



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/15641/2016
HU/15647/2016
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THE IMMIGRATION ACTS

Heard at Field House
On 13th July 2018

Decision & Reasons Promulgated
On 1st August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

MAGH (FIRST APPELLANT)
MET (SECOND APPELLANT)
MJT (THIRD APPELLANT)
MJT (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Slatter, Counsel

For the Respondent: Ms L Kenny, Senior Presenting Officer

DECISION AND REASONS

1. The Appellants appeal against the decision of First-tier Tribunal Judge White promulgated on 20th December 2017 dismissing their appeals against applications for

leave to remain on the basis of their human rights. The Appellants appealed against that decision and were granted permission to appeal by First-tier Tribunal Judge Doyle in the following terms:

“The grounds assert that the judge’s proportionality assessment is flawed, and that the judge failed to properly take account of the best interests of the child Appellants.

MT and ET (child’s best interests; ex tempore pilot) Nigeria [2018] UKUT 88 (IAC) and *R, (on the application of MA Pakistan and Ors) v Upper Tribunal Immigration and Asylum Chamber and Another* [2016] EWCA Civ 705, suggests that powerful reasons are required to overcome the length of residence of children in the UK. It is arguable that the judge’s findings on the reasonableness of return of the third Appellant are inadequately reasoned. It is also arguable that the judge failed to take account of the potential the third and fourth Appellants have to meet the requirements of paragraph 276ADE(1)(iv) of the Rules.

It is also arguable that the judge has factored the poor immigration history of the first and second Appellants into the proportionality assessment for the third and fourth Appellants at 18 and 19 of the decision.

The grounds disclose an arguable error of law. Permission to appeal is granted.”

2. I was not provided with a Rule 24 response from the Respondent but was given the indication that the appeal was resisted.

Error of Law

3. At the close of the hearing I indicated that I found that there was an error of law in the decision but that my reasons for so finding would follow. My reasons for so finding are as follows.
4. As identified by the grant of permission, the key test posited by the Court of Appeal in *R, (on the application of MA Pakistan and Ors) v Upper Tribunal Immigration and Asylum Chamber and Another* [2016] EWCA Civ 705 is whether there are, or are not, any “powerful reasons” as to why it is reasonable for a child who has obtained seven years’ continuous residence to leave the United Kingdom, notwithstanding that length of residence.
5. Although the decision in *MA (Pakistan)* gave clear guidance on this issue at [49], for example, the position was made even more clear by the decision of the Presidential panel in *MT and ET (child’s best interests; ex tempore pilot) Nigeria* [2018] UKUT 88 (IAC) which made plain at [33] and [34] that the starting point for the Tribunal is to look for “powerful reasons” why a child who has been in the United Kingdom for the requisite period of time should be removed, notwithstanding their best interests may lie in remaining. In sympathy with the First-tier Tribunal Judge’s stance, it is

noteworthy that *MT and ET* were not promulgated at the time of the hearing before the First-tier Tribunal.

6. Notwithstanding the comprehensive nature of the First-tier Tribunal Judge's decision, given the binding reported decision of the Upper Tribunal on this matter it is now clear that the starting point for consideration of this issue is whether "powerful reasons" have been given by the Secretary of State as to why it is reasonable for the child to leave the United Kingdom, and it is for the First-tier Tribunal to independently appraise that position on an appeal.
7. Unfortunately the First-tier Tribunal did not take this as its starting point nor look at this relevant parameter, and notwithstanding that the judgment contains a considered analysis of the best interests of the child, without taking into account the Government's published position in relation to what it is agreed must be shown in order to defeat the requisite residency of a child (who has attained seven years' continuous residence), in my view the error is a material one, given that the main umbrage held against the Appellant-family is that the Appellant-parents arrived on transit visas and then overstayed those visas for nine years before attempting to regularise their status.
8. That behaviour is plainly unlawful and should not be excused; however, having said that, that behaviour in comparison to the behaviour seen in the decision in *MT and ET* - where the mother of the children had a poor immigration history and had arrived as a visitor, overstayed and was unlawfully present for ten years and had also committed a criminal offence of fraud - is not so grievous, and to use the Presidential panel's words, in my view the Appellant-parents' immigration history could be properly described as "run of the mill" immigration offending and in any event these immigration breaches are not as serious as those committed by *MT*. As the Upper Tribunal states, the point in short is that the immigration history does not constitute the kind of "powerful" reason that would render reasonable the removal of the children.
9. Given my findings on the issue of the Tribunal's approach to the appraisal of the reasonableness of the children's relocation to their country of nationality, and given that these findings affect the whole of the decision made by the First-tier Tribunal, I will not go on to consider the remaining grounds as in my view the first ground does reveal a material error of law.
10. In light of the above findings the appeal to the Upper Tribunal is allowed and I set aside the decision of the First-tier Tribunal in its entirety.

Notice of Decision

11. The appeal to the Upper Tribunal is allowed.
12. The appeals are to be remitted to be heard by a differently constituted bench.

13. There was some debate by the parties as to whether the matter should be remade by me or not, however I was told by Counsel for the Appellants that one or more of the children has obtained British nationality, and in my view this is a matter which should be the subject of properly filed and served evidence and importantly should be put before the Secretary of State so that she is on notice of this development and may consider her position *before* any further hearing.
14. Consequently, I am not in a position to remake the decision today given that this evidence is not before me in a properly filed, served and paginated Appellants' bundle.
15. Given that matters have moved on the parties agreed that the matter should be remitted to the First-tier Tribunal, even if the remitted hearing were to be a mere formality in assessing the appeal on the basis of the up-to-date position of the children and taking the correct approach adumbrated by the Court of Appeal and the Upper Tribunal in relation to the search for "powerful" reasons.

Directions

16. Standard directions are to be given.
17. No interpreter is required.
18. The first and second Appellants are to give evidence at the remitted hearing.
19. The time estimate for the appeal is two hours.

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

20. 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

Date: 27. 07. 2018

Deputy Upper Tribunal Judge