Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15097/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 November 2021	**On 24 January 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

JAN MOHAMMED BABUL
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Biggs, Mr West
For the Respondent: Mr Whitwell

DECISION AND REASONS

1. This is the appeal of Jan Mohammed Babul, a citizen of Bangladesh born on 20 October 1988, against the decision of the First-tier Tribunal of 3 February 2020 dismissing his appeal on Human Rights Convention grounds.

2. The Appellant entered the UK on 18 January 2011 with entry clearance effective as leave to enter as a student until 30 April

2014. He applied to extend that leave, his application being refused on 15 July 2014; his ensuing appeal failed and his appeal rights were recorded as exhausted on 22 September 2015. Applications to the Respondent for leave on private life grounds were refused on 29 February and 29 November 2016; a further application of 16 May 2019 was refused on 29 August 2019, against which refusal the present appeal ultimately lies.

3. The Appellant's latest human rights claim was based on his relationship with his spouse, Mosammat Sabia Khatoon, a British citizen, whose previous husband had passed away on 31 December 2015. The evidence from the Appellant and Mrs Khatoon was essentially that they had decided to embark on infertility treatment using an egg donor, conduct of which their parents had disapproved, leading to a breakdown in relations between the couple and their respective families. Furthermore there were still three eggs remaining from those provided by their donor and they intended to use these for a future pregnancy, a project which would be too expensive and less likely to succeed in Bangladesh. Mrs Khatoon suffered from diabetes and hyperthyroidism.

4. The Respondent refused that application, finding that the Appellant could not meet the five-year route to settlement under Appendix FM as he was an overstayer; and that he could not satisfy the ten-year route as there were no insurmountable obstacles to the couple’s relocation to Bangladesh, a country where medical treatment including IVF would be available to them to make use of the remaining eggs.

5. By the date of the hearing below a child, Mohammad Ayan Ali, had been born to the Appellant and his partner on 17 January 2020; the Secretary of State gave consent for the fact of his birth, and thus his best interests, to be considered on the appeal.

6. The First-tier Tribunal found that

   (a) The Appellant's leave ended in 2014, he married his wife in 2016, and that presumably she had acquired her British citizenship following her marriage to her previous husband who also held such citizenship, and who she had married in 2005. She had lived in the UK since then. She spoke English though not fluently; she had lived within the Bengali community here; she had recently visited Bangladesh though stated her family did not want to know her.

   (b) There was a “*real issue in relation to credibility*” vis-á-vis the asserted hostility from their families – whilst IVF was generally controversial, and it would be understandable if their community stigmatised it, the fact that they had seen fit to discuss the matter with their families indicated that they had had their support for the project.

(c) The child was aged around eight weeks at the hearing date, his needs were being met by his mother, and he had no relationship with anyone beyond his parents; he had no awareness of British culture or language; his best interests would be to remain with his parents wherever they lived; the "*mere fact*" he held a British passport did not prevent him from "*returning to Bangladesh*"; and the comments of Lord Carnwath in *KO (Nigeria)* as to the relevance of "*real world*" facts such as where the parents would be living in the future presuming they had no right to remain here were relevant. Alternatively there was nothing to prevent the child from remaining in the UK alongside his mother if she chose not to accompany her husband abroad pending an entry clearance application to return here. This was a choice the family had to make and having to confront that choice did not undermine the child's best interests.

(d) There were no exceptional circumstances present: Mrs Khatoon's health needs could be met in Bangladesh, the IVF treatment could continue in the UK given her right to return here as a British citizen and the support from family members here she could receive, and that, were any stigma to potentially arise, they could avoid it by keeping the circumstances of their child's birth to themselves. The same thinking applied to the age difference between the couple. Their child's birth was not a trump card which could override the Immigration Rules.

7. Grounds of appeal to the First-tier Tribunal contended that the decision erred in law because

(a) It considered only two scenarios: where the child remained in the UK with his mother alone and where the whole family returned to Bangladesh. In so doing it effectively failed to apply the hypothetical question posed by s117B(6) as interpreted in *AB (Jamaica)*; and failed to evaluate the real world consequences of the British child following the parent without immigration status abroad.

(b) It failed to explain how it was that the instant case was one of those "*relatively rare*" ones where it was appropriate to expect a British citizen child to leave the UK.

8. The First-tier Tribunal refused permission to appeal on 17 April 2020; the Upper Tribunal refused permission to appeal on 13 July 2020 on the basis there was a clear finding that the child could reasonably be expected to depart the UK given that the evidence suggested his mother would follow his father there. Foster J granted permission for judicial review on 2 November 2020 because it was arguable that the First-tier Tribunal had adopted reasoning inapt to lawfully answer the s117B(6) question. The

permission refusal having been quashed by order of Master Giddens on 16 July 2021, permission to appeal to the Upper Tribunal was granted on 5 August 2021.

9. On 23 September 2021 the Respondent provided a Response to the appeal arguing that the reasonableness of the child's relocation from the United Kingdom had been properly assessed; there was no material inconsistency with the thinking in *Runa* [2020] EWCA Civ 514. References to the child remaining in the UK were essentially an aside to the principal assessment of the reasonableness of the child's departure

10. At the error of law Mr Biggs appeared, leading Mr West, the author of the grounds of appeal. The second ground of appeal was not pursued, in recognition of its untenability in the light of the Court of Appeal's clarification of the relevant test in *NA (Bangladesh)* [2021] EWCA Civ 953. It was his case that *Runa* (which represented the culmination of appellate consideration of the arguments comprising the first ground of appeal) firmly confirmed that the First-tier Tribunal had erred in law. That error was shown in three distinct aspects of the decision, which he labelled as "*cast iron*" manifestations of misdirection. Firstly it was necessary to determine the future location of the parent without the right to remain in the UK, and, if their location inferred a separation of the child from a parent, for how long that state of affairs would endure: the child's best interests had to be evaluated with that in mind. Secondly, the British citizenship of the child and mother was not afforded due attention. Thirdly the First-tier Tribunal failed to appreciate that s 117B(6) posed a single normative question. These errors were material because there was no clear finding as to the degree of hostility of the couple's parents.

11. For the Respondent Mr Whitwell submitted that whilst there was no express finding as to the mother's probable future location, the Tribunal had squarely confronted the question of reasonableness and looked at relevant criteria such as the child's age, citizenship and cultural ties. This may have been rather a brief review but only so much could be said vis-á-vis a very young child. Credibility had not been challenged in the grounds of appeal and there were clear adverse findings on the couple's assertions as to their difficulties with their families abroad.

12. Mr Biggs responded that regardless of the lack of any formal challenge to the findings as to family support abroad, there was ambiguity in the First-tier Tribunal's reasoning on the point, as shown by the phrase "*even if I accept what they are saying*."

13. We reserved our decision.

Findings and reasons

14. The four decisions which are central to this appeal are

(a) *ZH (Tanzania)* [2011] UKSC 4 §24 for the importance of appreciating the entitlements of a British citizen child;

(b) *AB (Jamaica)* [2019] EWCA Civ 661 for the proposition that the only question under s117B(6) is whether it is reasonable to expect the child to leave the UK;

(c) *KO (Nigeria)* [2018] UKSC 53 emphasising that a "*real world*" view must be taken vis-á-vis the parents' immigration status and its implications for the family's future place of residence;

(d) *Runa* [2020] EWCA Civ 514 establishing that

- Judges should conduct an evaluative fact-finding exercise to properly establish the context in which the s117B(6) enquiry fell to be assessed, within the confines of the statutory question which essentially asked whether it was reasonable to expect the child to follow the parent without leave to remain to the family's country of origin (*EV Philippines* [2014] EWCA Civ 874; and

- There is scope for ECHR Art 8 to play a part in a family life appeal once s117B(6) has been addressed: this second stage enquiry is broader than the statutory one, and is one in which the parents' conduct may be relevant, and where the evaluative exercise may include determining what will happen where one parent has the right to remain and the other does not.

15. Our conclusion is that there are material errors of law in the decision below having regard to that quartet of precedents.

16. Firstly, it is clear that the First-tier Tribunal failed to appreciate the distinct considerations arising when the departure of a British citizen child from the UK is contemplated. The Appellant's child's nationality is of particular importance because it brings into play considerations going beyond those present, for example, in the case of a foreign national child who has established seven years of residence in the UK. As was noted by Baroness Hale in *ZH* [2011] UKSC 4 relevant considerations in removing a British citizen child include the potential deprivation of the practical benefits of that citizenship, "*and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle*." However, these distinct benefits of British citizenship were simply not considered at all, as is shown by the reference to the "*mere fact*" the child held a British passport. It is also notable that the reference to there being nothing to prevent the child from "*returning to Bangladesh*" also exaggerates the strength of his ties there as opposed to those with the United Kingdom: he was of course born here and is in no sense "*returning*" to a country of origin.

17. Secondly, the relevance of *KO (Nigeria)* was mis-stated. Whilst "*real world*" facts self-evidently have relevance to every immigration appeal, the central point being made there was that where neither parent had the right to remain in the UK the presumed starting point would be that the family should relocate to somewhere that the parents were entitled to reside (as emphasised in *KO* §51 where the absence of a right to remain for either parent in the appeals of NS and AR generated the natural expectation that any child would leave with their parents). But where the real world facts involve one parent being a British citizen, especially where a child enjoys that status too, then the evaluative enquiry mandated by *Runa* becomes more nuanced. Here both mother and son enjoyed the right of abode in the UK. The alternative finding §34 is made *as part of* the determination of reasonableness under s117B(6), as is shown by it preceding the residual consideration of the appeal outside the Rules by reference to "*exceptional circumstances*". Yet the First-tier Tribunal does not show itself alive to the fact that that scenario would imply the family's separation for an uncertain period, which would inevitably be inimicable to the child's best interests.

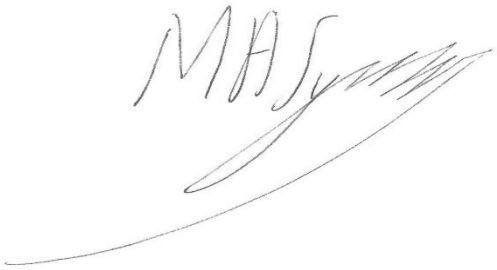
18. In those circumstances the appeal must be re-heard. Given the fact-finding required, remittal to the First-tier Tribunal is appropriate. The grounds of appeal do not challenge the factual findings. However in the circumstances it is appropriate that no such findings are preserved. There does appear to be some confusion in the reasoning of the First-tier Tribunal: it is difficult to see how the mere fact that IVF treatment was discussed with the couple's relatives would inevitably mean that those same relatives accepted the treatment's necessity, particularly given the Tribunal's own recognition that some degree of stigma would be unsurprising. Given the importance of family support to the reasonableness of the child's hypothetical future outside the UK it is appropriate that that issue is looked again alongside all other matters on the appeal.

Decision

The appeal is allowed to the extent that it is remitted for full re-hearing in the First-tier Tribunal.

The Judge erred materially for the reasons identified. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed Date 20 January 2022



Deputy Upper Tribunal Judge Symes