Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09392/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 July 2019	**On 26 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

VALMIRA [A]
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Collins, Counsel
For the Respondent: Ms K Pal, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The decision of the First-tier Tribunal was set aside by me and the appeal was adjourned for a continuation hearing reserved to me. No findings made in the First-tier Tribunal were preserved.

2. The appellant entered the UK illegally on 3 March 2016, accompanied by her son, LP, then aged four. On 11 December 2016, she gave birth to her daughter, LA. On 16 November 2016 she made an application for leave on the basis of her

family life with her partner, Mr [A], and her children. Mr [A] has indefinite leave to remain, having been recognised as a refugee from Kosovo.

3. The error of law decision made clear that the appellant's partner, the father of her children, has indefinite leave to remain. It follows that LA is a British citizen by birth and therefore a 'qualifying child' for the purposes of section 117B(6) of the 2002 Act. There is no challenge to the fact the appellant has a genuine and subsisting relationship with her children. The narrow issue left to resolve is whether it is reasonable to expect LA to leave the United Kingdom.

4. No new evidence was filed by either party.

5. The appellant bears the burden of establishing the factual matters on which she relies to the civil standard of a balance of probabilities.

6. I heard brief oral evidence from the appellant and her partner. The appellant used an Albanian interpreter. The partner managed in English.

7. The appellant said she entered the United Kingdom in order to be with her partner, Mr [A], and so that her son, LP, could be with his father. If she had to return to Albania, she would prefer her daughter, LA, to stay in the United Kingdom with her father but she is still breast-feeding her. She confirmed that she lives with her partner and their two children. She is in contact with her parents and siblings in Albania but she has not been back to Albania since she arrived here.

8. The appellant's partner said he is the father of both children. He came from Kosovo in 1998 and has lived in the United Kingdom ever since. He works part-time. If the appellant returned to Albania, he would not go with her.

9. In her submissions, Ms Pal did not challenge the evidence that the appellant lives with her partner and two children as a family unit and has done so since she arrived in 2016 or that LA is still breast-feeding at the age of 2½. I find that the evidence of both the appellant and her partner to be consistent and honest.

10. Ms Pal invited me to find that it would be reasonable for LA to leave the United Kingdom despite being a British citizen. She said nothing more.

11. Mr Collins relied on the respondent's guidance Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes, Version 4.0, published on 11 April 2019. He said the starting-point was that LA should not be expected to leave the United Kingdom. Applying KO (Nigeria) v SSHD [2018] UKSC 53, [2018] 1 WLR 5273, the 'real world' context was that LA's father was settled in the United Kingdom and not from Albania. Mr Collins took me to the facts of JG and the tribunal's concern about uprooting the children. It was also pertinent to the 'real world' assessment that the appellant's partner did not meet the minimum income threshold to be able to

sponsor the appellant to return with entry clearance. The family separation would be lengthy.

12. Having considered the submissions made, I have decided to allow the appeal because I find with is not reasonable to expect LA to leave the United Kingdom.

13. The respondent's guidance was amended in April and now reads in relevant part as follows:

> "Would it be reasonable to expect the child to leave the UK?
>
> If the effect of refusal of the application would be, or is likely to be, that the child would have to leave the UK, the decision maker must consider whether it would be reasonable to expect the child to leave the UK.
>
> **Where there is a qualifying child**
>
> A child is a qualifying child if they are a British child who has an automatic right of abode in the UK, to live here without any immigration restrictions as a result of their citizenship, or a non-British citizen child, who has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, which recognises that over time children start to put down roots and to integrate into life in the UK. The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK.
>
> In the caselaw of KO and Others 2018 UKSC53, with particular reference to the case of NS (Sri Lanka), the Supreme Court found that "reasonableness" is to be considered in the real-world context in which the child finds themselves. The parents' immigration status is a relevant fact to establish that context. The determination sets out that if a child's parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that that it would not be reasonable.
>
> There may be some specific circumstances where it would be reasonable to either expect the qualifying child to leave the UK with the parent(s) or primary carer or for the parent(s) or primary carer to leave the UK and for the child to stay. In deciding such cases, the decision maker must consider the best interests of the child and the facts relating to the family as a whole. The decision maker should also consider any specific issues raised by the family or by, or on behalf of the child (or other children in the family).
>
> It may be reasonable for a qualifying child to leave the UK with the parent or primary carer where for example:
>
> • the parent or parents, or child, are a citizen of the country and so able to enjoy the full rights of being a citizen in that country
>
> • there is nothing in any country specific information, including as contained in relevant country information which suggests that relocation would be unreasonable

- the parent or parents or child have existing family, social, or cultural ties with the country and if there are wider family or relationships with friends or community overseas that can provide support:
    - o the decision maker must consider the extent to which the child is dependent on or requires support from wider family members in the UK in important areas of his or her life and how a transition to similar support overseas would affect them
    - o a person who has extended family or a network of friends in the country should be able to rely on them for support to help (re)integrate there
    - o parent or parents or a child who have lived in or visited the country before for periods of more than a few weeks. should be better able to adapt, or the parent or parents would be able to support the child in adapting, to life in the country
    - o the decision maker must consider any evidence of exposure to, and the level of understanding of, the cultural norms of the country
    - o for example, a period of time spent living amongst a diaspora from the country may give a child an awareness of the culture of the country
    - o the parents or child can speak, read and write in a language of that country, or are likely to achieve this within a reasonable time period
    - o fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice
- removal would not give rise to a significant risk to the child's health
- there are no other specific factors raised by or on behalf of the child

…"

14. This guidance, as Ms Pal recognised, places the respondent in some difficulties in resisting this appeal. It says that the starting-point is that qualifying children are not normally expected to leave the United Kingdom and that it is in a child's best interests for all the family to remain living together. It is plain to me that it is in LA's best interests to remain living in the United Kingdom, where she was born, so that she can continue to live in a household with both parents and her older brother, who is now aged seven.

15. The prospect of the appellant's partner relocating to Albania was not explored. He said he would not go to Albania permanently and he was not challenged about this. It is clear from the circumstances of LP's birth that he has visited Albania. However, he is not a national of that country and he has resided in the United Kingdom since 1998.

16. There is public interest in maintaining immigration controls and the appellant is an illegal entrant. However, her conduct must not be taken into account when assessing either the best interests of the child or the reasonableness of expecting the child to leave. The real-world context is that LA's father is not from Albania to where the appellant would have to return with LA. There would be no

immediate prospect of the family being reunited given the fact the financial requirements of Appendix FM cannot be met. The circumstances show that uprooting LA to separate her from her father would be unreasonable and, therefore, the decision is disproportionate.

17. The appeal is allowed on Article 8 grounds.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside. The following decision is substituted:

The appellant's appeal is allowed on Article 8 grounds.

No anonymity direction has been made.

Signed Date 22 July 2019

Deputy Upper Tribunal Judge Froom

TO THE RESPONDENT
FEE AWARD

The appeal has been allowed but I do not find it is appropriate to make a fee award. The appeal was allowed as a result of the evidence adduced at the hearing and the respondent was entitled to refuse the application on the basis of the information provided at the time.

Signed Date 22 July 2019

Deputy Upper Tribunal Judge Froom

APPENDIX: SET ASIDE DECISION

1. *The appellant appeals with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Stedman, promulgated on 28 January 2019, dismissing her appeal against a decision of the respondent, made on 6 April 2018, refusing her application for leave to remain on the grounds of private and family life. The appellant entered the UK illegally on 3 March 2016, accompanied by her son, LP, then aged four. On 11 December 2016, she gave birth to her daughter, LA. On 16 November 2016 she made an application for leave on the basis of her family life with her partner, Mr [A], and her children. Mr [A] has indefinite leave to remain, having been recognised as a refugee from Kosovo.*

2. *The appellant's application was refused for the following reasons:*

   - *the application was refused by reference to the 10-year partner route because the appellant was not married to Mr [A] and had not lived with him in a relationship akin to marriage for at least two years prior to the date of application. Therefore, she did not fall within the definition of 'partner' found in paragraph GEN.1.2 of Appendix FM Immigration Rules;*
   - *the application failed on suitability grounds because the appellant owed £5,827.50 to the NHS for treatment received in December 2016;*
   - *the application could not be considered by reference to paragraph EX.1 of Appendix FM of the rules;*
   - *there were no very significant obstacles to the appellant's reintegration in Albania;*
   - *LP did not meet the eligibility requirements of the rules for leave to remain under Appendix FM because his mother's application had been refused and his father did not have leave granted under Appendix FM;*
   - *there were no exceptional circumstances to warrant a grant of leave outside the Immigration Rules because there was little documentary evidence to demonstrate the appellant shared a family life with her claimed partner;*
   - *the decision was in accordance with the best interests of the children.*

3. *The appellant appealed to the First-tier Tribunal. She argued that removing her would amount to a very serious breach of article 8 because of her genuine relationship with her settled partner and her genuine relationship with her British child.*

4. *Judge Stedman heard the appeal at Hatton Cross on 15 January 2019. He noted that the appellant had not made a protection claim even though she had mentioned in her application that she had been disowned by her family and she feared for the safety of her children. In any event, he found the appellant's evidence was inconsistent with any such fear because she said her family had helped finance her travel arrangements. The appellant also said that the reason she could not return to Albania was that the economic circumstances there are bad.*

5. *The judge's findings on the issues under appeal begin at paragraph 23 of his decision. He noted that LA was born in the UK and "cannot be removed". He found the appellant entered the UK illegally in the knowledge that she was unable to apply to join her partner through the normal channels. Mr [A] gave evidence that he was on benefits. The judge found that the appellant's actions were designed to circumvent immigration control and that her family and private life had been formed at a time that her status was precarious. The judge noted the unimpressive nature of the quality of the appellant's family life. He found this was not a close family unit and that there were no particularly close or strong bonds or emotional ties between them. Mr [A]*

gave evidence that he did not believe that LP was his son until he had been shown DNA evidence which, to the judge, demonstrated a complete lack of trust between him and the appellant. Whatever relationship they had, separation for many years did not appear to have been a matter of consequence for either of them. The judge characterised Mr [A]'s evidence under cross-examination as "almost nonchalant about his family life" and noted he was "quite reluctant to disturb his own life's equilibrium".

6. *Beginning at paragraph 28, the judge considered the best interests of the children which, he recognised, were a primary consideration. He recognised that it is generally in the best interests of siblings not to be separated but to remain together. He reasoned that, in this case, that decision is a matter for the parents to decide because LA would not be subject to removal.*

7. *The judge went on to conclude that the rules were not met and he did not see any compelling or compassionate circumstances to render the refusal of leave to remain a breach of article 8. He considered the public interest outweighed the competing interests of the appellant and her children. He found the respondent's decision was an entirely proportionate response to the specific facts of the case. He dismissed the appeal.*

8. *The grounds seeking permission to appeal argued that the judge had indulged in conjecture and speculation rather than rational analysis of the evidence. The judge had not expressly noted the salient fact that LA is a British citizen. As such, she is a 'qualifying child' for the purposes of Part VA of the Nationality, Immigration and Asylum Act 2002. The judge's "wholesale failure" to consider whether it would be reasonable for a British citizen child to leave the UK is a material error of law.*

9. *In granting permission to appeal, Judge of the First-tier Tribunal O'Brien considered it was arguable the judge had failed to consider reasonableness under section 117B(6), as he was mandated to do. Whilst the judge's conclusions might well have been the same, it was at least arguable that his failure was material.*

10. *The respondent has not filed a rule 24 response.*

11. *Mr Collins's submissions followed his written grounds. In reply, Ms Everett accepted the force of Mr Collins's points. She accepted the judge had, at most, only considered the reasonableness of LP leaving the UK.*

12. *I agree with the representatives that the error in this decision is sufficient to require it to be set aside. I suspect the judge was fully aware that LA was a British citizen. He clearly recognised that her father, Mr [A], had indefinite leave to remain under which circumstances, LA would have been born British pursuant to section 1(1)(b) of the British Nationality Act 1981. The judge's recognition of this point can be read into his observation that LA could not be removed.*

13. *However, it follows that Mr Collins is right to argue that section 117A(2) of the 2002 Act mandated the judge to have regard to the considerations listed in section 117B. Section 117B(6) provides that,*

> *"(6) 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 parental relationship with a qualifying child, and*
>
> *(b) it would not be reasonable to expect the child to leave the United Kingdom."*

14. *In R (MA (Pakistan)) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705, [2016] 1 WLR 5093 Elias LJ identified the questions posed by the section as being:*

- *Is the applicant liable to deportation?*
- *Does the applicant have a genuine and subsisting parental relationship with the child?*
- *Is the child a qualifying child?*
- *Is it unreasonable to expect the child to leave the UK?*

15. *If the answer to the first question is no, and the answer to the other three questions is yes, then removing the applicant would be a breach of article 8. The answer to the first three questions in this case is uncontroversial. There is no challenge to the genuineness or subsisting nature of the parental relationship. The error by the judge was his failure to direct himself in terms of the final question.*

16. *The correct approach to this question has been the subject of considerable discussion in both the higher courts and this Tribunal. Most recently, it was considered by the Court of Appeal in SSHD v AB (Jamaica) & Anor [2019] EWCA Civ 661. The Court held, following KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, [2018] 1 WLR 5273, that the focus in paragraph (b) is solely on the child and there is no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest. The judge acknowledged this in paragraph 22 of his decision.*

17. *However, the Court of Appeal also confirmed the approach of this Tribunal in SR (Subsisting Parental Relationship – s117B(6)) Pakistan [2018] UKUT 00334 (IAC) and the subsequent Presidential decision in JG (s 117B(6): "reasonable to leave" UK) [2019] UKUT 00072 (IAC) that the section asks a single question and the fact the child would not in reality be expected to leave the UK did not mean that the question of whether it was reasonable to expect the child to leave did not arise. As Singh LJ explained at paragraph 75,*

> *"It is clear, in my view, that the question which the statute requires to be addressed is a single question: is it reasonable to expect the child to leave the UK? It does not consist of two questions, as suggested by the Secretary of State. If the answer to the single question is obvious, because it is common ground that the child will not be expected to leave the UK, that does not mean that the question does not have to be asked; it merely means that the answer to the question is: No."*

18. *The judge in this case did not have the benefit of the decisions in PG and AB (Jamaica). However, it is clear that he did not pose the key question so as to show he had assessed the reasonableness question in relation to the British child. That can be seen from the reference to LA in paragraph 35 of the decision, where he says, "The appellant's daughter will no doubt, with the agreement of her father, return to Albania with the mother as her primary carer".*

19. *I consider that the decision must be re-made in the Upper Tribunal. Evidence will have to be called and findings made in order to decide whether it is reasonable to expect the British child to leave the UK.*

20. *The appeal is therefore allowed to the extent the decision of the First-tier Tribunal is set aside. The appeal is adjourned for a continuance hearing reserved to me. The parties may file and serve additional evidence which is focused on the single issue left to determine.*