



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/11208/2016
HU/11212/2015
HU/11216/2016
HU/11221/2016
HU/11231/2016

THE IMMIGRATION ACTS

Heard at Field House
On 25 May 2018

Decision & Reasons Promulgated
On 08 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

- (1) KC (MALAYSIA)
- (2) HC (MALAYSIA)
- (3) CC (MALAYSIA)
- (4) SC (MALAYSIA)
- (5) JC (MALAYSIA)

(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms Emma Harris, Counsel instructed by Nag Law Solicitors
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal from the decision of the First-tier Tribunal (Judge Obhi sitting at Birmingham on 6 June 2017) dismissing their appeals against the decision to refuse to grant them leave to remain on the grounds of family and private life established in the UK. The First-tier Tribunal made an anonymity direction because, I infer, the

central issue in the appeals was whether the best interests of the minor children (the third to fifth appellants) – and in particular the best interests of the oldest child, who had acquired over seven years’ residence at the date of application - should prevail over the public interest in the maintenance of effective immigration controls. I was not invited to discharge the anonymity direction, and I consider that it is appropriate to maintain the anonymity direction for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 15 December 2017 First-tier Tribunal Judge Bennett, granted permission to appeal for the following reasons:
 2. The first ground, in relation to the reasonableness requirement of paragraph 276ADE(iv) of the Immigration Rules and section 117B(6) of the Nationality, Immigration & Asylum Act 2002, is arguable. Although the Judge correctly referred to this requirement at paragraphs 34 and 37 of her decision, it is arguable that she did not apply it because she said in paragraph 35 of her decision that she was not satisfied that disruption, change and hardship, reached the level of “very significant obstacles” and, in the context of section 117B(6) did not make any finding about whether it is reasonable to expect the qualifying child to leave the United Kingdom.
 3. While the second ground, about the availability, cost and affordability of English medium education in Malaysia, might not warrant a grant of permission on its own, because of the appellant’s failure to produce any objective evidence about this, I grant permission on both grounds to avoid multiplicity of proceedings and because it is not a discreet point but part of THE reasonableness assessment.

Relevant Background Facts

3. The first appellant, ‘Mr C’, was born on 7 April 1981, in Penang, Malaysia. Mrs C was born in Malaysia on 24 July 1991. Mr C entered the United Kingdom as a visitor from Malaysia on 19 January 2003, and overstayed. Mrs C entered the UK on 13 March 2003 as a working holidaymaker with permission to remain until 19 February 2005. She also overstayed. On 24 May 2008 she gave birth to the third appellant, CC. On 19 March 2011 she gave birth to the fourth appellant, SC, and on 6 October 2014 she gave birth in the UK to the fifth appellant, JC.
4. Mr and Mrs C made three attempts to regularise their status in the UK. On 26 November 2009 they applied for permission to remain outside the Immigration Rules and on Article 8 grounds. The application was refused, with no right of appeal. The couple made a second application on 5 April 2012 on similar terms, which was also refused with no right of appeal on 14 October 2013. The refusal with no right of appeal on 14 April 2010 was reconsidered, and the decision to refuse with no right of appeal was maintained on 20 October 2010).
5. At some point following the birth of the third child, the parents made a third application on behalf of themselves and their three children on 25 January 2016, by which time CC had accrued over seven years’ continuous residence in the UK.

6. On 14 April 2016 the respondent gave her reasons for refusing the application of the appellants. With regard to the parents, there were not insurmountable obstacles to them continuing their family life together outside the UK in Malaysia. CC did not meet the requirements of Rule 276ADE(1)(vi) of the Rules, as he could live in Malaysia with his parents and siblings. In a separate decision under section 55, the respondent said that the parents would be returning to Malaysia with their children and would be able to support them whilst they were living there enjoying their full rights as citizens of Malaysia. They might be currently enrolled in education in the UK, but it was clear from the objective information available that Malaysia had a functioning education system which the children would be able to enter. Furthermore, they already had family in Malaysia and there was no reason to suggest that they would not be adequately supported on return.

The Hearing Before, and the Decision of, the First-tier Tribunal

7. Both parties were legally represented before Judge Obhi. The first appellant gave his evidence in Mandarin, with the assistance of a Court-appointed Interpreter. His wife, the second appellant, gave her evidence in English, occasionally turning to the Interpreter for assistance.
8. In her subsequent decision, the Judge summarised the first appellant's claim at paragraph [11]. He had met the second appellant in the UK in 2003. On 26 September 2007 he had been granted British overseas citizenship as a former national of Penang. On 26 December 2008 he had renounced his Malaysian nationality in order to enable him to apply for naturalisation as a British national. It was now accepted that this was bad advice. He could not apply for British nationality on the basis of his status as a BOC, and instead he had sought to remain in the UK on the grounds of family and private life established here. He claimed that he could no longer return to Malaysia because he would need a visa to go there, and he would also lose the business which he had established in the UK. The three children had never met their relatives in Malaysia.
9. At paragraphs [13]-[15], the Judge set out the oral evidence given by the first appellant; and at paragraphs [16]-[17], the Judge set out the oral evidence given by the second appellant. On the topic of the registration of the children as Malaysian nationals, the evidence of the second appellant was as follows: *"She said that they had not registered the children as Malaysian nationals because her husband had renounced his citizenship and she could not register them as she was not a single parent. She said that they had enquired at the Malaysian Embassy who would not let them make the applications. She said that they had enquired about her husband going to Malaysia as her spouse, but the main problem was the children and they had been in the UK for such a long time and had support here."*
10. In her closing submissions on behalf of the respondent, the Presenting Officer submitted that the eldest child had been registered as a Malaysian citizen and there was no evidence that the other two would not be able to acquire it. The documents showing that the first appellant had revoked his Malaysian citizenship were in the bundle, but there was no evidence in relation to the applications for the children to

obtain Malaysian citizenship. She submitted that the appellants had not applied, because they knew they would get Malaysian nationality, and there was no evidence that the first appellant could not return to Malaysia. She submitted that the appellants had been selective about the information they provided. For example, information had been obtained about Marlborough School which taught in English, but there was no evidence that other schools in Malaysia did not also teach in English. The reality was that children spoke Mandarin and Cantonese, and they could learn the language with the assistance of their parents. There was no satisfactory evidence that it was unreasonable for them to go back.

11. On behalf of the appellants, Ms Anzani of Counsel submitted that even if CC was going to go to an English-speaking school in Malaysia, there would be a significant disruption for him. His mother had undertaken research on this, and she knew the education system well, having been through it in Southern Malaysia. His mother had learned English at an after-school club. While there was a functioning education system in Malaysia, language would be a barrier for CC.
12. The Judge set out her findings of fact at paragraphs [20] onwards. At paragraph [21], she noted that the respondent's case was that the appellants had sought to exaggerate their situation in order to suggest that their removal to Malaysia would have a more disadvantaged impact on the children "*than reality would show it to be*".
13. At paragraph [22], the Judge said that she was not persuaded that the first appellant had sought to reinstate his Malaysian nationality, as his evidence and that of his wife on this topic was inconsistent. He said that he had not done so - but she suggested that he had. Similarly, in relation to getting Malaysian passports and nationality for the children, there was no evidence that any enquiries had actually been made in relation to that, and again the oral evidence of the parents were inconsistent on this point: "*For the purposes of my decision I find that all the appellants either are, or are entitled to, Malaysian nationality.*"
14. At paragraph [25], the Judge gave her reasons for finding that it was more likely than not that the language spoken at home was Mandarin, and that the children could all converse in that language. She was also not satisfied that the contact the family had with their extended family in Malaysia was as limited as they said.
15. At paragraph [26], the Judge held that, despite CC being nine years of age, she was not satisfied that it was unreasonable to require him to return to Malaysia with his parents. All three of the children were still more integrated into the family than they were with the community. There was no evidence of any extraordinary, independent connection with the community from which they would have to be severed. Their closest relationships were with their family, and primarily with their parents.
16. At paragraph [27], the Judge said that the Courts consistently upheld the premise that a child's best interests were primarily served by remaining within the birth family. The family before her was one of which, no doubt, the parents would do the best for their children. The second appellant was a caring and concerned parent who had

already started making enquiries about English-speaking schools in Malaysia, as it was the family's "choice" that the children be educated in English. She was told that cost of such education would be prohibitive. But sadly, everyone had to manage within their means, and the fact that they would not be able to put their children into the schools which they chose, was not a reason for them to be given more preferential treatment than others in their situation: "*I do not know whether there are any non-fee paying schools, nor am I in a position to state that the education provided in Mandarin is any less valuable than education provided in English. I have already found that CC does speak Mandarin, and it may not be as good as his English language, but it would improve within a very [short] period once he returns and is entered into the education system in a country where his family and extended family speak the same language.*"

17. At paragraph [32], the Judge referred to **EV Philippines** and at paragraph [33] she made reference to **NA & Others (Pakistan)**. At paragraph [35], she applied the guidance given by Clarke LJ in **EV (Philippines)** to the children in the present case.
18. At paragraph [36], the Judge held as follows: "*While there would be disruptions and change, and possibly hardship, although the couple have family in Malaysia, I am not satisfied that it will be to the level of very significant obstacles.*"
19. At paragraph [37], the Judge acknowledged that CC was a qualifying child under section 117B(6), but she drew a distinction between his case and that **PD**, who was a teenage boy aged 14 years.
20. At paragraph [39], the Judge held (in the context of the discussion of section 117B) that the family's removal from the UK would impact on the children's education, but there were similar resources in their country of origin. There was no evidence of their integration into any other aspect of British cultural life outside their respective primary schools, and they were not of an age where a change of schools was going to impact on them negatively as they would be moving to secondary schools within a few years in any event. They were not at a critical state of their education, as the child in **PD** was.

The Hearing in the Upper Tribunal

21. At the outset of the hearing before me to determine whether an error of law was made out, Ms Harris applied for permission to amend the grounds of appeal pursuant to paragraph 5(3)(c) of the Upper Tribunal Procedure Rule 2008. The additional ground of appeal was that the Judge had erred in law by finding that the appellants with only BOC status were entitled to Malaysian nationality. She relied on **KU, R (on the application of) The Secretary of State for the Home Department [2013] EWHC 388(1)(Admin)**. In that case, Timothy Brennan QC, sitting as a Deputy High Court Judge, held at paragraph [26], that the material before him established that in February 2013 Malaysian officials agreed that a BOC who was prepared to return to Malaysia voluntarily, could apply for a 5-year residence pass (intending to lead to citizenship) before his departure from the United Kingdom. This would allow him to live and work in Malaysia while his application to re-acquire his citizenship was processed.

The claimant could therefore return to Malaysia and begin the process of re-acquiring his Malaysian citizenship voluntarily if he wished to do so.

22. Ms Harris submitted the first appellant could be readmitted to Malaysia, but it would not be as a Malaysian national, but as a holder of a five-year residence pass. Although this was intended to lead to citizenship, it was certainly not the case that he was “entitled” to Malaysian citizenship. Citizenship would only be acquired by naturalisation in accordance with the Malaysian constitution, and that would be a question of discretion for Malaysian authorities after a period of 12 years had elapsed.
23. In terms of the two younger children, they did not fall into the same position as their father, as they had not been Malaysian nationals in the past. There was therefore nothing to suggest (she submitted) that they would even be admitted to Malaysia, let alone that they would be entitled to Malaysian nationality.
24. Although Mr Fijiwala did not oppose the application to amend, provided that the appeal was adjourned, I was not persuaded that it was in accordance with the overriding objective to permit the appellants to add an additional ground of appeal for which permission had not previously been sought. I also did not consider that the case of KU disclosed an arguable error of law in the decision of Judge Obhi which was material to the outcome.
25. Firstly, dealing with the first appellant, it was not his case before the First-tier Tribunal that there was an insuperable legal obstacle to him carrying on family life in Malaysia with his spouse, who had not renounced her Malaysian nationality. The ratio of KU was that the claimant had not made out a case that he was not returnable to Malaysia. At paragraph [39], Judge Brennan held that the claimant had never presented a letter from the Malaysian authorities indicating that he could not be returned to Malaysia; secondly, he had never applied for a visa to enter Malaysia; thirdly, he had never attempted to enter Malaysia voluntarily; and fourthly, the UK Government had at all material times had written confirmation from the Malaysian Government that BOCs who had renounced their citizenship could return to Malaysia and begin steps to re-acquiring their Malaysian nationality.
26. Ms Harris submitted that the material considered in KU did not address the issue of the returnability of children of BOCs who had renounced their Malaysian citizenship. She is right about that, but it does not follow that children of BOCs who renounce their Malaysian citizenship are likely to be in a worse position *vis-à-vis* the Malaysian Government than the parent on whom they are dependant. As I explored with Ms Harris in oral argument, there is no reason to suppose that children would be not eligible for similar favourable treatment.
27. While I accept that the case of KU casts doubt on the proposition that the children are entitled as of right to Malaysian nationality, the burden of proof rested with the parents to show that the Malaysian Embassy would not issue the two youngest children with Malaysian passports or that they would not admit them to Malaysia on

the same basis as their father. The Judge found that the parents had not discharged this burden, and there is no challenge to the Judge's findings of fact by way of appeal.

28. Having given my ruling on the application for permission to raise the additional ground, Ms Harris developed her case in respect of the grounds of appeal for which permission had been sought and granted. In reply, Ms Fijiwala submitted that no error of law was made out. The finding at paragraph [36] related to the couple, not to the third appellant. With regard to the other ground of appeal, this was no more than an expression of disagreement with findings that were reasonably open to the Judge.

Discussion

29. Ground 1 is that at paragraph [36] the Judge applied the wrong test. Instead of asking herself whether it is reasonable to expect CC to leave the United Kingdom, she asked herself whether the level of disruption likely to be faced by CC and his family amounted to very significant obstacles. It is submitted that this is a far higher threshold than reasonableness, and the adoption by the Judge of this test vitiated her assessment of the best interests of the children.
30. Before reaching paragraph [36], the Judge had repeatedly directed herself that the issue was whether it was reasonable to expect CC to leave the United Kingdom. In assessing the child's best interests, the Judge was required to have regard to the best interests considerations which militated in favour of him remaining in the UK, and also those which militated in favour of him returning with his parents and siblings to the country of which he is a national.
31. If there were very significant obstacles to the integration of CC into life and society in Malaysia that would be a highly relevant consideration in the best interests assessment, such that the best interests in him remaining in the UK would be overwhelming. As acknowledged in the grounds of appeal, the finding at paragraph [36] is not limited to CC, but is directed to the family as a whole. Insofar as it is directed to CC, the Judge has not misdirected herself. For it is not the only finding that the Judge makes on the topic of the likely level of disruption to the education that CC would face on return to Malaysia.
32. It is apparent from the findings made by the Judge elsewhere in her lengthy reasons that, so far as CC was concerned, her view was that the disruption to his education would not be significant, let alone very significant. For example, at paragraph [39], the Judge held as follows: *"There is no evidence of integration to any other aspect of British culture or life outside of their respect primary schools, and they are not of an age where a change to schools is going to impact them negatively as they will be moving to secondary schools within a few years in any event. They are not at a critical stage of their education as the child in PD was."*
33. Secondly, the Judge was not persuaded that either there were no non-fee paying English schools in Malaysia or, if there were not, that CC would be disadvantaged by having to return to a school where the medium of instruction was Mandarin, as she

was of the view that he could improve his Mandarin within a very short period: paragraph [27].

34. Ground 2 is that the findings referred to above were not open to the Judge on the evidence, or were perverse, or were inadequately reasoned.
35. The pleader of the grounds of appeal, who is not Ms Harris, sets out an extract from the witness statement of the second appellant, and then juxtaposes her evidence about the education system in Malaysia with the findings of the Judge at paragraph 27. She submits that the finding at paragraph [39] that there are "*similar resources in their country of origin*" is speculative and not borne out by the evidence of the second appellant. Similarly, she submits that the Judge did not engage with the evidence of both parents, which was that their children do not understand, read or write in Mandarin to a sufficient standard so as to enter mainstream education in Malaysia.
36. However, this error of law challenge ignores the fact that the Judge accepted the respondent's case that the parents had exaggerated the difficulties that the children would face in continuing their education in Malaysia. In addition, as highlighted by Judge Bennett when granting permission to appeal on Ground 2, the parents had not put in any objective evidence to support the mother's claims about them not being able to access schools where English was the medium of instruction.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands.

These appeals to the Upper Tribunal are dismissed.

Direction Regarding Anonymity - rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 7 June 2018

Judge Monson

Deputy Upper Tribunal Judge