**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Numbers: HU/21895/2016
HU/21899/2016
HU/21900/2016
HU/21903/2016
HU/21906/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 28 September 2018** | **On 12 October 2018** |

**Before**

**UPPER TRIBUNAL JUDGE BLUM**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MS**
**RC**
**DEC**
**DIC**
**DOC**
**(ANONYMITY DIRECTION MADE)**

Respondents

**Representation:**
For the Claimant: Ms N Kenny, Home Office Presenting Officer
For the Respondents: Ms S Ferguson (Counsel), instructed by Solomon Shepherd Solicitors

**DECISION AND REASONS**

1. The Secretary of State For the Home Department (SSHD) appeals against the decision of Judge of the First-tier Tribunal Behan (the judge) who, in a decision promulgated on 18th March 2018, allowed the human rights appeals of MS, RC, DEC, DIC and DOC (hereafter the claimants) against the SSHD's decision dated 5 September 2016 refusing their human rights claims.

2. The claimants are citizens of Brazil. The first and second claimants are partners, the remaining claimants are their children. At the date of the judge's decision the third claimant was 15 years old and had been in the United Kingdom for nine years and three months. The fourth claimant was almost 13 years old and had also lived in the United Kingdom for nine years and three months. The fifth claimant was born in the United Kingdom in January 2014.

3. The judge set out the immigration history, which is not in dispute. The second claimant entered the United Kingdom in January 2005 but was then removed in July 2008. The first claimant entered the United Kingdom in June 2006 as a visitor and she overstayed. The second claimant married a Portuguese national in Brazil with the specific intention of returning to the United Kingdom on the basis of the relationship. The second claimant accepted that this was a marriage of convenience. The second claimant and the third and fourth claimants entered the United Kingdom on 23rd September 2008. On entering the UK, the first and second claimants continued their relationship with their children living with them as a family unit.

4. After previous human rights claims were refused the claimants made an application for leave to remain on 4th August 2016. This was considered by the SSHD as a human rights claim. The judge very briefly summarised in his decision the reasons given by the SSHD for refusing the human rights claims. Essentially, the SSHD did not accept that any of the claimants met the requirements of the Immigration Rules and that it was reasonable for the children to leave the United Kingdom with their parents.

5. Grounds of appeal to the First-tier Tribunal essentially contended that the third and fourth claimants met the criteria in paragraph 276ADE(1)(iv) of the Immigration Rules and additionally made reference to the fifth claimant's diagnosis that he was on the Autistic Spectrum (ASD).

6. At a hearing on 8th January 2018 the judge heard evidence from the first and the second claimants and briefly from the third and fourth claimants. In his decision the judge correctly directed himself as to the applicable burden and standard of proof. The judge found that the third and fourth claimants had been truthful and there has been no challenge to this finding.

7. The judge then found, for the most part, that the first and second claimants had been truthful. The judge commented that the second claimant had been extremely frank about his marriage to a Portuguese national which was contracted for the singular purpose of re-entering and remaining in the United Kingdom.

8. The judge rejected the 1st claimant's claim that she was unaware of the false marriage plan. Nor did the judge accept the evidence from the first and second claimant relating to the proficiency in Portuguese of the third and fourth claimants. The judge found that they would be able to speak Portuguese but accepted that they would not read or write the language to the same standard as if they had been brought up in Brazil.

9. The judge then considered the appeal under Article 8. The judge appreciated that the Article 8 human rights claim had to first be considered through the prism of the Immigration Rules. The judge correctly noted that both the third and fourth claimants had lived in the United Kingdom for more than seven years and that the issue under the Immigration Rules for the judge to decide was whether it was reasonable to expect them to leave the UK.

10. The judge then identified a number of relevant decisions and authorities relating to the best interests of the children and the correct approach to take when weighing up those best interests in an Article 8 proportionality assessment. The judge specifically made reference to the Court of Appeal decision in **MA (Pakistan) [2016] EWCA Civ 705**. At paragraph 23 the judge correctly noted that the best interests of the children were a primary consideration and that their parents' immigration history was not relevant to the best interests assessment.

11. The judge then noted the ages of the children when they entered the United Kingdom and their length of residence. The judge noted that a period of seven years from the age of 4 onwards was likely to be more significant to a child when it came to the assessment of the impact of removal on their wellbeing, this reflecting the decision in **Azimi-Moayed and Others [2013] UKUT 00197**.

12. At paragraph 25 the judge noted that the third and fourth claimants were at secondary school, and that they had formed friendships and interests outside of the family unit. The judge noted that they had put down roots and developed cultural, social and educational links. With reference to the evidence given by the third and fourth claimants the judge noted in particular the third claimant's anxiety about his safety should he be required to return to Brazil.

13. The judge found at paragraph 26 that the third claimant was at a crucial point in his education, that he was some months away from taking his GCSEs and BTech exams. The judge then noted that both the third and fourth claimants had wider family in the United Kingdom. The judge

concluded, at paragraph 28, that the best interests of the third and fourth claimants was for them to remain in the United Kingdom with their parents and their younger brother.

14. The judge then undertook an assessment of the evidence relating to the fifth claimant. The judge noted that it was not suggested that a change of home would and of itself be particularly difficult for the fifth claimant, and that the main issue raised on his behalf was that therapeutic and educational interventions had already commenced and that, if moved to Brazil, there would be, at the very least, an interruption with those educational and therapeutic interventions. The judge concluded that it was reasonable for the preferred interventions to continue uninterrupted and, for this reason, concluded that it was in the fifth claimant's best interests also to remain in the United Kingdom.

15. The judge then reminded himself at paragraph 37 that the best interests of children may be outweighed by the need to maintain immigration control. The judge proceeded to consider various factors that were, in his view, capable of ameliorating some of the disruption that would face the third and fourth claimants if they were required to leave the UK. The judge set out several factors that were capable of ameliorating the impact on the third and fourth claimants. The judge noted that they had extended family in Brazil who would be capable of being a source of support. The judge noted that there would be a home available for the claimants and that all the children spoke Portuguese. The judge noted that, although all the children had been socialised in the UK, they lived with their Brazilian parents and had frequent contact with other Brazilian relatives and would therefore have some familiarity with Brazil culture. With respect to the fifth claimant, the judge noted that his parents had the benefit of advice and training on autism and additionally observed that it was not unknown for families to take the decision to move countries for work or life experiences or indeed for children to move schools.

16. The judge satisfied himself that the decision to refuse the claimants' human rights claims was lawful and made for a legitimate purpose, and then, at paragraph 39, commenced his consideration of the issue of proportionality. In so doing the judge made reference to Section 117B of the Nationality, Immigration and Asylum Act 2002 and the various requirements and factors contained therein.

17. At paragraph 40 the judge expressly stated, when assessing the reasonableness of removal, that the immigration history of the first and second claimants was relevant. "*Their history is a matter to be taken into account and to do so is not the same as blaming or punishing the children for the actions of their parents over which they have no control.*"

18. At paragraph 41 the judge stated, "*The adult claimants have very poor immigration histories. They are not just overstayers but have deliberately used or been a party to deception to keep their family in the UK*." The judge noted that the second claimant had worked illegally for a number of years and that there had been repeated applications for leave to remain which had been refused. The judge additionally noted, at paragraph 41, that the family had been using hospitals, schools and other services paid for by the UK taxpayer when they had no right to be in the country, and finally noted the first claimant's lies at the hearing. The judge additionally noted, at paragraph 42, that, as the claimants had resided in the UK with illegal or precarious statuses, their private lives carried little weight. However, this primarily impacted upon the adult claimants.

19. The judge explained at paragraph 43, "*If this case concerned only the adult claimants and the fifth claimant I would have refused the appeal as I find the effect on him based on the evidence I have before me to be proportionate for the need to maintain immigration control*." Then at paragraph 44 the judge stated, "*However, in all the circumstances, giving due weight to the need* [sic] *the public interest in the maintenance of immigration control and taking into account the adult* [claimants'] *history I do not consider it is reasonable to expect* [the third and fourth claimants] *to leave the United Kingdom*." Having so concluded, and by reference to Section 117B(6) of the 2002 Act, the judge found that the public interest did not require the first, second or fifth claimants to be removed as they were part of the same family unit. The judge therefore allowed the appeals.

20. The SSHD sought permission to appeal to the Upper Tribunal.

21. In his grounds the SSHD submitted that the judge had considered the best interests of the children essentially as a 'trump card' and failed to carry out a proportionality exercise balancing their interests against the public interest. Ms Kenny reiterated this ground in her submissions. The grounds further maintain that the judge listed numerous reasons as to why it would be reasonable to expect the family unit to return to Brazil such as the children's ability to speak Portuguese, the familiarity with Brazilian culture, the fact that there was a home there and they had extended family who would be able to support them and the existing provision for autistic children in the country. It was claimed that the judge failed to give adequate reasons why the public interest was outweighed in these circumstances. The grounds contend that the judge attached weight to the education of the third and fourth claimants but failed to consider that this, as well as NHS treatment, had been gained at the public expense. The grounds finally note that the family had established their private lives by means of deception exercised by the parents and that the judge failed to give adequate reasons why it

would now be unreasonable for the Brazilian national children to return to that country.

22. In granting permission Judge of the First-tier Tribunal Cruthers stated, "*In my assessment it is arguable, as per the grounds in which the respondent seeks permission to appeal, that [in law] these appeals were not properly allowable. In particular, when deciding these appeals in the* [claimants'] *favour the judge may have wholly left out of account the duplicity of the adult* [claimants] *in relation to the UK's immigration laws [see the judge's paragraphs 5 on] and it seems to me arguable that the approach is contrary to the principles explained by the Court of Appeal in* ***MA (Pakistan) [2016] EWCA Civ 705****. As the respondent's grounds suggest reference might usefully be made to the principals explained in* ***EV (Philippines) [2014] EWCA Civ 874***."

23. In her submissions Ms Kenny reiterated that the essence of the appeal was that the judge used the best interests of the children as a 'trump card' without carrying out a full proportionality assessment. She drew my attention to all the factors that would ameliorate the impact on the third and fourth claimants if they were returned to Brazil. She submitted that the judge was not rationally entitled to conclude that it would be unreasonable to expect the children to return to Brazil having full regard to the public interest factors and, in particular, the very serious immigration history of the adult claimants.

## Discussion

24. It is simply not correct to state that the judge wholly left out of account, as referenced by the First-tier Judge granting permission, the duplicity of the first and second claimants in relation to UK immigration laws, or that the judge failed to appreciate the relevant public interest factors at play. The judge made specific reference to the second claimant's deception and his extremely poor immigration history at paragraphs 4, 5, 16, 20 (where the judge refers to the first and second claimants "*very bad immigration histories*"), and at paragraph 40 and at paragraph 41, where the judge again referred to and took into account ,when determining the issue of the reasonableness, the "*very poor immigration histories*" of the first and second claimants and the second claimant's illegal working and his failure to leave. it is abundantly clear that the judge was acutely aware of the adult claimants' poor immigration history and gave it its due weight.

25. The judge also made specific findings that the first claimant was lying about her knowledge of the marriage of convenience, and that both the first and the second claimants were not telling the truth in respect of their children's proficiency in Portuguese. These were all matters specifically identified and referred to by the judge in the course of his decision and, indeed, in his assessment of the issue of reasonableness. Nor is it correct to say that the judge failed to consider the children's

education and any NHS treatment that was gained at public expense. At paragraph 41 the judge specifically referred to the family using hospitals, schools and other services paid for by the UK taxpayer. It is quite clear that the judge was fully aware of these public interest point and that he gave full consideration to these factors in his assessment.

26. In my judgment it is simply not tenable that the judge approached the children's best interests as a 'trump card'. The judge properly directed himself in respect of the best interests of the children, noting that they were a primary consideration only, and that their parents' immigration history was not relevant to the best interests assessment. For reasons given by him at paragraphs 24 and 27 the judge was unarguably entitled to conclude that the best interests of the third and fourth claimants were to remain in the United Kingdom with their parents. In so doing the judge applied the factors identified in **EV (Philippines)**. At paragraph 31 the judge specifically and properly noted that the best interests of the children can be outweighed by public interest factors. Bearing all these factors in the round, I am satisfied that the judge did not treat the best interests as a trump card.

27. The judge also properly directed himself as to the legal test for the assessment of reasonableness under paragraph 276ADE(1)(vi) of the Immigration Rules and Section 117B(6) of the 2002 Act. In particular, in his assessment of the issue of reasonableness under Section 117B(6) the judge specifically took into account the relevant public interest factors, as required by **MA (Pakistan)**. These were identified in detail by the judge from paragraphs 32 to 42. They included the fact that the children had extended family in Brazil, they had a home available, that the older children spoke Portuguese, that the older children would have some familiarity with Brazilian culture, the parents' very poor immigration history and the use of public funds. Nor is there any merit in the ground contending that the judge failed to give adequate reasons to support his conclusion that it would be unreasonable for the children to return to Brazil. At paragraph 24 the judge noted the ages of the third and fourth claimants when they entered the United Kingdom and their length of residence and that they had both resided in the UK for more than seven years since the age of 4. The judge's assessment is consistent with the approach taken by the Court of Appeal in **MA (Pakistan)** where Lord Justice Elias stated, at paragraph 49, "*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 a child's best interests, and second, because it establishes a starting point that leave should be granted unless there are powerful reasons to the contrary*."

28. At paragraph 25 the judge noted that both the third and the fourth claimants were at secondary school, and that they had formed

friendships and interests outside of the family unit. The judge essentially found that the third and fourth claimants had both established identities that were moulded by their experience in the UK and by the culture and social links that they had developed.

29. At paragraph 26 the judge properly noted that the third claimant was at a crucial point in his education, and was undoubtedly entitled to this conclusion. The judge additionally noted the existence of wider family links in the UK. At paragraph 44 it is readily apparent that the judge balanced these reasons against the factors he had already identified as ameliorating the effects of removal, including, once again, the parents' very bad immigration history (which I note the SSHD specifically declined to hold against them as a Suitability point in the Reasons For Refusal Letter).

30. Having rejected the contention that the judge failed to take into account relevant considerations or to give adequate reasons, the remaining challenge, as accepted by Ms Kenny, is essentially one of perversity. The judge's conclusions, whilst perhaps generous, cannot on any reasonable view be regarded as being perverse. The judge heard oral evidence from the third and fourth claimants and was best placed to make an assessment of their evidence and the extent of their integrative links. The judge gave cogent and clear reasons for his conclusions, which were supported by the documentary evidence. The judge clearly considered the best interests of the third and fourth claimants as a primary consideration only and weighed those against what he clearly identified as the relevant public interests. In my judgment, the judge's decision was well within the range of decisions rationally open to him.

31. In these circumstances, and for these reasons, I find that there is no material error of law and I dismiss the Secretary of State's appeal.

## Notice of Decision

**The SSHD's appeal is dismissed**

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

Unless and until a Tribunal or court directs otherwise, the claimants 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 claimants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

5 October 2018
Date

Upper Tribunal Judge Blum