IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003571

First-tier Tribunal Nos: PA/55199/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

29th February 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MD (FIRST APPELLANT)
AK (SECOND APPELLANT)
RK (THIRD APPELLANT)
(ANONYMITY ORDER MADE)

Appellants

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellants: Mr J Dhanji, instructed by Mayfair Law Solicitors
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

Heard at Field House on 29 January 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellants are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellants. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellants are a family comprising of the mother and two dependent children and seek permission to appeal the decision of First-tier Tribunal Judge Wilsher (the judge) dismissing their appeals on 24 April 2023. The sole ground of appeal was in relation to Article 8. The first appellant had two children one born on 14th December 2015 and the second born on 14th July 2020.

2. Previously, the appellants' protection appeal was dismissed on 11 June 2018 (when the first child was approximately 3 years old) and whereupon adverse credibility findings were made against the first appellant. She was also subject to a negative National Referral Mechanism decision. The first appellant proceeded to make a further human rights claim on 23 February 2021 which was refused on 22 September 2021.

Grounds of appeal

3. It was asserted that the judge had misdirected himself in law when finding at [5] and [7] of the decision that the question of whether A2 was a qualifying child within the meaning of Section 117D(1) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) depended on the issue of reasonableness. It was plain from the definition of qualifying child in that section that it is not "subject to reasonableness of removals" as considered by the judge.

4. In terms of the Immigration Rules the judge failed to take into account the fact that the appellant A2 was a relevant child for the purpose of GEN.3.3.(2) of Appendix FM. That again was not dependent upon the question of whether it was reasonable to expect A2 to leave the UK.

5. The judge materially erred in law when assessing the best interests of A2 and whether it was reasonable to expect him to leave the UK and [5] and [6] of the decision.

6. It was not apparent on the face of the decision the source of the judge's acceptance that the father had no lawful status in the UK and that finding appeared to be unsupported by any evidence and was **Wednesbury** unreasonable.

7. The judge did not appear to have been assisted by evidence for A2's father on appeal but nonetheless the judge found at [4] of the decision that A2 currently saw his father up to four times a month and there was family life between them.

8. In these circumstances it was **Wednesbury** unreasonable for the judge to determine in the best interests of A2 and A3 and the reasonableness of expecting A2 to leave the UK, based on the father A2 and A3 leaving with them, as there was no evidence that he would do so and prevent disruption to the lives on the children.

9. The approach of the judge was that it was only if the father gave evidence that he could find if the father would not return, which was an incorrect approach and **Wednesbury** unreasonable.

10. The judge failed to make best interests finding in relation to the child appellants. After turning to that issue in [5] of the decision, there was no finding on what was in the interests of the children before the First-tier Tribunal. The judge concluded the question of reasonableness briefly at [7] of the decision.

11. The judge made a perverse decision finding that it was reasonable for A2 to leave the UK and which failed to take properly into account, if at all, the nature and strength of A2's interest in remaining in the UK as a primary consideration. The judge recorded that A2 had been in the UK for seven years and was a material factor after observing that no presumption was raised by it; no consideration was given to the disruptive effect on withdrawing the child from his integrative social, cultural and educational links. That was a material consideration, not only to the best interests but also the question of reasonableness as shown by **NA (Bangladesh) and others v the Secretary of State [2021] EWCA Civ 953** at [30].

12. The question of whether it was reasonable to expect A2 to leave the UK was relevant to Section 117B(6) of the 2002 Act, in relation to A1 only. For the reasons above, the judge's decision in relation to that assessment was flawed and therefore the decision under 117B(6) is unsustainable.

Submissions

13. At the hearing before me Mr Dhanji submitted that certain grounds, as drafted, were not pursued by him. In particular that the judge had misdirected himself in law under Section 117D of the Nationality, Immigration and Asylum Act 2002 and the assertion that the judge had failed to make a best interests finding was not correct. The two grounds on which he did wish to proceed were first, that the judge had made an insufficient consideration of the impact of the second appellant leaving the UK as a child when looking at his social, cultural and educational interests. He accepted that the judge did look at the child attending school but nothing in the determination looked at the impact it would have should the child have to leave the UK.

14. Secondly, the judge did not make a finding on the impact on the first appellant returning to Albania with two children. The first appellant would be a single mother returning to Albania and that had not been considered.

15. Mr Lindsay helpfully had discussed the evidence prior to the hearing and noted three points. First, that it was the first appellant's evidence that the father was in the UK illegally. Indeed, there was no evidence from the appellants that he was here legally. Secondly, it was the Secretary of State at the First-tier Tribunal that relied on **NA (Bangladesh)**. This was a fact-sensitive consideration and it was clear that the judge did reach a lawful position and it was accepted there had been a best interests assessment. The judge having decided on the reasonableness point, rendered the remaining grounds otiose. In terms of the mother returning as a single mother, it was not clear this was not a clear point relied on before the First-tier Tribunal or in the evidence, such that the judge should have considered it in more detail than previously considered.

Conclusions

16. As the judge, as accepted, had made a best interests assessment, in relation to the second appellant and which is commenced at [5] of the decision, the judge was evidently well-aware that the second appellant had been in the UK for seven years and was a qualifying child and subject to the 'reasonableness of removal' provision. The judge set out that the child attended primary school and that he spoke some Albanian. The judge noted that the child was still young and there was no reason to think that he could not learn Albanian, or writing and reading by building on his oral skills. The judge recorded that the child was in good health

and that there were no other welfare issues arising for the children, raised either by the school or the GP. The mother clearly, as the judge noted, had a teaching degree but did not work. Finally, the judge assessed that there was no suggestion that the schooling or healthcare were not available in Albania and it was evident from the decision that the children would remain with their mother. Specifically, at 7 the judge stated:

> *"Weighing up the matter overall, I therefore consider that it would be reasonable for AK (the second appellant) to return to Albania because he is of an adaptable age, would not face serious obstacles to developing his potential and he will be leaving with his mother and younger brother. He may also maintain contact with his father if the latter chooses (or is required) to return to Albania."*

17. This is clearly an assessment and an adequate assessment of the effects on the child of having to leave the United Kingdom. The decision should be read as a whole, and the judge was aware of the social, integrative and cultural links of the second appellant with the United Kingdom but on an assessment of the evidence overall clearly found it was reasonable for him to return to Albania with his mother and sibling.

18. In relation to the second ground, and the impact on the mother of returning to Albania with two children as a single mother throughout the determination, the judge noted that she was single, for example at [4], he records "The first appellant is a full-time mother who is supported within local authority housing and by welfare benefits. The father does not live with her and does not provide for the children financially". There was no evidence that the father had lawful status in the UK or of the extant immigration proceedings. In particular at [5] the judge recorded

> *"Their mother confirmed she took a teaching degree in Albania but did not work. She has relatives there even though she had lost contact with them. There was no evidence led that the appellants could not re-establish themselves in Albania nor that the social and economic situation there raised serious concerns."*

19. Kaur v SSHD [2018] EWCA [57] confirms that bare assertions are just that and that more than mere practical difficulty is required; mere assertion is insufficient to raise very significant obstacles in relation to an appeal and that is the case here.

20. It is clear that the judge did weigh up the matter overall and properly applied **NA (Bangladesh)**. It is clear that the first appellant's previous appeal was dismissed when she was a single mother. In the circumstances as identified by the judge, he directed himself legally properly and made wholly adequate findings both on the children and in relation to the first appellant on return to Albania.

Notice of Decision

21. I find no material errors of law in the First-tier Tribunal decision and the appeals remain dismissed.

Helen Rimington

Judge of the Upper Tribunal
Immigration and Asylum Chamber
23rd February 2024