Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/08349/2018
HU/08367/2018
HU/08373/2018
HU/08378/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 January 2019	**On 6 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

HUSAIN [N]
SHABNAM [N]
[A N]
[S N]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms Solanki of Counsel
For the Respondent: Mr Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of India. They entered as visitors and applied for further leave to remain on the basis of family and private life which was refused in decisions dated 24 March 2018.

2. Judge Kimnell (the judge) dismissed the appeals in a decision promulgated on 19 January 2018. He found that neither parent had the right to remain here and should be expected to return to their country of nationality, that is, India. The judge considered it was reasonable to expect their children to accompany them.

3. There are four grounds:

   (i) Inadequate finding as to the best interests of the children;

   (ii) Failure to consider submissions, case law, policy guidance and evidence;

   (iii) Parents' misconduct the primary consideration;

   (iv) Incorrectly summarising evidence and assessing rights.

4. Judge Povey granted permission on 13 December 2018. He said inter alia:

> *"2. The grounds assert that the judge failed to undertake proper assessment of the children's best interests and erred in assessing whether it was reasonable for the children to return to India.*
>
> *3. It was not in dispute the third and fourth appellants had been in the UK for over seven years or that their parents (the first and second appellants) were in the UK without leave. Although reference was made to the primacy of the children's best interests, it was arguable that the judge provided inadequate reasons for the factors which informed her assessment of the same and the conclusions she reached. It was also arguable that the judge, contrary to her own self-direction, allowed the parents' conduct to influence her assessment of whether it was reasonable for the children to return to India."*

5. There was no Rule 24 response.

Submissions on Error of Law

6. Ms Solanki relied upon her grounds. The judge erred in his approach to the best interests of the children and in particular as regards **KO (Nigeria) [2018] UKSC 53** the judge's decision was predicated upon the parents' conduct. See the judge's decision at [29] – [32].

Conclusion on Error of Law

7. **KO** was authority for the principle that where immigration law sets out a discretionary assessment of the impact of removal on a child using a "reasonableness" or "undue harshness" test, the parents' conduct is irrelevant to that assessment of the impact on the child. That is, a child must not be blamed for matters for which he or she is not responsible,

such as the parents' conduct. That is because Rule 276ADE(1)(iv) contains no requirement to consider the conduct of a parent as a balancing factor and such requirement cannot be read in by implication. See **KO** at [16]. S117B of the 2002 Act does not include conduct of a parent as a consideration in the event that the person has a genuine and subsisting parental relationship with a qualifying child. See 117B(6) and **KO** at [17]. It is however relevant to consider where the parents, apart from the relevant provision, are expected to be as it will normally be reasonable for the child to be with them such that to that extent only, the record of the parents may become indirectly material if it leads them to having to leave the UK. It is only if it would not be reasonable for the child to leave with the parent, that the provision may give the parent a right to remain. See **KO** at [18].

8. I must consider the interaction of paragraph 276ADE(1)(iv) and S.117B in terms of **KO**. Paragraph 276ADE(1)(iv) provides that a child be permitted to remain if the child has lived here continuously for at least seven years and it would not be reasonable to expect the child to leave. Lord Carnwath was of the view that that requirement was irrelevant of any misconduct on the part of the parent although the immigration status of the parent was indirectly relevant to the consideration of whether it was reasonable for a child to leave the UK. Put simply, a parent's poor immigration history does not justify the removal of a child which would represent a gloss on the test.

9. Because of the effect of S.117B, the status of the parent will follow that of the child. Unlike paragraph 276ADE(1)(iv) S.117B applies only to courts and Tribunals and not officials of the Home Office. Further, it is directed to the parent whereas paragraph 276ADE(1)(iv) is directed to the child. Lord Carnwath was of the view that the same approach applied to S.117B as to paragraph 276ADE(1)(iv). That is, the conduct of the parents is not relevant to the assessment of whether it is reasonable for the child to leave the UK although having said that, given that in most cases one or both parents will not have status, the question will then be whether it is reasonable for the child also to leave the UK with the parent.

10. There was considerable evidence before the judge regarding the question of whether it was reasonable for the children aged 12 and 9 to leave the United Kingdom. The youngest child was born here. The oldest child has been here since the age of 1. Effectively, they have known no other life than in the United Kingdom. The family have been here for eleven years.

11. At [29] – [34] the judge made wholesale adverse credibility findings against the parents describing the first appellant as "… a mendacious and manipulative individual who has very little credibility", who came here with the intention of staying without leave and settling without any regard to our laws. Within three weeks of arriving, the family registered with the NHS and gave spurious reasons for remaining whilst working in the black

economy, earning a reasonable income, taking advantage of the National Health Service and free education here without contributing a penny by way of taxation.

12. It was against the above background that the judge considered the best interests of the children. He said that the children should not be blamed for matters for which they were not responsible but in my view, he did not adequately engage with the evidence as to whether it was reasonable for the children to remain. The judge said the children's school reports testified to their character and to their popularity. He said that the children would face difficulties in terms of their education in India as compared with here. He accepted the children were "*clearly integrated* in school." Given they were used to the culture of their parents and immersed in it, he did not accept that they did not understand much Hindi bearing in mind that both parents were fluent in that language. Nevertheless, the judge found that given the length of time the children had been here, which he accepted was significant, that they would have formed friendships and associations and begun some kind of social life outside the family, the judge found the respondent's decision to be proportionate.

13. I do find that the judge, whilst reminding himself of the requirements in **KO** that the misconduct of the parents should not be held against the children, fell into that very trap. My reading of **KO** is that [18] is dependent upon [16] – [17]. I find that [18] is clearly not a stand-alone principle as it depends upon the foundation in [16] – [17] to give it meaning.

Notice of Decision

The judge materially erred. I set aside his decision and remit the appeal to the First-tier for a de novo hearing.

No anonymity direction is made.

Signed Date: 4 March 2019

Deputy Upper Tribunal Judge Peart