



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

Appeal Numbers: HU/20765/2018
HU/20770/2018, HU/20774/2018
HU/20777/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 16 December 2019**

**Decision & Reasons
Promulgated
On 25 February 2020**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**MWAJUMA [R] (FIRST APPELLANT)
[M N H] (SECOND APPELLANT)
[M A H] (THIRD APPELLANT)
[M N] (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Bazini, instructed by One Immigration (Leicester)
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the remaking of an appeal against the decision to reject the appellants' human rights claims on 21 September 2018. Their appeals against those decisions were dismissed by the First-tier Tribunal in a decision promulgated on 22 May 2019. For the reasons given in my

decision of 23 August 2019 that decision was set aside for it to be remade in the Upper Tribunal. A copy of my decision is attached to this decision.

2. The first appellant is a citizen of Tanzania. She entered the United Kingdom in 2008 with leave to remain as a student, the last being until October 2011. Although she made an in-time application for further leave to remain in that capacity, that was refused and her appeal was dismissed. On 10 September 2012 she was warned that she was liable to administrative removal and then made a private and family life application which was refused with no right of appeal. Further submissions were made but were refused as not amounting to a fresh decision. That position was, however, reversed, the respondent agreeing to reconsider the human rights claim pursuant to a pre-action Protocol letter.
3. The second to fourth appellants are the children of the first appellant and her partner [RH] who is also a citizen of Tanzania.
4. The second appellant was born in January 2011, the third appellant in January 2014 and the fourth appellant born in April 2016.
5. The appellants' case is that the older child falls within paragraph 276ADE(1)(iv) and that it would not be reasonable to expect him now to go to live in Tanzania. It is further argued that in consequence the other appellants should not be expected to leave the United Kingdom.
6. The first appellant's parents separated when she was young and she has had no contact with her father since she was 10. He remarried but she has no contact with his new family either. She is not on speaking terms with her mother as she has had the three children out of wedlock. Her uncles and aunts will not assist her either if she were return as she comes from a strict traditional Islamic family which would consider it to be a dishonour to have had children out of wedlock and which would cause them great shame if they were to return in the same locality.
7. She does not have a relationship with her partner's family and would not be able to rely on them for support nor are his family wealthy in Tanzania and would not be in a position to support them even if they wished to do so.
8. The respondent's case is that it would be reasonable to expect the older child to leave the United Kingdom; and, that there are no exceptional circumstances, having had regard to paragraph GEN.3.2 such that their removal would result in unjustifiably harsh consequences. The Secretary of State noted that they would be returning to Tanzania as a unit; that the first appellant would be able to support them whilst they adjusted to a life there. The Secretary of State considered that due to their reliance on the appellant they would be regularly exposed to the language, tradition and culture of Tanzania and have not fully integrated into British society. It was not considered that the fact that the children are in education is an

insurmountable obstacle and nor was it accepted that they would be unable to continue their education in Tanzania.

9. The Secretary of State considered that the appellants would have family members to assist with integration on return and help their children to adapt to the culture and traditions and language in Tanzania. The Secretary of State considered that the appellant had failed to provide documentary evidence to substantiate her claim that she had been disowned by her family and that in any event she could use the financial assistance available from voluntary return service.
10. At the time of the last hearing, the first appellant was estranged from her partner; they have now reunited.
11. The appellant adopted her witness statements and was cross-examined. She confirmed she was living with her partner who is also from Tanzania and that they spoke Swahili. She said that the children did understand a little bit of Swahili. She said that he unable to support her she would have to provide for herself and her children which would be very difficult. She had some support from her community at present but they would not be able to support her if she left the country.
12. The first appellant said that her partner is not working but previously had worked as a carer. She said that he had not worked in Tanzania but had been a student in business and finance. She said it would be hard for him to find a job in Tanzania despite holding an advanced diploma he had obtained in the United Kingdom as the system had now changed as the government wishes to use home graduates. An advanced diploma would be very low for him to get a job. She confirmed that her partner and children did have friends within the Tanzania community. In re-examination the first appellant confirmed that her partner had not worked in Tanzania nor had she.
13. The first appellant said that her son did have special friends at school some originally of Pakistani origin and others from Poland. She said that he enjoys school, plays football and enjoys running. She said that he knew little about Tanzania.
14. In response to my questions the first appellant said that she and her partner spoke English to the children as they had been advised by the speech and communication team at the school that this was better given the difficulties the son had had.

Submissions

15. Mr Tufan submitted that it would not be unreasonable to expect the children to go to Tanzania. He submitted that as the parents spoke Swahili and the children understood and spoke a bit of it, they would be able to attend school and that English is the medium in secondary school. He submitted that, following EV (Philippines) and KO (Nigeria) [2018] UKSC

53 the real world situation in this case was that the parents would be moved and it will be reasonable to expect the children to go with them.

16. Mr Tufan submitted that although there was no convictions, the parents, it was relevant in that they had remained without leave. He submitted that the real issues that were being prayed in aid here were not school but simply language and money.
17. Mr Bazini submitted that, following KO (Nigeria) as properly understood, that it would be not reasonable to expect the second appellant to go to live in Tanzania. It therefore followed that it would be unreasonable to expect the rest of the family or for him to be separated from them. He submitted the second appellant had been brought up as an English child. I declined to take a judicial notice of the current circumstances in Tanzania. This is entirely different from the situation in Sierra Leone when the previous president took notice of the fact that he was in the middle of an Ebola outbreak. Mr Bazini submitted that the evidence was credible and it was understandable why the children did not speak Swahili as well as might otherwise be thought, he submitted this was important because the primary school education is in Swahili not English it would be difficult for the children to adjust. He submitted that it was reasonable that the mother and father would not have jobs and in any event the mother would have to look after the three younger children which would make the situation extremely difficult. Mr Bazini submitted further that once the period of six or seven years had been reached this was a significant point.

The Law

18. Section 117B of the Nationality, Immigration and Asylum Act 2002 provides so far as is relevant:

...

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

19. Paragraph 276(1) ADE (iv) of the Immigration Rules provides:
276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

...

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

20. In considering how section 117B(6) should be applied it is relevant to have regard to SSHD v AB and AO [2019] EWCA Civ 661 at paragraphs [59] to [61] and [73]:

59. Accordingly, the position has now been reached in which this Court is not only free to depart from the approach taken by Laws LJ in *MM (Uganda)* but indeed is required to do so in order to follow the binding decision of the Supreme Court in *KO (Nigeria)*. That can be done by following the preferred approach of Elias LJ in *MA (Pakistan)*, at para. 36, where he said:

"Looking at section 117B(6) free from authority, I would favour the argument of the appellants. The focus on paragraph (b) is solely on the child and I see no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest. I do not deny that this may result in some cases in undeserving applicants being allowed to remain, but that is not in my view a reason for distorting the language of the section. Moreover, in an appropriate case the Secretary of State could render someone liable to deportation, and thereby render him ineligible to rely on this provision, by certifying that his or her presence would not be conducive to the public good."

60. The essential submission which Ms Patry makes on behalf of the Secretary of State is that the condition for section 117B(6)(b) simply did not arise on the facts of the two cases before this Court now. She submits that there was no question of either of the relevant children concerned being expected to leave the United Kingdom. In those circumstances there was no need for the Tribunals to ask the question whether it was reasonable to expect them to do so.

61. In my judgement, this submission must be rejected. It founders on the clear wording of the legislation. As Mr Drabble QC submitted to this Court on behalf of the Respondent AB, it requires the Court to insert words into the Act which are simply not there. Furthermore, as he submitted, it requires the Court to divide the concept of a "qualifying child" into two types. There is simply no warrant in the legislation itself for doing so.

...

73. Speaking for myself, I would not necessarily endorse everything that was said by the UT in its reasoning, in particular at para. 25, as to the meaning of the concept "to expect". However, in my view that does not make any material difference to the ultimate interpretation, which I consider was correctly set out by the UT in *JG*. In my view, the concept of "to expect" something can be ambiguous. It can be, as the UT thought at para. 25, simply a prediction of a future event. However, it can have a more normative aspect. That is the sense in which Admiral Nelson reputedly used the word at Trafalgar, when he said that "England expects every man to do his duty." That is not a prediction but is something less than an order. To take another example, if a judge says late in the day at a hearing that she expects counsel to have filed and served supplementary skeleton arguments by 9 a.m. the following morning, so that there is no delay to the start of a hearing an hour later: although she may not be ordering the production of that skeleton argument, that is what she considers *should* happen. That is not a prediction of a future occurrence. It carries some normative force.

21. Thus, the key question is as is set out in JG (s 117B(6): “reasonable to leave” UK) Turkey [2019] UKUT 00072:

“Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 requires a court or Tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so”.

22. Unlike the situation in JG, neither parent has a right to remain in this country.
23. In assessing the best interests of the second appellant and the other children, I note that I have only a bare assertion from the first appellant that she would be unable to obtain employment. This has, after the event, been supplemented by generic material relating to the economic situation in Tanzania. I do not consider that this is of capable of bearing any weight as regards the specific circumstances of the appellants. There is simply no supporting evidence to show any attempt to find employment or that the partner’s family would be unable to help.
24. Similarly, there is no direct evidence from her partner that he would be unable to obtain employment. The evidence that his family would be unable to support or provide any assistance is second hand although I note that the first appellant says this has been a matter of contention between them. Both the first appellant and her partner have obtained qualifications in the United Kingdom and both speak English.
25. Whilst I accept given the consistent evidence of the first appellant that she has become estranged from her family which makes sense given that she has had now four children out of wedlock, neither than nor the claim that the partner could not obtain employment is sufficient to show that if the family went back as a unit they would not be able to have some employment or accommodation.
26. I have no reason to doubt the situation would be not as good as it is here and it is unlikely that the education that the children receive would be the same standard as is available in the United Kingdom but the evidence of this is simply assertion on the part of the appellant. I accept that the medium of instruction in Tanzanian schools and primary department is Swahili and this would cause difficulty from the appellant’s children. But they do understand some Swahili; both parents are Swahili speakers and there appears to be no good reason why they would not be able rapidly to acquire the language. They would also have an advantage when it became later on in education in speaking English.
27. I do not accept that any consideration of the “real world” scenario can be so easily distinguished as Mr Bazini sought to do.

28. I consider that it would be reasonable to expect the older and indeed the younger children in this case to leave the United Kingdom because the scenario is in reality no different from that of those identified in paragraphs 18 and 19 of KO (Nigeria). The sole difference is that one child has now been here for seven years. The real world in this case is that neither parent has a right to remain.
29. I remind myself that in NS, one of the cases considered within KO (Nigeria) at paragraphs 46 to 51, that the family are expected to leave the United Kingdom. I do not consider that there is any meaningful way in which this could be distinguished from the basis of the conduct on the part of the parents. Whilst in NS the parent had been involved in the CCL “scam” it is not their misconduct which was the issue but it is the fact that they had no right to be here. Reading paragraph 51 with paragraph 18, the background that has to be assessed here is that neither parent has a right to remain the same is true of what is said at paragraph 18 and it is of note that the case referred to, SAB v SSHD [2017] CSOH 117, also involved a qualifying child.
30. Accordingly, for these reasons, I conclude it to be reasonable in all the circumstances of this case to expect the child to leave the United Kingdom. Accordingly, the second appellant does not meet the requirements of paragraph 276ADE(1)(iv) of the Immigration Rules.
31. Moving on then to consider the cases within GEN.3.2 I consider that in light of the findings of fact made above that I am not satisfied that there would be very insurmountable obstacles such that the first or indeed any of the other appellants could not integrate into life in Tanzania. I consider also that there are having had regard to the facts set out in Section 117B any serious compelling reasons why they should be granted permission to stay. Drawing up a balance sheet, whilst I accept that it would be in the children’s best interests to remain in the United Kingdom where they have a degree of security and good education, as against that must be said the fact that they are dependent on public funds and whilst the family speak English, equally private lives they have built up have been created whilst their position here was precarious, particularly in the case of the first appellant. It is difficult to say that it was precarious in respect of the other appellants given that they had no choice in the matter.
32. Taking all of these matters into account and viewing the appeal as a whole, I conclude that removing the appellants would not be disproportionate.

Notice of Decision

1. The decision of the First-tier Tribunal made an error of law and I set it aside.
2. I dismiss the appeal on human rights grounds.

3. There is no anonymity direction.

Signed

Date: 20 February 2020

A handwritten signature in black ink, appearing to read 'Jonathan Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW DECISION



IAC-AH-CO-V1

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

Appeal Numbers: HU/20765/2018
HU/20770/2018, HU/20774/2018
& HU/20777/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 13 August 2019**

**Decision & Reasons
Promulgated**

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**MWAJUMA [R]
[M N H]
[M A H]
[M N]**

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr D Bazini, Counsel, One Immigration (Leicester)
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are a mother and children born in 2011, 2014 and 2016. The appellants are all citizens of Tanzania. The appellants' case is that because the children were born outside of marriage, the first appellant has fallen out with her family as results of the and she would be unsupported by them in Tanzania as she has been disowned by them. It is said that in consequence there would be very significant obstacles to her integration on return there and so she meets the requirements of paragraph 276ADE (1) (vi).
2. It is also the case that the oldest child is a qualifying child given that the child was in the United Kingdom for more than seven years as at the date of application as was accepted by the Secretary of State when refusing the application for leave. It is said that the oldest child meets the requirements of paragraph 276ADE (iv). It is also argued that it would not be reasonable to expect the family as a whole to return to Tanzania or rather to go to Tanzania for the first time in the case of the children because the oldest child is a qualifying child within Section 118B to 117B(6). The respondent did not accept that
3. On appeal the judge found:
 - (i) he did not believe that the appellant had fallen out with her family over the children being born out of wedlock
 - (ii) having directed himself in line with Kamara [2016] EWCA Civ 813 he was not satisfied that the first appellant faced significant obstacles on return.
 - (iii) that the first appellant did not satisfy EX.1(a).
 - (iv) Paragraph 276ADE(1) (iv) did not apply to the eldest child; and, having directed himself in line with MA (Pakistan) and KO (Nigeria) and taking into account the Immigration Directorate Instructions to staff that the appeal fell to be dismissed.
4. Permission was granted by First-tier Tribunal Judge Bird.
5. The errors as pleaded in the grounds appear to fall into four separate categories
 - (i) That the judge's approach to the fact-finding was flawed in two respects first with respect to the finding that there had been no falling out of the family and second as to the prevalence of English in Tanzania of which he had taken judicial notice. It is also said that he did not make proper findings as to the family as a whole.
 - (ii) the judge's approach to the law was incorrect and confused particularly at paragraph 22 where he appeared not to apply the law properly as regards paragraph 276ADE(iv) in respect of the child and it was also argued that his approach to Article 8 outside the Rules is incorrect first in that he appears to have decided that there was

nothing to be decided outside the format of the Rules and second that he has again confused the application of Section 117B(vi). In essence it is that the judge has not taken a properly structured approach to the determination of the appeal;

(iii) the judge has not applied the law properly.

(iv) the judge failed in his consideration of the Immigration Directorate Instructions to make any proper findings or to say what weight he attached to the relevant factors in assessing whether it would be reasonable for the eldest child to return to Tanzania.

6. I will deal with each of those in turn.

7. In considering the first ground I considered that there is merit in Mr Bazini's submission that the judge has not properly assessed the evidence that there has been first limited contact with the father and second there has been a falling out with the family in Tanzania. In spite of Mr Tufan's submissions I conclude that the judge did err in concluding at paragraph [18] that he was not satisfied the Appellant had fallen out with the family.

8. What the judge has done here is to misconstrue the first appellant's case. Her case was not that she was at risk from the family to the level that would amount to persecution but simply that she had fallen out with them; she may have mentioned death threats but that does not mean that she took them seriously or considered that they were such that she would not be protected from them on return. There is no basis therefore for arguing absent any other factors that the evidence was unsupported. This error is compounded by the judge's approach to that finding at paragraph 31. Even had it been open to the judge to find that there was no support that is not a basis of which it can then be said that there is support or accommodation available a finding that is simply speculative and for these reasons I find that the judge's findings of fact for that reason did involve the making of an error of law.

9. Turning to the judge's approach to the law the decision is not properly constructed. What the judge should have done is to approach the position under the Immigration Rules first and then, if necessary, proceed to consider whether even if those specific Rules were not met nonetheless, this was a case in which applying now paragraph GEN 3.2 of Appendix FM that there were reasons why removal would nonetheless be disproportionate.

10. The judge appears at paragraph 22 to have confused the issue over whether the oldest child met the requirements of 276ADE(iv). In doing so he appears to have read into that provision the provisions of Section 117B with regard to the requirement to speak English and to be financially independent. That is not a permissible approach.

11. Further, as Mr Bazini submitted, the judge appears to have shifted focus between the position of the mother, the eldest child and the other children. I consider that this was an error but I bear in mind the submission that this may or may not have been material. Mr Tufan submits that in this case it was not material given in essence the lack of evidence as to the difficulties the family would find in Tanzania with regard to education, support or otherwise. Whilst I take note the references to Tanzania being a third world country I do not find that particularly helpful; nothing specific about the country which flows from such an observation. That said, what the judge does not appear to have done in considering the reasonableness is to undertake a proper assessment of the best interests of the child which is of course the proper starting point in an assessment of this sort.
12. I accept Mr Bazini's submission that in purporting to consider the IDIs on family migration set out at paragraph 29 of his decision the judge does not really make any findings of fact. He does not say which of these are applicable or why nor does he say what weight he attaches to them. What findings that the judge does make are about the availability of accommodation and taking judicial notice of the fact that English is widely spoken. I have already said why the former is not applicable in terms of the latter it is not a matter of which a judge could take notice as the situation is considerably more nuanced.
13. Whilst it may well be the case that English is the lingua franca in Tanzania certainly at a business level it does not necessarily follow that that is the language spoken in schools or in every day usage or that there would not be difficulties for somebody who did not speak Kiswahili.
14. The judge also appears to have erred in his approach to the fact that the child has reached the age of 7 in effect going against that point when stating at paragraph 30 that the child is still very young and therefore adaptable with the greatest of respect to the judge that is not the point.
15. Taking all of these points into consideration I consider that the judge has as Mr Bazini submitted confused the law and misdirected himself as to the law. I consider also that he has erred in his application of the law and accordingly, while I accept I note that Mr Tufan refers to these as blips there are simply far too many "blips" in this to be able to make this decision sustainable and I conclude that the decision of the First-tier Tribunal did involve the making of an error of law which was capable of affecting the outcome in that the approach to the law is wrong in law and there are insufficient findings of fact that will be capable of showing that irrespective of the error of law, the this error was not material.
16. For these reasons I set aside the decision of the First-tier Tribunal.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. The appeal will be remade in the Upper Tribunal on a date to be fixed in consultation with Mr Bazini's clerk.
3. The appeal will be listed for 2 hours.
4. If any of the parties wish to adduce further evidence, oral or otherwise, they must make an application pursuant to rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 at least 21 days before the hearing, such application to be accompanied by the evidence upon which it is sought to rely.

No anonymity direction is made.

Signed

Date 19 August 2019

A handwritten signature in black ink, appearing to read 'Jonathan Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul