Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/18036/2018
HU/18038/2018
HU/18042/2018
HU/18044/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 October 2019	**On 11 November 2019**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

NA, SB, YS, YA
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z. Hussain, Solicitor, Hubers Law
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. In a decision promulgated on 6 September 2019, I found that a decision of First-tier Tribunal Judge Bart-Stuart promulgated on 14 May 2019 involved the making of an error of law and set it aside, with certain findings of fact preserved. That decision may be found in the Annex to this decision. On 17 October 2019, I reheard the matter, to determine the best interests of the two child appellants, and to consider whether it would be

reasonable to expect the third appellant, a "qualifying child" (see below), to leave the United Kingdom.

Factual background

2. The full factual background is set out in my error of law decision. Briefly, the appellants are all citizens of Bangladesh. The first two appellants are husband and wife. The third and fourth appellants are their sons; AS, born on 21 July 2010, and YA, born on 19 October 2017. The first appellant (husband, father) entered as a visitor in 2005 and has remained here since. The second appellant (wife, mother) entered as a student in 2009, leave valid until 2012. She too has remained here since. Their two children were born here and have only known life in the United Kingdom. The judge reached a number of findings of fact, which I shall set out below, relating to the likely circumstances the family would face upon their return to Bangladesh, the medical needs of the third appellant, the linguistic skills of the children, and the overall family circumstances.

3. I found that the judge's analysis of the best interests of the children contradicted itself; at [44], the judge appeared to conclude that it would not be "unreasonable to expect the [third appellant] to relocate with his parents to the country of their nationality and culture." By contrast, at [48], the judge said that, "the children's best interests are to remain in the UK where they benefit from a good standard of education, medical, social and financial support…" These contrasting findings made difficult to understand the later basis upon which the judge was to find that it would be reasonable to expect the third appellant to leave the United Kingdom, for the purposes of section 117B(6) of the 2002 Act.

4. In addition, when assessing the question of "reasonableness" the judge said at [53], "the conduct and adverse immigration history [of the parents] is relevant to the assessment of the public interest…" The judge appeared, therefore, to have ascribed significance to the immigration misconduct of both parents when determining the question of reasonableness, which was an error of law: see KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53.

5. Having preserved the findings of fact reached by the judge, I directed that the matter be retained in the Upper Tribunal for consideration of the best interests of the children, and to determine whether it would be reasonable to expect the third appellant to leave the United Kingdom, for the purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

Legal framework

6. This appeal was brought under Article 8 of the European Convention on Human Rights. The essential issue for my consideration is whether it would be proportionate under the terms of Article 8(2) of the Convention

for the appellants to be removed, in the light of the family and private life they claim to have established here. In the present matter, the primary remaining public interest consideration is that set out in section 117B(6) of the 2002 Act.

7. Section 117B(6) provides:

> "(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."

8. As the third appellant has resided here for more than seven years, he is a "qualifying child": see section 117D(1).

9. It is settled law that the best interests of the child are a primary consideration when considering whether removal of an appellant under Article 8 would be proportionate, see ZH (Tanzania) [2011] UKSC 4 and Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 at [10] per Lord Hodge.

Evidence and documents

10. Mr Hussain relied exclusively on the evidence considered by the First-tier Tribunal initially. He did not apply under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce new evidence, for example in relation to developments which post-dated the findings of fact I preserved from the First-tier Tribunal. He did not call any of the appellants as witnesses, although the first, second and fourth appellants were in attendance at the hearing centre.

Discussion

11. The First-tier Tribunal found that none of the appellants met the requirements of the Immigration Rules. Although Mr Hussain previously sought to challenge some of the factual bases upon which those findings were reached, I found that the judge's findings were not irrational, perverse, or infected by some other error of law. This appeal turns on the position of AS, the third appellant, and whether it would be reasonable to expect him to leave the United Kingdom. To determine his best interests, and those of his brother, I must set out the factual matrix upon which that analysis must be based.

12. At the outset of my analysis, it will be helpful to summarise the relevant preserved findings of fact from the First-tier Tribunal:

a. The first appellant had worked previously in Bangladesh. The first and second appellants each have extended family in Bangladesh and there is family property there [43].

b. There was no evidence of private life outside the family home. The main language spoken at home is Bengali Sylheti. The third appellant previously experienced language learning difficulties when he started school, which may have been attributable to the different language spoken at home [44].

c. The third appellant had experienced a range of medical conditions relating to his ears, tonsils, and vitiligo. There was no evidence that any "curiosity and comment" attracted by the third appellant in Bangladesh would exceed that which he would experience in this country in any event [45].

d. There was no evidence that the third appellant would be at any greater risk of bullying in Bangladesh than he would have been in this country [46].

e. There would not be very significant obstacles to the integration of the first or second appellants upon their return to Bangladesh. The first appellant's mother remains in Bangladesh; it was she who originally brought him to the UK, and she remains there. If it were the case that the first appellant had never worked in Bangladesh, as he had claimed, he must have had family support. Both the first and second appellants had acquired qualifications and work experience, and experience of life in this country, which would assist with them obtaining employment upon their return in Bangladesh. They claimed to be financially supported in this country by relatives here, and they had provided no credible explanation as to why that support would not be able to continue in Bangladesh, at least initially [47].

f. An issue before the First-tier Tribunal had been whether the third appellant's medical conditions rendered his return Bangladesh unreasonable. In relation to these issues, the judge found that he may not require grommets in the future but noted the medical diagnosis may change. There was no evidence that treatment would not be available in Bangladesh; the first appellant "appears to concede" that treatment would be available in cities such as Dhaka. All difficulties expressed by the family in relation to the children's relocation to Bangladesh "can be overcome" [48].

g. Although an international move, and a change in schools, would be disruptive for the third appellant, he remains in primary school and is some years away from transferring to secondary school. The third appellant would be travelling with his parents and within the family unit to join extended family in Bangladesh [55].

13. Against that background, and without having applied to admit any new evidence, Mr Hussain submits that there remains an absence of finality concerning the diagnosis for the third appellant's ear conditions. He submitted, without reference to any underlying evidence, that there is "no evidence" that the treatment required by the third appellant may adequately be obtained in Bangladesh, still less would it be possible for the first and second appellants to pay for it.

14. Mr Hussain sought to rely on a single sentence in an article for the *Daily Star*, a Bangladeshi English language paper, in which the author sought to describe the difficulties experienced by those living with vitiligo in Bangladesh. This was an article to which Judge Bart-Stuart ascribed little weight, for understandable reasons. It may be found pages 61 to 62 of the appellants' bundle. It describes the condition, causes, potential treatments, and highlights "World Vitiligo Day", and the fact that Michael Jackson suffered from the condition. It concludes with these short paragraphs:

> "In our society, the vitiligo patient is treated inhumanely in the family, public place [sic] and mostly at their workplace. People avoid them just like the patient of leprosy but vitiligo and leprosy is not the same disease [sic].
>
> The government should emphasise on the vitiligo day to spread knowledge and should raise the funding for treatment and research to overcome this mortifying disorder."

This article provides little assistance. There is no suggestion that the first and second appellants, as the third appellant's family, would treat him "inhumanely"; indeed, the contrary is true. As a child, the third appellant will be some way from the world of work. To the extent that Mr Hussain sought to rely on the article to demonstrate that the third appellant would suffer in "public place", the article does not refer to the underlying evidence for such an assertion, let alone provide any detail as to what such discrimination would look like in practice.

15. Mr Hussain highlighted the length of residence of the first and second appellants, submitting that, in light of how long they have been here, the chances of them finding work in Bangladesh would be minimal, which would in turn impact upon the overall reception the third appellant would face upon his return to Bangladesh. He also maintained that the third appellant has minimal Bengali language skills.

16. It is difficult to ascribe significant weight to the above factors raised by Mr Hussain. Many of them sought to go behind the preserved findings of fact reached by the judge below, or are speculative. There was no new evidence to demonstrate that the third appellant's medical conditions had deteriorated, for example. There was nothing concerning any private life the appellants as a whole may have established outside the confines of their family in the time that has elapsed since the hearing before Judge

Bart-Stuart. The judge found that the family would return to extended family and property in Bangladesh, with experience of and familiarity with the language. The foundations are there for a successful return to their home country.

17. Finally, Mr Hussain submitted that the third appellant, having been born here in July 2010, is now eight months away from becoming eligible to register as a British citizen. That, he submits, is a significant factor rendering his return unreasonable. In my view, this is not a factor which attracts great weight. The relevant date of assessment is that of the hearing. At present, the third appellant is a citizen of Bangladesh, and is a considerable period away from being eligible to register as a British citizen. Although I can readily understand that it may be frustrating for the family if they managed to reside for almost enough time for their son to acquire British citizenship, but did not manage to meet the 10 year threshold by only a short margin before removal, it is not a factor which attracts significant weight. There is no near-miss doctrine which aids the appellants in this regard.

Best interests of the children

18. I must turn first to the best interests of the children. I accept that the family have a strong desire to remain in this country. I accept that there will be considerable disruption which will follow, at least initially, in the event of an enforced international move. It could be difficult for the children, especially if (as is likely) the parents are reluctant to leave. However, the approach that I am to take to determining the best interests of the children is that advocated for by Mr Lindsay, as set out in KO (Nigeria).

19. At [18] of KO, Lord Carnwath held that the context in which the best interests assessment of the children must be conducted is relevant. To that extent, and only indirectly, the immigration status of the parents is relevant:

> "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 …'"

Thus, the context in which my assessment of the best interests of the third and fourth appellants must take place is against the background of their parents having no leave to remain in this country. The law expects them to return to Bangladesh (but for, in this context, the operation of section

117B(6)). The reason the question of the children leaving the United Kingdom has arisen is, "because the parents have no right to remain in the UK" (SA (Bangladesh) at [22]).

20. Lord Carnwath endorsed what was said in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874 concerning the same issue, at [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?"

21. Applied to the facts of the present matter, in light of the preserved findings of fact of Judge Bart-Stewart, and the absence of any additional evidence before me concerning developments which have post-dated the hearing in the First-tier Tribunal, I find that it is in the best interests of both children to accompany their parents to Bangladesh. While I accept the logic of Mr Hussain's submissions that the overall length of the family's residence in this country is such that their return will entail considerable difficulties, at least in the short-term, there is no evidence that there will be long-term detrimental effects of such a move. The children will return with their parents in the family unit. They will return to extended family and property there. They already have experience in Bengali Sylheti, and to the extent that they will need to develop their linguistic skills further, they will have the benefit of both parents whose mother tongue is that language. They are without the right to work here, and have been supported financially by members of the family. By contrast, upon the return of the first and second appellants to Bangladesh, they will both enjoy the right to work and the full panoply of rights as citizens of Bangladesh.

22. There is no medical evidence that the third appellant's medical conditions are such that his return will present particular challenges meriting a departure from what Lord Carnwath said would generally be reasonable in KO. Mr Hussain highlighted a letter dated 23 March 2019 from the third appellant's general medical practitioner. At page 33 of the appellants' bundle, the letter states:

> "[The third appellant's] vitiligo may become a challenge for him, when it would be preferable for him to be in an environment where his condition is known and understood and where bullying because of it is not tolerated."

23. It is not clear how the appellant's London-based general practitioner is able to speak about general social conditions relating to vitiligo in Bangladesh. Although I have no reason to doubt doctor's sincerity, the

basis upon which this assertion is made is not clear, and therefore is of little assistance.

24. The best interests of the child appellants, individually and collectively, is to remain with their parents, in the family unit, wherever their parents are expected to be. The expectation is that, as the first and second appellants are without leave, they will return to Bangladesh. It is entirely consistent with their best interests for the children to accompany them to Bangladesh.

Reasonable to expect

25. In light of the above findings, then, I turn to the "real world context" in which the question of whether it is reasonable for the third appellant to leave the United Kingdom arises. There are significant parallels in my approach to this issue to the process for determining the best interests of the children. The real world context is that the first and second appellants are expected to return to Bangladesh. They are husband and wife, and parents to the third and fourth appellants. The real world context is that the family can return as a unit, in the circumstances, and for the reasons set out above. That militates in favour of a finding that it would be reasonable to expect the third appellant to leave the United Kingdom.

26. Mr Lindsay also submitted that it is no longer necessary for me to adopt as my "starting point" the premise that the third appellant must be granted leave to remain unless there are "powerful reasons" to the contrary, as was previously the case before MA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 705 was overturned by the Supreme Court in KO. I agree, for the following reasons.

27. By way of preliminary observation, I note that at [14] of KO, Lord Carnwath specifically distanced himself from the "impressive but conflicting judgments" of this Tribunal and the Court of Appeal, stating that instead he was "attempting a simpler and more direct approach". Lord Carnwath did not purport to retain certain aspects of the jurisprudence which was being overturned by the Supreme Court on that occasion. Lord Carnwath's "simpler" approach does not call for the implied preservation of certain elements of the earlier "impressive but conflicting judgments". This strongly suggests that the entirety of Lord Justice Elias' approach in MA (Pakistan) was being set aside. Although at [19] of KO, Lord Carnwath specifically disagreed with MA at [40], the omission of criticism of other paragraphs of MA's operative reasoning, when viewed in the context of the overall approach of the Supreme Court, does not mean that the remainder of the Court of Appeal's decision in that case was being retained. Rather, the "simpler and more direct approach" meant that nothing in MA was being preserved, for the reasons set out below.

28. Lord Carnwath held at [17] that the relevant factors going to reasonableness contained in the respondent's Immigration Directorate Instructions ("IDIs") then in force, *Family Life (as a partner or parent) in Private Life: Ten Year Routes*, August 2015, were "wholly appropriate and sound in law". The extract of that guidance referred to by His Lordship was as follows:

> "b. Whether the child would be leaving with their parents.
>
> 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."

As such, Lord Carnwath did not consider that the "starting point" that leave must be granted in the case of a qualifying child was retained, nor that there must be "powerful reasons" not to grant leave. By contrast, "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…"

29. Although it may be said that the above guidance is no longer in force and, therefore, that the principle it enunciates is no longer of any relevance, I do not consider that to be a valid objection. Lord Carnwath's reliance on the extract from the IDI was not because the respondent's views or guidance carried weight, whether because those views featured in the IDIs, or otherwise. Rather, His Lordship considered that the quoted extract correctly encapsulated the core principle which lies at the heart of the question of reasonableness. The fact that it featured in IDI guidance was of no significant relevance; it could equally (for example) have featured a quote from the skeleton argument advanced by the Secretary of State in the proceedings, or a decision of one of the courts or tribunals below. The significance of the quote from the IDIs lay in the fact that Lord Carnwath considered it to be a correct statement of the legal position, which he adopted, endorsed and in doing so, preserved. That the respondent may have changed her guidance since then (which, of course, she has) is irrelevant; the *ratio* of Lord Carnwath's approach preserves the principle – as previously set out in the IDI quoted above – for application in these proceedings.

30. The approach adopted by Lord Justice Elias in MA (Pakistan) was based on the now abandoned premise that the wider immigration context of the qualifying child's parents may be taken into consideration as a factor militating against the reasonableness of leave being granted. It was in that – no longer relevant – context that the question of powerful reasons displacing the starting point arose. By contrast, Lord Carnwath made no mention of there being a "starting point" along those lines. Instead, he endorsed the Immigration Directorate Instructions quoted above that it will "generally be reasonable" to expect the child to return in a situation such as the present. Were it the case that the MA "starting point" were

preserved, by definition, there could be no suggestion that it would "generally be reasonable" to expect the children to return with their parents.

31. It is difficult to see how, in post-KO territory, there could ever be "powerful reasons" to withhold a grant of leave in a seven year child case. The former suggestion that "powerful reasons" were needed arose in the context where the immigration – or other – misconduct of the child's parents could be incorporated into that assessment. If the parents' conduct was particularly bad, that would provide "powerful reasons" to override the "starting point" which previously applied. By definition, that is not, and can no longer be, the case. The "powerful reasons" doctrine is incompatible with the post-KO prohibition against holding the misconduct of the parents against children, and with the "real world" analysis which lay at the heart of the case.

32. For the reasons set out above, the MA (Pakistan) approach did not feature in the operative reasoning of the Supreme Court. Indeed, in the individual section 117B(6) case before the Supreme Court in KO, *NS*, Lord Carnwath did not resolve the case by reference to there being a "starting point" that leave must be granted, nor did he suggest that there must be "powerful reasons" why leave should not be granted. His Lordship noted that the best interests of the children concerned were to remain in the United Kingdom, but nevertheless reasonable to expect them to leave, given the expectation of where their parent should go. See [51] of KO, in relation to *NS*:

> "…in a context where the parents had to leave, the natural expectation would be that the children would go with them, and there was nothing in the evidence reviewed by the judge to suggest that that would be other than reasonable."

33. Mr Lindsay also cites the opinion of the Lord President of the Inner House of the Court of Session in SA and others v Secretary of State for the Home Department [2018] CSIH 71, a case which post-dated KO, as authority for this proposition. SA was a case with similar facts to the present matter: a family of four Bangladeshi citizens, two parents, two children, had resided in the United Kingdom without leave for some time. The children were born here. There was evidence before the First-tier Tribunal from a child psychologist stating that relocation would present a "major challenge" for the third appellant, a qualifying child born in 2008. The report described her removal would lead to her perceiving her circumstances as a "form of exile", with only "bleak" educational prospects by comparison to what she would enjoy if she remained in Scotland. The First-tier Tribunal dismissed the appellants' appeal against linked refusal decisions and found that it would be reasonable to expect the child to return to Bangladesh; the Upper Tribunal refused permission to appeal. It was a judicial review against that permission to appeal refusal which was under consideration by the Inner House, following its dismissal by the Outer House. The Lord

President considered Lord Carnwath's approach in KO. He looked specifically to the case of *NS*, outlined above. When drawing parallels between SA's case, and that of *NS*, the Lord President said, at [30]:

> "… [as] in this case, the children [in *NS*] would 'lose much'. It was in their best interests to remain with their parents in the UK, where they are settled. None of the children had had any life outside the UK and they were happy, settled and doing well…"

Despite those findings, the Lord President held that the reasoning of the Lord Ordinary in the Outer House, which had been to apply KO (Nigeria) to dismiss the appeal, "cannot be faulted". In the Lord President's opinion, there was no suggestion that there was a "starting point" that leave had to be granted in a seven year case, nor that there had to be "powerful reasons" to displace that starting point. Nor, realistically, could there have been a suggestion that such factors were relevant: such terminology was the language of MA (Pakistan), not the "simpler and more direct approach" adopted by Lord Carnwath in KO.

34. The opinion of the Lord President is highly persuasive authority, and I am fortified in the approach that I have set out above by the fact it correlates with that of the Inner House.

35. For the above reasons, I find that it is no longer necessary to adopt as the "starting point" that leave would be granted in a seven year child case, nor that leave may only be withheld where there are "powerful reasons" to do so. The correct approach is to perform the "real world" assessment, as set out above.

36. I should record that Mr Hussain did not have any submissions in response to Mr Lindsay's submissions concerning the meaning and impact of KO.

Conclusion

37. Drawing the above analysis together, therefore, I find that it would be compatible with the best interests of the third and fourth appellants for the family to be removed to Bangladesh. The first and second appellants have no leave to remain in this country, yet by contrast are citizens of Bangladesh, with family and property there, and are fully familiar language, culture and customs: that is the "real world" context. Under the circumstances, it is entirely reasonable to expect the third and fourth appellants to return to Bangladesh with them. That being so, section 117B(6) of the 2002 Act does not operate to render the removal of the first and second appellants disproportionate. Similarly, it cannot be said that paragraph 276ADE(1)(iv) is engaged in relation to the third appellant personally (child under the age of 18, seven years' continuous residence, but not reasonable to expect him or her to leave the United Kingdom). It is not necessary for there to be "powerful reasons" for leave not to be granted.

38. The only issues which fell to be determined in the course of this remaking hearing were whether the removal of the third and fourth appellants would be consistent with their best interests, and whether, in light of those interests as determined, it would be reasonable to expect the third appellant to leave the United Kingdom. The answer to both questions is in the affirmative: removal of all four appellants is consistent with the best interest of the third appellant, and it would be reasonable to expect him to leave the United Kingdom. There are no other issues to be resolved. To the extent that the removal of the appellants will engage and interfere with their private life rights under Article 8 of the European Convention on Human Rights, the public interest in the maintenance of effective immigration control, as articulated by Parliament in Part 5A of the 2002 Act, is a sufficient justification to render their removal proportionate.

39. These appeals are dismissed on human rights grounds.

Notice of Decision

These appeals are dismissed 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 *Stephen H Smith* Date 7 November 2019

Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT
FEE AWARD

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

Signed *Stephen H Smith* Date 7 November 2019

Upper Tribunal Judge Stephen Smith

ANNEX – ERROR OF LAW DECISION

IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/18036/2018
HU/18044/2018
HU/18042/2018
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THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 August 2019	**[6 September 2019]**
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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

NA (FIRST APPELLANT)
SB (SECOND APPELLANT)
YS (THIRD APPELLANT)
YA (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Z Hussain, Solicitor, Hubers Law
For the Respondent: Ms S Cunha, Home Office Presenting Officer

ERROR OF LAW DECISION

1. This is an appeal against a decision of Judge of the First-tier Tribunal Bart-Stewart promulgated on 14 May 2019, dismissing the appellants' appeal against a decision of the respondent dated 16 August 2018 to refuse their human rights claims for leave to remain in the United Kingdom on the basis of their private life made on 5 April 2018.

Factual Background

2. The first appellant is a citizen of Bangladesh and was born on 16 October 1966. He arrived in this country as a visitor in 2005. He has remained as an overstayer since the expiry of his visitor's leave. The second appellant is also a citizen of Bangladesh, born on 11 November 1984. She arrived with leave to remain as a student in 2009, valid until 30 June 2012. The first and second appellants are husband and wife. The third and fourth appellants are their son and daughter and were born on 21 July 2010 and 19 October 2017 respectively. They have never held leave to remain in this country, but, due to his age, the third appellant is a "qualifying child".

3. The basis of the appellants' application to the respondent, and the basis of the appeal advanced before Judge Bart-Stewart, was that it would not be reasonable to expect the third appellant, YS, to leave the United Kingdom. YS has a number of medical conditions, including include a past history of hearing difficulties and surgery in the form of a tonsillectomy, adenoidectomy and bilateral grommet insertion in September 2015. His symptoms are said to recur from time to time. He has episodes of otitis externa and problems with ear wax. He has also been diagnosed with vitiligo and has a deep pigmentation of skin around his left eye. Those medical conditions, combined with his lack of understanding of Bengali Sylheti and established life in this country, all combined to render it unreasonable to expect him to leave the United Kingdom.

4. Judge Bart-Stewart dismissed the appeal on the basis that the medical conditions experienced by YS could receive adequate treatment in Bangladesh, and that it would be reasonable to expect him to leave the United Kingdom, in light of the immigration misconduct of his parents. The judge made a number of findings of fact upon which her findings concerning the likely reception that would await the family in Bangladesh were based.

Permission to Appeal

5. Permission to appeal was granted by Upper Tribunal Judge Grubb on the basis that it was arguable that the judge had held the immigration conduct of the first and second appellants against YS, and in doing so failing properly to apply KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53. The grounds of appeal sought to undermine a number of findings of fact made by the judge which were not excluded from the grant of permission to appeal, but Judge Grubb noted that they

were unlikely to have the same merit as the primary argument concerning whether it would be reasonable to expect YS to leave the United Kingdom.

The Law

6. This is an appeal brought under Article 8 of the European Convention on Human Rights. The central issue in this appeal turns on the interpretation and application of the statutory framework set out in Part 5A of the Nationality, Immigration and Asylum Act 2002. Of significance for present purposes is Section 117B(6) which provides:

> "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."

7. Having been born here over seven years ago, and resided in this country throughout that time, YS is a "qualifying child" (see section 117D(1)). As such, whether it would be reasonable to expect YS to leave the United Kingdom, absent any other factors, would be determinative of the appeals of the first and second appellants who, as his parents, have been accepted to be in a genuine and subsisting relationship with him.

8. It is settled law that the best interests of the child are a primary consideration when considering whether the removal of an appellant under Article 8 would be proportionate, see ZH (Tanzania) [2011] UKSC 4 and Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 at [10] per Lord Hodge.

Discussion

9. Mr Hussain provided a skeleton argument which I have considered, along with the grounds of appeal and all oral submissions.

10. I turn first to the grounds of appeal which contend the judge made a number of factual errors when reaching her findings of fact. Part of the appellants' case in relation to the third appellant was that his vitiligo would lead to extreme bullying at school in Bangladesh. In support of that argument, the appellants had provided a copy of an article in an English language newspaper in Bangladesh, written by a medical student outlining the ostracization that some people with that condition can face in Bangladesh. The article stated that they are treated as though having leprosy and treated "inhumanely" in public and at work. At [45], the judge had attached little weight to what she described as a "student's essay", noting that there was no evidence that the child would be subject to any

more curiosity and comment than the first appellant had acknowledged he receives in the United Kingdom.

11. Mr Hussain submits that the judge erred in categorising this article as a "student essay" for the purposes of ascribing minimal significance to it. In oral submissions, he contended that the article was, in essence, a factual description of what life with vitiligo would be like in Bangladesh. It mattered not, submitted Mr Hussain, that the article had been written by a medical student. It was not being presented as expert evidence; the judge should have viewed it as a contemporaneous factual description of life in Bangladesh, and should have assessed it as attracting greater weight, submits Mr Hussain. I consider the judge's findings at [45] and [46] to have been open to her on the evidence. Barring irrationality, weight is a matter for the judge. The appellants had not provided an expert's report concerning the likely impact of having the condition which YS suffers from in Bangladesh. The article had been written by an unqualified person, and the fact that it had been reproduced in what was claimed to be a leading English language newspaper in Bangladesh does not add any further weight to the article, still less does it render the judge's findings of fact on this point irrational. It was an essay by a student. The judge was perfectly entitled to refer to it as a "student's essay".

12. Before the judge was a letter from the appellants' general practitioner which stated that it would be preferable for YS to be in an environment, such as the United Kingdom, where his condition is known and understood and where bullying is not tolerated. The grounds of appeal contend that the judge placed insufficient weight on this letter, especially given the general practitioner is from the same background as the appellants and "presumably has some personal knowledge" of the matter in order to have made this recommendation. I consider the judge to have reached findings of fact which were open to her on the evidence she received. The mere fact that a GP shares the same background as an appellant does not necessarily qualify him or her to provide expert evidence on the conditions that would obtain upon return to Bangladesh. A general practitioner in this country is primarily able to provide evidence or assistance to a tribunal in relation to medical conditions that he or she has treated during consultations with their patients here. It was within the range of responses properly open to the judge for her to have treated the medical evidence from the GP in this way.

13. Mr Hussain next seeks to challenge the judge's findings that sufficient treatment would be available in Bangladesh for the ear problems experienced by YS. There has not yet been a final diagnosis of his condition, and matters may change, he submitted. It was, therefore, too early for the judge to have reached a considered view. The judge addressed the position concerning the ongoing diagnosis at [48] of her decision. She noted that the hearing difficulties may no longer require grommets in the future, and they may be changed as he gets older. To

that extent, it is correct for Mr Hussain to observe the diagnosis is not yet final. However, to contend that the fact that the diagnosis may change in the future should have had a significant impact on the judge's findings is speculative. Nothing in the submissions of Mr Hussain demonstrates that the judge made irrational findings when observing at [48] that there was no evidence that treatment would not be able to be available in Bangladesh. The judge records that the first appellant appeared to accept that treatment would be available in cities such a Dhaka. Accordingly, I do not find that the judge reached an irrational finding in relation to this issue.

14. Mr Hussain submits that the third appellant's language abilities were unfairly given little weight. The appellants had contended that the third appellant speaks only English and would therefore struggle with the language upon his return to Bangladesh. The judge did not accept this to be a credible account of the third appellant's language difficulties, noting that the first and second appellant had each given evidence before her through a Bengali Sylheti interpreter, and gave no impression of having a wider social or private life outside the confines of their home or the Bengali-speaking community. Mr Hussain contended that the reason that the appellants spoke through an interpreter at the hearing before Judge Bart-Stewart was because the complexity of the proceedings meant that they would need the potential availability of an interpreter in order for them to engage with what was taking place. That submission has no merit. The judge reached findings of fact that were properly open to her on the materials that she had before her and the evidence that she had heard that it was not credible that the first appellant and the second appellant only conversed with the child in English. The judge does not record in her discussion of YS's language abilities at [44] that the parents spoke through an interpreter only when difficulties in translation arose in the proceedings, as is sometimes the case. They have been here since 2005 and 2009 respectively, and still required the use of an interpreter throughout the entirety of the proceedings. YS speaks English at school, and initially had some problems with his speech. The judge considered that that was likely to be attributable to being educated in a different language to that spoken at home. These were all rational findings. The judge's finding that the language likely to be spoken at home would be Bengali Sylheti was a finding properly open to her on the facts, and this submission has no merit.

15. A further criticism levied by Mr Hussain at the judge is that she formed a dim view of the first and second appellant's adverse immigration history and unfairly counted that against them in her credibility assessment. There is no merit to this criticism. Although it is right to say that the second appellant did hold leave to remain upon her arrival in the United Kingdom, and that it was valid until June 2012, in her evidence she accepted that she did not study for more than a few days following her arrival and that she has done nothing since. The judge did not display any

adverse attitude towards the second appellant on this account, but rather recorded accurately throughout her decision the fact that the second appellant only held leave under these circumstances, and that she had not since 2012. On any view, the second appellant has been an overstayer since June 2012 and the judge was right to record this fact in her decision. There is no demonstrable prejudice on the part of the judge towards the appellant in this respect; the judge simply recognised and recorded the nature of the initially precarious, and later unlawful, immigration status held by the second appellant. As she had not studied as she was required to by the terms of her leave, the judge could have gone further and observed that she had been here in breach of the terms of her leave for most of the time she held leave. Nothing turns on this criticism.

16. At [43], the judge rejected the appellants' account that their remaining property in Bangladesh had been unlawfully appropriated by the first appellant's brother. One of the bases upon which the judge rejected that account was that there was said to be no "supporting evidence" of the unlawful appropriation. Mr Hussain takes issue with this, on the basis that the first appellant's sister's statement corroborated this account. I consider the judge to have been referring to supporting documentation of the sort that would be reasonably expected to be generated through the fraudulent transfer of a property into another person's name, for example title deeds or ownership records of the family home. In this respect she was reflecting the evidence that she recorded at [29] of her decision where she noted the first appellant's evidence that his brother had fraudulently transferred all the family assets into his name and sold a lot of it. The judge was referring to the absence of title deed documentation or other ownership records which would have referred to the transfer of the properties into the name of the first appellant's brother, or otherwise demonstrating that the claimed property is no longer registered in the name of the first appellant. Nothing turns on this criticism of Mr Hussain.

17. In summary, therefore, the factual criticisms advanced by Mr Hussain are without merit. The judge reached findings of fact which were open to her on the evidence before her and did not feature any irrationality or other error of law which infects their safety.

18. However, I do consider the judge to have erred in relation to her assessment of, first, the best interests of the children concerned, secondly and in relation to whether it would be reasonable for YS to leave the United Kingdom.

19. At [44], based on her earlier findings of fact, the judge conducted an assessment of the best interests of the appellants' children. It is in many respects a model assessment, and in line with the authorities the judge was later to quote concerning determining what the best interests of children in such circumstances are.

20. The difficulty with the judge's assessment of the children's best interests is that she appears to contradict herself later in the decision, at [48]. When determining the hearing difficulties experienced by YS, and his need for grommets and possible surgery, she concludes [48] by stating that the children's best interests are to remain in the United Kingdom, where they benefit from a good standard of education, medical, social and financial support. Although she finds in that same paragraph that those best interests do not amount to a "significant call to return to Bangladesh", and observes that all difficulties can be overcome, it is not clear which of the two differing best interests assessments the judge based her analysis on. The decision featured two conflicting assessments of the best interests of the children concerned and therefore the judge's analysis appears confused. It is not clear, for example, the basis upon which she introduces the children's best interests as being to remain in the United Kingdom in [48], given her earlier analysis and the overall thrust of the remaining parts of her decision which find that the best interests of the children are compatible with returning to Bangladesh, and that it would be reasonable to expect the children to return to the country of their parents' nationality and their nationality. Accordingly, I find that the judge erred in relation to her assessment of the best interests of the children concerned.

21. I reject Mr Hussain's submissions, however, that it was necessary for the judge to analyse the best interests of the two children individually as well as collectively. Such specificity is not required given the judge had addressed in detail the medical situation of YS and had clearly factored that into her assessment at [44].

22. The most significant error, however, that the judge fell into was to hold the immigration misconduct of the first and second appellants against the third appellant in the consideration of what is reasonable for the purposes of Section 117B(6) of the 2002 Act.

23. Although the judge cited KO (Nigeria), which held that the immigration misconduct of the parents of a child should not be held against a qualifying child, the operative analysis engaged in by the judge appears to take the contrary approach.

24. At [53] the judge said:

> "The fact that the third appellant has been in the UK for more than seven years at the date of application must be given significant weight. Strong reasons are required to refuse a case where the outcome would be removal of the child with continuous UK residence of seven years or more. **The conduct and the adverse immigration history is relevant to the assessment of the public interest but it is not determinative in removal"** (emphasis added).

25. As may be seen, in the above paragraph the judge appeared to follow the now impugned approach adopted by the Court of Appeal in MA (Pakistan)

v Secretary of State for the Home Department [2016] EWCA Civ 705, where the Court of appeal held that the "starting point" for children with more than seven years' residence in this country was that they would be entitled to remain in the United Kingdom, and that strong reasons would be required to displace that starting point. The Court of Appeal held that the immigration misconduct of the parents of the child can be taken into consideration as a relevant factor when considering whether there are strong reasons to displace the starting point that leave must granted in such a case.

26. That interpretation was overturned by the Supreme Court in KO (Nigeria): see [17], [18] and [19]. Although the judge correctly noted at [52] that the immigration status of the parents is "indirectly relevant" to the position of the qualifying child her later analysis in [53] took the contrary approach and suggested that it was, by contrast, directly relevant.

27. The correct approach should have been to assess the "real world" position of the parents, to adopt the terminology of the Supreme Court in KO (Nigeria). While that assessment does take into account, as an indirectly material factor, the immigration status of the parents, it is not in the context of holding the misconduct of the parents against the child for the purposes of assessing what amounts to a reasonable expectation for the qualifying child to leave the United Kingdom.

28. The judge adopts a similar approach in [55]. There she specifically addresses the concept of reasonableness, addressing the difficulties that the third appellant is likely to experience upon his return to Bangladesh. The first half of the paragraph features sound analysis, which is entirely consistent with the approach of the Supreme Court in KO (Nigeria). However, the concluding words adopted by the judge suggest in clear terms that she had held the immigration misconduct of the first and second appellants against the third. She said

> "This is a case where both parents have deliberately flouted immigration control and continue to be a burden on public funds. I consider in the circumstances the public interest outweighs the family and private life of the appellants and are strong reasons for refusing leave to remain in the UK."

29. Although it is possible to read this paragraph as though the judge addressed, first, the question of reasonableness, concluding that it would be reasonable to expect the children to return to Bangladesh, before approaching the quite separate question of the overall balancing act required under Article 8 in order to determine the question of proportionality (which is an assessment that would be required if section 117B(6) was not dispositive of the appeal in the appellants' favour), when read alongside [53], that reasoning does not withstand scrutiny.

30. Ms Cunha submits that the error is not material. Her submission is that it would be reasonable to expect the entire family unit to return to Bangladesh, regardless of any consideration of the immigration misconduct of the first and second appellants. Were it not for the conflicting assessment of the best interests of the children, I would agree with this submission. The difficulty is, however, it is not possible to ascertain what the judge's best interests assessment of the children was, for the reasons set out above.

31. I find the decision features a material error of law and must be set aside and remade. I direct that the matter is relisted in the Upper Tribunal for an assessment of the best interests of the two children and for consideration of whether it would be reasonable to expect the third appellant to leave the United Kingdom. I preserve all other findings of fact reached by Judge Bart-Stewart.

Anonymity

32. Given the age of the children and the nature of the third appellant's medical conditions, in light of the routine publication of Upper Tribunal decisions, I make an order for anonymity.

Notice of Decision

The decision of Judge Bart-Stewart featured an error of law but no errors of fact. I set aside the decision for it to be re-made by the Upper Tribunal, preserving the findings of fact set out in the decision.

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 2 September 2019

Upper Tribunal Judge Stephen Smith