Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/14085/2015
HU/14102/2015
HU/14104/2015
HU/14105/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th November 2018	**On 30th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MR Y U (FIRST APPELLANT)
MRS K S (SECOND APPELLANT)
MASTER U A (THIRD APPELLANT)
MISS U A (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms S Jegarajah, Counsel
For the Respondent: Ms A Everett, Senior Presenting Officer

DECISION AND REASONS

1. The Appellants appeal against the decision of First-tier Tribunal Judge A Blake promulgated on 8th March 2018 dismissing their human rights appeals. The Appellants appealed against that decision and were granted

permission to appeal by Upper Tribunal Judge Plimmer in the following terms:

> "Although the First-tier Tribunal made reference to *MA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 705, it is arguable that there has been a failure to identify any strong or powerful reasons why the qualifying children and their family should be expected to leave the UK, given the parents' particular immigration history – see *MT and ET (child's best interests; ex tempore pilot) Nigeria* [2018] UKUT 88 (IAC), applying *MA* at [33]–[34]".

2. I was not provided with a Rule 24 by the Respondent but was given the indication that the appeal was *not* resisted, for reasons which I shall discuss below.

Error of Law

3. Having discussed this matter with the parties at great length, it was the parties' agreed position that there was a clear material error of law in the decision as identified by Upper Tribunal Judge Plimmer in that the First-tier Tribunal had made reference to *MA (Pakistan)* but had failed to consider as a starting point whether there were any strong or powerful reasons why the two children, then being qualifying children and having resided in the UK for over seven years continuously, should be expected to leave the UK.

4. Since the promulgation of the First-tier Tribunal's decision, the Supreme Court has handed down its judgment in *KO (Nigeria) and Others v Secretary of State for the Home Department* [2018] UKSC 53 wherein Lord Carnwath JSC giving the judgment of the court (with which Lord Kerr, Lord Wilson, Lord Reed and Lord Briggs agreed) made clear in [15] to [19] of the judgment that the conduct of migrant parents are matters which the child cannot be blamed for (see *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 at [10] per Lord Hodge). In that light there was a further error identified in the judge's decision given that the judge has stated explicitly at paragraph 132 that he has taken into account the full immigration history of the family and had taken the parents' conduct into consideration. Thus, in that light there is a further error in the decision in that it conflicts with the binding authority of *KO (Nigeria)*. It was agreed by the parties that as a consequence of the error in respect of the failure to take into account the powerful reasons threshold and the judge taking into account the immigration history of the family and implicitly the parents, that paragraphs 124 to 139 of the Tribunal's decision suffered from material errors of law and should be set aside. I agree with the parties' position and I share the view that those paragraphs do suffer from material error of law and are hereby set aside for the above reasons.

5. In light of the above findings I canvassed with the parties whether I should go on to re-make the decision and they agreed that I should with nominal submissions being made by both representatives which are contained in my findings below for the sake of completeness.

6. Thus, in that light I go on to re-make the decision as follows.

Re-making the Decision

7. In light of my findings, I briefly re-make the decision in these terms.

8. Given that the First-tier Tribunal's findings at paragraphs 1 to 123 are not infected with legal error I adopt those paragraphs as part of my decision but do not set them out herein given their length and that their content is not controversial, but take them into account in reaching my decision.

9. In light of the facts as set out in the First-tier Tribunal's decision, I find that the Appellants' Article 8 rights as a family are engaged by virtue of their shared family life and the decision to remove the parents.

10. In accordance with the judgment in *KO (Nigeria)*, I acknowledge that the context of this appeal is that the parents are facing removal and consequently so are the children and that they are expected to return to Sri Lanka as a family. That is the context of the appeal, but as per the judgment of Lord Carnwath, I do not take the conduct of the parents into account other their immigration history (as set out in a plain and mundane way in the First-tier Tribunal's decision at paragraphs 7 to 10, and in the reasons for refusal letter on pages 2 and 6 of the 19-page refusal) but do not consider that history in any way beyond merely reciting the facts, thus giving rise to this appeal and the context of my decision.

11. As agreed by Ms Everett, owing to the Secretary of State's published policy in Appendix FM 1.0b, the Tribunal needs to take into account whether there are any qualifying children. At present date, the older child (Master U A) is now over 10 years of age and has acquired British citizenship as evidenced by the passport that was presented to Ms Everett and which she accepted. Therefore he is a qualifying child and his citizenship is of significance, which I shall turn to shortly. In respect of the younger female child (Miss U A), she remains a qualifying child in that she has lived in the United Kingdom for longer than seven years continuously. Having identified that I am faced with a British child and a third country national qualifying child, I consider them in turn.

12. In respect of the older child, I bear in mind the guidance and decision given in the Upper Tribunal matter of *SF and Others (Guidance, post-2014 Act) Albania* [2017] UKUT 120 (IAC) at [7] to [12] wherein the Vice President of the Upper Tribunal took into account the Secretary of State's

guidance (as it previously was but which remains in largely similar form) and concluded that if the Secretary of State were to make a decision in a person's favour on the basis of that guidance, the Tribunal would also need to make a decision on matters such as reasonableness which are consistent with decisions taken by the Secretary of State in favour of individuals in her published guidance. On that basis, the Upper Tribunal found that the parent of a British citizen child, should be granted a period of leave in order to enable the British citizen child to remain in the UK with them. The policy as it currently stands, since its updation on 22nd February 2018, continues to reflect that it will not be reasonable to expect a British citizen child to leave the UK with an applicant parent or primary carer; and where in practice the child will not, or is not likely to, continue to live in the UK with another parent, EX.1.(a) of the immigration rules is likely to apply. The only consideration which could defeat this matter, according to the guidance, is if a parent suffers from a "very poor immigration history, having repeatedly and deliberately breached the Immigration Rules". Ms Everett did not seek to persuade me that this was the case having had regard to the immigration history in the First-tier Tribunal Judge's decision and in the refusal letter, and also having briefly examined previous determinations of the First-tier Tribunal as they were available to her although not shared with the Appellant nor myself. Ms Everett was of the view that she would not press the point that there was a very poor immigration history in this matter but simply a mundane one given the immigration history as set out in the First-tier Tribunal Judge's decision. I am inclined to share this view, but in any event, I have reservations regarding the lawfulness or applicability of this guidance given the *dicta* of Lord Carnwath's judgment in *KO (Nigeria)*. As a consequence, I would have been averse to taking into account the immigration history of the parents of this British child, even if it were to be very poor, given that the judgment in *KO* is clear in stating that the child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent, which is precisely what the guidance appears to be asking the reader to do. Happily, I do not need to confront this tension as when applying the Secretary of State's policy, and taking into account the Appellant-parents' immigration history, I find that it remains unreasonable for this British citizen child to leave the United Kingdom. Indeed, given that the third Appellant has become a British citizen, he ceases to be subject to 'immigration control' by virtue of Section 1(1) of the Immigration Act 1971 and may have ceased to be a party to these proceedings, but remains the subject of my discussion in any event for the sake of completeness.

13. Turning to the fourth Appellant younger child, given that she is a qualifying child but a third country national, turning again to the Secretary of State's guidance under Appendix FM 1.0b, and in light of the decision in *KO (Nigeria)* and its approval (save for [40] in part) of Lord Justice Elias' judgment in *MA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 705, given that the Secretary of State has in her policy

published that it will be necessary to identify strong or powerful reasons why a qualifying child should be expected to leave the UK, which was met with approval and applied by the Upper Tribunal in the matter of *MT and ET (child's best interests; ex tempore pilot) Nigeria* [2018] UKUT 88 (IAC) wherein at [33] and [34] the Upper Tribunal made it plain that, notwithstanding their best interests, would lie in remaining in the UK, the starting point for a Tribunal is to look for "powerful reasons" why a child who has resided in the United Kingdom for seven continuous years should be removed. In *MT and ET* the Upper Tribunal took into account the immigration history of MT which the panel described as "run of the mill" immigration offending, however given the judgment in *KO (Nigeria)* and that I should not take immigration offending of the parents into account, I start first with an appraisal of whether strong or powerful reasons have been given why the fourth Appellant child should be expected to leave. Notwithstanding my finding that the third Appellant child cannot reasonably leave and the parents must stay here as a consequence, I am of the further view – independent of that third Appellant child – that there are no powerful reasons given to defeat the threshold which the fourth Appellant child has met in having passed the seventh continuous year of residence in the United Kingdom. On that basis and in line with the Secretary of State's published policy it would also be unreasonable to expect the younger child to leave the UK.

14. Thus, in line with the published policy it is unreasonable for either of the children to leave the United Kingdom.

15. I take into account Section 117B of the Nationality, Immigration and Asylum Act 2002 and I note the Appellants did not give evidence in English which I find of course falls against them, but they appear to be self-sufficient during their time here which does not fall against them. I further note that the Appellants have been in the United Kingdom at a time when their status was precarious and that the decision is in accordance with firm and fair and effective immigration control. Notwithstanding the above factors, on balance I find the decision is a disproportionate interference with the family life of the Appellant family and that the balance is tipped in favour of the Appellants as a consequence of it being unreasonable for the two children to leave the United Kingdom with their parents for Sri Lanka.

16. In light of the above findings and in light of the Secretary of State's published position concerning British children, and non-British children who have passed the residence threshold of seven years; I find that the family's removal would be a disproportionate interference with their family life.

17. Accordingly I allow the appeal on human rights grounds.

Notice of Decision

18. The appeal to the Upper Tribunal is allowed.

19. The decision of the First-tier Tribunal is set aside in respect of paragraphs 124 to 139.

20. I re-make the decision in the above terms and hereby allow the appeal on human rights grounds.

21. An anonymity direction is made.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 25 November 2018

Deputy Upper Tribunal Judge Saini