



Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: HU/10332/2017

THE IMMIGRATION ACT

Heard at Field House

On 13th June 2018

Decision & Reasons Promulgated

On 3rd July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

EM & CM

(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Adewoye of Prime Solicitors

For the Respondent : Mr L Tarlow Senior Home Officer Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Solly promulgated on the 27th February 2018 whereby the judge dismissed the

appellants' appeals against the decisions of the respondent to refuse the appellants' claims based on family and private life.

2. I have considered whether or not it is appropriate to make an anonymity direction. These proceedings concern the status and rights of a minor. In the circumstances I consider it appropriate to make an anonymity direction.
3. Leave to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge E M Simpson on 23 April 2018. Thus the case appeared before me to determine whether or not there was a material error of law in the decision.
4. The material part of the grant of leave provides:-

iii) There appeared arguable..... that the judge erred when assessing the linked appeals of the appellants in failing to provide an adequacy of sustainable reasoning on the issue of whether it is reasonable to expect the 2nd appellant to leave the UK having regard to the respondent's own policy and PD & Oers ...2016 UKUT 00108 an authority before the judge relied upon by the appellants of which there was no mention in the assessment, rather only those advance for the respondent inter alia EV (Philippines) & Ors [2014] EWCA Civ 874 , Kaur [2017] UKUT 00014 (IAC) and AM (Pakistan) & Ors [2017] EWCA Civ 180.

iv) more particularly having regard to PD above it was arguable that criteria such as the age of the 2nd appellant, her length of residence in the UK, where she had always been educated the stage at which her education had reached, and the extent of private life ties were together inadequately weighed in the assessment of whether it was reasonable to expect her to leave the UK.

5. During the course of the submissions before me the appellant's representative consistently referred to the weight given to the elements of the appellant's case. In that respect I would draw attention to the case of FK (Kenya) [2010] EWCA Civ 1302 where the issue of the weight to be given to evidence is considered, specifically in paragraph 23 of the judgement of Lord Justice Maurice Kay which provides:-

23..... It follows that the appeal on this ground is in effect a perversity challenge, and the submission that undue reliance was being placed by the Immigration Judge on the appellant's convictions amounts to no more than a submission that the Immigration Judge gave that factor too much weight. It is well established that a submission that too much or too little weight has been given to a particular factor does not raise an arguable point of law. There is no suggestion, apart from the submission that the Immigration Judge gave undue weight to the appellant's criminal record, that she failed to take into account any other relevant factor or that she took into account any irrelevant factor. In these circumstances it seems to me there is no proper basis on which this perversity challenge to the Immigration Judge's conclusions can succeed.

6. Whilst clearly a failure to give any weight to material factors would constitute an error of law, the issue is whether or not the judge has considered the factors identified and taken such into account in making the findings of facts. It is for the judge to determine what weight to give to such.
7. Whilst the judge has taken account of the fact that the appellant's daughter is in her GCSE year and that she is doing well, there is little consideration of the consequence of removing her from her GCSE year or just post that year save that it was submitted that the change of environment will damage her education. [see paragraph 33 and 39].

8. What is significant with regard to the approach to the rights of the 2nd appellant is that the judge indicates that the question to be asked was whether or not it would be reasonable to expect the 2nd appellant to leave the United Kingdom. It is the approach adopted by the judge in assessing Article 8 and is drawing upon the provisions of the Immigration Rules and Section 117B of the 2002 Nationality, Immigration and Asylum Act 2002.
9. In that respect I draw attention to the Home Office policy- Family Migration: Appendix FM Section 1.0b –Family Life (as a Partner or Parent) and Private Life: 10-year Routes, which deals with Article 8 rights and family life. In respect of a child that has been in the United Kingdom 7 years or more the policy contains the following.

The requirement that a non-British citizen child has lived in the UK for a continuous period of at least the seven years immediately preceding the date of application, recognises that over time children start to put down roots and to integrate into life in the UK, to the extent that it may be unreasonable to require the child to leave the UK. Significant weight must be given to such a period of continuous residence. The longer the child has resided in the UK, and the older the age at which they have done so, the more the balance will begin to shift towards it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more.

10. The guidance mirrors the approach advocated in the case of MA (Pakistan) 2016 EWCA Civ 705 specifically paragraphs 46 to 49 in Lord Justice Elias decision which provide:-

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 interests 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. The concept of "best interests" is after all a well established one. 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 in the country where it is proposed he should return. What could not be considered, however, would be the conduct and immigration history of the parents.

.....

49 Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. 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.

11. In MA reference is made to the judgement of LJ Christopher Clarke from *EV Philippines v SSHD 214 EWCA Civ 874*, wherein how the Tribunal should approach the issues of assessing the best interests of the child under Article 8 is given some guidance. The judgment at paragraphs 34 onwards provides:-

"34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.

35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hypothesi, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

12. The emphasis in EV is on the balance to be struck between the interests of immigration control and the rights and best interests of the child in remaining in the United Kingdom in that context the immigration history of the parent may be a significant factor. The later case of MA in dealing with the balance indicates that where the child has been in the UK for in excess of 7 years there have to be powerful reasons to justify removal of the child.

13. I also draw attention to the case of *MT & ET v SSHD Nigeria (UKUT) 88 (IAC)*, which also deals with the approach to be taken in respect of children that have been in the United Kingdom in excess of 7 years. At paragraph 33 in dealing with the child to be in the United Kingdom 10 years the Tribunal noted :-

On the present state of the law, as set out in MA, we need to look for 'powerful reasons' why a child who has been in the United Kingdom for over 10 years should be removed, notwithstanding that her best interests lie in remaining.

14. An examination of the facts has some parallel with the present case. The child had been in the UK for 10 years having arrived in the UK at the age of 4; the child had grown up in the United Kingdom; attended nursery, primary school and then a high school; child was preparing for her GCSEs; the family and child were involved with the local church and had a circle of friends which provided a degree of stability and support. The child was only familiar with and comfortable with the English way of life and had no concept of what life was like in Nigeria. Finally no steps had been taken to remove the family from the United Kingdom for some years. In allowing the appeal the Upper Tribunal noted that the best interests of the child were manifestly to remain in the United Kingdom.
15. I draw attention also to paragraph 31 of the MT decision wherein it is pointed out that the child had no direct experience of Nigeria and the issue of whether or not there was a functioning education system in that country was noted. The child's best interests manifestly were to remain in the United Kingdom with her mother. In that respect school is a significant aspect of the child's experience and connection with the wider world. The conclusions to be drawn from the Home Office policy and the case law were that where a child has been in the UK for 7 years or more strong reasons justifying removal of the child are required. As set out in MT & ET.
16. In light of the case law and the policy identified on considering the article 8 rights of the 2nd appellant the judge was required to consider whether or not there were strong reasons justifying removal. The judge in looking at the position of the 2nd appellant has found in paragraph 51 that the best interests of the 2nd appellant are to remain in the United Kingdom. In making that finding he has considered the fact that she has friends and family in the United Kingdom, which would provide her with significant support. The judge has also found that the appellant has been successfully proceeding through the education system in the United Kingdom.
17. Thereafter whilst the judge has considered the circumstances that would face the appellant on return to Malawi, there is no identification of any strong reasons that would justify removal. Given the case law I find that that is material error of law. I therefore set the decision aside.
18. At the hearing I invited submissions from the parties as to the course of action that they advocated with regard to the appeal and whether or not there was any requirement for the case to be reheard in full. It was accepted by both parties that I had all the evidence before me upon which I could determine the appeal without a further hearing. I therefore heard submissions from both the Home Office representative and the appellant's representative as to how I should deal with this appeal.

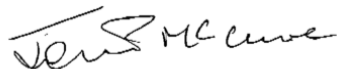
Remaking the decision

19. I follow the guidance given in the case of MT & ET.
20. As found in paragraph 51 of the decision the best interests of the child are clearly to remain in the United Kingdom. As set out therein the child has been in the United Kingdom for in excess of 10 years, having entered in 2007. She is well advanced in the education system and indeed seems to be doing reasonably well in her education.
21. The child has relatives in the UK with whom she is close. She has friends at school and has clearly developed close connections with her school mates. There are also connections with local church organisations.
22. Looking otherwise the child has no direct experience of Malawi. She has no experience of the education system in Malawi. She would have to commence to establish not only an educational base but friends and social connections if she were returned to Malawi. That would have to be a significant adjustment of the child in seeking to adjust to a totally new education system and life.
23. In the circumstances of the present case there are no powerful reasons justifying removal. Whilst the public interest clearly lies in removing a person such as the first appellant, who has flouted the immigration system and remained without lawful leave for a significant period of time, the 2nd appellant cannot be held responsible for such conduct.
24. However given the strength of the child's case I find that the conduct of the first appellant is not such as would come anywhere near justifying removal of the 2nd appellant and therefore the 1st appellant. In coming to that conclusion I do acknowledge that the first appellant has clearly come to the United Kingdom and sought to remain unlawfully. I take account of the fact that the first appellant has made many applications many without prospect of success and has delayed the proceedings. In that sense I do not seek to excuse or give any form of sanction to the conduct of the first appellant. However none of this is such as to constitute powerful reasons that would render it reasonable to remove the child to Malawi.
25. In those circumstances I find that the appeal of the 1st appellant and the 2nd appellant are allowed on article 8 grounds. In the light of the matters set out the judge has made a material error of law. I set the decision aside and allow the appeal on article 8 grounds.

Notice of Decision

26. I allow the appeals on article 8 grounds.

Signed

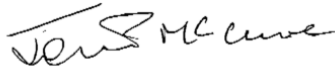


Deputy Upper Tribunal Judge McClure

Date 2nd July 2018

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 the appellant or any member of the appellant's family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings

A handwritten signature in black ink, appearing to read 'James McClure', written in a cursive style.

Signed

Date 2nd July 2018

Deputy Upper Tribunal Judge McClure