



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/14987/2016
HU/18341/2016
HU/18343/2016

THE IMMIGRATION ACTS

Heard at Field House
On 24th August 2018

Decision & Reasons Promulgated
On 10th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS A.M. (FIRST RESPONDENT)
MR K.N. (SECOND RESPONDENT)
MISS K.C.N. ("K") (THIRD RESPONDENT)
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr Walker, Senior Home Office Presenting Officer

For the Respondents: Ms J Bezzam of Counsel

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity direction is made. As the third Respondent is a minor, it is appropriate to do so.

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of a First-tier Tribunal (Judge T Jones) promulgated on 23rd March 2018 allowing the Respondents' appeals in respect of a decision made by the Secretary of State refusing to grant them leave to remain in the UK.
2. For the sake of clarity, throughout this decision, I shall refer to the Secretary of State as "the Respondent" and to the Respondents as "the Appellants", thus reflecting their respective positions before the First-tier Tribunal.
3. The Appellants are a family of three. The first Appellant A.M. is a citizen of Malawi born 4th October 1977. The second Appellant is her partner, K.N., a citizen of Nigeria born 17th February 1960. The third Appellant is their child, K.C.N whom I shall refer to in this decision as "K", born 19th July 2008.
4. The first and second Appellants have been in a relationship for the past thirteen years. K was born in the UK and has remained here ever since. She has now been in the UK for ten years and is eligible to apply for British citizenship.
5. The Appellants appeal against the decision of the Respondent dated 5th April 2016 refusing their applications for leave to remain. The appeals are brought under Section 6 of the Human Rights Act. It is said that the Respondent's decision amounts to a disproportionate interference with their right to family/private life under Article 8, ECHR.
6. The central issue of these appeals turns on the fact that K is a qualifying child for the purposes of Section 117(6) of the Nationality, Immigration and Asylum Act 2002. Therefore the issue before the First-tier Tribunal centred on whether it was reasonable to expect K as a qualifying child to leave the UK with her parents.
7. When the appeals came before the First-tier Tribunal, the judge made several findings. He directed himself that at the date of the hearing, K had spent more than nine years in the UK. He noted she was approaching the ten year mark. He further noted that Mr Choudhury (HOPO) accepted that K would be 10 years of age in the summer and therefore eligible to apply for British citizenship and all the benefits this imports. The FtTJ allowed the appeals, finding that it was in the best interests of K to remain in the UK with her parents.
8. The Respondent sought and was granted permission to appeal the FtT's decision. There were two grounds seeking permission. It was said firstly that the judge had erred in law by failing to consider the decision in MA Pakistan [2016] EWCA Civ 705 in that there had been a failure to take into account the first and second Appellants' extremely poor immigration history, when conducting the reasonableness test.
9. Secondly it was said that the judge had given improper weight to the fact that neither Appellant had been convicted of any criminal offences and given improper credit for the first and second Appellants' industriousness. The Respondent took exception to

these findings, in that it is long-established that credit should not be given for not being a criminal, and any industriousness on the part of the child's parents can only refer to the fact that they have been able to remain in the UK for a considerable period without leave. Thus it was said that the balancing exercise conducted by the FtT was flawed.

10. Permission was granted in the following terms:

“There is some substance in the ground that the judge fails to take into account, as part of the proportionality exercise, the adult appellants' adverse immigration history. The judge notes that the child appellant is a qualifying child but, there appears to be a lack of reasoning as to why the child could not be removed to Nigeria with her parents as a single family unit. This issue needs to be explored further.”

11. Thus the matter comes before me to decide whether the decision of the FtT discloses such error of law that the decision must be satisfied and remade.

Error of Law Hearing

12. Before me Ms Bezzam appeared for the Appellants and Mr Walker for the Respondent. Mr Walker referred to the grounds seeking permission. He said that a reading of the decision gives the impression that the FtTJ has treated the best interests of K as determinative. That would constitute a failure to follow the approach set out in **MA Pakistan** meaning that the Article 8 balancing exercise had not been conducted properly.
13. However he added in fairness that he accepted that K as a qualifying child had now been in the UK over ten years. Because she had been born in the UK, it followed that all her education was carried out in the UK system and because of her age, she was now approaching secondary education. He also acknowledged that the Respondent's decision letter did not spell out clearly the factors or difficulties concerning K's nationality. The child's mother is a Malawian but was born in Zimbabwe and therefore it is not clear that the child would be entitled to Malawian citizenship. Equally, the first and second Appellants are not married and it is therefore unclear that the child would be entitled to Nigerian citizenship.
14. Ms Bezzam's submissions amounted to saying that the judge's reasons were adequate, in that the FtTJ had engaged in the proportionality exercise [32]. Whilst the FtTJ might have taken the wrong approach in his failure to clearly factor in the first and second Appellants' poor immigration record, nevertheless he was entitled to conclude as he seems to have done, that K's best interests outweighed her parents' immigration history. That was a finding open to the judge on the evidence before him. The decision was sustainable.
15. At the end of submissions I announced that I was satisfied that there was sufficient evidence in the decision to show that it is overwhelmingly in K's best interests to remain in the UK and this outweighed the other factors when conducting the proportionality exercise under Article 8 ECHR. I now give my reasons for this finding.

Consideration

16. The main criticism levelled against the FtTJ is that he failed to properly take into account, and place the appropriate weight upon, the first and second Appellants' adverse immigration history when conducting the proportionality exercise under Article 8. It is said therefore that when considering the reasonableness test in Section 117(6), the proper balance between the public interest and the interests of the qualifying child had not been struck.
17. I find that it is correct to say that on a first reading of the FtTJ's decision, there is an appearance that the best interests of the qualifying child have been treated as determinative. The judge makes no mention of **MA Pakistan** and, had he done so and followed the structured principles set out in that decision, then his fact-finding may well have been clearer and not open to criticism.
18. However, that being said, I find that the initial approach of the FtTJ was correct, in that he recognised that the first step to be carried out in any decision involving a qualifying child is to see where the child's best interests lie. In this particular case it is undoubtedly correct that K's best interests lie in remaining in the UK. She was born here, has lived here all her life, has been educated here, and is now eligible for British citizenship with all the benefits that that imports.
19. As outlined in paragraph 13 above, according to her mother's statement, K would not be entitled to Malawian citizenship, nor would she be entitled to Nigerian citizenship on account of the fact that her parents are not married. Thus whilst it is said by the Respondent that both Malawi and Nigeria have functioning educational systems, in reality it remains unclear as to whether K would have access to schooling in either country.
20. I find that the judge failed to grapple with elements of the evidence regarding K's nationality and the status of her parents' relationship. Indeed it is unclear as to how he has reached his finding at [30] which appears flawed in that he said "... I set little if any weight by the claims made by the first and second Appellant as to the difficulties entering Malawi/Nigeria with the other respective *spouse* (my emphasis)." I find this is based on a misconception but that the error is not one that affects the materiality of the decision. I say this in the light of Mr Walker's acknowledgement that the Respondent had not dealt fully with the question of K's nationality given that the first and second Appellants are not married.
21. It must be recalled that the Grounds of Appeal mention the first and second Appellants' poor immigration history. The question that must be considered is whether their poor immigration history is sufficient to make it reasonable to expect K to leave the UK. She was born in the UK and has never lived in any other country. Her age means that, as the FtTJ found, she cannot be held responsible for overstaying or any breach of the Immigration Rules. It must also be recalled that family life between the first, second and third Appellants was established in the UK during a period when it appears they were lawfully resident here. The first and second Appellants have sought thereafter to regularise their status in the UK. I find that this

is not a case where there is any significant period where the Appellants have not been pursuing applications to regularise their stay. This means their immigration histories cannot be regarded as being so poor as to undermine the best interests of the third Appellant.

22. **MA Pakistan** establishes that “the fact that a 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.” In short applying these principles, there is no evidence to show that there are powerful reasons justifying removal of K and her parents. I find that the judge dealt adequately with this point.
23. Drawing all the threads together therefore, I find that the decision of the FtTJ allowing the appeals of Miss A.M., Mr K.N. & Miss K.C.N. is sustainable, and the appeal of the Secretary of State is dismissed.

Notice of Decision

The appeal of the Secretary of State is dismissed. The decision of the First-tier Tribunal promulgated on 23rd March 2018 stands.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellant and to the Respondents. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: C E Roberts
Deputy Upper Tribunal Judge Roberts

Date: 05 September 2018

TO THE RESPONDENT **FEE AWARD**

The First-tier Tribunal made full fee awards. That decision stands.

Signed: C E Roberts
Deputy Upper Tribunal Judge Roberts

Date: 05 September 2018