



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/11751/2017
HU/11755/2017
HU/11758/2017
HU/11759/2017
and HU/11762/2017

THE IMMIGRATION ACTS

Heard at North Shields
On 19th September 2018

Decision Promulgated
On 19th October 2018

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

- (1) JOHN [P]
- (2) LONNEY [P]
- (3) [F P]
- (4) [S P]
- (5) [J P]

(NO ANONYMITY DIRECTION MADE)

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellants: Crown and Law, Solicitors

For the respondent: Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The 1st and 2nd appellants married on 3 March 2007 and came to the United Kingdom on 10 August 2007. They subsequently had 3 children, all born in the United Kingdom: [FP], born on 12 February 2009, [SP], born on 9 February 2013, and [JP], born on 5 May 2015. All are nationals of Malawi.
2. The original appeal was against the respondent's decision refusing applications for leave to remain. Their appeals were heard by First-tier Tribunal Judge Cope at North Shields on 5 February 2018. In a decision promulgated on 6 March 2018 the appeals were dismissed.
3. Permission to appeal that decision has been granted on the basis the judge materially erred in law in failing to take as his starting point that leave should be granted where there was a qualifying child unless there are strong reasons to the contrary.

The Upper Tribunal

4. The appellant's representative referred to the decision of MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC). The decision makes the point that a very young child would have difficulty in establishing that her article 8 private and family life has a material element outside the need to live with her parents. The position however changes over time with the result that assessment of the child's best interests must adopt a correspondingly wider focus, examining the child's position in the wider world of which school is usually an important part. In the instant case the eldest child, [FP], is now aged 9. I was also referred to the respondent's own guidance and the reference to a need for a strong reason to justify removal such as the parent seeking to circumvent immigration control.
5. The presenting officer accepted that [FP] had been here a significant period of time. 1st Tier judge referred to the decision of MA Pakistan [2016] EWCA Civ 705 but the presenting officer accepted that there was no engagement with the test of reasonableness set out. He said that he could not find in the decision whether judge had acknowledged there were powerful reasons why the child should be removed notwithstanding their best interests lay in remaining.
6. Both representatives were in agreement that if an error of law was found it would be possible for me to remake the decision was heard hearing further evidence.

Consideration

7. The judge had referred to the Devaseelan principal in relation to an unsuccessful appeal heard in October 2014. That appeal included consideration of a protection claim by the appellant's parents.

8. At paragraph 35 the judge said that the current case was essentially the same as that previously put forward save for the discrete issue as to the increased length of time the 3rd appellant has been living here. Clearly therefore the judge did appreciate the unique position of the 3rd appellant.
9. The judge accepted the existence of family and private life. The focus in the appeal was upon those rights. The judge accepted the 3rd and 4th appellants were being educated and that the family had community and church links. The judge also found that if one of the appellants was to succeed then to maintain their family life all must succeed. The judge referred to the principal in Beoku-Betts [2008] UKHL 39 that the family unit as a whole had to be considered as well as its individual members. The judge referred to the need to balance the appellants interests with those of society and the economic well-being of the country.
10. At paragraph 55 the judge correctly starts by considering separately the best interests of the children. The judge refers to their best interests being a primary consideration.
11. The starting point was that their best interests lay in the family unit being maintained, whether that be here or in Malawi. At paragraph 58 the judge distinguished the 3rd appellant from her younger siblings, with the latter being almost completely dependent on their parents. This follows the logic of MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC).
12. Regarding the 1st two appellants the judge did not see any very significant obstacles to their reintegration into Malawi. At paragraph 78 the judge went on to consider in the context of paragraph 276 ADE(1)(iv) the position of the 3rd appellant. The judge noted she had never been to Malawi and that she was doing well academically and in terms of social activities and friendships. The judge then refers to MA Pakistan [2016] EWCA Civ 705. Lord Justice Elias was concerned with part VA of the 2002 Act which contains the same wording as that in paragraph 276 ADE (1)(vi) and concluded that regard had to be had to the wider public interest including the immigration history of the child's parents.
13. The judge recorded that the 1st and 2nd appellants had no leave to remain since March or April 2015. There was also a period of unlawfulness between July 2011 until an application for protection was made on 9 September 2013. The judge then went on to consider the position of the 3rd appellant, including her acquisition of some knowledge of her Malawian cultural heritage. At paragraph 94 the judge concludes that weighing all the factors as a whole. Whilst acknowledging she is well settled here the judge concluded it had not been shown it would be unreasonable to expect her to leave.

14. The judge then went on to consider the public interest considerations in section 117B of the 2002 Act. The judge acknowledges that the 3rd child is a qualifying child but nevertheless again concluded it would be reasonable to expect her to leave. The earlier reference in paragraph 112 to neither the 3rd or 4th appellants being in the United Kingdom for over 7 years appears to be a mistake, with the judge presumably intending to write the 4th and 5th appellant.

Conclusions.

15. It is clear that this is a carefully prepared decision in which the judge has set out the factual background and made appropriate findings of fact. There is also a detailed consideration of legal principles. The challenge is based upon the position of the 3rd appellant.
16. It is clear from reading the decision that the judge appreciated her position had to be specifically considered because she passed the 7 year benchmark. The judge concluded that she, along with the rest of her family, could return to Malawi. The decision does indicate that the judge did weigh up relevant factors. However, the argument is that whilst the judge referred to the need for powerful reasons to justify the removal of a child those reasons are not adequately set out.
17. Para 13 of MA Pakistan [2016] EWCA Civ 705 points out para 276ADE(iv) and section 117B(6) are similarly framed: both require seven years' residence and in both a critical question is whether it would be unreasonable for the child to be expected to leave the UK. The seven years' residence is not calculated in precisely the same way but on the facts of the present appeal the eldest child is covered by both.
18. Reference was made to the Secretary of State's published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there needs to be "strong reasons" for refusing leave (para. 11.2.4). There is now the guidance of February 2018 which postdates the decision this appeal.
19. Para 46 of the judgement states:

“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. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with

his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.”

20. At para 49 the court said:

“... the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.”

21. As stated, the decision has been most carefully prepared and there is reference to the times when her parents were here without leave. However, there is no indication from the decision that their behaviour otherwise was so reprehensible that the public interest favoured removal of the whole family. It is on this rather narrow point I find the judge materially erred in law in what otherwise is a sound decision. I find it was necessary for the judge to have set out precisely what were the clear cogent reasons that would justify the removal of the 3rd appellant in light of the 7 year provision.

Remaking the decision.

22. The relevant facts are already set out and both parties before me are in agreement if I find an error of law I can remake the decision based on that existing information. On the facts I find that it would not be reasonable to require the eldest child to leave the UK. In the absence of evidence that the behaviour of the 1st 2 appellants has been such as to require in the interests of public policy the family's removal or other strong considerations it is my conclusion that the appeals succeed based upon the position of the 3rd appellant.

Decision.

The decision of First-tier Tribunal Judge Cope materially errs in law and is set aside. I remake the decision allowing the appeal of all the appellants on the basis of article 8.

Francis J Farrelly
Deputy Upper Tribunal Judge.