IAC-AH-CO-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Numbers: IA/35173/2014
IA/35175/2014
IA/35176/2014
IA/35177/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 18th January 2016** | **On 1st March 2016** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MS CHRISTINE WILLIAMS-BROWN**
**MR MICHAEL ANTHONY BROWN**
**[F B]**
**[M A B]**
**(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellants: Mr C Emezie, Dylan Conrad Kreolle, Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellant**

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were before the First-tier Tribunal that is Messrs Brown as the appellants and the Secretary of State as the respondent.

2. The Secretary of State against appealed against the decision of the First-tier Tribunal which allowed the appeals of the appellants on human rights grounds.

3. The background to this appeal is that on 10th April 2015 a decision was promulgated by the First-tier Tribunal and there followed an application for permission to appeal form lodged by the Secretary of State but within that application there was an application for amendment of the determination under Rule 60 of the AIT Procedure Rules 2005. In fact that application should have been made by way of Rule 31 of the Tribunal Procedure Rules 2014 whereby it states that the Tribunal may at any time correct any clerical mistake or other accidental slip. The application submitted by the Secretary of State was that the decision to allow the appeal on the asylum grounds appeared to be a "slip of the pen" amenable to amendment under the Slip Rule ***"please treat this an application for the determination to be amended pursuant to Rule 60(1) of the 2005 Procedure Rules."***

4. What muddied the water was that in addition to the above there was added to the application the following statement

> *"For the avoidance of doubt, no issue was taken with the judge's additional or alternative decision to allow the appeals on human rights grounds".*

5. As a result of that application dated 16th April 2015 the Tribunal issued a further determination, promulgated on 23rd June 2015, still allowing the appellant's appeals on human rights grounds only.

6. The judge recorded that the first appellant Mrs Williams-Brown first entered the United Kingdom in January 2001 on a six month visit visa and she was joined in the UK by her partner the second appellant Mr Brown. At that time the first appellant Mrs Williams-Brown had two children [TR] her child by a previous relationship and [MB] her child by the second appellant. The family were believed to have entered as visitors for six months and overstayed. A third appellant [FB] was born on 1st July 2004 and [MAB], the fourth appellant, was born on 22nd February 2006. Both the third and fourth appellants were born in the UK. It transpired that in 2013, both [TR] and [MB] were granted 30 months' leave to remain, but the respondent following a human rights application refused leave to remain for the four appellants in this appeal, that is the parents and two younger children.

7. The Secretary of State refused their application for leave to remain on the basis of Appendix FM and paragraph 276ADE. The matter was also considered by the respondent outwith the Rules because of exceptional circumstances. The Secretary of State considered that the appellants could not succeed under the partner route as they were both Jamaican citizens and they did not meet the eligibility requirements under Appendix FM because they did not meet EX.1 as the Secretary of State considered it was reasonable for the two younger appellants to leave the UK for Jamaica. The Secretary of State considered that although that might cause a degree of hardship there were no insurmountable obstacles under paragraph EX.2 which would prevent them from continuing their relationship in Jamaica.

8. Each appellant was considered separately.

9. The matter came before Judge of the First-tier Tribunal who allowed the appeal and the Secretary of State appealed on the basis that the judge had made a material misdirection of law in relation to "reasonableness."

10. It was asserted that the judge concluded that it would not be reasonable for the third and fourth appellants to leave the UK [79], and therefore it followed that Section 117(6)(b) enabled the appellants one and two to remain in the UK to look after the younger appellants. It was contended that the judge's assessment [84] of what was reasonable in the instant appeal was "superficial" and "goes go no way to identifying and explaining those factors that outweigh the cogent public interest in maintaining effective immigration control." The judge considered that the sins of the parents should not be attributed to the minors but this was not part of the assessment of what their best interests were. The best interests were the starting point of the judge's assessment what was then was required was an assessment of what was reasonable. The judge conflated these two concepts and this was a material misdirection of law.

11. Mr Avery submitted that there had been no consideration of the parents' background further to **EV (Philippines) [2014] EWCA Civ 874** albeit that the judge had noted that background at paragraph 75. The parents had no basis on which to remain in the UK. At paragraph 61 if the judge had considered reasonableness he would have factored in the fact that the parents had no status there was no mention of **Azimi-Moayed**. The consideration was fundamentally flawed.

12. With reference to the background of the events, regarding the previous confirmation that no issue was previously taken with the judge allowing the appeal on human rights grounds, there was no abuse of process and this was a misunderstanding of the approach.

13. Mr Emezie submitted that there were two preliminary issues one of whether the Secretary of State was entitled to apply for permission to appeal on different grounds or rather a second time around following the

representation made in April 2015 whereby she had submitted that there was no human rights error. Secondly the application was out of time. Mr Emezie however noted that the decision had been sent on 23rd June and the application for permission to appeal was dated 10th July.

14. Further to Rule 33 - Application for permission to appeal to the Upper Tribunal

*"(1) A party seeking permission to appeal to the Upper Tribunal must make a written application to the Tribunal for permission to appeal*

*(2) subject to paragraph (3) an application under paragraph (1) must be provided to the Tribunal so that it is received no later than fourteen days after the date on which the party making the application was provided with written reasons for the decision."*

*...*

*(4) The time within which a party may apply for permission to appeal against an amended notice of decision runs from the date on which the party is sent the amended notice of decision.*

15. I am not persuaded that this application was made on different grounds or out of time. The First-tier Tribunal decision is dated 23rd June 2015 and an amended notice of decision was sent out on 23rd June 2015 by the Tribunal. The receipt of the application for permission to appeal is dated 6th July 2015 and is within the fourteen days envisaged by the Rules. Further to Rule 33(4) "the time within which a party may apply for permission to appeal against an amended notice of decision runs from the date on which the party is sent the amended notice of decision."

16. On careful consideration of the alleged permission to appeal by the respondent this is clearly stated to be an application for an amendment of determination under the Slip Rule. Although there appeared to be no challenge to the human rights grounds I do not accept that this constituted an application for a permission to appeal and it is the application dated 6th July 2015 which formally constitutes an application for permission to appeal. It is the substance not the form which should be considered.

17. That said I turn to the substance of the appeal and accept that the Secretary of State is merely attempting to re-argue the merits of the case. On reading of the decision as a whole the judge clearly set out the facts and considered the case of the children first and their best interests which is what he should do. There was no challenge to the effect that the judge should look at the matter outside the Immigration Rules or classify the children as qualifying children under Section 117B(6).

18. As Mr Avery states it is not the case, as the judge directed that if he

> *"Reached the conclusion in all the circumstances of this case that it was not reasonable to expect the children to leave the United*

*Kingdom then the first and second appellants would succeed under Section 117B(6) of the 2002 Act."*

The judge must undertake an exercise in assessing proportionality, once he realises the best interests of the children, as to whether it would be reasonable to expect the children to leave the United Kingdom.

19. Nonetheless the judge did refer himself to the Immigration Rules and considered Section 55 of the Borders, Citizenship and Immigration Act 2009 at paragraphs 59 and 60. He identified that the best interests of the children are to live and be brought up with the parents and he also directed clearly that a child's best interests could be outweighed by the cumulative effect of other considerations such as the maintenance of immigration control, precarious immigration status or criminality.

20. At paragraph 64 the judge makes an assessment of the children and finds that one is 9 years old and one is 10 years old and they both live with their parents in a close family. I also noted that the two elder siblings had been granted limited leave to remain for 30 months with a view to applying for further leave to remain.

21. The judge recorded that the children were both at school and doing well and did not wish to return to Jamaica. He considered that they were not young children and their wishes should be considered at paragraph 69.

22. The judge also factored in the more complicating factor of the illness of the child's father who had suffered a stroke and was receiving rehabilitation and who had significant cognitive impairment. The judge noted at paragraph 70 that "clearly both children will have suffered upset and concern because of their father's illness and that if the children were returned it would mean the split up of the family."

23. The judge did take into account the public interest and noted at paragraph 72 identified that there were

"*A number of public interest considerations which I have to take into account in the balancing exercise. The first of these is the maintenance of effective immigration control. The second is that a person seeking to enter or remain in the UK should speak English. In this case both children and both parents speak English."*

He also found that the family were not financially independent. The judge noted

*"75. In regard to the latter two factors, the question arises of whether the best interests of the children are to be determined without reference to the immigration status of either parent. Lord Justice Christopher Clarke certainly took the view in the case of* ***EV (Philippines v Secretary of State for the Home Department [2014] EWCA Civ 874*** *that the best interests of*

> *the child are to be determined without reference to the immigration status of either parent. However, Lord Justice Lewison in the same case appeared to suggest that the evaluation of the best interests of the child should be evaluated based on 'real world facts', i.e. that the immigration status of the parents did come into consideration."*

I find in particular at paragraph 75 that the judge took into account the immigration status of the parents. He was not paraphrasing Lord Justice Lewison without intending to import that factor into an assessment of the case in this appeal.

24. The judge did consider at paragraph 79 whether it would be reasonable for the two children to leave the United Kingdom bearing in mind that they had been here for ten and nine years respectively and they knew nothing but the United Kingdom. The judge also balanced in the factor that there had been no criminality in the family but that there was certainly a burden on the tax payer.

25. It may be unfortunate that the judge expressed himself in the way that he did in stating that

> *"... for all the reasons I have already given, I would have considered that the balancing exercise came down in favour of the two children in this case and would have upheld the appeals on behalf of the children"*

and at paragraph 84

> *"As I have upheld the appeals of [FB] and [MAB] it follows that under Section 117B(6) I consider that it is appropriate to uphold the appeals of both parents, the first and second appellants as both children are qualifying children and I consider that it would not be reasonable to expect the children to leave the United Kingdom. That means that the appeals on behalf of the first and second appellants must succeed under Section 117B(6) of the Nationality, Immigration and Asylum Act 2002."*

26. Although this would appear to be somewhat misconceived there is no doubt from **Treebhawon and Others (Section 117B(6)) [2015] UKUT 00674 that**

> *"(i) Section 117B(6) is a reflection of the distinction which Parliament has chosen to make between persons who are, and who are not, liable to deportation. In any case where the conditions enshrined in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 are satisfied, the section 117B(6) public interest prevails over the public interests identified in section 117B (1)-(3).*

*(ii) Section 117B(4) and (5) are not parliamentary prescriptions of the public interest. Rather, they operate as instructions to courts and tribunals to be applied in cases where the balancing exercise is being conducted in order to determine proportionality under Article 8 ECHR, in cases where either of the factors which they identify arises."*

27. **EV (Philippines)** can be entirely distinguished in this case because in that case the children were Philippine nationals who had only been in the country for three to four years. In this case the judge had clearly identified that the children had been in the UK for over seven years and had also identified that under Section 117B(6) that they would be classified as qualifying children. That was not the case in **EV (Philippines)**.

28. Crucially it is not the case that the judge did not take into account other balancing factors in relation to the public interest and was clearly aware that none of the family were British citizens and all were Jamaican citizens. Although the judge stated [58] that he must allow the appeal with regard to Section 117B(6), that is not what he in fact did because he factored in the various issues not least the length of time the children had been here, the ill-health of the father and the prospect of the family being separated. The judge established the best interests of the children and considered that as a factor in the decision of whether it was reasonable to expect the children and the family to remove from the United Kingdom. The judge undertook an assessment of proportionality which is what he was required to do and gave reasons for finding as he did and stated at [77] that '*Section 117B considerations could not be ignored'* which indicates that the judge did not treat Section 117B as the deciding factor. He also found that the family were close, that it was in the best interests of the children to remain and be brought up by their parents, to have stability [61], and noted the length of time the children had been in the United Kingdom. The judge did carry out a balancing exercise as he was required to do.

29. For all these reasons I find that although there may be some misdirection in the law it is not material to the decision when read as a whole and the decision shall stand.

No anonymity direction is made.

Signed Date 29th February 2016

Deputy Upper Tribunal Judge Rimington