Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/33331/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 September 2019	**On 2 October 2019**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BALWINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant/Secretary of State: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr A Burrett, Counsel instructed by Lawise Solicitors

DECISION AND REASONS

1. I shall refer to the respondent as the appellant as he was before the First –tier Tribunal (FTT). The appellant is a citizen of India. His date of birth is 15 July 1990.

2. The appellant appealed against the decision of the Secretary of State to refuse his application for leave to remain on human rights grounds on 12 October 2015. His appeal was allowed by First- Tier Tribunal Judge (FTTJ) Ross in a decision dated 28 February 2019, following a hearing on 30 January 2018.

3. The Secretary of State's appeal against the decision of FTTJ Ross to allow the appeal was successful. His decision was set aside by Upper Tribunal Judge (UTJ) Jackson. She went on to dismiss the appellant's appeal on human rights grounds.

4. Sir Stephan Silber refused to grant the appellant's application for permission; however, the appellant's application to re-open that decision pursuant to CPR Rule 52.30 was successful. The decision was set aside: see *Singh [2019]* EWCA Civ 1504. The parties agreed that permission to appeal should be granted and the decision of UTJ Jackson was set aside. The court of appeal remitted the case to the UT. Thus, the matter came before me to determine whether FTTJ Ross had made an error of law.

The background

5. The appellant came to the UK on 10 February 2010 as a student. He made a further application in the same category which was refused on 17 July 2012. On 13 February 2015 he made an application for leave to remain on the basis of family life with his wife and child. His application was refused by the respondent on suitability grounds(S-LTR.1.6) of Appendix FM of the Immigration Rules ("the Rules") because the appellant submitted a false TOIEC certificate from ETS with his application dated 24 March 2012.His appeal was dismissed by FTTJ Parker. That decision was set aside by UTJ Craig. The finding that the appellant exercised deception was, however, maintained. The appeal was remitted to the FTT and came before FTTJ Ross.

The decision of the FTTJ Ross

6. At the hearing it was not disputed by the respondent that the appellant had a genuine and subsisting relationship with his wife, a citizen of India with ILR (she came here at the age of 4 following the death of her parents in a car crash), and their two British citizen children aged 4 (date of birth 12 November 2013) and 2 (date of birth 29 March 2016). Judge Ross said at [11] that he could not go behind the finding that the appellant had exercised deception in obtaining an English language certificate by using a proxy test taker; however, he said that the issue was whether the refusal on suitability grounds is proportionate. The judge at [12] considered the children's best interests"in isolation to the appellant's conduct in obtaining a false certificate."The judge at [13] said that "it would not be reasonable to expect British citizen children to leave the United Kingdom in order for their family life to continue abroad. Such was actually conceded in Sanade and others (British children – Zambrano – Dereci [2012] UKUT 48". The judge found that it was in the eldest child's best interests to remain here "and continue with his schooling without disruption". He accepted that the appellant was the youngest child's primary carer. He found at [13] "that it would not be reasonable to expect British citizen children to leave the United Kingdom in order for their family life to continue abroad…….I find that the best interests of the appellant's children are that the status quo is maintained, and they remain being looked after by the appellant and his wife in the United Kingdom.."

7. At [14] the judge found that it would not be reasonable to expect that appellant's wife to relocate to India where she has no surviving relatives. The judge at [15] considered section 117B (6) and concluded that "it would not be reasonable to expect them [the children] to leave the UK. Whilst there is a public interest in the removal of

a person who has used deception in an application for leave, having regard to Treebhawon and other (sections 117B96)) (sic) [2015] UKUT 00674 (IAC), I find that the section 11b(6) (sic) public interest prevails".

The grounds of appeal

8. The Secretary of State's grounds assert that the judge "has failed to adequately consider the public interest alongside considerations about the best interests of the children and in doing so he errs in law." The respondent submits that it is a choice for the parents whether the children should relocate or remain here with their mother; thus, the judge misapplied *Sanade and Others (British Citizen- Zambrano – Dereci*) [2011] UKUT48.It is submitted that there is no evidence that the children could not remain here with their mother. It is submitted that the judge erred when finding that the appellant was the youngest child's primary carer. He may provide care for the child because he is unable to work but that does not make him a primary carer. The judge failed to balance the appellant having no status and having committed a fraud. To summarise the judge failed to factor into the assessment the public interest when considering s117B (6) of the 2002 Act. The cases of *N (Kenya) v SSHD* [2004] EWCA Civ 1094 and *OH (Serbia and Montenegro) [*2007] EWCA 1140 are relied on.

9. The grounds assert that reasonable in the context of s.117B (6) encompasses all of the relevant public interest factors set at s117B (1) – (5). It is asserted that the consideration of a child's best interests is an exercise conducted separately within the proportionality analysis. The best interest's assessment is free-standing and not the sole relevant consideration under s.117B(6). The judge erred in his approach because it may be reasonable to remove a parent notwithstanding that it is not in the child's best interests. The judge did not consider all relevant factors and consider them in the round.

Oral submissions

10. Mr Tufan accepted that since the grounds were drafted the law has changed; however,the thrust of his submissions is that the judge made an error in applying *Sanade* in the light of *The Secretary of State v VM (Jamaica)* [2017] EWCA Civ 255 and in treating the child's best interests as determinative. Mr Burrett said that whilst there was a lack of clarity in the decision, this was not material.

The law

11. In *KO (Nigeria) v SSHD* [2018] UKSC 53 the Supreme Court held that the question of whether it would be reasonable to expect a child to leave the UK is focused exclusively on the child and what is "reasonable" for the child- albeit the child "in the real world" – and that an assessment precludes any balancing of the child's best interests against the public interest in removing foreign nationals on the basis of their conduct. The Supreme court said as follows;

"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 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?""

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.

12. *In SSHD v AB (Jamaica) and (AO) (Nigeria) [2019]* EWCA Civ 661 in which the issue arose as to whether s117B (6) of the 2002 Act applies at all in circumstances in which there is no realistic prospect of a qualifying child leaving the UK as a consequence of the removal of one of their parents, the court of appeal agreed with the UT in *JG v*

SSHD [2019] UKUT 00072 and *SR (subsisting parental relationship – s.117B (6) (Pakistan) [*2018] UKUT 0033 about the interpretation of s.117B (6); namely, that the construction is not affected by the Secretary of State's submission that in cases where the subsection does not have any purchase because the child would not in practice leave the UK at all there would need to be a full blown proportionality assessment.

Conclusions

13. The relevant case law, reported after the decision of Judge Ross, tells us how s.117B (6) should lawfully be interpreted and applied, and fatally undermines many of the complaints made in the grounds. However, there is substance in the grounds in so far as the judge conflated the best interest's assessment and the assessment of reasonableness (albeit neither test call for a balance to be drawn with the public interests) and erroneously relied on the concession in *Sanade* which at the time of the hearing before judge Ross had been withdrawn. It may be in a child's best interests to remain here, but it may be reasonable for him or her to leave. For this reason, the judge materially erred.

14. Mr Burrett conceded that the decision is not clear, but this lack of clarity is not material, in his view. The children are British. Their mother has ILR. The only person who does not have status is the appellant. Taking a "real world view" the appeal must succeed. Mr Tufan's response was simply to refer me to *KO* and the appellant in that case *NS*; however, he accepted that both parents in that case had used deception whereas in this case the appellant's wife was blameless.

15. There was no properly articulated challenge to the judge's findings about the eldest child's best interests; namely, to remain in the UK. It is the assessment of reasonableness that is the subject of challenge. Whilst the appellant has exercised deception, it is not a matter relevant in the assessment of what is reasonable. Parental misconduct is to be disregarded. I have considered materiality in the context of Mr Tufan's submissions on the point and the scope of the Secretary of State's grounds. I have taken into account the children's citizenship, the status of the appellant's wife (how long she has been here and her employment) and that the eldest child is at pre-school here. Moreover, I find that moving to a different country would be disruptive and unsettling for the family, particularly the children. I find that on the evidence before the FTT, it would be unreasonable to expect the children to leave the UK. For this reason, I accept Mr Burrett's submission that the error made by the judge was not material on the facts of this case.

16. The decision of the judge to allow the appeal under Article 8 is maintained.

Signed *Joanna McWilliam* Date 30 September 2019

Upper Tribunal Judge McWilliam