Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11892/2017

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 29th March 2019	**On 25th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

ROQIA [A]
(No anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr K Forrest, Advocate, instructed by Anderson Rizwan, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by Judge of the First-tier Tribunal Stuart Buchanan dismissing an appeal on human rights grounds.

2. The appellant is a national of Pakistan. She is married with two children, a daughter and a son. The family all live together in Scotland. At the date the human rights claim leading to this appeal was made, 3rd July 2015, the appellant's son (hereinafter referred to as "HA") was under 18 but at the date of the hearing before the First-tier Tribunal on 22nd May 2018 he was over 18.

3. The appeal before the First-tier Tribunal was largely based upon the position of HA, as a qualifying child who had been in the UK for more than 7 years at the time the human rights application was made. At the age of 9 in 2008 he had entered the UK accompanied by his parents and sibling. Upon consideration of the evidence the Judge of the First-tier Tribunal was not satisfied or that it would be disproportionate to require the appellant to leave the UK either with the rest of her family or even without her children, who were now adults.

4. Permission to appeal was granted by the Upper Tribunal principally on the basis that following the decision of the Supreme Court in KO (Nigeria) [2018] UKSC 53 the Judge of the First-tier Tribunal arguably erred by taking into account his parents' immigration history in deciding whether it was reasonable to expect HA to leave the UK.

Submissions

5. For the appellant, Mr Forrest relied on the grounds of the application for permission to appeal. He submitted there were two reasons why the decision of the First-tier Tribunal was wrong, based on the authorities of KO (Nigeria) and JG (s117B(6) "reasonable to leave" UK) Turkey [2019] UKUT 72. The First-tier Tribunal erred by concluding that it was reasonable to expect HA to leave the UK and by the way that section 117B(6) was applied.

6. In more detail, Mr Forrest submitted that the judge addressed the best interests of HA in relation to the exercise of private life in the UK but exactly the same reasoning applied to the reasonableness of expecting him to leave. At paragraph 5.8 of the decision the judge found it was in HA's best interests to remain in the UK but the judge then looked at the immigration history of HA's parents, and particularly that of his father, and concluded that at the date of the human rights application HA did not meet paragraph 276ADE(1)(iv) of the Immigration Rules. After looking at HA's father's circumstances the judge reached a different conclusion from what he had decided HA's best interests were. In MA (Pakistan) [2016] EWCA Civ 705 it was decided that paragraph 276ADE(1)(iv) was a stand-alone provision and parents' misdemeanours should not be taken into account. The grant of permission to appeal indicated that MA (Pakistan) was overruled by KO (Nigeria) but this was not strictly correct. In addition to looking at KO (Nigeria) earlier Supreme Court decisions should be taken into account, namely ZH (Tanzania) [2011] UKSC and Zoumbas [2013] UKSC 74.

7. Turning to JG, Mr Forrest submitted that, according to the headnote, in applying s 117B(6) the tribunal should hypothesise that the child would leave the UK. If the parents were not liable to removal then there would be no public interest in removing the child. Where the

parents were liable to removal the starting point was whether the child should be expected to leave the UK. Mr Forrest acknowledged that in the present appeal each member of the family had no more than temporary admission. From paragraph 8.4 onwards the Judge of the First-tier Tribunal discussed the reasonableness of expecting HA to leave the UK but had earlier found that at the time the human rights claim was made, when HA was only 15, it was in his best interests to stay. The judge failed to make any further finding in relation to the expectation that HA would accompany his mother. The findings made from paragraph 8.4 onwards were not open to the judge given the earlier findings made. The judge treated HA as if he was on a "gap year" whereas he had been in the UK for a long time. The judge had assumed the position was different for someone aged 15 but time had passed while HA continued to study and the judge should have assessed the period after the age of 15.

8. Mr Forrest acknowledged that para 276ADE(1)(v), which was mentioned in the application for permission to appeal, did not apply as HA was under 18 when the human rights claim was made. This was an Article 8 claim in which, instead of taking an unduly prescriptive approach, all the circumstances should have been looked at in the round, including the position when HA was under 18. The judge did not mention educational certificates for HA's father and a psychologist's report which were before the tribunal.

9. For the respondent Mr Govan supported the decision of the First-tier Tribunal. The decision in MA (Pakistan) was not overturned by KO (Nigeria). At paragraph 45 of MA (Pakistan) the Court of Appeal took the same approach to reasonableness as the Supreme Court in KO (Nigeria), as set out at paragraphs 11, 17,18 and 19. The actions of the parents would not be taken into account in assessing the best interests of the child but would be relevant to the overall proportionality assessment.

10. Mr Govan continued by saying that the present appeal was a good example of looking at the child's circumstances in the "real world" context referred to in KO (Nigeria) at paragraph 19. There had been a protracted period between the human rights claim and the appeal. It was necessary to look at the circumstances at the time of the original decision and on appeal. The Judge of the First-tier Tribunal had applied the correct test at paragraphs 5.2-5.8 by considering the best interests of HA without looking at outside factors. The judge then considered those other factors at 5.9-5.13 and found it was not unreasonable to expect HA to leave the UK. The judge had not given inappropriate relevance to past conduct. The family would all return to Pakistan together. There was no error of law.

11. Mr Govan pointed out that although HA was not eligible to rely on paragraph 276ADE(1)(v) at the date of the human rights claim, because he was then under 18, he could make an application under this provision in his own right.

12. Mr Govan commented on an important distinction between paragraph 276ADE(1)(iv), which applied to circumstances at the date of the human rights claim, and s 117B(6), which applied to the prevailing circumstances at the date of the application or when any subsequent decision was being made , whether by the Secretary of State or by a tribunal on appeal. The Judge of the First-tier Tribunal had considered Article 8 outside the rules as he was entitled to do and had assessed the family's circumstances in considerable detail, taking into account the degree of integration, languages spoken, family ties, and education. The judge took into account the refusal of an asylum claim. At paragraph 8.5 and 8.6 the judge looked at proportionality and reasonableness based on the facts of the case. The judge did not accept there were no ties with Pakistan, such as a family home and financial interests there. The judge noted that HA was not in education at the time of the hearing. The family's immigration history included verbal deception and the family had no leave to continue residing in the UK.

13. In response Mr Forrest submitted that at paragraph 5.8 the Judge of the First-tier Tribunal found that at a certain point it was in HA's best interests to remain in the UK. At that time HA's education was a critical factor. The appeal did not succeed because of the passage of time between that point and the date of the hearing but this lapse of time was not the fault of the appellant.

Discussion

14. I will begin my consideration of whether the Judge of the First-tier Tribunal erred in law by looking at the structure of his decision. The Judge of the First-tier Tribunal started his consideration at paragraph 5.2 by assessing the best interests of the appellant's son, HA, at the date of the human rights claim in July 2015. As stated at paragraph 5.9, the judge had in mind the application at that time of paragraph 276ADE(1)(iv) of the Immigration Rules. The judge found that at that time the best interests of HA were served by remaining in the UK to complete his secondary education. The judge observed at paragraph 5.8 that HA was at a critical stage of his education.

15. Having found that in 2015 it was in the best interests of HA to remain in the UK, the judge then proceeded, from paragraph 5.9 onwards, to consider whether it would have been reasonable to expect HA to have left the UK with his parents at that time, seeking to apply the test in paragraph 276ADE(1)(iv). In considering this the judge took into account the family's immigration history and HA's father's two criminal convictions. At paragraph 5.13 the judge

concluded that it would not have been unreasonable to expect HA to leave the UK in July 2015. The reasons supporting this conclusion are based primarily on the family's immigration history. The judge also took into account that HA spent the first nine years of his life in Pakistan and his parents still have business interests there. The judge referred to an unsuccessful asylum claim based on grounds of religion and referred to an item of psychiatric evidence.

16. Surprisingly I do not recall either party referring me specifically to paragraph 16 of KO (Nigeria), where Lord Carnwath stated as follows:

> "It is natural to begin with the first in time, that is paragraph 276ADE(1)(iv). This paragraph is directed solely to the position of the child. Unlike its predecessor DP5/96 it contains no requirement to consider the criminality or misconduct of a parent as a balancing factor. It is impossible in my view to read it as importing a requirement by implication."

17. This clearly shows that the Judge of the First-tier Tribunal erred in law by taking into account HA's parents' immigration history and his father's criminal convictions under paragraph 276ADE(1)(iv). It is fair to the Judge of the First-tier Tribunal to observe that the Supreme Court's decision in KO (Nigeria) was not given until October 2018, some 5 months after the hearing of this appeal before the First-tier Tribunal, but this does not alter the finding of an error of law.

18. What is the significance of this error? The answer is that it is not material to the outcome of this appeal. This is not the appeal of HA but of his mother. Were it HA's appeal then it might be that the decision of the First-tier Tribunal would be set aside. But as this is his mother's appeal there are further considerations to be taken into account. The only finding in this appeal which would be altered as a result of this error is that in July 2015 HA should have been successful in an application on his own account under paragraph 276ADE(1)(iv). If HA made such an application and it was refused by the Secretary of State, HA nevertheless did not pursue an appeal against it. Instead this appeal was brought by HA's mother on her account. At the time the appeal was decided by the First-tier Tribunal in May 2018, HA was approaching his nineteenth birthday and any entitlement he might have had under paragraph 276ADE(1)(iv) was confined to a historical possibility.

19. In passing I note Mr Forrest's submission that the lapse of time between the making of the human rights claim in July 2015 and the hearing in May 2018 was not the fault of the appellant. Nevertheless, as will be seen, this passage of time is important in relation to section 117B(6) because HA reached 18 years of age in June 2017 and was then no longer a qualifying child for the purpose

of this provision. Mr Forrest also questioned why, if education was considered critical in assessing HA's best interests in 2015, it should not also have been critical in 2018. The answer to this question, of course, is that by May 2018 HA was no longer a child and his best interests were no longer a primary consideration in his mother's appeal. As Mr Govan pointed out, it is open to HA to make an application on his own behalf under paragraph 276ADE(1)(v). If this is successful he will be entitled to remain in the UK as a an adult and may have the opportunity of proceeding to tertiary education in this country.

20. Having considered the application of paragraph 276ADE(1)(iv) in July 2015, the Judge of the First-tier Tribunal then considered at paragraphs 6 to 7 of his decision how the Immigration Rules related to the jurisdiction he was exercising. After this he proceeded, from paragraph 8 onwards, to consider the application of Article 8 outside the Immigration Rules, having regard to the facts and circumstances at the date of the hearing in May 2018. The judge referred at paragraph 8.4 to section 117B. By May 2018, of course, as the Judge of the First-tier Tribunal recognised, HA was no longer a qualifying child as he had attained the age of 18 in June 2017. The judge concluded that where the family was leaving together there would be no interference with family life and the interference with private life was not disproportionate. Furthermore, both children were adults and there was no evidence of more than usual dependency between adult family members. Even if the appellant left without the children any interference with family life would not be disproportionate.

21. The proportionality assessment under Article 8 carried out by the Judge of the First-tier Tribunal was carefully reasoned and took full account of all the relevant factors. It has not been challenged save in relation to the best interests of HA and the reasonableness of expecting him to leave the UK. By the time of the hearing in May 2018, however, these matters were no longer relevant to this appeal as HA was an adult. The judge took into account the question of dependency by adult family members but he does not appear to have had before him evidence or submissions specifically directed to this.

22. The position is that although a significant part of the reasoning of the Judge of the First-tier Tribunal, in relation to the application of paragraph 276ADE(1)(iv), was based on an error of law, this was not material to the outcome of the appeal. The important part of the judge's decision was the proportionality assessment under Article 8, in which the judge did not make any error of law.

23. There is a further issue arising from the application for permission to appeal. This is the question of whether the Judge of the First-tier Tribunal properly addressed whether there would be very significant obstacles to the appellant's integration into Pakistan, in terms of paragraph 276ADE(1)(vi). It was pointed out that the appellant's father has been given refugee status in the UK on the grounds of religion.

24. Mr Forrest had little to say on this issue at the hearing, for reasons which are apparent. The Judge of the First-tier Tribunal addressed the issue initially at paragraph 5.14. The judge noted that there was no appeal on protection grounds before him and an earlier asylum claim was unsuccessful. The judge further noted that only selective documents from the unsuccessful asylum claim were lodged on behalf of the appellants. These included an expert report, referred to in the application for permission to appeal, which the judge found was of little weight without the rest of the documentation relating to the claim. The judge referred in similar terms to a psychologist's report from 2009 on the appellant.

25. In the application for permission to appeal it is stated that the findings at paragraph 5.14 were made in respect of the position of the appellant's son, rather than the appellant herself. However, the judge went on to consider at paragraph 5.18 whether there were very significant obstacles to integration for the appellant and her spouse. The judge specifically took into account recent medical evidence from 2018 and found there was nothing to show the appellant would not receive effective treatment in Pakistan. Subsequently, at paragraph 8.7, the judge considered the ability of the appellant and her husband to provide for themselves on return to Pakistan and noted that if their property had been unlawfully acquired by other members of their family they could have recourse to the legal system. In short, there is no substance in the contention that the judge did not adequately consider whether there would be very significant obstacles to integration by the appellant on return to Pakistan.

26. Having considered the grounds of the application for permission to appeal and the submissions made before me, I am not satisfied that the decision of the First-tier Tribunal contains any error of law which could have given rise to a different outcome. Accordingly the decision of the First-tier Tribunal dismissing the appeal shall stand.

Conclusions

27. The making of the decision of the First-tier Tribunal did not involve the making of an error of law.

28. The decision of the First-tier Tribunal dismissing the appeal shall stand.

Anonymity
The First-tier Tribunal made a direction for anonymity. I have not been asked to continue this direction and I see no reason of substance for doing so.

M E Deans
16th April 2019
Deputy Upper Tribunal Judge