



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/11429/2016
HU/11434/2016

THE IMMIGRATION ACTS

Heard at North Shields
On 10 August 2018

Decision & Reasons Promulgated
On 29 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

1. KHADIJA TABASUM
2. HAMMAD SUBBANI
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr M Dwyncz, Senior Home Office Presenting Officer
For the Respondent: Mr S Mohammed of Kingston Law, Solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Buchanan, promulgated on 28 January 2018 which allowed Appellants' appeals on article 8 ECHR grounds.

Background

3. The First Appellant was born on 08/10/2003. The second appellant was born on 27/06/2001. The second appellant is the first appellant's brother. Both appellants are nationals of Pakistan.

4. On 4 April 2016 the Secretary of State refused the Appellants' applications for leave to remain on article 8 ECHR grounds.

The Judge's Decision

5. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Buchanan ("the Judge") Allowed the appeals against the Respondent's decisions. Grounds of appeal were lodged and on 8 May 2018 Judge Mailer gave permission to appeal stating

1. The appellants are nationals of Pakistan and are siblings, born 08 October 2003 and 27 June 2001 respectively. In a decision promulgated on 23 January 2018 First-tier Tribunal Judge SPJ Buchanan dismissed their appeals against the respondent's decision to refuse their applications for leave to remain under paragraph 276 ADE(1)(iv) of the immigration rules, but allowed the appeals under article 8 of the human rights convention - [7.14] and [8.10].

2. The grounds content that the Judge found under 276 ADE(1)(iv) that it would not be unreasonable for the appellants to leave the UK, but concluded that there were compelling reasons to consider the appeal outside the rules, namely, that the appellants are in education. Those same considerations were encompassed in rule 276 ADE but had been rejected for consideration "inside of these provisions". He failed to reconcile his findings at [8.6]

3. It is arguable that there may be an inexplicable inconsistency in the Judge's findings. The further grounds of appeal are also arguable.

The Hearing

6. For the respondent, Mr Dwnycz moved the grounds of appeal. He told me that the Judge had made a material misdirection and the fact that both child appellants are in education is something which is factored into consideration under the immigration rules. He told me that the Judge had subjected himself to an internal conflict which he had not resolved, however, Mr Dwnycz conceded that MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 is against him, and that that case fully supports the conclusion that the Judge reached.

7. For the appellant, Mr Mohammed told me that the decision does not contain a material error of law. He told me that the Judge's findings are entirely in line with the rationale in PD (Sri Lanka) [2016] UKUT 108. He took me to the reasoning contained between [37] and [41] of that decision and told me that the Judge employed similar reasoning in reaching his conclusion. He reminded me that both appellants had been in the UK for more than 10 years, they are each at a critical stage of their education, they are immersed in UK life and culture and have minimal contact with their country of nationality. Mr Mohammed relied on MT & ET. He urged me to dismiss the appeal and allow the decision to stand.

Analysis

8. Both appellants entered the UK in June 2008. They entered the UK as visitors with entry clearance valid until 28 November 2008. On 19 November 2015 they submitted applications for leave to remain in the UK.

9. Between [7.1] and [7.14] of the decision the Judge considers paragraph 276 ADE(1)(iv) of the rules. At [7.14], after correctly considering the test of reasonableness, the Judge finds that neither appellant establishes that it would not be reasonable for them to leave the UK. The Judge then goes on to carry out an article 8 proportionality assessment between [8.1] and [8.10]. Between [8.6] and [8.8] the Judge finds that the critical stage of each appellants education is the determinative factor in assessing proportionality.

10. The Judge correctly draws a distinction between the test of reasonableness under paragraph 276 ADE(1)(iv) of the rules and his article 8 ECHR proportionality assessment at [8.5] of the decision. There, the Judge correctly sets out that to succeed under the rules it is for the appellant to establish that removal is not reasonable, but in an article 8 proportionality assessment, when disruption to private life is established, the burden of proof shifts to the respondent.

11. What is beyond dispute in this case is that both appellants are qualifying children. Section 117 B(6) of the 2002 act says

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom.

12. In R (on the application of MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was confirmed that if section 117B(6) applies then "*there can be no doubt that section 117B(6) must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the subsection are satisfied, the public interest will not justify removal.*"

13. In the case of MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 it was held that a very young child, who had not started school or who has only recently done so, will have difficulty in establishing that her Article 8 private and family

life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part. On the particular facts of a child who had been in the UK for ten years from the age of 4, that her mother had abused the immigration laws by overstaying on a visit visa and then making a false asylum claim and at some stage using a false document to obtain employment was not such a bad immigration history as to constitute the kind of "powerful" reason that would render the child's removal to Nigeria reasonable.

14. The circumstances of these appellants are on all fours with the circumstances of the child appellant in MT & ET. Relying on R(on the application MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705, there must be a powerful reason why a child who has been in the United Kingdom for over 10 years should be removed. There is a dearth of evidence of such a powerful reason which could outweigh the length of residence.

15. As there are no powerful reasons to remove the appellants, it cannot be reasonable for the appellants (Qualifying children at the date of application) to leave the UK, so that in the article 8 proportionality assessment both appellants benefit from s.117B(6) of the 2002 Act.

16. At [8.5] the Judge correctly directs himself in law. At [8.5] the Judge correctly distinguishes between consideration of the appellants' facts and circumstances under the immigration rules, and the distinct article 8 proportionality assessment. There is no conflict between the Judge's finding that the appellants do not meet the immigration rules, but succeed on article 8 ECHR grounds. The decision the Judge reached is entirely in line with the guidance now given in MT & ET

17. **The decision does not contain a material error of law. The Judge's decision stands.**

DECISION

18. **The appeal is dismissed. The decision of the First-tier Tribunal, promulgated on 28 January 2018, stands.**

Signed

Date 20 August 2018



Deputy Upper Tribunal Judge Doyle