Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17598/2018

THE IMMIGRATION ACTS

Heard at North Shields	**Decision and Reasons Promulgated**
On 10 May 2019	**On 20 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

M. P.
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Weatherall, Counsel, instructed by Collingwood Immigration Services
For the Respondent: Mr Stainthorpe, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, an Indian national, enjoyed leave to remain as a student which expired on 7 June 2014. He made his most recent application for leave to remain as an overstayer on 27 March 2018, and his wife and two

children were dependents on that application. The application was refused on 10 August 2018. His Article 8 appeal against that decision was heard and dismissed by First Tier Tribunal Judge Gumsley in a decision promulgated on 10 January 2019.

2. The Appellant was granted permission to appeal by decision of 7 February 2019 of First tier Tribunal Judge Scott Baker because it was considered arguable that the Judge's approach had placed too much weight upon the public interest in assessing the reasonableness test arising in relation to the Appellant's eldest child under s117B(6), and, a failure to make adequate findings in relation to the best interests of that child.
3. No Rule 24 Notice has been lodged in response to the grant of permission to appeal. Neither party has applied pursuant to Rule 15(2A) for permission to rely upon further evidence.
4. Thus the matter came before me.

The Appellant's position

5. The Judge noted that the Appellant's presence in the UK had been precarious until 7 June 2014, and thereafter unlawful. He found that the Appellant and his wife were determined to remain in the UK, although fully aware they had no leave to do so, and in the face of attempts by the Respondent to persuade them to go [35-6].
6. It is common ground before me (as it was before the Judge [30-1]) that the Appellant's appeal could only succeed by virtue of his reliance upon the position of his eldest child, S, who was 8 years old at the date of the hearing, and thus a "qualifying child". The Appellant's younger child was only a young infant at the date of the hearing, not yet two, and it is accepted that the Judge, correctly, identified that the youngest child had no "private life" beyond the family unit, and that her best interests lay in remaining with her parents, wherever they may live.
7. Thus the focus of the Appellant's appeal was upon S. The Appellant relied upon s117B(6), arguing that since he was not liable to deportation the public interest did not require his removal because he enjoyed a genuine and subsisting parental relationship with S, and, it would not be reasonable to expect S to leave the UK.
8. S was born in the UK, and has grown up here. Thus the UK is said to be the "only country he has ever known". On the other hand, it is accepted that S is an Indian national, and it was not suggested to the Judge that S had no contact with his extended family in India. The Judge found, and there is no challenge to this, that the

Appellant and his wife had downplayed the fluency in Gujarati that S enjoyed. Certainly the Judge made no finding that S was unable to communicate with his extended family in India, or, that language barriers would prevent S from accessing education in the event the family moved to India [49]. In any event no reason was ever offered as to why S could not access his education in India through an international school, at which he would primarily be taught in English.

9. The Judge identified that at the date of the hearing S was enrolled at public expense in full time education, but he was not at any key point in his education at the date of the hearing [47]. That position has not changed subsequently.

10. There was no suggestion to the Judge that the family would be unable to live in India together in safety. The Appellant had claimed that he would be unable to provide education for his children in India – but this was rejected as untrue by the Judge, and no challenge is made to that adverse finding [46-7].

11. Equally no challenge is made to the Judge's conclusion that the Appellant would be able to provide his family with a reasonable standard of living in India. Both he and his wife are well educated; each possess degrees. Both he and his wife clearly have a very significant earning capacity in India. One or both may choose not to work, but that would be a matter of choice, and no more. Indeed it would indicate that they had the financial luxury to make such a choice. The Appellant's family's wealth has been sufficient, not only to be able to educate him in India, but also in the UK. Thus Ms Weatherall accepted that the family would enjoy a comfortable lifestyle upon return to India.

<u>The challenge</u>

12. Ms Weatherall, who was not the author of the grounds, accepted that they offered no challenge to any finding of primary fact made by the Judge.

13. Ms Weatherall accepted that the third ground lacked merit. This is a complaint that the Judge was wrong to consider the Appellant was not financially independent. As an overstayer he and his wife had however accepted before the Judge that the family was not. They denied that either of them worked illegally, and they told the Judge that the family were entirely dependent upon the charity they received from the local Indian community, through the Temple at which they worshipped [21].

14. Ms Weatherall accepted that there was little merit in the second ground, which is a complaint that the Judge's

consideration of the best interests of S was "entirely lacking". Read as a whole, she accepted that the decision contained a complete consideration of the best interests of S [22-25]. She accepted that no material matter had been left out of account in that review of the evidence. Her criticism was that the Judge had failed to make a clear and express finding that it was in the best interests of S to remain in the only country that he had ever lived in. She argued that had that finding been made, the Judge's overall conclusion would necessarily have been different.

15. There are in my judgement two obvious difficulties with that approach. First, when the decision is read as a whole it is quite clear that the Judge was well aware that the family had lived in the UK throughout S' life, and there is nothing in the decision to suggest that he overlooked this at any point in his reasoning. Second, the "best interests" of a child is not conclusive of the reasonableness of the expectation that they should leave the UK. Were it otherwise, it is clear that the appeal in KO (Nigeria) [2018] UKSC 53 would have succeeded. Their Lordships noted that it was in the best interests of the children concerned in that appeal for their family to remain in the UK, but concluded that there was no error of law in the assessment of the evidence that had led to the assessment that it was reasonable (in the context of s117B(6)) to expect them to leave the UK with their parents.

16. Thus the focus of Ms Weatherall's argument fell upon the first ground; the complaint that the Judge had erred in his approach to the reasonableness test in s117B(6)(b). It was accepted that the Judge had directed himself to the relevant statutory test, but argued that in undertaking his assessment he had, wrongly, adopted "a sins of the parents approach", rather than approaching the test in its proper context, namely with a full focus upon the circumstances of the child.

17. As the Supreme Court identified in KO (Nigeria) [2018] UKSC 53 @ [18, 19 & 51] the conduct of the Appellant was not irrelevant, and mere reference to it by the Judge could not, of itself, establish a material error of law in his approach. The Appellant's conduct was relevant because it established the proper context for the consideration of the Article 8 appeal In this case the Appellant's conduct had led to him being an overstayer in the UK since 2014. His wife's leave to remain had been dependent upon his own, and she had not suggested that she was separately entitled to a grant of leave pursuant to the Immigration Rules. Thus the

proper context for this appeal was that both the Appellant and his wife had to leave the UK unless he could bring himself within the provisions of s117B(6).

18. That was the context in which the Judge had to consider whether it was reasonable to expect S to leave the UK, because ordinarily in that context the natural expectation would be that the Appellant's children would do so; KO [51]. In my judgement that is the context in which the Judge considered the evidence before him concerning S' circumstances. It was open to him on the evidence to make the findings of primary fact that he made, concerning S' circumstances, and they were adequately reasoned. It follows that it was open to him to reach the conclusion in relation to s117B(6), and upon the proportionality assessment concerning the Appellant's "private life" appeal, that he did.
19. The Judge did not have the benefit of the very recent decision in AB (Jamaica) [2019] EWCA Civ 661, because this was only promulgated on 12 April 2019. However he would not have derived any great assistance from its guidance, because the Court of Appeal were not then concerned with a situation in which neither parent had leave to remain, and thus both parents were required to leave the UK.
20. In the circumstances, and as set out above, I am satisfied that the Judge did not fall into any material error of law when he dismissed the Article 8 appeal, notwithstanding the terms in which permission to appeal was granted. In my judgement the grounds fail to disclose any material error of law in the approach taken by the Judge to the public interest that requires his decision to be set aside and remade.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 10 January 2019 contained no material error of law in the decision to dismiss the Appellant's human rights appeal which requires that decision to be set aside and remade, and it is accordingly confirmed.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify her or the sponsor. This direction applies both to the Appellant and to the Respondent.

Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed
Deputy Upper Tribunal Judge JM Holmes
Dated 16 May 2019