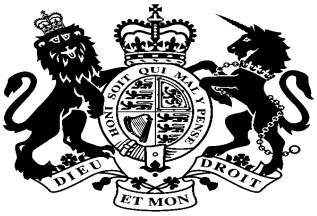


Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10881/2016
HU/12647/2016

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 May 2018	**On 19 June 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

EPHALA [M]
[A T]
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Plowright (counsel instructed by Perera and Co Solicitors)
For the Respondent: Ms N Willock-Briscoe (Home Office Specialist Appeals Team)

DECISION AND REASONS

1. These are the appeals of Ephala [M] and [AT], citizens of St Lucia born 10 October 1980 and 14 June 2010, against the decision of the First-tier tribunal of 19 October 2017 to dismiss their appeals on human rights grounds, itself brought against the decisions of 8 April 2016 to refuse their human rights claim.

2. The immigration history supplied by the Respondent was that Ms [M] arrived in the UK on 9 October 2002 with leave to enter as a visitor for six months until 9

April 2003. In March 2003 she applied to extend her leave; this was rejected on 8 April 2003. However she was subsequently granted leave until 30 June 2004 and then until 31 May 2009. Her last application under the Tier 4 General route was refused on 24 September 2009, her appeal rights becoming exhausted on 23 December 2009. She was served with notice of liability to removal on 28 August 2015.

3. The Secretary of State refused their most recent application, made on 9 September 2015, on the basis that Ms [M] had not established that she faced very significant obstacles to integration back in St Lucia, and as [AT]'s best interests were not shown as requiring the grant of leave in the UK, given his youth and the fact that his mother represented the entirety of his family life.

4. The First-tier Tribunal recorded the evidence before it. The Appellant had formed a relationship with a gentleman in early 2009 by whom she fell pregnant with [AT]. Her son had some contact with his father but the Appellant was his sole carer; He had never left the UK; she had only had one short spell abroad in October 2008. She had family and friends here, and had never claimed public funds. She was supported financially and morally by her family and friends here, whereas she had not stayed in touch with her friends abroad. His son was doing well in school. There was nobody abroad who could support them; the only person who might have done had died in 2008. She and her son would be destitute if they returned now. Her parents and siblings were now independent from them and would not offer support, bearing in mind she now had a child. The boy spoke no Creole and had many friends in the UK. He had expressed a wish not to return to St Lucia; he loved school and was doing well here. He had been shy but had grown in confidence, and she did not know how to explain to him that he faced departure from all that he knew in the UK; modern means of communication would not suffice to maintain his friendships here.

5. The Tribunal went on to dismiss the appeal, stating it would consider the claims of the "two separate appellants … individually." Ms [M] had no family life under the Rules given her son was not a British citizen and had not lived here for seven years at the date of their application to the Secretary of State. There was nothing exceptional about the mother's circumstances to merit consideration outside of the Immigration Rules; though if such an exercise was to be conducted, then there would be no interference with family life, given that the proposal was to remove mother and son together. Whatever problems she might face in St Lucia, they did not amount to very significant obstacles to integration; she had been raised there and had spent much of her life in the country, and it was to be presumed that her family would help her settle there.

6. As to [AT], the submissions made on his behalf as to him having lived in the UK for more than seven years by the date of the appeal hearing failed to appreciate that the Immigration Rules required that length of residence at the application date. Even if his case was assessed outside the Rules, he had only just reached the age of seven and he had his mother to care for him.

7. Grounds of appeal of 31 October 2017 contended that as [AT] was seven years old by the date of hearing his best interests should have been assessed on the basis that he was a qualifying child under section 117B(6) of the Nationality Immigration and Asylum Act 2002.

8. On 11 April 2018 the First-tier Tribunal granted permission to appeal on the basis that inadequate attention had been given to the appeal outside the Immigration Rules, and having regard to the best interests of a qualifying child.

9. A Rule 24 Response from the Secretary of State pragmatically recognised that the decision appealed was apparently flawed for the reasons set out in those grounds of appeal: given there was a qualifying child as part of the family unit at the date of the hearing before the First-tier Tribunal, section 117B(6) demanded reasoned engagement.

10. I indicated that this Response accorded with my own initial reaction to the decision below, and following brief submissions I determined that there had indeed been a material error of law. The First-tier Tribunal's decision was confused, in its repeated indication that it was under no obligation to assess the Appellants' claims outside the Immigration Rules, and in its apparent belief that Article 8 rights did not face infringement were the family unit to relocate abroad: clearly uprooting them from the UK would represent an *interference* with their private life in this country; the real question was the assessment of proportionality. More seriously, the Tribunal below apparently considered it unnecessary to consider the "strong reasons" test (which flows from the requirement to assess reasonableness under the statutory provisions of section 117B(6) of the NIAA 2002) because it was inconsistent with the Immigration Rules: clearly the statute must be given effect. Furthermore, those reasons that were given were scant indeed and failed to give any material attention to the strength of ties that [AT] has in the UK.

11. I accordingly found there to be material errors of law in the decision appealed. The parties were agreed that it would be appropriate for the Upper Tribunal to go on to determine the appeal finally on its merits, and made submissions on that basis.

12. Ms Willocks-Briscoe submitted that the relevant question was greatly informed by the Home Office Guidance of February 2018 p74 onwards: a child's best interests were to remain with their parents, and their wider family ties abroad should be borne in mind whether or not the child knew those family members personally. There was no indication that the family unit could not re-establish itself in St Lucia. English was widely spoken there, neither Appellant had any significant health issues, and [AT]'s UK ties were not established within the all-important four to eleven years age range. The mother's immigration history was a relevant consideration and was by no means perfect.

13. Mr Plowright submitted that this was a case of lawful entry where there were no strong reasons contraindicating the grant of leave. The Appellant's son did not speak Creole; he had never been to St Lucia. He emphasised the relevance of paragraph 17 of the FTT decision, which encapsulated the Appellant's claim, the findings therein being unchallenged by cross examination: there was no family support effectively available to support them in St Lucia, the mother's parents and siblings had independent lives there, and [AT] was well established in the UK where he was thriving in school and had many relationships with school friends which could not now be reasonably replicated in St Lucia.

Findings and reasons

14. It being accepted that the Appellant has parental responsibility for [AT] and is indeed his sole carer, the critical Immigration Rule within Appendix FM is the Exception:

> "**Section EX: Exceptions to certain eligibility requirements for leave to remain as a partner or parent**
> **EX.1.** This paragraph applies if
> (a)
> (i) the applicant has a genuine and subsisting parental relationship with a child who –
> (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
> (bb) is in the UK;
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
> (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK."

15. Thus the key question is the reasonableness of [AT]'s departure from the UK. Both parties referred me to this Guidance on the Appendix FM "ten year route" to settlement as a partner:

> "Relevant factors to consider, as to whether it would be reasonable to expect the child to leave the UK, are likely to include:
> • whether the child would be leaving the UK with their parent(s):
> - it is generally the case that it is in a child's best interests to remain with their parent(s)
> • the extent of wider family ties in the UK:
> - the decision maker must consider the extent to which the child is dependent on or requires support from wider family members in the UK in important areas of his or her life
> • whether the child is likely to be able to (re)integrate readily into life in another country, relevant factors include whether the:

- parent(s), or child, are a citizen of the country and so able to enjoy the full rights of being a citizen in that country
- parent(s) or child have lived in or visited the country before for periods of more than a few weeks. The question here is whether, having visited or lived in the country before, the child would be better able to adapt, or the parent(s) would be able to support the child in adapting, to life in the country.
- parent(s) or child have existing family or social ties with the country. A person who has extended family or a network of friends in the country should be able to rely on them for support to help (re)integrate there
- parent(s) or child have relevant cultural ties with the country. The decision maker must consider any evidence of exposure to, and the level of understanding of, the cultural norms of the country. For example, a period of time spent living amongst a diaspora from the country may give a child an awareness of the culture of the country
- parents or child can speak, read and write in a language of that country, or are likely to achieve this within a reasonable time period. Fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice
- child has attended school in that country
...

• other specific factors raised by or on behalf of the child. Parents or children may highlight the differences in the quality of education, health and wider public services or in economic or social opportunities between the UK and the country of return and argue that these would work against the best interests of the child if they had to leave the UK and live in that country. These will not normally tip the balance in the applicant's favour, particularly if the parent(s) or wider family have the means or resources to support the child on return or the skills, education or training to provide for their family on return, or if Assisted Voluntary Return support is available.

The requirement that a non-British citizen child has lived in the UK for a continuous period of at least the 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."

16. It will be noted that the Guidance maintains the "strong reasons" test as the threshold for justifying the relocation of a child who has begun to put down roots in the UK. As set out in *SF Albania* [2017] UKUT 120 (IAC) Guidance of this nature is of relevance to assessing an appeal §13:

> "10. … it appears to us that the terms of the guidance are an important source of the Secretary of State's view of what is to be regarded as reasonable in the circumstances, and it is important in our judgement for the Tribunal at both levels to make decisions which are, as far as possible, consistent with decisions made in other areas of the process of immigration control.
> 11. If the Secretary of State makes a decision in a person's favour on the basis of guidance of this sort, there can of course be no appeal, and the result will be that the decision falls below the radar of consideration by a Tribunal. It is only possible for Tribunals to make decisions on matters such as reasonableness consistently with those that are being made in favour of individuals by the Secretary of State if the Tribunal applies similar or identical processes to those employed by the Secretary of State.
> 12. On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance. But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it."

17. I accordingly have regard to that Guidance in my findings below. However, there is also a significant volume of relevant case law with which I must engage. Jackson LJ in *EV (Philippines)* [2014] EWCA Civ 874 at [35] stated: "A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life ..."

18. *Azimi-Moayed* [2013] UKUT 197 (IAC) states that as a starting point it is in the best interests of children to be with those of their parents who are their primary carers. If a parent has no further right to remain in the United Kingdom then it is to be expected that it is in the interests of a dependent child to follow them absent some particular reasons to the contrary. Stability and continuity of social and educational provision, and an upbringing consonant with the cultural norms of the society to which their parents belong, are usually in their best interests.

19. Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 explained that wider public interest considerations had to be taken into account when assessing the reasonableness of a child's relocation, beyond its best interests. The fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise as was shown by the Secretary of State's published guidance from August 2015 in which it is expressly stated that once the seven years' residence requirement

is satisfied, there need to be "strong reasons" for refusing leave, because 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. Nevertheless, it may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling.

20. In *MT and ET Nigeria* [2018] UKUT 88 (IAC) the Upper Tribunal examined the best interests of the child where the mother and daughter had lived in the UK for around a decade (for the latter, from the age of four to fourteen) by the time of the appeal hearing. The First-tier Tribunal found that the daughter had no memory of Nigeria and was well integrated in school and socially; it was clearly in her best interests to remain in the UK. However, her mother had overstayed her original visit visa, pursued a false asylum claim and received a community order for using a false document to obtain employment. The uprooting from school and loss of her friends were no different to the common experience of any child whose parents decided to make a significant move abroad or otherwise.

21. The Upper Tribunal disagreed with the First-tier Tribunal's assessment. It relied on *MA Pakistan* for the proposition that seven years' residence in the UK "establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary". As it put it, it was necessary 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. Accordingly the mother was merely 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: these were not sufficiently powerful reasons to counteract the child's best interests when assessing reasonableness: the appeal was accordingly allowed.

22. Drawing together the threads above, it is clear that, when assessing the reasonableness of a child's relocation, stability and continuity of social and educational provision, and an upbringing consonant with the cultural norms of the society to which their parents belong, are usually in their best interests. General speaking greater weight will attach to the private life of children who have been developing private life connections outside the family unit, and as a rule of thumb residence from the age of four upwards, when the child is developing external ties.

23. It is useful to adopt a balance sheet approach which identifies the pros and cons as to whether the Appellants' departure would be unreasonable (and thus disproportionate), as the higher courts have repeatedly encouraged of late.

24. The main factor counting against them is of course the mother's immigration history. Breaches of immigration control are relevant to the assessment of the precariousness of residence within section 117B of the NIAA 2002. That kind of factor is of course relevant to the assessment of whether a parent's departure from the UK is relevant notwithstanding a child's best interests, see generally *MA*

(Pakistan) which identified that wider public interest considerations must be taken into account when applying the reasonableness criteria.

25. When assessing precariousness, I have regard to the fact that Ms [M] spent a significant period in the UK lawfully. Having become pregnant, subsequently she overstayed her visa. The overstaying is of course culpable, but it is not something that should be held against her son, and it must be recognised that overstaying in those rather tangled circumstances where the boy was conceived in a country where she had been living lawfully for an extended period and whose father may well have been based here is a rather different scenario to a person who overstays for pure reasons of personal convenience after a very short period of leave, or from the circumstances of the illegal entrant.

26. Having regard to another factor from section 117B of the NIAA 2002, they are not financially independent in their own right, but nor is there any evidence of them being a burden on public funds, beyond the costs of schooling. There is no suggestion that the support from friends in this country by which they presently subsist will dry up, and of course, once the mother's immigration status is regularised, she will be able to work.

27. Then there are the factors in their favour. Of course *Azimi-Moayed* represents a general starting point, and the facts of the individual case must be evaluated with care. Here [AT] has never been to St Lucia, whereas in the UK he has for some years now begun to develop life outside the family unit, even though he has not yet spent more than seven years in school. The evidence is that he has a significant number of good friends, and he is well-settled in school. The strength of his ties here is graphically illustrated by his mother's evidence that she cannot imagine how to tell him that he may have to leave everything that he knows in this country.

28. I attach significant weight to the fact that the mother's evidence of their foreseeable circumstances back in St Lucia was unchallenged by the Secretary of State, either in the First-tier Tribunal or before me. Accordingly I accept that her relationship with family and friends there has dissipated in recent years; it is clear that she has gone her own way. There is no evidence of any sustained contact between her and her relatives abroad. St Lucia is a relatively poor country, and one cannot simply assume that relatives to whom the Appellant is no longer close will be able to find the resources to support her or have the contacts that might allow her to become self-sufficient.

29. Clearly the Appellant speaks fluent English as does [AT]. He does not speak Creole; whilst English is the national language in which one imagines classes are taught, it is clear that Creole is very extensively spoken in the country. That would put him at a disadvantage in making friends which in turn could lead to a degree of social isolation, making it more difficult for him to establish himself and make the most of his education. The Secretary of State's policy document *Every Child Matters - Change for Children* has been published as as statutory guidance on making arrangements to safeguard and promote the welfare of children, which refers to the definition of

this task found in section 11 of the Children Act 2004 and in the policy guidance Working Together to Safeguard Children, as "ensuring that children are growing up in circumstances consistent with the provision of safe and effective care; and undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully." The language disadvantage could significantly impinge on [AT] having optimal life chances going forwards.

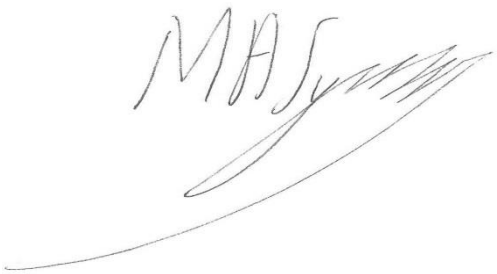
30. Weighing the positive factors against the negative ones, it seems to me that the negative factors, whilst present in the equation, are not especially strong. I have particular regard to *MT and ET Nigeria* as a useful benchmark in terms of identifying the kind of case where considerations of immigration history can be expected to outweigh a young child's strength of connections in this country. There a history of overstaying and a false asylum claim were considered not to outweigh a child's interests, though admittedly the child had resided in the UK for a significantly greater period than the youngster here. Nevertheless, here the mother has merely overstayed. One should not downplay the severity of that: clearly overstaying is contrary to government policy, is potentially a criminal offence, but nevertheless context is everything.

31. I conclude that the positive features of the case outweigh the negative ones and on balance I find that the Appellants' departure from the UK would be disproportionate to their private and family life.

Decision:

The decision of the First-tier Tribunal was legally flawed.
Re-hearing and re-determining the appeal, I allow the appeal.

Signed: Date: 31 May 2018



Deputy Upper Tribunal Judge Symes