



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/43770/2014
IA/43784/2014
IA/43777/2014
IA/47389/2014

THE IMMIGRATION ACTS

Heard at Field House
Orally at the hearing
On 25th July 2018

Decision & Reasons Delivered.
Typed Decision RePromulgated
On 29th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR NUNES JODEILTO LIMA
MASTER SAMUEL LUCAS NUNES DE OLIVEIRA
MRS FABIANA LOPES DE OLIVEIRA
MISS GABRIELA NUNES DE OLIVEIRA
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Miss Saifolhai, Counsel instructed on a public access basis
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Cockrill sitting at Taylor House on 10th July 2017. Permission was granted by Upper Tribunal Judge Gill by way of a decision dated 12th June 2018 when she said as follows:

“It is with regret that I found it necessary to grant permission given the history of this case (it was remitted from the Court of Appeal to the Upper Tribunal and from the Upper Tribunal to the First-tier Tribunal).

It is arguable that Judge of the First-tier Tribunal Cockrill may have materially erred in law by failing to take into account the state’s interest in immigration control in reaching his decision that it would be unreasonable to expect the third and fourth Appellants to leave the United Kingdom.

Arguably this makes a material difference to his decision to allow the third and fourth Appellants’ appeals under paragraph 276ADE(1) of the Rules and therefore also to his decision to allow the appeals of the first and second Appellants outside the Rules.”

2. The Secretary of State’s renewed grounds to the Upper Tribunal in part said as follows:

“As is abundantly clear in paragraphs 32 and 33 of the determination, Judge Cockrill has reached his conclusions on the reasonableness test on the basis of the interests of the children alone completely failing to undertake a balancing exercise which factors in the poor conduct of their parents as **MA (Pakistan)** requires. The original grounds are reproduced below and relied upon in full.”

Those grounds say in part as follows:

“... It is clear that the determinative finding of the judge in all four appeals is that it is unreasonable for either the third or fourth Appellants to be expected to leave the UK with reference to paragraph 276ADE(iv) of the Immigration Rules and Section 117B(6) of the NIA Act 2002. The Court of Appeal have confirmed in **MA (Pakistan) and Others [2016] EWCA Civ 705** that the reasonableness test under both of these provisions is more than simply an analysis of where the best interests of the respective children lie. Rather the test requires a balancing exercise to be undertaken where countervailing factors such as the poor conduct of parents are considered with a recognition as such matters can potentially outweigh the interests of the children such that it would be reason for them to leave the UK even if it is in their best interests to remain. Unfortunately, in the instant case it is clear that the judge at paragraphs 32 and 33 in answer to the question of reasonableness solely by reference to the best interests of the children and has failed to undertake a balancing exercise where those interests are weighed against wider matters relating to the public interest. Given the poor immigration history of the parents including the fact that they both continue to work in breach of conditions of their temporary admission, there are strong countervailing factors which arguably could have led to the appeals being dismissed. The clear errors made by the judge are therefore material and permission to appeal is respectfully sought in consequence.”

3. At the hearing before me today the submissions on behalf of the Secretary of State were that there was continued reliance on the Secretary of State's grounds. That Upper Tribunal Judge Gill considered the decision by the First-tier Tribunal Judge to be comprehensive but regretted that permission to appeal had to be granted in view of the history of the case. The family had made numerous applications and in the circumstances it was regrettable that the Respondent felt it necessary to make an application on a point of law but there was a material misdirection in law because of the Court of Appeal's decision in **MA (Pakistan)**. Reference was made to paragraph 32 of the judge's decision. The reasonableness test conclusions were reached without consideration of the appalling immigration history of the parents. It was submitted that the point being made was a relatively narrow point the history of the parents was not taken into account. It was incumbent upon the judge to follow the case law. This was a point about misdirection and law. I was invited to remake the decision taking into account the history of the Appellants' appalling immigration history but there was no issue in respect of the findings which had been made by the judge. There was no reason for this matter to be remitted to the First-tier Tribunal. Again, it was emphasised that I should find an error of law based on the misdirection and that I should remake the decision.
4. I invited submissions as to which part of **MA (Pakistan)** was relied upon because the Secretary of State's grounds did not indicate which. Mr Melvin was then given time to consider which paragraphs of **MA (Pakistan)** were relied upon. He initially said paragraph 46 but that did not seem to assist his submission. Paragraph 47 was then relied upon but that seemed to say the opposite of what he was contending for. Thereafter he submitted it was paragraphs 44 and 45 which were relied upon and again Mr Melvin said the issue was a narrow one.
5. I then heard in response from Miss Saifolhai. She relied upon her Rule 24 response which was submitted to the Tribunal some time ago and which I shall return to but to amplify and expand her submissions she took me to **MA (Pakistan)** but also to the judge's decision. She said that there was no strenuous submission from the Secretary of State as to the outcome. She stressed that the thorough assessment undertaken by the First-tier Tribunal Judge has not been challenged. Really the issue in summary was whether or not the irregular stay in the United Kingdom and the work in breach of the Rules as those with temporary admission was sufficient to enable the decision of the First-tier Tribunal Judge to be set aside. It was stressed that the Court of Appeal's decision in **MA** is a two stage approach. The judge was quite clear in his decision that there was reference to proportionality and to the best interests of the children **ZH (Tanzania)** was referred to.
6. It was accepted that a Tribunal can take account of parents' immigration history when assessing the public interest question but ultimately the proportionality assessment was for the Tribunal to make and it was submitted that the judge in this case clearly did have the public interest in mind and indeed the case of **MA** is specifically referred to in such matters within his decision.

7. I was taken to paragraph 26 of the judge's decision which encapsulated the Secretary of State's submission at that time and indeed even with the Secretary of State's refusal letter there was no issue on suitability grounds, this was all about the reasonableness of return that is how the case had always been presented. Indeed, it was submitted that was the basis of the remittal by the Court of Appeal in the first place. I was taken to various other parts of **MA (Pakistan)** but I was also taken to the Upper Tribunal's decision in **Satinder Kaur (children's best interests/public interest interface) [2017] UKUT 00014 (IAC)** in particular to paragraphs 14, 18 and 33. It was relevant at this stage to refer to paragraph 18 which says "... the assessment of a child's best interest must focus on the child while simultaneously evaluating the reality of the child's life situation and circumstances. Factors such as parental immigration misconduct must not intrude at this stage" and at 37 it was said "... I consider that each of these statements invites little further analysis. The best interests of any affected child constitute a free-standing factor and should properly be assessed before the proportionality balancing exercise is carried out." This was after reference to Elias LJ's judgment in **MA (Pakistan)**.
8. I was then taken to the Upper Tribunal's decision in **MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC)** (The President and Upper Tribunal Judge Lindsley) when it was said at paragraph 34 in part as follows:

"... Although Mr Deller did not seek to rely on it, we take account of the fact that, as recorded in Judge Baird's decision, **MT** had, at some stage received a community order for using a false document to obtain employment. But, given the strength of ET's case, **MT**'s misconduct in our view comes nowhere close to requiring the respondent to succeed and Mr Deller did not strongly urge us to find. Mr Nicholson submitted that even on the findings of Judge Martin, **MT** was what might be described as a somewhat run of the mill immigration offender who came to the United Kingdom on a visit visa, overstayed, made a claim for asylum that was found to be false and who has pursued various legal means of remaining in the United Kingdom. None of this is to be taken in any way as excusing or downplaying **MT**'s unlawful behaviour. The point is that her immigration history is not so bad as to constitute the kind of powerful reason that would render reasonable the removal of **ET** to Nigeria."
9. It was submitted on behalf of the Appellants that at first glance this narrow point raised by the Secretary of State of State may have superficial attractiveness but in reality when considering the two stage approach and looking at the substance of the public interest factors, there was really nothing in this case that would enable me to find that there is a material error of law. There could not have been a material difference even if those matters had been taken into account. Even if there was if I was to remake the decision it would clearly be an appeal which would have to be allowed.
10. In reply Mr Melvin said that the maintained that there was an error of law and that the judge had materially misdirected himself. The reasonableness test must include the wider public interest issues. The case of **MT and ET** was reported in relation to different matters and what was said by the President was obiter in the body of the

determination which had been referred to. I was asked to disregard **MT and ET**. It was said that it was paragraph 45 of **MA (Pakistan)** which was relied upon.

11. In coming to my decision, I consider the following matters. The Court of Appeal when it remitted this matter to the Upper Tribunal by way of a sealed order dated 14th November 2016 said at paragraph 3 in the agreed statement of reasons between the parties as follows:

“The parties agreed that the Upper Tribunal erred by failing to consider the third Appellant who was under 18 at the time of her application under paragraph 276ADE(1)(iv) of the Immigration Rules. The parties are also agreed that the Upper Tribunal would benefit from considering the application of the third and fourth Appellants in light of the recent judgment of Elias LJ in **MA (Pakistan) and Others [2016] EWCA Civ 705** which addresses the correct approach to be taken in a case involving children who have resided in the United Kingdom for at least seven years. The judgment in **MA (Pakistan)** was not available at the date of the Upper Tribunal’s determination in this case.”

12. I then look to and consider the decisions of the Secretary of State which had led to the appeals and I do agree with the submissions on behalf of the Claimants that there were no issues in respect of suitability and the real focus of the case was about reasonableness of return. I then turn to the decision under appeal that being the decision of Judge Cockrill. I stand back and consider first, of all the the task at hand and. Namely, the decision read as a whole shows an error of law. In my judgment the judge had properly set out the chronology and the background to the procedural history including the numerous hearings which had taken place. That includes at the Court of Appeal. The judge did that, for example, at paragraphs 4, 5 and 6 of his decision. The judge has very clearly noted at paragraph 7 that he had to examine the case in light of the decision in **MA (Pakistan)** and then he set out in some detail what occurred during the hearing itself. It was noted at paragraph 26 that the Presenting Officer in her submissions had said “*This was not a matter where there is really a dispute over facts*” and it was further said that the argument presented by the Presenting Officer was “*That the third and fourth Appellants could adapt to life in Brazil they could learn Portuguese the case was not exceptional.*” The judge then in setting out his findings and reasons at paragraphs 31 to 35 in extensive detail went through the balance sheet exercise which in my judgment **Hesham Ali** requires. Indeed, the judge did so in a fair and balanced way by examining (being critical where required) the evidence which had been presented. The judge considered the immigration history both implicitly and expressly because he had gone through the chronology of the family being here in the United Kingdom. In my judgment this very experienced judge clearly would have known that there was overstaying and illegal stay in the UK. Certainly, he noted that there was work here in the United Kingdom because he said so at paragraph 34 of his decision. Albeit he does not say that this work was being undertaken illegally. I am entirely satisfied that the judge would have been well aware that there was no permission to work. The overstaying or illegal staying was obvious. If there was work

during that time then it is also obvious that it was almost certainly undertaken without permission.

13. I then take into account what has been said by the Court of Appeal in **MA (Pakistan)** and there are various paragraphs which become relevant. I go first to the original paragraph that was referred to by the Secretary of State and that is paragraph 47 of Elias LJ's judgment when it was said, "*What could not be considered however would be the conduct and immigration history of the parents*" and this is under the sub-heading of applying the reasonableness test. What is also said at paragraph 49 is, "*However the fact that the child has been in the UK for seven years will 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 the starting point that leave will be granted unless there are powerful reasons to the contrary*". At paragraph 53 there is reference to Christopher Clarke LJ in **EV (Philippines)** at paragraph 33 when it is said that "*The best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.*" At paragraph 56,

"In the light of this jurisprudence I do not think it can now be said that courts and Tribunals are mandated to look at matters in any particular way such that it is an error of law for them to fail to do so. No doubt it will usually be sensible to start with a child's best interests but ultimately it does not matter how the balancing exercise is conducted providing that the child's best interests are treated as a primary consideration."

At 57 in considering the submissions on behalf of one of the Appellants it was said,

"If that is not done there is a danger that those interests will be overridden simply because their full significance has not been appreciated. The court must not treat the other considerations are so powerful as to assume that they must inevitably outweigh the child's best interests whatever they might be with the result that no proper assessment takes place."

14. The paragraph relied upon by Mr Melvin, paragraph 45, in part says as follows:

*"However, the approach I favour is inconsistent with the recent decision of the Court of Appeal in **MM (Uganda)** where the court came down firmly in favour of the approach urged upon us by Ms Giovannetti and I do not think that we ought to depart from it. In my judgment if the court should have regards to the conduct of the applicant and any other matters relevant to the public interest when applying the unduly harsh concept under Section 117C(5) so it should when considering the question of reasonableness under Section 117B(6). I recognise that the provisions in Section 117 are directed towards the particular considerations which have to be borne in mind in the case of foreign criminals and it is true that the court placed some weight on Section 117C(2) which states that the more serious the offence the greater is the interest in deportation of the prisoner. But the critical point is that Section 117C(5) was in substance a free-standing provision in the same way as Section 117B(6) and even so the court in **MM (Uganda)** held that wider public*

interest considerations must be taken into account when applying the unduly harsh criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in Section 117B(6). It would not be appropriate to distinguish the decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case I will analyse the appeals on the basis of the Secretary of State's submission on this point is correct and that the only significance of Section 117B(6) is that where the seven year Rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted."

15. Insofar as the decision in **MT and ET** is concerned, I take on board the submission that paragraph 34 is obiter only. If that submission is right, and assuming it is, in any event the obiter of the Upper Tribunal which in this case is a panel comprising the President and Upper Tribunal Judge Lindsley in my judgment is clearly of great persuasive effect. I then return to the decision of the First-tier Tribunal Judge. The judge said very clearly and specifically towards the end of paragraph 34, *"It follows therefore that looking at the totality of the material presented to me that the third and fourth Appellants succeed under the Immigration Rules in their appeal and that the first and second Appellants succeed on Article 8 grounds outside the Rules."*
16. Therefore, I then return then to the "narrow point" which is being referred to by the Secretary of State. Mr Melvin refers to the illegal working and the "appalling immigration history". As I indicated during submissions today, in **ZH (Tanzania)** itself the Supreme Court made it clear that that Appellant had an appalling immigration history and I cannot for one moment consider that this judge had out of his mind that the Appellant in this case had a bad immigration history. I would not go so far as to say it was immigration history in the 'appalling' category, but nonetheless it was a bad immigration history. And similarly, I cannot for one moment consider that the judge excluded from his mind that the adult Appellants were doing anything other than working illegally in the United Kingdom. But in any event, I agree with the submissions by Miss Saifolhai that this simply was not a case which was put on the basis of illegal working or overstaying as was made clear by the submissions which were made at the hearing by Miss Lindsley on behalf of the Secretary of State. Similarly, I refer to the written refusal decision of the Secretary of State itself which did not refer to any difficulty with the eligibility grounds. In my judgment there is no material error of law in the judge's decision but I go in any event to say that even if there had been in my judgment this is a clear case in which the error would not be material. Quite simply the evidence in favour of the Appellants was overwhelming.
17. As a further step I should say that it was submitted that this is the type of case that in any event even if I was to remake the decision that the submissions would be the same. Therefore, even if I look at the matter afresh in that respect, in my judgment even if I had found there to be a material error of law and if I did have to remake the decision, the decision would not have been anything other than that the Claimants' (the family's) appeal would have to be allowed. Accordingly, in the circumstances I conclude as follows.

Notice of Decision

There is no error of law in the decision of the First-tier Tribunal Judge.

The Secretary of State's appeal is dismissed.

The decision of First-tier Tribunal Judge Cockrill allowing the appeals stands.

No anonymity direction is made.

Signed: A Mahmood

Date: 25 July 2018

Deputy Upper Tribunal Judge Mahmood