



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/13784/2016
HU/13790/2016
HU/13802/2016
HU/13796/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3 July 2018

Decision and Reason Promulgated
On 12 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

S M M D O
M B D O
V H M M D O
L M M D O

(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Norman (counsel) instructed by Sterling and Law associates
LLP

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellants to preserve the anonymity order made by the First-tier Tribunal.

2. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Goodman promulgated on 1 November 2017, which dismissed the Appellants' appeals.

Background

3. The first and second appellants are the parents of the third and fourth appellants. All four appellants are Brazilian nationals. The first appellant was born on the 3 April 1980. The second appellant was born on 15 December 1978. The third appellant was born on 28 August 2003. The fourth appellant was born on 20 December 2009. The second appellant entered the UK on 15 March 2008. The first and third appellants joined him in the UK on 26 October 2008. They entered as visitors and overstayed. The fourth appellant was born in the UK. The third and fourth appellants are qualifying children because they have been in the UK for more than seven years.

4. The Appellants applied for leave to remain in the UK. On 17 May 2016 the Secretary of State refused the Appellants' applications.

The Judge's Decision

5. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Goodman ("the Judge") dismissed the appeals against the Respondent's decision. Grounds of appeal were lodged and on 4 April 2018 Upper Tribunal Judge Martin gave permission to appeal stating

1. The appellants had sought leave to remain in the UK on the basis of their private and family life. The two children have been in the UK 10 and 7 years respectively.

2. It is arguable that the Judge erred in failing to take into account the wisdom of MA (Pakistan) [2016] EWCA Civ 705 (paragraph 49) or of the President of the Upper Tribunal in MT & ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088(IAC) in finding it reasonable for the children to be removed from the UK.

The Hearing

6. For the respondent, Mr Mills told me that the appeals are no longer resisted. The respondent now concedes that the Judge's decision contains a material error of law and should be set aside. The respondent asks me to substitute my own decision allowing the appellant appeals on article 8 ECHR grounds. Mr Norman simply moved the grounds of appeal and associated herself with Mr Mill's comments.

Analysis

7. The Judge's factual findings lie between [10] and [25]. He found that the third appellant has been in the UK since October 2008 and the fourth appellant was born in

the UK. Between [26] and [32] the Judge takes correct guidance in law. At [35] the Judge correctly identifies that

This case is about the children.

8. Between [35] and [41] the Judge sets out the factors to be weighed in the proportionality exercise, and at [42] he summarises his proportionality exercise. It is difficult to see whether or not the Judge has applied section 117B(6) of the 2002 Act. The third and fourth appellants are both qualifying children.

9. Although the Judge discusses the best interests of the children and discusses whether or not it would be reasonable for each appellant to leave the UK, in reality the decision contains inadequate findings about whether or not there are strong, powerful reasons to overcome the length of residence of the third, & fourth appellants. At [38] of the decision the Judge applies the wrong test when he draws the conclusion that return to Brazil

...will not be a disaster.

The decision contains inadequate consideration of the best interests of the children. That is a material errors of law.

10. I set the decision aside.

11. Although I set the decision aside there is enough material before me to let me substitute my own decision.

My Findings of Fact

12. At the date of application none of the appellants could meet the requirements of the immigration rules. Neither the first nor the second appellant are British citizens so neither of them can meet the eligibility requirement of the immigration rules.

13. The third and fourth appellants are both qualifying children. They are both immersed in the UK education system. Both children have recently been victims of serious crime; the third appellant suffers from PTSD as a result of crime. The fourth appellant was born in the UK. In October this year the third appellant will have been in the UK for 10 years.

The Immigration Rules

14. The respondent accepted that the first and second appellants met the suitability requirements, but not the eligibility requirement. The focus was on E-LTRPT 1.2 of the rules because neither the first nor the second appellant is a British citizen. The only competent ground of appeal is on article 8 ECHR grounds.

Article 8 ECHR

15. Since the date of decision in this case the Upper Tribunal has issued the decision in MT & ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88(IAC).

16. The circumstances of the third appellant are practically 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 10 years should be removed. There is a dearth of evidence of such a powerful reason.

17. As there are no powerful reasons to remove the third and fourth appellant, it cannot be reasonable for the third and fourth appellants (Qualifying children at the date of application) to leave the UK.

18. The sole ground of appeal is on article 8 ECHR grounds. Section 117B of the 2002 Act tells me that immigration control is in the public interest. Family life within the meaning of article 8 is established for the appellants. The respondent's decision is an interference with that family life. The burden therefore shifts to the respondent to show that the interference was justified. The respondent relies solely on the public interest in effective immigration control.

19. The third and fourth appellants are qualifying children. S.117B(6) of the 2002 Act, which 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.

20. By virtue of section 117D a "qualifying child" means a person who is under the age of 18 and who— (a) is a British citizen, or (b) has lived in the United Kingdom for a continuous period of seven years or more. If a child is a qualifying child for the purposes of section 117B of the 2002 Act as amended, the issue is whether it is not reasonable for that child to return.

21. I remind myself of Section 55 of the Borders, Citizenship and Immigration Act 2009. In ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 Lady Hale said that "*Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child*".

22. In R(on the application MA (Pakistan) and Others) v Upper Tribunal (Immigration and Asylum Chamber) and Another [2016] EWCA Civ 705 it was held that in light of

the jurisprudence of the Supreme Court, courts and tribunals were not mandated to approach the proportionality exercise where the best interests of the child were in issue in any particular order such that it was an error of law for them to fail to do so. Although it would usually be sensible to start with the child's best interests, ultimately it did not matter how the balancing exercise was conducted provided that the child's best interests were treated as a primary consideration (paras 49, 53-57 and 72). In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) in which it was held that the best interests assessment should normally be carried out at the beginning of the balancing exercise.

23. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) it was held that the "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

24. 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 sub-section are satisfied, the public interest will not justify removal.*" It was additionally held that the fact that a child had been in the UK for seven years should be given significant weight in the proportionality exercise because it is relevant to determining the nature and strength of the child's best interests and as it established as a starting point that leave should be granted unless there were powerful reasons to the contrary.

25. The third appellant's circumstances are the similar to those of the appellant in MT & ET. In that case the Upper Tribunal looked for powerful reasons why a child who has been in the UK for over 10 years should be removed and found that there were no such powerful reasons. Paragraphs 30 to 34 the decision in MT & ET could have been written with the third appellant in mind.

26. Applying exactly the same logic to the facts as I find them to be, the first and second appellants' immigration history is not so bad that it can constitute a powerful reason that would render reasonable the third and fourth appellants' removal to Brazil.

27. The third and fourth appellants succeed on article 8 grounds. In line with PD their success leads to success for all four appellants.

Decision

28. The decision of the First-tier Tribunal promulgated on 1 November 2017 is tainted by material errors of law and is set aside.

29. I substitute my own decision

30. The appeals are allowed on article 8 ECHR grounds.

Signed

Date 9 July 2018

A handwritten signature in black ink, appearing to read "Paul Doyle". The signature is written in a cursive, flowing style.

Deputy Upper Tribunal Judge Doyle