



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/17190/2018
HU/17824/2018, HU/17829/2018
HU/17832/2018, HU/17837/2018
HU/17847/2018, HU/17853/2018

THE IMMIGRATION ACTS

Heard at Manchester
On 8th July 2019

Decision & Reasons Promulgated
On 16th August 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MH
KS
AA
MSA
MFA
MSA
MIA

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: No legal representation
For the Respondent: Mr. C. Bates (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Warren, promulgated on 23rd April 2019, following a hearing at Manchester on 5th February 2019. In the determination, the judge dismissed the appeal of the Appellants, whereupon the Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The principal Appellant in this case, came to the UK as a visitor on 7th November 2005 and, following various extensions of stay as a student, remained here, eventually applying outside the Rules for leave which was rejected on 23rd June 2010. His wife, who joined him later, is his dependant. There are children who have been born to the Appellant and his wife in the UK. The Appellant is a citizen of South Africa, although of Pakistani origin, as is his wife. The Respondent's view was that it would be reasonable for the Appellant, his wife and siblings to return to either South Africa or Pakistan as a family unit. It is true that he had children who were "qualifying" children in that they had been in the UK for over seven years. Nevertheless, the appropriate course of action here was for the family to return as a single family unit.
3. The Respondent Secretary of State gave consideration to whether there were "exceptional circumstances" to the whole family remaining in the UK and concluded that there were none. The Appellant himself was born in Pakistan and lived there until 1999. He obtained settlement in South Africa up until 2005. His wife was a Pakistani national. Neither they as adults, nor their children were British citizens. The eldest child was born on 7th October 2010 in the UK. The next child was born on 2nd March 2012. The third child was born on 21st July 2013 in the UK. The fourth child was born on 12th September 2015 in the UK. The final child was born on 9th December 2016 in the UK. Apart from the first and second child, both of whom were now children who had been in the UK for over seven years, the others had not. At the date of the hearing before Judge Warren, the second child had not been in the UK for over seven years, but by the date of the decision this had changed.

The Judge's Findings

4. The judge summarised the facts before the Tribunal. It was recognised that the older children are now established in a local school and their reports showed that they are working hard and doing well. The eldest child, however, has fibular hemimelia, with a leg length discrepancy of approximately 3.5cm. She had been treated at the Royal Manchester Children's Hospital and is due to have a special frame fitted to her left leg with a view to lengthening it (paragraph 19). That aside, the judge's view was that "the appeal is only to be considered under private and family life provisions outside of the Rules". Nevertheless, the judge did consider the Rules (paragraph 20). The reason why the Appellant was excluded from consideration under the Rules was because he had failed to pay litigation costs awarded against him in favour of the

Respondent and “he was unable to explain his failure to pay to me, and simply argued other points when I asked him about this” (paragraph 20).

5. The judge concluded that the decision by the Respondent Secretary of State could be upheld. None of the family were asylum seekers. None of the children were stateless. None of the family were eligible for leave to remain within the Rules. The principal Appellant had an unpaid debt to the Respondent. Moreover, with respect to the children there was no evidence to suggest that their education or medical treatment would suffer as a result. Indeed, the best interests of the children was to remain as a family unit with their parents and travel either to South Africa or to Pakistan (paragraph 23).
6. The appeals were dismissed.

Grounds of Application

7. The grounds of application state that the judge had failed to apply paragraph 276ADE in an appropriate manner. The grounds also state that the judge did not consider the Supreme Court decision in **KO (Nigeria) [2018] UKSC 53**.
8. On 13th May 2019, permission to appeal was granted by the Tribunal on the basis that the judge failed to consider **KO (Nigeria) [2018] UKSC 53**. This was important when considering reasonableness, and particularly the assessment undertaken (at paragraph 23) as to where the balance of considerations fell.

Submissions

9. At the hearing before me on 8th July 2019, the Appellant referred to the grounds of application. He also stated that he had paid the outstanding debt to the Respondent Secretary of State. He said that he had explained the matter to the Tribunal below that he was in discussions with the Home Office. He had, in fact, received no notification whatsoever that a debt was outstanding. It was only when he had become aware of this that he had opened discussions with the Home Office about this. He now handed up a confirmation of a visa debit to the Home Office dated 23rd March 2019 when he had paid the outstanding debt of £480 for litigation costs. This, of course, was after the date of the hearing before Judge Warren on 5th February 2019, although only just before the decision was promulgated on 23rd April 2019. The judge cannot be faulted for not taking this into account. The principal Appellant, who appeared in person, however, continued to maintain that the application of the eldest child **AA**, should have been considered under paragraph 276ADE and as such, it would be unreasonable to ask this child to return to either South Africa or to Pakistan, because of the condition described as fibular hemimelia that the child suffered from whereby a special frame was now being fitted to her left leg. Second, he submitted that **KO (Nigeria)** ought to have been considered in relation to her.

10. For his part, Mr Bates submitted that although it is the case that at the critical place in the determination (paragraph 23) the judge does not make express reference to **KO (Nigeria)**, to all intents and purposes, the issue of “reasonableness” has been properly considered by the judge at this paragraph, as indeed it has been throughout the determination. The fact here was that in a “real life” situation the family will be returned as a single unit. They could either go to South Africa or to Pakistan from where they originated. There was no evidence to suggest that either education or medical treatment would suffer as a result of the removal.
11. In reply, the principal Appellant submitted that the Secretary of State’s own guidance made it clear that it was not reasonable to expect a child in the position of AA to leave the UK when she was receiving treatment, and his daughter was having a left leg operation to extend her leg. The fact was that as far as paragraph 23 was concerned the judge had failed to take into account the very significant difficulties that the family would face if the eldest child was also required to return with them to either South Africa or to Pakistan. The children’s needs had to be considered separately from those of the parents who had been guilty of immigration offences. This matter had not been properly considered by the judge below.

Error of Law

12. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set the decision and remake the decision. My reasons are as follows.
13. First, although the judge has embarked upon a fulsome analysis of the factual circumstances before the Tribunal, the position of AA, the eldest child, who has been in the UK for over seven years, and is a qualifying child, and undergoing medical treatment, has not been considered in the context of **KO (Nigeria)**. This requires that it is necessary to consider whether it was “reasonable to expect” a qualifying child to leave the UK. When this is considered a court or Tribunal must not engage in a balancing exercise, weighing the impact upon the child against the public interest. The effect of **KO (Nigeria)** in relation to the proper interpretation of Section 117B(6) of the 2002 Act is to disprove the Court of Appeal decision in **R (MA) Pakistan [2016] EWCA Civ 705**. In assessing whether it is “reasonable to expect” a qualifying child to leave the UK the focus must be exclusively on the position of the child. The Supreme Court has accepted that, of course, the immigration status of a parent may be relevant in assessing “in the real world the impact a parent’s removal may have on a child’s ‘best interests’, but the focus must be on the position of the child”. When regard is had to the position of AA, who has been in the UK for over seven years, it cannot be said that, viewed that from the prospective of reasonableness, that the judge has indeed applied the strictures in **KO (Nigeria)** to the analysis at paragraph 23.
14. Second, consideration must also be given to the Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or a Parent)

and Private Life: Ten Year Routes August 2015. The guidance that is given is to the effect that,

“the requirement that a non-British citizen child has lived in the UK for a continuous period of at least seven years immediately preceding the date of the application, recognises that over time children start to put down roots and integrate into life in the UK ...”.

15. The guidance goes on to say that in these circumstances, where the balance weighs more in favour of the child such that it would be generally unreasonable to expect the child to leave the UK, the position is that “strong reasons will be required in order to refuse a case with continuous residence of more than seven years”. This being so, the failure to demonstrate that the judge has had express regard to these matters means that the decision must be set aside and remitted back to the First-tier Tribunal for a reconsideration.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Warren, pursuant to Practice Statement 7.2(b) of the Practice Statement.

The appeals are allowed.

An anonymity order is made.

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

Deputy Upper Tribunal Judge Juss

13th August 2019