



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/19600/2016
HU/19618/2016
HU/19626/2016
HU/19638/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2 August 2018

Decision & Reasons Promulgated
On 30 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

R M (FIRST APPELLANT)
O J (SECOND APPELLANT)
T L (THIRD APPELLANT)
F J (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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.

Representation:

For the Appellants: Mr M A Muid Khan, Legal Representative from Lincoln's Chambers Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the four Appellants against the decision of First-tier Tribunal Judge Buckwell (the judge), promulgated on 26 January 2018, dismissing their appeals against the Respondent's refusal of their human rights claims. These claims were made on 14 March 2016. The family unit consists of the first and second Appellants, who are husband and wife, and the third and fourth Appellants, their children. The third Appellant was born in July 2008, and the fourth in March 2010. They have resided in the United Kingdom throughout their lives.

The judge's decision

2. At [52] the judge correctly notes that he was required to apply the reasonableness test in respect of the two children. In so doing he was bound to have regard to wider public interest considerations. At [52] to [57] it is clear that he was unimpressed by certain aspects of the parents' motivations and assertions made in relation to their ability to re-establish themselves back in Mauritius. [60] and [61] read as follows:

"60. With further consideration to the minor Appellants, both have benefited from education in this country for a number of years. I do not accept that their ages and the time spent in this country mean that it would be unreasonable to now expect them to accompany their parents to Mauritius. Their best interests overwhelmingly are to remain within the family unit and I take into account all case law to which I have been referred ... In addition there is the Upper Tribunal decision in Kaur and Azim-Moayed with respect to the period of time spent in this country beyond the age of 4 years by qualifying children. That is relevant in these appeals for the minor Appellants. I have fully taken into account the specific issues relating to the third Appellant and the reports and information made available.

61. Accordingly overall I do not find that it would be unreasonable to expect the minor Appellants to return to Mauritius with their parents ... I am specifically guided by the judgment of the Court of Appeal in MM (Uganda) and MA (Pakistan)."

3. The appeals were duly dismissed.

The grounds of appeal and grant of permission

4. The grounds are certainly not as focused as they might have been but at paragraph 22 it is asserted, in essence, that the judge failed to have proper regard to the important factor that both the children were, as at the date of hearing, qualifying children in respect of the triggering of the reasonableness test. In granting permission to appeal

by a decision dated 24 May 2018, Designated First-tier Tribunal Judge McCarthy observed that it was arguable that the judge had failed to give considerable weight to the length of the children's residence, given what is said in paragraph 46 of MA (Pakistan).

The hearing before me

5. At the outset of the hearing Mr Melvin quite fairly acknowledged that there were weaknesses in the judge's decision as regards the best interests of the children, particularly the third Appellant. He was not, however making a formal concession.
6. In all the circumstances I did not need to hear submissions from Mr Khan.

Decision error of law

7. I conclude that there are material errors of law in the judge's decision.
8. Weight is in general terms a matter for the fact-finding tribunal. However, in cases concerning qualifying children and the reasonableness test, it is clear from MA (Pakistan) and other cases that "significant" weight *must* be accorded to the length of residence and, by extension, the consequent ties arising therefrom. In my view the judge has simply failed to attribute such weight to the length of residence, particularly that relating to the third Appellant who by the date of hearing had been in this country for approximately nine and a half years. It is right that the judge makes reference to MA (Pakistan) and he specifically states that he had been guided by it (see for example [61]). However, and with all due respect, there is simply nothing by way of substance to indicate that appropriate (i.e. "significant") weight had been given to the length of residence factor, as required by the guidance provided by the Court of Appeal.
9. If indeed such weight had been accorded to the residence factor, the judge has failed to identify any "powerful reasons" which went to outweigh the length of residence factor. There is nothing inherently so serious in the parents' immigration history that such reasons can be taken to have existed by way of implication. Indeed, whilst the judge took an adverse view of certain elements of the parents' evidence, their immigration history as a whole could not sensibly be described as particularly serious or appalling.
10. Further, and in line with Mr Melvin's observations about the best interests point, in my view the judge has failed to take all relevant evidence into account that was relevant to the best interests assessment, particularly in relation to the third Appellant. There was evidence before the judge in relation to the third Appellant of particular cognitive and behavioural difficulties (see Annexes E, G, and J of the Respondent's bundle) but none of this appears to have been taken into account in [60]. I appreciate that he has said that he had had regard to "the reports and information made available" but that does not adequately deal with the substance of this evidence in any way.

11. In light of the above and reading the judge's decision sensibly and holistically, there are material errors of law and I set that decision aside.

Remaking the decision

12. After a discussion about how to dispose with these appeals, I have decided that I should remake the decisions based upon the evidence now before me.
13. Mr Melvin initially suggested that I should remit the appeals and that to proceed to remake them now would effectively deny the Respondent a "layer of appeal". I indicated to him that the Upper Tribunal was well able to make any additional relevant findings of fact in any given case. Remitting to the First-tier Tribunal is to be seen as the exception rather than the rule. It would require good and relevant reasons to remit: there are none in this case.
14. Mr Khan urged me to remake the decisions.
15. I put the appeals back in my list in order that both representatives would have an opportunity to consider the evidence and make relevant submissions to me in due course.
16. On resumption, Mr Melvin indicated that in fact he had nothing to add beyond what he had already said in relation to the error of law issue. He accepted that both children were qualified, but in light of what he described as the parents' "appalling" immigration history, public interest considerations outweighed the weight to be given to the children's residence in this country.
17. Mr Khan suggested that the parents' immigration history was not as bad as portrayed by Mr Melvin. He confirmed that the third Appellant will be starting Year 6 this September whilst the fourth Appellant will be starting Year 4.
18. I reserved my decision on the remaking of the decisions in these appeals.

Remaking the decision: findings of fact

19. Based on the evidence before me, in light of what the judge found, the submissions made before me, and on a balance of probabilities, I make the following core findings of fact in these appeals.
20. I find that all of the Appellants are Mauritian nationals. I find that the second Appellant arrived in the United Kingdom in 2000 and appears to have had leave to remain until approximately July 2010. I find that the first Appellant entered the United Kingdom in July 2004. She too appears to have had leave until July of that year. I find that the third Appellant was born in this country in July 2008 and the fourth in March 2010. I find that they have resided in this country continuously throughout their lives. I find that the first and second Appellants did approach the Respondent to try and regularise their status in March 2016. I find that there are no convictions against them, nor have they practised deception at any time. I find that the Appellants have

probably worked in the United Kingdom both with and without permission. I find that there will be no particular obstacles to the first and second Appellants finding employment if the family unit returned to Mauritius.

21. Turning to the children, and in particular the third Appellant, I find that the evidence contained at Annexes E, G and J in the Respondent's bundle is entirely reliable. None of it had been challenged by the Respondent at any stage. I find that the third Appellant has mild to moderate learning difficulties, with significant speech and language problems and significant difficulties with attention, listening, and over-active behaviours. I find that he has not been given a diagnosis of ADHD or autism at this time, although it appears as though assessments are continuing. I find that the third Appellant has received educational support in school including revised classroom activities. I accept that with such support he has gradually increased in confidence and is slowly building up literacy and numeracy scores. I find that educational support would continue in all curriculum areas. I regard it as a reliable assessment of a relevant professional that without good support his intellectual, social and emotional outcomes would be compromised (with particular reference to E1 of the Respondent's bundle). I find that the third Appellant was in Year 4 at the time and that the fourth Appellant was in Year 2.

Remaking the decision: conclusions

Paragraph 276ADE(1)(iv) of the rules and the third Appellant.

22. The relevant human rights claims were made on 14 March 2016. At that time the third Appellant had resided in the United Kingdom for over seven years. He was therefore a qualifying child at that time. In relation to his best interests, I conclude that as at that time, they lay in remaining with his parents and young sibling, and I also conclude that the best interests lay in him remaining in the United Kingdom. This is due in part to his length of residence, in part because he had resided in this country throughout his life, and also because it is clear enough in the evidence that he had significant cognitive and educational problems for which he was receiving important support at school. On a cumulative basis, any removal from the United Kingdom at that time would have been contrary to his best interests.
23. I now go on to conduct the reasonableness assessment, having regard to wider public interest considerations. The best interests of the third Appellant are clearly a significant factor. So too of course is the fact that he was a qualified child, thereby acquiring an important 'residential' status (i.e. beyond the seven-year threshold). I attribute very significant weight to these factors.
24. Are there powerful countervailing reasons which go to outweigh the significant factors in the third Appellant's favour? In my view there are not.
25. I take full account of the public interest in ensuring effective immigration control. It is of course the case that none of the family members had status in this country as at the date of the human rights claims. In respect of the parents, I do not however agree with Mr Melvin's description of their history as being "appalling". They in fact had leave

to remain for a significant period of time before becoming overstayers. There is no criminality or deception in play here. Albeit rather belatedly, they did in fact approach the Respondent to try and regularise their status in 2016. The history, whilst poor, is not particularly adverse.

26. The family unit are not financially independent and I take account of this. There is no question of an inability to speak English in these appeals.
27. Weighing all relevant matters up, whilst there are obviously factors counting against the third Appellant within the reasonableness assessment, these factors are not such that they combine to disclose “powerful reasons” in light of what is said in MA (Pakistan) and as reiterated by the president at paragraph 33 of MT and ET (child’s best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC).
28. I conclude that the third Appellant satisfies the requirements of paragraph 276ADE(1)(iv). He therefore succeeds in his own right on this basis, satisfaction of the relevant rule being dispositive of the appeal (see for example paragraph 34 of TZ (Pakistan) [2018] EWCA Civ 1109).
29. There has been no suggestion that this family unit should be split up, with the third Appellant remaining in this country alone whilst the others are returned to Mauritius. I therefore conclude that on the basis that the third Appellant succeeds with reference to the relevant rule, the three other Appellants succeed outside the context of the rules.

Section 117B(6) NIAA 2002

30. For the sake of completeness, I go on and address this issue which of course brings the relevant date of assessment of circumstances up to the date of the hearing before me, as opposed to it being confined to the date of the making of the human rights claims.
31. As of now the third Appellant has been in this country for just over ten years and the fourth Appellant for almost eight and a half. The best interests of both the children lies not only with remaining with their parents but, in both cases, also in remaining in the United Kingdom. The third Appellant’s best interests have, I conclude, clearly strengthened since March 2016. I take into account the fact that the third Appellant will shortly be starting an important stage in his educational career, namely Year 6, which includes the SATS tests. The evidence shows that his cognitive problems persist (as would be expected). His best interests combined with the now very substantial period of residence represents a very, very significant factor in the overall reasonableness assessment. In respect of the wider public interest considerations, these are really much the same as they were in respect of the assessment under paragraph 276ADE(1)(iv) (see above). The Appellants all continue to have no status in this country, but there are no new adverse factors in play here.
32. It remains the case, and now by an extended margin, that no “powerful reasons” exist to outweigh the very significant importance attributable to the children’s best interests and length of residence in the United Kingdom, in particular those of the third

Appellant. I conclude that it would not be reasonable to expect either of the children to leave the United Kingdom. Section 117B(6) is satisfied.

33. In this regard, the first and second Appellants are able to succeed in their appeals as this provision is a free-standing provision (see paragraphs 17-21 of MA (Pakistan)). There is no need for them to show anything else in order to succeed on article 8 grounds. Where the first and second Appellants succeed with reference to section 117B(6), the third and fourth Appellants must also succeed, there being no suggestion that the family be split up.

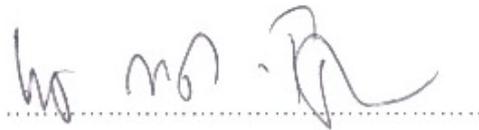
Postscript

34. Following the hearing before me I received correspondence from the Appellants' solicitors that an application has now been made on the third Appellant's behalf for her registration as a British citizen under the British Nationality Act 1981. I make it clear that this information has played no part in my decision.

Notice of decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I remake the decisions by allowing all four appeals on the basis that the Respondent's decisions to refuse their human rights claims are unlawful under section 6 of the Human Rights Act 1998.



Signed

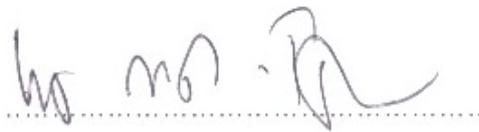
Date: 19 August 2018

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make full fee awards of £140.00 in each appeal, making a total of £560.00.

A handwritten signature in black ink, appearing to read 'Ms Norton-Taylor', is written over a horizontal dotted line.

Signed

Date: 19 August 2018

Deputy Upper Tribunal Judge Norton-Taylor