decision of the First-tier Tribunal involved the making of an error of law

2. I set aside the decision of the First-tier Tribunal.

3. I remake the decision by dismissing the appeal on all grounds.

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

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 14 December 2018

Upper Tribunal Judge Rintoul

ANNEX - ERROR OF LAW

IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/25685/2016
HU/25686/2016
HU/25687/2016
& HU/25688/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 August 2018	
Extempore	.....

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

G E
P S
S E
D E
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Miah instructed by Del & Co solicitors
For the Respondent: Mr David Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permission against the decision of First-tier Tribunal Judge Graves promulgated on 15 March 2018 dismissing their appeal against the decision of the Secretary of State made on 28 October 2016 refusing their private and family life human rights claims.

2. Briefly the facts are set out in the decision regarding the family which consists of husband, wife and their two children both of whom were born in the United Kingdom, the older having been resident in the United Kingdom in excess of seven years at the date of the decision of Judge Graves. The judge did not consider that it was unreasonable to require the children to leave the United Kingdom and concluded that weighing up the public interest and the maintenance of immigration control, that the family's rights to remain in the United Kingdom were outweighed and thus removal was not disproportionate.

3. The principal thrust of the grounds of challenge is that the judge has erred first, in not properly assessing the best interests of the children and second, failed properly to assess the reasonableness of their removal not having proper regard to Section 117B(6) of the 2002 Act, the decision in **MA (Pakistan)** and also the policy guidance provided by the respondent which is set out in part in the decision at [28].

4. Mr Clarke submitted that the decision was rational, reasonable and sustainable in that the judge had properly directed himself first, that the best interests of the children are to be considered first and this is to be done without regards to other matters, second, that the judge had then gone on to consider the issue of reasonableness and had properly directed himself as to the law as well as properly applying that law reaching conclusions having weighed the relevant factors which were open to the judge and from which adequate and sustainable reasoning had been given.

5. Whilst the judge has in my view properly directed himself as to the law with regard to best interests, it does not appear to me that at [25] in particular that that has been properly applied given the reference to the best interests in the longer term. There appears also not to have been proper weight attached to the fact that seven years had been spent here and the observations on that made in the case law. Second and more importantly with regard to reasonableness I consider that at [29] the judge has misdirected himself in law with regards to Section 117B(6) of the 2006 Act and in light of **MA (Pakistan)** in that he appears to have diminished the importance of the guidance without having regard to section 117B(6) and the weight to be attached thereto as set out in **MA (Pakistan)**.

6. I consider also that the judge has failed properly to assess their position in the light of that and has reached conclusions which are unsustainable having taken into account a number of factors which are not relevant and failed to take into account the strong weight which has to be attached to the fact that one of the children had reached seven years and that the

reasoning as to why in this case there are serious reasons, it is not adequately and properly reasoned.

7. For these reasons I set aside the decision of the First-tier Tribunal which will be remade in the Upper Tribunal on a date to be fixed.

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 their 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 24 August 2018

Upper Tribunal Judge Rintoul