



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

Appeal Number: HU/15247/2018

THE IMMIGRATION ACTS

**Heard at Bradford
On 29 April 2019**

**Decision & Reason promulgated
On 02 May 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**BIBI [T]
(anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Mahmood, instructed by AWS Solicitors.

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Herwald ('the Judge') promulgated on 29 November 2018 in which the Judge dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant is a citizen of Mauritius born on 17 January 1982.
3. Permission to appeal was granted by Judge Warr, a judge of the Upper Tribunal, on 6 February 2019 in the following terms:

“It is said the First-tier Judge gave an indication at the hearing about allowing the appeal but no procedural irregularity is contended for and it is not argued the decision was made orally at the hearing – see PAA (FtT: Oral decision- written reasons) Iraq [2019] UKUT 00013(IAC) and Patel v SSHD [2015] EWCA Civ 1175.

However it is also argued that the judge’s consideration of the case law is not based on the up-to-date position in grounds 8 to 11. It is correct that KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53 had been handed down on 24 October, not long before the hearing. The Judge refers to MA (Pakistan) [2016] EWCA Civ 705 in paragraph 25 of the decision and it is perhaps arguable that his attention had not been drawn to what was said in KO at paragraph 19.

I say no more than that the point is arguable. All the grounds may be argued although I do not see much merit in the contention that the Judge might not have recalled all the evidence given the 20 days that had elapsed between the hearing and the decision being prepared.”

Error of law

4. The Judge sets out findings of fact from [19] of the decision under challenge in which the Judge notes that the sponsor is a British citizen and that the respondent conceded that there is a genuine and subsisting relationship between the sponsor and appellant [20(a)]. The Judge considers the issue of insurmountable obstacles to integration into Mauritius concluding at [20(n)] that it was not made out that insurmountable obstacles existed in accordance with paragraph EX2 to the appellant and her sponsor continuing their family life in Mauritius or elsewhere. The Judge therefore dismissed the appeal under the Immigration Rules before proceeding to consider article 8 outside the Rules.
5. A determination speaks from the date of promulgation or the handing down of a judgement and there is arguable merit in the appellant’s contention that the case law relied upon by the Judge in assessing the best interests of the child and whether it was reasonable to remove a qualifying child, pursuant to section 117B(6) of the Nationality, Immigration and Asylum Act 2002, is based on consideration of the earlier case law with no reference to the findings of the Supreme Court in KO (Nigeria).

6. It was properly conceded by Mr McVeety that the Judge's assessment of the best interests of the child and the reasonableness issue is infected by arguable legal error for the reason submitted in the grounds of appeal and skeleton argument provided. The decision is set aside on this basis.
7. The Upper Tribunal was, with the assistance of the advocates and the appellant, able to proceed to remake the decision on the day. Oral evidence was given by both the appellant and her partner (the sponsor).
8. There are two relevant children for the purposes of these proceedings. The appellant's partner has 5 children from a previous marriage and is in contact with all his children and that 2 of the children were living with the appellant and their father when she first moved in with him. The current situation is that the appellant and her partner care for his granddaughter from Sunday to Thursday whilst the child's mother is at work and that the youngest child of the appellant's partner, who is approximately 15 years of age, visits regularly.
9. There is ongoing contact maintained between the appellant and her partner's child when she visits. It was not disputed the relevant children are British nationals and/or that the appellant has a genuine and subsisting relationship with her British national partner and a genuine and subsisting relationship with a British child resident in the UK.
10. The question in this appeal, as properly identified by the advocates, is whether it be reasonable in all the circumstances to expect the qualifying child to leave the UK. The Supreme Court in *KO (Nigeria)* [2018] UKSC 53 has disapproved the reasoning in *MA (Pakistan) & Others* [2016] EWCA Civ 705, in so far as the immigration history of the parent is relevant. The question of whether it is reasonable to expect a child to leave the UK is to be decided without considering the immigration history of the parents. The immigration history is relevant however to whether the parents will be leaving the UK. To that extent their record becomes indirectly material because it may lead to them having to leave the UK. 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 reasonableness of the child leaving the UK is to be considered on the basis that the facts are as they are in the real world, so that if one parent has no right to remain, but the other does, or if both parents have no right to remain that is the background against which the best interests assessment is conducted. The ultimate question is whether it is reasonable to expect the child to follow the parent with no right to remain to their country of origin.
11. The appellant has existing family life with her partner in the United Kingdom and if the appellant has to leave the UK the relationship

cannot continue. If the appellant's partner follows the appellant to Mauritius the appellant's partner's child will be denied the opportunity to continue with the contact that is currently enjoyed with her father. It was not made out in all the circumstances that is reasonable to expect the qualifying child to leave the United Kingdom to settle in Mauritius.

12. The existence of the relationship with the qualifying child and the fact it is accepted it is not reasonable to expect the child to leave the United Kingdom establishes an insurmountable obstacle to family life between the appellant and her partner continue outside the United Kingdom. The appellant arguably makes out her case pursuant to the Immigration Rules.
13. Mr Mahmood also referred to the fact the appellant had left an abusive husband in Mauritius. This element was considered by the Judge who at [15 (d)] finds:

“She was physically abused by her husband, eventually leading to the Protection Order in 2012. Once the Protection order was issued, she had to leave the home of her parents-in-law and:-

“Having left with no option rented a house at my cost but my ex-spouse broke the padlock at entry door and entered the house to steal my money. On a second occasion he broke the window and opened the door to come inside.”

So, although she appears not to have been further physically abused, she “left the country to escape domestic violence and abuse”.
14. There are within the bundle almost 50 reports to the authorities by the appellant of domestic abuse suffered at the hands of her husband and evidence of the Protection order.
15. It is also part of the factual matrix of this appeal that the appellant's partner has serious mental health issues. He receives PIP payments and has suicidal ideation and there was clear evidence before the First-Tier Tribunal from the appellant's partner's daughter that her father was in no fit state to live anywhere else and that he was suicidal when her mother left him. It is this daughter whose child the appellant and her partner care for from Sunday to Thursday as she works in Manchester.
16. In his submissions made at the conclusion of the evidence Mr McVeety properly recognised that he was in difficulty arguing that it was reasonable to expect the child to leave the United Kingdom or that it was reasonable in all the circumstances to sever the bond between the appellant's partner and his child in the UK. This is not a deportation appeal with no substantial adverse countervailing circumstances having been made out.

17. This is one of those cases in which the factual matrix clearly establishes that any interference with the appellant's family life in the United Kingdom will not be proportionate to the public interest relied upon by the Secretary of State.
18. Accordingly I substitute a decision to allow the appeal pursuant to article 8 ECHR.

Decision

19. **The Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

20. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 30 April 2019.