Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/21757/2016
HU/21759/2016
HU/21763/2016
HU/21767/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31st August 2018	**On 25th September 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

RAFAELA [P]
MARCOS [S]
K1 (THEIR ELDEST DAUGHTER)
K2 (THEIR SECOND DAUGHTER)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Miss N Karbani, Counsel, Sterling & law associates LLP
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge L K Gibbs promulgated on 22 February 2018 following a hearing on 19 January

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2018. The determination of the First-tier Tribunal Judge resulted in her refusing dismissing the appeal of four Brazilian citizens against the decision of the Secretary of State to refuse them further leave to remain.

2. The circumstances of the case are a matter of history which I do not consider can properly be omitted. The weight that is to be attached to them is of course a matter for further consideration in this decision, but as a matter of history, the father entered the United Kingdom on 18 November 2005. He is now aged 36. The mother entered the United Kingdom on 1 June 2006. She is now aged 28. They not only remained unlawfully from the moment of their arrival but they entered unlawfully because the judge properly found that it had always been their intention to enter and remain in the United Kingdom unlawfully and eventually to seek settled status in the United Kingdom.

3. The appellants have remained in the United Kingdom and three children were subsequently born. K1 was born on 7 May 2009. She is now 9 years old but was 8 years old at the time of the decision by the First-tier Tribunal Judge. K2 was born on 14 February 2012 and is now aged 6. Although K3 is not a party to this application she too is a relevant consideration. She was born in July of 2016 and is now aged 2. The judge therefore had to grapple with the situation as to whether the presence of these children in the United Kingdom (notwithstanding the absence of any right to remain under other parts of the Immigration Rules) was such as to render their removal unlawful.

4. In doing so, the judge set out in paragraph 10 the immigration history but then in paragraph 11 said in terms

> I must however at this stage put aside my concerns regarding the conduct of the first and second appellants and review the best interests of their children as a primary consideration.

5. It said that that statement was tainted by the fact that there was a reference to the parents' poor immigration history. I reject that submission. It was an inevitable part of the consideration of the claim that the family history in immigration terms had to be looked at. Indeed, had they entered lawfully and remained lawfully for such a period of time, that would have been material and, by parity of reasoning, the converse. Consequently, it cannot be said that a judge is not permitted even to mention the immigration history. It becomes, if only in chronological terms, a crucial element of the description that any judge is required to make as to the situation the family faces.

6. Furthermore the consideration of the family's situation as a whole is a matter which has been considered significant in that, as McCloskey J observed and is referred to in paragraph 40 of the decision of the Court of Appeal in *MA (Pakistan)* v *Secretary of State for the Home Department* [2016] EWCA Civ 705, it would be absurd to consider the child's position

entirely independently of, and in isolation from, the position of the parents given that the child's best interests were usually required that he or she lives as part of the family unit. It does not seem to me to be tenable to argue that the judge was wrong as a matter of law from reciting the immigration history of the parents. It was inevitable that she should do so. Even if she had been wrong, the judge correctly stated in paragraph 11 that she must, at that stage, *put aside* her concerns regarding the conduct of the first and second appellants and review the best interests of the children as her primary consideration. It cannot therefore be said that the judge was not entirely aware of what her approach should be.

7. In paragraph 12 of the determination the judge properly finds (and it is accepted that the contents of paragraph 12 are correct) that, as a matter of common sense, the children's best interests are to remain in their current family unit. That may be something that was self-evident but, nevertheless, it was important for the judge to say it. It led on to the judge then saying in paragraph 12, and correctly saying, that as the respondent was seeking to remove the family as a unit, the question for her was whether it was in the children's best interest for this family unit to remain in the United Kingdom. That was a correct approach in law and then that was immediately taken up by the judge in paragraph 13 when the judge said that K1 was 8 years old and K2 was then 5 years old. The judge clearly had in mind the fact that K1 was then enjoying schooling and after school activities and that she was doing well. She also accepted that the girls were happy but the judge concluded that they are not at a crucial stage of their education or social development. In my judgment that was an entirely proper comment to make in relation to a child who is 8 years old.

8. The focus of this appeal has inevitably centred upon K1 because K1 has been in the United Kingdom for a period in excess of seven years. But what the judge said in paragraph 13 was factually correct: they are not at a crucial stage of their education or social development. It goes without saying that a child for the first four or five years of her life spends most of that time within a domestic setting with her parents and the quality of the private life that a child develops during those four or five years of her life before going off to schooling is qualitatively different from the position of one who has been in the United Kingdom for a period of seven years, say, between the ages of 10 and 17 where the education and social development has reached a very different stage. That is something which we will see developed when we come to consider the second decision which is relied upon by the appellant in this appeal. This is the decision made in the case of *MT and ET (Nigeria)* [2018] UKUT 88 a decision of the President and Upper Tribunal Judge Lindsley. It cannot in my judgment be suggested that the judge was wrong in saying that these children had not reached a crucial stage of their education or social development.

9. The judge properly directed herself as to the relevance of the seven year period by making reference to the case of *Azimi-Moayed* [2013] UKUT 197 in which in the headnote at sub-paragraph (iii) that the lengthy period of residence is not clear-cut but past and present policies have identified seven years as a relevant period. It was inevitable therefore that the judge should draw a distinction between K2 who at the age of 5 did not meet the seven year period and K1 who at the age of 8 had done so. However, the judge sensibly made the point that, as K1 had been resident in the United Kingdom since birth, the early years carry less weight in terms of a consideration of the impact of education and social development than the years accrued since the age of about 4.

10. The judge then went on to consider the position overall. It is said that the judge's consideration of the family's circumstances was skewed by reference to the situation in Brazil and not by proper reference to the situation in the United Kingdom. That, it is said, amounts to an error of law. Yet, looking at paragraph 16, I do not consider that that criticism is sustainable.

11. The judge first of all acknowledged that K1 was familiar with the United Kingdom but placed weight on the fact that her parents' oral evidence was that she had grandparents and aunts and uncles who live in Brazil with whom the family are in contact. I do not consider that the judge had acted in error in mentioning what was a material factor. The judge went on to say that there was a reference to a close bond between the children and the mother's sister who is in the United Kingdom but also drew attention to the fact that that sister did not attend the appeal hearing in support of the claim a factor which was also factually accurate. The judge also placed weight on the fact that K1 and K2 spoke Portuguese.

12. In the course of the evidence, K1 demonstrated a positive attitude which could in the judge's opinion make the move to Brazil a beneficial experience for the children. She repeated the children's excellent progress at school, reached a sustainable conclusion that they are bright, motivated individuals and that there was no evidence that they would not be able to adapt and thrive in another school in Brazil. Those findings are not challenged. Nor could they properly be challenged. They were facts which were properly open to the judge. The criticism that is made is that the judge was paying too much attention, such that it amounted to an error of law, to the situation in which the children would find themselves in Brazil. I reject that criticism because, on any view, the reception facilities for children when they are removed from the United Kingdom must be a relevant and, indeed, an important consideration. If those conditions were unsatisfactory, the appellants would be the first to claim that that situation was unsatisfactory and was a reason why it would not be reasonable to return them to Brazil. In contrast it cannot be said that if the situation in Brazil would be a positive one, it must be available to the judge to make that finding.

13. The judge pursued that point by consideration of the second-named appellant. The father is a highly skilled man. He is a watchmaker. He had worked in that capacity in Brazil and, again factually correctly, the judge found that there was no evidence that he would be unable to find such work again on return.

14. The first and second appellants have obtained qualifications in the United Kingdom. All of those factors would benefit them when they returned to Brazil but, here again, the judge starts out by acknowledging the task before her. The first and second appellants' case was that life for them and their children was better in the United Kingdom and that included the standard of education. The judge acknowledged that this might well be true, although accurately stating that there was no country background information about it. But, even if it were true, she came to the conclusion that the children, by being able to speak Portuguese and coming from educated, resourceful parents with access to family in Brazil, would be able to make that process of relocation without harm to them. I use the word '*harm*' advisedly because what we, of course, are looking at are the disadvantages - the harm - or even the inconvenience that the children might suffer when considering whether it is in their best interests to remain in the United Kingdom. Where one is looking at the impact upon the children, the impact is going to include the impact that they will experience when they return to their native country.

15. The judge went on to consider paragraph 276ADE. In relation to this, it is said that the judge failed in his reference to paragraph 40 of *MA* to set out the entirety of the relevant passage. Paragraph 40 of the decision in *MA* continues after the passage cited by the judge in paragraph 19:

> But the focus on the family does not sit happily with the language of s. 117B(6). Had Parliament intended to require considerations bearing upon the conduct and immigration history of the applicant parent to be taken into consideration, I would have expected it to say so expressly, not for the matter to have to be inferred from a test which in terms focusses on an assessment of what is reasonable for the child. This does not in my view mean that the wider public interests have been ignored. It is simply that Parliament has determined that where the seven-year Rule is satisfied and other conditions in this section have been met, those potentially conflicting public interests will not suffice to justify refusal of leave if, focussing on the position of the child, it is not reasonable to expect the child to leave the United Kingdom.

16. In my judgment that is exactly what the judge was doing without express reference having been made to this second part of paragraph 40 of the decision in *MA.* The judge was, indeed, focussing on whether it would be reasonable for the child to leave the United Kingdom. The whole tenor of this judgment deals with the reasonableness of that conclusion. She expressly avoids allowing the sins of the father to be visited on the child. So much is clear from paragraph 20 of her determination. She then

considers the voluntary work which the parents are conducting but balances that against their disregard of the Immigration Rules and the fact that they never acknowledged that what they did was in breach of those Rules. It may not be greatly significant that somebody who is an immigration defaulter should acknowledge wrongdoing but it is a relevant factor, particularly when one is considering matters of public interest.

17. In summary, the judge concluded in paragraph 33 that the evidence before her was that they maintained contact with relatives in Brazil; are fit and healthy; have reasonable job prospects on return and it was therefore open to her to conclude that neither the parents nor the children met the requirements of paragraph 276ADE.

18. The submissions made on behalf of the appellant focussed to a considerable degree on the recent decision of the Tribunal in the case of *MT and ET (child's best interest, ex tempore pilot)* Nigeria [2018] UKUT 88. The gravamen of the submissions was that nowhere in the decision of the Tribunal is there any reference at all to the seven year period being a seven year period which should be looked at differently in the case of a child who is 8 years old compared with a child who is older. In other words, the simple submission is asserted that, once the seven years have been established, there had to be compelling reasons why the child should not be permitted to remain: seven years is seven years, irrespective of the period of life in which that seven year falls in the child's development. In my judgement that is a misreading both of the Tribunal's decision in *MT* and of previous decisions.

19. There is a material difference in the impact upon a child and the deleterious situation in which that child may be faced where the child has reached a stage in her development that the removal would be more damaging than in other periods of her life. That is obvious when one is considering the case of a child who is born in the United Kingdom and who has spent four or five years within the domestic setting of her home and has limited experience of education and further social development within the community at large. So much is clear from the decision in *MT* itself because the Tribunal made specific reference to the fact that one of the appellant's in that appeal was 14 years of age. She had arrived in the United Kingdom when she was only 4. She was well advanced in her education in this country having spent, from four. some ten years in education and, as a 14 year-old, can plainly be expected to have established significant social contacts involving friends, at school and outside, such as the church. Indeed, the materiality of looking at these cases on a case-by-case basis is made plain by the reference in paragraph 30 of the decision to the fact that *ET* had embarked upon a course of studies leading to the taking of GCSEs. It would be extremely disruptive for that child to have been removed from the United Kingdom, and thereby unreasonable. The same cannot be said where the judge makes a sustainable finding of fact, which is not challenged in the grounds of

appeal, that K1 had not reached a crucial stage of her education or social development.

20. These cases are fact-sensitive and there has to be a balance struck between the inevitable impact that removal has upon a child who is entirely innocent of her parents' wrongdoing and the consideration of whether, if the Immigration Rules had been complied with, the parents would have left the United Kingdom in accordance with the terms of their permission to enter. There is a public interest which cannot simply be omitted from this consideration. Any suggestion that the seven year period is, in essence, determinative of the case where the child has spent more than seven years in the United Kingdom is wrong. The judge looked at all the relevant factors including the fact that these children, K1 and K2, were doing well in the United Kingdom and might well have benefited from a continued education in the United Kingdom. He therefore paid due attention to their position, treated it as a primary consideration but was not persuaded, ultimately, that it was unreasonable to require them to be removed. I conclude that the judge properly applied the law, that that law has not been significantly altered by the more recent decision by the Tribunal in the case of *MT and ET* and that the case law has consistently remained, that it is for the judge to make a fact-sensitive decision based upon all of the material but paying express and necessary attention to the primary consideration of the best interests of the children. That is what the judge did. I find no error of law in her determination. I therefore dismiss the appeal of the appellants.

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.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
21st September 2018