Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/05632/2018
HU/05635/2018
HU/05637/2018
HU/05639/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th January 2019	**On 14th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

GOPAL [T] (FIRST APPELLANT)
SHANTANA [T] (SECOND APPELLANT)
[S T[1]] (THIRD APPELLANT)
[S T[2]] (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Dey (Legal Representative), Lexpert Solicitors LLP
For the Respondent: Mr N Bramble (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellants are citizens of Nepal. They were born respectively on 27th March 1972, 2nd October 1978, 20th September 2001 and 19th June 2008.

They are a family of mother, father and two children. Their immigration histories are set out in some detail in the Notice of Refusal. On 17th March 2017 the Appellants made a human rights claim for leave to remain in the UK on the basis of their family life within the UK. That application was refused by Notice of Refusal dated 12th February 2018.

2. The Appellants appealed and the appeals came before Judge of the First-tier Tribunal Cohen sitting at Taylor house on 1st October 2018. In a determination and reasons promulgated on 19th November 2018 the Appellants' appeals were allowed on human rights grounds.

3. On 26th November 2018 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 3rd December 2018 Immigration Judge Lambert granted permission to appeal. Judge Lambert noted that the third and fourth Appellants, who were non-British qualifying children, met the requirements of paragraph 276ADE(iv) and that the appeal of the first Appellant, their father, had to be allowed under the Respondent's own guidance as to the reasonableness of expecting his children to leave the United Kingdom and in accordance with the Court of Appeal decision in *MA (Pakistan)*. The circumstances of the second Appellant were virtually identical.

4. Judge Lambert noted that the grounds maintained a failure by the judge to consider or make findings in relation to alleged use of a proxy in obtaining an English language test result and that this issue is material to the proportionality exercise and public interest considerations. The absence in the decision of any apparent consideration or discussion of this issue rendered, in the view of Judge Lambert, that the ground was arguable. Further, reliance was placed in terms of the issue of reasonableness on the recent Supreme Court decision in *KO (Nigeria) [2018] UKSC 53* which may not have been before the judge but was nevertheless not taken into account.

5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. For the purpose of continuity throughout the appeal process I refer herein to the Thapa family as the Appellants and to the Secretary of State as the Respondent albeit that I note that this is an appeal by the Respondent. The Appellants appeared by their instructed legal representative Mr Dey. Mr Dey is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer Mr Bramble.

Submissions/Discussions

6. Mr Bramble relies on all grounds and submits that there has been a failure by the judge to resolve a conflict of material fact. He submits that the second Appellant would not speak English and that her TOEIC test was taken by a proxy. He takes me to the findings of the Immigration Judge,

particularly at paragraphs 5, 6 and 7, pointing out that the judge ignores this factor and as to whether the second Appellant can meet the suitability criteria. He accepts that it may be arguable that that alone does not constitute a material error but thereafter he takes me to paragraph 24 of the decision finding that the position of the second Appellant is virtually identical to that of the first Appellant and consequently submits that the judge has completely sidestepped the issue and that the proxy test is a matter of relevance.

7. He indicates that the case should now be looked at in accordance with the guidelines set out in *KO (Nigeria)* and whilst he does not dispute the reasonableness of the third and fourth Appellants' applications he submits that the judge has failed to consider the guidance given therein and that "reasonableness" has to be considered in the real world in which the children find themselves and the real world in this case is that they will remain with their parents.

8. He consequently submits that in allowing the determination on behalf of all four Appellants the judge has failed to take into consideration the position of the second Appellant in considering her proxy taking of a TOEIC and that this goes to suitability and a failure to consider the public interest. He points out that if the first and second Appellants do not have leave all four Appellants would leave the UK as a family unit and that is why the failure of the judge to consider this factor is material and the case needs to go back and be reassessed.

9. In response Mr Dey submits since there are no detailed findings on the second Appellant other than to conclude that her circumstances are virtually identical to the first Appellant it cannot be said that the second Appellant has committed an offence.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which

was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

12. There are two principal areas here which need consideration. One leads to another. The issue turns very largely on the suitability of the second Appellant to remain in this country bearing in mind the allegation that is made that she took a TOEIC test by proxy. Careful scrutiny of the First-tier Tribunal Judge's decision completely ignores that factor. It is a relevant and material factor to be taken into account and consequently on that basis alone there is a material error of law particularly when looked at against the assessment by the judge that the position of the first two appellants is identical.

13. Secondly, it is an issue that needs to be considered when the reasonableness of returning the family, in this case to Nepal is given due consideration. Whilst it may not have been before the First-tier Tribunal Judge the Supreme Court in the recent authority of *KO*, at paragraph 18 of *KO* Lord Carnwath delivering the judgment of the court said:

> "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."

14. That paragraph along with the conclusion at paragraph 19 that reasonableness is to be considered in the real world in which the children find themselves shows that the position in which the children's application has be considered must take into account the factors involving the parents and that unless it is argued that the children should remain to the exclusion of the parents (and that does not appear to be suggested here) then the children's case cannot be considered in isolation.

15. Against that background it is essential that the principal questions posed by Mr Bramble and posed in the Grounds of Appeal are addressed and they have not been. To that extent the decision is materially flawed and I agree with Mr Bramble that the appeal needs to be considered afresh against this background and with both parties making their further appropriate representations. Consequently, to that extent I find there are

material errors of law in the decision of the First-tier Tribunal Judge and I set it aside and I give directions for the rehearing of this matter.

Notice of Decision

16. The decision of the First-tier Tribunal Judge contains a material error of law and is set aside. Directions are given hereinafter for the rehearing of this matter.

    (1) That on finding that there are material errors of law in the decision of the First-tier Tribunal Judge the decision of the First-tier Tribunal Judge is set aside with none of the findings of fact to stand.

    (2) The appeal is remitted to the First-tier Tribunal sitting at Taylor House to be heard before any Judge of the First-tier Tribunal other than Immigration Judge Cohen.

    (3) The estimated length of hearing be two hours.

    (4) That there be leave to either party to file and serve a bundle of such further subjective and/or objective evidence upon which they seek to rely at least seven days prior to the restored hearing.

    (5) That a Nepalese interpreter will attend the restored hearing.

17. No anonymity direction is made.

Signed Date: 11th February 2019

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date: 11th February 2019

Deputy Upper Tribunal Judge D N Harris