



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/16261/2016  
HU/16262/2016  
HU/16264/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21 January 2019**

**Decision & Reasons Promulgated  
On 14<sup>th</sup> March 2019**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

**Between**

**RAJENDRA [B]  
SARASPATI [B]**

**[D B]**

**(ANONYMITY DIRECTION NOT MADE)**

**Appellants**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation:**

For the Appellants: Mr M Allison, counsel instructed by RAMFEL  
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants, who I shall refer to as A1, A2 and A3, sought permission to appeal the decision of First-tier Tribunal Judge Pacey dated 8 January 2018. Permission to appeal was given in June 2018 and by a decision promulgated on 28 November 2018 I

concluded that the Original Tribunal's decision could not stand and the matter should be listed for a resumed hearing in the Upper Tribunal.

2. The resumed hearing took place on 21 January 2019. As has been recognised, the outcome of the appeal turned on the consideration of A3 who is now 17½ years old, having been born in Mauritius as were A1 and A2. He entered the UK on 9 November 2006 aged 5 years 4 months and has resided in the UK for over twelve years. The Judge's failure to properly address Section 117B(6) of the NIAA 2002 as amended was problematic because the Judge had simply whilst referring to some of the matters had failed to assess the reasonableness of A3 being required to leave the United Kingdom; when he was a qualifying child and its impact upon his parents, A1 and A2. The matter has since it was considered moved on in that there was now to hand the decision in KO (Nigeria) [2018] UKSC 53 which specifically deals with the relationship between a qualifying child and the parents. In the speech of Lord Carnwath in KO the view has been taken that the conduct of the parents and their immigration history is not determinative of what happened to the qualifying child which had to be set in the real context where the parents had no any right to remain in the UK.
3. It therefore was the case that a person who was not liable to deportation then the public interest does not require that person's removal where that person has a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the UK.
4. KO lists by reference to the guidance that was published by the Secretary of State factors which will be considered. Those factors are to an extent recited in guidance given to caseworkers which at the date of the decision in this case had not been changed to reflect the Secretary of State's view published on 19 December 2018 on family life in the Family Migrations: Appendix FM Section 1.0b. Mr Tufan referred to the current guidance but it seemed to me the current guidance did not demonstrate an error of law by the Judge who was unaware of it. The relevant guidance was published in August 2015. Parts of that guidance are also cited in the

Upper Tribunal decision in PD and Others (Article 8 – conjoined family claims) Sri Lanka [2016] UKUT 00108.

5. It was argued by Mr Allison that quite simply for A3 to return to Mauritius with his parents was simply not reasonable. A number of factors were relied upon in no particular order and originally advanced in the skeleton argument that was put before the First-tier Tribunal Judge. In particular, the best interests of A3 lie in remaining in the United Kingdom; secondly, the length of time he has been here and undertaken in effect the majority of his schooling; thirdly, that he has completed a BTEC level 2 diploma in media studies and would wish to continue the studies by way of a practical engineering course, which he could start in September 2019. Fourthly, A3 has had an extensive private life in the United Kingdom and part of that private life has been the part his sister, [GB], has played in his life. Just as much as he has played in hers, particularly in relation to recent unfortunate events in connection with a child born to her which subsequently died. [GB] has some limited leave to remain in the UK but was seeking to establish leave stay in the United Kingdom with a view to moving on to permanence in residence here. The point was pressed also as a factor that the interference would have an impact through removal on the Appellant on his sister.
6. It is not entirely clear to me on what basis [GB] originally succeeded in establishing a limited right to be in the United Kingdom but the fact was, as before the Judge, she was the only one allowed to have paid work which supported her family. She was undoubtedly dependent upon her parents in terms of emotional support but she was the financial provider for them all, earning net c. £300 a week after tax and national insurance deductions. Finally, it was said for A3 he has no ability to speak, count or operate in Creole, the lingua franca of Mauritius, and he would therefore face significant impediment in establishing a career in business there, as he moved closer to adulthood.

7. All those points are as a fact well made but as Mr Allison accepted A1 and A2s' claims to remain are entirely driven by A3's succeeding in demonstrating it is not reasonable for him to return to Mauritius.
8. In support of the appeal there were originally statements made by A1 and A2 and nothing is said to effectively suggest that those considerations, which were taken into account should not be given weight. The reality was A1 and A2 came as visitors and simply overstayed, they had no expectation of remaining and even if they came under some misunderstanding, as to the possibilities of applying once here to remain, the underlying objective of coming to the United Kingdom was for economic betterment and for a better life and education for their children. Since being here they have also been a cost to the NHS and the liabilities were originally put at £7,000 for A2 and about £3,000 for A1. Those sums are now being paid off at a rate of £10 per week out of [GB]'s earnings.
9. The accommodation where the Appellants live is provided by a local council and the rent and, it seemed, such council tax was to be paid for by the local authority: Albeit the local authority maybe looking to [GB] to contribute towards at least her element of occupation of the house.
10. The Judge did not substantively criticise A3 immigration history. The immigration decisions made by A1 and A2 were entirely their choice and done in the clear knowledge that they had no basis to remain, nor have they had their visit visas had expired.
11. The Judge below accepted, and it seemed to me no-one has argued to the contrary, that the best interests of A3 lie in remaining in the UK. The Judge took into account the various factors that were pressed before him but the effect of the Judge's decision being overturned was that it has enabled A3 to complete at least the stage of his education. He would wish to carry on his studies and has the ability to do so.
12. In addition, it was clear that A1 and A2 would wish to support themselves and for A1 to work. They embarked upon and received NHS treatment and have educated

their children at the public expense. They undoubtedly delayed making their applications in order to obtain the benefits that they could in the United Kingdom. Whether or not they now accept it, their conduct once they were in the UK was aimed at seeking to settle in the United Kingdom. The Judge originally concluded that that had been their intentions from the outset.

13. The issue, I did not hear any argument to the contrary that the best interests of A3 lie in staying in the United Kingdom, was whether or not it was reasonable for him to leave the United Kingdom and return with his family to Mauritius.
14. In considering that matter I have weighed up the pros and cons of his circumstances and the impact upon him of having to remove, bearing in mind the length of time which he has been in the United Kingdom. I consider the period of time in the United Kingdom started at about the age of 5 and probably for the earlier years he was more focused on his family and his parents. However he has obviously been developing a private life in the United Kingdom, made friends and acquaintances and had a life here. The twelve years he has been in the UK have brought him to an important point in his further education.
15. I take into account that it was his parents' choice not to educate him in Creole and not to introduce him to the culture and ways of life in Mauritius. As A3 identified in his statement he plainly felt that he was British. He did not wish to leave the United Kingdom and yet he felt his life has been put on hold through the effects of the Respondent's decisions so that he cannot, as his friends have done, move forward, work, travel abroad on holiday, learn to drive and other things which he would otherwise have wished to do. He unsurprisingly wished to remain with his parents in the United Kingdom and he has no interest in returning to Mauritius.
16. As the case law indicated there need to be good and powerful reasons why if someone has the benefit of the rights acknowledged as a qualifying child to remain in the United Kingdom, he should not do so. The case of KO highlights the fact that Section 117B (6) of the NIAA applies where, even though the parents have no rights

to remain, then it the question remains whether or not It was reasonable that the child leaves the UK. The fact that a child would leave the United Kingdom with their parents because they had no right to remain in the United Kingdom does not avoid the question of the reasonableness. Therefore, acknowledging as Lord Carnwath did in his speech, the rationale of and relationship between Section 55 BCIA 2009 and EV (Philippines) [2014] EWCA Civ 874, the parents having no right to remain was indeed the background against which the assessment came to be conducted.

17. I concluded looking at this matter as I must do in the “real world” that it was not reasonable for the Appellant to leave the United Kingdom because of his age, the length of time he has been in the UK with its attendant consequences and the important stage he has arrived at in his education. There would be clear and real difficulties in his reintegration into life in Mauritius. I have taken into account that his sister may remain in the UK but that position was uncertain and I do not give that factor significant weight.
18. Whilst A1 said that he was a carpenter by trade, the world of carpentry and the availability of work in Mauritius has changed, it seemed to me that that may as a fact be right but that was not to say the evidence showed that he simply could not find any work or that the Appellants would be forced into destitution and serious hardship.
19. I find the best interests of A3 alone would lie in remaining in the United Kingdom. I take into account the case of Treebhawon and Others (NIAA 2002 Part 5A – compelling circumstances test) [2017] UKUT 13 which has to a degree moved on with the development of KO but in the fact-finding exercise and carrying out the evaluation of it, most of the matters relied upon are uncontentious. However, I am only looking at the reasonableness of A3 returning to Mauritius. I have taken into account JG (s117(B): “reasonable to leave” UK) Turkey [2019] UKUT 00072. I find Article 8 private/family life rights are engaged.

20. I find the Respondent decisions are lawful and serve Article 8(2) purposes in the maintenance of immigration controls. I conclude that although the A3 could have a life in Mauritius with difficulties in transition on return to Mauritius it was not reasonable to expect him to leave. It followed that for A1 and A2, who have a genuine and subsisting parental relationship with A3 from that the public interest did not require A1 and A2's removal. At the present time I did not find, for the above reasons, that the return of the Appellants to Mauritius was proportionate. It will be a matter for the Respondent to decide what period of leave should be given in the context of the age of A3, his education and his elder sibling's status in the UK.

### **NOTICE OF DECISION**

21. The appeals are allowed. The Original Tribunal's decisions do not stand and the above decisions are substituted.
22. No anonymity direction was made nor is one required.

Signed  
Deputy Upper Tribunal Judge Davey

Date 19 February 2019

### **TO THE RESPONDENT**

#### **FEE AWARD**

The appeal has succeeded based on after arising consideration. No fee awards are appropriate.

Signed  
Deputy Upper Tribunal Judge Davey

Date 19 February 2019