



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/32699/2015**

Appeal Numbers:

IA/32702/2015

IA/32703/2015

IA/32707/2015

THE IMMIGRATION ACTS

Heard at Field House

On 1st August 2017

**Decision & Reasons
Promulgated**

On 15th August 2017

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

**MR KI YONG KIM
MRS HAEREE LEE
MR DAEHWA KIM
MR DAEJUN KIM**

(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondents: Ms G Peterson, Counsel, instructed by Gillman-Smith
Lee Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I shall refer to the parties as in the First-tier Tribunal.
2. The Appellants are citizens of South Korea and are a husband, wife and two sons. The third Appellant was born on 20th February 1998 and the fourth Appellant was born on 22nd May 2004. The Appellants came to the UK in 2005.
3. Their appeals against the decisions of the Respondent dated 22nd September 2015 refusing leave to remain was allowed under the Immigration Rules and on human rights grounds by First-tier Tribunal Judge R L Walker in a decision promulgated on 10th January 2017.
4. The Secretary of State for the Home Department appealed on the grounds that the judge had misdirected himself in the application of MA (Pakistan) & Ors [2016] EWCA Civ 705 and had failed to recognise that the reasonableness assessment involved an assessment of the whole family unit as well as the public interest considerations. The judge had erred by only focusing on the interests of the children rather than engaging with the public interest in some detail. The first and second Appellants could not meet the Immigration Rules and their status had always been precarious and/or unlawful. As such, applying Section 117B, the wider public interest outweighed the Appellants' Article 8 rights.
5. Permission to appeal was granted by First-tier Tribunal Judge Astle on 16th June 2017 on the grounds that it was arguable that, in considering whether it was reasonable for the children to leave the UK, the judge failed to recognise that this involved an assessment of the whole family as well as the public interest considerations.

Submissions

6. Mr Melvin submitted that the judge failed to recognise the public interest considerations in relation to the whole family in allowing the appeal and had misdirected himself on the ratio of MA (Pakistan). The judge had only paid 'lip service' to the public interest and had failed to have due regard to immigration control or the economic welfare of the UK in respect of the funding of the minor Appellants' education. The first and second Appellants had remained in the UK without leave since 2010. The family were not self-sufficient and there were material errors of law in the decision.
7. Ms Peterson submitted that, applying PD and Others (Article 8 - conjoined family claims) Sri Lanka [2016] UKUT 00108 (IAC), the Appellants' claim would succeed and the judge's decision was correct. She submitted that the Respondent's challenge was in respect of a lack of reasoning, but disclosed no material error of law. The judge was well aware of the Respondent's case, which was set out in the refusal letter and referred to

at paragraph 13 of the judge's decision. The Respondent was not represented at the hearing and the evidence of the Appellants was not challenged.

8. The Record of Proceedings showed that all relevant matters were explored and put before the Tribunal. Even if the judge did not refer to them in his decision, it was clear from the Appellants' skeleton argument and the oral evidence that the judge considered all relevant factors including the immigration history of the parents. However, there was strong evidence that returning the minor Appellants to Korea would have devastating effects.
9. Ms Peterson submitted that the judge quite rightly dealt with the best interests of the children before going on to consider reasonableness and there was extensive evidence, given orally and in the Appellants' bundle, of the catastrophic consequences for the children to be returned to Korea today. The judge had the relevant provisions in mind. Although, the parents did not have leave after 2010, they had a considerable period of leave prior to that and had made attempts to obtain leave. The parents had given compelling evidence that it would be difficult for the children to reintegrate.
10. Ms Peterson referred to the best practice set out in Kaur (children's best interests/public interest interface) [2017] UKUT 0014. This decision postdated the judge's decision and perhaps with the benefit of the guidance given in this decision the judge may well have explained his conclusions better. However, on the facts of the Appellants' case, it was evident on the material before the judge that the public interest was taken into account and none of the factors in relation to the parents' negative immigration history outweighed the best interests of the children. There was no error of law in the judge's finding that it was not reasonable for the third and fourth Appellants to leave the UK.
11. In response, Mr Melvin submitted that there was no finding on the status of the parents. It was irrelevant that there was no Home Office Representative at the appeal hearing. The judge had not made findings of fact and the best interests of the children were not a deciding factor. The judge had misdirected himself in failing to take into account the public interest in assessing reasonableness. He had misunderstood the ratio of MA (Pakistan) and therefore none of the judge's findings could stand. The decision should be set aside and remitted for rehearing because the balancing exercise was completely absent from the judge's decision.

The Appellants' Immigration History

12. The Appellants came to the United Kingdom on 4th August 2005 as a student, dependant wife and dependant children. Leave to remain was extended until 30th April 2010. In October 2013, the first Appellant made applications for further leave to remain for the third and fourth Appellants and they were granted discretionary leave from 27th March to 30th September 2014. On 30th September 2014, the first Appellant made

applications for further leave to remain for the entire family, which were refused on 12th December 2014. Only the third and fourth Appellants were granted a right of appeal against the decision, which they exercised. Their appeals were heard by the First-tier Tribunal on 20th August 2015 and allowed to the extent that the Respondent reconsider their applications under paragraph 276B. Subsequent to an application for judicial review, the Respondent agreed to re-determine all the applications with a right of appeal. The Respondent refused the applications with a right of appeal on 22nd September 2015.

Discussion and Conclusions

13. It was not in dispute that, at the date of application, the third and fourth Appellants had been living in the UK for more than seven years and were qualifying children under paragraph 276ADE(1)(iv).
14. The judge identified that the issue in the appeal was whether it was reasonable for the third and fourth Appellants to leave the UK. The judge set out significant paragraphs of MA (Pakistan) and then considered the best interests of the children. The judge appreciated that the best interests of the children was a separate assessment to the test of reasonableness under Section 117B of the 2002 Act. The judge found that it was in the best interests of the third and fourth Appellants to remain in the UK. However, he noted at paragraph 30, that there was a further step: to decide whether it was reasonable for them to leave the UK. Accordingly, the judge has not equated reasonableness with the best interests of the children and has carried out a separate assessment in accordance with MA (Pakistan).
15. In deciding whether it was reasonable for the children to leave the UK the judge considered their education and the fact that they had been living in the UK for eleven and a half years and were well settled. The judge stated at paragraph 33:

“In looking at the reasonable exercise I must take into account the public interest and [sic] which comes into the general proportionality exercise as well. Section 117B(6) specifically states that the public interest here does not require the Appellants’ removal where it would not be reasonable to expect the child to leave the UK.”
16. The judge’s reasons are brief. However, he properly directed himself and applied MA (Pakistan), in which the Court of Appeal held: “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 determine the nature and strength of the child’s best interests and second, because it establishes a strong starting point that leave should be granted unless there are powerful reasons to the contrary.”

17. The judge set out the parents' immigration history at paragraphs 2 to 7. He was aware of the reasons for refusal and noted at paragraph 13 that neither the first or second Appellant had leave to remain at the time of the application.
18. On the facts of this case the immigration history of the first and second Appellants did not outweigh the best interests of the third and fourth Appellants. The judge took the public interest into account in assessing reasonableness. His failure to state which factors made up the public interest in this case was not material.
19. The third and fourth Appellants had been resident in the UK for eleven and a half years. The third Appellant was 7 years old when he came to the UK and the fourth Appellant was only a year old when he came to the UK and was now 12. They had spent significant periods of their lives in the UK and their education here.
20. The judge's decision would not have been different had he specifically stated that the first and second Appellants had been here illegally since 2010 when he referred to the public interest at paragraph 33. The judge quite clearly did take into account the public interest in assessing reasonableness. His failure to refer to the facts which weighed in favour of the public interest amounted to a lack of reasons, but did not amount to a material error of law. On the particular facts of this case, the judge's conclusions were open to him on the evidence before him. The third and fourth Appellants had significant residence in the UK and had developed a significant private life outside of the family unit. Their parents' unlawful residence was not sufficient to outweigh their best interests.
21. Accordingly, I find that there was no error in the decision of First-tier Tribunal Judge R L Walker dated 10th January 2017 and I dismiss the Respondent's appeal.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

J Frances

Signed

Date: 11th August 2017

Upper Tribunal Judge Frances