



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA002112015;

IA002122015; IA002132015; IA002142015

THE IMMIGRATION ACTS

**Heard at Manchester Piccadilly
On 19 May 2017**

**Decision Promulgated
On 5 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

DB

PB

KB

KDB

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Bremang instructed by Ravi Sethi Solicitors

For the Respondent: Mr A Mc Vitie Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. An order was previously made as this case relates to the rights and interests of children. The order will continue.
2. To avoid confusion, I will refer to the parties as they were in the First-tier Tribunal.

3. The Appellants are all nationals of Mauritius. The first Appellant (A1) born 4 October 1979. The second Appellant (A2) is her husband born 26 April 1974. The third Appellant (A3) is their child born 23 August 2003. The fourth Appellant (A4) is their child born 22 November 2012.
4. The Appellants appealed against the decision of the Secretary of State dated 11 December 2014 to refuse to grant an application for leave remain on the basis of their family and private life in the UK. First-tier Tribunal Judge Davies dismissed the appeal and the Appellants appealed with permission to this Tribunal. In an error of law hearing on 18 March 2016 Deputy Upper Tribunal Judge Mc Ginty set aside the decision and remitted the rehearing to the First tier tribunal where it was re heard before First-tier Tribunal Judge Thorne on 6 July 2016. The Judge allowed the appeal although he appears to have allowed it under Article 8 only making no findings under the Rules and given the date of the decision there was a right of appeal under the Rules,
5. That decision was also appealed by the Respondent therefore in relation to a decision under Article 8 only and in an error of law hearing on 21 February 2017 Upper Tribunal Judge O'Connor found an error of law and set the decision aside as the Judge had failed to consider MA (Pakistan) [2016] EWCA Civ 705 in his assessment of whether it was reasonable to require A3 to leave the UK for the purpose of section117B6.
6. The matter was adjourned for rehearing and came before me.

The Law

7. The burden of proof in this case is upon the Appellant and the standard of proof is upon the balance of probability.
8. Section 117A (2) of the 2002 Act provides that where a Tribunal is required to determine whether a decision made under the Immigration Acts would be unlawful under section 6 of the Human Rights Act 1998 it must, in considering 'the public interest question', have regard in all cases to the considerations listed in section117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). Section 117 (3) provides that the

'public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

9. The S117B considerations are as follows:

- “(1) The maintenance of effective immigration controls is in the public interest.*
- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—*
 - (a) are less of a burden on taxpayers, and*
 - (b) are better able to integrate into society.*
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—*
 - (a) are not a burden on taxpayers, and*
 - (b) are better able to integrate into society.*
- (4) Little weight should be given to—*
 - (a) a private life, or*
 - (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.*
- (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.*

- (6) *In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—*
- (a) *the person has a genuine and subsisting parental relationship with a qualifying child, and*
- (b) *it would not be reasonable to expect the child to leave the United Kingdom."*

Section 117B6

10. The definition of "qualifying child" is found in section 117D:

"qualifying child" means a person who is under the age of 18 and who-

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;"

11. I have taken into account the guidance given in R (on the application of MA (Pakistan) and Others) v UT (IAC) & Anor [2016] EWCA Civ 705 in relation to the issue of reasonableness in section 117B 6 of the 2002 Act at paragraph 45 it states:

"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).....

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."

12. As to the relevance of the Respondents policy in relation to Appendix FM and children which is relied on by the Appellants in this case at paragraph 46-47 it states:

"46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State 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 need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view, they merely confirm what is implicit in adopting a policy of this nature. 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.

47. Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child's best interests are in favour of remaining. I reject Mr Gill's submission that the best interest's assessment automatically resolves the reasonableness question. If Parliament had wanted the child's best interests to dictate the outcome of the leave application, it would have said so."

Evidence

13. On the file I had the Respondents bundle. I had a copy of the reason for refusal letter. The Appellant put in an appeal and a bundle of documents.

Final Submissions

14. On behalf the Respondent Mr Mc Vitie made the following submissions:
- (a) He drew my attention to the fact that this was old decision and therefore I was obliged to consider both whether the Appellants could meet the requirements of paragraph 276ADE and whether in the light of the elder child having lived in the UK for 11/12 years it was reasonable to require him to leave.
 - (b) He suggested that while the length of residence may in the past have been determinative in the light of MA all of the circumstances could be taken into account.
 - (c) He identified those factors in the Appellants favour were that they had a positive immigration history and had never been in the UK illegally.
 - (d) The older child was performing well at school.
 - (e) The younger child had issues in that he was suffering from selective mutism.
 - (f) The only factor he conceded that weighed in the balance against them was immigration control.
15. On behalf of the Appellant Ms Bremang submitted:
- (a) She relied on her skeleton argument.
 - (b) The adult Appellants were well educated, both spoke English and were well assimilated.
 - (c) The youngest child had selective mutism and this had only come to light since he had been attending nursery in 2016 . He needs a stress free stable life.
 - (d) The older child was at a critical stage of his education in that he was starting his GCSE years.

Findings

16. I am required to look at all the evidence in the round before reaching any findings. I have done so. Although, for convenience, I have compartmentalised my findings in some respects below, I must emphasise the findings have only been made having taken account of the evidence as a whole.

17. The Judge's decision in respect of Article 8 only was put in issue and that is the matter that I have had to determine. In any event it makes no material difference given that the central question is the same under paragraph 276ADE 1 (iv) and section 117B6 : is it reasonable to expect A3 to leave the UK taking into account the circumstances of the whole family.

18. I have determined the issue on the basis of the questions posed by Lord Bingham in Razgar [2004] UKHL 27

Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?

19. I am satisfied that the Appellants have a family life in the UK and they have a private life as the parents have lived and worked in the UK since their arrival in 2006 and as soon as the children reached the appropriate age they have been educated here.

If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

20. I am satisfied that removal would have consequences of such gravity as potentially to engage the operation of Article 8.

If so, is such interference in accordance with the law?

21. I am satisfied that there is in place the legislative framework for the decision giving rise to the interference with Article 8 rights which is precise and accessible enough for the Appellants to regulate their conduct by reference to it.

If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others?

22. The interference does have legitimate aims since it is in pursuit of one of the legitimate aims set out in Article 8 (2) necessary in pursuit of the economic well

being of the country through the maintenance of the requirements of a policy of immigration control. The state has the right to control the entry of non nationals into its territory and Article 8 does not mean that an individual can choose where she wishes to enjoy their private and family life.

If so, is such interference proportionate to the legitimate public end sought to be achieved?

23. In making the assessment of the best interests of the children I have also taken into account ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2011] UKSC 4 where Lady Hale noted Article 3(1) of the UNCRC which states that *"in all actions concerning children, whether undertaken by ... courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*
24. Article 3 is now reflected in section 55 of the Borders, Citizenship and Immigration Act 2009 which provides that, in relation, among other things, to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions *"are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom"*. Lady Hale stated that *"any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8(2)"*. Although she noted that national authorities were expected to treat the best interests of a child as *"a primary consideration"*, she added *"Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration"*.
25. The starting point for children is that it is in their best interests to be brought up by both of their parents.
26. In relation to the two children in this case A3 came to the UK in 2006 when he was 2 years old and has been here for 11 years and he is now 14 years old. A4 was born in the UK and is 4 years old. The unfortunate immigration history of

this case with there being two hearings before the First-tier Tribunal and both decisions having been found to contain errors has lengthened the period of their stay.

27. In relation to the children's best interests I am satisfied that it is overwhelmingly in both child's best interests to remain in the UK for the reasons I set out below.
28. I am satisfied in relation to A3 that he has spent the vast majority of his life here and has spent formative years here having moved beyond the confines of his family into the wider world. While I accept it is possible to exaggerate the impact on a child of a change of school, particularly when they have well educated and supportive parents who are familiar with the system in the country of origin, this child is now 13 years old and is well embedded in the UK education system and indeed in the culture of the UK. I remind myself of what was said in Azimi-Moayed and others (decisions affecting children; onward appeals)[2013] UKUT 197(IAC) (Blake J) that it is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong; and that lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period. In this case therefore A3 has gone well beyond the 7 year point identified in Azimi Moyed. Mr Mc Vitie fairly acknowledged that A3 is well settled in school and appears to be doing well and there is material from the school and the unchallenged evidence from the parents to confirm this. He is at an age where he has started his GCSE course and I accept that this is an important stage in his education.
29. A4 is only 4 years old and therefore has not lived in the UK for as long as his brother. There are however a number of significant recent medical reports for him at page 299 onwards of the supplementary bundle. He has been assessed by the NHS as a Special Educational Needs Coordinator found that he was

'showing signs of a severe anxiety disorder with the possibility of the disorder being Selective Mutism' because although there were no concerns about his language skills he was refusing to speak to anyone, adults or children, at his nursery. The material provided by the NHS to his parents confirms that this is treatable but a reduction in anxiety and the fostering of a positive environment is vital. I am therefore satisfied that it is reasonably likely that the upheaval of returning to a country that he is unfamiliar with would have an adverse impact on his condition.

30. Taking the circumstances of both boys into account and particularly given A3s length of residence and A4s health issue I am satisfied that it is strongly in their best interest to remain in the UK.
31. In relation to the adult Appellant's relationship with A3 who has been in the UK I accept that A3 is a qualifying child for the purpose section 117B6 and therefore I am required to consider whether, in the light of my finding that it is overwhelmingly in A3s best interests to remain in the UK it is nevertheless reasonable to require him to leave as the children's best interests are not determinative of the issue if there are strong reasons nevertheless why the family should be removed. The assessment of the reasonableness of return must not however focus on the position of the children and this has been made clear in MA referred to above and more recently in AM (Pakistan) [2017] EWCA Civ 180
32. I take into account that while the family have established their life in the UK when their status was precarious they have nevertheless at all times had leave and have therefore respected the UK system of immigration control and this was very fairly acknowledged and indeed highlighted by Mr Mc Vitie. They have clearly honoured the requirements of the leave they have been given previously and both have made a positive contribution to the UK economy with A1 working as an accountant and A2 as a security officer. They both speak English. These factors I am satisfied must reduce the weight that I might normally give to the interests of immigration control

where, for example, Appellants are overstayers or indeed have never had any form of leave or have entered as students and then never studied..

33. When considering where the balance lies therefore between the best interests of the children on the one hand where I have set out above that the best interests of the children are overwhelmingly to remain in the UK, and the importance of maintaining immigration control on the other, I am entitled to take into account the fact that they are not British Citizen children and are not entitled as of right to benefit from the education system and other public services of this country.
34. Having considered all of the evidence carefully and in the round, particularly the length of residence for the children, the health issues of A4 and the positive immigration history, I have come to the conclusion, on balance, that it is not reasonable for the purposes of section 117B6 to require A3 to leave the United Kingdom.
35. Given my findings that this family should remain together all the appeals must succeed.

Decision

36. I allow the appeals under Article 8.
- 37. Under Rule 14(1) the Tribunal Procedure (Upper Tribunal) rules 2008 9as amended) the Appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order for anonymity was made in the First-tier and shall continue.**

Signed

Date 1.6.2017

Deputy Upper Tribunal Judge Birrell