



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

Appeal Numbers: HU/08789/2016

THE IMMIGRATION ACTS

**Heard at Birmingham
On 15 May 2019**

**Decision & Reasons Promulgated
On 11 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**MR ABRAR [A]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Greer, Counsel, instructed by All Nations Legal Services-Derby

For the Respondent: Mr D Mills, Home Office Presenting Officer

DECISION AND REASONS

The Appellant is a national of Pakistan born on 24 February 1991. He first arrived in the UK as a Tier 4 (General) Student on 26 May 2011. His leave was subsequently extended until July 2014. However, it was curtailed with immediate effect from 4 April 2014 on the basis that the Secretary of State believed that the Appellant had used deception when applying to extend his leave and that the deception was the use of a false TOEIC English language certificate in circumstances where he had used a proxy to take the test.

The Appellant appealed against this decision and his appeal was dismissed by Judge Shanahan on 10 November 2014. The Appellant got married to a British citizen on 6 January 2014, shortly prior to that hearing and determination. He has two children who were born subsequently, AD, born on 8 January 2016, and AR, born 23 December 2016. The Appellant then applied for leave to remain on the basis of his human rights on 20 August 2015. This application was refused in a decision dated 14 March 2016. The Appellant appealed against this decision and his appeal came before Judge of the First-tier Tribunal A K Hussain for hearing in Birmingham on 31 July 2018.

In a Decision and Reasons promulgated on 11 September 2018, the judge dismissed his appeal, finding the Appellant's credibility to be very seriously damaged. This finding was, in part, based on the fact that the Appellant strenuously denied having fraudulently obtained a TOEIC English language certificate but at the hearing, on advice, he accepted that he had done this. The judge found that it would be proportionate for the Appellant to leave the United Kingdom, having taken into account the best interests of his children. The primary basis of this finding was the Appellant's deception in respect of the TOEIC certificate and the fact that he had attempted to maintain that he had not acted in a manner that was deceptive.

Permission to appeal was sought in time, firstly, on the basis that the Appellant had not conceded that he had made a concession. However, on renewed application to the Upper Tribunal this ground of appeal was abandoned and two further grounds were put forward: firstly, that the judge had failed to give adequate reasons with regard to the application of the suitability requirements at S-LTR.1.6 of Appendix FM to the Rules and that the judge had erred in failing to refer to the criminality guidance in Article 8 cases, version 6, 22 February 2017, which sets out the factors relevant to an assessment of suitability and the section 55 duty, and it was submitted that the Appellant, who has never been convicted of a criminal conviction, fell below the threshold set out in that policy. Thus, the Respondent's assertion that the Appellant's conduct crossed the threshold in order to engage S-LTR.1.6 was contrary to his own policy.

The second ground of appeal asserted that the judge had misdirected himself in respect of the relevance of the Appellant's conduct when considering the reasonableness of his children relocating to Pakistan. It was submitted the judge's approach at [37] was irreconcilable with section 117B(6) when read in conjunction with [17] of KO (Nigeria) [2018] UKSC 53 and was an error of law.

Permission to appeal was granted by Deputy Upper Tribunal Judge Davey on 11 January 2019 in the following terms:

"The renewed grounds of appeal dated 20 November 2018 are different to those (undated) considered in the First-tier Tribunal. It does seem that the guidance to caseworkers dated 22 February 2018 was put to the judge [D 29]. It does not seem the criminality guidance of 22 February 2017 was put to the judge or submissions made upon it. The children's dates of birth are 8 January 2016 and 23 December 2016 and they are British

nationals. Their mother is a British national and the children are qualifying children. His wife is a qualifying partner. In light of MA (Pakistan) [2016] EWCA Civ 11 and KO (Nigeria) [2018] UKSC 93 and the guidance there may be an arguable error of law but the materiality of it will have to be established.”

Hearing

At the hearing before the Upper Tribunal, Mr Mills expressly conceded that the judge had made a material error of law in respect of ground 2 only, however this was determinative. He submitted that given there are two British citizen children the Appellant was bound to succeed in respect of Section 117B(6) of the NIAA 2002 in light of the changes to the jurisprudence, in particular following KO (Nigeria), the Court of Appeal judgments in AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661 and the decision of the Presidential panel in JG [2019] UKUT 00072 (IAC).

Mr Mills expressly accepted that nothing short of criminality would suffice to make it reasonable for a British child to leave the United Kingdom. He invited me upon setting the decision aside and remaking the decision to allow the appeal outright.

Findings and Reasons

In light of Mr Mills’ helpful concession, I find that there is a material error of law in the decision of First-tier Tribunal Judge Hussain and that is the judge’s decision that it was proportionate for the Appellant to leave and that it was reasonable for the children to go to Pakistan: [30] to [37] where the judge concluded:

“Certainly, there are no insurmountable obstacles to the family relocating [to Pakistan]. I am satisfied that the ‘sins’ of the Appellant create a strong reason for why it is reasonable for the children to leave the United Kingdom with their parents should their mother decide to follow the Appellant back to Pakistan.”

It is clear that this approach, as Mr Mills accepted, is unsustainable in light of the recent case law.

In JG (op. cit.) the Presidential panel considered the issue of Section 117B(6)(b) of the 2002 Act, following the judgment in KO (Nigeria), finding at [25] that:

“The key question, therefore, is whether the element of conditionality which is introduced by the word would in Section 117B(6)(b) governs both the question of reasonableness and that of expectation; in other words, whether one must hypothesise that the child leaves the United Kingdom, whether or not in the real world he or she is likely to do so”,

concluding at [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 Lord Justice Elias at 44 of MA (Pakistan).”

The Court of Appeal considered JG in AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661, where at [72] Lord Justice Singh respectfully agreed with the interpretation of Section 117B(6)(b) by the Upper Tribunal in JG. He also endorsed the judgment of Upper Tribunal Judge Plimmer in SR (subsisting parental relationship, Section 117B(6)) Pakistan [2018] UKUT 00334 (IAC) at 51. In light of this very recent jurisprudence, *AB and AO* having been handed down on 12 April 2019, I find, as Mr Mills expressly conceded, that the Appellant succeeds in that his two British children cannot reasonably be expected to leave the United Kingdom. In these circumstances, the removal of the Appellant is not required by the public interest.

Decision

I find a material error of law in the decision of First-tier Tribunal Judge Hussain. I set that decision aside and substitute a decision allowing the appeal for the reasons set out above.

Notice of Decision

The appeal is allowed on human rights grounds.

No anonymity direction is made.

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 fee award of any fee which has been paid or may be payable.

Signed Rebecca Chapman

Date 10 June 2019

Deputy Upper Tribunal Judge Chapman