Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no's: HU/07278/2015
HU/11349/2015
HU/11351/2015
HU/11350/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 21 February 2018	**On 28 February 2018**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

Dr & Mr [A] and their two children

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Katani, of Katani & Co, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants appeal against a decision by FtT Judge Farrelly, promulgated on 15 February 2017.

2. The appellants did not appear and were not represented in the FtT, and their grounds of appeal to the UT, filed on 28 February 2017, were not professionally prepared.

3. Understandably, under those circumstances, the grounds are somewhat discursive and unfocused. Their main points are these:

   (i) The respondent was wrong to say they have had no leave since August 2012, as curtailment of leave was not received until February 2014, and they were subsequently here pending their in-country appeal.

   (ii) They could not attend the hearing "due to unfortunate and unusual circumstances".

   (iii) The case went ahead without them, to their disadvantage.

   (iv) Their "main lawyers" abandoned their case suddenly due to financial disagreement.

   (v) A "legal aid lawyer" deceived them by promising to obtain an adjournment and telling them not to appear.

   (vi) The judge erred, based on the children having "spent more than 8 years lawfully and continuously" in the UK; the impact on the children of relocation to Nigeria; and the health of the second appellant, who would be "sent home to an early death".

4. On 1 September 2017 FtT Judge Easterman refused permission, on the view that in absence of any application to adjourn, there was no error in going ahead; the grounds appeared to depend on matters which were not before the FtT; and the grounds disclosed no apparent error of law.

5. The appellants repeated their grounds in an application to the UT. On 13th October 2017, UT Judge Coker granted permission, saying:

> "… it is arguable the judge failed to take proper account of ss. 117A – D of the 2002 Act, despite having quoted it in his decision. Although he describes the children's best interests as paramount that is clearly incorrect although nothing turns on that."

6. Mr Katani, who had been instructed by the appellants only on 15 February 2018, argued their case by reference to *MA (Pakistan) & others* [2016] EWCA Civ 705 and to the respondent's Immigration Directorate Instructions (IDI's), appendix FM, August 2015.

7. The key points I noted from his submissions were:

   (i) *MA* and the IDI's exemplified the error identified in the grant of permission.

   (ii) The error could also be approached in terms of the question in s.117B (6), whether it would be reasonable to expect the children to leave the UK.

(iii) The judge overlooked the significance of the private life built up by the children over a long period of residence. He gave that no significant weight.

(iv) The real question should have been whether there were strong reasons for refusing leave – *MA* at ¶46, the IDI's at 1.2.4.

(v) The decision at ¶17 and 19 did not disclose any strong reasons.

(vi) The judge made a slip at ¶19. The 7-year period was not "just met". In the case of the older child, it was exceeded by some margin.

(vii) The judge failed to consider that moving the children to Nigeria would be "highly disruptive".

(viii) Applying the correct approach to the evidence which had been before the FtT, the decision should be reversed.

8. The key points which I noted from the submission by Mrs O'Brien were:

(i) The appellants had done nothing to show that any unfairness might have occurred through the proceedings in the FtT. It was not clear whether the grant of permission covered that point.

(ii) The judge was bound to decide the case in the end by an overall proportionality assessment, human rights being the only ground open to the appellants.

(iii) Statute, *MA* and the IDI's did not indicate a rule that residence of children for 7 years was decisive. The outcome turned on the whole circumstances of the case.

(iv) The appellants came to the UK for temporary purposes, so their immigration status was always precarious; and they had no leave granted from 2012 onwards, the bulk of the period relied upon.

(v) The judge correctly found it not established that the children's best interests would be adversely affected by the family removing to Nigeria. No case had been advanced which might have led him to conclude otherwise.

(vi) Far from being a case with only one proper outcome, as now submitted, the evidence had not been there for the appellants to succeed.

9. I reserved my decision.

10. Cases may arise where parties are deprived of a fair hearing by circumstances which were not known to the judge and so could not have prompted an adjournment. Such circumstances, however, must be established, not just vaguely asserted.

11. It is a very serious allegation that a lawyer advised the appellants not to turn up and did nothing about their case. The lawyer has not been named, the matter has not been put to the lawyer for comment, and no evidence has been advanced from the appellants or anyone else, although there has been plenty of time for steps to be taken.

12. The allegation has in effect been abandoned. There is no basis for any finding of procedural unfairness.

13. The case based on health was exaggerated in the grounds beyond anything which was before the FtT. The decision at ¶24 explains why it fell short of showing a right to remain in the UK for medical treatment. No error on that point is shown.

14. That leaves the matter advanced by Mr Katani, the reasonableness of expecting the children to leave the UK.

15. The judge was wrong to describe the children's interests as paramount. They are a primary but not over-riding consideration. However, that was an error tending in the appellants' favour, and so, as the permission judge observed, not one by which the decision might fall to be set aside.

16. The full section in *MA* entitled "Applying the reasonableness test" should be set out:

> 46. Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.
>
> 47. Even if we were applying the narrow reasonableness test where the focus is on the child alone, it would not in my view follow that leave must be granted whenever the child's best interests are in favour of remaining. I reject Mr Gill's submission that the best interests assessment automatically resolves the reasonableness question. If Parliament had wanted the child's best interests to dictate the outcome of the leave application, it would have said so. The concept of "best interests" is after all a well established one. Even where the child's best interests are to stay, it may still be not unreasonable to require the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and in the country where it is proposed he should return. What could not be considered, however, would be the conduct and immigration history of the parents.

48. In *EV (Phillipines)* Lord Justice Christopher Clarke explained how a tribunal should apply the proportionality test where wider public interest considerations are in play, in circumstances where the best interests of the child dictate that he should remain in the UK (paras. 34-37):

> "34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.
>
> 35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
>
> 36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.
>
> 37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, ex hypothesi, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

49. Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. However, the fact that the child has been in the UK for seven years would 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 as a

> starting point that leave should be granted unless there are powerful reasons to the contrary.

17. The submissions on reasonability for the appellants was long on generalities but short on specifics. The judge found at ¶17 that the children were doing well here but might do equally well in Nigeria. At ¶19 he was not satisfied it was in their best interests to remain here. No error is shown in those findings.

18. There was no slip of any significance on the period the children had spent here. At ¶16 the judge states it as eight years.

19. Even on the alternative that there might be some advantage to the children in remaining here, the judge went on to find that would not be determinative, on the view that any advantage would be by a slender margin, and would not outbalance other factors, such as their return as a family unit, their mother being a medical doctor who could secure employment, and their time here always having been precarious at best.

20. Mr Katani's submissions made the most of the materials from which they had to proceed. However, the decision of the First-tier Tribunal is not shown to have erred in point of law on the best interests of the children, on the reasonability of their being expected to leave the UK, or in any other such respect as might call for it to be set aside. That decision shall stand.

21. No anonymity direction has been requested or made.

22 February 2018
Upper Tribunal Judge Macleman