Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/09041/2018
HU/09043/2018
HU/09047/2018
HU/09053/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th January 2019	**On 8th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MMRS (FIRST APPELLANT)
NJM (SECOND APPELLANT)
EJM (THIRD APPELLANT)
NB (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondents: Mr Md Tariq Bin Aziz of JS Solicitors

DECISION AND REASONS

1. Although the Secretary of State is the Appellant in these proceedings, I refer to the parties as they were in the First-tier Tribunal.

2. The Appellants, nationals of Bangladesh, appealed to the First-tier Tribunal against the decisions of the Secretary of State dated 3rd April 2018 to refuse their applications for leave to remain in the UK on the basis of their private and family life. First-tier Tribunal Judge C Greasley allowed the appeals in a decision promulgated on 14th November 2018. The Secretary of State now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Grant-Hutchison on 28th November 2018.

3. The background to the appeal is that the first Appellant entered the UK in November 2010 as a student. His leave to remain was extended until August 2014 but an application to extend his leave to remain further was refused in March 2015. His appeal against that decision was dismissed in August 2017 when he became appeal rights exhausted. He made a further application on 31st August 2017 for leave to remain on the basis of his private and family life in the UK. The Secretary of State refused that application, inter alia, under S-LTR.1.6 of the Immigration Rules on the basis that his presence in the UK is not conducive to the public good based on the decision of the Secretary of State that the Appellant had fraudulently obtained a TOEIC English language certificate from Educational Testing Service (ETS). It was therefore considered that the Appellant's application falls for refusal on grounds of suitability. The applications of his wife and children (the second, third and fourth Appellants) were refused in line with his.

4. The First-tier Tribunal Judge considered the evidence in relation to the English language certificate and found at paragraph 39 that there was credible evidence that the first Appellant had acted dishonestly through the use of a third party proxy in taking three TOEIC speaking tests in May, June and July 2012.

5. The judge went on then to consider the appeals of the second, third and fourth Appellants and concluded that it was not reasonable for the children to leave the UK and in those circumstances allowed all four appeals.

The grounds of appeal

6. It is contended in the Grounds of Appeal by the Secretary of State that the judge made a material misdirection in law by failing to give adequate consideration to the public interest in removal given the findings in relation to deception and the fact that none of the family members are British citizens. Reliance was placed on the case of **Jeunesse v The Netherlands [2014] ECHR 1036**, paragraph 108, which states that an important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of family life within the host state would be precarious. Reference was also made to the case of **R (on the application of Agyarko) v Secretary of State for the Home Department [2017] UKSC 11** which states that in cases concerned with precarious family life it is likely to be only in exceptional

circumstances that the removal of the non-national family member will constitute a violation of Article 8 reflecting the weight to the state's right to control its borders and the limited weight generally attached to family life established in the full knowledge that its continuation is unlawful or precarious. It is contended that, in allowing the Appellants' appeals, the judge failed to give adequate weight to the fact that it is always considered in a child's best interest to remain with his parents if possible and the judge failed to consider the evidence in the round including the fact that there are clear ties to Bangladesh, that the children have been raised in a household where that culture is predominant and have remaining ties to that country. Reliance was placed on the case of **E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 315** where the Upper Tribunal acknowledged that a right to education is too narrow in scope to be of assistance when assessing the best interests of the child and that it would be a material misdirection to consider such an analysis entirely through the prism of education.

7. It is contended in the second Ground of Appeal that the judge erred in failing to apply the relevant case law including **EV (Philippines) [2014] EWCA Civ 874** where the Court of Appeal considered that "if the parents are removed it is entirely reasonable to expect the children to go with them". The Court of Appeal also said that it could not see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. "Just as we cannot provide medical treatment for the world so we cannot educate the world" [60]. The grounds also rely on the case of **Zoumbas [2013] UKSC 74** where the family were not British citizens and the court said that they had no right to future education and healthcare in the UK and that integration in the UK will have been predominantly in the context of the family unit. It is contended that the First-tier Tribunal Judge had failed to identify why he had chosen not to apply the principles in these cases.

8. At the hearing Mr Whitwell referred to the grant of permission to appeal where First-tier Tribunal Judge Grant-Hutchison restructured the grounds into four grounds considering it arguable that the judge erred in law in:

   (1) failing to give adequate consideration to the public interest in removal when finding that the first Appellant had used a third party proxy to take his English language speaking test;

   (2) failing to give consideration to the fact that any private life was created at a time when the Appellant and his family were aware that their status was precarious;

   (3) failing to give adequate consideration to the fact that the best interests of the children are to remain with their parents and failing to consider why they could not return as a family unit to Bangladesh when the children have been raised in a household where their culture is predominant and have remaining ties to that country; and

(4) failing to consider the appropriate case law in placing too much weight on the children's education in the UK (**E-A**, **EV (Philippines)** and **Zoumbas**).

The hearing

9. Mr Whitwell also submitted that at paragraph 46 the judge relied only on two reasons for deciding that the position of the children outweighed the public interest. These were their length of residence in the UK and their education; the fact that the children are in the education system and that the eldest daughter is about to embark upon GCSEs. He pointed out that in the decision in **KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53** at paragraph 18 and 19 the Supreme Court indicated that the assessment of reasonableness is to be considered in the real world in which the children find themselves and that the judge had failed to consider whether it was reasonable for the children to follow their parents to Bangladesh. In his submission the judge had failed to consider the years the children had spent in Bangladesh and the fact that the family will be returning to Bangladesh as a family unit. He submitted that the judge failed to consider the precariousness of the status of the parents when family life was established under Section 117B of the Nationality, Immigration and Asylum Act 2002. In his submission the judge's assessment is inadequate and amounts to a misdirection of law and that the judge had failed to give adequate reasons. Mr Whitwell also referred to the factual scenario of NS, one of the Appellants in the case of **KO**, and highlighted consideration of that issue at paragraphs 46 to 52 of the decision in **KO** submitting that the circumstances here were similar to those in the case of NS where the appeal was dismissed by the Supreme Court.

10. Mr Aziz sought to distinguish the Supreme Court's decision in the case of NS within **KO**, pointing to the last sentence in paragraph 51 where the Supreme Court said "but in a context where the parents had to leave, the natural expectation would be that the children would go them, and there was nothing in the evidence reviewed by the judge to suggest that that would be other than reasonable". He pointed that the difference in this case is that the evidence reviewed by this judge indicated that it would not be reasonable for these children to go.

11. Mr Aziz also submitted that the First-tier Tribunal clearly considered the evidence in relation to the children, for example at paragraph 43 where the judge considered the evidence in relation to the elder child who is about to take her GCSEs and has aspirations to attend college or university. He suggested that the material facts in NS are different from those in this case. Mr Aziz submitted that the judge's consideration at paragraph 39 to 42 was adequate in relation to the deception point. He highlighted that at paragraphs 43 and 45 the judge referred to the deception point and clearly balanced that against the rights of the Appellant's wife and children. Mr Aziz submitted that it was clear that the judge had in mind the precariousness of the first and second Appellants' leave because at paragraph 26 he noted the Appellants' immigration history in the UK and how in August 2017 the Appellants became appeal rights exhausted. He submitted the fact that the Appellant had leave initially

is relevant to the weight to be given to the precariousness. He submitted that it was relevant there was no deportation order, removal or curtailment in play in this case.

12. In terms of the third and fourth grounds identified in the permission to appeal Mr Aziz submitted that the Secretary of State's position is a disagreement with the judge's findings. He pointed out that the best interests of the children were considered by the judge. He submitted that the First-tier Tribunal Judge was not required to set out all of the evidence but did consider the best interests of the children and the reasonableness of removal. He submitted that the judge had also considered the case law, for example at paragraph 47 where he considered the decision of **Azimi-Moayed & Ors**. He took into account that the children had put down significant roots in the UK [49]. In his submission the judge considered the reasonableness point adequately, he considered the length of residence, the age of the children, the fact that the elder child was embarking on GCSEs and that she had put down significant roots in the UK. In his submission the First-tier Tribunal did not need to mention every case in the determination. But in his submission the judge considered the cases of **EV**, **E-A** and **KO**, all of which were in the judge's mind when he reached the decision. In his view there was no material misdirection in law, the judge made clear findings open to him.

13. In response, Mr Whitwell submitted that **NS** could not be distinguished from this case. He referred to paragraphs 49, 50 and 51 noting that the Appellant's children in that case were doing well at school, that they had no experience living outside of the UK and in his submission the distinction sought to be drawn by Mr Aziz is false. With reference to precariousness in his submission it was not possible to say what was in the mind of Judge Greasley.

14. At the end of the hearing I reserved my decision. It was agreed between the parties that if I considered that the Secretary of State had established the grounds I would set the decision aside and re-make it on the basis of the evidence submitted before the First-tier Tribunal. Mr Aziz took instructions from the Appellant and indicated that it would not be necessary to update any evidence and that I could make the decision on the basis of the evidence before me.

Error of Law

15. The First-tier Tribunal Judge made findings in relation to the Article 8 issue at paragraphs 43 to 51 of the decision. The judge set out a summary of the case of **KO** at paragraph 49 stating that the conduct of the parents is not relevant in an assessment of whether or not it would be reasonable for children to leave the UK. However, the judge failed to appreciate the guidance set out in **KO** at paragraphs 18 and 19 where Lord Carnwath said that the assessment of reasonableness must be considered in the real world in which the children find themselves. The question in **EV (Philippines)** is cited at paragraph 19 which states that if neither parent has the right to remain then that is the background against which the assessment is conducted and that 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. The judge has taken a simplistic assessment of the decision in **KO** at paragraph 49. The judge has therefore failed to consider the situation of the children in the real world where the parents do not have leave to remain and the parents are expected to leave the UK.

16. In his submission Mr Aziz contended that it is clear from paragraph 26 that the judge took into account the precariousness of the parents' leave to remain. However, paragraph 26 is simply a rehearsal of the first Appellant's oral evidence. In the assessment at paragraphs 43 to 51 the judge made no reference to the precariousness of the status of the first and second Appellant when they established a family life in the UK. Further, the judge made no assessment of the factors set out in Section 117B of the Nationality, Immigration and Asylum Act 2002.

17. The factors the judge considered by the judge to be in the Appellants' favour are at paragraph 46 where the judge accepted that the children are in the UK education system and have been for several years, and that the eldest daughter is about to embark on GCSEs and both have aspirations for university education. The other positive factor the judge took into account is the fact that he considered that the children had put down significant roots in the UK [49].

18. The only factor the judge weighed on the other side of the scale against the Appellants is the fact that the first Appellant used a third party proxy to take his English language speaking test [43 and 45]. The judge did not take into account any other factors in undertaking the proportionality assessment.

19. In my view the fact that the judge failed to take account of the public interest factors in section 117B and failed to properly apply the decision in **KO**. These amount to errors of law such that the decision should be set aside.

20. As indicated above Mr Aziz agreed that if I were to decide that were an error of law I would re-make the decision on the basis of the evidence before me.

Re-making the Decision

The Immigration Rules

21. There was no submission that the Appellants meet the requirements of the Immigration Rules. The grounds of appeal in the Appellant's bundle are in general terms. The first Appellant does not meet the suitability requirements in paragraph S-LTR1.6 because of the finding that he used deception in relation to the English language test and his presence in the UK is accordingly not conducive to the public good. Therefore he cannot meet the requirements of paragraph 276ADE of the Immigration Rules. The second Appellant would have to establish that there are "very significant obstacles" to her integration in Bangladesh in order to meet the requirements of paragraph 276ADE (1)(vi). I find that she has not done so. She lived there for her childhood and a significant part of her adult life. She speaks the

language. She has not put forward any evidence of any difficulties she would face on return to Bangladesh.

22. The third and fourth Appellants entered the UK in July 2011 and had not therefore been in the UK for 7 years at the time of the application and cannot therefore meet the requirements of paragraph 276ADE (1)(iv). They cannot meet any other provisions of the Immigration Rules.

Article 8

23. I follow the approach set out in the decision of **R v SSHD ex parte Razgar [2004] UKHL 27**. There has been no challenge to the findings of fact made by the First-tier Tribunal. I therefore approach the appeal on the basis of the findings as to the deception by the first Appellant and the findings in relation to the children's education.

24. I accept that the Appellants have a family life with each other in the UK. There is no evidence before me as to any wider family members in the UK. If the family return to Bangladesh together there will be no breach of their family life. I accept that they have developed a private life in the UK. The first Appellant has been in the UK since 11 November 2010, according to the application form, the second third and fourth Appellants came to the UK on 22 July 2011. The children have been attending school in the UK. I accept that removal will interfere with their private life in the UK. As it is in accordance with the Immigration Rules I accept that such interference is in accordance with the law.

25. In considering the issue of proportionality I firstly consider the best interests of the children. A summary of the assessment of the best interests of children in the context of immigration is to be found in **Azimi-Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)**:

> "30. It is not the case that the best interests principle means it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:
>
> (i) As a starting point in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
>
> (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> (iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be

> inappropriate to disrupt, in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
>
> (iv) Apart from the terms of published policies and Rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than peers and are adaptable.
>
> (v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic wellbeing of society amply justifies removal in such cases."

26. In **MT and ET**, the Presidential panel of the Upper Tribunal said at paragraph 31 in relation to the best interests assessment:

> "… A much younger child, who has not started school or who has only recently done so will have difficulty in establishing that her Article 8 private and family life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part."

27. At the date of the hearing before me the third appellant was 16 years old and had been in the UK for 7 years and 6 months. She submitted a letter in which she said that she is in the second year of her GCSE studies. I accept that she is at a significant stage of her studies. The third Appellant is 9 years old and has also been in the UK for 7 years and 6 months. She is at primary school and has developed a life there with her school friends. Absent any evidence to the contrary, I find that it is in the best interests of the children to remain with their family whether in the UK or elsewhere. I accept that the third Appellant is at an important stage of her education and that she would prefer to complete her studies in the UK, however she is still a minor and her best interests are to be with her parents.

28. I have considered the proportionality of the decisions in this case. In the Appellants' favour I consider section 117B (6) of the Nationality, Immigration and Asylum Act 2002. The third and fourth Appellants are qualifying children as at the date of the hearing they have lived in the UK for 7 years and 6 months (section 117D).

29. In considering section 117B(6) I have taken account of the guidance given by the Supreme Court in **KO (Nigeria)**. Lord Carnwath said at paragraph 16 that Rule 276ADE(1)(iv) contains no requirement to consider the criminality or misconduct of a parent as a balancing factor and that it was impossible in his view to read it as importing such a requirement by implication. At paragraph 17, he said that section 117B(6) incorporated the substance of the Rule without material change, but this time in the context of the right of a parent to remain. He inferred that it was intended to

have the same effect. The question again was what is reasonable for the child. Lord Carnwath endorsed as a highly relevant consideration the following guidance contained in an Immigration Directorate Instruction (IDI) of the Home Office cited at paragraph 10:

> "It is generally the case that it is in a child's best interests to remain with their parent(s). Unless special factors apply, it will generally be reasonable to expect a child to leave the UK with their parent(s), particularly if the parent(s) have no right to remain in the UK."

30. At paragraph 18, he continued:

> "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 would 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."

31. Lord Carnwath went on to say that the point was well expressed by Lord Boyd in **SA (Bangladesh) -v- SSHD [2007] SLT 1245** at 22, and also by Lewison LJ in **EV (Philippines) -v- SSHD [2014] EWCA Civ 874** at paragraph 58 where Lewison LJ said, inter alia: "*If neither parent has the right to remain, then that is a background against which the assessment is conducted. Thus the ultimate question would be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?*" Lord Carnwath said, at 19, "*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.*"

32. In this case the first and second Appellants have no right to remain in the UK. Neither has had leave to remain since their applications for leave to remain were refused in March 2015, their appeals against these decisions were dismissed. I have found that there are not "very significant obstacles" to the second Appellant returning to Bangladesh. For similar reasons there are no very significant obstacles to the first Appellant returning to Bangladesh. He came to the UK when he was 32, having spent most of his life in Bangladesh. He has put forward no difficulties to his integration back in Bangladesh. I have considered the following additional factors in considering the public interest in assessing the proportionality of their leaving the UK.

- The Appellants do not meet the requirements of the Immigration Rules for the reasons set out above;
- The first and second Appellants have not had leave to remain since 2015;
- The first Appellant practised deception in relation to his TOEIC English language test;

- The private life of all of the Appellants was developed when their status was precarious or unlawful and therefore it should be accorded little weight (section 117B (4) and (5));
- There is no evidence that the family are financially independent. This is a factor to be weighed against them in assessing the public interest (section 117B (3)).

31. It is clear on the above findings that the first and second Appellants have no right to remain in the UK. Following **KO** it is in this context that I must assess whether it is reasonable to expect the children to follow the parents with no right to remain to their country of origin. As set out above I find that it is in the best interests of the children to be with both parents. I acknowledge that the third Appellant is at an important stage in her education and is well settled here. However this is the only strong factor in favour of the Appellants and access to education in itself is not enough to demonstrate that it is not reasonable for the third Appellant to leave the UK when her parents have no right to be here and are expected to leave. The fourth Appellant was 2 when she came to the UK and has spent the next 7 years and 6 months here, she is at primary school, but her life is mostly focussed on her parents and immediate family.

32. Considering all of the evidence and all factors I find that it is reasonable to expect the third and fourth Appellants to leave the UK with their parents. Accordingly their parents cannot meet the provisions of paragraph 117B (6).

33. Weighing all of these factors I am satisfied that the decisions to refuse the applications are proportionate to the Respondent's legitimate aim of the maintenance of an effective system of immigration control for the prevention of disorder or crime or to secure the economic well-being of the country.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and I set it aside.

I remake the appeals by dismissing them 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 him or any member of their 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: 31st January 2019

A Grimes

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date: 31st January 2019

A Grimes
Deputy Upper Tribunal Judge Grimes