Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/14982/2016
HU/14979/2016
HU/14975/2016
HU/14977/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 18th of December 2017	**On 26th of February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR LUIZ CARLOS DE SOUZA
MS DIUZETE LOPES DE SOUZA
MR MARCUS LOPES DE SILVA
MR LEONARDO LOPES DE SOUZA
(Anonymity orders not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr W Adams of Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are all citizens of Brazil, the 1st and 2nd Appellants are husband and wife and the 3rd and 4th Appellants are their children. The 1st Appellant was born on 6th of December 1961, the 2nd Appellant was born on 20 of December 1962, the 3rd Appellant was born on 27th of May 1998 and the 4th Appellant was born on 14th of August 1996. They appeal against decisions of Judge of the First-tier Tribunal Pacey sitting at Birmingham on 3rd of April 2017 who dismissed their appeals against decisions of the Respondent dated 25th of May 2016. Those decisions were to refuse the Appellants' application for leave to remain in the United Kingdom. The Appellants arrived in the United Kingdom on 10th of February 2009 on visit visas valid for 6 months. When those visas expired on 10th of August 2009 they did not return to Brazil but have remained here unlawfully ever since.

The Appellants' Case

2. The Appellants applied on 3rd of March 2016 for leave to remain in the United Kingdom on the basis of their family and private life. The 3rd Appellant was under the age of 18 when the application was made and was dependent upon his mother the 2nd Appellant. The family had not applied for leave to remain during the currency of their visit visas because they had unsuccessfully attempted to research their European ancestry. They had made their current application when the 3rd Appellant was assaulted and the 2nd Appellant had to go to the police station to report the matter. The family had intended to return to Brazil and had not applied for visa extensions because they were confident they could soon become European citizens.

3. The 1st Appellant suffered from depression and had done so in Brazil. He had a heart problem and panic attacks. The family could not return to Brazil because the children were young when they came in and had made friends in the United Kingdom. They had no house in Brazil to go to and there were neither jobs nor family there. The 1st and 2nd Appellants had worked in the United Kingdom from time to time as cleaners. They were aware they had been working without permission and had no evidence of having paid tax or national insurance. Counsel for the Appellants in oral submissions stated that the 4th Appellant had achieved a great deal in the United Kingdom and was immersed in the culture here. Neither child had chosen to come to the United Kingdom.

The Decision at First Instance

4. At [20] the Judge stated that all the Appellants were now adults and she would deal with the appeals on that basis. None of the Appellants could bring themselves within the Immigration Rules and therefore she looked at the appeals outside the Rules under the terms of Article 8 of the Human Rights Convention (right to respect for private and family life). The case turned on the balancing exercise between the public interest in the maintenance of immigration control and the private and family lives of

the Appellants when determining proportionality. She acknowledged that the 3rd and 4th Appellants came as minors and had no choice as to whether to overstay since they were under the control of their parents. None of the Appellants had engaged in criminal activity apart from overstaying and breach of the Immigration Rules. The 3rd and 4th Appellants had been successful in their studies and had developed friendships and ties with the community. The 1st Appellant was in poor health which arguably might worsen if he were to return to Brazil.

5. As against that the Appellants had overstayed for a period of 7 ½ years and the reason for the delay in seeking to regularise their status was not a reasonable one. There was no evidence of any research carried out by the 2nd Appellant into the issue of European ancestry. At [28] the Judge considered it an open question as to whether the 2nd Appellant would have sought to regularise the family's status had the 3rd Appellant not been assaulted. The parents had worked in breach of their visit visas. The children's education had taken place whilst their presence in the United Kingdom was precarious. Even though the 1st Appellant was not in good health, medical treatment was available in Brazil and his health problems were not so grave or potentially terminal as to engage either Article 3 or Article 8. At [33] the Judge stated that the 3rd and 4th Appellants were not children at the date of decision because the 3rd Appellant was 18 on 27th of May 2016, the decision occurring 2 days earlier. All the Appellants were adults and could return to Brazil as a family unit. Applications could be made to return from there. The refusals were not disproportionate and the scales weighed more heavily on the side of the public interest. She dismissed the appeals.

The Onward Appeal

6. The Appellants appealed against these decisions arguing that there had been procedural unfairness during the hearing. The Respondent had not sent the Appellants her bundle by 3rd of April 2017 despite the directions of the Tribunal that the bundle should be disclosed. Instead it had been received by the Appellants' representatives on 5th of April 2017 after the appeal hearing on 3rd of April. They Appellants had contacted the Respondent to have documents returned to them but they had not been received.

7. The 3rd Appellant was born on 27th of May 1998 and the family's previous representatives had made application for leave to remain on 29th of December 2016. Thus the 3rd Appellant had continued to remain in the United Kingdom without absence for over 7 years prior to the application. He was thus a qualified child at the time that the 2nd Appellant made an application on his behalf. To expel the 3rd Appellant from the United Kingdom would be detrimental to his mental health, well-being and personal development. He was still receiving education. Insufficient weight had been given to the assault on the 3rd Appellant (described in the determination).

8. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Hodgkinson on 19th of September 2017. In granting permission to appeal he noted that the Appellants were represented at the hearing before the Judge but were now unrepresented. The grounds argued that the Judge had miscalculated the length of time spent in the United Kingdom and failed to consider properly that at least one of the Appellants was entitled to be considered with reference to EX.1(a) of Appendix FM and paragraph 276 ADE (1) (iv) which the Judge had not considered. The Judge did not consider the impact of removal upon the two younger Appellants with reference to their ongoing education and did not adequately consider their level of integration. It was arguable that the Judge did not give satisfactory consideration to the potential application of the Immigration Rules with particular reference to the youngest Appellant who was still a minor at the date of application. The grounds disclosed arguable errors of law and permission was granted on all grounds.

9. The Respondent replied to the grant of permission by letter dated 30th of October 2017 opposing the Appellants' appeals. The Respondent argued that the grounds merely disagreed with the Judge's findings. The facts were relatively uncontentious and the difficulty the Appellants had was that they were a single family all of whom were adults at the date of decision and hearing and who had no leave to remain in the United Kingdom. It was arguably open for the Judge to find that they could return together as a family unit and continue their family life in Brazil and that the public interest must prevail in this case.

The Hearing Before Me

10. At the hearing before me to decide whether there was a material error of law in the determination such that it should be set aside and the matter reheard, counsel argued that there was such a material error of law. The Judge had dealt with the appeals on the basis that all the Appellants were adults. That was wrong but once the foundation of her determination was wrong her conclusions were also bound to be defective. Had the Judge accepted that the 3rd Appellant was a minor at the date of application she would have needed to consider subsection (iv) of paragraph 276ADE. The question then would have been would it be reasonable for the 3rd Appellant to return to Brazil but the Judge had not done that. She had failed to consider that the 3rd Appellant was a qualifying child and thus came within section 117B (6) of the 2002 Act. It was not in the public interest to remove the parents of the 3rd Appellant as this was a non-deportation case. The decision should be set aside and the matter remitted back to the First-tier to be reheard as the determination had failed to look at the case within the rules. It was not important that the 3rd Appellant was 18 at the date of hearing it was the date of application that was relevant.

11. For the Respondent, it was argued that there was no material error of law in the decision. The refusal letter had acknowledged that one of the Appellants was 17 at the date of application. Whilst the Judge was referring to all of the Appellants as

adults and that was perhaps an error it was not material. The Appellants had come on visit visas but overstayed. They had worked illegally and had not paid tax. One had to look at the economic well-being of the country, this family had not contributed but they had received the benefit of an education to which they were not entitled. The Judge had set out the facts in some detail. The Judge had acknowledged that the 3rd and 4th Appellants had come here as minors. The delay in making the applications for leave to remain was unreasonable. Their private lives were established at a time when their immigration status was precarious.

12. In conclusion counsel for the Appellants acknowledged that the Appellants' immigration history was not good but there had been no proper proportionality exercise carried out by the Judge. There was nothing on the best interests of the 3rd Appellant. Whilst the family had benefited from NHS treatment that was not conclusive. One should not visit the iniquities of the parents upon the children. They did not want to come here, the parents brought them.

Findings

13. The first issue which the Judge had to decide in this case was whether the Appellants could meet the Immigration Rules. She proceeded on the basis that they could not. The argument before me is that the 3rd Appellant could meet the Immigration Rules at the date of application and that therefore the Judge had incorrectly analysed the case on the basis that all four Appellants were adult over stayers. The 3rd Appellant had entered the United Kingdom on the 10th of February 2009 and had applied for leave to remain on 3rd of March 2016 a period of 7 years and 21 days. At the date of application, the 3rd Appellant was just over 17 years and 8 months old. He was a minor who had been in the United Kingdom for at least 7 years. The Judge was incorrect to say at [27] that the family had overstayed for over 6 years before they made their current applications. By proceeding on the basis that all four Appellants were adults at the date of hearing the Judge potentially overlooked the 3rd Appellant's position under the Immigration Rules.

14. I note at this stage that the Appellants also sought to argue before me that the Judge had failed to properly consider section 117B (6) of the Nationality, Immigration and Asylum Act 2002. The difficulty with this argument is that the sub-section did not apply. The Judge was quite correct to point out that at the date of hearing all four Appellants were adults. Since the section applies at the date of hearing as opposed to the provisions of the Immigration Rules which apply at the date of application the 3rd Appellant was no longer a qualifying child at the date of hearing by a period of ten months.

15. Returning to the issue under the Immigration Rules, the Respondent had accepted in her refusal letter dated 31st of May 2016 that the 3rd Appellant met the suitability requirements in section S-LTR but it was not accepted that the 3rd Appellant could meet the eligibility requirements of section R-LTRC 1 .1 (d) (iii) because he failed to meet the requirement that at least one of his parents must be in the United Kingdom

with leave. Since that did not apply because neither of the 3rd Appellant's parents had leave, he could not meet the eligibility requirements and thus could not meet that part of the Immigration Rules.

16. The Respondent was aware that the 3rd Appellant was 17 years old at the date of application and had lived in the United Kingdom for 7 years but he had not lived continuously in United Kingdom for at least 20 years and the Respondent considered it would be reasonable to expect the 3rd Appellant to leave the United Kingdom and return to Brazil as a family unit with his parents and brother. Consequently, the Appellant failed to meet the requirements of paragraph 276ADE (1) (iv) and by extension although not specifically mentioned Section EX.1.

17. The Respondent considered whether there were any exceptional circumstances to justify allowing the 3rd Appellant's application. The 3rd Appellant would be familiar with the culture in Brazil and able to adapt to life more easily there. He could speak Portuguese and there would be no language barrier.

18. The Judge noted at [8] that in the grounds of appeal against the Respondent's decision it was stated that the 3rd Appellant was under 18 when the current application was made. She had also noted at [5] the Respondent's refusal of the 3rd and 4th Appellants' applications because they did not meet the requirements of paragraph 276ADE. It does not appear from the determination that it was argued at first instance that the 3rd Appellant could bring himself within the Immigration Rules. The argument appeared to be whether the appeal should be allowed outside the rules under Article 8.

19. For section EX.1 to apply it would have to be shown that it would not be reasonable to expect the 3rd Appellant to leave the United Kingdom. The section is an exception to certain eligibility requirements for leave to remain as a parent. For section EX .1 to apply to the 3rd Appellant and his family it would have to be shown that it was not reasonable to expect the 3rd Appellant to leave the United Kingdom. The Respondent had rejected that view in the refusal letter for the detailed reasons given in the refusal letter (see paragraph 17 above).

20. The Judge had not summarised the Respondent's reasons but clearly accepted them since she noted at [17] that there could be no appeal on the basis the Respondent had not correctly applied the Immigration Rules as that was no longer a permissible ground of appeal. Even if it was a material error of law for the Judge not to consider section EX .1 or at least indicate in her determination that she agreed with the Respondent's view that it was reasonable to expect the 3rd Appellant to return to Brazil, it is difficult to see how this error was material as was submitted to me by the Presenting Officer.

21. All 4 Appellants were adults by the time of the hearing and thus could not succeed under the 2002 Act provisions for the reasons which I have set out above. In assessing the reasonableness of expecting a 17-year old to leave the United Kingdom

with his parents the Tribunal would be bound to consider the Court of Appeal authority of **MA Pakistan [2016] EWCA Civ 705** which held that whilst there needed to be very strong reasons why a child here more than 7 years should be removed from the United Kingdom, the Tribunal was able to look at the immigration status of the parents in assessing the reasonableness of expecting the child to leave the United Kingdom.

22. In this case the parents' immigration record was poor as was acknowledged at the hearing before me. Not only had they overstayed by several years they also appeared to have worked illegally. These were powerful factors to be put into the balance. Whilst one should not visit the sins of the parents upon the children, the assessment of reasonableness involves taking all of the background facts into account and these include the poor immigration history of the parents. The Judge was clearly aware of the difficulties in the Appellants' immigration history and gave it due weight. She also gave weight to the consideration that the family would be returned as a unit and that they had all received benefits to which they were not entitled. Whilst it would have been preferable perhaps for the Judge to have made it clear that in agreeing with the Respondent's view on the Immigration Rules she specifically found that it was reasonable to expect the 3rd Appellant to return to Brazil, it is difficult to see that had she considered the matter in those terms it would have made any material difference to the outcome of her decision. I do not find therefore there was any material error of law in the Judge's decision since it was reasonable to conclude that the 3rd Appellant should return to Brazil with the other three Appellants.

23. I deal with the remaining grounds of appeal for the sake of completeness since permission was granted on all grounds. The grounds sought to argue that there had been procedural unfairness by reason of the late submission of the Respondent's bundle. The Appellants were represented by experienced counsel at the hearing at first instance and it does not appear that any application was made to the Judge for an adjournment for further papers to be received. The point was also not argued before me. The grounds of appeal were drawn up by the Appellants in person and not by the legal representatives or those who had represented them at first instance. In those circumstances, I am not at all convinced that there was any procedural error. There was a difficulty over the absence of the 1st Appellant who had was not able to attend to give evidence because of ill health but at [2] the Judge made clear that counsel did not seek an adjournment. It does not appear that counsel sought an adjournment for any other reason either and I can only assume that the issue of the papers was clarified at the hearing.

24. The Judge adequately considered the issue of the 1st Appellant's ill health and gave cogent reasons why that was not an objection to him returning to Brazil, for example the existence of medical facilities. The grounds are a mere disagreement with the Judge's finding but do not indicate any error of law.

25. The 3rd Appellant states that he has engaged in studies, has friends and his life would be severely disrupted if he were to be required to return to Brazil. There is no indication that any medical evidence is available to substantiate the 3rd Appellant's claims. He is now an adult with the benefit of a United Kingdom education, he can speak Portuguese and I see no reason why he cannot fully integrate back into life in Brazil as the Respondent pointed out in her refusal letter. He has had the benefit of an education to which he was not strictly speaking entitled because he had no leave to be here. That was as a result of a decision of his parents not his but in any event there is nothing to indicate that it would be disproportionate to interfere with the private and family life 3rd Appellant has built up in this country whilst here unlawfully. The 3rd Appellant has made friends (it would be surprising if he had not) but he could remain in contact with them through modern means of communication. Importantly he would have the support of his immediate family as the Judge implicitly acknowledged at [34].

26. The point made at the hearing at first instance was that the 3rd and 4th Appellants could contribute to the United Kingdom but equally they could contribute to Brazil upon return and this factor is neutral. The 3rd Appellant also complained in his grounds of onward appeal that the effects of the assault upon him had not been fully taken into account by the Judge. The difficulty with this is that it is not at all clear what evidence was before the Judge regarding the assault which was not taken into account. As I have indicated there was no relevant medical evidence and without this evidence it is difficult to see how a physical attack in the United Kingdom could have an adverse impact on the 3rd Appellant's return to his country of origin. In conclusion, I find that the Judge did not make a material error of law in dismissing the Appellants' appeals and I dismissed their onward appeals against her decisions.

Notice of Decision

The decisions of the First-tier Tribunal did not involve the making of an error of law and I uphold the decisions to dismiss each of the Appellants' appeals

Appellants' appeals dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 3rd of January 2018

…….
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeals and therefore there can be no fee award.

Signed this 3rd of January 2018

…….
Judge Woodcraft
Deputy Upper Tribunal Judge