Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15662/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On June 17, 2019	**On July 02, 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR VINAY RANGANATH GUPTHA JAVVAJI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Smith, Counsel, instructed by Legal Rights Partnership
For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

The appellant is an Indian national who originally entered the United Kingdom on a student visa in January, 2007.

The appellant extended his leave initially in the Tier 4 (General) Migrant category until March 31, 2009 and thereafter his leave was extended to remain as a Tier 1 (Highly Skilled) Migrant and then as a Tier 1 (General) Migrant until August 6, 2015.

The appellant left the country for a holiday and when he returned on November 24, 2014 he was refused entry. A number of appeals were lodged both in the

First-tier and Upper Tribunals, which both refused his appeals although subsequently the Administrative Court remitted the matter back to the Upper Tribunal who allowed his appeal to the extent that it was remitted back to the respondent for a reconsideration in respect of whether deception in a previous period of leave could be used to curtail an existing period of leave under paragraph 321A HC 395.

On March 17, 2017, following on from that decision, the appellant was granted leave to remain for a period of six months.

The appellant lodged an application for indefinite leave to remain under paragraph 276B HC 395 but this was refused by the respondent on November 8, 2017.

The appellant appealed this decision on November 22, 2017 under Section 82(1) of the Nationality, Immigration and Asylum Act 2002. The First-tier Tribunal refused his appeal in a decision promulgated on October 10, 2018.

The appellant appealed that decision and on March 22, 2019, Upper Tribunal Judge Kamara granted permission to appeal.

The error of law hearing came before me on April 17, 2019 when I found that in assessing the eldest child the First-tier Judges had erred by failing to have regard to the approach set out by the Supreme Court in KO (Nigeria) v SSHD [2018] UKSC 53 and when considering the eldest child the First-tier Tribunal Judges wrongly placed weight on the appellant's immigration history when considering Section 117B(6) of the 2002 Act. In all other respects there was no error in law.

I adjourned that hearing for further evidence, directing that the matter could proceed by further submissions and/or additional oral evidence and permission was granted to the appellant to file such evidence that may assist the issue that would fall to be decided by me today.

No anonymity direction is made.

EVIDENCE

The appellant, aged 34 and his wife, aged 33 provided witness statements dated May 25, 2018 and June 9, 2019 respectively. The appellant had been in the United Kingdom since January 2007 and his wife, following their marriage in October 2009, entered the United Kingdom initially as his dependant on November 20, 2009 and has remained here legally ever since and currently has leave in her own right until September 25, 2020. According to Mr Kandola, the appellant's wife had been granted leave to remain on the basis that she had a genuine and subsisting relationship to a child who had been here for more than seven years and that it would be unreasonable to expect that child to leave the United Kingdom.

Ms Smith indicated in her skeleton argument and in oral submissions made to me at the beginning of the hearing that as this appellant also had a genuine

and subsisting relationship with a child then in the same way it would also be unreasonable to expect the child to leave the United Kingdom and the appellant should therefore be granted leave to remain on the basis Section 117B(6) of the 2002 Act was engaged. I was presented with a skeleton argument by Ms Smith that referred not only to the decision in KO but also the subsequent case of JG (Section 117B(6): "reasonable to leave") (UK) Turkey [2019] UKUT 00072.

Mr Kandola did not seek to persuade me otherwise and accepted that as the respondent had already reached that conclusion in respect of the mother's application, it would be wrong for him to reach any other conclusion in this appeal.

FINDING

In light of Mr Kandola's concession and taking into account the previous acceptance by the Secretary of State that it would be unreasonable to require a child to leave the United Kingdom I find that this appeal must succeed under Article 8 ECHR with specific reference to Section 117B(6) of the 2002 Act. That provision makes it clear that the public interest does not require this appellant's removal where he has a genuine and subsisting parental relationship (which the appellant has) with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. Case law, referred to above, has made it clear that such an assessment must have no regard to the immigration history of a parent and in assessing the reasonableness question I am only concerned with the child.

In the circumstances, I allow the appeal under Article 8 ECHR.

Decision

I had previously found an error in law and I have remade the decision and I allow the appeal under Article 8 ECHR.

Signed Date 27 June 2019

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

Although I have allowed the appeal I do not make a fee award on the basis that the appeal has been allowed through the passage of time and the change in status of the appellant's wife, which directly impacts on my decision today.

Signed Date 27 June 2019

Deputy Upper Tribunal Judge Alis