



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10546/2016

THE IMMIGRATION ACTS

Heard at Field House
On 26 April 2018

Decision & Reasons Promulgated
On 15 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

[C F]

~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The appellant's parents in person

For the Respondent: Miss J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a national of Brazil and whose date of birth is [] 2008, appeals from the decision of the First-tier Tribunal (Judge Housego sitting at Hatton Cross on 19 September 2017) dismissing her appeal against the decision to refuse to grant her leave to remain on private life grounds under Rule 276ADE or on human rights (Article 8 EHCR) grounds outside the Rules. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission to Appeal

2. On 8 March 2018 Judge Hollingworth granted the appellant permission to appeal for the following reasons:

“It is arguable that the Judge has attached insufficient weight to the integration of the Appellant in the United Kingdom across the social, educational and cultural spectrum. It is arguable that the Judge has not applied section 55 correctly given the references at paragraphs 72 and 73 of the decision. The Judge refers to what is arguably in the child’s best interests on the alternative bases of remaining in the United Kingdom and going to Brazil. The Judge has not set out in analysing proportionality thereafter the application of the conclusion reached in applying section 55. It is arguable that the reference at paragraph 78 is insufficient in this regard.”

Relevant Background Facts

3. The appellant’s parents are Brazilian nationals. Her mother has never had any leave to remain in the UK, and her father was last granted leave to remain until 31 December 2010. On 29 December 2015, the appellant applied for leave to remain under Rule 276ADE of the Rules on the basis that she had accrued over 7 years’ residence in the United Kingdom since birth, and had embarked on her primary school education in which she was showing “*an immense talent*”.
4. On 31 March 2016 the respondent gave her reasons for refusing the appellant’s application. Her parents had spent the majority of their lives residing in Brazil prior to their entry into the UK, and so they would be able to support her in adjusting to life in Brazil upon her return. Although she could not read or write in Portuguese, she would have some level of understanding the language, given that she had been raised by Brazilian nationals, whose first language would have been Portuguese. In addition, her parents had relatives in the UK with whom they all, as a family unit, maintained a good relationship. These social ties could be maintained by modern forms of communication from Brazil and through visit visas. Her parents had remained unlawfully in the UK without regularising her stay. They could therefore accompany her to Brazil, begin to seek legal employment and start to build a financially stable future for her.
5. It was generally accepted that the best interests of a child whose parents were facing removal from the United Kingdom were best served by the child remaining with their parents and being removed with them. This represented the centrality of the child’s relationship with their parents in determining their wellbeing. There were also the following general factors which made the decision to refuse her application reasonable and section 55-compliant:
- She was a national of Brazil and would therefore be able to enjoy all the benefits and advantages that Brazilian citizenship entailed;
 - She would be returning to a country where there was provision for education;

- She was not yet old enough to have started to study towards a recognised qualification;
- She was not yet old enough to have developed any skills which were not transferable to Brazil;
- She had not provided evidence of any special educational or medical needs;
- She was being removed to a country where her parents had lived and worked, and no explanation had been provided as to why they would be unable to secure similar employment on their return;
- She had always remained in the care of Brazilian nationals and therefore would be aware, to some extent, of the language and culture of that country.

The Hearing Before, and the Decision of, the First-tier Tribunal

6. Both parties were legally represented before Judge Housego. The Judge received oral evidence from the appellant's parents, who gave evidence through a Portuguese Interpreter.
7. The Judge's subsequent decision ran to 35 pages. Some 19 pages are taken up with an extensive review and discussion of a number of authorities, including many of those cited by the appellant's solicitor.
8. At paragraph [23] of his decision the Judge cited the guidance given in **Azimi-Moayed & Others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC)**:
 - "30. It is not the case that the best interests principle means it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:
 - (i) As a starting point in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
 - (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
 - (iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
 - (iv) Apart from the terms of published policies and Rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a

child than the first seven years of life. Very young children are focused on their parents rather than peers and are adaptable.

- (v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic wellbeing of society amply justifies removal in such cases.”

9. At paragraph [25] the Judge reproduced verbatim various passages from **MA (Pakistan) and Others, R (on the application of) v Upper Tribunal (IAC) & Anor [2016] EWCA Civ 705**, including paragraphs [45], [46] and [48]. At paragraph [45] Elias LJ said:

“In my judgment, the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the ‘unduly harsh’ concept under Section 117C(5), so should it when considering the question of reasonableness under Section 117B(6). ... The critical point is that Section 117C(5) is in substance a free-standing provision in the same way as Section 117B(6), and even so the court in **MM (Uganda)** held that wider public interest considerations must be taken into account when applying the ‘unduly harsh’ criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in Section 117B(6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case, I will analyse the appeals on the basis that the Secretary of State’s submission on this point is correct and that the only significance of Section 117B(6) is that where the seven year Rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted.”

10. At paragraph [46] Elias LJ said that the published Home Office Policy guidance merely confirmed what is implicit in adopting a policy [the seven year rule] 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 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.”

11. At paragraph [48] Elias LJ cited with approval the explanation given by Clarke LJ in **EV (Phillipines)** at [34]-[37] as to how the 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 with his parents. At [36] Clarke LJ said that if it is overwhelmingly in the child’s best interests to remain, 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. Clarke LJ continued in [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.”

12. At paragraphs [41]-[58], the Judge rehearsed the evidence given by the appellant’s parents. Her mother said that the appellant spoke basic Portuguese, but did not write Portuguese. She was very bright and doing well at school. They intended to say in the UK to give their daughter a good educational background and a decent standard of life. She had been in the UK for over 7 years and had the right to stay here. She had made a great contribution to the nation, and would do so even more when she was grown up. She was everyone’s sweetheart as she had such a captivating personality. The education system in Brazil was very poor. Children only went there for a good square meal at lunchtime. Her father did not have a good education himself, so he could not get a good enough job to pay for the appellant to be educated privately in Brazil. Also, her daughter had not had the necessary vaccinations, and so she would be at risk on that basis. She had lots of friends and relatives in the UK. Removal would cause her more harm than good. Also, they had nowhere to go to in Brazil.
13. The Judge recorded the solicitor’s closing submissions at paragraph [60]. The appellant was making the very best of her UK education, whereas the education which was available to her in Brazil was very poor. She submitted that those who could not afford fee-paying schools in Brazil languished, and although university education in Brazil was free, it was very difficult for children who went to state schools to get into university.
14. The Judge set out his findings of fact at paragraphs [61]-[64]. He found that the appellant was born in the UK, and she was for that reason “*wholly integrated*” into the UK. He did not accept the parents’ evidence that they spoke English all the time at home. He found that the appellant had a working knowledge of Portuguese. She was a bright child, and even if she did not write in Portuguese, it would not take her long to learn to do so. She had extensive family in Brazil on both sides. There were no family rifts. There would be accommodation for the family in Brazil. There had been no reason to prevent, or even make difficult, the return of the parents and the appellant to Brazil at any time. Her father had transferable and marketable skills in home computing, through the use of which he had maintained the family in the UK, even though he was not entitled to work, and he was not fluent in English. He could replicate that work in Brazil.
15. At paragraphs [65]-[79] (pages 33-34), the Judge went on to give his reasons for finding that the appellant did not fall within Rule 276ADE(1)(vi); and that the public interest in the maintenance of effective immigration control prevailed, as the best interests of the child were not very firmly in her remaining in the UK; and that the refusal was compliant with the Secretary of State’s duties under section 55 of the Borders, Citizenship and Immigration Act 2009.

The Hearing in the Upper Tribunal

16. In advance of the hearing before me to determine whether an error of law was made out, the appellant's parents applied for an adjournment as they wished to instruct Counsel to appear at the hearing. The adjournment request was refused in writing. Following this refusal, the appellant's solicitors served lengthy written submissions. The purpose of this was two-fold: to renew the adjournment request; and, if that failed, the submissions were designed to add "*further clarity*" to the grounds of appeal.
17. I was satisfied that it was in the interests of justice to proceed with the error of law hearing, as the reasons for refusing the initial request for an adjournment to brief Counsel still stood. In addition, there was no explanation as to why the appellant's case could not be presented by the appellant's solicitor, as it had been before the First-tier Tribunal. It was asserted that the appellant's solicitors had not been able to instruct Counsel due to limited funds being available and the notice of hearing being served short. However, the Notice of hearing was sent by first-class post to the appellant's solicitors on 4 April 2018, and if there were not sufficient funds for the solicitor to appear on the appellant's behalf, it was unlikely that there were sufficient funds to instruct Counsel to appear in the alternative.
18. The appellant's parents were in attendance, and at the outset of the hearing the appellant's father requested a Portuguese Interpreter. This request had also been refused in advance of the hearing, on the ground that there was no suggestion that the appellant was going to give evidence. The appellant's parents had some command of English, and I explained to them that the hearing would proceed without an interpreter.
19. I invited Ms Isherwood to respond to the reasons given for the grant of permission, and also to the written submissions in support of the appeal. She relied on passages in **AM (S117B) Malawi [2015] UKUT 260 (IAC)** and in **AM (Pakistan & Others -v- Secretary of State for the Home Department) [2017] EWCA Civ 180**. She submitted that the Judge had directed himself appropriately, and he had not erred in law. There was also no merit in the argument advanced in the written submissions that the Judge had erred in giving no weight to the appellant's school reports or to the opinion of the expert. The witness statement of Julian Rutherford at D5 did not constitute an expert's report, although it was described as such in the Index.
20. I explained to the appellant's parents that I was reserving my decision, and that in deciding whether an error of law was made out I would take full account of the grounds of appeal, the reasons for the grant of permission to appeal and the written submissions in support of the appeal. The appellant's mother made a short speech in which she said in effect that the Judge had been wrong on the facts: things were going to be much worse for her daughter in Brazil than he had been willing to accept.

Discussion

21. The Judge's line of reasoning from paragraph [65] onwards is far from ideal in terms of clarity, as he does not follow the orthodox approach set out by Clarke LJ in

paragraphs [36] to [37] of **EV (Philippines) -v- Secretary of State for the Home Department** [2014] EWCA Civ 874. This is the two-stage approach to the assessment of reasonableness. The first stage is the weighing up of the best interest considerations for and against the child going to the country of which he or she is a citizen, without any immigration control overtones. The second stage is that, having arrived at a conclusion as to where on the spectrum the child's best interests lie, the judicial decision-maker goes on to consider wider proportionality considerations before reaching a conclusion as to whether requiring the child to leave the country with his or her parents is reasonable or not.

22. Instead, the Judge followed an unstructured approach, in which observations about the child's best interests in remaining here or going to Brazil are inter-woven with observations about the public interest and the maintenance of effective immigration control.
23. However, the conclusion that the Judge reached was unarguably open to him on the facts which he found at paragraphs [61]-[64], and also at paragraphs [68], [70]-[71] and [76]-[77]. In addition, it is tolerably clear how the Judge has arrived at the conclusion that it is reasonable to expect the appellant to go to Brazil with her parents, and why he is satisfied that the decision complies with the Secretary of State's duties under section 55 of the Borders, Citizenship and Immigration Act 2009.
24. The Judge's additional findings of fact included the following: (a) the appellant had supportive and extensive family in Brazil, and it was most unlikely that she and her parents would suffer any form of destitution; (b) the fact that she had not yet had relevant inoculations was easily remedied; (c) no evidence had been produced to him to show that the educational system in Brazil was so far below that of the UK that it would be unreasonable for the appellant to have to endure it; (d) the information provided about the Brazilian educational system dated from 2002, and there was no biography of its author; (e) the matters referred to by the solicitor were, when examined closely, pointing mostly to disadvantage in education suffered by the children of the very poor and black population - those who inhabited favelas, for example - whereas the parents of the appellant were middle-class people who did not fall into the category of the highly disadvantaged; (f) there was no evidence that Rio de Janeiro was a dangerous place where the appellant would be at risk; and (g) there were not very significant obstacles to the return of the parents to Brazil, where they were fully conversant with its language and culture, and where the fact that they had some facility with the English language would assist them.
25. In his statement at D5, Mr Rutherford says that he was asked to give an opinion, based upon his teaching experience in the UK, as to how the appellant's proposed repatriation to Brazil might be expected to impact upon her future education and welfare. He says that he has not met the appellant or her parents, but he has reviewed her school report. He says that he is most impressed with her school report, which suggested that if she was allowed to continue her education in this country she would become a real asset to English society. If, on the other hand, she was required to move

to Brazil, her education and welfare would undoubtedly be affected - probably quite seriously.

26. Mr Rutherford's statement does not satisfy the formal requirements of an expert's report. Moreover, he does not claim to have any knowledge or expertise with respect to the education system in Brazil. So, the Judge did not err in law in not treating Mr Rutherford's evidence as reinforcing the case advanced by the appellant's solicitor as to the quality of state education in Brazil or as corroborating the evidence given by the appellant's parents on this topic.
27. The Judge accepted that the appellant was fully integrated into the UK, and was doing very well at school, as shown by her school reports.
28. The Judge said that he was giving full weight to the length of time the appellant had been in the UK, which was over 9 years from birth, and he noted that at age 10 she would be entitled to seek registration as a British citizen. In an oblique reference to the fourth principle of **Azimi-Moayed [2013] UKUT 00197 (IAC)**, cited earlier at paragraph [23] of his decision, the Judge went on to state that the years from birth to about 4 or 5 were of less weight than those years after the commencement of school (i.e. seven years from the age of four).
29. In line with the first, second and fourth principles of **Azimi-Moayed**, it was unarguably open to the Judge not to treat the evidence of the appellant's social, cultural and educational integration into the UK as establishing that it was overwhelmingly in her best interests that she should not leave the UK and go to Brazil; and, in such circumstances, that the need to maintain immigration control tipped the balance the other way. At paragraph [74], the Judge gave a clear answer to the question posed by Clarke LJ at paragraphs [36] and [37] of **EV (Philippines)**. The Judge said as follows:

"For the Article 8 proportionality assessment, the cynical flaunting of the Immigration Rules and the use of their child as a reason to remain in the UK is a relevant factor. If the best interests of the child were very firmly in remaining that would overcome the public interest in the maintenance of effective immigration control, but they are not."

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed

Date 30 April 2018

Judge Monson
Deputy Upper Tribunal Judge