Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/14427/2017
HU/14433/2017
HU/14436/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 April 2019	**On 2 May 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS AKLIMA [I]
MR MD MAHABUBUL [H]
(ANONYMITY DIRECTION NOT MADE)

MASTER M H
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondents: Mr M Iqbal, Counsel, instructed by KC Solicitors

DECISION AND REASONS

1. In a decision sent on 4 October 2018 Judge Ferguson of the First-tier Tribunal (FtT) allowed the appeal of the respondents (hereafter the claimants) who are husband and wife and son (aged 13), all citizens of Bangladesh, against the decision made by the appellant (hereafter the Secretary of State or SSHD) on 27 October 2017 refusing their applications for leave to remain based on family and private life grounds. The judge concluded that the first claimant met the suitability requirements of the Rules (paragraph S-LTR.1.6 of Appendix FM) as well as paragraph 276ADE(iv) (in respect of the third claimant) and paragraph EX.1 (in respect of the first two claimants), the claimants also being able to benefit from S117B(6)NIAA 2002.

2. The SSHD's grounds lack clarity, as Mr Clarke conceded. In essence they appear to raise two main points. First, it is submitted that the judge erred in treating the child claimant's best interests as a "trump card", since "accepted law dictates [such interests are to be] always with their parents as a starting point". Second, it is contended that the judge erred in failing to observe that there were "countervailing reasons that would override the fact that the minor [claimant] has been in the UK for over 7 years …", in particular: the fact as found by the judge that there were no very significant obstacles to the first two claimants returning to Bangladesh (paragraphs 16 and 17); that they had the opportunity to pursue an asylum claim but chose not to do so and had not established any asylum-related obstacles (paragraph 18); the fact that the first claimant used a proxy to sit his ETS test; and the fact that "none of the family members have ever had entitlement to permanent stay and in fact they have only benefited from Section 3C leave since the curtailment of Mrs [I]'s leave due to no longer satisfying the terms of her Tier 4 visa in April 2016".

3. I heard helpful submissions from both representatives. Mr Clarke submitted that the judge was required to consider whether it was reasonable to expect the child to leave the UK and whether there were compelling circumstances outside the Immigration Rules. In the case of the third claimant, although he had been in the UK for 8 years, he was not at the GCSE or AS/A level stage of his education; the judge found that he had some level of understanding of Bengali and it was not suggested there were any health issues. The judge had failed to follow the guidance set out in **KO (Nigeria)** [2018] UKHL [2018] UKSC 53 and by the Court of Appeal in **EV (Philippines) [**2014] EWCA Civ 874.

4. I am not persuaded that these grounds are made out, for three main reasons.

5. First, it is quite clear that the judge did not treat the child's best interests as a "trump card", he himself noting at paragraph 21 that they could be "outweighed by the force of other circumstances". Further, Mr Clarke conceded that it was open to the judge to find that the third claimant's best interests lay in remaining in the UK. That represented a resilement from the position taken in the written grounds.

6. Second, so far as the judge's treatment of the reasonableness issue is concerned, **KO (Nigeria)** has confirmed at paragraph 17 that paragraph 276ADE(1)(iv) and S117B(6) of the NIAA 2002 are directed solely to the position of the child and contain "no requirement to consider the criminality or misconduct of a parent as a balancing factor". Hence the judge did not err in conducting an assessment of reasonableness that did not factor in such conduct.

7. Third, whilst **KO** makes clear that in both contexts it remains relevant to consider where the parents, apart from the relevant provision, are expected to be, in the case of the third claimant in this case, he being a qualifying child resident in the UK for over 7 years, he stood to benefit from the guidance given in **MA (Pakistan)** (not in my view contradicted by **KO (Nigeria)**) requiring "strong reasons" to be shown why he should be expected to leave the UK. (The judge noted that this was also the Home Office guidance applicable at the date of decision (paragraph 24)).

8. Whilst the judge's application of that guidance may have been more generous than some other judges may have made, it cannot in my judgment be said to be outside the range of reasonable responses. At paragraphs 21–24 the judge stated:

> "21. As Lord Hodge said in *Zoumbas*: *'it is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations'*. M's circumstances are not in significant dispute: he came to the UK aged 5 and is now aged 13 having lived here for eight years. He is well settled in school and has positive school reports set out at pages 43 – 64 of the bundle. The reports show that he is engaged in all the range of activities offered by the school and he has a centre of interest well beyond her home life with his parents. He is no longer a very young child but has just begun his third year of secondary school (Year 9) and so the disruption to his secondary schooling and friendships will be significant.
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> 22. His mother and father tried to minimise the extent to which he could communicate in Bengali. His education has been wholly in English since the age of 5 but Bengali is the language used at home and he arrived in the UK at the age of five speaking only that language. He must have a good understanding of it and could speak it if he was required to do so. He would be able to become fluent in it again much more quickly than when his parents uprooted him at the age of five and voluntarily moved him to a country where he did not know the language. There was no evidence that he could read or write Bengali with any proficiency however. He would have to leave the supportive environment of the education system in which he has completed primary school and the first two years of secondary school, for a country with which he now has much less connection, although he is a national of that country and lived there until the age of five.

> 23. It would be highly disruptive if M was required to leave the UK: as set out at paragraph 46 of **MA**, his best interests are undoubtedly to remain in the UK. The rules afford weight to seven years residence as a child, particularly seven years starting from an older age such as 5. As the President set out in PD: *'Other legal tests which have gained much currency in this sphere during recent years – insurmountable obstacles, exceptional circumstances, very compelling factors – have no application in the exercise we are performing. Self-evidently the test of reasonableness poses a less exacting and demanding threshold than that posed by the other tests mentioned.'*
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> 24. The Home Office guidance has been updated since the decision in **MA** but applies only to decisions made on or after 22nd February 2018. The applicable guidance acknowledges that when balancing the child's best interests with whether it is reasonable to leave the UK, strong countervailing reasons may arise 'where for example the child will be returning with the family unit to the family's country of nationality and the parents have deliberately sought to circumvent immigration control'. That is not the situation for this family. The respondent's guidance also sets out what has been well-established in case law that: 'the consideration of the child's best interests must not be affected by the conduct or immigration history of the parents but these will be relevant to the assessment of the public interest…whether this outweighs the child's best interest…and whether … it is reasonable to expect the child to leave the UK.'"

9. So far as concerns the factors raised by the SSHD's grounds as ones said to count against the claimants in any assessment of reasonableness and of proportionality, it is clear that the judge did take them into account, but did not find they crossed the threshold of strong countervailing reasons. Thus I consider the points made regarding them to amount to mere disagreement with the judge's assessment.

10. Given that the judge found the claimants met the requirements of the Rules, it was clearly open to him to conclude that there was no public interest in requiring the claimants to leave the UK.

11. The judge did consider in the alternative whether even if Mr [H] deception was serious enough to justify refusal under the suitability requirements, the claimants were entitled to succeed outside the Rules (see paragraph 26). In relation to this aspect of the judge's decision, Mr Clarke did not seek to pursue the argument concerning whether the suitability requirement had been met. In any event, I consider the judge was entitled to regard S117B(6) as the "complete answer" to the balancing exercise required by the circumstances of the claimants' case (see paragraph 27). That is consistent with the guidance given by the Supreme Court in **KO**.

12. For the above reasons I conclude that whilst on the generous side, the judge's assessment is not vitiated by material legal error and accordingly it must stand.

13. To conclude:

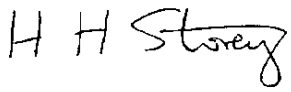
The judge did not materially err in law.

Accordingly, his decision to allow the claimants' appeals must stand.

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

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

Signed Date: 30 April 2019



Dr H H Storey
Judge of the Upper Tribunal