



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/26778/2016
HU/26783/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14th August 2018

Decision & Reasons Promulgated
On 23rd August 2018

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

CG (1)
EG (2)
(ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Murray, of Counsel, instructed by Norcross, Lees and Riches Solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are citizens of Brazil. The first appellant was born in 1976, and the second appellant is her son who was born on 27th April 2011 in the UK. The first appellant arrived in the UK in 2002 as a student. She had leave to remain in that

capacity until January 2004 and then overstayed. The second appellant was born in the UK in 2011 and has remained here ever since. The appellants applied to remain in the UK on human rights grounds but were refused in a decision of the respondent dated 24th November 2017. Their appeal against the decision was dismissed by First-tier Tribunal Judge Wyman in a determination promulgated on the 16th March 2018.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Birrell on the basis that it was arguable that the First-tier judge had erred in law in failing to identify the best interests of the second appellant who is a child and failing to factor these into the proportionality assessment.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. The grounds of appeal put forward by the first appellant, who at that point in time acted in person, contend that the decision errs as the second appellant had been in the UK for seven years on 27th April 2018 and was eligible to register as a British Citizen. Further, it was contended that the second appellant has autism and a statement of special educational needs, and that it is in his best interests to remain in the UK. Letters in support from Guy's and St Thomas' NHS Foundation Trust and from three friends were attached to the grounds of appeal which support the contention of it being in the second appellant's best interests to remain in the UK and his having autism and special needs, although none of these particular letters were before the First-tier Tribunal.
5. Prior to the hearing the first appellant applied in writing to adjourn the hearing before the Upper Tribunal so she could obtain legal representation and so that it could have taken place at a time when her child was in school. This application was refused by lawyer to the Upper Tribunal Mr Asim Hussain in a decision dated 30th July 2018. This application was not renewed before me as the first appellant had managed to make arrangements for her son and representation.
6. It was agreed by Mr Tarlow that the First-tier Tribunal had erred in law by failing to make findings as to the best interests of the child. I found that the First-tier Tribunal had erred in law for this reason, as set out below. There was a short adjournment for half an hour to allow Mr Tarlow to read the papers for the remaking hearing which included a bundle of recently lodged documents. Both parties were happy to proceed with the remaking hearing when we resumed. I provided details to both parties of a short summary of the situation for those with autism in Brazil from a website "Autism around the Globe" and Ms Murray gave brief details of a study by the University of Leicester of autism provision in Brazil. It was accepted by both parties that the appeal would be determined by application of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 in light of the second appellant now having been in the UK for over seven years.

Conclusions – Error of Law

7. The First-tier Tribunal did not err in law in finding that the second appellant is not a British citizen as whilst he was born in the UK his mother did not have indefinite leave to remain as the time of his birth and was not a British citizen, and there was no evidence before the First-tier Tribunal his father held indefinite leave to remain or was a British citizen either. There was no error with respect to the second appellant having been in the UK for seven years either, as the appeal was determined on 16th March 2018 and the second appellant had only been in the UK for seven years on 27th April 2018.
8. However, the First-tier Tribunal does not make any findings as to whether it would be in the best interests of the second appellant to remain in the UK in the exceptional circumstances conclusions and findings section at paragraph 59 to 80. Factors that might go either ways are identified in this section. Matters which might be understood as indicated it was in his best interests to remain in the UK are: he is doing very well at his English school with special support; change would be distressing for him; and he has friends in the UK. Factors which might be interpreted as being in favour of returning to Brazil are: he would be able to attend school there; he has extended family in that country; and his mother could lawfully work. In these circumstances I find that the First-tier Tribunal has erred in law in not making an explicit finding as to the second appellant's best interests, and further this is material as it is not possible to deduce the First-tier Tribunal's position from the various mixed findings.

Evidence and Submissions – Remaking

9. There was no statement prepared by the first appellant as counsel and solicitors had only just been instructed so the evidence of the first appellant was by way of questioning by Ms Murray and Mr Tarlow. In summary the evidence was as follows.
10. The first appellant had come to the UK with the help of a family for whom she had worked as a cleaner in order to study in June 2002 and had leave until January 2004, after this time she had no funds for school fees and overstayed. She had left her own family when she was 15 years old following the death of her mother. Prior to this she had lived with her mother, father, brother and sister in a small, very basic, wooden shack. Her father had abused her mother, and she could see no reason to remain at home after her death. She last spoke to her sister in the 1990s and has no contact with her brother who is a convicted rapist living in prison. She did speak to her father following the birth of the second appellant. He refused to apologise for the abuse to her mother and so she has had no further contact with him. Her only positive contact in Brazil is with the family she had worked for prior to coming to the UK, whom she called after the second appellant was born and sent a picture. She had also called them when she got the diagnosis of autism for him, and had a discussion with them as she needed some emotional support. Her father was an only child. Her mother had a sister, but she is not in contact with her aunt.

11. In the UK the first appellant studied English and French, and has done some short courses in things such as different aspects of child care, family numeracy and healthy eating.
12. The second appellant's father is a British Muslim who has refused to have anything to do with his son. The Mosque he attended refused to help the first appellant make contact with him and Social Services could not find him when they tried in 2016.
13. The second appellant has a diagnosis of autism and an Education Health and Care Plan issued in 2016. He has had contact with various professionals since he was four years old and was referred to CAMHS after the first appellant went to visit her GP due to the second appellant hitting and kicking her when stressed. The second appellant was diagnosed with autism in November 2014, and has had assistance from educational psychologists, occupational therapists and speech and language therapists since that time. He has a place in a specialist autism unit in a state primary school, Crown Lane Primary School. The second appellant's difficulties are that he is very literal in his understanding of words and finds it difficult to communicate with others as a result. He finds all change very challenging, and resorts to hitting himself or his mother or others or closing down and not speaking if even minor things do not happen as per his predictable routine, such as his not being able to have his "normal" seat on the bus or his regular teacher not being present at school or even if she is there when she has said she would be absent. Any change in his life is a very, very negative and difficult thing for him. The second appellant cannot speak Portuguese. The first appellant tried to teach him herself when he was four years, having spoken English with him since his birth, but he would just cry and scream and more recently she tried via taking him to a Portuguese speaking church but he refused to remain there.
14. The second appellant's friends are all from the autistic unit within his school and from the disabled Sunday school group at their regular English speaking church, St Luke's church in West Norwood. He is an academically able child. However, it has taken a long and slow process for him to be able to socialise but now he is happy to be in these places so long as all of the people are the same. With the help of all of the professional support the second appellant has also made other progress: he is now toilet trained, he can clean his teeth, he walks nicely, he can eat better and he is learning social rules such as what is private and what is not. He has recently learned with an occupational therapist to do exercises and use a sensory room to help him feel his body better when stressed so that he does not bang himself and make himself sick.
15. The first appellant does a lot of voluntary work at her son's school where she helps parents who don't speak English and those who have children with autism who are going through the process of diagnosis and obtaining support. She also helps out at a children's centre running a support network for parents of disabled children, as it is very hard on such parents and they need help to help their children. She has a number of close supportive friends in the UK.
16. The first appellant believes it would not be in the second appellant's best interests for him to have to go and live in Brazil. She is unaware of any educational provision

or services for autistic people in that country. She does not believe the second appellant would cope with the change, and fears he would be bullied as her experience of Brazil is that there was a lot of bullying of those with mental health issues. She accepts that there are schools and there is a health service in Brazil, and that she could be permitted to work there. She does not know how she would find a place to live or survive financially however.

17. Mr Tarlow relied upon the reasons for refusal letter, although this was written prior to the second appellant having lived in the UK for more than seven years. He made no further submission in this context. The reasons for refusal letter accepts that the second appellant has autism, and finds change distressing but states that there is no evidence that his mental health would be seriously and irreparably damaged by going to live in the country of his nationality. There is an assertion that there is treatment for autism in Brazil, and that as the first appellant is well acquainted with Brazil, having lived there most of her life, that she would be able to support the second appellant. It is asserted that the first appellant could turn to her father, brother and sister for help in return, and would be able to work and find accommodation in that country particularly as she is healthy. The respondent maintains that the second appellant has no contact with his father in the UK, and has not made any significant ties with the UK, and the first appellant could keep in contact with her friends through modern methods of communication.
18. Ms Murray submits that the best interests of the second appellant are overwhelmingly to remain in the UK, and that this must be a primary consideration in the proportionality assessment under Article 8 ECHR. The second appellant's autism diagnosis means that he is very closely integrated with adults other than the first appellant including his teachers at his school; the teacher at his church Sunday school; the particular professionals such as occupational therapists, speech therapists and psychologists with whom he works; and is particularly unable to cope with change in this support network. His ability to have private life friendships with other children is reliant on the stability of these arrangements and has taken time to come about. Further without this support his relationship with his mother would deteriorate to one involving aggression against her again, and so would affect the quality of his family life relationship with his only parent. The second appellant's autism mean implicitly that he has a social communication disorder and social anxiety and it follows that these would be both greatly aggravated by any change in structures or people.
19. In Brazil the second appellant would not only be in a completely new and different place, as he has never been to Brazil or met or had contact with any of his mother's family there and there is no supportive family for him to join there, but he would not be able to understand anyone as he does not speak Portuguese and has shown he is resistant to learning this language. It would be most unlikely that his UK support package could be recreated there as it was only in 2012 that autism was recognised as a disability and the country of origin materials indicate that there are only community-based support groups and not diagnostic services in Brazil at the current time, see research by Leicester University. Further the support he has now has been tailored in a responsive fashion to fit his needs by his existing UK services

over a number of years. To return the second appellant to Brazil would be to impair his development, and would thus be contrary to his best interests as defined in the UKBA guidance on "Every Child Matters". Further, in three years' time the second appellant will be entitled to register as a British citizen based on his birth and continuous residence.

20. Ms Murray argues that it is not reasonable to expect the second appellant to leave the UK in the context of the second appellant's best interests being so strongly to remain in the UK, and that therefore the appellants are entitled to remain in accordance with s.117B(6) of the Nationality, Immigration and Asylum Act 2002. This is because the second appellant has lived in the UK for more than seven years now, and that in accordance with MA (Pakistan) & Ors v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705 there would need to be strong reasons for refusing leave. To quote the Court of Appeal: "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." These factors are all magnified given the second appellant's autism compared to a neurologically normal child, and the fact of the first appellant's overstaying does not sway the balance against them.

Conclusions - Remaking

21. The first and second appellants both have private lives in the UK which will be interfered with if they were removed from the UK, the first appellant having lived in the UK and made friends, attended church, studied and undertaken voluntary work since 2002, and the second appellant having been born in the UK and lived here for his entire life, a period of seven years and three months, and having friends, school, church and support from a variety of known professional adults due to his autism. They cannot qualify under the Immigration Rules for leave to remain, and so their removal would be in accordance with the law. It remains therefore to consider whether it would be proportionate to the legitimate aim to remove them, giving due weight to the fact that maintaining effective immigration control is in the public interest.
22. It is accepted by both parties that the second appellant has now lived in the UK for more than seven years, and therefore that the key consideration in determining whether it would be proportionate to remove the appellants is whether it would be reasonable to expect the second appellant to leave the UK, and thus whether the requirements of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 are met. The second appellant is a qualifying child, having lived in the UK for seven years, and there is no challenge to the fact that the first appellant has a genuine and subsisting parental relationship with him as his mother.
23. The first consideration is whether it is in the best interests of the second appellant to remain in the UK or not. This is a primary consideration. I find, for the reasons I set out below, that it is overwhelmingly in his best interests to remain in the UK based on the totality of evidence from the reports in the appellants' bundle.

24. The second appellant has a diagnosis of autism spectrum disorder made when he was four years old. He has profound challenges with social communication, and any change leads him to experience high levels of anxiety. Over the past three years there have been many professional interventions and now he has an Education Health and Care Plan which provides him with appropriate educational and other support. These provisions have led to the situation where he is, in the words of his headteacher, "thriving", but needs ongoing input from occupational therapists and speech therapists to develop further. He has had to live through times when he and the first appellant lived in impoverished and unstable conditions, but now they are part of a supportive community of friends and have resources from professionals which have enable the second appellant to make friends and academic progress at school, and where the second appellant also has friends through a special disabled Sunday school group at his church.
25. When faced even with small changes, such as not being able to sit in his usual place on the bus or not having his usual teacher, the second appellant becomes angry and melts down due to his neurology. It would clearly not be in his best interests to move him to a new situation in Brazil which I find would be extremely alien to him in terms of culture, language and home and school structures, and where the country of origin evidence indicates that there would not be the same level of support in terms of professional intervention, and where I find his mother would not have support from an extended circle of friends as she has in the UK. Numerous friends have written in support from the school and church in the UK, and it is clear that both appellants are respected and loved members of their community, where as in Brazil I find that she would have no family support and only some emotional support from the first appellant's former employer. The relocation would also be very stressful for the first appellant, as she has no place she could immediately stay and very few qualifications to assist her quest for work as well as extensive caring needs for her son, who would not be a child who would easily be cared for by others whilst she worked and who would be very probably angry and aggressive to her due to the changes foist upon him, and that would in turn impact on the second appellant ability to parent him which would be highly significant as she is his sole parent.
26. As stated by the Court of Appeal in MA (Pakistan) strong reasons are required to find that it would be reasonable to expect a child who has lived in the UK for seven years to leave. In this case the best interests are clearly that he should remain in the UK, and they are particularly strong given his disability as outlined above. I find that the first appellant is integrated into UK society, and is contributing to the community through volunteer work to the Early Years Centre and Crown Lane Primary School and to the community at St Luke's Church; and that she speaks fluent English which is to be seen as a neutral matter. On the other side, in considering whether it is reasonable to expect the second appellant to leave, is firstly the fact that the first appellant has overstayed her leave to remain in the UK, although there is nothing further in terms of deception, use of false identities or criminality. Secondly it is the case that, at the current time, the appellants are not financially independent as the first appellant does not have work permission, and thus they are a financial burden on the taxpayer. When the negative matters are

balanced against the best interests of the second appellant however I conclude that it is not reasonable or proportionate to require the second appellant to leave the UK, and that the appeal should therefore be allowed under Article 8 ECHR.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal with no findings preserved.
3. I re-make the decision in the appeals by allowing them on human rights grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the second appellant as a vulnerable young child.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 14th August 2018

Fee Award Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals. I have decided to make no fee award because no fee was payable.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 14th August 2018