Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/05997/2018
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THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th December 2018	**On 9th January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

BHARTI [S]
AJAY [K]
[G S]
(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr B Malik instructed by Connaughts Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants, nationals of India, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 23rd February 2018 refusing their applications for leave to remain in the UK on the basis of their private and family life. The first Appellant is the wife, the second is the husband and the third is the child of the same family. First-tier

Tribunal Judge Lucas dismissed the appeals in a decision promulgated on 23rd July 2018. The Appellants now appeal to this Tribunal with permission granted by First-tier Tribunal Judge Lambert on 11th October 2018.

2. The background to this appeal in summary is that the first Appellant named above came to the UK on 21st October 2009 with entry clearance. She was granted further periods of leave until 24th January 2017. On 20th January 2017 she applied for further leave to remain on the basis of her private and family life. In the Reasons for Refusal letter the Secretary of State accepted that the first and second Appellants are in a genuine and subsisting relationship. They have two children together. As the partner is not a British citizen and, at the date of the application, the children (then aged 5 years and 7 months and 1 year and 8 months) had not spent seven years residing in the UK, the Secretary of State considered that they did not meet the requirements of the Immigration Rules.

3. The First-tier Tribunal Judge considered the appeals and found that the removal of the Appellants is not disproportionate or unlawful in the context of their rights under Article 8 of the ECHR. Two grounds are put forward in the Grounds of Appeal.

4. It is contended in the first ground that the judge failed to give findings on material matters and failed to take into account material evidence. It is contended that the judge failed to take account of the report of an independent social worker. Mr Malik did not make any further submissions in relation to this ground at the hearing. In my view he was right to do so. The judge considered the report of the social worker at paragraphs 13 and 14 of the decision where he noted the conclusions that in the view of the social worker the third Appellant had put down roots that were described as robust, secure and stable in the UK and that her best interests would not be protected and promoted should she be removed to Punjab. At paragraph 33 the judge noted that he had considered the best interests report prepared by the social worker and carefully considered the contents. The grounds contend that the judge failed to consider the social worker's assessment as to the analysis of different levels of education available in India. In the decision at paragraph 33 the judge said

> "There is a system of state education available in India and the fact that it is different to that in the UK is immaterial to this appeal. It is accepted that there will be disruption to the education of Appellant three, but in all of the circumstances, she will adapt to life in India with the help and support of her parents".

5. As pointed out in the Rule 24 notice by the Secretary of State it is not clear what, if any, qualifications the social worker had in relation to educational provision in India. In my view the judge has given adequate consideration to the report from the social worker in assessing the best interests of the children.

6. It is contended in the second Ground of Appeal that the judge erred in failing to engage with the authorities and the legislation in particular

Section 117 of the Nationality, Immigration and Asylum Act 2002 in terms of his assessment of the Article 8 appeal. In his skeleton argument Mr Malik expanded upon this ground relying on the decisions in **MA (Pakistan) and Others [2016] EWCA Civ 705** in particular paragraphs 46, 47 and 49. In his submission the effect of the guidance in **MA (Pakistan)** is that, in the case of a child who has been in the UK for seven years or more or is a British citizen, there is a very strong expectation that the child's best interest will be to remain in the UK and such very strong expectation can only be displaced by strong reasons. He submitted that the fact that it is in a child's best interests to remain in the UK does not lead inevitably to the conclusion that requiring the child to leave would be unreasonable under Section 117B(6)(b) and that this statement simply underscores the fact that best interests do not lead categorically to a finding that removal would be unreasonable and that there is a residual consideration of reasonableness that is not determined simply by reference to the best interests. However he contends that ultimately in such cases the starting point is that leave should be granted unless there are powerful reasons to the contrary.

7. In his skeleton argument and at the hearing Mr Malik also relied on the case of **MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC).** He accepted that the error of law found by the Upper Tribunal in that case related to the ex tempore pilot scheme but contended that in remaking the decision the Upper Tribunal at paragraphs 33 and 34 looked at whether there was a powerful reason to the contrary to displace the starting point that the child ought to be granted leave. In his submission the Upper Tribunal's finding reflects the high threshold that any notional powerful reasons to the contrary meet that the high threshold is in turn a reflection of the natural meaning of the phrase powerful reason to the contrary in the absence of such a high threshold the phrase is rendered meaningless in his submission. It was therefore submitted that, in spite of the nuance in the law in this area, ultimately the law creates a starting point to the position favourable to the child, namely that leave should be granted unless there are powerful reasons to the contrary. In his submission the judge in this case completely omits to engage with Section 117B(6) and the associated authorities at all or properly.

8. He further relied on the decision in **Forman (ss117A-C considerations) [2015] UKUT 412** at paragraph 20. In his submission as in the case of **Forman** the First-tier Tribunal Judge in this case erred in failing to set out Section 117B or to refer to it at all. He submitted that the Upper Tribunal in **Forman** said that if Section 117B has not been set out then there is an error of law. In the alternative he submitted that the omission is material in this case because **MA (Pakistan)** as underscored by **MT and ET** sets out the high threshold and if the judge does not state the high threshold it is not possible to know how he has applied it. In these circumstances the findings are unsafe in his view and therefore the error is material.

9. At the hearing Mr Lindsay submitted that the question posed by Section 117B(6) is whether it is reasonable to expect a third Appellant to leave the

UK with her parents. In his submission the judge has answered that question here and has given clear reasons for that answer. He referred to the headnote in the case of **Forman** where the Tribunal said

> "(1) The public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.
>
> (2) The list of considerations contained in Section 117B and 117C of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) is not exhaustive. A court or Tribunal is entitled to take into account additional considerations, provided that they are relevant in the sense that they probably bear on the public interest question.
>
> (3) In cases where the provisions of Section 117B to 117C are of the 2002 Act arise, the decision of the Tribunal must demonstrate that they have been given full effect."

10. He submitted therefore that the issue is not the failure to set out the law but whether Section 117B had been given full effect. In his submission it has. He also referred to the decision in **MT and ET** and to head note 1 which states:

> "A very young child, who has not started school or who has only recently done so, will have difficulty in establishing that her Article 8 private and family life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part".

Mr Lindsay submitted that the judge found at paragraph 30 that the Appellant was not at a critical point in her education. Accordingly in his view it was open to the judge to conclude that the third Appellant did not have a sustainable private life in the UK. In his submission it is clear that family life is not relevant here as the Appellants will be returned together as a family.

11. Mr Lindsay relied on the decision in **KO v Secretary of State for the Home Department [2018] UKSC 53**. He relied on paragraph 10 where the Supreme Court sets out the Immigration Directorate Instruction on family life as a partner, a parent and private life ten year routes and to an extract headed "would it be unreasonable to expect an non-British citizen to leave the UK?" under which there were a number of relevant considerations such as risk to the child's health, family ties in the UK and the likelihood of integration into life in another country and went on to say:

> "It is generally the case that it is in a child's best interest to remain with her 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".

12. He further referred to paragraph 19 of the decision in **KO** which cites an extract from **EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874** paragraph 58 and where Lord Carnwath in the Supreme Court went on to say

> "To the extent that Elias LJ may have suggested otherwise in **MA (Pakistan)** paragraph 40, I would respectfully disagree. There is nothing in the section to suggest that 'reasonableness' is to be considered otherwise than in the real world in which the children find themselves".

Mr Lindsay submitted that the judge answered that question in this case.

13. Mr Malik disagreed with Mr Lindsay's suggested interpretation of the decision in **KO**. He contended that nowhere in **KO** does it say that the IDIs contain a comprehensive statement of the law. In his submission at paragraph 19 of **KO** there was a focus there on the question of whether reasonableness takes into account having to leave the UK or instead looks at the reality of whether the child would have to leave the UK or not. He contended that in **KO** there was a broad range of issues considered and there were quite a lot of obiter statements and if the Supreme Court had wanted to disapprove of **MA (Pakistan)** they would have done so explicitly.

Error of Law

14. As set out above I do not accept that the judge erred in relation to his approach to the social worker report.

15. In terms of the Article 8 consideration it is clear that paragraphs 22 to 35 amount to a consideration of the appeal under Article 8. In my view all of the findings there go to the Article 8 issue. I accept that the judge has not set out a separate consideration under the Rules and under Section 117B explicitly. However it is adequately clear that the judge has considered all relevant matters.

16. The judge accepted that the first and second Appellant have established a private and family life in the UK in the full knowledge that they had no settled status [24] the judge considered the circumstances of the child at paragraphs 25, 29, 30 and 33. In my view it is crucial to note that at paragraph 33 the judge concluded that it is in the best interest of the children, in particular the third Appellant who had at that stage been in the UK for over seven years, to be in a family unit with her parents.

17. Having reached such a conclusion it is not therefore the case that the judge was looking at any residual consideration of reasonableness as suggested by Mr Malik in his skeleton argument at paragraph 12. His submission is based on a finding that the child's best interests are to remain in the UK. That is not the finding made in this case.

18. There is no submission in the skeleton argument or at the hearing that the Appellants met the requirements of the Immigration Rules. Accordingly all of the issues considered by the judge were outside of the Rules. At paragraph 32 the judge considered whether there were insurmountable obstacles to the family unit continuing their private and family life in India. The judge considered that the Appellants would adapt to life in India and that the third Appellant would adapt to life in India with the help and support of her parents. At paragraph 29 the judge considered that the two children, although settled in school in the UK, would be able to adapt to life in India and would continue to benefit from the support and parental responsibility of their parents and that any disruption to their education would be temporary and they would have the support of their family their parents and family members in India.

19. It is clear to me that, although not articulated in terms of whether it would be reasonable for the third Appellant to leave the UK, the judge's concentration throughout the reasoning on the situation of the third Appellant and the judge's assessment of the circumstances in the UK and in India, it is clear to me that the judge considered in substance whether it was reasonable to expect the third Appellant to leave the UK. It is adequately clear that the judge's conclusion on this matter was that it is reasonable to expect the third Appellant to leave the UK. In these circumstances in my view it is clear that the judge gave adequate consideration to the substance of Section 117B as it affects these Appellants. In my view the judge reached a conclusion open to him that having considered all relevant factors that the decision to refuse the applications is proportionate.

Notice of Decision

There is no material error in the First-tier Tribunal Judge's decision. The decision of the First-tier Tribunal will stand.

No anonymity direction is made.

Signed Date: 21st December 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed and therefore there can be no fee award.

Signed Date: 21st December 2018

Deputy Upper Tribunal Judge Grimes