Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/22081/2018
HU/22085/2018
HU/22088/2018
HU/22092/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On Monday 8 July 2019	**On Thursday 18 July 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

(1) MEPA
(2) MAA
(3) JEA
(4) AMA

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Ahmed, Counsel instructed by Dias solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this is an appeal involving minor children whose identity it is necessary to protect, it is appropriate to continue that order. Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their

family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

BACKGROUND

1. The Appellants appeal against a decision of First-Tier Tribunal Judge Colvin promulgated on 20 March 2019 ("the Decision") dismissing the Appellants' appeals against the Secretary of State's decision dated 18 October 2018 refusing their human rights claim. The Appellants are a family consisting of wife, husband and two minor children. The focus of the human rights claim is on the position of the eldest of those two children, the Third Appellant, who has lived in the UK for over seven years. The family are all nationals of the Philippines.

2. The First Appellant came to the UK as a student in February 2008. Her husband, the Second Appellant joined her as a dependent in January 2009. In November 2009, the Third Appellant was born in the UK. The First Appellant continued her studies in the UK and graduated in 2013. In January 2014, she was granted leave to remain as a Tier 2 migrant with the Second and Third Appellants as her dependents. Her leave was curtailed to May 2015 after her Tier 2 sponsor lost its licence. The family then sought leave to remain on human rights grounds which was refused, and their appeal dismissed. The Fourth Appellant was born in September 2016.

3. The Judge concluded that the Appellant could not meet the Immigration Rules ("the Rules") applying paragraph EX.1 of Appendix FM ("paragraph EX.1") to the Rules as it was reasonable to expect the Third Appellant to return with his family to the Philippines. For the same reasons, she found that Section 117B (6) of the Nationality, Immigration and Asylum Act 2002 ("Section 117B (6)") did not apply when Article 8 ECHR was considered outside the Rules.

4. The Appellants raise one ground of appeal that the Judge failed to give adequate or sufficient weight to the Third Appellant's best interests and has failed to follow the case-law in relation to the impact on the proportionality assessment of those interests.

5. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 29 May 2019 on the basis that she was satisfied that the Decision contained an arguable error of law "in view of the guidance in AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661".

6. The matter comes before me to decide whether the Decision does contain any error of law and, if I so conclude, either to re-make the decision or remit the appeal to the First-tier Tribunal for re-making.

THE DECISION

7. As I have already indicated, the focus of the Appellants' grounds is a narrow one based on whether it is reasonable for the Third Appellant to return to the Philippines. If the Judge is wrong in her conclusion that it is, the Third Appellant would succeed under paragraph 276ADE (1)(iv) of the Rules and the remainder of the family would be entitled to remain in the UK based on paragraph EX.1 and/or Section 117B (6) (or at least that would enable the First and Second Appellants to remain and it could not sensibly be suggested that the Fourth Appellant would not then be entitled to stay with her family – she is now aged two years).

8. The starting point in this appeal was the previous decision of First-tier Tribunal Judge Manyarara promulgated on 23 November 2016. The Judge recognised that she needed to make a fresh assessment of the Third Appellant's position but concluded that it was appropriate to retain the earlier finding that there would not be any very significant obstacles to the family's integration in the Philippines ([24] of the Decision). No issue is taken with that finding.

9. In relation to the assessment of the Third Appellant's best interests, the Judge made the following findings:

> "[26]At the time of this application made in October 2017 [J], who was born in the UK, had been living continuously in the UK for 7 years and 11 months and at the time of this hearing it is now 9 years and 3 months. He lives with his parents in an area where there is a 'huge' and supportive Filipino community and many Filipino students attend the same school. He has been in the UK education system since he was aged 3. His school reports show that he is doing well academically, is highly motivated and is reaching the expected attainment levels. His primary school headteacher has written a letter dated 12 December 2018 which refers to him as '*an incredibly kind and caring pupil who takes great pride in all the work that he produces in school. He is a very friendly boy with lots of friends inside and outside the classroom and is an integral part of the class. In fact he is a great asset to St Joseph's School as a whole.'* She further adds that she knows *'that he will go on to become a valuable part of our society.'* His class teacher has also written a letter making similar points which concludes: *'[J] is a valuable member of our class and his gentle and kind personality is appreciated by both adults and children alike.'*
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> [27] In both the written and oral evidence before me a significant focus was placed on the claim that [J] does not speak or understand the Tagalog language. I have set out this evidence in some detail above. However, on re-reading the previous appeal Decision since the hearing, I am surprised to find that there appears to be no reference to a claim that [J] cannot speak or understand Tagalog and was not an issue in the appeal. It is

> unfortunate that this fact was not brought to my attention and that the parents were not asked to explain this significant omission at the hearing before me. In these circumstances I am left with the strong impression that on a balance of probabilities both parents were not giving accurate evidence on this language issue especially as it was accepted that [J} has listened to the Tagalog language being spoken in the family home and in the community since he was born. I accept that it may well be that [J} prefers to speak English but this does not mean that he cannot speak and understand Tagalog as well.
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> [28] As stated in the previous appeal Decision, it is in the best interests of [J} to be with his parents and he would be returning to the Philippines with them and his younger sister as there is no question of the family being separated. There are family members there including the first appellant's sister and brother and their children which means that [J} has cousins there. The parents admitted that they had made no enquiries of schools in their home area in the Philippines for [J] including no enquiries of international schools where English is spoken. At the age of 9 [J} is not at a critical stage in his education which would make relocation to a new education system more difficult."

10. The Judge then turned to the question whether it would be reasonable for the Third Appellant to return to the Philippines. In so doing, she had regard to the cases of EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874 ("EV (Philippines)"), MA (Pakistan) and others v Secretary of State for the Home Department [2016] EWCA Civ 705 ("MA (Pakistan)") and KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53 ("KO (Nigeria)") as well as the Home Office guidance. Having directed herself as to the case-law which applied, she made the following assessment:

> "[33]As already stated it is clear that the best interests of [J} are served by remaining to live with his parents in a family unit. Also, in terms of the fact that he has lived all his life in the UK for the past 9 years and is well-established in the education system and in other aspects of his private life outside of the family means that his best interests would be to remain in the UK with his parents as an ideal result. However I must go beyond this and assess the 'reasonableness' test particularly as it has been considered in the recent case of *KO* when it comes to looking at the facts in the 'real world' and asking the ultimate question: is it reasonable to expect this child to follow his parents to Pakistan [sic] as they have no right to remain here.
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> [34] This has to be put in the context of the circumstances of the parents and the family as a whole. There is no question that these parents have anything other than a good immigration history although their actual status – only ever having had limited leave to remain – means that their entry and presence in the UK is considered to have been 'precarious' and without any expectation

of settled status. The position now is that they have no further right to remain in the UK unless their removal would breach their human rights. I have set out why the finding in the previous appeal Decision still stands in relation to the parents returning to the Philippines when it was concluded that there are no very significant obstacles to their reintegration into their country of origin and therefore removal would not breach their human rights.

[35] The findings in the previous appeal Decision also suggest that these parents will be able to provide satisfactorily for the welfare of their family on return. I am also in no doubt that they will provide a supportive setting to assist both their children to adapt to life in the Philippines and, in this context, it is to be noted that the eldest child, [J], has lived within the culture of his parents and a strong Filipino community in the UK and has been exposed to a multi-cultural school population over several years. The issue of whether [J] speaks and understands Tagalog is dealt with above in some detail above. Even if he is not fluent in this language it is reasonable to assume that he would become so relatively quickly as a bright and confident child. And, in any event, there is the possibility – as yet un-researched by the parents – of him being able to attend an international school where the pupils are taught in English.

[36] there is no doubt on the basis of the above-cited cases that the fact that a child has been in the UK for over 7 years needs to be given significant weight. And this is confirmed in the Home Office's own guidance which makes the clear statement that: *'The starting point is that we would not normally expect a qualifying child to leave the UK.'* And certainly before the Supreme Court in *KO* I would have been minded to follow the decision in *MA*, namely, that the starting point is that leave should be granted in such circumstances unless there are powerful reasons to the contrary which I do not find that there are on the facts in this case as it is only the parents lack of immigration status that it is the adverse factor.

[37] However, there is now the decision in *KO* which is specifically referred to in the recent Home Office guidance. In applying the test of reasonableness, the Supreme Court (when making particular reference to the case of *NS (Sri Lanka))* held that if a child's parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that it would not be reasonable. In applying this to the facts in this case I consider that I am bound to make a different decision. This is because the parents (who it should be noted do not have a bad immigration history as was the case in *NS (Sri Lanka))* have no leave to remain and therefore are expected to leave the UK. And I find that the kind of matters set out in the Home Office guidance that might make it unreasonable for a qualifying child to leave the UK do not apply to the facts in this case for all the reasons given above relating to both [J] and the family as a whole. This means that I find that the reasonableness test in EX.1(a) and

paragraph 276ADE(1)(iv) of the Immigration Rules does not apply to this qualifying child."

DISCUSSION AND CONCLUSIONS

11. I begin with one narrow challenge to the Judge's findings. Mr Ahmed said that, although at [35] of the Decision the Judge referred to having given detailed reasons for finding that the Third Appellant does speak and understand Tagalog, she had not in fact given such reasons. That submission has no merit as is evident from what is said at [27] of the Decision which I have also set out above and which in turn cross-refers back to the evidence recorded at [5], [7] and [8] of the Decision. In light of the inconsistency between the First Appellant's written and oral evidence as there recorded, and for the reasons given at [27], the Judge was entitled to reach the finding that the Third Appellant can speak and understand the language spoken in the Philippines.

12. Turning then to the general ground, Mr Ahmed said that the Judge failed to have regard to some of the relevant case-law. He referred me in particular to the guidance given by a Presidential panel of this Tribunal in JG (s 117B (6)): "reasonable to leave" UK) Turkey [2019] UKUT 72 (IAC) Rev 1 ("JG"). That case is reported only for the proposition that "[s]ection 117B(6) of the Nationality, Immigration and Asylum Act 2002 requires a court of 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". As is evident from what is there said, that has little bearing on this case as the position which the Judge had to and did consider is that the Third Appellant would be required to return to the Philippines if she found that it was reasonable for him to do so. There was no question of him remaining in the UK with one parent who was entitled to stay. The factual scenario there being considered is very different, therefore, to this case.

13. It is also appropriate at this point to refer to the cases of Secretary of State for the Home Department v AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661 which are referred to by the Judge granting permission. Mr Ahmed did not refer to those cases in his submissions and there is no reference to them in the Appellants' grounds. In any event, as appears at [48] to [52] of the judgment and the discussion which follows, those cases were considering the issue for which JG was reported, namely whether it is relevant when considering whether it is reasonable to expect a child to leave whether he will in fact do so. In other words, those cases concern the factual scenario where a child would be able to remain in the UK with one parent and whether in such cases the Respondent (and the Court/Tribunal) is required to consider whether the other parent can be removed

without looking at the reasonableness of the child being expected to leave.

14. Mr Ahmed drew my attention to what is said at [41] in JG that the interpretation which the Tribunal placed on the Home Office guidance which was there being considered "may result in an undeserving individual or family remaining in the United Kingdom" but that, having regard to what was said by Elias LJ at [44] of MA (Pakistan), that must be taken to be Parliament's intention when approving Section 117B(6). However, the Tribunal also said at [37] of its decision that "[t]he citation of KO (Nigeria) merely recognises that, in deciding what would be reasonable, one must have regard to the fact that one or both parents is liable to removal under immigration powers." No doubt there will be cases where it is found not reasonable to expect a child to leave where the parents even though undeserving due to their own conduct will be allowed to stay. However, the crucial issue which is a fact sensitive one in each case is whether it is reasonable to expect the qualifying child to leave.

15. Mr Ahmed accepted that the issue of what would happen in the real world is a factor to which the Judge was entitled to have regard, but he said that it was not the only factor and that the Judge had failed to carry out a proper balance as to what it would be reasonable to expect the Third Appellant to do. He said that the passage which I have set out at [33] to [36] of the Decision failed to provide cogent reasons for the conclusion reached. He also relied on the Home Office guidance as set out in JG to the effect that the Home Office would not normally expect a qualifying child in the position of the Third Appellant to leave the UK. He added that the need for the existence of powerful reasons to require removal in such circumstances was underlined by the Court of Appeal in MA (Pakistan) (see [44] of that judgment as also relied on in JG). However, even that paragraph makes clear that a child in the Third Appellant's position should be allowed to stay "if it would not be reasonable to expect them to leave". The Court of Appeal also made clear that it was not there advocating a return to the DP5/96 policy which has been repealed where the starting point was that a child with seven years' residence could be refused leave only in exceptional circumstances. As the Court said, "[t]he current provision falls short of such a presumption".

16. Mr Tufan submitted that what the Judge was required to consider was the isolated requirement whether it was reasonable to expect the Third Appellant to leave the UK notwithstanding his length of residence in the UK. The Appellants' challenge is in reality an assertion that the factors should have tilted the balance in their favour. He accepted that another Judge may have reached a different conclusion on these facts but that is not the issue. The natural

expectation is that a child will go where his parents are. In this case, the parents have no leave to remain and so the expectation is that the child will return to the Philippines with his parents provided it is reasonable for him to do so. Although the Third Appellant is in education in the UK, as the judgment in EV (Philippines) makes clear, the UK cannot be expected to educate the world. The parents have in the past had precarious status in the UK (and in fact the family has had no leave to remain since 29 September 2017). The Third Appellant has grown up in a strong Filipino community and the Judge found that he has knowledge of the Filipino language or would pick it up readily. Those are the Judge's reasons for concluding that it would be reasonable for the Third Appellant to leave.

17. The Judge considered that she was applying the guidance in KO (Nigeria). That is also of course the most recent and most authoritative consideration of how paragraph 276ADE (1)(iv) and Section 117B (6) are to be interpreted. One finds the Supreme Court's discussion in this regard at [16] to [19] of the judgment. A Tribunal Judge is required to consider the position of the child leaving out of account any adverse history of the parents. The question is what is reasonable for the child. When looking at that issue, however, the Supreme Court approved as "wholly appropriate and sound in law" the Home Office guidance cited at [10] of the judgment to the effect that for a non-British citizen child it would generally be in the child's best interests to remain with their parents and to leave with their parents if their parents had no right to remain. The factors to be considered when looking at reasonableness included any risk to the child's health, family ties in the UK and ability to integrate into life in their home country.

18. I recognise that the Home Office guidance has been updated since the judgment in KO (Nigeria) as is evident from the guidance cited at [32] of the Decision. However, the statement that a qualifying child would not normally be expected to leave is qualified by what follows by reference to the judgment in KO (Nigeria). The Judge therefore applied the whole of the guidance and not simply the extract cited at [36] of the Decision. She recognised that the issue for her was whether it was reasonable for the Third Appellant to leave. That is the assessment made at [33] to [35] of the Decision. That assessment is consistent with what is said in KO (Nigeria), in particular at [19] of the judgment that what is reasonable has to be considered in the "real world in which the children find themselves."

19. I have considered carefully whether it might be said that the Judge has erred at [36] of the Decision in her comment that KO (Nigeria) effectively mandated the conclusion she reached and that the conclusion is likely to have been different if she had applied the guidance in MA (Pakistan). The Supreme Court in KO (Nigeria)

approved the way in which the Court of Appeal indicated that it would have decided those cases had it been free to do so (with the possible exception of [40] of the judgment). However, as I have pointed out at [15] above, the Court of Appeal itself recognised that there was no presumption of leave being granted once a child had been in the UK for seven years. The question still remained whether it was reasonable to expect the child to leave. That it was reasonable for the Third Appellant to leave was the conclusion the Judge reached for the reasons given at [33] to [35] of the Decision and there is no error of law in that assessment or conclusion. The Judge has given adequate reasons for her conclusion.

20. Insofar as the Appellants' grounds suggest that the conclusion fails to give adequate weight to the Third Appellant's best interests, that argument has no merit. The Judge recognised that the child's best interests "as an ideal result" were to remain in the UK. However, to suggest that having reached that conclusion the Judge could not then find it to be reasonable to expect him to leave is to accord undue weight to best interests. Those are a primary consideration and not the primary consideration. To suggest that the finding in relation to best interests in effect mandates a result consistent with those interests is to elevate the weight given to them beyond that required. For the reasons given by the Judge in the passage which follows that conclusion, she was entitled to decide that it would nonetheless be reasonable to expect the Third Appellant to leave the UK and therefore to dismiss the Appellants' appeal.

CONCLUSION

21. For all of the above reasons, I am satisfied that the Decision does not contain an error of law. Accordingly, I uphold the Decision.

DECISION

I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge Colvin promulgated on 20 March 2019 with the consequence that the Appellants' appeals stand dismissed

Signed Dated: 12 July 2019
Upper Tribunal Judge Smith