Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/14755/2016
HU/14766/2016
HU/14767/2016
HU/14768/2016
HU/14769/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On November 30, 2018	**On December 7, 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

WEIMING [L]
KRISTIE [T]
[Z X L]
[Z H L]
[Z T L]
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Fisher, Counsel, instructed by Zelin and Zelin
For the Respondent: Ms Kenny, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first-named appellant is a Chinese national. The second-named appellant is a Malaysian national and is the wife of the first-named appellant. The remaining appellants are potentially both Chinese/Malaysian nationals and are the children of the first and second-named appellants. The children's dates of birth are [~] 2008, [~] 2011 and [~] 2012 respectively.

2. The first-named appellant entered the United Kingdom on September 8, 2002 with entry clearance as a work permit holder with leave until February 26, 2007. His leave expired at that date and he has remained here unlawfully since that date.

3. The second-named appellant entered the United Kingdom in April 2006 as a visitor. Her leave expired six months later. They met before the first-named appellant's leave expired but after the second-named appellant's leave had expired.

4. On October 11, 2013 the appellants applied for leave to remain on the basis of their family and private life, but the respondent refused these applications on November 16, 2013. Subsequently submissions were lodged on their behalves which led to a fresh refusal letter being issued by the respondent on May 27, 2016.

5. The appellants appealed on June 9, 2016 under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and their appeals came before Judge of the First-tier Tribunal Hawden-Beal on December 8, 2017 who in a decision promulgated on December 18, 2017 refused their appeals on human rights grounds.

6. Permission to appeal was sought but this was refused by Judge of the First-tier Tribunal Easterman on May 2, 2018. Permission to appeal was renewed and on September 17, 2018 Upper Tribunal Judge Perkins granted permission to appeal on all grounds although indicated that grounds one and two may be difficult to argue. In granting permission on Ground Three, he found it was arguable the Judge may have erred in finding it was reasonable to require the third-named appellant to leave the United Kingdom given that he had lived here since his birth on December 28, 2008.

7. This matter came before my colleague Deputy Upper Tribunal Judge Lewis on October 24, 2018 who adjourned the case on the basis that the Supreme Court had handed down judgement in KO (Nigeria) and others [2018] UKSC 53 that morning.

8. At the commencement of the hearing I raised with Ms Fisher whether all grounds were to be pursued and she confirmed that they were.

SUBMISSIONS

9. Ms Fisher adopted the original grounds of appeal that had been submitted on January 2, 2018.

10. With regard to the first ground of appeal she argued that the Judge had applied to high a burden of proof and in reaching the conclusion she did she had ignored the

evidence given by the witnesses and in particular that the appellant had never been to Manchester and her findings at paragraphs 34 and 35 of her decision were flawed. She submitted that the Judge's findings on the conviction and relevance to the first-named appellant raised more questions than answers and the first-named appellant could not have obtained further information about the conviction as he did not have an identification document.

11. With regard to ground two, she submitted that the Judge erred in finding the third-named appellant would be able to settle in either China or Malaysia because there was no evidence to her finding that the third-named appellant would be able to accompany his mother to Malaysia as neither he nor any of his siblings were guaranteed Malaysian citizenship. Ms Fisher referred to evidence from both the Canadian Refugee Board and the US Report (March 2001) submitted that as the second-named appellant had been outside Malaysia for almost 12 years (as at today's date) it was questionable whether she would still be considered a Malaysian citizen.

12. Turning to the final ground of appeal she submitted that the Judge's approach when considering reasonableness and the best interests of the third-named appellant was flawed. The Judge had placed far too much weight on the cost to the NHS and schooling costs and had failed to give due weight to the respondent's own policy and the guidance given by the Court of Appeal in MA (Pakistan) and others [2016] EWCA Civ 705. The Judge had failed to identify any strong reasons for refusing the application especially in circumstances where his parents were from different countries and the family, if removed, would be split up. She submitted that the decision by the Supreme Court in KO did not address the issue of strong reasons and did not disapprove of MA.

13. Ms Kenny opposed the grounds of appeal. In respect of the first ground of appeal she submitted that this Tribunal could not go behind the conviction recorded against the first-named appellant. All the matters that had been raised by Ms Fisher at today's appeal had been argued before the First-tier Tribunal and the Judge had found the conviction did relate to the first-named appellant and contrary to Ms Fisher's submission the Judge had applied and the correct standard of proof.

14. In respect of the second ground of appeal both Upper Tribunal Judge Perkins and Deputy Upper Tribunal Lewis had pointed out that there was no expert evidence adduced in this case to support this ground of appeal. The Judge had considered the issue of return and in particular whether the children could accompany either of their parents to China or Malaysia and had given reasons for her finding. Without further evidence from an expert there was no basis upon which to find an error in law.

15. Turning to the final ground of appeal Ms Kenny submitted that the Judge, in light of the decision in KO, was entitled to find it would be reasonable for the child to accompany his parents to either China or Malaysia. Neither parent had any legal basis upon which to remain in this country. The first-named appellant had been here

unlawfully for over 10 years and the second-named appellant had been here unlawfully for longer. Their relationship had been substantially formed whilst they were both here unlawfully and at a time when their immigration status was precarious at best. The Judge had considered the best interests of the children and had then looked at whether there were strong reasons which would make it reasonable to require the third-named appellant to leave the United Kingdom. She submitted it was mere speculation they would be removed to different countries and in finding it reasonable to require the third-named appellant to leave with his parents, the Judge applied significant weight to his parent's poor immigration history, his father's illegal working and the accessing of publicly funded facilities.

FINDINGS

16. The appellants have each appealed the Judge's decision to refuse them leave to remain under article 8 ECHR. Three grounds of appeal were put forward and argued before me.

17. The first ground of appeal concerned a conviction recorded against the first-named appellant. The Judge heard evidence from the appellant and his witnesses. In her oral submissions, Ms Fisher pointed to the fact that the evidence before the First-tier Judge was that the first-named appellant did not drive, had never lived in Manchester, the respondent had not raised it in the 2013 decision letter or and the conviction did not appear on a basic CRB check. Ms Kenny submitted that the starting point for the Judge was that the first-named appellant had been convicted of the fraudulent use of the tax disc and the Judge had considered all the evidence and had given and reasons for concluding he was the person convicted.

18. This was not a case where the Judge did not consider the evidence and unless the Judge's decision was perverse there could be no error in law. The Judge had considered Ms Fisher's submissions in the First-tier Tribunal but pointed out that steps could have been taken by the appellant, bearing in mind the age of the conviction, to challenge the conviction. Whilst I take on board Ms Fisher's submissions regarding potential difficulties he may have doing this the Judge was entitled to find no efforts had been taken and all the findings contained in paragraph 35 of the decision were open to the Judge. Contrary to Ms Fisher's submission, the Judge did apply the correct standard of proof stating in paragraph 35 of her decision that she was satisfied "on the balance of probabilities". No error in law was identified on the first ground of appeal.

19. Turning to the second ground of appeal I take on board what Upper Tribunal Judge Perkins stated when giving permission to appeal namely that in order to demonstrate there was an error in law the appellant would have to produce something tangible such as an expert opinion from a suitably qualified lawyer. The First-tier Judge was presented with two differing arguments and the Judge had to make a decision on the information presented to her. In the absence of a legal opinion to the contrary there is nothing contained in the Judge's decision which would,

without further evidence, support Ms Fisher's submission that there had been an error in law.

20. The final ground of appeal was the issue which Upper Tribunal Judge Perkins found most troubling. There has been much litigation surrounding cases where a child of the family has accumulated seven years residence in this country. The respondent has issued two policies, that I am aware of. The previous policy from August 2015 was replaced by one in February 2018 and whilst some presenting officers have suggested the February 2018 policy has been withdrawn, following the decision in KO, that was not a position adopted by Ms Kenny before me today.

21. Before considering Ms Fisher's submission that the Judge erred it is necessary to consider how the Judge approached this issue. This assessment commenced at paragraph 36 of the decision and continued until paragraph 53.

22. The Judge, having concluded the Immigration Rules could not be me identified that if it was unreasonable for the third-named appellant to go to either China or Malaysia then not only would he succeed but his whole family would also succeed.

23. Contrary to Ms Fisher's submission, the Judge considered the children's best interests first and foremost. The Judge took into account the various school reports but concluded that the child was not at a critical stage of his education. The Judge took into account the guidance issued in EV (Philippines) [2014] EWCA Civ 874 and at paragraph 38 of her decision, she set out the current situation. None of the conclusions given by the Judge in paragraph 38 of her decision were factually incorrect and the Judge concluded that it would be in the third-named appellant's best interests to remain in the United Kingdom.

24. In EV (Philippines) the Court stated, "how the tribunal should approach the proportionality exercise if it has determined that the best interests of the child or children are that they should continue with their education in England. Whether or not it is in the interests of a child to continue his or her education in England may depend on what assumptions one makes as to what happens to the parents. There can be cases where it is in the child's best interests to remain in education in the UK, even though one or both parents did not remain here."

25. The Judge having established that it would be in the child's best interests to remain then set about looking at the proportionality of requiring him to leave the United Kingdom. Ms Fisher's challenge to this is that the Judge's approach was flawed through a failure to properly apply section 117B(6) of the 2002 Act or the respondent's own policy.

26. At paragraph 41 of the Judge's decision she noted that the child's best interests were a primary consideration, but they could be outweighed by the cumulative effect of other considerations. The Supreme Court in KO did provide guidance on how this should be approached.

27. The Supreme Court in KO concluded that the purpose of Part 5A of the 2002 Act is to produce a straightforward set of rules, intending to reduce discretion in taking public interest into account, and to be consistent with the general principles relating to the 'best interests' of children.

28. The Court considered that paragraph 276ADE(1)(iv) contained no requirement to consider the criminality or misconduct of a parent as a balancing factor and such a requirement cannot be read in by implication. Equally it was considered that s 117B of the 2002 Act did not include criminality or misconduct of a parent as a consideration, though it recognised that this may indirectly become relevant if an individual's record impacts where they will be, and where their dependent child will be.

29. At paragraph 18 of KO the Supreme Court stated:

> "On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here and having to leave. 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."

30. The Supreme Court went on to adopt what Lewiston LJ had stated in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874, namely:

> "… the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus, the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

31. The Judge made a finding that there was no evidence before her that China or Malaysia would prevent the third-named appellant from accompanying either of his parents to either China or Malaysia and she also found that there was nothing before her to support the submission that the parents would not be able to enter either China or Malaysia as a family.

32. The Judge noted that the child's parents had spent substantial parts of their lives (26 and 24 years respectively) in China or Malaysia respectively. The Judge took into account that the children had extended family in both countries and the third-named appellant spoke both Cantonese and English and had been learning Mandarin for two years. Whilst he did not speak Malay the Judge noted that both English and Cantonese were spoken in Malaysia and it was reasonable to expect the child and his siblings to be able to learn Malay.

33. The Judge addressed the ability of the family to be able to obtain a Hukou and she rejected Ms Fisher's submission that the second-named appellant would be unable to register the third-named appellant's birth. Whilst Ms Fisher argued the family would be split up this was something considered by the Judge who concluded at paragraph 45 of her decision that there was no evidence to suggest they would be unable to apply for entry clearance to the other's home country as either an unmarried partner or ultimately as a spouse. Whilst I accept every country has entry clearance requirements the burden lay on the appellants to persuade the Judge that entry clearance was not available and they failed to satisfy the Judge that entry clearance was not available.

34. The Supreme Court made clear that in assessing reasonableness, under section 117B(6) of the 2002 Act, a parent's previous misdemeanours was not something to take into account but such behaviour could be relevant because the Court/Tribunal had to consider the position in the "real world". The Judge had concluded the third-named appellant was a qualifying child and came within section 117B(6) but ultimately concluded it would be reasonable for that child to accompany his parents when they were removed.

35. The respondent's policy makes clear that relevant factors, when considering reasonableness, include:

    (a) Whether the child would be leaving with a parent.

    (b) Whether there are any wider family ties in the United Kingdom.

    (c) Whether the child is likely to be able to integrate readily into life in another country including taking into account:

        (i) whether the parent/child are a citizen of the country they are being removed to.

        (ii) How long the parent had lived in that country for.

        (iii) Whether the child had ever lived in that country and if so for how long.

        (iv) Whether the child had ever visited the proposed country of return.

        (v) Does the parent/child have any family or social ties to that country.

        (vi) Does the child had cultural ties to that country.

        (vii) Can the parent/child read and write the language associated to that country.

    (d) Would removal give rise to a significant risk to the child health.

    (e) Any other factors put forward on behalf of the appellant in relation to education, health or public services.

    (f) Significant weight should be given where a non-British child has lived in the country for seven years or more and strong reasons would be required to refuse such a case.

(g) Such strong reasons may arise where, for example, the child will be returning with the family unit to the family's country of nationality, and the parents have deliberately sought to circumvent immigration control or abuse the immigration process – for example, by entering or remaining in the UK illegally or by using deception in an application for leave to enter or remain.

(h) The consideration of the child's best interests must not be affected by the conduct or immigration history of the parent(s) or primary carer, but these will be relevant to the assessment of the public interest, including in maintaining effective immigration control.

36. Having read the Judge's decision I am satisfied that these are factors the Judge took into account when considering reasonableness. The Judge rightly concluded that neither the first nor second-named appellant had any legal basis upon which to remain in this country and the Supreme Court made clear that this is a factor the court must take into account when considering the reasonableness of the child being removed.

37. The Judge repeatedly stressed that none of the children should be blamed for the conduct of their parents but that their parent's conduct was something she could take into account at the proportionality stage.

38. I accept a Judge hearing an appeal on these facts may have reached a different conclusion but that is not the test to be applied when considering whether there has been an error in law.

39. This was a detailed decision in which the Judge recognised the issues and approached the assessment in the knowledge that a decision on the best interests of the child had to be made first and foremost, followed by an assessment of factors including whether there were any strong reasons which would make it unreasonable for the third-named appellant to leave the country.

40. Applying the guidance in KO, I am satisfied that this decision was open to the Judge and in such circumstances there was no error in law.

Notice of Decision

41. There is no error in law. I uphold the original decision.

Signed Date 01/12/2018

Deputy Upper Tribunal Judge Alis

FEE AWARD
TO THE RESPONDENT

I do not make a fee award as I have dismissed the appeal

Signed Date 01/12/2018

Deputy Upper Tribunal Judge Alis