



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/23735/2016
HU/23739/2016
HU/23745/2016
HU/23746/2016

THE IMMIGRATION ACTS

Heard at Field House
On 21 June 2018

Decision & Reasons Promulgated
On 27 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

MITULKUMAR UPENDRABHAI JANI
KINJALBEN MITULKUMAR JANI
K M
K J
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms M Vidal, Counsel
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal brought by four family members, comprising parents and two sons, in respect of a decision of First-tier Tribunal Judge Mayall promulgated on 19 March 2018. I had occasion to revisit the provisional view I expressed at the outset of the hearing, and afforded Ms Vidal of Counsel, acting for all four appellants, and Mr

Wilding, on behalf of the Secretary of State, the opportunity of making detailed and focussed submissions on the issues raised on this appeal for which I am indebted.

2. The first appellant is a citizen of India born on 26 June 1982. The second appellant is his wife born on 6 October 1985. The third appellant, their son, was born on 30 July 2008 and will turn 10 years of age next month; and the fourth appellant, his brother, had his fifth birthday last March.
3. The decision of the First-tier Tribunal Judge set out the immigration history, the evidence of the first appellant, and (more shortly) that of the second appellant. In an appropriately succinct manner it recited the submissions made on behalf of the respective parties. The judge's assessment of that evidence is to be found at paragraph 30 and following.
4. The judge concluded [49] that neither the first nor the second appellant could meet the threshold criteria under paragraph 276ADE as the test of "very significant obstacles" to integration on return to India was not made out. There is no challenge to that finding. It was common ground that the fourth appellant has no free-standing claim under the Immigration Rules.
5. The judge rightly identified that the third appellant, having lived continuously in the United Kingdom for in excess of seven years, is a "qualifying child" within the meaning of paragraph 276ADE(iv) of the Rules and section 117B(6) of the Nationality, Immigration and Asylum Act 2000. The issue for determination, as the judge identified [50], was whether it would be reasonable to expect him to leave the United Kingdom.
6. The judge addressed the issues of the best interests of the children and concluded [45] it will inevitably be in the best interests of children as young as these to remain with their parents wherever that may be. There is more detailed analysis at [56]:

"I turn to consider the best interests of the children. As stated I am satisfied that their best interests lie in remaining with their parents wherever that may be. Given that they were both born here and have been here for some considerable time and given my findings set out above it seems to me likely that their best interests would now be served, ideally, by being with both parents in the United Kingdom. It is however a marginal matter. They are Indian citizens and are at an age when they could still readily adapt to life in their home country. They are at an age when they can still easily make fresh friendships. Children of this age are regularly moved from one country to another by their parents for reasons of employment or the like. The answer to whether their best interests lie in remaining in the UK is yes but it is not an emphatic yes."

7. The judge properly identifies the position as follows [58]:

“If it is not reasonable to expect the qualifying child to leave the UK then there is no public interest in removing the parents and obviously none in removing the children and separating the family.”

8. The following paragraphs are particularly salient to the Judge’s decision:

“59. The issue is therefore whether or not it is reasonable to expect the third appellant to leave the United Kingdom. I have found his best interests are, albeit marginally, in favour of remaining in the UK. I must however take account of all of the other circumstances in considering the question of reasonableness.

60. This is a family who have, quite deliberately as it seems, stayed in the United Kingdom despite the fact that the first appellant was applying for leave to remain as a student when, as I have found, he had no real intention of studying or returning at the conclusion of his studies and despite various human rights applications having been refused. They were without any leave to remain from, at least, January 2013.

61. Thus the qualifying child has established the 7 years continuous residence as a result of the parents’ failure to comply with the immigration laws of the United Kingdom. The extent of his private life, and that of the other child, which has led me to conclude that it is marginally in their best interests to remain in the United Kingdom, has occurred to a large extent whilst the family were in the United Kingdom without leave. I consider it likely that the parents have, indeed, been deliberately ignoring the decisions of the respondent in an attempt to string out their residence in the United Kingdom until such time as the eldest child has completed 7 years.”

9. The grant of permission to appeal identified the decision of **MT and ET (Child’s best interests; ex tempore pilot) Nigeria [2018] UKUT 88 (IAC)**, although this decision was not adverted to in the grounds settled on behalf of the appellants. Citing **MT and ET** the grant of permission reads:

“Powerful reasons are required to overcome the length of residence of children in the United Kingdom. There are no findings in relation to such powerful reasons. It is arguable that the decision contains insufficient reasoning in relation to paragraph 276ADE(iv) of the Rules, insufficient analysis of the test of reasonableness and insufficient consideration of Section 117B(6) of the 2002 Act.”

10. On my initial reading of the papers, I had come to the preliminary view that there was substance in this criticism. However, having heard full submissions and been taken to the full text of the Upper Tribunal decision in **MT and ET**, I have concluded that there is no error of law in the careful, clear and balanced decision of the First-tier Tribunal in this instance. My reasons are as follows.

11. The Upper Tribunal decision in **MT and ET** makes reference to the judgment of the Court of Appeal in **MA (Pakistan) and Others v Secretary of State for the Home Department [2016] EWCA Civ 705** and in particular the following passage from the judgment of Lord Justice Elias 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. Firstly because of its relevance to determining the nature and strength of the child’s best interests and secondly because it establishes that a starting point that leave should be granted unless there are powerful reasons to the contrary.”

12. In applying this principle to the individual facts of **MT and ET** the President puts the matter as follows in paragraph 34:

“In the present case there are no such powerful reasons. Of course the public interest lies in removing a person such as MT who has abused the immigration laws of the United Kingdom. Although Mr Deller did not seek to rely on it, we take account of the fact that as recorded in Judge Baird’s decision MT had at some stage received a community order for using a false document to obtain employment. But given the strength of ET’s case, MT’s conduct in our view comes nowhere close to requiring the respondent to succeed and Mr Deller did not strongly urge us to so find. Mr Nicholson submitted that, even on the findings of Judge Martin, MT was what might be described as a somewhat run of the mill immigration offender who came to the United Kingdom on a visit visa, overstayed, made a claim for asylum that was found to be false and who has pursued various legal means of remaining in the United Kingdom. None of this is to be taken in any way as excusing or downplaying MT’s unlawful behaviour. The point is that her immigration history is not so bad as to constitute the kind of powerful reason that would render reasonable the removal of ET to Nigeria.”

13. Ms Vidal submits correctly that the decision in this case makes no express reference to the decision of the Upper Tribunal in **MT and ET**, nor does the judge adopt or deploy the term “powerful reason” in the course of her decision. It is not clear when the decision in **MT and ET** was promulgated, but the appeal was heard on 9 January 2018, and the decision signed off by the President on 1 February 2018. The current appeal was heard by the First-tier Tribunal on 16 February 2018 and the decision promulgated on 19 March 2018.

14. However the decision in **MT and ET** was not breaking fresh ground or declaring new law. It was merely adding the lustre of additional clarity to the pre-existing position as the passage from the judgment of Lord Justice Elias in **MA (Pakistan)** (rehearsed above) makes plain. The judge’s analysis in this instance followed the approach which ought to be taken in cases such as these. All immigration appeals are fact-specific and

care must be taken in reading over from one case to another when the underlying facts are, by their nature, different.

15. As Mr Wilding persuasively submitted, in the current matter the judge made a very clear and careful finding that the children's best interests were marginally in favour of remaining in the United Kingdom [56]. As the judge herself put it, "The answer to whether their best interests lie in remaining in the UK is yes but it is not an emphatic yes." This is in stark contrast with the assessment of the Upper Tribunal in **MT and ET** which used the term "manifest" when determining where ET's best interests lay. The President states, at paragraph 31:

"Whether or not there is a functioning education system in [Nigeria], her best interests, in terms of section 55 of the 2009 Act, manifestly lie in remaining in the United Kingdom with her mother" (emphasis added)

16. As appears from paragraph 31 of the decision, the factors which seemed to have weighed most heavily with the Upper Tribunal in **MT and ET** were that ET had been in the United Kingdom for over 10 years, that she arrived in the country when she was only 4, that she is well-advanced in her education in the United Kingdom, having embarked in a course of studies leading to the taking of GCSEs, and that she is assumed to have established significant social contacts including those through her school and church community. In contrast, the third appellant in this case is not yet 10 years of age, he is at a less advanced stage in his education, and the judge's assessment (to which the Upper Tribunal should afford proper deference) was that his best interests favouring his remaining in the United Kingdom were marginal and not emphatic.
17. Proportionality assessments, and the evaluation of reasonableness, are for First-tier Tribunal Judges to make. I cannot find any error of law in the way in which the judge approached the matter, bringing all relevant considerations into account. Whilst there is a degree of brevity within paragraphs [59] to [61] of the decision, the level of detail with which the facts are addressed earlier in the decision gives me sufficient confidence that all relevant matters were in the judge's contemplation. The judge's summary at paragraph [55] of the approach endorsed in **MA** is impeccable. This is not a case of adopting a blunt and formulaic approach and "visiting the sins of the parents on the child". Nor is the judge asserting as an invariable rule, that poor parental immigration history should always trump the best interests of a qualifying child.
18. On the contrary, the analysis is nuanced and carefully articulated. There are two distinct matters in play, each with gradations of persuasiveness: one is the best interests of the qualifying child which may be strong or, as here, marginal; and the other is whether it is reasonable to expect the family unit to leave the United Kingdom. It is implicit that within the fact-specific circumstances of this particular case, the judge concluded that the powerful reasons for removal prevailed over the best interests of the children. I consider that the judge was perfectly entitled to come to the conclusion

that she did in paragraph [62] that, "Bearing in mind all these factors and the factors set out in section 117B, I am of the clear view that, in the circumstances, it is not unreasonable to expect the children, including the qualifying child, to leave the United Kingdom".

19. Although other matters were mentioned in the skeleton argument handed in on behalf of the appellants, none featured in the grounds nor were they pursued in oral submissions. In the absence of any error of law this appeal must be dismissed.

Notice of Decision

1. Appeal and decision of First-tier Tribunal affirmed.
2. No anonymity direction is made.

Signed *Mark Hill*

Date 26 June 2018

Deputy Upper Tribunal Judge Hill QC