Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07905/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 November 2018	**On 8 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

M K
(ANONYMITY DIRECTION MADE)

Appellant

Representation:
For the Appellant: Ms F Allen, Counsel.
For the Respondent: Mr T Lindsay, Home Office Presenting Officer.

DECISION AND REASONS

1. The Appellant is a citizen of India who made a human rights claim in an application for leave to remain in the United Kingdom on the basis of her family life with her partner Mr A H and their British citizen child. The application was refused and the Appellant appealed. Following a hearing, and in a decision promulgated on 18 September 2018 Judge of the First-Tier Tribunal Page dismissed the Appellant's appeal.

2. She sought permission to appeal which was granted by Judge of the First-tier Tribunal Alis on 10 October 2018. His reasons for so granting were: -

> "1. The appellant seeks permission to appeal, in time, against a Decision of the First-tier Tribunal Judge Page (hereinafter called the Judge) who, in a Decision and Reasons promulgated on September 18, 2018 dismissed the appellant's appeal against the respondent's decision to refuse her application on human rights grounds.
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> 2. The Grounds argue the Judge failed to consider the best interests of the children where the child was a British child and failed to carry out an appropriate proportionality assessment. Additionally, the Judge applied the wrong test when considering section EX.1 of Appendix FM of the Immigration Rules applying the test set out in subsection (b) whereas the appropriate test was set out in (a) which is mirrored in section 117B(6) of the 2002 Act.
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> 3. The appellant's ground of appeal concerning the incorrect test being applied overlooks the fact that the appellant could not satisfy Appendix FM because the Judge found she had used deception (paragraph 21 of the decision) and she could not therefore meet the suitability requirements. This point appeared to be accepted by the appellant's representative as that was recorded in paragraph 27 of the decision.
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> 4. With regard to the first ground of appeal the grounds argue that the Judge failed to properly consider the best interests of the child in circumstances where the child was a British citizen. It is arguable that the assessment of article 8 failed to give sufficient weight to the best interests of a child who is British or have regard to the respondent's own policy. At paragraph 30 of the decision the Judge simply concludes "there is no compelling reason why article 8 should be considered outside of the Immigration Rules".
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> 5. Permission to appeal is granted on this single issue."

3. Thus, the appeal came before me today.

4. Ms Allen contended that the Judge had failed to answer the essential question in the case which was whether or not it would be reasonable for the Appellant's British citizen child to leave the United Kingdom as set out in Section 117 of the Nationality, Immigration and Asylum Act 2002. She also relied on the grounds seeking permission to appeal. Firstly, that the Judge had failed to apply the seventh principle as set out in **Zoumbas v SSHD [2013] UKSC 74** where it is recorded that a child should not be blamed for matters for which he or she is not responsible such as the conduct of a parent. Ms Allen also referred me to the recent Authority of **KO (Nigeria) v SSHD [2018] UKSC 53**. She submitted that there is nothing within the Judge's decision to suggest that he has "attempted to consider the best interest of the Appellant's daughter, independent to deception allegations and suitability of the Appellant". Further, that there is an absence of a balancing exercise of proportionality as per the five-stage test identified in **Razgar v SSHD [2004] UKHL 27**. Finally, at paragraph 29 of the decision the Judge has relied on the "wrong legal test". It is not the issue of "insurmountable obstacles" that fell to be considered but that of "reasonability".

5. Mr Lindsay contended that the Judge's decision was sustainable and that at paragraph 24 he had taken into account the best interests of the Appellant's daughter. Further, that at paragraph 27 he had set the best interests of the child against the Respondent's intention to remove her to India. There had therefore been lawful consideration of this possibility. Beyond that the decision is adequately reasoned. He referred me to the Authority of **R (on the application Chen) V SSHD (Appendix FM – *Chikwamba* – temporary separation – proportionality) IJR [2015] UKUT 189 (IAC)** and submitted that in an application for leave on the basis of an article 8 claim the Secretary of State is not obliged to consider whether an application for entry clearance will ultimately be successful. Accordingly, the Secretary of State's silence on this issue does not mean that it is accepted that the requirements of entry clearance to be granted are satisfied. Ms Allen submitted (and I agree with her) that this authority and its reference to **Chikwamba** bore no relevance to the issues before me.

6. I find that the Judge has materially erred and failed to properly consider the best interests of the Appellant's child in circumstances where she is a British citizen. The assessment under article 8 has failed to give sufficient weight to the best interests of that child or the Respondent's own policy. At paragraph 30 of the decision the Judge says little more than that there are "no exceptional circumstances to consider outside of the immigration rules". That is where the balancing exercise should have taken place.

7. In the circumstances I set aside the Judge's decision. He has materially erred for the reasons set out in the Appellant's grounds seeking permission to appeal.

Notice of Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh pursuant to Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Direction 7(b) before any Judge aside from Judge Page.

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 him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 17 December 2018

Deputy Upper Tribunal Judge Appleyard