



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03791/2017

THE IMMIGRATION ACTS

Heard at Field House
On 10 September 2018

Decision & Reasons Promulgated
On 24 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MASTER A D A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Collins, counsel instructed by Kilic & Kilic solicitors
For the Respondent: Mr Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Turkey born in the United Kingdom on 24 June 2009. On 22 December 2016 an application was submitted on his behalf that he should be allowed to remain in the UK on the basis that he was a qualifying child. In a decision

dated 15 February 2017, the application was refused by the Home Office on the basis that it would be reasonable for him to leave the UK and return to Turkey with his parents and siblings as a family unit.

2. The Appellant appealed against that decision and his appeal came before Judge of the First-tier Tribunal Smith for hearing on 25 April 2018. In a decision and reasons promulgated on 9 May 2018, the judge dismissed the appeal. Permission to appeal was sought out of time on the basis that the judge had erred materially in law in failing to follow the guidance of the presidential panel in MT and ET (Nigeria) [2018] UKUT 00088 (IAC) where the Upper Tribunal made clear a nuanced approach was called for and that powerful reasons should be identified as to why the Appellant should be removed from the UK. It was submitted that the judge had conflated the question of reasonableness with that of proportionality and had lost sight of the essential question of whether it was reasonable for the Appellant to leave and that it was irrational and perverse to find that it would be reasonable to expect the Appellant to leave.
3. Permission to appeal was granted by Judge of the First-tier Tribunal Ford in a decision dated 9 July 2018 on the basis:

“It is arguable that the Tribunal erred in its assessment under paragraph 276ADE(6) [Judge’s note: I think in fact that should be subparagraph (4)] and in finding it reasonable to expect the Appellant to continue his private and family life outside the UK where he was born and has lived for nine years. There is an arguable material error of law.”

Hearing

4. At the hearing before the Upper Tribunal, Mr Collins sought to rely on the grounds of appeal. He submitted that the judge’s approach to the issue of reasonableness was odd and that he had nowhere identified powerful reasons as to why it would be reasonable for the Appellant to leave the United Kingdom. He submitted the only factor he could discern is the immigration history of his parents, a factor which is then considered as part of the proportionality assessment later in the decision and reasons. Mr Collins submitted that in so doing the judge had fallen into the same error as Judge of the First-tier Tribunal Martin sitting in the First-tier in the case of MT and ET (op cit). He submitted the Appellant was 8 years and 10 months at the date of hearing and even considering the immigration history of the parents, neither parent has ever put forward a false claim, there was no criminality and clearly following the decision in MT and ET this would not constitute the type of strong reasons that would justify removal of the Appellant.
5. In his submissions, Mr Whitwell helpfully submitted an extract from the current Home Office guidance in relation to Family Migration: 10 year route, which was updated on 22 February 2018. This provides *inter alia* as follows:

“The requirement that a non-British citizen child has lived in the UK for a continuous period of at least seven years immediately preceding the date of application, recognises that over time children start to put down roots and to integrate into life in the UK, to the extent that it may be unreasonable to require the child to leave the UK. Significant weight

must be given to such a period of continuous residence. The longer the child has resided in the UK, and the older the age at which they have done so, the more the balance will begin to shift towards it being unreasonable to expect the child to leave the UK and strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more.

Such strong reasons may arise where, for example, the child will be returning with the family unit to the family's country of nationality, and the parents have deliberately sought to circumvent immigration control or abuse the immigration process. For example, by entering or remaining in the UK illegally or by using deception in an application for leave to remain or remain. The consideration of the child's best interests must not be affected by the conduct or immigration history of the parents or primary carer, but these will be relevant to the assessment of the public interest, including in maintaining effective immigration control; whether this outweighs the child's best interests; and whether, in the round, it is reasonable to expect the child to leave the UK....

In particular circumstances, it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the child who has been resident here for seven years or more could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has been or is being granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules."

6. Mr Whitwell submitted that the approach of the judge was not perverse. The judge at [25] and [26] had adopted a balance sheet approach, which has been endorsed by the Supreme Court. He submitted there were at least five factors why the judge considered it would not be unreasonable to expect the child to relocate to Turkey:
- (1) the parents have access to the labour market;
 - (2) the child would be returning with his parents and has extended family there;
 - (3) the lower cost of living in Turkey;
 - (4) the fact the Appellant has some knowledge of the Turkish language and has the ability to learn; and
 - (5) that it will be in his best interests to remain with his parents.

The judge had at [30] also set out the factors in favour of the Appellant remaining. Those factors being:

- (1) that the applicant has lived here all his life and considers himself to be British;

- (2) that his social, cultural and educational roots are in the UK and he has extensive links here;
 - (3) he has never been to Turkey;
 - (4) he has a limited grasp of the language and is likely to face a degree of fun being made of him on account of his English accent;
 - (5) his parents have resided in the UK for nearly twenty years and disruption of the family unit would be significant. Opportunities for his mother to work in the hospitality sector may be limited in light of recent political developments;
 - (6) his education may suffer as he adjusts to a different education system;
 - (7) the Appellant has resided in the UK for over seven years which needs to be given significant weight in the proportionality exercise and establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary (MA (Pakistan) at [49]); and
 - (8) the Appellant is not responsible for his immigration status.
7. Mr Whitwell submitted that the judge was entitled to rely on the immigration history of the parents, that there had been a long period of avoiding immigration control or living illegally in the UK. The presidential guidance set out in the decision MT and ET was not before the judge when he made his decision and can in any event be distinguished on its facts. Mr Whitwell submitted that the grounds of appeal were a disagreement rather than established a material error of law.
8. In reply Mr Collins maintained his challenge that the decision was perverse. He submitted that the points identified by the judge at [25] and [26] were odd and peripheral given that the case concerns a 9-year-old boy and that the Appellant ET was 14 years old. He submitted in respect of the conduct of the parents that it was necessary to consider [34] of MT and ET and no powerful reasons have been identified in this case which clearly meant the decision was flawed.

Findings

9. I found material errors of law in the decision of Judge of the First-tier Tribunal Smith and gave my decision at the hearing. My reasons are as follows. As Mr Whitwell correctly identified, the judge did set out a balance sheet approach setting out factors for and against the reasonableness of the Appellant's removal. However, I find the judge did fall into error in the application of the correct legal test, bearing in mind the judgment of the Court of Appeal in MA (Pakistan) [2016] EWCA Civ 705, the presidential guidance in MT and ET and the Home Office's own guidance. This is because none of the factors set out by the judge and considered by him are either identified or identifiable as powerful reasons.

10. It is clear from the Home Office guidance that, as Mr Collins had indicated, both the Appellant's parents arrived legally and there was no history or deception or any criminality. It is clear from that guidance that in those circumstances the phrase "*very poor immigration history*" is not mere surplusage.
11. I set aside the decision of the First-tier Tribunal Judge and proceeded to hear submissions from the parties in order to remake the decision.
12. Mr Whitwell invited the Upper Tribunal to take account of the factors set out by the judge at [25] and [26]. He submitted the case could be distinguished from that of MT and ET. Whilst he was not suggesting that the Appellant's immigration history was criminal, clearly it was necessary to attach weight to the fact that there had been a prolonged period of overstay. I asked Mr Collins to take instructions as to the Appellant's father's immigration history and was also assisted by Mr Whitwell in establishing that the Appellant's father had entered the UK on 15 July 1999 with entry clearance which he subsequently sought to extend; his appeal against this decision was dismissed on 11 April 2013 and he became appeal rights exhausted on 6 June 2003. Mr Whitwell also provided me with a copy of the decision of Judge Kinnell dated 11 April 2003, dismissing the Appellant's appeal essentially on the basis that the Appellant had been unable to attend his course due to an accident and thus had not provided satisfactory evidence of regular attendance. No issue arises in this decision as to any adverse credibility or deception on the part of the Appellant's father.
13. Thereafter a further application was made for leave to remain as a student on 27 November 2003, which was refused some years later on 26 February 2007 with no right of appeal. There was then however a period of seven years before an application was made. On 3 April 2014 the first Appellant's case was reviewed by the Secretary of State and it was deemed that there was no basis to grant leave to remain. However an application for leave to remain on the basis of private and family life was made on 25 September 2014. This application was refused with no right of appeal on 21 January 2015, which, following a judicial review application, ultimately led to the application made on behalf of the Appellant.
14. Mr Collins submitted in light of the fact the judge's findings were still in place that at [23] the judge accepted that the Appellant had formed very strong links with the UK and perceived his identity to be British and accepted there would inevitably be a degree of disruption in the event they were removed to Turkey at [24]. Mr Collins drew attention to some of the supporting evidence which the judge had set out at [30](1) to (8) ([6] above refers). There was a letter in the Appellant's bundle at page 73 from Mr Dervish, the Appellant's martial arts instructor, at page 78 from a friend of the Appellant's and their parents and at pages 82 and 84 from family friends. He submitted that it was not in issue that the Appellant has strong roots and ties in the United Kingdom and he has no knowledge of Turkey apart from his parents' heritage. He submitted that there were no powerful reasons demonstrating as to why it would be reasonable to expect the Appellant to leave the UK. He submitted that the fact the parents had overstayed was not in itself, without more, sufficient to show such

powerful reasons. Mr Collins sought to rely on the judgments in MA (Pakistan) (op. cit.) and MT and ET.

Findings and reasons

15. I adopt the findings of the First tier Tribunal at [29] and [30] for and against removal of the Appellant. The Appellant is now 9 years of age. I take account of his best interests, which are to remain in a family unit with his parents and younger siblings. The issue is whether it would be reasonable to expect the Appellant to leave the United Kingdom and whether in all the circumstances, including the public interest considerations set out in section 117B of the NIAA 2002, it would be proportionate.
16. In MA (Pakistan) [2016] EWCA Civ 705, Lord Justice Elias held as follows at [46]:

“Applying the reasonableness test

46. *Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.”*

And at [49]:

“...the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.”

17. In MT & ET (child's best interests; *ex tempore* pilot) Nigeria [2018] UKUT 00088 (IAC) the Upper Tribunal held *inter alia* as follows:

“32. *This is why both the age of the child and the amount of time spent by the child in the United Kingdom will be relevant in determining, for the purposes of section 55/Article 8, where the best interests of the child lie.*

33. *On the present state of the law, as set out in MA, we need to look for "powerful reasons" why a child who has been in the United Kingdom for over ten years should be removed, notwithstanding that her best interests lie in remaining.*

34. *In the present case, there are no such powerful reasons. Of course, the public interest lies in removing a person, such as MT, who has abused the immigration laws of the United Kingdom. Although Mr Deller did not seek to rely on it, we take account of the fact that, as recorded in Judge Baird's decision, MT had, at some stage, received a community order for using a false document to obtain employment. But, given the strength of ET's case, MT's conduct in our view comes nowhere close to requiring the respondent to succeed and Mr Deller did not strongly urge us to so find. Mr Nicholson submitted that, even on the findings of Judge Martin, MT was what might be described as a somewhat run of the mill immigration offender who came to the United Kingdom on a visit visa, overstayed, made a claim for asylum that was found to be false and who has pursued various legal means of remaining in the United Kingdom. None of this is to be taken in any way as excusing or downplaying MT's unlawful behaviour. The point is that her immigration history is not so bad as to constitute the kind of "powerful" reason that would render reasonable the removal of ET to Nigeria."*

18. Having considered the relevant jurisprudence and the Home Office guidance, set out at [5] above, I find on the particular facts of the case that there are no powerful reasons to refuse leave, even if as a consequence of that the Appellant's family are entitled to remain with him. Whilst the Appellant's parents are overstayers, they entered the United Kingdom lawfully and I do not find that as such this can be characterised as a "very poor immigration history" in the absence of any criminality or deception.

Notice of Decision

19. The appeal is allowed on human rights grounds.

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 *Rebecca Chapman*

Date 20 September 2018

Deputy Upper Tribunal Judge Chapman