Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11767/2018**

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On July 18, 2019	**On August 07, 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDUL [S]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms Aboni, Senior Home Office Presenting Officer
For the Respondent: Mr Khan, Counsel, instructed by Fountain Solicitors

DECISION AND REASONS

1. Whilst the respondent is the appellant in these proceedings before me, I hereafter refer to the parties using terminology used in the First-tier Tribunal. The appellant in the First-tier Tribunal will hereafter be referred to as "the appellant" in these proceedings, and the respondent will be referred to as "the respondent".

2. The appellant, a Pakistani national, entered the United Kingdom as a student on 26 October 2010. His leave was initially extended until 12 October 2013, but that leave

was curtailed before his leave was extended on 1 September 2013 enabling him to remain his as a Tier 4 (General) student until 9 April 2016.

3. On 26 April 2014 the appellant was served with form IS151A because he was found to have used deception to obtain leave by using a proxy taker to obtain his TOEIC certificate. On 27 April 2017 he made an application for leave to remain which was refused by the respondent on 14 May 2018.

4. The appellant appealed the decision under section 82(1) of the Nationality, Immigration and Asylum Act 2002 and his appeal came before Judge of the First-tier Tribunal Andrew (hereinafter referred to as the "FTT Judge") on 19 November 2018 who in a decision promulgated on 21November 2018 allowed the appellant's appeal on human rights grounds.

5. The respondent appealed this decision on 27 November 2018 arguing the FTT Judge had erred in dealing with the appellant's immigration history and this impacted on her assessment under article 8 ECHR.

6. Permission to appeal was granted to the appellant by Judge of the First-tier Tribunal Pedro on 27 December 2018 who in granting permission found it was arguable the FTT Judge had erred by failing to give sufficient weight to the public interest and failed to apply the "real world test" in KO (Nigeria) [2018] UKSC 53.

7. A Rule 24 reply, dated 29 January 2019, argued that the FTT Judge had considered S117B(6) of the 2002 Act correctly and had properly balanced the best interests of the child against the adverse findings made against the appellant. The Court made clear that the "reasonableness" test in both section 117B(6) and paragraph 276ADE(1)(iv) involved a child-centred approach set in a 'real world' context.

8. In JG (s.117B(6); "reasonable to leave" UK) Turkey [2019] UKUT 00072 the Tribunal stated Section 117B(6) of the 2002 Act required a court or Tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so.

9. No anonymity direction is made.

SUBMISSIONS

10. Ms Aboni adopted the grounds of appeal and invited the Tribunal to find an error in law. In dealing with Section 117B(6) of the 2002 Act the FTT Judge failed to weigh up the best interests of the children against the appellant's immigration history and in doing so had erred. The fact the appellant had used deception in applying for further leave and had then absconded when the deception was detected were factors the FTT Judge should have given greater weight to. The appellant had no basis of stay, had formed a relationship with partner and chosen to have a family life despite knowing his immigration status. The child was not required to leave the United Kingdom as they could stay with mother or they could choose to accompany him and their

mother to Pakistan. She placed reliance on pages 68-69 of the Family Migration Appendix FM 1.0b April 2019 policy document.

11. Mr Khan relied on the Rule 24 reply and invited the Tribunal to find the respondent's grounds of appeal were a mere disagreement with the FTT Judge's decision. The Supreme Court in KO considered the February 2018 IDI (current one is April 2019) and made it clear the child's best interests must not be affected by the public interest. At para [17] the Court made clear section 117B(6) was a free standing test and the "real world test", set out in para 18 and 19, was the test to be applied. If one parent has no right to remain, but the other parent does, that is the background against which the assessment had to be conducted. If neither parent had the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question was, "is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

12. In this case the children's mother had the right to remain and the question was whether it was reasonable to expect the child to leave the UK?

13. The appellant was not guaranteed to succeed with an entry clearance application because he had practised deception and if he were not allowed back into the country there would be a break in family life.

14. The child's mother was unable to return to Pakistan because a forced marriage protection order (pages 45-47) had been obtained because the police feared she would be forced to marry a cousin in Pakistan, and she feared her family would find her were she to return.

15. If conduct came into the assessment (old style article 8 appeal) then the FTT Judge had to consider whether reasonable for children to leave the UK and did the public interest require the children to leave the UK and go to Pakistan. The FTT Judge took into account the following factors and concluded that removal was not proportionate. Those factors were:

    (a) Children were 3½ and 10 months.

    (b) At par 37 the Judge recognised the children are very young and return was not contemplated.

    (c) Children's best interests for the appellant to be allowed to remain.

    (d) At para 38 the Judge allowed the appeal with some reluctance

    (e) Judge reached conclusion that was open to them. Public interest tilts in their favour.

16. The decision was open to the FTT Judge and the appeal should be dismissed.

17. Ms Aboni responded that although the FTT Judge found the appellant's wife would not wish to return, there had also been a finding she would not be at risk having

visited Pakistan on a number of occasions and any entry clearance application cannot be pre-judged by the FTT Judge as respondent makes this decision. She asked that I set aside the decision and remake it

FINDINGS ON ERROR IN LAW

18. This was an application for leave to remain by an appellant whose application to remain had been refused after it was discovered he had used deception to extend his stay by the use of a proxy taker. The FTT Judge allowed the appellant's appeal and the respondent has challenged that decision.

19. In KO Lord Carnwath left open the question of "reasonableness" by holding that the best interests assessment must be conducted in "the real world in which the children find themselves." In doing so he endorsed the approach in EV (Philippines) [2014] EWCA Civ 874 and SA (Bangladesh) 2017 SLT 1245 that the child's right to remain does not automatically guarantee that the parents will be granted leave to remain as well.

20. In JG, Mr Justice Lane stated:

> "39. We do not consider our construction of section 117B(6) can be affected by the respondent's submission that, in cases where – on his interpretation – the subsection does not have purchase (i.e. because the child would not in practice leave the United Kingdom), there would nevertheless need to be a full-blown proportionality assessment, compatibly with the other provisions of Part 5A of the 2002 Act, with the result that a person with parental responsibility who could not invoke section 117B(6) may, nevertheless, succeed in a human rights appeal.
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> 40. Such an assessment would, however, have to take account of the immigration history of the person subject to removal; so there could well be a very real difference between the outcome of that exercise, and one conducted under section 117B(6). But, the real point is that this submission does not begin to affect the plain meaning of subsection (6). If, as we have found, Parliament has decreed a particular outcome by enacting section 117B(6), then that is the end of the matter.
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> 96. We therefore conclude that, on the facts of this case, it would not be reasonable to expect the appellant's children to leave the United Kingdom, in the event of her removal. This means the appellant's appeal succeeds. It does so because Parliament has stated, in terms, that the public interest does not require her removal, in these circumstances. It does so despite the fact that, absent section 117B(6), the appellant's removal would be proportionate in terms of Article 8 of the ECHR."

21. The Court of Appeal in AB (Jamaica) [2019] EWCA Civ 661 upheld this core reasoning and Singh LJ stated,

> "I respectfully agree. 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."

22. It is against this background that I have considered the respective submissions. Effectively, Ms Aboni argued the FTT Judge erred by placing insufficient weight on the appellant's immigration history. That approach has been found by both the Upper Tribunal and the Court of Appeal to be wrong. The appellant's immigration history would come into play if it was not unreasonable for the child to leave and a full blown assessment under article 8 ECHr was being carried out.

23. At paragraph [37] the FTT Judge considered section 117B(6) and the FTT Judge gave reasons why it was unreasonable to expect the children to leave on the basis the children and their mother were British citizens and the mother could not consider a return to Pakistan.

24. Both the grounds of appeal and the grant of permission failed to engage with what the Upper Tribunal and the Court of Appeal subsequently said about section 117B(6) post KO and the approach to be taken and whilst it may seem unpalatable that a person who has acted dishonestly be allowed to remain, that was a finding the FTT Judge could come to in light of how the courts have since interpreted KO and in the circumstances there is no error in law.

NOTICE OF DECISION

25. There was no error in law and I uphold the original decision.

Signed Date 23/07/2019

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

No fee award was made by the First-tier Tribunal.

Signed Date 23/07/2019

Deputy Upper Tribunal Judge Alis