



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

Appeal Numbers: HU/04996/2019
HU/16762/2018
HU/05002/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 6 January 2021**

**Decision & Reasons Promulgated
On 4 February 2021**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**IQBAL [S] (FIRST APPELLANT)
MANINDER [K] (SECOND APPELLANT)
[J S] (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Z Raza, Counsel, instructed by Charles Simmons Solicitors
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and background

1. These are linked appeals against the decision of First-tier Tribunal Judge Paul (“the judge”), promulgated on 7 November 2019, by which he dismissed the Appellants’ appeals against the Respondent’s refusals of their human rights claims.
2. Before the judge the appeals were focused very much on the position of the third Appellant, the daughter of the other two Appellants, who was born in the United Kingdom in March 2010 and has resided in this country ever since. At the date of the hearing before the judge she had lived here for 9 ½ years.
3. The judge directed himself to KO (Nigeria) [2018] UKSC 53; [2018] 1 WLR 5273 and EV (Philippines) [2014] EWCA Civ 874, addressed the best interests of the third Appellant, and then considered whether it would be reasonable for her to leave the United Kingdom. He ultimately concluded that her best interests lay with remaining with her parents and that given that the parents had no leave to remain in the United Kingdom that place of residence should, in all the circumstances, be India. He concluded that it was “entirely reasonable” for the third Appellant to be expected to leave the United Kingdom. There was no merit in the Article 8 claims of the other two Appellants. Accordingly, the appeals were all dismissed.
4. The grounds of appeal and submissions of Mr Raza at the hearing before me have been concise. They assert that the judge erred in his approach to the issue of whether it would be reasonable for the third Appellant to be expected to leave the United Kingdom. It is said that the judge had effectively assumed that the only place in which the third Appellant could reside with her parents would be in India and that no, or no adequate, significance was attributed to the fact of her lengthy residence in this country.
5. Mr Melvin urged me to uphold the judge’s decision. He accepted that it was relatively brief in its reasoning, but the judge had directed himself properly and considered all the relevant evidence.

Decision on error of law

6. I conclude that the judge has materially erred in law. In so doing I essentially agree with the submissions of Mr Raza. In my view it is apparent from the relatively brief consideration given by the judge to the core issues that he operated from the premise that the third Appellant needed to be living with her parents and as the parents had no leave to remain in this country (what may be described as the “real world” scenario) this was, if not decisive, then clearly the most significant factor in assessing the reasonableness of expecting this young girl to leave the United Kingdom.

7. The basis of that premise was, in my judgment, flawed. The judge was required to have conducted an overall best interests assessment and a plainly very significant aspect of that must on any view have been the 9 ½ years' residence in this United Kingdom at the relevant point in time. Matters such as family ties in India were no doubt relevant, but the judge essentially focused entirely on what might await the third Appellant in India and has overlooked what statute itself (in the form of section 117B(6) of the Nationality, Immigration and Asylum Act 2002, as amended – "the 2002 Act") has stated to be a significant factor, namely a 7-year residence in this country. Indeed, the judge's only real reference to the third Appellant's situation in this country, apart from accepting that she was bright and doing well at school, was in a comment included in parenthesis in paragraph 23, where he concluded that "apart from the dislocation involved by moving from one country to another" there is nothing to suggest that her interests or future prospects would be significantly adversely affected.
8. With respect, that is inadequate, particularly when the length of residence was not simply just over the 7-year threshold, but some 2 ½ years further on. In my view, what is said in paragraphs 44 and 49 of MA (Pakistan) [2016] EWCA Civ 705 holds good: whilst there is no statutory presumption, the question of whether "powerful reasons" exist in a case involving a qualifying child recognises the obvious significance that must be attached to that status. Here, the judge has simply failed to recognise or take account of that significance.
9. In summary, the judge erred in his assessment of best interests and in consequence then went on to err in respect of his assessment of the reasonableness test under the Immigration Rules, but more importantly section 117B(6) of the 2002 Act.
10. For these reasons I set the judge's decision aside.

Re-making the decision in this case

11. Having given my decision on error of law at the hearing, I invited both representatives to make any additional submissions as to the re-making of the decision in this case; it being agreed that there was no need for any further written submissions or a resumed hearing.
12. Mr Raza relied on his initial submissions. In addition, he urged me to find that it must be in the third Appellant's best interests not only to remain with her parents, but also to remain in the United Kingdom. This was particularly so given the fact that she had now lived in this country for close to 11 years. Although a child's best interests were not a trump card, in this case they clearly pointed to the conclusion that it would not be reasonable for the third Appellant to leave the United Kingdom. On this basis, the appeals of the first and second Appellants should succeed.
13. Mr Melvin also relied on his original submissions. He urged me to take account of the first Appellant's previous misconduct in the United Kingdom (namely two

convictions for Battery and one for Sexual Assault, together with three Cautions) when assessing the proportionality of the third Appellant leaving the United Kingdom.

14. I make the following relevant findings of fact.
15. The first and second Appellants are husband and wife, and are Indian nationals. I find that the second Appellant arrived in United Kingdom on 19 September 2009 with entry clearance as a student, valid until 10 April 2011. An extension of leave to remain in the same category was subsequently granted, running until 7 October 2013. A further application, this time based on Article 8, was made out of time on 18 November 2013. This application was refused on 11 November 2015. The human rights claim leading to the refusal now under appeal was made on 24 March 2017.
16. In light of the above, the second Appellant has been in the United Kingdom without leave since 7 October 2013.
17. The first Appellant's immigration history is identical to that of his wife, save that he had been granted leave as her dependent. He too has been in this country without leave since 7 October 2013. His record is further blighted by the convictions referred to by Mr Melvin in submissions. I have looked amongst the documentary evidence before me for details of the convictions, but without success. In any event, I find as a fact that the first Appellant has been convicted twice for Battery and once for Sexual Assault, in respect of which he was placed on the Sex Offenders' Register. I find that he has also received three Cautions for failing to comply with the conditions attached to the Register. Neither party has provided any evidence as to the sentences passed in respect of the convictions or the circumstances surrounding the offences themselves.
18. I find that the third Appellant an Indian national and was born in the United Kingdom on 7 March 2010. I find that she is currently in Year 6 at school (the First-tier Tribunal was apparently led to believe that she was in a year below this - an error is disclosed by the school report at A58 of the Appellant's bundle). There is nothing to suggest that the third Appellant is anything other than fully integrated into school life, and that she has established ties beyond her nuclear family unit. I agree with and adopt the judge's description of the third Appellant as "a bright child who is thriving at a local school." There is no evidence to suggest that she suffers from any material medical conditions or other developmental or behavioural difficulties.
19. Like the judge, I accept that the first and second Appellants retain ties to India, including extensive family connections. I find that the third Appellant went to visit relations there in 2013.
20. I now turn to my analysis and conclusions on the core issue in these linked appeals, namely whether it would be reasonable to expect the third Appellant to leave the United Kingdom.
21. Section 117B(6) of the 2002 Act provides as follows:

“(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.”

22. Section 117B(6) is a free-standing provision and its satisfaction will be determinative of the appeal(s) of the relevant parent(s) concerned. Neither party has suggested that the first Appellant is a person “liable to deportation” and, notwithstanding the fact of the convictions referred to previously, I am satisfied that he does not fall within this category. I base this on the absence of any evidence that any sentences imposed triggered the automatic deportation provisions under the UK Borders Act 2007; or that they brought him within the definition of “foreign criminal” under section 117D of the 2002 Act; or that there has been any other action on the Respondent part to indicate that she believes him to be an individual who is unable to rely on section 117B(6).
23. It is plain that the first and second Appellants have a genuine and subsisting parental relationship with their daughter.
24. Taking all relevant circumstances into account, I assess the third Appellant’s best interests as lying very firmly indeed with both remaining as part of a loving family unit with her parents and also remaining in the United Kingdom, the country of her birth and continuous residence for the entirety of her life, a period that is now reached almost 11 years. It is quite apparent that she is fully integrated into British society in respect of all aspects that a child of her age is able to participate in.
25. My best interests assessment is a crucial aspect of the overall reasonableness evaluation, but it is not, in and of itself, determinative.
26. I direct myself to the authoritative guidance set out by the Supreme Court in KO (Nigeria), at paragraphs 17 to 19, together with subsequent well-known cases in respect of which it is unnecessary to cite here.
27. The focus is on the question of whether it would be reasonable to expect the child to leave the United Kingdom. It is plain from the authorities that any previous misconduct on the part of a parent is irrelevant to this assessment. Thus, Mr Melvin’s attempt at urging me to take account of the first Appellant’s convictions when assessing the reasonableness issue is misplaced. The criminality would certainly be relevant to an assessment of the proportionality of the first Appellant’s removal from the United Kingdom, if that were the crucial issue in these appeals: but it is not.
28. What is relevant is the so-called “real world” scenario in which the family unit finds itself. None of them have leave to remain in this country and, all other things being equal, they would be expected to return to the country of their nationality. It is also the case that the first and second Appellants are loving and capable parents who

would have the support of family members were they to return to India. India does have a functioning education system and there is no reason to believe that the third Appellant would be unable to access this, albeit not without significant disruption and probable distress on her part.

29. Against these factors are what in my judgment constitute very significant matters. The best interests in this case are very strongly in favour of the third Appellant remaining in the United Kingdom for the reasons set out previously. In addition, the third Appellant has not only met the seven-year threshold designated by Parliament as representing an important milestone in a child's life, but she has exceeded this by almost 4 years now. Despite the disruption caused to children's educations by the Covid-19 pandemic, she is at an important stage of her education: Year 6 is the final year of primary school and one in which assessments are to be undertaken and transitions begun for the move into secondary education in September 2021.
30. For my part, I regard the observations of Elias LJ in paragraph 44 and 49 of MA (Pakistan) as sound, notwithstanding the disapproval of another aspect of his judgment by the Supreme Court in KO (Nigeria). Put shortly, whilst I do not regard what is said as creating any form of a statutory presumption, I see no "powerful reasons" as to why it can properly be said that the third Appellant should reasonably be expected to leave the United Kingdom.
31. Whether or not I take the observations of Elias LJ into account, I conclude that it would not, in all the circumstances, be reasonable to expect this particular child to leave the United Kingdom.
32. It follows from this that the first and second Appellants are able to satisfy the criteria set out in section 117B(6) of the 2002 Act. This in turn means that their appeals fall to be allowed on Article 8 grounds. This then has the inevitable consequence that the third Appellant's appeal must also be allowed on Article 8 grounds.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and it is set aside.

I re-make the decision and allow all three appeals on Article 8 grounds.

No anonymity direction is made.

Signed *H Norton-Taylor*

Date: 19 January 2021

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT**FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a reduced fee award of £70.00 in respect of each of the appeals, making a total of £210.00. Appellants have succeeded, this is in a significant way based upon the passage of time since the human rights claims were made and refused, with reference to the third Appellant's best interests. This issue was a matter which required judicial evaluation on appeal.

Signed: *H Norton-Taylor*

Date: 19 January 2021

Upper Tribunal Judge Norton-Taylor