Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03081/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 June 2019	**On 30 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

S.R.
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STTE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Rodger promulgated on 6 September 2018 refusing the appeal against a decision of the Respondent dated 12 January 2018 refusing a human rights claim.

2. Permission to appeal was granted by Upper Tribunal Judge Bruce on 8 May 2019 following an initial refusal of appeal by the First-tier Tribunal. The grant of permission to appeal was on a narrow basis. It was indicated that the grounds advanced in support of the application were of no merit, but

that permission to appeal was granted in any event because of the consequences of the recent decision in **KO (Nigeria) [2018] UKSC 53**: it was arguable that the First-tier Tribunal Judge had fallen into error in balancing the Appellant's own immigration history (in particular her use of a proxy tester to secure an English language certificate) in the consideration of whether or not it was reasonable for her British citizen child to leave the United Kingdom. Accordingly, the issue before the Upper Tribunal relates to the Appellant's British citizen child born on 24 March 2016, and the application of section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

3. Ms Jones for the Secretary of State very properly acknowledges that the case law is such that the Tribunal is bound to find error on the part of the First-tier Tribunal. Further she acknowledges that in remaking the decision the case law points only in the direction of allowing the appeal. (I pause to observe that in making such acknowledgements Ms Jones was careful to point out that she was reflecting the Respondent's recognition of the condition of the case law rather than expressly conceding the ultimate correctness of the position stated in the case law.)

4. The error of law is to be identified in particular at paragraphs 56 and 74 of the Decision of the First-tier Tribunal.

5. At paragraph 56 the Judge gives consideration to the best interests of the Appellant's child, noting not only his citizenship but that he is undergoing review at Moorfields Eye Hospital. The Judge describes the matter as *"finely balanced"* but determines that the best interests of the child are to remain in the United Kingdom. The Judge then states:

> *"The finely balanced decision on best interests does not automatically lead to a conclusion that it would be unreasonable to expect him to leave the UK as there are other factors that need to be considered including those matters set out above in relation to the Appellant's immigration history and likely situation on return to Pakistan."*

It is, of course, the reference to the immigration history of the Appellant that is in error.

6. This ultimately finds expression at paragraph 74 of the Decision, which begins with a phrase indicating that consideration is being given to the question of whether it is unreasonable to expect the child to leave the United Kingdom, and then in part states:

> *"However, I also have to take into account the fact that his mother fraudulently submitted an English speaking test as part of her*

> *application and has shown a blatant disregard to the immigration laws of the UK by relying on a proxy test taker to take her English language test on her behalf. Whilst this may have been assisted by her cousin, the Appellant would have known that this was wrong and in breach of the immigration laws and overall I am satisfied that the fraud outweighs the child's finely balanced best interests of where he should live and on balance I am not satisfied that it is unreasonable to expect the child to leave the UK. The public interest does require the Appellant's removal as s.117B(6) has not been made out. …"*

7. As is now common ground, the impact of **KO (Nigeria)** renders the Judge's approach wrong in law, and necessarily requires that the decision of the First-tier Tribunal be set aside.

8. In remaking the decision the focus is again on the question of 'reasonableness' pursuant to section 117B(6). This of course is essentially the same question as is asked in paragraph EX.1 of Appendix FM of the Immigration Rules. In this regard, it is to be noted that in the 'reasons for refusal' letter ('RFRL') the Secretary of State acknowledged that paragraph EX.1 was engaged:

> *"We have considered whether you are exempt from meeting certain eligibility requirements under Section R-LTRP of Appendix FM because paragraph EX.1 applies. We have carefully considered whether paragraph EX.1 of Appendix FM applies to your application and therefore whether you meet the requirement of paragraph R-LTRP.1.1.d(iii) of Appendix FM. It is accepted that you have a qualifying relationship contained within EX.1 and therefore meet the requirements of R-LTRP.1.1.d(iii)."*

Such a position, whilst not the invariable position of the Respondent, is a common position adopted in circumstances where a British citizen child is involved.

9. The First-tier Tribunal Judge gave some consideration to this aspect of the RFRL at paragraph 72 of the Decision and concluded that that aspect of the RFRL must have been in error.

10. I am afraid I am quite simply unable to follow the reasoning at paragraph 72. Similarly, Ms Jones helpfully and frankly acknowledges that she is not able to support that reasoning, and does not seek to do so. She acknowledges the position as stated in the RFRL.

11. The consequence of the latter acknowledgement is that I find that section 117B(6) is engaged. Consequently, in turn, pursuant to **KO (Nigeria)** - and more particularly **JG (Turkey) [2019] UKUT 0072** which has been cited with approval in the case of **Secretary of State for the Home Department v AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661** - the public interest does not require the removal of the Appellant, notwithstanding the entirely justifiable observations of the First-tier Tribunal Judge in respect of her immigration history and conduct.

12. The appeal must be allowed accordingly.

Notice of Decision

13. The decision of the First-tier Tribunal contained a material error of law and is set aside

14. I remake the decision in the appeal. The appeal is allowed on human rights grounds.

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 her or any member of her 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.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **29 July 2019**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

Although I have allowed the appeal I make no fee award. This is because the Respondent's decision reflected the understanding of the applicable law at that time, and on that premise there was an element of justification for the Respondent's decision in light of the conduct of the Appellant.

Signed: Date: **29 July 2019**

Deputy Upper Tribunal Judge I A Lewis
(*qua* a Judge of the First-tier Tribunal)