Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10038/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 15 April 2019	**On 26 April 2019**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

VB Appellant

(ANONYMITY ORDER MADE)

And

The Secretary of State for the Home Department Respondent

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. No report of these proceedings shall directly or indirectly identify her or members of her family. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.
I make this order because it refers to evidence that one of the appellant's minor children suffers a speech impediment.

Representation:

For the appellant: Mr A Slatter, of Counsel, instructed by Malik & Malik Solicitors.
For the Respondent: Mr E Tufan, Senior Presenting Officer

DECISION AND REASONS

1. This is the resumed hearing in order to re-make the decision on the appellant's appeal against the respondent's decision of 24 August 2017 to refuse her human rights claim of 5 October 2016 for indefinite leave to remain to be granted to her on the basis of her marriage to Mr FB, a British citizen born on 18 December 1973.

2. The appellant (date of birth: 20 January 1982) is from Kosovo. Her husband is also from Kosovo. He has been living in the United Kingdom since 2000. They were married in Kosovo on 27 May 2011. The appellant arrived in the United Kingdom on 6 October 2013 as FB's spouse with leave valid from 22 August 2013 until 22 November 2015. A daughter ("X") was born to them on 11 November 2014. Their second daughter ("Y") was born on 19 February 2016. The children are both British citizens.

3. By a decision (with directions) sent to the parties on 12 March 2019 (hereafter the "Error of law decision") following a hearing on 12 February 2019 before Upper Tribunal Judge Rintoul and Upper Tribunal Judge Gill (hereafter the "panel"), the Upper Tribunal set aside the decision of Judge of the First-tier Tribunal Mace, who dismissed the appellant's appeal following a hearing in the First-tier Tribunal ("FtT") on 22 June 2018. The reasons for doing so are set out in the Error of law decision. (The Error of law decision is not annexed to this decision because it was not considered necessary to make an anonymity direction at the time. I have decided to make an anonymity direction in view of the evidence I heard that X has a speech impediment.)

4. In essence, the panel concluded that, through no fault of her own, the judge had materially erred in law by taking into account the behaviour of the appellant (i.e. the fact that she had submitted a false "Life in the UK" test certificate in support of her application for indefinite leave to remain) in reaching her finding that it would be reasonable for her children to leave the United Kingdom, contrary to the judgment of the Supreme Court in KO (Nigeria) & Others v SSHD [2018] UKSC 53 which was delivered after the judge's decision had been promulgated.

5. The panel set out at para 30 of its decision the findings that were to stand and stated, at para 31, that the judge's record of the evidence that she heard also stood.

6. However, in relation to the judge's findings, it should be noted that she incorrectly referred to Albania. The appellant and her husband are both from Kosovo, not Albania. They speak the Albanian language, which may be the reason for the judge mistakenly referring to the country Albania.

7. Although the panel stated, at para 25 of the Error of law decision, that the re-making of the decision would be limited to the issue in s.117B(6)(b of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"), the issues were enlarged at the resumed hearing, as explained at paras 8-10 below.

The issues

8. The **first issue** in this resumed hearing is whether it would be reasonable for the appellant's children to leave the United Kingdom for the purposes of s.117B(6)(b) of the 2002 Act. In this regard, I have the benefit of the judgment of the Supreme Court in KO (Nigeria), the Upper Tribunal (the President and Upper Tribunal Judge Gill) in JG (s.117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) (Rev 1)

and the Court of Appeal in SSHD v AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661.

9. In relation to the first issue, Mr Slatter and Mr Tufan agreed that:

   (i) If I found that it would not be reasonable for the appellant's children to leave the United Kingdom, I would allow the appeal on human rights grounds because s.117B(6)(b) of the 2002 Act is satisfied.

   (ii) If I found that it would be reasonable for the appellant's children to leave the United Kingdom, the **second issue** arises, i.e. whether, having conducted the balancing exercise in relation to proportionality, the decision would breach Article 8. In this regard, Mr Slatter and Mr Tufan agreed that I would need to weigh all relevant factors including the public interest which arises on account of the fact that the appellant had submitted a false “Life in the UK” test certificate in support of her application for indefinite leave to remain.

10. The following issues arose during submissions:

   (i) In relation to the first issue, whether it is permissible for the Tribunal to consider whether it would be reasonable for the appellant's children to leave the United Kingdom temporarily whilst the appellant makes an entry clearance application. This requires me to consider, inter alia, paras 89-91 of JG.

   (ii) In relation to the first and second issues, whether it is permissible for the Tribunal to take into account the reasonableness of the appellant's husband relocating to Kosovo permanently with her and her children or the reasonableness of the appellant's husband following her and her children to Kosovo temporarily whilst she makes an entry clearance application.

Oral evidence on 15 April 2019

11. Before summarising the evidence, I should say that there was some discussion at the hearing before me about the possible problems that may arise as a result of the fact that the interpreter at the hearing before me was interpreting in the Albanian language as spoken in Albania, whereas the appellant was speaking the Albanian language as spoken in Kosovo.

12. The appellant and the interpreter said that the two languages are the same except that there are some words that are different. I rose at that point to make some enquires. When I returned, I informed the parties that the Tribunal’s system for booking interpreters did not distinguish between interpreters who interpret the Albanian language as spoken in Albania and interpreters who interpret the Albanian language as spoken in Kosovo. It was also clear from the correspondence on file that the appellant's representatives had requested an interpreter in the Albanian language, without any further explanation or qualification.

13. I decided to continue with the hearing with the interpreter who was present. There was no request from Mr Slatter for an adjournment for another interpreter to attend. I took into account the fact that my enquiries with the administrative staff of the Upper Tribunal revealed that the Tribunal’s system for booking interpreters did not distinguish between interpreters who interpret Albanian as spoken in Albania and interpreters who interpret Albanian as spoken in Kosovo, from which it followed that,

even if the hearing were to be adjourned for another interpreter to be provided, the same situation could arise. In addition, the lack of any differentiation in the Tribunal's system appears to suggest that there was no known problem with using an interpreter who interprets in the Albanian language as spoken in Albania for a witness who originates from Kosovo. The Tribunal's system would have accommodated any such known problems. I took into account that it was possible for me to give clear instructions in order to pre-empt any difficulties so that the Tribunal was alerted to any problems in interpretation if and when they arose, and give further instructions as needed.

14. I instructed the appellant and the interpreter to inform me immediately if there was any occasion when they did not understand anything and I would then give further instructions to enable the word or words in question to be properly and accurately conveyed. At the end of the hearing, they each confirmed that there was no occasion during the evidence of the appellant and the interpretation by the interpreter that they did not understand any word or words and that they had each understood everything.

15. The appellant's husband began giving evidence in the English language. However, I was not satisfied that he was able to communicate his answers accurately in a way that I could understand. I therefore informed him that he should give his evidence through the interpreter, whereupon I gave him and the interpreter the same instructions, as summarised above. At the end of the hearing, he and the interpreter confirmed that there was no occasion during his evidence and the interpretation by the interpreter that they did not understand any word or words and that they had each understood everything.

The appellant's oral evidence

16. The appellant adopted the contents of her witness statement 14 June 2018 (pages 1-5 of bundle A) and her witness statement dated 27 March 2018 (pages 1-3 of bundle C) which she confirmed were true and accurate to the best of her knowledge and belief and which she confirmed had been translated to her in a language she understood.

17. The appellant's elder daughter, X, has a speech impediment and is receiving speech therapy. The appellant was referred to the document dated 21 February 2019 from NELFT NHS Foundation Trust, Speech and Language Therapy Service (hereafter the "NELFT Letter") (pages 38-39 of bundle C), which states that X had attended a block of five sessions entitled: "*Developing Play Sessions*" from 10 January 2019 until 7 February 2019. The appellant said that X is due to attend another block of six sessions, beginning at the end of April 218. Her progress on the second block of sessions will determine whether it is necessary for her to attend any further sessions. She will start nursery school in September 2019.

18. Asked how it came about that it was decided that X needed speech therapy, the appellant said that, when she took X to her play group, there was a psychologist present as was usually the case. It will be two years this summer since X has been attending the play group. She told the psychologist that X was having speech difficulties and that she does not even say "Mum". The psychologist helped her. The psychologist visited her home. She explained the problems to the psychologist who advised her to speak to X in Albanian at home. However, the psychologist said that the reason why X needed to attend speech and language therapy sessions was

because she had a speech impediment and not because she had difficulty with the English language. The psychologist wrote a report.

19. Having attended the block of five sessions, X has improved and can now speak a little. She now speaks both Albanian and English at home, although she only says a few words that she knows. Before attending the speech and language therapy sessions, X's speech was "*not good at all*". She is due to attend another block of six sessions.

20. Asked why the report from the psychologist was not in the bundle of documents, the appellant said that she had submitted the report and all of the letters she received to her solicitors.

21. It was the psychologist who told her that X needed to attend another block of six sessions. The appellant had a letter informing her that X had to attend another block of six sessions beginning at the end of April. She forgot to bring the letter to court. She left this letter at home.

22. Asked whether she was told why X would need to attend another block of sessions in view of the fact that the NELFT letter states that X had achieved the aims of the sessions, the appellant said that she was not given any reasons. She was just sent another letter informing her that X had to attend another block of sessions.

23. The appellant said that X would not be able to receive any help with speech therapy in Kosovo. She had not made any enquiries about the availability of such services in Kosovo because she wants X to access services in the United Kingdom.

24. The appellant said that she and her family speak Albanian at home.

25. The appellant said that, although her husband is a self-employed builder, it is not possible for him to choose when to work because he has to pay the rent and the bills. It is not possible for him to work in Kosovo because he has lived in the United Kingdom for a long time; a lot of people in Kosovo are emigrating to other countries; there would be no employment for him in Kosovo; her children go to school in the United Kingdom; and their education would be better in the United Kingdom.

Oral evidence of the appellant's husband

26. FB adopted the contents of his three witness statements – a statement dated 14 June 2018 (pages 7-11 of bundle A), a statement d 19 June 2018 (pages 1-2 of bundle B) and a statement dated 27 March 2019 (pages 4-5 of bundle C). They had been read back to him in a language he understood. Their contents were true and accurate to the best of his knowledge and belief.

27. Asked what triggered X's attendance at the speech and language therapy sessions in January 2019, he said that she did not speak some words. For example, she would say "daddy" but not "mummy". When he took her to the nursery, he explained the problem. Asked who decided that she should attend the first block of sessions, he said that he explained the problem to the staff at her school and a person who was "*like a teacher at the school*" said that X needed to go to the place where she subsequently attended the speech and language therapy sessions. He said that X had had a hearing test which was positive. After the hearing test, a psychologist saw X. The psychologist identified the problem.

28. Asked whether there was a psychologist's report, FB said that a report will be prepared when X completes the second block of sessions.

29. Pressed to say whether there was a psychologist's report before X commenced the first block of sessions stating that she had been examined and explaining that she had a speech impediment, FB said that the staff at the play group helped them when they saw the problem. Asked again, he said that he and his wife had seen that X had difficulties at home.

30. Asked again, FB said that there was no report from the psychologist but the teachers at the school had identified the problem. Asked to confirm that it was his evidence that there was no report from the psychologist before X commenced the first block of sessions, he said that there was no psychologist's report but "they" explained the problem to the school and the school identified that she could not speak properly.

31. FB said that, having attended one block of sessions, X can now say the alphabet, she can count up to 20 and say words like "mummy" and "aunty". He and his wife have received a letter saying that it is necessary for X to attend one more block of sessions. He does not know how many sessions are in the second block.

32. FB said that he had not enquired about whether speech and language therapy is available in Kosovo but he does not believe that it is available.

33. FB said that he could not follow the appellant to Kosovo because his children are in school in the United Kingdom and everything they need is in the United Kingdom. Asked to explain why he had said at the hearing before the FtT that, if he had to do so in order to keep his family together, he would return to Kosovo, he said that his children are now in school. At the time of the hearing before the FtT, X was attending a play group and Y was not attending any play group or school.

34. Asked whether he was a citizen of both the United Kingdom and Kosovo, he said he was a citizen of the United Kingdom.

Submissions

The first issue

35. Mr Tufan submitted that paras 89-91 of JG presented him with a difficulty on the question whether the Tribunal should consider whether it would be reasonable for the appellant's children to leave the United Kingdom in order to accompany the appellant to Kosovo whilst she made an entry clearance application. Nonetheless, he submitted that I was not precluded from considering the possibility of the children leaving the United Kingdom temporarily whilst the appellant made an entry clearance application and conclude, on that basis, that s.117B(6)(b) was not satisfied. He submitted that para 91 of JG was obiter and it is clear that the Upper Tribunal did not hear submissions on the point.

36. Mr Tufan submitted that JG could be distinguished from the instant case on the facts and asked me to find that it would be reasonable for the appellant's children to leave the United Kingdom and relocate to Kosovo. In JG, the children were considerably older and therefore advanced in their education. There were issues concerning the availability of Catholic schools in Turkey. In the instant case, the appellant's children are right at the beginning of their education. They are only 4 years and 3 years old. It is said that it would not be reasonable for X to leave the United Kingdom because she

requires speech and language therapy sessions. However, the only evidence submitted was the NELFT letter which is brief and which states that the aims of the first block of sessions have been achieved. There is no letter to confirm that X needs to attend another block of sessions. The appellant and her husband had been inconsistent about whether there was a psychologist's report. There was no medical evidence at all.

37. There was no evidence that the children would not be entitled to enter or live in Kosovo. Both parents are of Kosovan origin. There are family members in Kosovo and a number of places to which the appellant and her family could go whilst they establish themselves.

38. In relation to the fact that the appellant's children were British citizens, Mr Tufan referred me to para 44 of KO (Nigeria) from which it is clear, in his submission, that the respondent's concession in Sanade (British children – Zambrano – Dereci) [2012] UKUT 48 was made in error. The fact that a person or a child is a British citizen is not a bar to relocation.

39. Mr Tufan asked me to find that s.117B(6)(b) of the 2002 Act was not satisfied.

40. Mr Slatter referred me to para 23 of the Error of law decision and submitted that the respondent's position was that he does not expect the appellant's children to leave the United Kingdom. Mr Slatter submitted that, given that the respondent does not expect the children to leave the United Kingdom, it was not reasonable to expect them to leave the United Kingdom. On that basis alone, s.117B(6)(b) was satisfied, in his submission.

41. Mr Slatter referred me to page 76 of the respondent's policy dated 22 February 2018 where the respondent states that:

> "Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal…."

42. Page 68 of the policy dated 19 December 2018 entitled: "Family Migration: Appendix FM Section 1.0b" version 2.0, states:

> "If the effect of refusal of the application would be, or is likely to be, that the chid would have to leave the UK, the decision-maker must consider whether it would be reasonable to expect the child to leave the UK."

43. Mr Slatter submitted that the respondent's position is therefore that it is not reasonable to expect a British citizen child to leave the United Kingdom.

44. Furthermore, in reliance upon paras 18-19 of KO (Nigeria), Mr Slatter submitted that, given that one parent is a British citizen in the instant case, it follows that it would be unreasonable to expect the children to leave with the other parent. He submitted that, pursuant to paras 18-19 of KO (Nigeria), the Tribunal is precluded from considering whether it is reasonable to expect a British citizen parent to relocate with the third-country national parent. He submitted that, pursuant to paras 18-19 of KO (Nigeria), it was only possible for the Tribunal to consider the position of the parent who has no right to remain in the United Kingdom in assessing whether s.117B(6)(b) is satisfied.

45. Mr Slatter submitted that it would not be reasonable to expect the appellant's children to leave the United Kingdom. They are British citizens. Their nationality is important, as is clear from ZH (Tanzania) v SSHD [2011] UKSC 4. They would lose their

educational opportunities, support and protection of the country of their nationality, amongst other matters.

46. The appellant's elder child has a speech impediment and is receiving therapy. Although she has improved, she continued to need therapy. She is about to start school in September 2018. It is important to ensure that she does not have difficulty with words. There was no obvious place for the appellant and her family in Kosovo. FB may have transferable skills but he has lived in the United Kingdom for 18 years. He would experience difficulties in starting a business in Kosovo from scratch.

47. Mr Slatter distinguished JG on the ground that JG's family had been separated at some point whereas the appellant, her husband and her two children have never been separated.

48. If the appellant leaves the United Kingdom, the children would have to follow her because she is their primary carer. It is in the best interests of the children for them to remain with both parents. The appellant and FB have shown remorse for the fact that the appellant submitted a false test certificate. It was a one-off incident. She arrived lawfully and passed her English language test to obtain entry clearance. It was disproportionate to force the family into an uncertain situation in Kosovo.

49. Mr Slatter submitted that s.117B(6)(b) requires the Tribunal to consider the reasonableness of the appellant's children leaving the United Kingdom permanently. He submitted that the Tribunal could not consider whether it would be reasonable for the children to leave the United Kingdom temporarily whilst the appellant makes an entry clearance application.

50. If the family were to relocate to Kosovo, the appellant would not be able to satisfy the entry clearance requirements because it would be difficult in that case for her to show that the maintenance requirement was satisfied. In any event, Mr Slatter submitted that it has not been the respondent's position in the instant case that the appellant should make an entry clearance application. This is because the respondent has never asserted that it was open to the appellant to make an entry clearance application. In any event, he submitted that it would be rare for it to be proportionate to expect a mother who is the primary carer of young children to make an entry clearance application.

The second issue

51. Mr Tufan submitted that, in conducting the balancing exercise in relation to proportionality, I should take into account Chikwamba. He relied upon the Upper Tribunal's decision in R (Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 189 (IAC) and para 51 of the Supreme Court's judgment in R (Agyarko) and others v SSHD [2017 UKSC 11. He submitted that, if it could be shown that any entry clearance application would be bound to succeed, then it may be that there would be no point in requiring an appellant to seek entry clearance. At para 39 of Chen, the Tribunal said that it may be easier to show that it is disproportionate to require an appellant to make an entry clearance application if there are children involved. However, he submitted that the onus was upon the appellant to place relevant evidence before the Tribunal or the Secretary of State.

52. The appellant had submitted a false test certificate. There was a lack of evidence concerning X's speech impediment. The appellant's husband was self-employed. In Mr Tufan's submission, he had flexible work arrangements such as would enable him to look after his children or arrange for them to be cared for, whilst the appellant made an entry clearance application. Alternatively, he could accompany the appellant to Kosovo with the children whilst she made an entry clearance application. Mr Tufan submitted that I would have to take into account the wider public interest, including the public interest arising from the fact that the appellant had submitted a false test certificate. He submitted that, taking into account the public interest arising on account of the appellant's use of a false test certificate, the decision was not disproportionate.

53. Mr Slatter submitted that I would have to consider proportionality on the basis that the appellant's husband remained in the United Kingdom because he is a British citizen. He submitted that this follows from paras 18-19 of KO (Nigeria) for the reasons he gave earlier and which I have summarised at my para 43 above.

54. Mr Slatter submitted that, in any event, the decision would give rise to unjustifiably harsh consequences for the appellant's husband, who has lived in the United Kingdom for a long time. He would have difficulties starting his business again in Kosovo. The least restrictive interference to family life would be for the respondent to return the appellant's passport to her and permit her to sit for English language and "Life in the UK" tests.

55. Mr Slatter submitted that, as the Home Office have not returned the appellant's passport to her, she has not studied English. However, Mr Tufan said that it was open to the appellant to have requested the respondent to provide her with a certified copy of her passport which would have enabled her to embark upon English language courses.

56. I reserved my decision.

Assessment

57. Mr Slatter and Mr Tufan agreed that I should first decide whether s.117B(6)(b) of the 2002 Act is satisfied, i.e. whether it is reasonable for the appellant's children to leave the United Kingdom. If it is satisfied, I would simply allow the appeal on human rights grounds on the basis that s.117B(6)(b) is satisfied. If it is not satisfied, then I would need to conduct the balancing exercise in relation to proportionality and decide whether the decision is disproportionate. In other words, the first stage is to consider the applicability or otherwise of s.117B(6)(b) and, if necessary, the second stage is to consider proportionality.

58. Before embarking upon an assessment of the evidence in relation to s.117B(6)(b), I shall first consider and decide the general issues of principle described at para 10 above.

59. The first general issue of principle concerns whether, in its consideration of whether s.117B(6)(b) is satisfied, it is permissible for the Tribunal to consider whether it is reasonable for a child to accompany one of his or her parents temporarily to that parent's home country whilst the parent makes an entry clearance application. This question is unlikely to arise in a case where both parents of a qualifying child face removal. It may arise where one parent of a qualifying child is entitled to remain in the

United Kingdom (whether as a British citizen or settled person or person with leave as a refugee or humanitarian protection) who is therefore able to act as sponsor to the parent facing removal in an entry clearance application.

60. I have carefully considered the comments of the Tribunal in JG at paras 89-91 which read:

> "89. Section 117B(6) concerns an assessment of the reasonableness of a child's leaving the United Kingdom. It does not expressly demand an assessment of reasonableness by reference to the length of time the child is expected to be outside the United Kingdom. In the light of paragraphs 18 and 19 of KO (Nigeria), the child's destination and future are to be assumed to be with the person who is being removed. In a case where the respondent's position is that the person who is being removed can be expected to make an entry clearance application, does this require the Tribunal's assessment to take this into account, in determining whether it would be reasonable for the child to leave? There may, obviously, be a good deal of difference between a child living outside the United Kingdom for a matter of months and facing an indefinite period abroad.
>
> 90. We did not hear submissions on this specific question. Certainly, Mr Malik did not advance it as a reason why, if his construction of section 117B(6) were not adopted, it would nevertheless be reasonable for the children to leave.
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> 91. In the circumstances, we do not consider it necessary to resolve the question; at least, in its stark form. The Chikwamba principle is predicated on the assumption that, where there are children, it is not envisaged that they would be expected to go and stay with the parent concerned, whilst the latter makes an application for entry clearance. To envisage otherwise would be almost to stand the principle on its head."

61. Mr Tufan is correct to say that the Tribunal's observations at paras 89-91 of JG were obiter and that the Tribunal did not hear submissions on the point. Nevertheless, these observations deserve respect. I did hear submissions, albeit only in brief. I was not referred to any other authorities.

62. Section 117b(6) reads:

> (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.

63. In my view, if it had been intended to limit the ambit of s.117B(6)(b) so that parents of qualifying children who can reasonably leave the United Kingdom for a temporary period whilst the parent makes an entry clearance application are excluded from benefiting from s.117B(6), one would expect Parliament to have said so. In the absence of any words of qualification, I draw the inference that "*leave the United Kingdom*" in s.117B(6)(b) refers to a child leaving the United Kingdom in order to live, permanently, elsewhere.

64. I therefore do not accept Mr Tufan's submission concerning the construction of s.117B(6)(b). I agree with Mr Slatter on this point.

65. The second general issue of principle concerns whether, in its consideration of reasonableness for the purposes of s.117B(6)(b) as well as in conducting the balancing exercise in relation to proportionality, the Tribunal is precluded (as Mr Slatter submitted) from considering whether it is reasonable for the parent of a qualifying child who is entitled to live in the United Kingdom and who is not subject to

removal action to leave the United Kingdom with the child and the other parent in order to enjoy family life elsewhere (my para 44 above). Mr Slatter's submission was based on paras 18-19 of KO (Nigeria) which read:

> "18. 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 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. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245:
>
> > "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …"
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> 19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, para 58:
>
> > "58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus 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?"
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> To the extent that Elias LJ may have suggested otherwise in *MA (Pakistan)* para 40, I would respectfully disagree. 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.

66. Para 19 of the judgment in KO (Nigeria) approves of para 58 of the Court of Appeal's judgment in EV (Philippines) where Lewison LJ said that *"the best interests of a child must be assessed on the basis that the facts are as they are in the real world"* and that *"If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted".*

67. In my judgement, it is simply impossible to draw from paras 18-19 of KO (Nigeria) any authority for the proposition Mr Slatter relies upon. An assessment of the facts *"as they are in the real world"* must include consideration of whether it is reasonable for the parent who is entitled to remain in the United Kingdom to leave the United Kingdom with the parent facing removal. If Mr Slatter is correct, and the circumstances of the parent entitled to remain in the United Kingdom are left out of account, this may (depending on the facts) work to the detriment of the parent facing removal. For example, suppose the parent entitled to remain suffers from an illness for which he or she would be unable to access suitable treatment in the third country. It would be wrong to leave this out of account in assessing whether it would be reasonable for a qualifying child to leave the United Kingdom for the purposes of s.117B(6)(b). Plainly, this would be relevant in deciding whether it is reasonable to expect the qualifying child to leave the United Kingdom.

68. I have therefore concluded that the Tribunal's duty to assess the facts as they are in the real world does not preclude it from considering whether it would be reasonable for a British citizen parent of a qualifying child to enjoy family life with the child and the parent facing removal outside the United Kingdom in reaching its conclusion whether it would be reasonable for the qualifying child to leave the United Kingdom for the purposes of s.117B(6)(b) of the 2002 Act and in reaching its decision on proportionality, if that issue is reached. I reject Mr Slatter's submission on this point.

69. The third general issue of principle concerns Mr Slatter's submission, in reliance upon the extracts of the respondent's policies set out at my paras 41-42 above, that is the respondent's position that it is not reasonable for a British citizen child to leave the United Kingdom and that, on this basis alone, s.117B(6)(b) is satisfied.

70. I have no hesitation in rejecting this submission. It is simply wrong. The policy dated 22 February 2018 has been withdrawn. The version dated 19 December 2018 does not yet take into account JG.

71. In addition, Mr Slatter's submission, in reliance upon para 23 of the Error of law decision, that the respondent *"expects"* the appellant's children to remain in the United Kingdom and *therefore* it is not reasonable to *"expect"* them to leave the United Kingdom is based on a misunderstanding of the panel's use of the word "*expect*". The panel made it clear at para 23 of the Error of law decision that there was no acceptance by the respondent that it would not be reasonable for the appellant's children to leave the United Kingdom.

72. Before turning to assess the evidence, I make it clear that I have considered all of the evidence before me. This comprises of the respondent's bundle, the appellant's bundles A, B and C and the oral evidence given before the judge (summarised in her decision) and before me. It is for the appellant to establish that the decision is unlawful under section 6 of the Human Rights Act 1998. The standard of proof is the balance of probabilities. Since this appeal affects two children, I have kept in mind throughout my assessment the duty to promote and safeguard the best interests of the children as a primary, though not paramount, consideration. I have also taken into account the impact of the decision on FB.

The first issue – assessment of reasonableness for the purposes of s.117B(6)(b)

73. I shall first assess credibility and make relevant findings of fact.

74. I did not find the appellant and her husband credible in relation to the evidence concerning X's claimed speech impediment. The NELFT letter indicates that X attended one block of five speech and language therapy sessions. When asked how long X had attended the school where she was found to have a speech impediment, the appellant said that it will be two years this summer that X has been attending the school. This means X has been attending this school since summer 2017. The hearing before the judge took place in June 2018. There was no mention before the judge of any speech impediment. It is simply incredible that, if X had had a speech impediment to the extent claimed by the appellant and FB, i.e. that she did not say words and could only say a few words, the appellant and FB would not have mentioned it in their evidence at the hearing before the judge. At para 19 of her decision, the judge recorded that the appellant had said that both children could speak both English and Albanian. That was a perfect opportunity for the appellant to

have mentioned the concerns that both she and FB said they had raised with the school but the appellant failed to mention it at the hearing in the FtT.

75. Plainly, there is a gap in timing. According to the evidence of both the appellant and FB, they raised their concerns about X's speech when they took her to her present school. Given that she first started attending this school (according to the appellant's evidence) in summer 2017, they either did not raise it in summer 2017 or, if they did, nothing was done about it until recently, before the first block of sessions started. Either they delayed raising their concerns or the authorities delayed in arranging the speech and language therapy sessions. Neither scenario is credible.

76. FB was asked several times whether there was any report from the psychologist before X commenced her first block of five sessions. He was evasive in his replies (see my summary at paras 27-30 above). He had to be asked several times before he finally said that there was no report from the psychologist before X commenced the first block of sessions. He was then asked to confirm that it was his evidence that there was no report from the psychologist before X commenced the first block of sessions. His evidence that there was no report from the psychologist contradicts the appellant's evidence that there was such a report before X commenced the speech and language therapy sessions. This is a material aspect of their case.

77. When the appellant was asked why the psychologist's report had not been submitted, she said that she had given the psychologist's report and all of the letters that she had received to her solicitors, the clear implication being that, if the report was not in the bundle before us, the fault lay with her solicitors. However, as I have said, according to FB's evidence, there was no such report from the psychologist.

78. There is no medical evidence at all to confirm that X has a speech impediment. The letter which the appellant and FB both said they had received stating that it was necessary for X to attend another block of sessions was not submitted, the appellant saying that she had forgotten it and left it at home. This is important when one considers the fact that the NELFT letter states that X had "*fully*" achieved two of the aims of the therapy sessions and "*mostly*" achieved the remaining five aims.

79. I take into account also the fact that the first block of sessions commenced on 10 January 2019 just a month before the "error of law" hearing on 12 February 2019.

80. On the whole of the evidence before me, I find that it has not been shown that X has a serious speech impediment or that she requires any further speech and language therapy sessions.

81. At the hearing before the judge, FB was asked whether he would return to Kosovo. He said (para 21 of the judge's decision):

> "21. …. [FB] stated that he would not want to go back but if he had to he would do so in order to keep his family together. He stated that it would be extremely difficult returning to Kosovo as he would have no means, finances or property to start his life over again. He would be placing his children into a situation of poverty."

82. However, at the hearing before me, FB said (para 33 above) that he could not follow the appellant to Kosovo because his children are in school in the United Kingdom and everything they need is in the United Kingdom. Asked to explain why he had said at the hearing before the FtT that, if he had to do so in order to keep his family together, he would return to Kosovo, he said that his children are now in school and that, at the

time of the hearing before the FtT, X was attending a play group and Y was not attending any play group or school.

83. I do not accept FB's evidence before me reflects a genuine change of mind and/or intention. It is clear from the evidence he gave before the judge that he had the circumstances of his children in mind. Y was already attending a play group and it would therefore have been in his reasonable contemplation that, if he returned to Kosovo to live with his family, both of his children would have to access educational and medical services in Kosovo and lose the opportunity of accessing these services in the United Kingdom.

84. On the whole of the evidence, I find that the evidence FB gave before the judge about his intentions was true and the evidence he gave before me was feigned because he now realises that the evidence he gave before the judge worked against the appellant. I find, as a fact, that, FB would return to Kosovo to keep his family together.

85. In any event, I find that it is reasonable for FB to relocate to Kosovo with the appellant and his children in order to enjoy family life in Kosovo, for the following reasons:

    (i) Mr Slatter relied upon the fact that FB is a British citizen and has been living in the United Kingdom since 2000 in support of his submission that it would not be reasonable for FB to relocate the Kosovo to enjoy family life with the appellant. However, the fact is that decided cases on Article 8 provide many examples of cases in which it was considered reasonable for British citizen spouses and partners who were born in the United Kingdom and have lived all of their lives in the United Kingdom to relocate outside the United Kingdom to enjoy family life whereas FB was born and brought up in Kosovo.

    (ii) If FB were to relocate to Kosovo, there is no reason why he should not be able to start a business there. It is true that he has lived in the United Kingdom for 19 years but he nevertheless grew up in Kosovo from birth until the age of 26/27 years. On the judge's findings, there are a number of family members in Kosovo, both on the appellant's and FB's side. The appellant's mother, two brothers and a sister live in Kosovo, although I note that they have families and children of their own (paragraph 20 of the judge's decision). FB also has immediate family in Kosovo. There are therefore family homes they can access, at least in the immediate future until they re-establish themselves, as the judge found (para 22 of the judge's decision).

86. Accordingly, I find that FB is willing to return to Kosovo and that, in any event, it would be reasonable for him to do so. This means that the family unit would be kept together. The appellant's children would continue to be with both parents, as is plainly in their best interests.

87. Although there is no report from a social worker, it would plainly be in the best interests of the children for their current stable environment, in which both parents are present playing their respective parts, to continue. I take their best interests into account as a primary consideration. I have already given my reasons for finding that FB would relocate to Kosovo with the appellant and the children and that, in any event, it would be reasonable for him to do so.

88. In considering the circumstances of each of the children, the fact that they are British citizens is an important factor. I was referred to para 30 of ZH (Tanzania) which I take into account and which reads:

> "30. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child. The UNCRC recognises the right of every child to be registered and acquire a nationality (Article 7) and to preserve her identity, including her nationality (Article 8). In *Wan*, the Federal Court of Australia, pointed out at para 30 that, when considering the possibility of the children accompanying their father to China, the tribunal had not considered any of the following matters, which the Court clearly regarded as important:
>
> > "(a) the fact that the children, as citizens of Australia, would be deprived of the country of their own and their mother's citizenship, 'and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle' (*Vaitaiki v Minister for Immigration and Ethnic Affairs* [1998] FCA 5, (1998) 150 ALR 608, 614);
> >
> > (b) the resultant social and linguistic disruption of their childhood as well as the loss of their homeland;
> >
> > (c) the loss of educational opportunities available to the children in Australia; and
> >
> > (d) their resultant isolation from the normal contacts of children with their mother and their mother's family."

89. Plainly, if the appellant's children were to go to Kosovo to live, they would lose out on the opportunities of growing up in the United Kingdom, the country of their nationality, not to mention the loss of educational opportunities and medical services available to children in the United Kingdom.

90. On the other hand, it is clear from the appellant's evidence at the hearing before the judge as well as her evidence at the hearing before me that both children speak Albanian. Accordingly, as the judge said at para 19 of her decision, neither of the children will face a language barrier. They are very young, X being about 4 years old and Y about 3 years old. They have not commenced mainstream education. Given that they are very young, their primary focus will be their parents, as the judge found at para 19 of her decision. In addition, X and Y will be able to establish relationships with their cousins, aunts, uncles and grandmother in Kosovo.

91. I have already found that it has not been shown that X has a serious speech impediment or that she requires any further speech and language therapy sessions. However, it has to be said that, even if she is in need of further speech and language therapy sessions, there is simply no background evidence to show that this would not be available to her in Kosovo. Both the appellant and FB said that such therapy would not be available. However, the judge made an adverse credibility assessment and I did not find them credible in their evidence about X's speech impediment.

92. It has not been suggested that Y suffers from any difficulties or that she has any needs. It has not been suggested that X and Y are not entitled to live in Kosovo as the appellant's children even if (which has not been shown) FB no longer has the nationality of his birth.

93. On the whole of the evidence, and considering the circumstances of each child separately, I find that it would be reasonable for X and for Y to leave the United Kingdom.

94. Accordingly, s.117B(6) of the 2002 Act does not apply.

The second issue – proportionality

95. In relation to the five-step approach explained in R (Razgar) v SSHD (2004) UKHL 27, it is clear that the judge accepted that the appellant enjoyed family life with her husband and two children in the United Kingdom. The appellant has been living in the United Kingdom since 6 October 2013 when she arrived with leave as FB's spouse valid from 22 August 2013 until 22 November 2015. Her family life and her private life were established at a time when she had leave as a spouse. She was on a path to settlement, albeit that she did not have settled status at the time. On the very limited evidence before me concerning the quality of the appellant's private life, I find that her private life ties in the United Kingdom are very weak.

96. Plainly, the second and third steps are satisfied. The real issue concerns the balancing exercise in relation to the fourth and fifth steps. The question is whether the circumstances are sufficiently compelling to reach the conclusion that the decision produces unjustifiably harsh consequences such as to amount to a breach of Article 8.

97. In the assessment of proportionality, it is relevant to take into account that the appellant does not satisfy the Immigration Rules. The panel set out at para 4 of the Error of law decision the respondent's reasons for refusing the appellant's application under the Immigration Rules. It was accepted before the judge that the appellant did not meet the requirements of the Immigration Rules (para 5 of the Error of law decision and para 14 of the judge's decision).

98. Given that the Immigration Rules are not satisfied, a very strong case is required in order to outweigh the public interest in immigration control.

99. When the Error of law decision was made, the sole issue was stated to be s.117B(6) of the 2002 Act. It is in that context that the panel set out the findings that were to stand at para 30 of its decision. Since the behaviour of the appellant in submitting a false certificate was not relevant to an assessment of reasonableness for the purposes of s.117B(6)(b), the panel omitted the judge's assessment of the credibility of the appellant's evidence concerning the reasons why she submitted a false certificate, at para 25 of her decision.

100. Given that it was agreed between Mr Slatter and Mr Tufan at the hearing before me that, if I found (as I have) that s.117B(6) of the 2002 Act is not satisfied, I would have to consider proportionality and therefore take into account the public interest arising on account of the fact that the appellant had submitted a false certificate, it is necessary for me to take into account the judge's reasoning in relation to the appellant's deception.

101. The judge rejected the appellant's explanation that she had thought that obtaining the test certificate in the way she had was an *"alternative way of meeting the test".* It is also clear that she found that there was a deliberate act of deception on the part of the appellant to which her husband had agreed, i.e. she found that both the appellant and FB had agreed to undertake the course of action that she took. I take this into account in deciding the weight to be placed on the public interest.

102. In my consideration of proportionality and the balancing exercise, I also take into account, and consider afresh, my assessment and findings in relation to the first issue. There is no need for me to repeat it all. When I say I have considered everything afresh, I mean just that, the difference being that I am now conducting a balancing exercise in order to answer a different question, i.e. the question set out at my para 96 above. I also take into account the appellant's private life and family life established in the United Kingdom, established whilst she had leave as a spouse and was on a path to settlement, and the length of her residence.

103. Having taken everything into account, I have concluded that, on the whole of the evidence before me and for the reasons I have given, the respondent's decision is not disproportionate. It is not disproportionate for the appellant, FB and their two young children to relocate to Kosovo in order to enjoy family life in Kosovo. This is determinative of the second issue, irrespective of my observations and findings at paras 104-106 below.

104. I turn to the question whether it is reasonable for FB to accompany the appellant and his children to Kosovo whilst she makes an entry clearance application. I have considered Chikwamba and Chen. Chikwamba can be readily be distinguished. There was no question of deception having been deployed by the claimant in Chikwamba. Her husband was a refugee and therefore the United Kingdom was the only place in which they could safely enjoy family life. It was accepted that any application for entry clearance was bound to succeed.

105. In the instant case, it simply cannot be said that an entry clearance application would be bound to succeed, as the appellant has not passed the relevant English language and “Life in the UK” tests. Mr Slatter sought to suggest that the respondent ought to have released the appellant's passport. However, Mr Tufan said that she could have requested the respondent to provide her with a certified copy which would have enabled her to sit for the relevant tests. I have to say that Mr Slatter's submission simply ignores the judge's reasoning at para 27 where she considered the appellant's explanation that she would learn English but that she is taking care of the children for now. The judge considered that the appellant had done very littlie during the period from 2015 when her application was made and August 2017 when the decision was made to rectify the position in terms of improving her language skills; that the appellant has young children but one of them attends -pre-school; and that she has a supportive husband who could assist. Furthermore, as Mr Tufan submitted, the appellant could have requested the respondent to provide her with a certified copy of her passport to facilitate her enrolment for the tests. In all of the circumstances, I find that the appellant finds herself in the position of being unable to meet the English language requirement because she has made very little effort to help herself.

106. Given that the appellant does not meet the English language requirement, it cannot be said that an application for entry clearance would succeed. This is relevant. The appellant has young children. As the Upper Tribunal observed in Chen, it may be easier to show that a decision is disproportionate if children will be impacted by it. Nonetheless, Chikwamba can be distinguished for the reasons given earlier.

107. Mr Slatter's submission (para 51 above) that it has not been the respondent's case that the appellant should make an entry clearance application ignores the fact that the issue falls for consideration when the Tribunal considers proportionality, if it is relevant, whether or not the respondent raises it.

108. Finally, if s.117B(6)(b) of the 2002 Act is not satisfied, it is difficult to see how an appellant can establish a sufficiently strong case to outweigh the public interest in immigration control, given that the balancing exercise in relation to proportionality requires consideration of any relevant public interest factors whereas reasonableness for the purposes of s.117B(6)(b) does not.

109. The appeal is dismissed on human rights grounds.

Decision

The decision of Judge of the First-tier Tribunal Mace involved the making of any error of law sufficient to require it to be set aside. The decision was set aside.

I re-make the decision on the appellant's appeal against the respondent's decision by dismissing it.

Upper Tribunal Judge Gill Date: 24 April 2019