



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

Appeal Number: HU/03303/2017

THE IMMIGRATION ACTS

**Heard at Birmingham CJC
On 7 March 2019**

**Decision & Reasons Promulgated
On 27 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**LILUBEN [K]
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms H Aboni, Home Office Presenting Officer

For the Respondent: Mr T Nyawanza, Just Legal Group

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of India born on 8 June 1982. She first arrived in the UK on 24 September 2008, with entry clearance as a student and made a subsequent application for an extension of leave as a student, which was granted until 6 February 2012 and then an application for leave to remain as a spouse on 21 April 2012, which was refused on 25 March 2013. On 26 January 2016, she applied for leave to remain on the basis of her family life in the UK. This application was refused in a decision dated 8 February 2017. The Claimant appealed against that decision and her appeal came before Judge of the First-tier Tribunal Asjad for hearing on 1 December 2017.

2. In a Decision and Reasons promulgated on 22 December 2017, the judge allowed the appeal. The Secretary of State sought permission to appeal against that decision on the basis that the judge had materially erred in law in her assessment of the Claimant's immigration history in light of the judge's finding that the Claimant had exercised deception in seeking to obtain leave using a falsely obtained ETS TOEIC certificate, those findings being set out at [6] through to [8].
3. Permission to appeal was granted by First-tier Tribunal Judge Holmes in a decision dated 10 May 2018 on the basis that the grounds raised arguable errors and that the approach taken to the issue of proportionality was arguably flawed.

Hearing

4. In her submissions, Ms Aboni for the Secretary of State submitted that the judge had erroneously allowed the appeal on human rights grounds despite finding that the Claimant had fraudulently utilised deception, thus the judge had failed to weigh up the use of deception, nor to identify whether there were very compelling circumstances justifying allowing the appeal with regard to Article 8 outside the Rules. Ms Aboni submitted that the Claimant has the option of returning to India in order to apply for entry clearance and that this was a material error.
5. In his submissions, Mr Nyanwanza asserted there was no error of law. The judge had assessed the behaviour of the Claimant and was very much aware of that conduct, that much is clear from [9] and [11]. He submitted it was unreasonable for the Claimant's British citizen child to leave the UK in light of the Home Office guidance.

Findings and Reasons

6. I found there were material errors of law in the decision of the First-tier Tribunal Judge and announced my decision at the hearing.
7. Whilst at [10] the judge took into account the Home Office guidance in relation to family life as a partner or parent ten year routes, this was the August 2015 guidance at 11.2.3. which is now out of date and was in fact out of date at the time of the hearing before the First-tier Tribunal.
8. At [11] the Judge addressed the issue of criminality and found that there was no criminality in this case. I find it was incumbent on the Judge to balance the fact that she had found the Claimant had used deception as part of the proportionality exercise in relation to whether it was reasonable to expect her child to leave the UK, whereas this exercise was not carried out.
9. The parties were content for me to remake the decision.
10. I heard submissions from Ms Aboni briefly, who submitted in respect of the recent decision in JG (Turkey) [2019] UKUT 72 that the Respondent's

position was that their current guidance was applicable and that they were intending to seek permission to the Court of Appeal in respect of JG.

11. In his submissions, Mr Nyanwanza submitted there had been a material change in circumstances. The Claimant's child was now at nursery and is 3 years of age, having been born on 24 March 2016. He submitted otherwise the circumstances were the same and ultimately it will be disproportionate to remove the Claimant without her British child.
12. I reserved my decision, which I now give with my reasons.

Findings and Reasons

13. The relevant facts of this appeal which were unchallenged by the Secretary of State or the Claimant's representatives, by way of a cross appeal, are that:
 - (i) she has no qualifications in English and is unable to speak sufficient English during the hearing. She is an individual who had every reason to take a proxy test [7];
 - (ii) the Immigration Rules are not met as the Claimant does not meet the suitability requirements [8];
 - (iii) in respect of section 117B of the NIAA 2002, the Claimant does not meet the English language requirements and little weight can be given to the family life she has formed with a qualifying partner as this was established at a time when her immigration status is precarious [9]
 - (iv) the Claimant is the mother of a British child and has a genuine and subsisting relationship with her British son [10];
 - (v) whilst the Claimant has exercised deception, by submitting a certificate taken by a proxy test taker, she has not been convicted of a criminal offence [11].
14. In JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) a Presidential panel of the Upper Tribunal held *inter alia*:

"33. We have seen how, in KO (Nigeria), the Supreme Court had regard to the respondent's IDI in its examination of section 117B(6). In his submissions, Mr Malik drew our attention to the latest relevant publication of the respondent; namely "Family Migration: Appendix FM Section 1.0b"...

36. There are a number of things to say about this IDI. First, it cannot override ordinary principles of statutory construction. If, applying those principles, a court or tribunal determines that a statutory provision falls to be interpreted in a particular way, the fact that the IDI may take a different view is irrelevant.

37. Second, the IDI does not cite KO (Nigeria) in support of the proposition that it is only where the child would be required to leave the United Kingdom that EX.1.(b) or section 117B(6) falls to

be considered. The citation of *KO (Nigeria)* merely recognises that, in deciding what would be reasonable, one must have regard to the fact that one or both parents is liable to removal under immigration powers (see paragraph 27 above).

38. Third (and relatedly), a previous version of the IDI, pre-dating *KO (Nigeria)*, contained statements to the effect that if the departure of a parent would not result in the child being required to leave the United Kingdom, the question of whether it was reasonable to expect the child to leave would not arise. This was noted by Upper Tribunal Judge Plimmer in *SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 00334 (IAC)*. At paragraph 50 of her decision, Judge Plimmer said that "This aspect of the 2018 IDI provides an untenable construction of the plain and ordinary meaning of EX.1. and section 117B(6)". At paragraph 51, she held that "Self-evidently, section 117B(6) is engaged whether the child will or will not in fact or practice leave the UK". For the reasons we have given, nothing in *KO (Nigeria)* affects the correctness of her conclusion.

39. We do not consider our construction of section 117B(6) can be affected by the respondent's submission that, in cases where – on his interpretation – the subsection does not have purchase (i.e. because the child would not in practice leave the United Kingdom), there would nevertheless need to be a full-blown proportionality assessment, compatibly with the other provisions of Part 5A of the 2002 Act, with the result that a person with parental responsibility who could not invoke section 117B(6) may, nevertheless, succeed in a human rights appeal.

40. Such an assessment would, however, have to take account of the immigration history of the person subject to removal; so there could well be a very real difference between the outcome of that exercise, and one conducted under section 117B(6). But, the real point is that this submission does not begin to affect the plain meaning of subsection (6). If, as we have found, Parliament has decreed a particular outcome by enacting section 117B(6), then that is the end of the matter.

41. We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A of imposing greater consistency in decision-making in this area by courts and tribunals. The fact that section 117B(6) has such an aim was expressly recognised by Elias LJ at paragraph 44 of *MA (Pakistan)*

...

80. *Our assessment of the appellant is that she is both dishonest and unscrupulous, each to a high degree. She has flagrantly defied the law of the United Kingdom by overstaying her leave for a large number of years, without bothering to seek to regularise her status; by making entry clearance applications that she knew full well were predicated on an entirely false basis; and in gaining access to the United Kingdom ...*

96. *We therefore conclude that, on the facts of this case, it would not be reasonable to expect the appellant's children to leave the United Kingdom, in the event of her removal. This means the appellant's appeal succeeds. It does so because Parliament has stated, in terms, that the public interest does not require her removal, in these circumstances. It does so despite the fact that, absent section 117B(6), the appellant's removal would be proportionate in terms of Article 8 of the ECHR."*

15. It is apparent from the guidance set out in *JG* that the Upper Tribunal have, on two occasions, found the Secretary of State's updated Immigration Directorate Instruction on Family Migration to be inconsistent with the approach set out in *KO (Nigeria)* and incorrect in its interpretation of EX1(b) and section 117B (6) of the NIAA 2002. Whilst it may be that the Secretary of State does seek to challenge the decision in *JG* to the Court of Appeal, currently it is good law.
16. Therefore, I determine the Appellant's appeal on the basis of the facts set out at [13] above, the guidance in *JG* and the best interests of the Appellant's British son.
17. Applying the test set out in *Razgar* [2004] UKHL 27, I find that the Claimant has formed a family life with her husband and British child. Her removal to India would be an interference with the family life they share, but would be in accordance with the law, given that the Claimant is an overstayer. The issue is whether her removal would be proportionate.
18. Key to the consideration of proportionality are the public interest considerations set out at section 117B of the NIAA 2002. The Judge's preserved findings are that the Claimant does not speak English: s117B (2) and formed her relationship with her husband at a time when she was an overstayer: s117B (4). In addition, the Judge found that the Claimant had utilised deception in order to obtain a TOEIC test with ETA.
19. The specific issue that requires determination, however, is whether it would be reasonable to expect the Claimant's son to leave the UK: s117B (6) of the NIAA 2002. I find that *JG (op cit)* requires a hypothesis that he would leave. The Claimant's son is a British child and whilst he is now attending nursery, he is only 2 years old, shortly to turn 3 (DOB 24.3.16). I find, for the reasons set out in *JG* and *KO (Nigeria)* that the issue has to be determined separately from his mother's conduct and that it would be contrary to his best interests and unreasonable to expect him to leave the UK.

Notice of Decision

The decision of First tier Tribunal Judge Asjad contained a material error of law. I re-make the decision, allowing the appeal. No anonymity direction is made.

Signed Rebecca Chapman

Date 21 March 2019

Deputy Upper Tribunal Judge Chapman

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal I make a fee award of any fee which has been paid or may be payable (adjusted where full award not justified) for the following reason.

Signed Rebecca Chapman

Date 21 March 2019

Deputy Upper Tribunal Judge Chapman