Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/19743/2016
HU/19738/2016
HU/19745/2016
HU/19748/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 October 2018	**On 8 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

JULIO [M] (FIRST APPELLANT)
LUCILENE [A] (SECOND APPELLANT)
[Y F] (THIRD APPELLANT)
[E A] (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr G Lee, Counsel instructed by M Reale Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. There are four appellants in this appeal, all of whom are citizens of Brazil. The first appellant was born on 3 January 1979. The second appellant is his partner who was born on 19 June 1987. The third and fourth appellants are their children who were born respectively on 27 May 2009 and 21 April 2011.

2. The appellants are appealing against the decision of Judge of the First-tier Tribunal Barker promulgated on 29 January 2018 whereby their appeals against the decision of the respondent to refuse their application to remain on the basis of human rights was dismissed.

3. The first appellant entered the UK in August 2007. The second appellant entered in December 2007. The third and fourth appellants were born in the UK.

Decision of the First-tier Tribunal

4. The central issue before the First-tier Tribunal was whether it would be reasonable (applying Rule 276ADE(iv) of the Immigration Rules and Section 117B(6) of the Nationality, Immigration and Asylum Act 2002) for the third appellant to be expected to leave the UK and travel to Brazil with his parents and sibling, given that he had resided in the UK for eight years and seven months.

5. The judge directed herself that the concept of reasonableness needed to be interpreted in line with the Court of Appeal decision in *MA Pakistan* [2016] EWCA Civ 705. The judge stated at paragraph 33 that

> "The best interests of the child must therefore be the starting point and treated as a primary consideration. 49 of the case *MA* states, 'The fact that a child has been in the UK for seven years would need to be given significant weight in the prepared proportionality exercise for two related reasons. First, because of its relevance in determining the nature and strength of the child's best interests; and second, because it establishes as a starting point and these should be granted unless there are powerful reasons to the contrary.'"

6. The judge found that it would be reasonable to expect the third appellant to leave the UK even though it would be in his best interests to remain in the UK. At paragraph 37 the judge set out her analysis as to how this conclusion was reached

> "The appellants have some link with relatives in Brazil and have kept contact with Brazilian nationals in the UK. I do not accept that they have lost contact with the way of life in Brazil. The parents have not learned English to any substantial degree and still speak Portuguese. The children were born to parents who had remained illegally in the UK, have no status and are not British citizens and are nationals of Brazil. There have been no criminal offences committed by the appellants and some supporting letters have been provided giving positive comments about the character of the appellants. I accept that the appellants would have no jobs and no accommodation but they have demonstrated that they are able to resolve such issues in the UK and have relatives in Brazil who could possibly provide help. The adult appellants maintain that their relatives could not help but have given no evidence as to why this was the case. The older

> child is 8½ and is at a stage where he is capable of adapting to life elsewhere and his social life is still dominated by his life with his parents and younger sister. He is a little over half way through his primary education and is not as at a stage of important exams. The family have been praised for their love and care and support and appear to be a united unit. No health issues or other issues have been raised. Removal from the UK would be with parents to a country where there are a number of relatives. The level of contact is uncertain and the evidence of the appellants vague. Whilst the adult appellants have stated that they would have no jobs and no accommodation they have worked in Brazil previously and rented accommodation in the past. Taking into account all the factors and the fact that some links with Brazilian culture and people from Brazil in the UK have been maintained I find no reason why it would be unreasonable to expect the qualified child together with the younger child to accompany the parents back to Brazil".

Grounds of Appeal and Submissions

7. The grounds of appeal challenge the decision on the basis that the judge failed to conduct the analysis of the reasonableness of the third appellant leaving the UK "through the lens of the question of whether there are powerful reasons to displace the presumption that leave be granted in these circumstances."

8. The grounds state that the judge failed to frame the question of reasonableness in the way set out by *MA* and consequently it is unsurprising that there was no indication as to whether the factors which are said to support the conclusion that removal would be reasonable amount to "powerful reasons".

9. Before me, Mr Lee argued that the recent Upper Tribunal decision in *MT and ET (child's best interests; ex tempore pilot Nigeria)* [2018] UKUT 00088 (IAC) shows how the judge has failed to properly consider whether there are powerful reasons to justify removal. He noted that in *MT and ET* the Upper Tribunal stated that they needed to look for "powerful reasons" why a child who had been in the UK for so long should be removed and concluded that there were no such powerful reasons even though her mother committed fraud. He contrasted the criminal conduct of the appellant in MT and ET to the appellant in this appeal, who had no such history, and argued that the judge only reached the conclusion that removal was reasonable because she failed to ask the right question, which is whether there were powerful reasons why the third appellant should be removed from the UK.

10. The response of Mr Jarvis was that it is not sustainable to argue that the judge failed to consider the case through the lens of whether there are powerful reasons as the judge at paragraph 33 of the decision clearly directed herself to this consideration. The decision only contains a small quote from *MA* and that quote is of the paragraph where it is stated that there must be powerful reasons.

11. Mr Jarvis argued that the judgment in *MA* requires that a fact specific nuanced approach is taken on a case by case basis to assess whether removal is reasonable.

He referred to the assessment in *MA* at paragraphs 61 to 74 of the circumstances of the appellant MA and highlighted the similarities to this appeal.

12. With regard to *MT and ET,* Mr Jarvis argued that to the extent the approach in that case differs to *MA* I am bound by *MA*. He also observed that *MT and ET* concerned a teenager aged 14 whose private life was far more entrenched than that of the third appellant who was only 8½ at the time of the decision of the First-tier Tribunal.

Analysis

13. The judge correctly identified the issue in contention, which is whether it would be reasonable to expect the third appellant to leave the UK. She also correctly identified that the Court of Appeal in *MA* explained how reasonableness is to be determined and at paragraph 33 of the decision (cited above) quoted one of the most significant passages from that case. After accurately setting out the law and summarising the relevant recent Court of Appeal judgement, the judge proceeded to consider a range of factors relevant to the reasonableness of expecting the third appellant to leave the UK, including his family's contact with Brazil, his linguistic ability, his stage of education, his age and the circumstances he is likely to face on return to Brazil.

14. Having considered the aforementioned factors the judge reached the conclusion that there was no reason why it would be unreasonable to expect the appellant, accompanied by his parents and sister, to leave the UK and reside in Brazil, which is the country of his and his family's nationality.

15. The judge has not ignored that the third appellant has lived for over seven years in the UK or that this is a powerful reason weighing against removal. On the contrary, the judge explicitly recognised this at paragraph 33. However, the judge has found that it would be reasonable to expect the third appellant to leave the UK notwithstanding the significance of the time spent in the UK.

16. As highlighted by Mr Jarvis, this is the same conclusion that was reached in *MA* where the factual matrix was broadly similar. *MA* concerned an eight year old where it was found that the child's life was dominated by his parents and younger brother, that his parents provide a loving and safe environment, that there were no safeguarding issues, that there were no health issues and that the return would be to a country where the family have close adult relatives. I agree with Mr Jarvis that if the Court of Appeal in MA found it was open to the judge to conclude that removal was reasonable, it is difficult to see how it could be unreasonable in this case.

17. I have considered the case of *MT and ET*. The stark difference between *MT and ET* on the one hand and this appeal and *MA* on the other is that the third appellant in this case and the child in *MA* were 8 years old at the time of the hearing, whereas the appellant in *MT and ET* was 14 years old. In *MT and ET* great emphasis is placed on the fact that she is 14 and it is stated at paragraph 30:

> "She is well advanced in her education in this country. As a 14 year old she can plainly be expected to have established significant social contacts involving

> friends in school and outside such as a church. She has embarked on a course of studies leading to the taking of GCSEs".

18. The Upper Tribunal in *MT* and *ET* made clear that the age of the child is a significant factor, stating at paragraph 31:

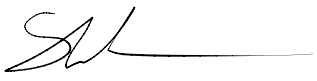
> "A much younger child, who has not started school or who has only recently done so will have difficulty in establishing that her Article 8 private and family life has a material element which lies outside her need to live with her parent or parents wherever that may be. This position however changes over time with the result that an assessment of best interests must adopt a correspondingly wider focus examining the child's position in the wider world of which the school will usually be an important part".

19. After hearing this appeal but before promulgation of my decision, the judgment of the Supreme Court in *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53 was reported. In this judgement, the Supreme Court determined that "reasonableness" must be assessed with reference only to the child. This differs to *MA*, where the Court of Appeal found that the conduct of the parents (including their immigration history) was a factor to be considered in assessing "reasonableness" under Section 117B(6). I have carefully considered whether the decision contains a material error of law because it is not consistent with *KO*. As is clear from the judge's findings at paragraph 37 (quoted above), having analysed the circumstances of the third appellant in the UK and the likely circumstances he would face in Brazil, the judge reached the conclusion that it would be reasonable to expect him to leave the in the UK in context of his parents also being required to leave the UK. Although the judge had regard to the parents' immigration history (correctly, at the time, following *MA*), it is clear, when reading the decision as whole (and in particular paragraph 37) that the decision as to reasonableness did not depend on the conduct or immigration history of his parents. The decision was therefore consistent with *KO* and consequently I am satisfied that it does not contain a material error of law.

Notice of Decision

The appeal is dismissed. The decision of the First-tier Tribunal does not contain a material error of law and stands.

No anonymity direction was made in the First-tier Tribunal and none was applied for at this hearing. I therefore do not make an anonymity direction.

Signed 
Deputy Upper Tribunal Judge Sheridan Dated: 31 October 2018