



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07061/2018

THE IMMIGRATION ACTS

Heard at Field House
On 17 May 2019

Decision & Reasons Promulgated
On 03 June 2019

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

ABUL [H]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Shrestha of Counsel, instructed by Law Lane Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. In a decision sent to the parties on 1 March 2019, I set aside for material error of law the decision of Judge Watson of the First-tier Tribunal dated 10 December 2018, dismissing the appeal of the appellant, a citizen of Bangladesh, against a decision made by the

respondent on 9 March 2018 refusing his application for leave to remain on family and private life grounds. I found that the judge erred in failing to address paragraph EX.1(a) of the Immigration Rules (the issue of whether it was reasonable to expect the British citizen child to leave the UK) and also s.117B(6) NIAA 2002. At para 8, I noted that there was no real dispute about the facts, hence the case would be retained in the Upper Tribunal. I then stated at para 9 that:

“Neither party referred to the Supreme Court guidance given in **KO (Nigeria)** UKSC [2018] although in my view its terms lend more support to the appellant than to the respondent. A presidential panel of the Upper Tribunal is due to deliver a decision on several test cases seeking to clarify the guidance given in **KO (Nigeria)**. In view of the necessity for the Upper Tribunal to receive submissions in any event on the significance for the appellant’s case of the guidance given in **KO (Nigeria)**, I shall direct that the case be set down for a further one hour hearing to receive submissions from both parties as to how the decision in this case should be re-made in the light of the guidance given by the Supreme Court in **KO (Nigeria)** together with the further analysis of that guidance due to be promulgated by the Upper Tribunal in the aforementioned test cases.”

2. Since then we have had further guidance from the Upper Tribunal, inter alia, in **JG (s117B(6): “reasonable le to leave” UK)** Turkey [2019] UKUT 72 (IAC) Rev 1 and from the Court of Appeal in **SSHD v AB (Jamaica) & Anor** [2019] EWCA Civ 661.

3. My task in this case is to re-make the decision on the appellant’s appeal.

The facts

4. Whilst I stated in my error of law decision that there was no real dispute as to the facts, it is more correct to say that I was satisfied I could proceed on the basis that the judge’s findings of fact were sound. On most matters those findings were based on agreed facts. In particular the following facts are not in dispute. The appellant came to the UK in 2010 as a student and his Tier 4 visa was renewed to 15 September 2015. On 15 September 2015 he applied for leave to remain outside of the Rules and then this was varied on 24 February 2016 to an application for leave to remain under Family and Private Life. This was refused on 17 August 2017 although the refusal notice was not served on the appellant until 14 November 2017. In August 2017 the appellant married Ms [A], this being a marriage arranged by her parents. Both are fit and well. She is a dentist. She completed the undergraduate part of her training in December 2017 and is now doing her post graduate studies and training to complete her qualification. She commenced her one-year placement in March 2018 and worked until May 2018 when she left due to her pregnancy. She returned to work in November 2018. She is earning while training and studying and earns sufficient to support the family. The couple have a baby born in May 2018. Both the baby and Ms [A] are British citizens. Ms [A] was born in the UK and all her family are here. They live with her mother and brother.

5. The only area of factual dispute concerned whether or not the appellant’s wife could get family help with looking after her child. The appellant’s evidence was that his mother and brother had some health problems and would not be able to care for the baby while Ms

[A] went to work four days a week and studied one day a week at college and continued her home studies at the weekend. The judge, however, found that there was “considerable family assistance available to Ms [A] in caring for the baby at home and she would also have the ability to look at paid child care assistance” (para 13) - although the judge also accepted at para 16 that “the appellant is at present an important resource to her and her life will be considerably harder if he has to leave the country and make an application to return.” (the judge went on to evaluate that this would not be “unduly harsh”).

6. As regards the appellant’s financial circumstances, the judge also found that the appellant’s wife earned £1700 net per month (in March 2018) and the appellant had thus shown that he and his wife earned sufficient to support the family without recourse to public funds. At para 19 the judge added that “whilst I have found that the spouse has at present sufficient to maintain the family it does not follow that an entry clearance application is bound to succeed. I have very limited documentation before me and the case is not analogous to Chiwamba [2008] UKHL 40.

7. In my error of law decision I found no error in the judge’s finding that the the couple would not face insurmountable obstacles if they had to return to Bangladesh and the appellant had not established that there would be very significant obstacles to his reintegration into Bangladesh society.

8. One feature of the appellant’s case is that at the date of the respondent’s decision, the couple were only expecting a child. It was only by the time of the hearing before the First tier Tribunal judge that the appellant’s wife had given birth to their child. No point was taken by the respondent at the time that this was in fact a “new matter” and one on which pursuant to s.85(5) of the 2002 Act the respondent had not given any consent to it being raised in the appeal. The parties and the judge simply proceeded on the basis that this was evidence that should be considered. However, Mr Kotas confirmed that the respondent was content to proceed on the basis that the appellant’s up to date circumstances, including the fact that there is a British citizen child, should be considered.

Submissions

9. I heard submissions from both representatives. Mr Kotas submitted that the further guidance in JG and SSHD v AB(Jamaica) confirmed that the assessment of reasonableness within para.EX.1(a) of the Rules and s 117B(6) NIAA 2002 had to be child-centred and that the Tribunal had to assess reasonableness without considering the conduct of the parent although it was indirectly relevant to consider in the real world what the immigration situation of the parents was. Here the appellant had been in the UK with leave for five years (until September 2015) although not thereafter. Given the very young age of the child, there were no issues concerning education. However, he would accept that the respondent’s current guidance on the position of parents of “qualifying children” treated the fact that there was a qualifying child as a “starting point”. Pages 68-69 of the guidance dated 11 April 2019 stated that “[t]he starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child’s best interests for the whole family to remain together, which means if the child is not expected

to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK". So far as concerns the policy that was in force when the respondent made her decision in this case (Mach 2018), the policy was, he said, as set out in KO (Nigeria). Mr Kotas said that in this case there was no evidence either way about whether the appellant's wife would leave the UK if the appellant was required to leave. Thus it was a "choice" case.

10. Mr Shrestha submitted that the mother and child were British citizens and that the appellant had had leave (including s.3C leave) lawfully for over 9 years. In these circumstances it would not be reasonable to expect the child to leave the UK, particularly since it was an accepted fact in this case that the appellant had been playing the major role in looking after the child, as his wife was either working or studying towards her dentistry degree. The appellant is not an overstayer and following the guidance given by the Supreme Court in Rhuppiah [2018] UKSC 58, it was important to consider that there were degrees of precariousness and in this case the appellant's immigration status was not characterised by unlawfulness. He was one year away from being eligible to apply on the basis of 10 years residence. In response to Mr Kotas' submissions that there was no evidence that the wife would or would not leave the UK and thus that it was a "choice" case, he said that there was evidence as set out in the wife's witness statement that she would not be able to leave and in any event, under para EX.1(a) of the Rules and s 117B(6) of the 2002 Act it was not the reasonableness of the parent leaving but that of the child that was in issue. He also contended that the appellant was entitled to the benefit of the guidance given in Chikwamba [2008] UKHL 40 as his was a family case and it was clear that the sponsor met the financial requirements given her income and thus entry clearance was "likely to be granted".

11. In the course of submissions it became clear that more information was needed regarding the wife's dentistry course and when it was likely to be completed. I gave an oral direction that the appellant's representatives send within 7 days documentation confirming the wife's expected degree completion date, with a copy to be sent to the respondent (Mr Kotas indicated the respondent would not wish to respond). In response I received further documents from the appellant's solicitors, including a witness statement from his wife dated 21 May 2019, which they had sent on 22 May 2019.

Policy considerations

12. The Home Office amended its policy document 'Appendix FM 1.0b: family life (as a partner or parent) and private life: 10 year', publishing a new version on 19th December 2018. The updated guidance includes a revision to the section entitled 'Would it be reasonable to expect the child to leave the UK?' (pages 68-70). This was amended following the decision of the Supreme Court in KO (Nigeria). In its latest incarnation, dated April 2019, the policy document contains the following passages:

"Is the child a British citizen or have they lived in the UK for a continuous period of at least 7 years?"

The decision maker should establish from the application or claim the age and nationality of each child affected by the decision. Where the child is a foreign national, the decision

maker should establish their immigration history in the UK (for example how long have they lived in the UK and where they lived before).

In establishing whether a non-British Citizen child has lived in the UK continuously for at least the 7 years immediately preceding the date of application, the decision maker should include time spent in the UK with and without valid leave.

Short periods outside the UK – for example for holidays or family visits – would not count as a break in the continuous period of at least 7 years required. However, where a child has spent more than 6 months out of the UK at any one time, this will normally count as a break in continuous residence unless any exceptional factors apply.

Will the consequence of refusal of the application be that the child is required to leave the UK?

The decision maker must consider whether the effect of refusal of the application would be, or would be likely to be, that the child would have to leave the UK. This will not be the case where, in practice, the child will, or is likely to, continue to live in the UK with another parent or primary carer. This will be likely to be the case where for example:

- the child does not live with the applicant
- the child's parents are not living together on a permanent basis because the applicant parent has work or other commitments which require them to live apart from their partner and child
- the child's other parent lives in the UK and the applicant parent has been here as a visitor and therefore undertook to leave the UK at the end of their visit as a condition of their visit visa or leave to enter

If the departure of the parent or carer would not result in the child being required to leave the UK, because the child will (or is likely to) remain living here with another parent or primary carer, then the question of whether it is reasonable to expect the child to leave the UK will not arise. In these circumstances, paragraph EX.1.(a) does not apply.

However, where there is a genuine and subsisting parental relationship between the applicant and the child, the removal of the applicant may still disrupt their relationship with that child. For that reason, the decision maker will still need to consider whether, in the round, removal of the applicant is appropriate in light of all the real-life circumstances of the case, considering the best interests of the child as a primary consideration and the impact on the child of the applicant's departure from the UK, or them having to leave the UK with them. If it is considered that refusal would lead to unjustifiably harsh consequences for the applicant, the child or their family, leave will fall to be granted on the basis of exceptional circumstances.

Would it be reasonable to expect the child to leave the UK?

If the effect of refusal of the application would be, or is likely to be, that the child would have to leave the UK, the decision maker must consider whether it would be reasonable to expect the child to leave the UK.

Where there is a qualifying child

A child is a qualifying child if they are a British child who has an automatic right of abode in the UK, to live here without any immigration restrictions as a result of their citizenship, or a non-British citizen child, who has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, which recognises that over time children start to put down roots and to integrate into life in the UK. The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest

for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK.

In the caselaw of *KO and Others* 2018 UKSC53, with particular reference to the case of *NS (Sri Lanka)*, the Supreme Court found that “reasonableness” is to be considered in the real-world context in which the child finds themselves. The parents’ immigration status is a relevant fact to establish that context. The determination sets out that if a child’s parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that that it would not be reasonable.

There may be some specific circumstances where it would be reasonable to either expect the qualifying child to leave the UK with the parent(s) or primary carer or for the parent(s) or primary carer to leave the UK and for the child to stay. In deciding such cases, the decision maker must consider the best interests of the child and the facts relating to the family as a whole. The decision maker should also consider any specific issues raised by the family or by, or on behalf of the child (or other children in the family).

It may be reasonable for a qualifying child to leave the UK with the parent or primary carer where for example:

- the parent or parents, or child, are a citizen of the country and so able to enjoy the full rights of being a citizen in that country
- there is nothing in any country specific information, including as contained in relevant country information which suggests that relocation would be unreasonable
- the parent or parents or child have existing family, social, or cultural ties with the country and if there are wider family or relationships with friends or community overseas that can provide support:
 - the decision maker must consider the extent to which the child is dependent on or requires support from wider family members in the UK in important areas of his or her life and how a transition to similar support overseas would affect them
 - a person who has extended family or a network of friends in the country should be able to rely on them for support to help (re)integrate there
 - parent or parents or a child who have lived in or visited the country before for periods of more than a few weeks. should be better able to adapt, or the parent or parents would be able to support the child in adapting, to life in the country
 - the decision maker must consider any evidence of exposure to, and the level of understanding of, the cultural norms of the country
 - for example, a period of time spent living amongst a diaspora from the country may give a child an awareness of the culture of the country
 - the parents or child can speak, read and write in a language of that country, or are likely to achieve this within a reasonable time period
 - fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice
- removal would not give rise to a significant risk to the child’s health
- there are no other specific factors raised by or on behalf of the child

For guidance on how to consider a child’s best interests, see the Exceptional Circumstances section of the Family Migration: Appendix FM Section 1.0a Family Life (as a Partner or Parent) 5-Year Routes and exceptional circumstances guidance, which can be found here:

<https://www.gov.uk/government/publications/chapter-8-appendix-fm-family-members>

Where the decision maker believes that, based on the specific circumstances raised, refusal would not breach their Article 8 rights, they should refer to the following section on compassionate compelling factors, to consider whether a short period of leave outside the Immigration Rules is appropriate: compassionate factors.”

13. I would make several observations about this policy document. The first is that it (still) does not accurately reflect the decision in **KO (Nigeria)**, in that it states that “[i]f If the departure of the parent or carer would not result in the child being required to leave the UK, because the child will (or is likely to) remain living here with another parent or primary carer, then the question of whether it is reasonable to expect the child to leave the UK will not arise. In these circumstances, paragraph EX.1.(a) does not apply.” As confirmed by the Upper Tribunal in **JG** and the Court of Appeal in **SSHD v AB (Jamaica)**, the decision-maker when assessing reasonableness has to hypothesise whether it would be reasonable to expect the child to leave, even if it is considered unlikely the child will. As noted by UTJ Plimmer in **SR (subsisting parental relationship - s117B(6)) Pakistan [2018] UKUT 334 (IAC)** and as endorsed by the President in **JG** at paras 33-59 policy documents in the present form do not provide a tenable construction of the plain and ordinary meaning of EX.1(a) or of s.117B(6).

14. Second, there is no longer any specific mention in the policy documents of the fact that it is not reasonable to expect a British citizen child to leave the UK. That omission, however, does not alter the fact that a British citizen child is entitled to live and reside in the UK and cannot be required to leave. Both a British citizen child and a child residing for 7 years may be a “qualifying child” and no subdivision is made between the two categories; but that does not entail that no greater weight attaches to the fact of nationality than to the fact of 7 years residence. As noted by Baroness Hale at [30], “[a]though nationality is not a “trump card” it is of particular importance in assessing the best interests of any child” and at [32] it was stated:

“32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. As Jacqueline Bhaba (in 'The "Mere Fortuity of Birth"? Children, Mothers, Borders and the Meaning of Citizenship', in *Migrations and Mobilities: Citizenship, Borders and Gender* (2009), edited by Seyla Benhabib and Judith Resnik, at p 193) has put it:

'In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.' “

British citizenship creates rights and benefits that exist from the moment when it is acquired and constitutes a status that places a person outside immigration controls. (I shall

return to the significance I attach to the fact that the child is a British citizen later on when assessing reasonableness.)

15. These two features reduce somewhat the value of this guidance insofar as it is intended to reflect case law.

16. Third, it would appear on the basis of developments in Home Office policy guidance that it is no longer possible to say straightforwardly, as the Tribunal did in **SF & Others** [2017] UKUT 120 (IAC), that since the respondent's policy accepts that (absent criminality or a poor immigration history) the British citizen children should not be expected to leave the UK, there can be no public interest in requiring their parent(s) to leave. The policy document at the time of the decision of concern in **SF & Others** was Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10-year Routes" (the edition of August 2015). At 11.2.3 it contained a section headed "Would it be unreasonable to expect a British Citizen Child to leave the UK?". The Tribunal in **SF & Others** set out its relevant parts as follows:

"Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice Judgment in Zambrano.

Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.

It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:

criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;

a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules."

17. This led the Upper Tribunal to conclude at para 12 that:

"...where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it."

18. At the same time, despite being now silent on the specific position of the parent of a British citizen child, the latest policy document does accept that “[t]he starting point is that we would not normally expect a qualifying child to leave the UK” and that “[i]t is normally in a child’s best interests for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK”. That wording indicates a presumption in favour of the parent of a British citizen child (or non-British citizen child resident for 7 years) not being expected to leave the UK unless there are specific circumstances that would make that proportionate. To that extent, the new policy document continues to have a bearing on the proper assessment of the weight to be attached to the public interest in requiring a parent of a British citizen child to leave. If that presumption is not displaced on the facts of a particular case, it amounts to the respondent saying there is no public interest in requiring such a parent to leave.

My assessment

19. In the appellant’s case, six factors seem to me to be of particular importance.

20. First, there is the fact that the child is a British citizen. That seems to me to be of particular importance in this case because, being still very young, most of the considerations that arise in the case of non-British citizen children resident in the UK for 7 years, such as their educational, linguistic, cultural circumstances in the UK, cannot play a significant role. Many of the rights and benefits that accrue from British nationality are for a very young child still putative. Yet they are important in the present because they are rights which, if required to live in Bangladesh, the child would not be able to exercise in the future. In particular, as noted by Baroness Hale in ZH (Tanzania), the child will lose the advantages of growing up and being educated in their own country.

21. Secondly, whilst there is incomplete information about the appellant’s financial circumstances, Mr Kotas has not disputed that the appellant would be able, on the basis of the wife’s present income levels, to meet the financial requirements of the Immigration Rules governing spouses. Nor has Mr Kotas suggested that there are any other possible respects in which the appellant might face difficulties in meeting in full the requirements for entry clearance as a spouse. That in my view does bring into play the principles set out in Chikwamba, at least to the extent that it appears likely the appellant would succeed in any such application. Mr Kotas’s submissions that Chikwamba principles only apply if the appellant is “bound” to succeed in an entry clearance application is too narrow a reading. As was stated by the President in JG at para 85:

“85. In so concluding, we apply the law as set out by the House of Lords in Chikwamba v SSHD [2008] UKHL 40 and in subsequent cases, including Hayat v Secretary of State for the Home Department [2012] EWCA Civ 1054. Following the approach adopted by Upper Tribunal Judge Gill in R (on the application of Chen) v Secretary of State for the Home Department (Appendix FM - Chikwamba - temporary separation - proportionality) (IJR) [2015] UKUT 189 (IAC), we acknowledge that *where an application for entry clearance from abroad is likely to be granted and where there*

would be significant interference with family life by temporary removal of the person making that application, then the weight to be accorded to the requirements of obtaining entry clearance (that is to say, to that aspect of immigration control) is to be reduced, particularly in cases involving children.” (emphasis added)

22. Thirdly, the appellant has been playing a major role as a parent of the couple’s child since the child’s birth and, if not required to leave, that is likely to continue to be the case, at least until his wife has completed her postgraduate dentistry qualifications. In the absence of the appellant, the child would have extremely limited care from the appellant’s wife because of her combination of work and studies.

23. Fourthly, on the hypothesis of the child being required to leave the UK, that would most likely to result in a situation where his mother, a British citizen, remains in the UK to complete her dentistry qualifications. I make that finding of fact because I see no reason not to accept what she said regarding this in her witness statement of 20 July 2018 wherein she stated that “I am in the middle of my degree and cannot be expected to leave my education in the UK where I want to develop a career in dentistry. The further documentation sent by the appellant on 22 May 2019 identifies that her initial completion date for her Dental Foundation Training was 31 August 2019 but that this was extended for 12 months due to maternity leave, lack of completion of requirements and LTFT (Less Than Full Time Training), so that her extended course completion date at Birmingham University is 31 August 2020. Her further witness statement notes that she has spent 7 academic years studying A levels and a degree in Dentistry and that her departure “would completely end my education and in the UK and my future employment prospects”. Her plain intention to complete her course in the UK makes very good sense in terms of planning the economic future of her family, whether that be in the UK or Bangladesh, since without completing this qualification, she would not be able to practice as a dentist. Given that on my finding the appellant’s wife would remain in the UK, at least until completion of her course, I consider the appellant’s departure would cause significant disruption to the child, whose best interests surely lie in remaining with both parents. I consider that would be the case even in the context of a temporary separation (necessary to make an application for entry clearance), since even on that basis it would involve significant interference with family life, taking into account the best interests of the child.

24. Fifthly, the appellant has not had any period of time in the UK during which his stay has been unlawful. He had lawful leave as a student until September 2015 and has since then enjoyed s.3C leave. Whilst for s.117B(5) purposes his immigration status has nevertheless been precarious throughout, his situation is to be clearly contrasted with an appellant who over the same period has been in the UK illegally or unlawfully. In contrast to the position of the appellant in **JG** (who was found to be both dishonest and unscrupulous and to have flagrantly defied the law by overstaying her leave for a large number of years (see para 80)), it would be disproportionate to require this appellant to return to Bangladesh to make an entry clearance application from there.

25. Sixthly, I consider that the revised version of the Home Office policy governing the position of qualifying children in relation to the reasonableness criterion indicates that there is a presumption in favour of the parent of a qualifying child not being required to

leave. In my judgement, the aforementioned factors suffice to establish that the presumption has not been rebutted in the appellant's case.

26. I consider these reasons suffice to establish that the appellant in this case is entitled to succeed under para EX.1(a) of the Immigration Rules and also under s.117B(6) of the 2002 Act. He is the parent of a child whom it would not be reasonable to expect to leave the UK.

27. To conclude:


I have already set aside the decision of the FtT judge for material error of law.

The decision I re-make is to allow the appellant's appeal.

No anonymity direction is made.

Signed

Date: 28 May 2019

A handwritten signature in black ink that reads "H H Storey". The signature is written in a cursive style with a large, looped 'y' at the end.