



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

Appeal Number: HU/06271/2016
HU/06282/2016
HU/06277/2016
& HU/06285/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 9 October 2018**

**Decision & Reasons Promulgated
On 30 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPEYARD

Between

M N M J

First Named Appellant

And

F S H M H

Second Named Appellant

And

U N

Third Named Appellant

And

A N

Fourth Named Appellant

(ANONYMITY DIRECTION MADE)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Wells, Counsel.

For the Respondent: Mr L Tarlow, Home Office Presenting Officer.

DECISION AND REASONS

1. The Appellants are citizens of Sri Lanka and the first and second Appellants are husband and wife and the third and fourth Appellants their minor children. They appealed against a decision of the Respondent refusing their applications for leave to remain under the Human Rights Act. That appeal was heard by Judge of the First-tier Tribunal O'Garro who, in a decision promulgated on 16 February 2018, dismissed their appeals.
2. They sought permission to appeal which was initially refused but following a renewed application was granted by Upper Tribunal Judge Freeman on 15 August 2018. His reasons for so granting were: -
 - “1. All the original grounds turn on the judge’s treatment of the report of an independent social worker which was before her, mainly about the two children. Umar, the elder, is 9 and was born very shortly after his mother arrived here in October 2008; so, he is a qualifying child.
 2. The judge recognized this at 47, and noted the effect of Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT(IAC) 00197 that there may in such a case be “...ties that it would be inappropriate to disrupt without compelling reasons”. However at 54 she said “I do not find this to be a case where the children’s best interests point overwhelmingly in favour of remaining in the United Kingdom...” and at 71-72 referred to the ‘compelling circumstances’ test set in Treebhawon & others (section 117B(6)) [2017] UKUT 674.
 3. Difficult as this area of immigration law has been allowed to become, MT and ET (child’s best interests; ex tempore pilot) Nigeria [2018] UKUT 88(IAC), discussing MA (Pakistan) & others [2016] EWCA Civ 705 and other authorities, provides useful guidance at 20: providing a parent is not liable to deportation, and has a ‘genuine and subsisting parental relationship’ with a qualifying child, who could not reasonably be expected to leave this country with them, the public interest does not require the parent’s removal.
 4. Arguably, where that question is the main or only issue, all that judges need do is to decide as a question of fact whether the qualifying child could reasonably be expected to leave, without turning to whether there are ‘compelling circumstances’.”
3. Thus, the appeal came before me today.
4. At the outset both representatives acknowledged that Upper Tribunal Judge Freeman’s reference to **MT and ET** should have been to paragraph 17 rather than 20. Paragraph 17 of that decision states: -
 - “17. Having made that finding, Judge Martin did not consider that it required the appeals to be allowed. She noted that section 117B(6) of

the Nationality, Immigration and Asylum Act 2002 had been interpreted by the Court of Appeal in MA (Pakistan) and Others v Secretary of State for the Home Department [2016] EWCA Civ 705. That provision states that the public interest does not require a person's removal where the person (who is not liable to deportation) has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. In MA, the Court of Appeal held that in determining what was reasonable, the issue is not solely to be looked at from the child's perspective but requires a balancing exercise between what was in the public interest and what was in the interests of the child."

5. Mr Wells put forward four arguments. Firstly, that the Judge had erred in consideration of her analysis of the expert report prepared by a senior social worker. He contended that Judge O'Garro failed to give clear reasons why the conclusions to the report were being rejected. This was plainly relevant with respect to the effect on the children of removal in terms of their development and psychological wellbeing. Further that at paragraph 48 of her decision the Judge has clearly misunderstood the report in terms of the psychological wellbeing with reference to the expert opinion on the psychological impact of removal and integration into an alien culture. The Judge has addressed the third and fourth Appellants' current psychological wellbeing and has consequently erred in her approach. This not simply a disagreement with Judge O'Garro's findings but a substantive challenge to the way in which she disregarded this evidence without engaging effectively with the conclusions drawn.
6. Secondly, the approach in relation to the third Appellant's best interests is flawed. The child has been in the United Kingdom for seven years and this would need to be given significant weight in the proportionality exercise for two related reasons: firstly, because its relevance to determining the nature and strength of the child's best interests; and secondly, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary. The Judge has erred in failing to approach the consideration of the weight of importance to be given to the third Appellant's residence.
7. Thirdly, the Judge has again erred in finding that in light of the expert evidence the Appellant's circumstances did not amount to the kind of special and compelling circumstances to override the guidance as outlined in Section 117 B (5). It was argued in the grounds initially following the Judge's decision that she had erred in finding Section 117 B (5) was determinative and that the Judge failed to have regard to all the relevant factors in giving appropriate weight to the expert report in the assessment of proportionality.
8. Finally, the Judge has recorded that the first and second Appellants each gave evidence through a Tamil interpreter and that there was no evidence that they spoke English. This is factually incorrect as the Appellants both

gave evidence in English without an interpreter and the expert report by the senior social worker also noted that the Appellants spoke English. This, together with the finding in paragraph 51 that the third Appellant could speak Tamil, with all the evidence including the expert report contradicting this finding suggests that Judge approached the hearing and the evidence without the “customary anxious scrutiny”.

9. Mr Tarlow urged me to accept that the Judge had made findings that were open to be made on the evidence as detailed at paragraph 45 and onward in her decision. He said that paragraph 50 of the Judge’s decision was “key”. It states: -

“50. At age nine and five, I find the children are still young enough to adjust to life in Sri Lanka, adapt to the education system there and learn more of their culture. Neither child has reached a critical age in their education nor do I find that they will be unable to adapt to the education system in Sri Lanka”.

10. I was asked to accept that the Judge had taken the public interest into account alongside the interests of the children and it was open for her to come to a conclusion that the family unit should remain together and be returned as such to their country of origin. Whilst the decision might not be one that all Judges might have come to it nonetheless was open to be made on the evidence and consequently the decision itself contains no material error.
11. I find that the Judge has materially erred for all the reasons put forward in the grounds seeking permission to appeal. The approach to the expert evidence fails to provide adequate reasoning for its rejection. It is also the position that the Judge has conflated the interests of the third and fourth Appellants. The third Appellant and the fourth Appellants’ positions should have been looked at individually and certainly the age of the third Appellant (nine years) is of great significance and should have been considered as such under both Section 55 of the Borders, Citizenship and Immigration Act 2009 and Article 8. The Judge has failed to give reasons for rejecting the social worker’s opinion regarding the impact of removal on the third Appellant. This was an Appellant who very shortly will be able to make application for British citizenship and in light of my findings, and for the reasons identified by Upper Tribunal Judge Freeman in granting permission to appeal, the Judge has materially erred.
12. Both parties asked me to remit this appeal were I to come to this conclusion. I consider in the circumstances that further evidence is necessary regarding the up to date position of all the Appellants. Therefore, I intend to follow that course.

Notice of Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh pursuant to Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Direction 7(b) before any Judge aside from Judge O'Garro.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed
2018

Date: 22 October

Deputy Upper Tribunal Judge Appleyard