



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/23162/2015
IA/23163/2015
IA/23164/2015

THE IMMIGRATION ACTS

Heard at: Manchester
On 4 July 2017

Decision & Reasons Promulgated
On 4 July 2017

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

MS

MP

BS

(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hawkin (Counsel)

For the Respondent: Mr McVeety (Senior Home Office Presenting Officer)

DECISION AND REASONS

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 Appellants.

1. I have made an anonymity order because this decision refers to the circumstances of a minor child, the third appellant. The first and second appellants are the father and mother of the third appellant, N. N was born in

2005 and is now 12. She came to the UK in 2005 when she was a young baby. The appellants are all citizens of Mauritius.

2. The appellants have appealed against a decision of the First-tier Tribunal dated 6 July 2016 in which it dismissed an appeal against the decision of the respondent dated 5 June 2015 refusing leave on Article 8 grounds. The First-tier Tribunal was satisfied that it would be reasonable for N to leave the UK with her parents and dismissed the appeal under the Immigration Rules and Article 8.
3. In grounds of appeal the appellants challenged the failure to grant an adjournment and the alleged failure to consider N's best interests. Permission to appeal was refused by the First-tier Tribunal and Upper Tribunal. This was challenged in the High Court, and following a decision from Collins J, the decision refusing permission was quashed on 12 April 2017. Permission to appeal was then granted by the Upper Tribunal in a decision dated 9 May 2017.

Hearing

4. Mr McVeety submitted that the First-tier Tribunal may not have used the correct terminology but was clearly aware of N's length of residence and the assessment of reasonableness was made in light of this. Mr Hawkin submitted that the First-tier Tribunal failed to direct itself that significant weight must be attached to N's residence of over seven years and the respondent's policy to the effect that strong reasons will be required to refuse such a case. Mr Hawkin did not pursue the challenge to the First-tier Tribunal's decision to refuse an adjournment. He was correct to do so. Collins J considered the challenge to be unarguable.
5. After hearing from both representatives, I indicated that I was satisfied that the decision contains an error of law, for the reasons I set out in more detail below. Both parties agreed that I should remake the decision myself. It was also not in dispute that N is a qualifying child, but that in remaking the decision I am restricted to considering human rights and not the immigration rules. Mr McVeety invited me to dismiss the appeal when all the circumstances are considered. Mr Hawkin submitted the opposite and referred me to all the relevant factors supporting his submission that to remove N would be unreasonable.
6. At the end of the hearing I indicated that I would be allowing the appeal for reasons which I now provide.

Error of law discussion

Approach to length of residence

7. The correct approach to the reasonableness test in 276ADE and section 117B(6) of the Nationality, Immigration and Asylum Act 2002 has been considered in MA (Pakistan) V SSHD [2016] EWCA Civ 705 (7 July 2016). The Court of Appeal found that the significance of section 117B(6) is that where the child has been in the UK for seven years, this is a factor of some weight leaning in favour of leave to remain being granted [45]. Elias LJ said this:

“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.

...

49...However, 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.”

8. When the First-tier Tribunal decision is read as a whole, there is no clear indication that it attached significant weight to the N's length of residence when considering the reasonableness test or carrying out the proportionality exercise. The First-tier Tribunal was clearly mindful of N's length of residence and that lengthy residence is a relevant factor but that is different to attaching significant weight to it. The First-tier Tribunal also failed to take into account the full ambit of the relevant respondent's policy in the Immigration Directorate instructions ('IDI') and failed to acknowledge that this provides that once the seven years' residence requirement is satisfied, there need to be "*strong reasons*" for refusing leave. In adopting the approach it did, the First-tier Tribunal erred in law and the decision needs to be remade.

Remaking the decision

Approach to evidence

9. Both representatives agreed that I should consider all the evidence for myself in making the relevant Article 8 assessment. In any event very little evidence was disputed by the respondent.

Best interests

10. I conclude that the best interests of N, viewed through the lens of Article 8 private life, would be overwhelmingly served by remaining in the UK. There are six dominant factors:

- (i) She has spent nearly 12 years residence in the UK.
- (ii) She came to the UK as a baby and has spent some of her most formative years (4 to 12) and almost the entirety of her life in the UK.
- (iii) N's ties to Mauritius are limited although I accept she has links through her parents, ethnicity and regular telephone contact with both sets of grandparents, and probably has a clear understanding of Mauritian culture. However, she was just a young baby when she left and I accept she sees himself as thoroughly British with an identity based on British multi-cultural society.
- (iv) Her integration into UK society can be described as complete.
- (v) N will find it very difficult to return to Mauritius at this particular stage of her education and childhood. She has begun secondary school in September 2016 at [School]. She will have undergone rigorous preparation and testing in order to do so. Indeed, Mr McVeety acknowledged this to be the case. She does very well at school and to remove her from the school that she has been working toward for many years after just one year will be difficult for her to accept and understand. Even if there is a suitable school for N in Mauritius (and there is every reason to believe that one can be found given the Mauritian education system and the fact that with time N can overcome any initial language barriers), there remains the real concern that N will be very anxious about leaving her new school. It is noteworthy that when this matter was before the First-tier Tribunal, N had not yet started secondary school - see [47].
- (vi) N was diagnosed with vitiligo when she was 5 and has been under specialist care in the UK. She needs to wear sun protection all year round and will probably have to wear long sleeve clothing and be much more vigilant in Mauritius, given

its climate. There is no indication that if the appropriate preventative measures are taken that N's vitiligo will deteriorate in Mauritius. However, N's vitiligo is likely to increase the prospect that she will "stand out" and not "fit in", and increase her anxiety and distress about leaving the UK.

Proportionality

11. I am mindful that the best interests assessment is not determinative of the question posed section 117B(6) of the 2002 Act, namely whether it would be reasonable to expect N to leave the UK. As Elias LJ noted in MA (Pakistan) at [47] even where the child's best interests are to stay, it may still be not unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and Mauritius, as well as any other relevant wider considerations – see [45] of MA (Pakistan), EV (Philippines) v SSHD at [34-37] and PD and Others (Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 108 (IAC).
12. This question cannot be answered without considering the parents' appeals, to which I now turn. Their Article 8 claims cannot succeed under the Rules. They do not come close to doing so. They can succeed only outside the Rules. The dismissal of the parents' appeals would interfere with their right to respect for their private lives. Since the impugned decisions are in accordance with the law and are in furtherance of a legitimate aim, namely the maintenance of immigration control, the next question to be addressed is whether they are proportionate. It is important to acknowledge that they are longstanding unlawful overstayers since 2007. Although they are law abiding, they have spent most of their lives in their country of origin, Mauritius and significant weight must be attached to their flagrant breach of immigration controls in the UK.
13. Proportionality is the "public interest question" within the meaning of Part 5A of the 2002 Act. By section 117A(2) I am obliged to have regard to the considerations listed in section 117B. I consider that section 117B applies to these appeals in the following way:
 - (a) The public interest in the maintenance of effective immigration controls is engaged. Whilst the first appellant initially arrived in the UK in 2005 as a work permit holder and the other appellants were his dependents, their leave expired in June 2007 and they became overstayers. The first applicant has explained that he continued working to 2012 because he was led to believe that he had an application to extend his leave pending. In any event it became clear in 2012 that there was no pending application and they has become overstayers, and as such an application outside the Rules was submitted in November 2012 and refused in June 2013. A further application was made in 2015 at a time when

the first and second appellants knew that they had become unlawful overstayers.

(b) There is no infringement of the "English speaking" public interest as all the appellants speak English.

(c) The economic interest must be engaged because N has been, and will continue to be, educated at public expense and if the appellants remain in the UK they will have the capacity to access other publicly funded services and benefits. The first appellant is a qualified accountant and the second appellant is a nurse. They both have experience of employment in Mauritius and in the UK. The first appellant has worked in the UK as an accountant from 2005 to 2012 and the second appellant has worked as a care worker.

(d) The private lives established by the parents during the entirety of their time in the UK qualifies for the attribution of little weight only.

14. This brings me back to section 117B(6), which provides:

“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.”

15. It is not disputed that N is a “qualifying child” by virtue of her length of residence in the UK and she has a genuine and subsisting parental relationships with the first and second appellants. In my consideration of N’s best interests above I have already highlighted the salient facts and factors. I must balance these with the outcome of the forecast, which must necessarily be undertaken, based on the premise of the entire family returning to Mauritius - see PD (supra). On the one hand, this would be hugely disruptive for N and would decimate the friendships, relationships and activities that form the core of her private life. It would also obstruct her education, though I accept not irredeemably so. Importantly it would involve her transfer to a society whose culture, values, norms and language are less familiar to her. Emotionally, it would undoubtedly be stressful and damaging. In addition, she would have to cope with the greater physical challenges she will face in Mauritius as a result of her vitiligo, than she has become accustomed to dealing with in the UK. Furthermore, this fundamental transformation of her life and lifestyle would occur at an age and stage of critical importance to her development.

16. On the other hand, taking into account N’s age and the support of a stable family unit, she would, foreseeably, adapt over time. Both her parents were born and raised in Mauritius and maintain close family links there. They both

have a good employment record and with the assistance of family support should be able to re-settle into Mauritius. There is no suggestion that N's health would be detrimentally affected, albeit it may present more challenges.

17. The test to be applied is that of reasonableness. The application of the reasonableness test involves a balance of all material facts and considerations – see MA (Pakistan) (supra). The application of this test will invariably be intensely fact sensitive, see EB (Kosovo) v SSHD [2008] UKHL 41, at [7] - [12], per Lord Bingham. I attach significant weight to N's length of residence in the UK (some 12 years). Other factors of particular strength are: her time in the UK spanned nearly the entirety of her life; her deep immersion in all aspects of life in this country; the critical stage of her personal and educational development which has been reached; and the likelihood that she will make a useful contribution to UK society.
18. Furthermore, I must weigh N's best interests which have the status of a primary consideration. The main countervailing factor is that the first and second appellants have no legal right to remain in the UK. They have become unlawful overstayers. This is a factor of undeniable weight. However, it has been frequently stated that a child's best interests should not be compromised on account of the misdemeanours of its parents – see Baroness Hale in ZH (Tanzania) v SSHD [2011] UKSC 4, at [20]-[21] and [35], and MA (Pakistan) at [52 and 53] and per Elias LJ at [102]:

“In my judgment, the observation of the judge to the effect that people who come on a temporary basis can be expected to leave cannot be true of the child. The purpose underlying the seven year rule is that this kind of reasoning ought not to be adopted in their case. They are not to be blamed for the fact that their parents overstayed illegally, and the starting point is that their status should be legitimised unless there is good reason not to do so. I accept that the position might have been otherwise without the seven years' residence, but that is a factor which must weigh heavily in this case. The fact that the parents are overstayers and have no right to remain in their own right can thereafter be weighed in the proportionality balance against allowing the child to remain, but that is after a recognition that the child's seven years of residence is a significant factor pointing the other way.

19. I consider that there are strong factors supporting the conclusion that it would not be reasonable to expect N to leave the UK. There are no strong reasons that bear upon her personally pointing in the other direction. I have taken into account the fact that her parents are overstayers and have weighed that in the proportionality balance but in my judgment this does not outweigh the preponderance of factors in support of N remaining in the UK, as outlined above. Accordingly, her appeal succeeds under Article 8.

Parents

20. Having thus concluded, the effect of section 117B(6) of the 2002 Act is that the public interest does not require the removal of either parent. The effect of dismissing the two parents' appeals would be to stultify the decision that N qualifies for leave – see PD (supra). In short, it would be unreasonable and disproportionate (notwithstanding their immigration history) to remove the parents because this would inevitably mean that N would have to leave with them. The first and second appellants' appeals therefore succeed under Article 8.

Decision

21. The decision of the First-tier Tribunal contains an error of law and is set aside.
22. I remake the decision by allowing the appeals of all the appellants on Article 8 of the ECHR grounds.

Signed: Ms Melanie Plimmer
Judge of the Upper Tribunal

Dated: 4 July 2017