



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/12334/2016
HU/12339/2016
HU/12342/2016
HU/12343/2016

THE IMMIGRATION ACTS

Heard at Field House
On 9 July 2018

Decision & Reasons Promulgated
On 30 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

(1) ISAAC BEDIAKO
(2) ANNA ANTWI
(3) A B
(4) E B

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Subramanian, Legal Representative, Lambeth Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal from the decision of the First-tier Tribunal (Judge Fletcher-Hill sitting at Hatton Cross on 21 July 2017) dismissing their appeals against the decision of the Secretary of State made on 19 April 2016 to refuse their applications for leave to remain in the United Kingdom on the basis of family and private life established here.

The first and second appellants are the parents of the third and fourth appellants. The third appellant, AB, was born in the UK on 30 July 2008 and the fourth appellant, EB, was born in the UK on 15 May 2011. The First-tier Tribunal did not make an anonymity direction, and do not I consider that the appellants require anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Initial Refusal of Permission to Appeal to the Upper Tribunal

2. On 27 February 2018, First-tier Tribunal Judge Saffer gave his reasons for refusing to grant the appellants permission to appeal to the Upper Tribunal: *“There is no unfairness for the Judge refusing to adjourn the hearing in the absence of medical evidence and an inability on behalf of one of the adults to attend (that lacuna still existing), and given their failure to file any evidence in support of the appeal. He/she gave adequate reasons for finding against the appellants and did not have to slavishly repeat the respondent’s case (which he/she set out in full) and was entitled to agree with.”*

The Reasons for the Eventual Grant for Permission to Appeal

3. Following a renewed application for permission to the Upper Tribunal, on 15 May 2018 Upper Tribunal Judge Plimmer granted permission to appeal for the following reasons:

“2. Although the First-tier Tribunal has made reference to **MA (Pakistan) -v- SSHD [2016] EWCA Civ 705**, it is arguable that it has erred in law in failing to attach “significant weight” to the third appellant’s child’s residence of over 8 years when considering her best interests and the reasonableness of expecting her to go to [Ghana]. It is insufficient to be aware of the qualifying child’s length of residence: significant weight must be attached to it - see [49] of **MA**.

3. It is also arguable that the First-tier Tribunal has failed to identify “powerful reasons” for why the child who has been in the United Kingdom for over eight years should be removed, notwithstanding that his best interests lie in remaining - see **MT & ET (Child’s best interests; extemporary pilot) Nigeria [2018] UKUT 88 (IAC)** applying **MA** at [33-4].”

The Hearing in the Upper Tribunal

4. At the hearing before me to determine whether an error of law was made out, Mr Subramanian referred me to a detailed skeleton argument in which he sought to develop two distinct grounds of appeal. The first was that the Judge had erred in law in not acceding to the request which he had made for an adjournment. The second was that the Judge failed to give significant weight to the best interests of the children, and that, with reference to the Judge’s finding of proportionality at paragraph [59], the Judge did not have “*any strong evidence*” before her to come to a reasonable and fair conclusion.
5. In reply, Ms Everett submitted that no error of law was made out either on procedural grounds or on the merits. There was no medical evidence to show that the second appellant, the mother of the two children, was unfit to attend the hearing in the First-tier Tribunal; and the Judge had been entitled to find that it was in the interests of fairness to proceed with the hearing on the appeal. With regard to the merits, it was

true that the Judge had not directed herself that significant weight should be attached to the fact that the oldest child had accrued over seven years' residence at the date of the hearing. But, on the particular facts, this lack of a self-direction was not material to the outcome. As the parents had not filed any evidence in support of the appeals, the Judge did not have the material to reach any other conclusion on an Article 8 claim outside the Rules than that it was reasonable to expect the third appellant to leave the UK with her parents and younger sibling.

Discussion

Ground 1 – Refusal to grant an adjournment

6. Judge Plimmer did not express disagreement with the views expressed by Judge Saffer on Ground 1. However, she did not refuse permission to the appellants to pursue Ground 1; and, in any event, its resolution has a potential bearing on the resolution of Ground 2.
7. The background to the adjournment issue is that the first appellant applied for leave to remain outside the Rules on 14 February 2013, with his wife and children as his dependants on the application. It is convenient to note, in passing, that the third appellant was well short of seven years' residence at the date of application. The appellants appealed against the refusal decision of 19 April 2016 by notices dated 11 May 2016. Mr Subramanian did not dispute, in oral argument before me, that the parents had plenty of notice that the hearing of the appeals would take place at Hatton Cross on 21 July 2017. Notwithstanding this, when he appeared before Judge Fletcher-Hill for the appeal hearing at Hatton Cross on 21 July 2017, his firm had not filed any evidence from the appellants in support of their appeals. As Judge Fletcher-Hill noted in her subsequent decision at paragraphs [27], Mr Subramanian confirmed that the first appellant had been informed of the hearing date and that no evidence had been collected, and that his firm had been representing the family for several years since at least 2015.
8. A few days before the hearing, an adjournment request had been refused. Mr Subramanian renewed the request for the adjournment at the hearing itself. He informed the Judge that neither the first appellant nor his wife had attended for the hearing. The only justification for the non-attendance of the second appellant was that she had given birth to a third child by caesarean section on 23 May 2017, about two months prior to the hearing, and she had subsequently developed pain in her stomach for which she had been prescribed tablets and injections by her GP for 30 days. He did not offer an excuse for the first appellant's non-attendance, but sought to explain the absence of an appellant's bundle of documents on the basis that the first appellant had been unable to collect letters from the school or from friends.
9. The Presenting Officer opposed the adjournment request, on the basis that there was no medical evidence relating to the second appellant's current condition and fitness to attend Court, and additionally the first appellant had simply chosen not to attend. The

Presenting Officer also relied on the fact that no documents whatsoever had been supplied in relation to the hearing.

10. Judge Fletcher-Hill records in her decision that she indicated to Mr Subramanian that she was refusing the adjournment request in the absence of any medical evidence and also because of the absence of the first appellant "*who could have attended*".
11. Mr Subramanian then announced that he was withdrawing his firm's representation, and said that he had already informed his client that he would do so if there was no evidence filed in support of the case, and in the event that neither parent attended at the hearing.
12. As noted by Judge Parkes when refusing permission to appeal, the appellants have not sought retrospectively to demonstrate that either parent did in fact have a good excuse for not attending the hearing, or that there was a good excuse for there being no evidence filed in support of the appeal.
13. The case advanced by Mr Subramanian in his skeleton argument is that for the Judge to have proceeded with the hearing of the appeal was presumptively unfair because the Judge did not have the necessary material before her to undertake an assessment of the children's best interests. Mr Subramanian cites the following passage from paragraph [59] of **MA (Pakistan)**: "*... whilst a Court can normally expect an applicant to provide the information required to the Court to make the best interests assessment, since the onus is on the applicant to prove any breach of section 55, there will be cases where the Court will have to make enquiries on its own initiative. The Court of Appeal in SS (Nigeria) thought this was likely to be very rare (and indeed Mann J doubted whether it would ever arise) although I think it fair to say that Mr Justice McCloskey, drawing on his broad experience in this field, believes that the situation will arise more frequently. No doubt the problem is more likely to occur with litigants in person who will not always appreciate what information is required to make good their case. In some circumstances it may become apparent that justice cannot be done without further material being obtained, either by a party or by the Court using its case management powers. I would accept that it may, albeit very exceptionally, be an error of law for the Court to fail to make further enquiries in such cases, and this may involve a need to adjourn the hearing, although in my view the failure to do so would only be an error of law where the refusal or failure to do so was Wednesbury unreasonable or resulted in unfairness.*"
14. Although the Judge did not have any evidence filed by the appellants, she was able to refer to the evidence contained in the Home Office bundle. I consider that the Judge was thereby adequately informed so as to be able to perform the interrelated tasks of identifying the children's best interests and then balancing them with other material considerations.
15. The parents have not, by way of appeal to the Upper Tribunal, sought to adduce specific evidence relating to the third appellant which would have come to the attention of the First-tier Tribunal, if an adjournment had been granted. So, the argument that the failure to grant an adjournment has resulted in unfairness with

regard to the assessment of the third appellant's best interests simply does not get off the ground.

Ground 2

16. Turning to Ground 2, Ms Everett acknowledges that the Judge's analysis of proportionality has the weakness identified by Upper Tribunal Judge Plimmer in her grant of permission. However, I do not consider that the Judge has thereby materially erred in law.
17. The Judge followed the correct methodology laid down by the Court of Appeal in **EV (Philippines)**, which was endorsed by the Court of Appeal in **MA (Pakistan)**.
18. The Judge correctly directed herself at paragraph [45] that, in determining the question of reasonableness, the consideration was not focused solely on the child, but must also look at wider public interests considerations.
19. The Judge correctly directed herself at paragraph [50] that the best interests of the children should be determined without considering their parents, and the fact that in the current case, "*the parents and children are all Ghanaian citizens and live together in a family unit*".
20. It is clear that the Judge understood that the assessment of the question of reasonableness was a two-stage process; the first stage was to assess the child's best interests without any immigration control overtones, and to determine where on the spectrum they lay; and, secondly, to go on to consider wider public interest considerations before reaching a final decision on whether it was reasonable to expect the child to leave the UK.
21. On the topic of the best interests of the children, the Judge set out the guidance given by the Upper Tribunal in **Azimi-Moyed & Others [2013] UKUT 197 (IAT)** at paragraph [56] of her decision. The Judge applied that guidance to the third appellant at paragraph [57]. The Judge addressed wider proportionality considerations at paragraph [59].
22. Although the Judge did not in terms hold that there were strong reasons for requiring the third appellant to accompany the rest of her family to Ghana, the Judge provided strong reasons for finding that it was reasonable to expect her to leave the country, through her findings and observations at paragraphs [56], [57] and [59].
23. The conclusion which the Judge reached on proportionality was clearly open to her on the uncontested evidence. With regard to wider proportionality considerations, the parents had been overstayers since the years 2000 and 2004 respectively. There were no known circumstances beyond their control which had prevented them from returning to Ghana, rather than remaining illegally in the UK to establish family and private life here. The third and fourth appellants were Ghanaian nationals, and what was proposed was that the two adult appellants and their sons would return to Ghana

as a family unit where they would all be able to enjoy to the full their rights as citizens of Ghana, and where the sons would have access to education. As found by the Judge at paragraph [57], the following core principles in Azimi-Moyed were in play: firstly, as a starting point, it was in the best interests of children to be with both their parents, and if both parents were being removed from the UK then the starting point suggested that so should dependent children who formed part of their household unless there were reasons to the contrary; secondly, it is generally in the interests of children to have both stability in the continuity of social education provision and the benefit of growing up in the cultural norms of the society to which they belong; and that seven years from the age of four 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 their peers and are adaptable.”*

24. In oral argument, Mr Subramanian highlighted the fact that the third appellant had nearly reached his 10th birthday, at which point he would be eligible to apply to register as a British national. He also pointed out that the fourth appellant had now accrued over seven years’ residence in the UK. But this is not relevant to question of whether the First-tier Tribunal Judge erred in law in her assessment of the question of reasonableness at the date of the hearing before her. It is open to the third and fourth appellants to make applications for leave to remain under the Rules, applications which they were not in a position to make in 2013. The fact that their respective private life claims have strengthened since the date of the hearing in the First-tier Tribunal does not render the findings of the First-tier Tribunal Judge retrospectively unsound or unfair.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands.

These appeals to the Upper Tribunal are dismissed.

I make no anonymity direction.

Signed

Date 21 July 2018

Judge Monson

Deputy Upper Tribunal Judge