



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/47856/2014
IA/47863/2014
IA/47869/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 26 September 2018**

**Decision & Reasons
Promulgated
On 22 October 2018**

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

**R B M (FIRST APPELLANT)
P C (SECOND APPELLANT)
A C (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms C Brown, Counsel, instructed by Haris Ali Solicitors (Kilburn)

For the Respondent: Mr C Bates, Home Office Presenting Officer

DECISION AND REASONS

1. In a decision posted on 13 July 2018 I set aside for material error of law the decision of Judge Shiner of the First-tier Tribunal (FtT) sent on 4 May 2017 dismissing on the papers the appeals of the appellants, all citizens of Brazil,

against the decision made in November 2014 by the respondent refusing their asylum and human rights claims. The first two appellants are husband and wife. The third appellant is their child, now aged 9 years 11 months. A previous appeal hearing before FtT Judge Majid (who allowed their appeals) was also set aside for material error of law.

2. In part because the case had already been before the FtT twice, I considered it unwarranted for the case to be remitted again. I stated that there was unlikely to be dispute as to most of the background facts concerning the family circumstances and immigration history.

3. At the resumed hearing before me, I heard submissions from the parties. Mr Bates said that the respondent accepted that following the guidance given by the Court of Appeal in **MA (Pakistan)** [2016] EWCA Civ 705 the outcome of the appeals turns largely on whether, by virtue of the third appellant being a qualifying child (one who has resided in the UK for more than seven years), there exist powerful reasons why she should be expected to leave the UK. He accepted that according to the approach set out by the Upper Tribunal in **MT and ET** [2018] UKUT 00088 IAC the longer a child has remained in the UK the more the public interest in removal diminishes. Nevertheless, there were powerful reasons why the third appellant could be expected to leave the UK. She was a national of Brazil. She had extended family in Brazil. She had been born into a Brazilian family. She has no health difficulties. She can continue her education in Brazil and she is at an age where she has not yet formed significant friendships outside the family and when friendships change in any event. She is of an adaptable age. Her best interests lay in remaining with both her parents. The removal of the appellants would take place together. It would not interfere with her nuclear family. Her brother (who is entitled to reside in the UK as the family member of an EEA national) was now an adult and lived separately. The immigration status of all three appellants has always been precarious. Her father is a long-term overstayer and made use of false documents. That meant that he could not meet the suitability requirements of the Immigration Rules.

4. Ms Brown submitted that whilst there was a suitability issue in relation to the position of the first appellant that should not impact on the best interests of the child assessment and that in turn should reduce its impact in the context of the proportionality assessment. In respect of the best interests of the child assessment, it was accepted that the third child was distanced from her country of nationality. In this case there was a letter from the third appellant making clear her wish to stay in the UK. Whilst children aged 9 changed classes and schools as they progressed through their education, they typically did retain some friends and changes of this sort should not be equated with changing countries. The fact that the third appellant was nearly 10 was important because the Upper Tribunal in **MT and ET** [2018] UKUT 00088 IAC has made reference to a sliding scale and she was nearly 3 years over the 7 year period when she became a qualifying child. Her first language was English. She is very close to the age when she has an entitlement to stay on the basis of 10 years residence. The first appellant's conviction dated from

before 2012 and was not at a level to trigger automatic deportation. It was just the one conviction and he had shown remorse for it. It did not constitute a powerful reason for requiring the third appellant to leave the UK. Whilst the immigration status of all three was precarious, the second appellant had had leave to remain for some period. It was open to the Upper Tribunal to depart from the norm of attaching little weight to the third appellant's family and private life because of precarious immigration status. Furthermore, both her parents had been outside Brazil for 17 and 16 years.

My assessment

5. Whilst I have set aside the decision of the FtT judge, I observe that the appellants' grounds did not challenge the judge's primary findings of fact. What is in dispute is evaluation of those findings of fact. It is common ground that the principal issue in this case is whether it would not be reasonable to expect the third appellant to leave the UK. It is recognised that if it would not be reasonable, then it would then be disproportionate to require the first two appellants to leave. In terms of the Immigration Rules, the relevant rule relating to the third appellant is para 276ADE(1)(iv). Under the NIAA 2002 the most relevant provision is s.117B(6).

6. As regards the third appellant, I must apply the guidance set out in **MA (Pakistan)** [2016] EWCA Civ 705 which in turn confirmed that given in relation to assessments of the best interests of the child in **EV (Philippines)** [2014] Civ 874 per Clark LJ at [34]-[36].

7. In relation to the best interests of the child assessment (in which context the immigration history of the first two appellants is not relevant), the fact that she has lived all her life in the UK and resided here for nearly 10 years and has a brother here means that she has put down roots here. Her first language is English and all her education has taken place in the UK. She also attends a Sunday school church group. She does not have any knowledge of Brazilian society; the FtT judge found that she has no connections with Brazil other than with her parents. She has never lived there or visited there. On the other hand, she is a national of Brazil and has working knowledge the Portuguese language through her parents. It is not suggested that her parents have brought her up in ignorance of Brazilian customs and traditions. Her brother is now an adult aged over 20 and he lives separately. She has no health difficulties. Taking into account all relevant factors relating to her best interests, I conclude that to require her to leave would significantly disrupt her life and on balance it is in her best interests to remain in the UK, particularly bearing in mind the period of nearly 10 years that she has lived here. I carry forward this finding into my proportionality assessment which, as explained earlier, principally turns on the issue of whether it would be reasonable to expect the third appellant to leave the UK.

8. There are certainly valid reasons for expecting the third appellant to leave the UK. They include those mentioned already in the context of my assessment of the best interests of the child: she is a national of Brazil and has knowledge

the Portuguese language through her parents. It is not suggested that her parents have brought her up in ignorance of Brazilian customs and traditions. Her brother is now an adult aged over 20 who lives separately. She has no health difficulties. She is of an adaptable age.

9. There is also the fact that her father has been in the UK without lawful permission for a lengthy period and he has a conviction for use of false documents. Her mother (the second appellant) did have a period of lawful residence as a family member of an EEA national but she has her residence card revoked and she too is an overstayer. Whilst the first two appellants have facility in English they were booked to have a Portuguese interpreter in the event they were needed to give evidence before me (in the event neither representatives saw that as necessary). There are thus strong public interest considerations weighing against the appellants.

10. However, applying the guidance given in **MA (Pakistan)** and confirmed by the Upper Tribunal in **MT and ET**, what I have to be satisfied of is that there are “powerful reasons” for expecting the third appellant to leave the UK. I am not persuaded that the above reasons amount to such powerful reasons. Mr Bates has submitted that the combination of the first appellant’s poor immigration history (he entered the UK as a visitor with a visitor visa valid for 6 months and has a criminal conviction for possessing forged documents and also admitted to working as a handyman despite knowing he had no right to do so) constitutes a powerful reason and points to the fact that it was this background that properly led the respondent to conclude that he did not meet the suitability requirements of the Rules as set out in S-LTR.1.6. However, the first appellant’s criminal conviction occurred over 6 years ago; he has not re-offended and Mr Bates did not seek to dispute Ms Brown’s reference to the first appellant having demonstrated remorse. That is salient because the relevant requirement of the Rules is cast in the present tense (“The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3 to 1.5), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.”)

11. Whilst I discern from the summary of the first appellant’s immigration history in the respondent’s refusal decision that he has made several attempts to remain in the UK and has engaged in litigation including two unsuccessful applications for judicial review (and in that way to attempt to frustrate the respondent’s efforts to take enforcement action commenced on 4 November 2011), I cannot ignore the fact that it was open to the respondent to take action to enforce his removal and that of his family at a much earlier stage. The delay in taking enforcement action has meant that the third appellant is only a month short of 10 years residence in the UK, when she will have the ability to register as a British citizen. In that regard, I very much doubt that the first appellant’s level of criminality would be of sufficient order to place him outwith the respondent’s current policy governing parents of British citizen children. There is something incongruous about being asked in late 2018 to find a refusal decision proportionate at a time when one of the appellants is only a

month away from becoming entitled to register as a British citizen and when it is clear that there have been a number of years during which enforcement action could have been pursued with more vigour. I cannot anticipate the fact that in less than a month the third appellant will have an entitlement to become a British citizen, but equally I cannot ignore the reality that if the public interest factors were found to be powerful in the context of the present appeals, there would be a likely further cost to the public pursue in responding to applications for a stay on removal in view of the imminence of this date.

12. Taking all matters into account, I am persuaded by a narrow margin that in respect of the third there are not powerful reasons to support a decision that would be contrary to the child's best interests.

13. I do not consider that it would be reasonable to expect the third appellant to leave the UJK and live in Brazil. I am satisfied therefore that the third appellant meets the requirements of paragraph 276ADE(1)(iv). There is accordingly no public interest in requiring her to leave. In consequence, I consider that there are compelling circumstances for considering that it would breach the Article 8 rights of the first two appellants for them to be removed whilst their child was entitled to remain. Whilst the first two appellants have a poor immigration history and whilst their immigration status has been and is precarious, I bear in mind the observations of the Court of Appeal in **Rhuppiah** [2016 EWCA Civ 803 at [53] indicating that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question, where it is not appropriate in Article 8 terms to attach only limited weight to private life. In this context, the best interests of the third appellant lie (on balance) in remaining in the UK and that means that her private life in the UK has particularly strong features.

Notice of Decision

14. For the above reasons:

The decision of the FtT Judge has already been set aside for material error of law.

The decision I re-make is to allow the appellant's appeals.

No anonymity direction is made in respect of the first appellant.

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

Unless and until a Tribunal or court directs otherwise, the second and third appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify this appellant 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: 15 October 2018

A handwritten signature in black ink that reads "H H Storey". The signature is written in a cursive style with a large, looped 'S' at the end.

Dr H H Storey
Judge of the Upper Tribunal