Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01647/2018
HU/01649/2018
HU/01650/2018
HU/01651/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 November 2019	**On 11 November 2019**

Before

HHJ STACEY
UPPER TRIBUNAL JUDGE PITT

Between

MR MH
MRS TS
MISS AH
MISS AH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Reynolds, of Counsel, instructed by Lawmatic Solicitors
For the Respondent: Ms Bassi, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication

thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. This is an appeal against the decision issued on 9 July 2019 of the First-tier Tribunal, before Judge Herlihy, which refused the Article 8 ECHR appeal brought by the Appellants.

2. The Appellants are a husband and wife and their two minor daughters, dates of birth 2nd September 2010 and 2 July 2016, all of whom are nationals of Bangladesh.

3. The First Appellant entered the UK unlawfully in approximately 2000. He has never had leave to remain. His wife came to the UK in 2009 with leave as a student but had no leave from 23 November 2014 onwards. The Article 8 ECHR claim was based on the fact of their daughter, AH, (the Third Appellant) having lived in the UK all of her life and for 8 years. The Appellants sought to argue that, following the provisions of s.117B(6) of the Nationality and Immigration Act 2002 (the Act), it would not be reasonable for AH to leave the UK. The Appellants also sought to argue that the Second Appellant had not used deception when relying on a TOEIC/ETS certificate and that it was disproportionate to expect the family to return to Bangladesh in all the circumstances.

4. The First-tier Tribunal found that the Second Appellant did use deception when relying on her TOEIC/ETS certificate, that it was reasonable for AH to leave the UK and that the decision to refuse leave was proportionate.

5. The Appellants applied for permission to appeal against the decision of Judge Herlihy. In a decision dated 2 September 2019, First-tier Tribunal Judge Andrew indicated that permission was refused but in the body of the decision indicated that the grounds had merit, limited to argument on the proper application of KO v SSHD [2018] UKSC 53.

6. The Appellants renewed their application for permission to appeal on the basis that the decision of Judge Andrew should have stated that permission on limited grounds had been granted. In a decision dated 30 September 2019, Upper Tribunal Judge Bruce granted permission as:

> "it is clear from the decision of Judge Andrew that she found there to be an arguable error in approach as per her paragraph 2. I am satisfied that the heading 'permission to appeal is refused' was an error and that it should have read 'permission to

> appeal is granted'. Permission is therefore granted in the limited terms identified by Judge Andrews."

7. At the hearing before us, Mr Reynolds sought to expand the grounds to include those set out in grounds 1 to 5 which addressed the adverse findings of Judge Herlihy on the TOEIC/ETS certificate.

8. We refused to admit grounds 1 to 5. As indicated by Upper Tribunal Judge Bruce, Judge Andrew clearly intended to grant permission only on the limited ground concerning the reasonableness of the older child leaving the UK. The renewal of the permission application to the Upper Tribunal maintained that the decision of Judge Andrew showed that permission should be granted on that limited basis rather than stating that permission was also sought on the grounds refused by Judge Andrew. Upper Tribunal Judge Bruce's decision clearly grants permission on a limited basis only.

9. Further, the application to expand the grounds was made only on the morning of the hearing, without notice having been given to either the Tribunal or the respondent. Mr Reynolds was not able to provide a good reason to explain why the renewal grounds only sought recognition that Judge Andrew had granted permission on a limited basis or why the Appellants had not raised the application to admit other grounds in writing at any point after the decision of Upper Tribunal Judge Bruce was issued and only at the hearing before us. Mr Reynolds conceded that it was difficult for him to seek to re-open the question of the findings that the Second Appellant had cheated in the TOEIC test given those matters.

10. In all the circumstances, it was our conclusion that it was not in the interests of justice or in accordance with the overriding objective to admit grounds on which permission had not been granted by the First-tier Tribunal or the Upper Tribunal.

11. We proceeded to hear argument on grounds 6 and 7 which concerned the approach of Judge Herlihy to s.117B(6) and the reasonableness of the older child leaving the UK.

12. Judge Herlihy properly identified KO as the lead authority on the correct approach the s117B(6) assessment in paragraph 52 of her decision. In paragraph 53 she said this:

> "The immigration history of the parents is not irrelevant and is indirectly material because it is necessary in order to assess whether it would be reasonable for [AH] to return to Bangladesh with her parents to ask why she would be expected to leave the UK and the answer is because her parents have no right to remain and this is a relevant consideration. To paraphrase the question another way would be to ask; "would it be reasonable to

expect the child to follow the parent with no right to remain in the country of origin?".

13. The grounds maintain that this statement on the principle in KO is incorrect. We did not find that to be so. Paragraphs 17-19 of KO provide:

> "17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is "reasonable" for the child. As Elias LJ said in *MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber)* [2016] EWCA Civ 705, [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv).
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> 18. 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. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245:
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> > '22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …'
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> 19. He noted (para 21) that Lewison LJ had made a similar point in considering the 'best interests' of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, para 58:
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> > '58. In my judgment, therefore, 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?'
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> To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. There is nothing in the section to suggest that 'reasonableness' is to be considered otherwise than in the real world in which the children find themselves."

14. In our judgment, the statements made by Judge Herlihy in paragraphs 52 and 53 of her decision reflect the ratio of KO entirely accurately. The unlawful status of the parents forms the context for the assessment of whether it is reasonable for the child to leave the UK. Judge Herlihy clearly understood this and we were not taken to anything in the substance of her assessment that shows that when considering whether it was reasonable for AH to leave the UK she approached the parents' immigration status otherwise.

15. In paragraph 56 the Judge expands on the immigration history of the parents – that MH entered and remained illegally and TS remained after the expiration of her leave and continued to develop her family life in the knowledge that she had no legitimate expectation of being able to remain to pursue the same. She also referred to deception perpetrated by TS and that it was not in the public interest for parents to be incentivised to flout immigration control by developing family life by remaining illegally when they know they have no right of return. But it is clear from paragraph 56 that these issues are discussed in the context of the wider proportionality exercise and not the s.117B(6) assessment so Judge Herlihy is not seeking to visit the sins of the parents on the children, but merely outlining the conduct of the parents in the context of the parents' human rights claim.

16. We therefore did not find that ground 6 had merit as there is no error of law in the Tribunal's approach to and application of the ratio in KO.

17. The second challenge, set out in ground 7, was that the First-tier Tribunal's findings in paragraphs 54 and 55 that that "any interaction [of AH] outside the family home and school is largely within the Bangladeshi Diaspora" was perverse as there was no evidence on which to base the finding.

18. Mr Reynolds accepted that perversity is "a very high hurdle" (R (Iran) v SSHD [2005] EWCA Civ 982) but includes a finding of fact wholly unsupported by the evidence. However, the grounds

overlook two matters. Firstly the parents' evidence recited at paragraphs 28 and 31 on the children's exposure to the Bangladeshi community was not found to be entirely credible by the Judge: see for example paragraph 48 and the contradictions and inconsistencies as between each of the parent's evidence about AH's interaction with other Bangladeshis.

19. Secondly, there was evidence before the First-tier Tribunal which clearly permitted a rational conclusion that the children had grown up with contact with the Bangladeshi community in the UK. The evidence before Judge Herlihy was that the Appellants live in an area where other Bangladeshis live and they are supported by their uncle who is originally from Bangladesh. The grounds do not challenge the conclusion that MH is likely to have worked in Bangladeshi restaurants when describing his employment as a chef. The Tribunal found that MH does not speak good English. MH gave evidence that members of the Bangladeshi community visit him at his house and he was disbelieved when he said they spoke in English together. MH volunteers at the local mosque and TS's work was in a sari shop before she had children. Despite their 19 and 10 years in the UK respectively the letters of support came entirely from other members of the Bangladeshi community. Furthermore, the letters of support gave almost no information about what the parents have being doing throughout their time in the UK and their level of integration. The Tribunal was entitled to note the absence of evidence of integration and ties outside the Bengali community. There was therefore sufficient evidence before the Tribunal to draw the inference that "any interaction [of AH] outside the family home and school is largely within the Bangladeshi Diaspora" and the finding was not perverse.

20. Since the perversity challenge fails, it follows that there has been no error of law by the tribunal in its conclusion that it would not be unreasonable to expect AH to leave the UK and her and her family's human rights have not been infringed.

Notice of Decision

The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed: Date: 5 November 2019

HHJ Stacey