Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06463/2017
HU/06464/2017
HU/06467/2017
HU/06469/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 June 2019	**On 02 July 2019**

Before

LORD BOYD OF DUNCANSBY
(sitting as Judge of the Upper Tribunal)
UPPER TRIBUNAL JUDGE D M W PICKUP

Between

GM
AS
KC
GC
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Thoree, solicitor Thoree & Co
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by these four appellants against a decision of First-tier Judge Nicholls promulgated on 5 June 2018. That decision refused the appellants' appeal against the decision of the respondent to refuse leave to remain on article 8 family grounds. Permission to appeal was refused by FTTJ Grimmett on 12 September 2018 and by UTJ Eshun on 11 December 2018. Following an application for Judicial Review the High Court, of consent, set aside that decision remitting it back to the Upper Tribunal. On 15 May 2019 Vice President Ockleton granted permission in the light of the High Court decision reminding parties that the UT's task is set out in s.12 of the 2007 Act.

2. All of the appellants are nationals of Ecuador. The first and second appellants are married. Both of them entered the UK illegally – the first appellant in about 2002 and the second in 2000. The second appellant was removed in 2004 but re-entered the UK illegally again a few months later. They have been in the UK ever since. The third and fourth appellants are their children both of whom were born in the UK. There is now a third child of the marriage. At the time of the FTT hearing the fourth appellant was a qualifying child for the purposes of section 117B of the Nationality, Immigration and Asylum Act 2002.

3. The ground of appeal that was pursued before us by Mr Thoree was that FTTJ Nicholls had visited the sins of the parents on to the children. He had found that it was in their best interests, particularly the fourth appellant, to remain in the UK with their parents. However at paragraph 23 he had balanced that with public interest in the control of immigration and found that it would be reasonable to remove the fourth appellant from the UK in the company of her parents and sister. Had the First-tier Judge left the matter there then we would not have found an error of law. However he then proceeded to make the following statement, "I find that the deliberate and aggravated breaches of the Immigration Rules by the first and second appellants create powerful reasons why leave to remain for these four appellants should not be granted."

4. Mr Tufan submitted that these remarks were similar to those attributed to UTJ Perkins' findings in **NS**, reported in **KO (Nigeria) UKSC 53**, at paragraph 50. UTJ Perkins said that he would consider it outrageous for them (the adult appellants) to be permitted to remain in the UK. He said that they must go and in the circumstances the others (the children) must go with them. At paragraph 51 Lord Carnwath acknowledged that the final conclusion was arguably open to the interpretation that the "outrageousness" of the parents' conduct was somehow relevant to the conclusion under section 117B(6). In context however he rejected that argument.

5. The distinction between this case and that of NS is that there was a clear distinction drawn between the adults and the children in UTJ Perkin's conclusions. While it was permissible to point to the deliberate and aggravated breaches of the immigration rules by the first and second

appellants the assessment under section 117B(6) is a discrete exercise. It is one which may be made in the context that the parents have no right to remain in the UK; **KO (Nigeria)** paragraphs 18 and 19. However as the IDI guidance (reported at paragraph 11 of **KO** and approved at paragraph 17) makes clear the assessment of the child's best interests must not be affected by the conduct of the parent.

6. It may be that the sentence quoted at paragraph 3 above was a careless use of words. But applying anxious scrutiny to a case which turns on the best interests of a child born in this country who faces removal from the UK with her parents it appears to us that the assessment of her interests under section 117B(6) has been infected by the view that FTTJ Nicholls took of the conduct of the first and second appellants. Accordingly we find an error of law.

7. Having canvassed options with the parties we came to the conclusion that this is a case which should be remitted back to the First-tier Tribunal. It is over a year since the decision of FTTJ Nicholls. The third appellant is now a qualifying child and we were informed that the fourth appellant was about to become a UK citizen. In these circumstances we consider that the fact finding exercise is one best conducted in the FTT, consistent with 7.2 of the Senior President's Practice Statement.

Notice of Decision

The appeal is allowed. The case is remitted to the First-tier Tribunal to be remade.

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

Unless and until a Tribunal or court directs otherwise, the appellant 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 appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 1 July 2019

Upper Tribunal Judge Pickup