



Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: HU/07818/2018

HU/07822/2018

HU/07825/2018

HU/07827/2018

THE IMMIGRATION ACT

Heard at Field House

**Decision & Reasons
Promulgated**

On 8th January 2019

On 23rd January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

OOA, OPA, RAA & RIA

(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Daykin of counsel instruct by Duncan Lewis & Co
Solicitors

For the Respondent: Mr Whitwell, Senior Home Officer Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge A Greasley promulgated on the 25th October 2018 whereby the judge dismissed the appellants' appeals against the decision of the respondent to refuse the appellants leave to remain in the UK based on Article 8 of the ECHR.
2. I have considered whether or not it is appropriate to make an anonymity direction. As the proceedings concern and impact upon the rights and status of a child I consider it appropriate to make an anonymity direction.
3. Leave to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Povey on 15th November 2018. Thus the case appeared before me to determine whether or not there was a material error of law in the decision.

Grounds of appeal

4. The grounds cite the case of **KO (Nigeria) v SSHD** [2018] UKSC 53 and allege that the judge has erred by weighing the conduct of the parents in the balance in considering the question of whether given that the parents of the child had no right to remain in the UK, it is reasonable for a qualifying child to leave the United Kingdom with the parents. It is suggested that that approach is inconsistent with the guidance given in **KO**.
5. The case of **KO** 2018 UKSC 53 is specifically relevant in considering how one deals with children and their best interests.
6. In the judgement I draw attention to paragraphs 18-19 of the decision. Having acknowledged that there was nothing in section 117B of the Nationality, Immigration and Asylum Act 2002 which referred to the conduct of the parents in the context of what was in the best interest of the child whether or not it was in the best interests of the child to remain in the UK, the judgment continues:-

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 children 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.

7. I also draw attention to paragraphs 46-51 in which the factual basis of NS and AR, two of the appellants before the Supreme Court, were considered. [NS and AR were the 3rd and 4th appellants in the case of *MA v SSHD* 2016 EWCA Civ 705 see paragraphs 76-89]. NS & AR had entered as students in 2004 and 2003. The appellants had children who had been in the UK over 10 years, including a child or children born in the UK. The appellants had been involved in applications to extend their leave, which involved scams, claiming to have studied at Cambridge College of Learning for postgraduate qualifications.
8. In paragraph 51 having found that the judge had correctly directed himself as to the wording of section 117 Lord Carnwarth continues:-

51. ... The parents' conduct was relevant in that it meant that they had to leave the country. As I have explained (para 18 above), 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 had to leave, the natural expectation would 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.

9. The case of NS & AR was not a deportation case but a removal case. Whilst the children had been in the UK a significant period of time, in excess of ten years, the fact that the parents were to leave the UK was material in assessing whether it was reasonable for the children to accompany them. Whilst the best interests of the child or children were for the family to remain, in the final analysis assessment had to be made in the context of the parents having to leave whether it was reasonable for the child or children to accompany them. That was separate from determining what the best interests of the children were.
10. With respect to the grounds of appeal it appears that the very thing that the Supreme Court dealt with in the paragraph cited is suggested to be an error on the part of the judge. The Supreme Court has indicated that having assessed the best interests of the children the judge thereafter has to go on and consider where exactly the parents would be and having assessed that consider whether or not it is reasonable for the children to accompany the parents to their country of nationality. That appears to be the very test that is applied by the judge in the present decision in paragraph 30.
11. In assessing the position of the appellants the judge has given individual consideration to the circumstances of the respective parents. The 1st appellant had entered the United Kingdom in May 2000 on a visit visa and thereafter had had no leave. He had made applications on EEA grounds which were refused, applications outside the rules which had been refused and otherwise applications on the basis of family life which were refused. None of those applications had been successful he had therefore been unlawfully in the United Kingdom since late 2000.
12. In paragraph 6 the judge had gone on to consider the 2nd appellant. She had entered as a student in September 2002. When his student visa had expired she remained unlawfully. She sought to make an application in August 2009 but that was refused. The appeal was ultimately withdrawn. It appears that she has sought to rely on qualifications from Cambridge college, which were not genuine

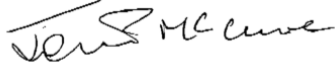
qualifications. Further applications had been made but all were refused.

13. At the time of the original application the subject of appeal the 4th appellant was not a qualifying child. The only qualifying child was the 3rd appellant. He had been born in the United Kingdom on 9 June 2010. The judge was well aware that the 3rd appellant was a qualifying child. He assessed the circumstances in which the family were living in the United Kingdom. The first appellant had to live separately from other family members. The judge also assessed the access that the children had to education, to medical facilities and to external activities outside of school.
14. In the judgement the judge had acknowledged that the 3rd appellant was a qualifying child and he had referred to the same for example in paragraph 30. In paragraph 30 the judge identifies that the principal issue is whether or not it would be reasonable for the qualifying child to be expected to leave the United Kingdom with the parents. In assessing that factor it was an issue of looking at where the parents and 4th appellant would be in accordance with the guidance given in **KO**.
15. There were some similarities between the present case the case of NS and AR as highlighted in the case of **KO**. In **KO** the appellants NS and AR had purportedly taken courses at Cambridge College of learning which were clearly bogus and false. In the present circumstances the 2nd appellant had likewise sought for a period of time to rely upon qualifications and courses at Cambridge College of learning. Whatever else could be said the 1st, 2nd and 4th appellant did not qualify for leave to remain in the United Kingdom. The expectation was taking account of the fact that they were unlawfully in the United Kingdom that they would be returned to Nigeria and the issue for the judge was whether in the light of that it was reasonable for the 3rd appellant to return to Nigeria.
16. The judge accordingly was asking himself the very questions that were posed in the case of **KO**. The judge concluded having looked at all the evidence that in order to maintain the family unit and taking account of all the circumstances it was reasonable for the 3rd appellant to go to Nigeria with the other members of the family. That was a finding of fact the judge was entitled to make on the evidence before. There is no error in the approach adopted by the judge. Indeed the approach is consistent with the guidance given in the case of **KO**.
17. In the circumstances I do not find that there is any error of law in the approach taken by the judge.

Notice of Decision

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18. I dismiss the appeal on all grounds.

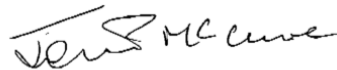
Signed 

Deputy Upper Tribunal Judge McClure
January 2019

Date 11th

Direction regarding anonymity- rule 14 of 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 the appellant or any member of the appellant's family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings



Signed
January 2019

Date 11th

Deputy Upper Tribunal Judge McClure