



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11806/2018

THE IMMIGRATION ACTS

Heard at Field House
On 22 August 2019

Decision & Reasons Promulgated
On 12 September 2019

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

UPUL [E]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Tobin of Counsel, instructed by Jay Visva Solicitors

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals with permission against the decision of First-tier Tribunal Judge Butler promulgated on 26 April 2019 in which Mr [E]'s appeal was allowed on human right grounds. For ease I continue to refer to the parties as they were before the First-tier tribunal, with Mr [E] as the Appellant and the Secretary of State as the Respondent.
2. The single ground of appeal is essentially that the First-tier Tribunal's decision was contrary to the reasoning of the Supreme Court in KO (Nigeria) v Secretary of State

for the Home Department [2018] UKSC 53 in that the test of reasonableness had not been properly applied and in any event, the nature of a parent's immigration status is relevant to the context of the question of reasonableness rather than being wholly irrelevant to the assessment.

3. Permission to appeal was granted by the Upper Tribunal on the basis of KO (Nigeria), that the First-tier Tribunal arguably misconstrued the reasoning in that case extending consideration to matters not relevant to the best interests of the children for the proportionality assessment. There is little dispute before me between the parties that there are at least arguable errors in the First-tier Tribunal's decision, not only in its structure in the way it has applied Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 by going on to do a proportionality exercise after finding that provision had been satisfied, but also in particular in paragraph 35, by the apparent exclusion of the nature of the parents' immigration status to the considerations before the First-tier Tribunal in relation to whether it would be reasonable to expect the children to leave the United Kingdom.
4. It is arguable that although the precarious nature of the parent's immigration status should not influence a decision on the best interests of the children, it is, further to KO (Nigeria), relevant to the question of whether it would be reasonable to expect qualifying children to leave the United Kingdom; the absence of leave to remain of the parents being the initial reason as to why they would be expected to leave at all. It is therefore relevant to the question that had to be assessed by the First-tier Tribunal in its proper context. However, whilst such an error of law may be material in some cases, in the circumstances of the present appeal, I do not find that it is a material error of law could have potentially affected the outcome of the appeal. The First-tier Tribunal made significant findings of fact in relation to the best interests of the children, their background in the United Kingdom and lack of connections with Sri Lanka. In particular reference is given to a social circumstances report and to letters from the children themselves as part of the evidence before the First-tier Tribunal.
5. In brief, the eldest child has been here since the age of 3, is currently 17 and studying for her A-levels with evidence of future plans for education in the United Kingdom. The younger child was born in the United Kingdom and is now approaching the age of 10, having been here all his life. The children are clearly both settled in the full-time education and the eldest child in particular is at a critical stage of education for exams. There is evidence of a social network for both children which is appropriate to their age and findings that both struggle to speak Sinhalese. One has not been in Sri Lanka for a very long time and the other has never been to Sri Lanka. Based upon these findings, even taking into account the background context that it is reasonable to expect the parents to leave having no leave to remain in the United Kingdom, it is not possible that the First-tier Tribunal could have rationally found that it would be reasonable for the children to leave and return to Sri Lanka with their parents, even if the proper context is taken into account. In this case Section 117B(6) of the Nationality, Immigration and Asylum Act 2002, properly applied, is satisfied on the factual findings made by the First-tier Tribunal. Any error in the approach to the

legal test following KO (Nigeria) is therefore not material. The appeal is dismissed and the decision of the First-tier Tribunal stands.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to allow the appeal is therefore confirmed.

No anonymity direction is made.

Signed



Date

5th September 2019

Upper Tribunal Judge Jackson