



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/04784/2018

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 29<sup>th</sup> April 2019**

**Decision & Reasons  
Promulgated  
On 1<sup>st</sup> May 2019**

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**SM  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Z. Jafferji of Counsel

For the Respondent: Mr E. Tufan, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of India.
2. **Rule 14: 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 his**

**family. This direction applies both to the Appellant and to the Respondent.**

3. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who, in a determination promulgated on the 2nd August 2018, dismissed his appeal against the decision of the Respondent made on the 30<sup>th</sup> January 2018 to refuse his application for leave to remain.
4. Permission to appeal was granted by First-tier Tribunal Judge Simpson on the 15<sup>th</sup> October 2018.
5. The background to the appeal is set out in the decision letter and the determination at paragraph 4. It can be summarised as follows. The Appellant entered the United Kingdom on the 26<sup>th</sup> October 2009 with leave as a working holiday maker until October 2011 and subsequently made applications for leave to remain. He began a relationship with his partner in 2013. He was found to be working in 2015
6. The Appellant was served with a notice of immigration decision (notice of removal) and a statement of additional grounds was completed on the 28<sup>th</sup> July 2015 for leave to remain on the basis of his family life with his partner, an Indian national who had permanent residence and his child, a British Citizen.
7. This was treated as an Article 8 (human rights) application which resulted in a refusal decision dated 30<sup>th</sup> January 2018.
8. The decision letter was summarised at paragraph 5 and 6 of the determination. The Appellant could not meet the Immigration Rules under Appendix FM as a partner as he could not meet the requirements because he had not demonstrated that he had been in a genuine and subsisting relationship with his partner for 2 years. Furthermore, he could not meet the eligibility requirements as a parent because he did not have sole responsibility for the children. As to EX1, it was considered that he could not meet the requirements although he was the parent of a child under 18 years of age because he had not provided evidence that the relationship was genuine and subsisting.
9. No assessment was made of the issue of reasonableness as the decision maker did not accept there was a genuine and subsisting parental relationship between the applicant and the British Citizen child.
10. As to private life under Paragraph 276ADE, he could not meet the requirements given his length of residence since September 2009. As to whether there were any very significant obstacles to his integration into India, it was not accepted that there would be such significant obstacles given that he had spent the first 22 years of his life in India nor would he have lost all ties to his country of origin. He had continuing cultural,

linguistic and social ties and would still be familiar with the culture language and social customs of India.

- 11.** At paragraph 79 – 99 the decision letter made reference to whether there were any “exceptional circumstances” for a grant of leave to remain outside of the Rules, taking into account the presence of the relevant child but that as he was not the primary care giver and had not demonstrated that he had a genuine and subsisting relationship with either his partner or the child, it would not be disproportionate for him to return to India.
- 12.** The Appellant sought permission to appeal and the appeal came before the First-tier Tribunal on the 20<sup>th</sup> July 2018. In a determination promulgated on the 2<sup>nd</sup> August 2017 the Judge dismissed the appeal under the Immigration Rules and on human rights grounds (Article 8).
- 13.** Grounds of appeal were submitted on behalf of the appellant which principally challenge the legal test applied as to the issue of the assessment of reasonableness and whether the judge applied the correct test and the evidential foundation for the Chikwamba principle. Other issues also arose as to the adequacy and relevancy of the findings of fact made (see paragraphs 11 of the grounds).
- 14.** Before the Upper Tribunal, the advocates agree that the decision of the FtTJ involved the making of an error on a point of law. Mr Tufan, in his submissions accepted that it was a material error and that given the changed circumstances of the appellant’s partner that the appeal should be remitted to the First-tier Tribunal for a re hearing, and for further findings of fact to be made.
- 15.** Given that the parties are in agreement, I need only set out in brief detail why that concession was properly made. It is plain for the decision letter that the respondent did not accept that that the appellant had a genuine and subsisting relationship with his child.
- 16.** In assessing whether the public interest considerations are sufficiently serious to outweigh the best interests of the child the judge was required to take into account the statutory provisions contained in section 117B (6), which states that the public interest will not require the person's removal where he has a genuine and subsisting relationship with a 'qualifying child' and it would not be reasonable to expect the child to leave the United Kingdom.
- 17.** There is no dispute that Z is a 'qualifying child' for the purpose of section 117B (6) as she is a British Citizen. The judge expressly found that contrary to the decision letter, that the appellant has a genuine and subsisting parental relationship with the child (see paragraph [34]), having assessed the evidence and the ISW report.
- 18.** The issue identified is whether it would be 'reasonable' to expect the child to leave the UK within the meaning of section 117B (6). In MA (Pakistan) v

SSHD [2016] EWCA Civ 705 the Court of Appeal expressed some doubt as to whether the 'reasonableness' test should include consideration of public interest factors but declined to depart from the earlier decision in MM (Uganda) v SSHD [2016] EWCA Civ 450, which concluded that it did. There can be no criticism of the FtJ who applied the decision of MA (Pakistan) and who did not have the benefit of the Supreme Court's decision in KO (Nigeria) v SSHD [2018] UKSC 53 (see paragraphs 63 and 64 of the decision). In that decision the Court held that the approach taken by the Court of Appeal in MM(Uganda) was wrong and endorsed the approach Elias LJ would have taken at paragraph 36 (see the judgment of Lord Carnwath at paragraph 17 and at paragraphs 12 -19).

**19.** In light of that decision and also the recent decision of the Secretary of State v AB (Jamaica and AO (Nigeria)) [2019] EWCA Civ 661, which upholds the reasoning set out in the decision of the Upper Tribunal in JG (s117B(6): reasonable to leave UK ) Turkey [2019] UKUT 72, there are two errors of law which the advocates agree was material to the outcome. Firstly, the judge expressly took into account the wider public interest considerations when purporting to assess the issue of reasonableness but more importantly, at paragraph 64 the judge did not go on to consider the issue of whether it would be reasonable for the child to leave the UK because the judge found that the child would not be required to leave (see paragraph 64). This is an error and unarguably applies the wrong test – the correct test being identified and summarised in AB (Jamaica) at paragraphs 72- 75; the question that the statute requires to be addressed is a single question; is it reasonable to expect the child to leave the UK?

**20.** The Court stated:

72. I respectfully agree with the interpretation given by the UT to section 117B(6)(b) in *JG*.
73. Speaking for myself, I would not necessarily endorse everything that was said by the UT in its reasoning, in particular at para. 25, as to the meaning of the concept "to expect". However, in my view that does not make any material difference to the ultimate interpretation, which I consider was correctly set out by the UT in *JG*. In my view, the concept of "to expect" something can be ambiguous. It can be, as the UT thought at para. 25, simply a prediction of a future event. However, it can have a more normative aspect. That is the sense in which Admiral Nelson reputedly used the word at Trafalgar, when he said that "England expects every man to do his duty." That is not a prediction but is something less than an order. To take another example, if a judge says late in the day at a hearing that she expects counsel to have filed and served supplementary skeleton arguments by 9 a.m. the following morning, so that there is no delay to the start of a hearing an hour later; although she may not be ordering the production of that skeleton argument, that is what she considers *should* happen. That is not a prediction of a future occurrence. It carries some normative force.
74. Finally, in that regard, I agree with and would endorse the following passage in the judgment of UTJ Plimmer in *SR (Subsisting Parental Relationship – s117B (6)) Pakistan* [2018] UKUT 00334 (IAC), a case

which was decided before decision of the Supreme Court in *KO (Nigeria)*, at para. 51:

"... It is difficult to see how section 117B(6)(b) can be said to be of no application or to pose a merely hypothetical question. Section 117B (6) dictates whether or not the public interest requires removal where a person not liable to deportation has a genuine and subsisting parental relation with a qualifying child. The question that must be answered is whether it would not be reasonable to expect the child to leave the UK. That question as contained in statute, cannot be ignored or glossed over. Self-evidently, section 117B (6) is engaged whether the child will or will not in fact or practice leave the UK. It addresses the normative and straightforward question – should the child be 'expected to leave' the UK?"

75. I respectfully agree. It is clear, in my view, 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? It does not consist of two questions, as suggested by the Secretary of State. If the answer to the single question is obvious, because it is common ground that the child will not be expected to leave the UK, that does not mean that the question does not have to be asked; it merely means that the answer to the question is: No."

- 21.** The judge found that as the child could remain in the UK with her mother (at [61]) that she would not be required to leave the UK. This was the wrong test to apply.
- 22.** Further issues arise as to the consideration of the separation of the family. The judge considered that the appellant could return to India and make an application for entry clearance and therefore any severance of the relationship between the child and her father would be temporary. However, as Mr Jafferji submits there were no findings as to whether the appellant could meet the requirements of Appendix FM nor whether it would entail a temporary separation. There did not appear to be any consideration as to the evidence as to the length of a likely separation or how long it would take for such an application to be considered and whether such an application would in fact succeed. It is unclear whether the judge applied the Chikwamba principles and where this was case where there is a good reason to expect the appellant to go to India.
- 23.** Consequently, I am satisfied that the decision of the First-tier Tribunal judge involved the making of an error of law and therefore the decision cannot stand and shall be set aside. I preserve the finding made at paragraph 34 that there is a genuine and subsisting relationship between the appellant and his daughter.
- 24.** Having heard the submissions of the advocates who both agree that this is an appeal which will require further evidence and findings made upon that evidence and that the circumstances have changed in the interim, I have therefore reached the decision that the appropriate course is that the appeal should be remitted to the First-tier Tribunal when all matters

relevant to the issue of reasonableness of return, including any evidence from her parents and the ISW should be considered. It is necessary for there to be the opportunity to hear up-to-date evidence concerning her best interests when considering the issue of reasonableness of return.

- 25.** Thus, the appeal shall be remitted to the First-tier Tribunal where it is anticipated further evidence will be given and factual findings made on all outstanding issues applying the correct legal framework.

**Decision:**

The decision of the First-tier Tribunal did involve the making of an error on a point of law and the appeal is remitted to the First-tier Tribunal.

Signed

Date: 29<sup>th</sup> April 2019

Upper Tribunal Judge Reeds