



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/15168/2018  
HU/15176/2018  
HU/15179/2018  
HU/15182/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On 10 January 2019

Decision & Reasons Promulgated  
On 31 January 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

M KKP (PLUS THREE)  
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Mr S Harding, Counsel, instructed by Wilson Barca LLP  
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. The appellants in this case are nationals of India. The first appellant was born on 18 October 1981 and arrived in the United Kingdom in 2004 as an illegal entrant and has remained since that date. The second appellant arrived in 2009 with valid leave

to remain as a student until 2012. The second appellant overstayed her leave. The third and fourth appellants were born on 3 September 2010 and 7 April 2017 in the UK, respectively and have remained.

2. The appellants appealed to the First-tier Tribunal against the decision of the respondent dated 12 July 2018 refusing their applications for leave to remain on human rights grounds. In a decision promulgated on 9 October 2018, Judge of the First-tier Tribunal O'Garro dismissed the appellants' appeals on human rights grounds.

### **Grounds for Permission to Appeal**

3. The appellants appeal with permission on the grounds, that in light of the jurisprudence, including **MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC)**, either the judge had given inadequate reasons or had reached an irrational conclusion in concluding that the best interests of the qualifying child, the third appellant were outweighed.

### **Error of Law Discussion**

4. Although the error of law hearing before me considered this issue in some detail, and I am grateful for the detailed submissions of both representatives, the issue before me is a relatively narrow one.
5. Mr Harding drew my attention to the judge's findings in relation to specifically the third appellant, the "qualifying child", Miss KP who at the time of the First-tier Tribunal hearing was (and indeed remains now) 8 years old. The judge acknowledged this at [41]. At [48] the judge acknowledged that the third appellant was born in the United Kingdom and had lived in the United Kingdom for more than seven years, attended school, had many friends and the judge had seen her school reports and she was doing very well. The judge accepted she had integrated well into British society.
6. At [49] the judge took into account that a return to India would be hugely disruptive for the third appellant, in that it would decimate friendships, relationships and activities that form the core of her private life and also interrupt her education, "although not irredeemably". The judge went on, at [54], to find that the appellants' stay in the UK had:

"reached the length where as was said in **Azimi-Moayed [2013] UKUT 00197**, it can lead to the development of social and cultural and educational ties that it would be inappropriate to disrupt without compelling reasons and that seven years is considered a relevant period in cases of children for such ties to be developed and emotionally it would undoubtedly be highly stressful".
7. The judge took into consideration all these factors and, although not highlighted by Mr Harding, the judge had also considered factors such as, although the third appellant suffered from acute eczema, this is managed by cream and avoiding the

sun and that she is mainly well and that her family had managed the heat in the summer in the UK, which was a good indicator of how they could help to manage it in India. The judge went on at [56] to see no reason why the third appellant could not establish a connection with the country of her nationality and that she had grandparents, an aunt and uncle and cousins in India and would have contact with her parents, friends and family members who form part of the Indian community in the United Kingdom, which means that she has some knowledge and familiarity of Indian culture. The judge took into consideration that this did not mean that she would not find life in India different from life in the UK but it will assist her in adapting. The judge found that the third appellant would have spoken and understood Gujarati prior to attending school, when she communicated mainly with her parents whose main language remains Gujarati. The judge made a finding, which has not been challenged, that the appellant would be able to speak Gujarati, even if not able to read it and write it and there was 'nothing to think' that she would have any particular difficulty in learning this.

8. The judge found that the third appellant would be well educated in India and had been provided with no evidence to satisfy her that she would not have access to education. The judge also found that the third appellant had not reached secondary level education which, she indicated, may have made a difference in the judge's consideration and did not consider that her education would be significantly disrupted. There was no challenge to those findings which were closely reasoned, evidence based and available to the judge.
9. Having very carefully considered the position of the third appellant, including in light of the relevant case law and the judge directed herself in relation to **EV Philippines and Others**[2014] EWCA Civ 874 and **MT and ET child's best interests ex tempore pilot Nigeria** [2018] UKUT 0088 (IAC), as well as **Azimi-Moayed and others** [2013] UKUT and considered the evidence before her in light of that case law, the judge went on to reach a finding on the third appellant's best interests that they would lie in her remaining in the United Kingdom, at [57], because:
  - "It will mean that ties in the United Kingdom formed through her residence would not be disrupted and she is likely to have better future opportunities both educationally and economically by continuing to live in a first world country."
10. However the judge, also at [57], went on to state that she did not find this to be a case where the third appellant's best interests pointed overwhelmingly in favour of remaining in the United Kingdom because of the factors which she had already mentioned which indicated she would be able to form a connection with her country of nationality.
11. There was much discussion at the hearing before me in relation to the effect of **MT and ET** and in particular what was said at paragraph 34, namely:

"In the present case there are no such powerful reasons. Of course the public interest lies in removing a person, such as MT, who has abused the immigration laws of the United Kingdom. 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 conduct in our view comes nowhere close to requiring the respondent to succeed and Mr Deller did not strongly urge us to so 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."

12. Both parties accepted that the decision in **MT and ET** was not reported on this basis, but rather in relation to the focus of a best interests' assessment (as well as ex tempore decisions). Mr Harding sought to persuade me that paragraph 34 was at the very least persuasive guidance.
13. As already indicated the judge directed herself in relation to **MT and ET**, at [52] and [53]. The judge summarised the head note of **MT and ET** in relation to the fact that a very young child who has not started school will have difficulty in establishing that Article 8 private and family life is a material element but that this position changes over time where an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part. In addition, the judge went on to record at [53] that great reliance had been placed on **MT and ET** but the judge found that the facts of that case were quite different to the case before her, in that the child in **MT and ET** was older and "was at a critical stage of her education". The judge reiterated that the circumstances of the third appellant were quite different and as always each case has to be considered on its individual facts. Those were clearly available findings and could not, on the facts and the judge's careful findings, be said to be irrational.
14. I was not pointed to anything by Mr Harding that might suggest that such an approach is an error. It is more than evident that the judge had in mind and applied the correct tests, including that the judge applied **MT and ET** and turned her mind to whether the same outcome, as set out in paragraph 34 of **MT and ET** was merited in this case. For the adequate reasons she gave, it was not.
15. Indeed, although the judge's decision was promulgated on 9 October 2018, a number of weeks before the judgment in **KO (Nigeria) and Others [2018] UKSC 53**, the judge's approach is that endorsed by the Supreme Court. Whilst I accept Mr Harding's submission that the Supreme Court was focused on the question of whether or not the immigration history and conduct of the parents is relevant to the assessment of reasonableness (under Section 117B(6) or paragraph 276ADE) or to whether deportation is unduly harsh, the Supreme Court found that it was inevitably relevant to consider where the parents, apart from the relevant provision, are expected to be as it will normally be reasonable for the child to be with them. The Supreme Court, at paragraph 18, decided that, to that extent, the record of the

parents may become indirectly material if it leads to them having to leave the UK. It is only if it would not be reasonable for the child to leave with them that the provision may give the parents a right to remain.

16. Although Mr Harding valiantly attempted to persuade me otherwise, including suggesting that there was a circularity to the respondent's argument, which I do not accept, the judge gave more than adequate reasons as to why it would be reasonable for the third appellant to leave the UK, including as set out at [55] and [56] of the decision and reasons, as well as, in summary, at [62].
17. In her summary at [62] the judge found that although she took into account that it was in the third appellant's best interests to remain in the UK, it was reasonable, bearing in mind the public interest in the maintenance of immigration control, and the judge placed reliance on what was said in **EV Philippines and Others [2014] EWCA Civ 874** (and the general approach in **EV Philippines** was further approved by the Supreme Court) that the maintenance of immigration control is a strong weight and therefore it would be reasonable for the third appellant to return to India with her parents and brother who are all citizens of India and who have no right to remain in the United Kingdom.
18. It was the judge's finding, again to which there was no sustainable challenge before me, that the third appellant had not reached a critical stage in her education and would be able to adapt to life in India, her country of nationality with both her parents' support and although she was at an age where friends were becoming more important to her, her parents were still the centre of her life and able to support the third appellant and promote her development. The third appellant had relatives in India and the judge found that she will not be totally unfamiliar with the culture and traditions for the reasons that the judge had given at [56].
19. Mr Harding took specific issue with the judge's findings at [61] and submitted that there were no powerful reasons as required in **MA Pakistan [2016] EWCA Civ 705**. In considering whether it was reasonable to expect the child to leave the United Kingdom regard must be had to the wider public interest in effective immigration control and that where a child had been in the United Kingdom for seven years this must be given significant weight when carrying out the proportionality exercise. However the judge reminded herself that it establishes a starting point that leave should be granted unless there were powerful reasons to the contrary (paragraph 49 of **MA Pakistan**).
20. In finding those powerful reasons the judge noted that the first appellant had come to the United Kingdom with no right to remain and there was no dispute that this was in March 2004. Therefore the first appellant at the time of the First-tier Tribunal decision had been in the United Kingdom for over fourteen years illegally. The judge also took into consideration that the first appellant came illegally and deliberately remained without regularising his immigration status. Although his wife entered as a student in 2012 she too subsequently remained in the United Kingdom unlawfully. The judge took into consideration that an application had been made to the

respondent for leave in 2012. However this was refused and the appellants continued to remain without leave.

21. The judge made no error in finding that this significant number of years without leave in the United Kingdom could not be overlooked and also took into consideration that neither the appellant nor his wife spoke English nor were they financially independent, noting that the first appellant works illegally when he has the opportunity and otherwise relies on relatives and friends for financial support.
22. This is not a case where the judge was relying on the misconduct of the first and second appellants as part of the consideration of reasonableness under paragraph 276ADE(1)(iv) and Section 117B(6), which **KO (Nigeria)** has now confirmed would be the wrong approach. Rather, as also expressly stated in **KO (Nigeria)**, the judge was considering where the parents were expected to be and gave more than adequate reasons as to why it was reasonable for the third appellant and indeed the fourth appellant to go with them and there was also no error in the judge distinguishing the facts in **MT and ET**, including the age and education stage of the respective appellants.
23. The judge reached a rational conclusion for the adequate reasons given which were available to her on the basis of the evidence she carefully considered, including in light of the relevant jurisprudence.
24. The decision of the First-tier Tribunal does not disclose an error of law and shall stand. The appellants' appeals are dismissed.

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

As two of the appellants are minor children I make an anonymity direction. 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: 24 January 2019

Deputy Upper Tribunal Judge Hutchinson

**TO THE RESPONDENT**  
**FEE AWARD**

As the appeal is dismissed no fee award is made.

Signed

Date: 24 January 2019

Deputy Upper Tribunal Judge Hutchinson