UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: HU/21243/2018**
HU/21245/2018
HU/21247/2018
HU/21249/2018

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated on**
On: 16 May 2019	**On: 23 May 2019**

Before

Deputy Upper Tribunal Judge Mailer

Between
S L
P K
M K
Y M
ANONYMITY DIRECTION MADE

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellants: **Mr Y Din, counsel, instructed by GLS Solicitors**
For the Respondent: **Mr S Walker, Senior Home Office Presenting Officer**

DECISION AND REASONS

Direction Regarding Anonymity

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 appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The appellants appeal with permission against the decision of First-tier Tribunal Judge French, who in a decision promulgated on 14 March 2019, dismissed their appeal against the decision of the respondent dated 4 October 2018 refusing their human rights claims, made on 18 October 2017, for leave to remain in the UK on the basis of family life.

The appeal before the First-tier Tribunal.

2. The first appellant was born in India on 10 December 1973. His wife, the second appellant, was born in India on 10 October 1973. The third and fourth appellants are their children, born on 18 February 2000 and 2 July 2001.

3. The second appellant arrived in the UK on 29 October 2006 on a visit visa valid until 26 March 2007. The first, third and fourth appellants arrived on 15 July 2010 on visas valid until 5 January 2011. All applied for leave to remain on 18 October 2017.

4. The respondent considered whether there would be very significant obstacles to their integration into the country of their nationality. The first appellant left India when he was 36 years old and the second appellant when she was 32 years old. It was 'concluded' that the first appellant was familiar with the cultural norms in India.

5. The expectation was that the third and fourth appellants would remain with their parents, although at the time of their applications the third appellant was 17 and the fourth was 16 years old. The argument on their behalf was that their parents should be able to "piggy back" behind their children.

6. It was acknowledged that both children had lived in the UK for more than seven years and might therefore potentially meet the criteria under paragraph 276ADE(1)(iii).

7. Each child had spent more than half their lives in India. The respondent's view was that their return to India would not be to the detriment of the third and fourth

appellants as India's higher educational system is the third largest in the world and they could fulfil their academic ambitions there.

8. Judge French stated at [4] that he was required to conduct a balancing exercise between the public interest of controlling immigration and the rights of the appellants to family life under Article 8, and to decide whether a refusal would be unlawful under s.6 of the Human Rights Act.

9. He considered the oral evidence of the second appellant, that her two children had had the benefit of the UK education system even though they had no leave to be in the UK. The third appellant was now 19 years old and the fourth appellant was now 17 years old. No applications had been made to the Home Office to regularise their status after the expiration of their visitors' visas in January 2011 until they had resided in the UK for seven years. They had been living in India until they were ten and nine years old respectively.

10. In considering the public interest, the Judge had regard to s.117B of the Immigration Act 2014. He did not accept that there was an insurmountable obstacle to the second appellant returning to India. As with his wife, the first appellant was familiar with life in India. The strongest argument put forward as to why the parents might be given leave to remain was on the basis of the maintenance of family life. However, Article 8 does not permit people to choose where they wish to enjoy family life. There was no reason why they could not all live together in India. This would not be unduly harsh as far as the children were concerned [7].

11. Having weighed the merits of the public interest of managing immigration as against the individual rights of the appellants to respect for family and private life, he was satisfied that the scales were in favour of confirming the respondent's decision.

The appeal to the Upper Tribunal

12. On 24 April 2019, Designated Judge of the First-tier Tribunal MacDonald granted the appellants permission to appeal. He found that it was arguable that the Judge applied the wrong test and also failed to apply any of the relevant case law including KO [2018] UKSC 52 which was considered and applied in JG (s.117B(6): "Reasonable to Leave") Turkey [2019] UKUT 0072 (IAC).

13. Mr Din, who did not represent the appellants before the First-tier Tribunal, relied on the grounds seeking permission to appeal, settled by counsel who represented the appellants before the First-tier Tribunal.

14. The third and fourth appellants were qualifying children at the date of the application on 18 October 2017, albeit they had reached majority at the time of the hearing.

15. The Judge stated at [7] that he was conscious of the requirement to ensure that s.55 of the Borders, Citizenship and Immigration Act 2009 had been followed.

16. At [4] of the decision the Judge stated that the key issue in deciding this appeal was whether there were exceptional circumstances which would render a refusal to be a breach of Article 8 because it would result in unjustifiably harsh consequences. That Mr Din submitted was the wrong test and the wrong approach.

17. He submitted that prior to the decision in KO, whatever else was said on the respondent's side of the scales, these would be outweighed by the seven years on the side of the child. The court in KO considered a number of factors whereby the scales tipped in favour of refusal of leave despite the qualifying period being fulfilled.

18. That however did not mean that the converse is now true. The qualifying child is still a significant primary factor on the scales, as confirmed in JG.

19. He noted that the appellants in KO were either reliant on s.117C due to criminality, or had other factors beyond immigration control adding to the balancing exercise. The question that the Supreme Court was being asked was whether the Tribunal should be concerned *only* with the position of the child or whether it was a balancing exercise. The court determined the latter, but in so doing, did not overturn MM (Uganda) and ZH (Tanzania) or section 55.

20. He submitted that provided the seven year criteria are met, s.117B (6) is a stand alone route requiring no other additional factors to be completed - Treebhawon & Others (NIAA 2002 Part 5A – Compelling Circumstances Test) [2017] UKUT 0013. The child's best interests should not be compromised on account of the misdemeanours of their parents.

21. There needs to be a powerful reason to remove child over seven years old as stated by the Upper Tribunal in MT and ET [2018] UKUT 88.

22. Lord Carnwath set out the general approach at [13]. This involves an assessment of all of the factors relevant to the application of Article 8. The child is not to be blamed for the matters for which they are not responsible, such as the conduct of a parent. What is "reasonable" for the child is central to the question [17].

23. Lord Carnwath's discussion of the issues at [23] noted the difference in language between s.117B(6) and s.117C (1) and that "unduly harsh" is a higher hurdle than "reasonableness". Mr Din noted that KO and IT were foreign criminals – a s.117C case. The appellants NS and AR were involved in the CCL scam.

24. Following KO, the Upper Tribunal re-examined the issues in JG (s.117B(6): "Reasonable to Leave") Turkey [2019] UKUT 0072 (IAC).

25. The Tribunal was satisfied that counsel's construction of s.117B(6) is the correct one. Even though, on the Tribunal's findings, it is unlikely that the children would leave the UK, if the applicant were removed, then the hypothesis (which s.117B(6)(b) demands) is that they are expected to leave, it must be determined whether it would be reasonable for them to do so.

26. Section 117B(6) concerns an assessment of the reasonableness of a child leaving the UK. It does not expressly demand an assessment of the reasonableness by reference to the length of time the child is expected to be outside the UK. In the light of paragraph [18] and [19] of KO, the child's destination and future are to be assumed to be with the person who is being removed.

27. The Tribunal referred to a case where the respondent's position is that the person who is being removed can be expected to make an entry clearance application. Did this require the Tribunal's assessment to take this into account in determining whether it would be reasonable for the child to leave? The Tribunal did not consider it necessary to resolve the question, at least in its stark form. The Chikwamba principle is predicated on the assumption that, where there are children, it is not envisaged that they would be expected to go away and stay with the parent concerned, whilst the latter makes an application for entry clearance. To envisage otherwise would be to turn a standard principle on its head.

28. In any event, in determining whether it would be reasonable for children to leave in these circumstances, the likely temporary nature of the absence from the UK may well be said, as in the present case, to make it unreasonable to expect the children to leave. The Tribunal posed the question whether it was reasonable in that case for the children to have their education disrupted so that they can be with a parent making an entry clearance application, which is predicated on the need (and thus, an Article 8 case) to be with the children in the UK.

29. Mr Din noted that in JG, the Tribunal assessed that the appellant was both dishonest and unscrupulous to a high degree. She flagrantly defied the law of the UK by overstaying. Nonetheless, the Tribunal concluded that it would not be reasonable to expect the appellant's children to leave the UK in the event of her

removal. That meant that their appeal succeeds. It does so because Parliament stated in terms that the public interest does not require her removal in these circumstances. It does so despite the fact that absent s.117B(6), the appellant's removal would be proportionate in terms of Article 8 of the Human Rights Convention.

30. Mr Din accordingly submitted that as there was a wrong approach adopted, no proper consideration or reference to key decisions, that there have been material errors.

31. On behalf of the respondent, Mr Walker accepted that the Judge did apply the wrong test and in particular failed to apply relevant case law including KO and JG.

Assessment

32. I find in the circumstances as agreed, that the Judge applied the wrong test and in particular did not consider the recent decision of the Upper Tribunal in JG.

33. Mr Walker has properly accepted that the decision cannot stand.

34. Both parties agreed that the decision should accordingly be set aside and remitted to the First-tier Tribunal for a fresh decision to be made, based on up to date evidence.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. It is set aside.

The appeal is remitted to the First-tier Tribunal (Birmingham) for a fresh decision to be made by another Judge.

Anonymity direction continued.

Signed Date 22 May 2019

Deputy Upper Tribunal Judge Mailer