



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/01918/2016
IA/01919/2016
IA/01920/2016

THE IMMIGRATION ACTS

Heard at Field House
On 21st May 2018

Decision & Reasons Promulgated
On 30th May 2018

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHAMARA PUNA KRISTHOMBUGE
HIRANYA VITHANAGE DONA
L P
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Ms Z Ahmed, Home Office Presenting Officer
For the Respondents: Ms J de Souza, instructed by PGA Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I refer to the parties as in the First-tier Tribunal. The Appellants appeal against the refusal of leave to remain was allowed on human rights grounds by First-tier Tribunal Judge Wilsher on 10 October 2017.
2. The Secretary of State appealed on the grounds that the Tribunal had erred for the following reasons:

- (a) Finding under paragraph 276ADE(1)(vi) that the Third Appellant is a qualifying child because as at the date of application the child had not achieved seven years' continuous residence in the UK.
 - (b) Finding that the child cannot speak Sinhalese.
 - (c) Finding that until the time that the First Appellant failed his English language reading test, the Appellants had a reasonable prospect of securing an extension of leave.
 - (d) Equating a capacity to be self-sufficient if working with actual self-sufficiency.
 - (e) Its assessment of reasonableness under Section 117B(6) and failing to carry out a holistic assessment following the guidance in MA (Pakistan) [2016] EWCA Civ 705.
3. Permission to appeal was granted by First-tier Tribunal Judge Ford on 22 March 2018 on grounds (a) and (e). The remaining grounds were not arguable.
4. Ms Ahmed relied on Rhuppiah v The Secretary of State for the Home Department [2016] EWCA Civ 803 and MA (Pakistan). She submitted that the judge had erred in his assessment of reasonableness. There was no holistic assessment because the judge had failed to consider the public interest within the concept of reasonableness. The parents came to the UK as students and the judge concluded that they had a reasonable prospect of securing an extension of Tier 2 leave. However, this was inconsistent with the judge's earlier finding that the First Appellant had failed a component of his English language test. The Appellants' status was precarious and the judge had failed to properly apply paragraph 45 of MA (Pakistan) which states:-

"However, the approach I favour is inconsistent with the very recent decision of the Court of Appeal in *MM (Uganda)* where the court came down firmly in favour of the approach urged upon us by Ms Giovannetti, and I do not think that we ought to depart from it. In my judgment, if the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the 'unduly harsh' concept under section 117C(5), so should it when considering the question of reasonableness under section 117B(6). I recognise that the provisions in section 117C are directed towards the particular considerations which have to be borne in mind in the case of foreign criminals, and it is true that the court placed some weight on section 117C(2) which states that the more serious the offence, the greater is the interest in deportation of the prisoner. But the critical point is that section 117C(5) is in substance a free-standing provision in the same way as section 117B(6), and even so the court in *MM (Uganda)* held that wider public interest considerations must be taken into account when applying the 'unduly harsh' criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in section 117B(6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case, I will analyse the appeals on the basis that the Secretary of State's submission on this point is correct and that the only significance of section 117B(6) is that where the seven

year rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted.”

5. Ms Ahmed submitted that the judge had misdirected himself when concluding that the First Appellant had a reasonable prospect of securing leave. At the date of this hearing, the First Appellant still had not passed his English language test and so had no prospect of securing an extension to his Tier 2 leave.
6. Ms de Souza clarified the position and stated the reason the First Appellant had not taken an English test was because he did not have his passport. His passport had been returned to him in order for him to sit the test in April 2015, but he did not pass one of the components. He had then returned his passport. He had not asked for the return of his passport to take another test because his employers were dealing with this.
7. Ms Ahmed submitted that the judge attached weight to the point that the First Appellant would have been granted leave when he would not. The judge had not weighed in the balance the precarious nature of the First Appellant’s status during which time the seven year threshold was passed.
8. Ms de Souza submitted that the Third Appellant could not satisfy paragraph 276ADE(1)(vi) of the Immigration Rules because she was 5 years old at the date of application. However, the same test applied under Section 117B(6) and the judge looked at all relevant factors. The judge dealt with reasonableness at paragraphs 6 and 7 of the decision stating:

“6. Turning to the reasonableness of her being required to return to her country, the principal reason would be the fact that her parents came here as students and could have no expectation of remaining in the UK. They secured further leave up until 2014. They have remained on statutory leave since then. Until summer 2015 they had a reasonable prospect of securing an extension based upon Tier 2. Since then, they have been waiting only for this appeal. It was during this period that the seven years crystallized. They have complied with the Immigration Rules, not being over-stayers at any point. Their leave has however been precarious. They have not however flagrantly abused the immigration system. The principal reason for their being required to return would be that they do not have any basis to enter or remain in the UK on a long-term basis. The mother speaks fluent English and is well-qualified. The father also speaks English and has worked for a number of years on a Tier 2 visa. They would be able to be self-sufficient if able to work.”

“7. Those factors must be considered when assessing the overall proportionality question. The overall matter is finely balanced. There are no compelling public interests favouring the removal of this couple but

the Immigration Rules do not contemplate them securing long-term residence in the normal course of events. This said, the daughter has been in the UK now for seven years and the statutory framework requires that this be given significant weight. The decision in MA (Pakistan) confirms at paragraph 49 that 'powerful reasons' are required to find that a child should be returned to their own country once they have been in the UK for seven years. The presenting officer was unable to point to any such reasons in this case. The unsuccessful appeals in MA (Pakistan) all involved cases with significantly poorer immigration histories or children who were less integrated to UK life. Although the matter is finely balanced, I find that there are no such reasons to disrupt this child's education and future prospects on the specific facts of this case. I therefore allow the appeals on human rights grounds."

9. Ms de Souza submitted that the judge had taken into account all relevant factors in assessing reasonableness. The Third Appellant was a qualifying child and the judge had considered the precarious nature of her parent's leave in his overall assessment of proportionality, and properly applied MA (Pakistan).
10. In response, Ms Ahmed relied on paragraphs 62 to 65 of Rhuppiah. In summary, 'being financially independent of others and able to support oneself is a matter which tends to minimise a risk of an immigrant likely to have to resort to public funds.' She submitted that financial independence was in the public interest, but it did not justify a grant of leave to remain. It was a negative factor potentially capable of justifying removal from the UK if an applicant was not financially independent.

Discussion and Conclusions

11. It is apparent from the judge's findings at paragraphs 6 that he took into account the precarious nature of the First and Second Appellants' leave in assessing whether it was reasonable for the Third Appellant to leave the UK. The judge acknowledged that they came as students and had no expectation of remaining in the UK. He noted that the seven year period was crystallised whilst the Appellants were waiting for this appeal and he specifically stated that their leave had been precarious.
12. The Third Appellant could not satisfy paragraph 276ADE because she was five years old at the date of application. However, in assessing proportionality, the judge properly applied section 117B(6). The Appellants could not satisfy the Immigration Rules and their status in the UK was precarious. However, they had been in the UK lawfully throughout. The judge took into account the parent's status and weighed this in the balance against the fact that the Third Appellant was a qualifying child who had been lawfully present in the UK throughout her life.
13. The judge did not misdirect himself in law in finding that there were no powerful reasons requiring the Third Appellant's return to Sri Lanka. Applying Rhuppiah her

parent's English language ability and financial independence were neutral factors. The Third Appellant was not fluent in Sinhalese and had been educated in the UK. The judge's conclusion that it was not reasonable for her to leave the UK was open to him on the evidence before him. He took into account all relevant factors and properly directed himself in law.

14. Accordingly, I find that there was no error of law in the judge's decision of 10 October 2017 and I dismiss the Secretary of State's appeal.

Notice of Decision

Appeal dismissed

No anonymity direction is made.

J Frances

Signed

Date: 25 May 2018

Upper Tribunal Judge Frances