Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/21404/2016
HU/21420/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 28 March 2019	**On 3 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

SB

AND

RR
(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Afzal of AR Law Chambers agents for International Immigration
For the Respondent: Mr L Tarlow of the Specialist Appeals Team

DECISION AND REASONS

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 his 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.

The Appellants

1. The Appellants are mother and child, born respectively in 1981 and 2004. They are both citizens of Pakistan. On 29 March 2007 they entered as visitors. They overstayed and within 10 days of expiry of the visit Visa the mother made and asylum claim which was refused on 2 November 2007 and the appeal dismissed on 19 December 2007.

2. On 12 August 2009 the mother's husband issued a deed of divorce which states that it will be sent for registration with the state authorities. is no evidence that it was so registered. In these circumstances, it is evidence that the child's parents are separated, even if not formally divorced.

3. But on 18 June 2014 the mother made a further application for leave outside the Immigration Rules on the basis of her private and family life in the United Kingdom. This was refused with no in country right of appeal. The mother lodged an application for judicial review which was dismissed at the hearing on 19 April 2016. On 6 May 2016 she made further applications for herself and her child based on Article 8 of the European Convention which was rejected and renewed on 16 June 2016.

The SSHD's decision

4. On 31 August 2016 the Respondent refused the application for both the mother and her child.

5. The mother did not meet any of the time critical criteria of paragraph 276 ADE(1) of the Immigration Rules and the SSHD considered that she and her child on return to Pakistan could re-integrate without undue hardship. Section EX1 of Appendix FM to the Immigration Rules did not apply, notwithstanding the child had been in the United Kingdom for over seven years because it was reasonable for the child to return with the mother to Pakistan. The SSHD went on to find that there were no exceptional or compassionate circumstances warranting a grant of leave to remain.

Proceedings in the First-tier Tribunal

6. On 07 September 2016 the Appellants lodged notice of appeal. By a decision promulgated on 07 September 2017 Judge of the First-tier Tribunal Watson dismissed the appeals on all grounds, finding there were no very significant obstacles to the integration of the Appellants on return to Pakistan and having considered the best

interests of the child concluded it was not unreasonable for the child to accompany the mother.

7. The Appellant's sought permission to appeal and on 22 February 2018 a Designated Judge of the First-tier Tribunal refused permission to appeal.

The Upper Tribunal Proceedings

8. The permission application was renewed to the Upper Tribunal and on 13 July 2018 Judge of the Upper Tribunal Storey granted permission because it was arguable the Judge had erred by failing to apply the approach set out in *R (MA (Pakistan)) v SSHD [2016] EWCA Civ.705* in respect of children resident in the United Kingdom for over seven years.

9. Subsequent to the grant of permission to appeal, judgment has been given in in *KO and Others v SSHD [2018] UKSC 53* and the Upper Tribunal has considered the meaning and impact of that judgment in a Presidential decision in *JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC) 27*.

10. The Appellants attended the hearing. I explained the purpose of and procedure to be followed at an Error of Law hearing. They confirmed their new address but otherwise took no active part in the proceedings.

11. I noted the two cases referred to in paragraph 9 above and that the child is now 15 and had arrived in the United Kingdom in March 2007, some 12 years ago. Mr Tarlow quite properly conceded that the Respondent could not oppose the Appellants' claim that the decision of Judge Watson could not stand. Further, in the light of the time the child has been living in the United Kingdom and the stage reached in her education, in the light of the recent case law the Respondent could not advance any argument that it would be reasonable for the child to have to leave the United Kingdom with the mother.

12. I announced that I found the decision of Judge Watson in the light of the two cases at the turn of 2018/2019 contained an error of law and should be set aside. I also announced the appeals would be allowed for reasons to follow.

13. There was no dispute as to the relevant facts which can be extracted from the list of documents referred to in paragraph 20 of Judge Watson's decision and the oral testimony summarised at paragraphs 21-23 and findings of fact in relation to the child appellant at paragraphs 24 and 25 and the mother at paragraphs 26-28.

14. At the date of the application leading to the decision under appeal, the' child Appellant was over the age of seven and had never lived elsewhere than in the United Kingdom since coming here at the age of about 3 ¼ years. She is now aged 15 and will be her GCSE examinations in a matter of weeks.

15. The child Appellant is a qualifying child by reference to Section EX1 of Appendix FM to the Immigration Rules and s.117D(1) Nationality, Immigration and Asylum Act

2002 as amended (the 2002 Act). Section EX1 requires that the best interests as a primary consideration of the child must be taken into account in assessing whether it would be reasonable to expect the child to leave the United Kingdom. The SSHD gave as a reason for refusing the lead Appellant leave to remain that she had a very poor immigration history which was not challenged

16. At paragraphs 17-19 of *KO and Others* in giving the only judgment of the Supreme Court Lord Carnwarth found: –

> "As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is "reasonable" for the child. As Elias LJ said in MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber) [2016] EWCA Civ 705, [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv).
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> 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, [2017] Scot CS CSOH_117:
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> > "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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> 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:
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> > "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?""

17. At paragraph 27 of *JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC)* 27 an Upper Tribunal Presidential panel found:-

> "We do not consider that paragraphs 18 and 19 of KO (Nigeria) mandate or even lend support to the respondent's interpretation. In those paragraphs, the point being made by Lord Carnwath and by the judges in the cases he cited is merely that, in determining whether it would be reasonable to expect the child to leave the United Kingdom, one must have regard to the fact that one or both of the child's parents will no longer be in the United Kingdom, because they will have been removed by the respondent under immigration powers. That, we find, is the extent of the "real world" envisaged by Lord Carnwath."

18. After a consideration of the jurisprudence in *KO and Others* and the guidance given at various times by the SSHD to its caseworkers, the Upper Tribunal concluded at paragraph 39 that s.117B(6) when properly construed could result in "a person with parental responsibility who could not invoke s.117B(6) may, nevertheless, succeed in a human rights appeal. At paragraph 41 the Upper Tribunal stated:-

> "We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998. It can be regarded as a necessary consequence of the aim of Part 5A (of the 2002 Act) of imposing greater consistency in decision-making in this area by courts and tribunals. The fact that section 117B(6) has such an aim was expressly recognised by Elias LJ at paragraph 44 of *MA (Pakistan)*."

19. However, the child Appellant meets the time and formal requirements of paragraph 276 ADE(1)(iv) of the Immigration Rules and hence also s.117B(6) of the 2002 Act: see paragraph 7 of the judgment in *KO and Others*. The remaining issue then is whether it is reasonable to expect the child Appellant to leave the United Kingdom with the mother.

20. The standard of proof is the civil standard; that is on the balance of probabilities. The burden is on the Appellants. Evidence subsequent to the date of decision may be taken into account. The relevant law in relation to claims based on the State's duty to respect private and family life is as at the date of the hearing: see paragraph 40 of *Haleemudeen v SSHD [2014] EWCA Civ. 558*.

21. Looking at the findings made by Judge Watson I am satisfied that the best interests of the child are to remain in the United Kingdom. The question is whether there are factors weighing against those interests such that it would not be unreasonable to expect the child to relocate with the mother who has an unsatisfactory immigration history.

22. The mother has overstayed. She does not speak English and has lived with her family until some time in 2016 since when she has been reliant on public funds. The mother has family in Pakistan. Her mother died in October 2016 but her father remains in Pakistan. Her evidence is inconsistent whether she remains in contact with her family in Pakistan. She has previously been found to be an unreliable

witness. If she were the sole Appellant, I would find in all the circumstances and having regard to the need to maintain proper immigration control that it would be reasonable for her to return to Pakistan.

23. The child Appellant came as a toddler and will have little if any recollection of life in Pakistan. The child is well settled in school and has by now at the age of 15 developed a substantive private life of her own. She is described by both her school and mosque as settled and doing well. The school states she has a close friendship group. The letter from the child Appellant at pages 15-17 the Appellant's bundle speaks with some passion of her involvement in school life and of her private life revolving around school and her school friends.

24. The child Appellant has in effect known no other place or wider community in its life other than the United Kingdom. She is about to sit her GCSE examinations. In these circumstances, as at the date of the hearing I do not find it reasonable to expect the child Appellant to follow the mother to Pakistan. Therefore, the child Appellant meets the requirements of the Immigration Rules.

25. Consequently, even assuming the child Appellant remains with the mother outside the United Kingdom it would be disproportionate to any legitimate public objective, such as the maintenance of proper immigration control, to require the child Appellant to leave the United Kingdom. Alternatively put, the public interest does not require the child Appellant's removal from the United Kingdom. Hence the removal of the mother would also not be proportionate in terms of Article 8 of the European Convention: see paragraph 96 of *JG*.

26. The appeals of the Appellants are allowed on human rights grounds (Article 8).

Anonymity

27. An anonymity direction was made by the First-tier Tribunal. The second Appellant is a teenage child and although no submissions were made on the point at the hearing, I consider it appropriate to continue the anonymity direction.

SUMMARY OF DECISION

The decision of the First-tier Tribunal contains an error of law and to the limited extent referred to is set aside.

The substantive appeal of each of the Appellants is allowed.

Anonymity direction continued.

Signed/Official Crest Date 01. iv. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE RESPONDENT: FEE AWARD

I have allowed the appeals but in the circumstances in which the appeals have been allowed do not consider it appropriate to make any fee award.

Signed/Official Crest Date 01. iv. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal