



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/05013/2018

THE IMMIGRATION ACTS

Heard at Field House
On 3rd January 2019

Decision & Reasons Promulgated
On 4th February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MD. [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Aslam (Counsel)

For the Respondent: Mr T Lindsay (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Brewer, promulgated on 16th October 2018, following a hearing at Taylor House on 27th September 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Bangladesh, who was born on 16th November 1969. He appealed against the decision of the Respondent dated 4th February 2018, refusing his application for leave to remain in the United Kingdom, on the basis that he had wrongly declared self-employment earnings on his application for indefinite leave to remain, and had therefore properly been refused on the basis of paragraph 322(5) of HC 395.

The Judge's Findings

3. In a careful and comprehensive determination, the judge, at the outset stated that he had found the Appellant to be a credible witness, and that his evidence was consistent with contemporaneous documentation (paragraph 17). The Appellant had come to the UK as a student dependant on 10th October 2007 and had valid leave to remain in this country ever since. He married a Miss [SB], in 1996 and she came to the UK to study and the Appellant followed in October of that year, and they now had a child born to them in 2009 who was a British citizen (see paragraphs 17 to 20). The difficulty, however, in the Appellant's further applications to remain here, and particularly in relation to his application for indefinite leave to remain, arose from the fact that he had declared earnings from self-employment as £68,358 (paragraph 21) but his tax returns for the relevant years showed his net profit as being just £5,830 (see paragraphs 21 to 22). This led to the Respondent Secretary of State refusing his application.
4. When at the hearing, the Appellant's declaration of the requisite information was considered by the judge, the judge observed that the Respondent did not use the term "dishonest" in the decision letter. To the extent that the Appellant had deliberately given false information in his 2011 visa application, the Judge was content to assume that it was in this sense that there had been an allegation of dishonesty (paragraph 27). Having considered the matter, thereafter, there did not appear to be an innocent explanation for the discrepancy on the tax return in the 2011 application (paragraph 38). The judge therefore proceeded to consider Article 8 outside the Immigration Rules (from paragraph 40 onwards). He cited a wealth of case law. He then concluded that the salient facts here were that the Appellant's child was a 9 year old British citizen, who had lived in the family unit with his parents for the whole of his life, and that the Appellant's wife had some health issues but there was no suggestion that if the Appellant was removed his wife and child would go with him (paragraph 47). The judge expressly considered the best interests of the child to remain in the UK with both parents (paragraph 48) and observed that the refusal of leave to the Appellant would undoubtedly have an impact upon the Appellant, but the Appellant's child could then relocate to Bangladesh, and could adapt to life there, and there was no reason why this could not be done, particularly as "the Appellant did not suggest there would be any difficulties on return whether for him or his family other than at paragraphs 22 and 23 of his witness statement" (paragraph 48).
5. The appeal was dismissed.

Grounds of Application

6. The grounds of application state that the judge made an inadequate Section 55 assessment in that he failed to give sufficient reasons as to why he found it to be in the “best interests” of this British national child to leave the United Kingdom (at paragraphs 47 to 48). The facts here were that the Appellant’s child had never lived in Bangladesh. He had continued with his education in the UK. He was a British national child. He will be deprived of the benefits of UK education. He would also be deprived of NHS treatment in this country for his healthcare. He had his circle of friends here which he would lose. He would also face inevitable language and cultural barriers in Bangladesh if he was returned there.
7. Second, it was argued that the judge had made no finding as to whether it would be reasonable for the Appellant’s son to leave the UK in accordance with Section 117B(6). Under that provision express consideration had to be given, in circumstances where it was accepted there was a genuine and subsisting parental relationship, to whether or not it would be reasonable to expect the child to leave the United Kingdom.
8. Third, the proportionality assessment was deficient and the judge failed to follow the approach in **MA (Pakistan) [2016] EWCA Civ 705**, and to the recent decision in **KO (Nigeria) [2018] UKSC 53**.
9. On 14th November 2018 permission to appeal was granted by the Tribunal on the basis that the judge had made no reference to Section 117B(6) and it was arguable that he failed to consider whether it was reasonable to expect a British citizen child to leave the United Kingdom.

Submissions

10. At the hearing before me on 3rd January 2019, Mr Aslam, appearing as Counsel on behalf of the Appellant, relied upon the Grounds of Application. He submitted that the basic error of the judge’s determination was his failure (starting from paragraph 40 of the determination) to distinguish the Section 55 considerations from the wrongdoing of the father. This impacted upon the judge’s decision as to whether it will be “reasonable” to expect the Appellant’s child to go and live in Bangladesh. Second, there was no consideration of Section 117B(6) in relation to the question of whether it was indeed “reasonable” to expect the child to go and live in Bangladesh. This was important bearing in mind that this was a British national child who had not lived in Bangladesh. Essentially, the judge had conflated the wrongdoing of the father with the best interests of the child, in the Section 55 consideration, which it was not open to the judge to do.
11. For his part, Mr Lindsay submitted that there was no error of law. First, it was not material to fail to mention Section 117B(6), and this had been conceded by Mr Aslam today during his submissions. Second, the Appellant could not succeed under **KO (Nigeria) [2018] UKSC 53** because of what the Supreme Court said at paragraph 51 of the determination. Here the Supreme Court considered whether Section 117B in this application meant that parental misconduct had to be disregarded. Lord Carnwath stated that,

“The parents’ conduct was relevant in that it meant that they had to leave the country. As I have explained, 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. But in a context where the parents have to leave, the natural expectation will 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” (paragraph 51).

12. It was implicit in this, submitted Mr Lindsay, that, in considering the parent’s conduct, this would have an impact on whether it was reasonable for the child to leave with the parent, and this was what Lord Carnwath had stated here. Third, where it is the case that in considering Section 117C(2), “the nature of the offending” should not be taken into account (see paragraph 42 of Lord Carnwath’s judgment), given that

“It will normally be reasonable for the child to be with them [i.e. their parents]. To that extent the record of the parents may become indirectly material, if at least leads to their ceasing to have the 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 to remain” (paragraph 18 of Lord Carnwath’s judgment).

13. In this case, this is exactly what the judge had held. This was clear from the judge’s determination at paragraphs 47 to 48, where it is plain that the judge does not conflate a consideration of the child’s best interests with the wrongdoing of the father, but treats this distinctly in its own right.
14. In reply, Mr Aslam submitted that the wrongdoing of the parent cannot be included in any Section 55 best interests analysis for the rights of the child. In this case, the best interests of the child may have been undervalued (see paragraph 6 of the grounds), and this may be the case because only at paragraphs 47 to 48 does the judge actually consider Section 55 of the relevant statutory provision with respect to the child’s best interests.
15. He asked me to allow the appeal.

No Error of Law

16. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
17. First, there is a question of the judge’s approach. It is not the case, as has been submitted before me today, that the judge has conflated the Section 55 best interests of the child considerations with the wrongdoing of the father. The judge first sets out the precise position of the 9-year old British child in this case, who has lived the whole of his life with his parents in this in this country. Indeed, the judge then goes on to say (at paragraph 48) that the best interests of the child are to remain with both parents in this case.
18. Second, however, the weakness in the Appellant’s appeal, lay in his not being able to demonstrate what the precise difficulties were in relation to this Appellant’s child

relocating to Bangladesh with him, should that be the case. This is clear from the judge's determination. He first states that

"There is no suggestion that if the Appellant were removed his wife and child would not go with him and no evidence was led of any particularly difficult obstacles the child, or indeed the parents would face in relocating to Bangladesh where both parents were born and where they lived for most of their lives" (paragraph 47).

19. The judge then also goes on to explain that, whilst it is being suggested that the Appellant's child has no experience of schooling outside the UK, and that there are "significant difficulties in reintegration", the Appellant "does not in fact say what they would be" (paragraph 48). It was for the Appellant to make good his case. He was unable to do so on the facts that were presented to the judge.

20. Third, there then arose the question of the position with respect to the law. The governing authority now is, of course, **KO (Nigeria) [2018] UKSC 53**. This records how the government's IDI (22 February 2018) makes it clear that

"The consideration of the child's best interests must not be affected by the conduct or immigration history of the parent(s) or primary carer, but these will be relevant to the assessment of the public interest, including in maintaining effective immigration control ..." (paragraph 11 of Lord Carnwath's judgment).

21. The decision of the Supreme Court refers to the IDI guidance and implicitly approves it thereafter when it states (at paragraph 18) that "to that extent the record of the parents may become indirectly material" because when the public interest is considered the record cannot at that stage be excluded. This leads the Supreme Court to the eventual conclusion (at paragraph 19) that the situation has been looked at in a way "that 'reasonableness' is to be considered in the real world in which the children find themselves" (paragraph 19). The real world is that neither parent has the right to remain in this country, and in circumstances where the Appellant did not suggest what the difficulties of reintegration precisely would be (see paragraph 48) before the judge, the conclusion that the child could reasonably go to Bangladesh with the Appellant was one that was open to the judge to come to.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall stand.

The appeal is dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

21st January 2019