Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/26864/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 June 2016	**On 04 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR L M S
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, a Home Office Presenting Officer
For the Respondent: Mr S Muquit of counsel

DECISION AND REASONS

Introduction

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of Mr L M S ('the claimant') who appealed against a decision, taken on 12 November 2013, to refuse to grant leave to remain in the UK on the basis of his family and private life and a decision to remove him.

Background Facts

3. The claimant is a citizen of Brazil who was born on [ ] 1979. He entered the UK as a visitor on 8 August 2004 with leave to remain valid until 7 February 2005. The claimant is married to [SS] who was born on [ ] 1972. They have two children, a son born on [ ] 2000 and a daughter who was born on [ ] 2003. The claimant's wife and children entered the UK illegally in November 2005. Thereafter the family remained in the UK unlawfully.

4. On 1 April 2011 the claimant applied for leave to remain in the UK under the Immigration Rules HC395 (as amended) on the basis of his family and private life in the UK. The claimant's wife and children were named as dependents on the claimant's application. The applications were refused on 9 May 2011. On 27 September 2011 the claimant asked for the decision to be reconsidered. The Secretary of State reconsidered her decision but maintained the reasons for refusal. The Secretary of State concluded that the claimant did not meet the requirements of the Immigration Rules and found that there were no features of his case that would justify a grant of leave under Article 8 outside the Rules. Similar decisions were made in respect of his wife and children. No removal decisions have been made in relation to the claimant's wife or children. Therefore, they do not have a right of appeal against the decision to refuse to grant leave to remain. However, it is not disputed that the claimant's appeal cannot be considered in isolation of the effect his removal would have on his dependants.

The First Appeal to the First-tier Tribunal

5. The claimant appealed to the First-tier Tribunal. In a determination promulgated on 11 November 2014, Judge Carroll dismissed the appeal without a hearing. The claimant was granted permission to appeal the decision. The Upper Tribunal allowed the claimant's appeal and remitted the case to the First-tier Tribunal to be heard de-novo.

The second appeal to the First-tier Tribunal

6. In a decision promulgated on 21 October 2015 First-tier Tribunal Judge Kelly allowed the claimant's appeal. The First-tier Tribunal found that removal of the claimant would amount to a disproportionate interference with his rights under Article 8. The judge found that the claimant's children's best interests outweighed the legitimate interest in maintaining effective immigration control.

The Appeal to the Upper Tribunal

7. The Secretary of State sought permission to appeal to the Upper Tribunal. The grounds of appeal, in essence, are that the judge erred in considering that the claimant's children were close to being entitled to register as British Citizens. On 15 April 2016 First-tier Tribunal Judge Hollingworth granted permission to appeal. Thus, the appeal came before me.

Summary of the Submissions

8. The grounds of appeal assert that the judge made a material error of law through a misdirection in law. The judge believed that the claimant's children were close to being entitled to register as British Citizens. The Secretary of State assets that this is incorrect. The judge indicated that the imminent entitlement to British Citizenship was 'an important' factor in his decision and it is asserted that this must necessarily be material to the outcome of the appeal.

9. Mr Whitwell adopted the grounds of appeal. He submitted that the judge's findings in relation to the children's' entitlement to British citizenship is incorrect in fact and in law. Given the importance of the issue to the judge's decision it cannot be said that a Tribunal would have arrived at the same decision. He referred to paragraph 31 of the decision and submitted that it is clear that the finding in respect of imminent eligibility goes directly to the judge's' findings on the best interests of the children.

10. Mr Musquit submitted that it was necessary to read paragraph 31 in the entire context of the decision not in isolation. The judge set out a serious of findings. He referred to the case of *PD and Others (Article 8 – conjoined family claims) Sri Lanka* [2016] UKUT 00108 (IAC) ('*PD*') and submitted that the judge could have reached the same findings irrespective of the finding in relation to eligibility for British Citizenship. In respect of section 117B of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') and paragraph 276ADE of the Immigration Rules he submitted that it was necessary to consider if it was unreasonable for the children to leave the UK. In making such findings the judge did not treat the children as British Citizens. He submitted that it is clear that the judge took into consideration the claimant's immigration history. He referred to paragraphs 36 and 38 of the decision. He submitted that following the *PD* case there is no need to consider anything further if the best interests of the child are to stay in the UK. This would be the same as a finding of unreasonableness. I asked Mr Musquit to refer me to authority that best interests equate to a reasonableness test. He referred me to *PD*. He submitted that the

question is whether or not the judge's finding on British Citizenship eligibility is material to the outcome of the appeal. He submitted that the judge's findings were sufficient to demonstrate that the judge would have made the same decision. He referred to the findings of a lack of connection to Brazil, the children were in the midst of studies etc.

11. Mr Musquit submitted that s117B (6) does not require removal if the claimant is in a relationship with a qualifying child. The children have both been in the UK for more than 7 years so are qualifying children. He submitted that the judge's findings that the children should not be expected to go back to Brazil was a reasonable one on the facts of the case.

12. Mr Whitwell, in reply, submitted that the judge had not considered the 'test' of whether or not it was reasonable for the children to leave the UK. There was a gap between the findings regarding the best interests of the children and whether or not it was reasonable for them to leave the UK.

Discussion

13. The First-tier Tribunal judge erred when considering that the claimant's children were likely to qualify for British Citizenship in a matter of weeks '*as they will have lived in this country for 10 years*'. It is clear that the judge took this into consideration when deciding if '*it was reasonable for them to leave the United Kingdom at this moment in their lives*' (para 31). The judge refers to the children having lived in the UK for nearly 10 years. No specific reference is made to any relevant legislative provision. As set out by the Secretary of State s1(4) of the British Nationality Act 1981, which provides for acquisition if a right to British Citizenship, applies to children born in the UK. Neither of the claimant's children were born in the UK. The judge was influenced by this when considering whether it was reasonable for them to leave the UK as she took it into account as an '*important factor*'.

14. However, whether the error is material centres around the essential issue in this case which is whether or not it would be reasonable for the children to leave the UK. The judge accepted that the claimant cannot satisfy the requirements of the Immigration Rules. She found that there were exceptional circumstances to consider his claim outside of the Immigration Rules under Article 8 and that in assessing proportionality she must begin by considering the best interests of the claimant's children. The Secretary of State did not dispute that the children's position was relevant when determining the claimant's appeal and no appeal was made in respect of the judge's approach to determining the best interests of the children.

15. Whether or not it is reasonable to expect the children to leave the UK is the test in paragraph 276ADE and in s117B(6) of the 2002 Act.

16. Paragraph 276 ADE (1)(iv) provides:

> "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 the 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."

17. S117B(6) of the 2002 Act provides:

> (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.

18. Although the approach taken by the judge was not correctly structured the findings were ones that were open to her. The judge does appear to have conflated the children's best interests with consideration of the reasonableness of the children leaving the UK. The judge considered correctly that she had to determine what the best interests of the children were. She found that their best interests lay in them remaining in the UK with the claimant. The judge, in reaching this conclusion, found that the children were aged 2 and 5 years when they came to the UK and had lived in the UK a little short of 10 years. They had been in the UK for the majority of their lives. The judge noted that greater significance is to be attached to time spent in the UK when the children are of school age and developing ties and attachments outside of the family. She noted that the children have not been back to Brazil since they first came to the UK and that they have become culturally and emotionally distanced from Brazil and that all of their important attachments and interests are in the UK. The judge also noted that the claimant's son was at a critical stage of his education as he was due to undertake his GCSEs. The judge then erred, as noted above, by taking into account the '*fact that they could soon be*' British Citizens when deciding whether it is reasonable to require them to leave the UK.

19. The question is whether this has infected the decision to such an extent that it is material to the outcome of the appeal.

20. The judge went on to consider and to weigh heavily in the balance the public interest in maintenance of effective immigration control particularly given the claimant's '*blatant disregard for the immigration laws of this country*'. However, when considering s117B, at paragraph 38, the judge correctly noted that the public interest does not require removal where it would not be reasonable to expect the child to leave the UK (see- *Treebhawon and others (section 117B(6))* [2015] UKUT 674

(IAC)). The judge found that the claimant fell within the requirements of s117B(6).

21. Given the judge's findings on the children's best interests and the reasonableness of expecting them to leave the UK, despite the erroneous addition of likelihood of British citizenship, the finding at paragraph 38 remained one that was reasonably open to the judge on the facts of the case.

22. Although the judge clearly erred as set out above I do not consider that this was material to the outcome of this appeal. The findings were ones that were open to the judge on the facts of this case.

Decision

23. There was no error of law such that the decision of the First-tier Tribunal is set aside.

Signed P M Ramshaw Date 3 July 2016

Deputy Upper Tribunal Judge Ramshaw