Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05431/2018**

THE IMMIGRATION ACTS

Heard at Field House
On 25 April 2019

Decision & Reasons Promulgated
On 20 May 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

MRS S A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Malik, Counsel
For the Respondent: Mr M Diwnycz, HOPO

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Mitchell dismissing her appeal against the decision of the respondent refusing to grant her leave to remain in the UK on the basis of her family life in the United Kingdom with her partner, AM and her two children born in the United Kingdom on 19 April 2014 and 20 February 2015.

2. In the decision dated 19 October 2015, the respondent did not consider that evidence had been provided to show that the children were British citizens or that the appellant had been living with her partner/husband in a relationship akin to marriage for two years prior to the date of the application. The respondent did not also consider that the appellant had provided any information to suggest that she

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had sole responsibility for the children or that the children live separately from the other parent.

3. The respondent has now accepted that the appellant's partner and their two children are British citizens.

4. The judge found that the facts of this case were not substantially in dispute. The appellant arrived in the UK in April 2004 as the spouse of a settled person. She left that person after a claimed period of domestic violence. She met AM on 28 June 2013 and they began living together. They have two children who were born in the UK on 19 April 2014 and 20 February 2015. The appellant is a national of Bangladesh. The appellant and her partner went through a Muslim marriage on 28 June 2013. The appellant's husband attended court and gave oral evidence. He is a driver. It was not claimed that their income was enough to meet the £18,600 financial requirements of Appendix FM of the Immigration Rules.

5. The judge accepted that evidence has been provided to show that the children are British citizens and that the appellant and her British partner have been living together in a relationship akin to marriage for over two years.

6. The judge noted that the children in this case are not 7 years yet though they have just embarked upon the education system. The judge said it is clear that the Immigration Rules consider that seven years is a period after which it becomes less reasonable to consider that the appellant and her children should leave the United Kingdom. There are though significant advantages which cannot be ignored as the children are British citizens.

7. The judge held that it was not suggested that the appellant would be in need of international protection as a lone woman in Bangladesh. She is not an unmarried woman and has a Muslim husband now. He found that the evidence does not support that the appellant would face insurmountable obstacles as a lone woman or that she has suffered significant periods of domestic violence which has changed her very demeanour adversely affecting of vulnerability.

8. The judge found that considering the age, the nationality and the period they have spent in the UK, and the health of the children and of the appellant, it has not been shown that it would not be reasonable to expect the children to leave the United Kingdom with the appellant.

9. Considering Section 55 of the Borders, Citizenship and Immigration Act 2009, the judge found that it would be in the best interests of the children to remain with both parents. It is the decision of the parents as to whether the children would travel to Bangladesh or remain in the UK.

10. The judge noted that the appellant's partner/husband was born in Bangladesh though he has lived in the UK for the majority of his life. He does not have any

relatives in Bangladesh. He has not claimed that he cannot speak a relevant language of Bangladesh.

11. The judge considered that the sins of the parents should not be visited upon the child. He found however that the appellant has used the immigration system to her advantage. She has breached immigration law by overstaying. There was no suggestion that the appellant would have or have had any recourse to public funds. It was clear that their immigration history means that any private life developed in that time was whilst their immigration status was precarious.

12. Having considered the evidence the judge concluded that the appellant had not shown that it would not be reasonable for the children to leave the United Kingdom. He found that there do not appear to be insurmountable obstacles to the appellant continuing her relationship with her partner outside the United Kingdom either. He concluded therefore that the appellant has not shown that she can meet the Immigration Rules.

13. The judge then went on to consider Article 8 outside the Immigration Rules. For the same reasons the judge found that the family are living together in a subsisting genuine relationship and that any decision to remove the appellant and the consequences following that removal would potentially engage Article 8 for the purposes of this appeal. The family would not be removed as a family unit. The decision to remove the appellant from the UK would effectively be a breach of their family life.

14. The judge said it is a primary consideration for him to consider the best interests of the children. He said all the family appears to be fit and healthy. The children are clearly young enough to adapt to a new environment.

15. The judge found that the appellant has been in the UK long enough to establish a private and family life in the UK. The decision to remove the appellant from the UK is in accordance with the law and has a legitimate aim. He has though concluded that the interference is proportionate to that legitimate aim. The appellant is the primary carer for both children, but she cannot meet the Immigration Rules for the reasons he had already given. And it has not been shown that there would be very substantial difficulties or exceptional circumstances or unjustifiable harshness for the appellant or any members of the family.

16. The judge held that the effect of removal would potentially have a significant effect on the children's education and family and private life; the appellant's daughter would be left without her mother at an important time in her development. The overall effect does make the decision disproportionate. The judge considered the reasonableness test set out in Rule 276ADE, Article 8 applications engaging Section 117B(6) and paragraph EX.1.1 of Appendix FM to the Immigration Rules. He concluded that it was reasonable to expect the appellant to leave the UK. He also concluded that it would be reasonable to expect the children to leave the UK.

17. Permission was granted to the appellant on the basis that the grounds raised arguable issues as to the judge's assessment of "reasonableness" in relation to the children, in particular given the development in relevant jurisprudence including **KO (Nigeria) and Others v Secretary of State for the Home Department (Respondent) [2018] UKSC 53**.

18. Mr Malik submitted that the judge materially erred in law in failing to consider **KO (Nigeria)** which was a decision in the public domain at the time the judge heard the case. Mr Diwnycz accepted that the judge made no mention of **KO (Nigeria)** which is a Supreme Court decision. He submitted that **KO (Nigeria)** has been endorsed in a recent decision by the Upper Tribunal in **JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) Rev 1**.

19. In the light of the argument made by the parties, I found that the judge materially erred in law by failing to consider **KO (Nigeria)** in his consideration of whether it was reasonable to expect the British born children to leave the United Kingdom with their mother. The judge's decision cannot stand. I set it aside and re-make it.

20. Mr Malik relied on a decision by the Court of Appeal in **AB (Jamaica) [2019] EWCA Civ 661** which he said endorsed **JG** and **KO (Nigeria)**. He said at paragraph 19 of **AB (Jamaica)** the Court of Appeal held that since the conditions in 117B(6) had been met, no further examination of the public interest was required.

21. In this case the appellant's two children are British born children and their father is a British citizen. Section 117B(6) of the 2002 Act states as follows:

> *"In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –*
>
> *(a) the person has a genuine and subsisting relationship with a qualifying child, and*
>
> *(b) it would not be reasonable to expect the child to leave the United Kingdom".*

22. I find that Section 117B(6)(a) of the 2002 Act is met in the light of the judge's finding that the family, that is the appellant, her husband and the two children, are living together in a subsisting and genuine relationship. The children are British and are qualifying children. The judge's finding means that the appellant has a genuine and subsisting relationship with her two qualifying children.

23. I also find that Section 117B(6)(b) is met in the light of the findings made by the judge. The judge held that the sins of the parents should not be visited upon the children. The children are rather young. The judge held that the children have spent their formative years in the UK. He also held that the appellant's children are clearly largely reliant upon her for their day-to-day needs at this moment. I find that it is not likely that the appellant's husband, who is a driver, will be able to meet the day-to-day needs of the children should the appellant be removed to Bangladesh.

24. In **JG** the Upper Tribunal cited paragraph 33 of the judgment of the Supreme Court in **ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4** which said:

> *"In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that".*

25. In **JG** the Upper Tribunal held in its head note:

> *"Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 requires a court or Tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so".*

26. I find on the evidence in this case that it would not be reasonable to expect the two British children, who are young, in the formative years and who rely on their mother for their day-to-day care and needs, to leave the United Kingdom.

27. Accordingly, I allow the appellant's appeal.

28. An anonymity direction 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 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.

Signed Date: 17 May 2019

Deputy Upper Tribunal Judge Eshun