Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/21469/2018
HU/01396/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given following hearing	**On 9 April 2020**
On 27 January 2020	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR VIRENDRA KUMAR SIMRYA (FIRST APPELLANT)
MRS VINITA SIMRYA (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M I Hossain, Solicitor of Chancery Solicitors
For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are both Indian nationals born respectively on 4 December 1979 and 12 November 1981. They are husband and wife. They both appeal with permission granted by First-tier Tribunal Judge J M Holmes against a decision of First-tier Tribunal Judge Wilding who, following a hearing at Taylor House on 18 July 2019, in a decision and reasons

promulgated on 2 August 2019, dismissed their appeals against the respondent's decision refusing to allow them leave to remain on human rights grounds.

2. The immigration history of the appellants can be summarised briefly, it being set out in some detail in Judge Wilding's decision. They have been in this country now for some several years, the first appellant having had leave from April 2008 until September 2014 when he became appeal rights exhausted from his latest appeal. Subsequently he has made further applications which have been progressing through the various Tribunals and courts, but he and his wife, the second appellant, have not had leave to be in this country since 2014. It is fair to say that this is not a case where the appellants have sought to hide from the authorities, as they have been openly present in the UK while their various appeals were progressing, but nonetheless they have been in this country without leave and accordingly cannot qualify for leave to remain on the grounds of long lawful residence under the Immigration Rules.

3. The couple have two children, both born in the UK, and by the time of the hearing before Judge Wilding the oldest child had just turned 7 and accordingly was for the purposes of Section 117B of the Nationality, Immigration and Asylum Act 2002 (as inserted by Section 19 of the Immigration Act 2014) a "qualifying child".

4. By Section 117B(6) it is provided as follows:

> "**117B Article 8: public interest considerations applicable in all cases ...**
>
> 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".

5. The definition of "qualifying child" is set out in Section 117D as follows:

> "(1) In this Part –
>
> ... 'qualifying child' means a person who is under the age of 18 and who –
>
> (a) is a British citizen, or
>
> (b) has lived in the United Kingdom for a continuous period of seven years or more ...".

6. The argument made on behalf of the appellants at the hearing before Judge Wilding, and certainly the argument which he considered, was that by reason of Section 117B(6) it would not be proportionate for the appellants to be removed.

7. Judge Wilding set out the appellants' case in the following way, at paragraphs 11 and 12 of his decision:

> "**The appellant's case**
>
> (11) The first appellant initially was seeking to argue, as I understand it, that he did have ten years' lawful continuous residence, but having clarified with Mr Aslam [the appellants' then Counsel] at the hearing he does not advance such a case. The appellant's leave ended in 2014 but [he] sought to always regularise his stay, and thus when looking at the matter through the lens of his private life, significant weight, Mr Aslam argues, should be given to that length [of] residence.
>
> (12) It [would] be unreasonable for the eldest child to return to India in all the circumstances applying s.117B(6) and in all the circumstances it would be disproportionate for the appellants to be removed".

8. When giving his reasons for granting permission to appeal against this decision, Judge Holmes, stated as follows:

> "… Although apparently professionally drafted the grounds do not focus upon identifying an arguable error of law. However it is arguable within the scope of this diffuse drafting that the focus of the appeals ought to have been on the position of the 'qualifying child' in the context of s.117B(6), given he has lived his entire life in the UK, and thus the reasonableness of the expectation that he should leave the UK for India. (There was no issue that the appellants as his parents had a genuine and subsisting parental relationship with him, or that they would otherwise have no arguable human rights appeal). The judge accepted that the child did not speak Hindi [18], and the only language the judge found that this child did speak was English. That ought to have prompted a consideration of how the child would access education in India, which is arguably absent, the judge merely commenting that Hindi can be learned in time. The decision contains no reference to the relevant current jurisprudence on s117B(6). Arguably the judge's approach to s117B(6) was flawed".

9. It appears that after this decision had been promulgated but before the hearing before this Tribunal, on 23 August 2019 the respondent has granted limited leave to remain to the appellants' oldest child, seemingly on the basis that he is now a qualified child. He has been granted a period of 30 months' limited leave to remain on the ten year private life route, the expectation normally being that having completed ten years under this route, he would be eligible to apply for settlement. In fact, as the Rules are currently, were this child to remain in the UK until he was 10 years old, having been born in the UK, he would then be eligible to apply for British citizenship, but that point has not yet been reached.

10. It is not clear why the respondent should have chosen to grant the child limited leave to remain without at the same time reconsidering the position of his parents. Clearly the child cannot be expected to remain in the UK on his own without either parent, and so one would normally

expect the position of all the members of the family to be considered together, which clearly it has not been in this case.

11. On behalf of the appellants, Mr Hossain advances the argument that because this child has now been granted leave to remain, the decision of Judge Wilding should be set aside and that I should "use my discretion" to send this back to the respondent. He was unable, however, to refer the Tribunal to any Rule or statute giving the Tribunal any discretion to do this, which this Tribunal does not have.

12. It is also the case that whatever the position might now be, at the time of Judge Wilding's decision the child did not have any leave to remain and so this was not a factor which he could possibly have taken into account.

13. As Judge Holmes pointed out when giving his reasons for giving permission to appeal, the grounds do not focus on identifying an arguable error of law and indeed do not specify any such error of law. When the Tribunal invited Mr Hossain to identify such an arguable error of law he could do no more than rely on paragraph 3 of Judge Holmes' reasons for granting permission but without going into any detail as to what the error had actually been.

14. Accordingly, this Tribunal must consider whether or not Judge Wilding's decision did contain any error of law with regard to his consideration of whether or not it would be reasonable for the child to leave the UK.

15. Mr Hossain referred the Tribunal to the recent decision of *AB (Jamaica) and AO (Nigeria)* [2019] EWCA Civ 661, which decision was handed down on 12 April 2019 and has taken into consideration the relevant jurisprudence culminating in the Supreme Court's decision in *KO (Nigeria)* [2018] UKSC 53. When the Tribunal invited Mr Hossain to address the court as to the point of law to be derived in the appellants' favour from *AB and AO*, he submitted that this was authority for the proposition that as the child was a qualifying child it would not be reasonable for that child to leave the UK. He then repeated that "because the child has been granted leave to remain, it is not reasonable to remove his parents". When asked how this subsequent grant of leave to the child could touch on Judge Wilding's decision, which had been made earlier, he repeated that the Tribunal should use its discretion to send this decision back to the Home Office.

16. On behalf of the respondent, Ms Jones, in her succinct submissions asked the Tribunal to note that Judge Wilding had been fully aware of the child's circumstances, and had taken into account all the factors concerning the child (set out in particular at paragraphs 17 and 18 of the decision). He had noted that the parents had had no leave to be in the UK since 2014 and he also considered the family dynamics, including the history of the child within his school, and whether he would be able to adapt and learn the language on return to India. At paragraph 21 the judge had noted that no evidence had been produced to show that the child would not be able

to communicate on return and at paragraph 22 he noted that in this particular case he had not been provided with any evidence that the child would not be able to leave the UK and live with his parents, who would have his best interests at heart.

17. The judge also looked at the availability of public services within India and in the UK and on balance considered that it was reasonable for the child to leave with his parents.

18. Accordingly, Ms Jones submitted that in the particular circumstances of this case no error of law had been identified in Judge Wilding's decision and there had been none. In these circumstances there was no proper basis upon which Judge Wilding's decision should be set aside.

19. In reply, Mr Hossain repeated the argument he had made earlier, essentially to the effect that because the child had been given leave to remain, it would not be reasonable to remove his parents, but without making any further argument as to why Judge Wilding's decision contained any error of law by his failure to consider this point.

My Findings

20. What the Court of Appeal found in *AB* is set out succinctly at paragraph 75 of that decision (given by Singh LJ) as follows:

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

21. In this case, it is clear that Judge Wilding did indeed ask himself the right question, because he does so at paragraph 20 when he turns "to consider the question of whether it would be reasonable for AA [the name of the child has been anonymised, although the names of the appellants have not] to return to India".

22. At paragraph 20 Judge Wilding continues as follows:

> "Neither parent has any lawful right to be in the UK, they will therefore be returning to India, all things being equal. AA's best interests are to remain with them, there is nothing, in my view, unreasonable about expecting AA to leave the UK now".

23. Although Judge Holmes in his reasons for granting permission suggests that the judge's accepting that the child "did not speak Hindi" (I note that the judge did not find that the child did not speak Hindi but merely that he "may not speak Hindi") arguably "ought to have prompted a consideration of how the child could access education in India", but in the judgment of this Tribunal the judge did consider this aspect of the case, because he found at paragraph 21 that he was of an age (as was his sibling) where he

"can adapt on return to India", noting that both children "speak English but will be able to adjust and in time learn Hindi insofar as it is required in India".

24. Furthermore, the judge notes that he "was provided [with] no evidence that the children will be unable to communicate on return to Mumbai in English, indeed English is widely spoken in India and is one of the two languages used in administrative affairs".

25. At paragraph 23 the judge notes that both parents, the appellants, can seek employment within India and that accordingly it would be appropriate and reasonable for their children to leave with them as a family together. As the judge notes, at paragraph 19 "AA and AB's best interests are to remain with their parents wherever that may be.". That, in the judgment of this Tribunal, is a clearly sustainable finding.

26. There is nothing untoward in the judge's findings in this case. Families will traditionally stay together and there is nothing in this case which makes it unreasonable to expect the young children of these appellants, the oldest being 7, to remain with their parents as part of one family unit. It is probably the case that the immigration status of the older child does not even have a bearing on this, because regardless of whether or not he has a right at the moment to remain in the UK it would still be reasonable and in his best interests for him to remain with his parents, but regardless of this factor, the issue before this Tribunal is not to reconsider the position of the appellants now in light of events which have happened subsequent to Judge Wilding's decision, but whether at the time of that decision and on the basis of the material put before him, Judge Wilding's findings are sustainable.

27. In the judgment of this Tribunal, Judge Wilding's findings, based on the material which was before him, were and remain sustainable, and no error of law in his decision has been identified.

28. It follows that these appeals must be dismissed and I so find.

Notice of Decision

The appellants' appeals against the decision of First-tier Tribunal Judge Wilding are dismissed, there being no material error of law in Judge Wilding's decision.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig

Date: 18 March 2020