Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/19295/2018
HU/19303/2018
HU/19299/2018
HU/19308/2018

THE IMMIGRATION ACTS

Heard at Field House
On 8th March 2019

Decision and Reasons Promulgated
On 18th April 2019

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

WAHIDA [S] + 3
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the appellant: Ms J Isherwood, Senior Presenting Officer.
For the respondent: Mr. S Harding, Counsel, instructed by Londonium Solicitors

DECISION AND REASONS

Introduction

1. It is the Secretary of State who is appealing in these proceedings. However, for convenience I will refer to the parties hereinafter as in the First-tier Tribunal. The first appellant is a national of Bangladesh. The other appellants are her husband and children.

2. She came to the United Kingdom on 20 January 2010 as a student with leave until 31 July 2013.This was extended until 26 September 2016. Leave was curtailed on the 8th July 2016, effective from 24 September 2016.

3. On 19 April 2017 she made an application for leave to remain on the basis of her family life. This was refused on 22 March 2018.The respondent concluded she did not meet the eligibility requirements of appendix FM as her partner was not British and they lived as part of a family unit with their children. In terms of private life the suitability requirements were not met. This was because in her application for an extension as a student she submitted an English language certificate which the respondent concluded was taken by a proxy. The respondent saw no reason why she and her family could not reintegrate into life in Bangladesh.

The First tier Tribunal

4. Her appeal was heard at Taylor House on 9 November 2018 before First-tier Tribunal Judge Bibi. In a decision promulgated on 28 November 2018 the judge found that the appellant cheated in her English language examination. However, the appeal was allowed on the basis her daughter, the 4th appellant, had been living in the United Kingdom for 7 years at the date of hearing and that it would be unreasonable to expect her to leave the United Kingdom. She came to the United Kingdom at the age of 6 was now 14 years old and about to start her GCSEs and so was at a crucial part of her education.

5. Permission to appeal was granted on the basis it was arguably the judge erred in applying KO (Nigeria) and others -v- SSHD UKSC 53 and section 117B(6).

The Upper Tribunal.

6. At hearing, Ms Isherwood relied upon the grounds for which permission was sought and referred me to the decision of JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC). She highlighted the fact that the judge had found the 1st appellant engaged in deception in relation to the English language testing and consequently she and her entire family had benefited from this.

7. The focus in the appeal has been upon the position of the fourth appellant who is a qualifying child. Ms Isherwood submitted that in allowing the appeal First-tier Tribunal Judge Bibi failed to have regard to what was said in AM (S 117B) Malawi [2015] UKUT 0260 (IAC) There, it was stated *w*hen the question posed by s117B(6) is the same as that posed in relation to children by paragraph 276ADE(1)(iv) it must be answered in the proper context of whether it was reasonable to expect the child to follow its parents to their country of origin (see also EV (Philippines)).

8. I was referred to paragraph 49 of the decision of First-tier Tribunal Judge Bibi, where the judge stated the fourth appellant was about to start her GCSEs and this was a crucial part of her education. The judge concluded that it would be unreasonable to expect her to leave the United Kingdom and to relocate to Bangladesh. However, Ms Isherwood argued that a child's education is not a trump card. No other reasons were advanced.

9. At paragraph 52 the judge referred to KO Nigeria and others -v- SSHD [2018] UKSC 53, pointing out that as neither parent had leave the question was whether it was reasonable for the 4th appellant to go with them to Bangladesh. In support of the conclusion that it would be unreasonable the judge referred back to comments made at paragraph 49 about her education. Ms Isherwood submitted that the judge failed to follow the guidance given , particularly at paragraphs 18 and 19. The Supreme Court said it was necessary to consider where the parents, apart from the provision in 276ADE(1)(iv) and section 117B 6, are expected to be since it will normally be reasonable for the child to be with them. Because of this, the record of the parents becomes indirectly material, for instance, if it leads to them having no right to be here. The Supreme Court referred to the comments of Lord Boyd in SA (Bangladesh) v Secretary of State for the Home Department 2017 SLT 1245:

> "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 …"

At paragraph para 21 Lord Boyd noted that 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:

> "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?"

10. Ms Isherwood submitted that the factual circumstances of the appellants NS and AR in KO Nigeria and others -v- SSHD [2018] UKSC 53 where akin to the present. NS and AR entered the UK as students, on 19 February 2004 and 4 February 2003 respectively. In the present appeal the 1st appellant came here as a student on 20 January 2010, with the other appellants joining her on 15 October 2010 as dependents.

11. NS and AR applied for leave to remain as Tier 1 (post study worker) migrants. Those applications were refused on the basis that NS and AR were involved in a "scam" by which they falsely claimed to have successfully completed postgraduate courses. UT Judge Perkins dismissed the appeals finding that NS and AR had deliberately submitted false documents to support applications to extend their stays, and by so doing were "acquiescing in a cynical plot to undermine the Rules by issuing meaningless certificates" (para 179). He acknowledged the position of their children and section 117B(6).The children had no knowledge of life outside the United Kingdom and have done well in the United Kingdom. If they remained they could take advantage of the education system. Removing them would unsettle them. He found no difficulty in concluding that their best interests were to remain in the United Kingdom with their parents. However, the judge went on to refer to the need to maintain immigration control and concluded it would be outrageous for the parents to be permitted to remain in the circumstance. He concluded they must go and the other appellants must go with them.

12. In affirming that decision, the Supreme Court pointed out that the parents' conduct was relevant in that it meant that they had to leave the country. 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. However, 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.

13. Ms Isherwood submitted that the only reason given by the judge for concluding it would not be reasonable to expect the 4th appellant to leave was because she was in education. However, she submitted this could continue in Bangladesh where she would have the support of her family.

14. Mr. Harding in response said that the judge posed the right question at paragraph 48, namely, whether under EX 1 or section 117B(6) it would be reasonable for the 4th appellant to leave. He contended that the judge did not simply consider the appellant's education but had regard to the length of time she had been here.

Consideration

15. First-tier Tribunal Judge Bibi's decision was given in the month following judgement in KO Nigeria and others -v- SSHD [2018] UKSC 53. The judge did not have the benefit of the consideration of that decision which has taken place since. This is a nuanced decision which requires careful study. Following it, the respondent has amended its instructions to caseworkers. The focus is upon the qualifying child but as stated, the conduct of the parents remains indirectly relevant. The judge here really only refers to the youngest child's education and the fact she came here at the age of 6.

16. The judge had found that her mother had engaged in deception in the taking of the English test. The 1st appellant's lack of credibility was reinforced by the evidence of her husband and sister which contradicted her claims about the use of English at her work. She compounded matters by claiming her eldest daughter, the 3rd appellant, could not speak Bengali whereas she had obtained an A star in her GCSEs examinations in the language. Both parents are from Bangladesh and have no right to be here. The question arising therefore was whether it would be reasonable to expect the fourth appellant to go to Bangladesh with them. The appellant's immediate family are from Bangladesh and she lived there until the age of 6. Consequently, there is evidence she has some appreciation of the country and its traditions. Singh LJ at para 75 of Secretary of State for the Home Department v AB (Jamaica) & Anor [2019] EWCA Civ 661 endorsed JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC) stating that the question which the statute requires to be addressed is a single question: is it reasonable to expect the child to leave the UK?

17. There is no appraisal in the decision of the likely prospects in Bangladesh for the appellant. A cumulative assessment was required, involving the likely family situation, including the circumstances of the appellant's elder sister. In effect the 4th appellant has been played as a trump card and the judge has not considered the real-world test, based on the entire family relocating and with due regard to the public interest factors. It is my conclusion therefore that the assessment materially errs in law and cannot stand. Consequently, the matter is remitted to the First-tier Tribunal for a de novo hearing in relation to article 8 only.

18. There has been no challenge to the finding in relation to the 1st appellant suitability and the submission of an English language qualification taken by a proxy.

Decision

The decision of First-tier Tribunal judge Bibi materially errs in law and is set aside.

The decision is remitted to the First-tier Tribunal for a de novo hearing.

Deputy Upper Tribunal Judge Farrelly.

Directions.

1. Relisting for a de novo hearing in the First-tier Tribunal at Taylor House, excluding First-tier Tribunal Judge Bibi. The appellants representative should advise if an interpreter will be required.
2. The finding that the 1st appellant fraudulently obtained a TOEIC certificate is retained. The finding that the 4th appellant is a qualifying child is retained.
3. In preparing for the rehearing the appellant's representatives should consider the circumstances of all the family. Consideration in that context should be given as to whether it is reasonable for the 4th appellant to return to Bangladesh with her parents and sister bearing in mind what stage she is at in her life.
4. A hearing time of up to 2 hours is anticipated

Deputy Upper Tribunal Judge Farrelly. Dated 17 April 2019