Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02695/2018
HU/02696/2018
HU/02700/2018

THE IMMIGRATION ACTS

Heard at Field House in London
On 8 May 2019

Decision & Reasons Promulgated:
On 31st May 2019

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

O Appellant

M Appellant

J Appellant

(ANONYMITY DIRECTED)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Waithe (Counsel)
For the Respondent: Mr Kotas (Senior Home Office Presenting Officer)

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DECISION AND REASONS

1. On 7 January 2018 the Secretary of State refused applications made by each claimant for leave to remain in the United Kingdom (UK) on human rights grounds. Each claimant appealed but, on 13 September 2018, the First-tier Tribunal (the tribunal) dismissed each appeal. A grant of permission to appeal to the Upper Tribunal followed and, on 22 March 2019, I decided to set aside the decision of the tribunal, with respect to each appellant, and in doing so, I directed that the decisions be remade by the Upper Tribunal after a further hearing. That hearing took place before me on 8 May 2019. What follows is a setting out of the background circumstances and the issues in these appeals and an explanation as to how I have remade the decisions and why I have done so in the terms in which I have.

2. By way of background, all three claimants are nationals of the Philippines. Of those, the person I have called O is an adult female. The person I have called M is an adult male. The two are partners. The person I have called J is the child of O and M. O was born on 21 September 1974. M was born on 18 April 1982. J was born on 11 November 2010. Put simply and briefly, O and M entered the UK in 2009. They had both been given leave to enter for temporary purposes. O had leave to enter until 12 June 2012. M had leave until 30 November 2011. Those respective periods of leave expired but they have remained in the UK without leave thereafter. Prior to the expiry of those periods of leave J was born in the UK. He has lived all of his young life here. He is now receiving education in the UK but he has health and educational difficulties and that has led to the London Borough of Hammersmith and Fulham (which is responsible for his education) putting in place in respect of him an Education, Health and Care Plan (EHCP). On 12 June 2017 O and M sought leave to remain on human rights grounds and a corresponding application was made on behalf of J. Reliance was placed on Article 8 of the European Convention on Human Rights (ECHR). It has never been alleged that any of the claimants have any other possible basis of stay in the UK.

3. When matters came before the tribunal on 11 September 2018 it was argued that J, in his particular circumstances, fell within the terms of paragraph 276(ADE)(1)(iv) of the Immigration Rules. It was also argued that O and M could rely upon Article 8 of the ECHR outside the Rules bearing in mind in, particular, the content of section 117B (6) of the Nationality, Immigration and Asylum Act 2002 and the need to consider the best interests of a child pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009. That section creates a duty upon public bodies to safeguard and promote the best interests of children in the UK. So, when making an immigration decision, the Secretary of State must consider the best interests of any child who is in the UK and who is a subject of any such decision.

4. Paragraph 276(ADE) relevantly provides, as follows:

> "**Requirements to be met by an applicant for leave to remain on the grounds of private life**
>
> 276(ADE)(1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant…

> (iv) is under the age of eighteen years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK…".

5. As to section 117B of the Nationality, Immigration and Asylum Act 2002, that provides that the maintenance of effective immigration controls is in the public interest. Of potential importance with respect to the position of the adult claimants in consequence of the position of the child claimant, section 117B(6) provides as follows:

> 6. In the case of a person who is not liable to deportation, the public interest does not require the persons removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

6. It has never been disputed that both O and M have a subsisting parental relationship with J. It was not disputed before me, nor does it seem to have been disputed previously, that J is a "qualifying child". That is because although J is not a British citizen he has been in the UK for a period in excess of seven years.

7. With respect to Article 8 either within or outside the Immigration Rules, the burden of establishing entitlement rests upon a claimant. The standard of proof is that of a balance of probabilities. In deciding this appeal with respect to all three claimants, I have had the benefit of all of the documentation which was before the tribunal when it heard the appeal and made its decision. I have had the benefit of further documentation in the form of a bundle filed on behalf of all three claimants, a skeleton argument prepared on their behalf by Mr Waithe, and a document headed "Directory of Speech Therapy Centers (Philippines only)" provided by Mr Kotas. The bundle I have just referred to and which was filed on behalf of the claimants contained, amongst other things, a witness statement of O dated 20 April 2019, a witness statement of M also dated 20 April 2019 and an EHCP J dated 12 March 2019. I also had the benefit of hearing oral evidence from O and from M and then oral submissions from Mr Waithe and Mr Kotas. I am grateful to all of those persons.

8. O told me that all of the speech therapy centres referred to in the documents provided by Mr Kotas were in or around Manila which was ten hours away from the province in which O and M had resided in the Philippines in the past and where certain of their family members still resided. O explained that she had previously worked as a teacher in the Philippines and her partner had worked there as a physiotherapist. She has family currently living in the province where she used to live, being her mother (whom she says is elderly and has health problems) and two siblings. M has his parents there too but they are unwell. She thought she would be able to find work as a teacher in the Philippines but doubted that M would be able to find work as a physiotherapist because that profession is not in demand there. But anyway, O's concern, she explained, is not with her position but with that of J. He receives one to one specialist teaching support in the UK. He could not get that in the Philippines. He has speech and language difficulties and mild autism.

9. M gave much briefer evidence, doing no more than adopting his witness statement referred to above.

10. The oral submissions of the representatives followed. In summary, Mr Kotas pointed out that the only real issue for me to decide was whether it would be reasonable to expect J to return to the Philippines. I should adopt the approach set out by the Supreme Court in *KO and others v SSHD* [2018] UKSC 53. It would be in J's best interests for him to remain in the UK but that is not the same as saying it would not be reasonable to expect him to depart. O and M are from educated backgrounds and would be able to find employment in the Philippines. There are family members there. It does not appear that proper attempts have been made to find out what educational assistance might be available for J in the province of the Philippines to which the family would return if they had to return. Over all, it would be reasonable for them to return. Mr Waithe said he would rely very largely upon the content of his skeleton argument. As to that, the relevant provisions were paragraph 276(ADE)(1)(iv) of the Immigration Rules and section 117B(6) of the Nationality, Immigration and Asylum Act 2002. O and M clearly had parental responsibility for J. It was in J's best interests to remain in the UK. He has severe developmental speech and language disorder and social communication difficulties. He is receiving expert assistance in the UK with respect to that. He is a qualifying child and the public interest does not require the removal of any of the claimants.

11. The representatives are right to say that matters boil down to my assessment of the reasonableness of the return of J in the context of paragraph 276(ADE) of the Immigration Rules and section 117B (6) of the Nationality, Immigration and Asylum Act 2002. It has not been argued before me that any of the claimants can succeed if the relevant reasonableness tests (or I suppose at least one of them) are met. But the tests are essentially the same and no-one has suggested otherwise in the context of these proceedings. So, it is the question of the reasonableness of J's proposed return which I have focused upon.

12. In focusing upon that issue I have had particular regard to the judgment of the Supreme Court in *KO*, cited above. It is made clear, therein, that misconduct of the parents, in the context of the question of the reasonableness of return of a child, is not directly relevant. In other words, a child is not to be punished for misconduct of the parents by way of, for example, unlawfully overstaying. But it is also said in the judgment that the conduct of parents can have indirect relevance to an assessment of reasonableness in the relatively limited sense that it will normally be reasonable for a child to be with the parents and if the parents, through their record, cease to have a right to remain in the UK and have to leave, it might be thought that it would at least sometimes be reasonable for the child to leave in order to stay with those parents (see paragraph 18 of the judgment in *KO*).

13. Having reminded myself of what was said in *KO* and the content of the tests in statute and within the Immigration Rules which I have set out above, it is necessary for me to make findings of fact concerning the position of J. The particular concern which has been stressed and relied upon on his behalf and therefore on behalf of O and M, is his educational or developmental difficulties.

14. There was evidence of such difficulties when it heard the appeal and I have that documentary evidence in front of me. But I also have more up to date evidence in the most recent claimant bundle including, as I have said, the EHCP of 3 March 2019. That is a helpful document. It seems to me to give a good flavour of J's difficulties which is, of course, what one might expect. It confirms he has "a diagnosis of developmental speech and language disorder and social communication difficulties". It also refers to his having

cognitive difficulties. It is said that his social communication difficulties “may be suggestive of autism spectrum disorder” though it also suggests that they might be secondary to his speech and language disorder. Reference is made to his expressive language difficulties being severe. It is said that he has difficulty communicating with and interacting with his peers. It is noted that he attends a mainstream school setting but receives twenty hours of one to one educational support each week in addition to some speech and language therapy. There was some discussion before me as to whether there was or was not a clear diagnosis with respect to autism spectrum disorder. It seems to me that there is not, although there are indications that he might or very likely does have such a disorder. I have not found it necessary to make a precise finding as to diagnosis. It seems to me sufficient for me to decide that he has difficulties of substance which are mirrored in the quite considerable provision of twenty hours of one to one educational support each week.

15. J would, of course, if he were to return to the Philippines, do so with his parents. I accept Mr Kotas submission to the effect that O and M are from a professional background and have experience or qualifications which would aid them in finding work in the Philippines. I see no reason to disbelieve O when she tells me that M’s profession is not in any particular demand in the Philippines. But she acknowledged that she would be able to obtain work and I find that, given time, both would have good prospects of finding employment in their respective fields (or perhaps ij the case of M in another field which may be linked to the area in which he has professional qualifications) such that they would be able to cater for themselves and for J. Indeed such did not seem to be seriously disputed.

16. O gave evidence regarding the presence of various family members not only in the Philippines but also in the particular province to which it appears they would return if they had to return to the Philippines. She sought to stress that some of them are elderly and not in good health but there is no corroborative evidence of that. She did not refer to any specific medical conditions from which any of those family members suffer. I find on the material before me that of the relatives she mentioned in her evidence (see above) certain of them might not be in the best of health but any health problems there are, are not of real significance. I find that the family members that there are in the Philippines would be able to welcome J to that country and assist him, at least to an extent, with respect to any emotional difficulties and adjustments he might experience in settling to life there.

17. I have not been provided with very much in the way of evidence as to what provision might be available for J with respect to his educational and developmental difficulties if he has to return to the Philippines. The document produced by Mr Kotas at the hearing indicated the availability of some provision. O told me, in oral evidence, that the provision referred to was in a location far away from where she, M and J would go to live if returned. She also said that such was not provided free of charge. But in cross examination she also acknowledged that as to provision in the province to which she would return, she had simply assumed that nothing would be available without undertaking full research on the point. I have done my best to reach findings on the material before me but can do no better than to conclude that the evidence does not preclude the possibility that some degree of support, though I accept it is very unlikely to be of the level J is currently receiving, might be available in the Philippines.

18. My having set out my relevant factual findings together with the import of the judgment in *KO* and the relevant legal provisions, I must now consider whether it would or

would not be reasonable for J to return to the Philippines. My conclusion, it seems to me, would inevitably be the same with respect to the test within the Immigration Rules set out above and the test within the statute set out above.

19. As I have indicated, it is accepted that J is a qualifying child. It is accepted (or at least it has never been disputed at all) that M and O have a subsisting parental relationship with J. But those matters, of themselves, are not sufficient to mean the appeals succeed. The question, as I have already said, is one of reasonableness.

20. Neither M nor O have an independent right to be in the UK other than through their connections with J. Ordinarily, therefore, they would be expected to return to the Philippines.

21. J does have substantial difficulties as set out above. He is receiving a package of care and educational assistance in the UK which in my view is substantial. The nature of his particular difficulties (although this point was not made in terms) seem to me to be likely to make his resettlement in a country which he is not familiar with, his never having lived there, to be even more difficult than would otherwise be the case. It is understandable that his parents wish him to remain here to continue to receive that package of support. But in the Philippines he would at least have support from his parents and wider family. He would be in an environment where those immediately caring for him would be familiar with the culture and lifestyle. It has not been asserted that the family would have a life of poverty in the Philippines and I have found that M and O would have good prospects of finding employment. O tells me that she has no training or experience with respect to children with special educational needs and there is no reason why I should disbelieve her as to that. But as a teacher she might be able to assist J with his difficulties at least a little more than other parents in a different profession might be able to do.

22. In light of the above I do accept, as Mr Kotas in fact very fairly concedes, that it would be in the best interests of J to remain in the UK with both of his parents. But I also accept that a conclusion as to best interests, whilst it informs it, does not dictate the outcome with respect to an assessment as to the reasonableness of return for a child. In returning J will lose a great deal through his disconnection with the UK educational and health system. He has lived here all his young life. But I am dealing with matters in a context where there is an expectation that his parents should leave. The natural expectation following that is that he would go with them and I have concluded that requiring him to do so would, in all the circumstances, be reasonable. In so deciding I have taken account of the support he will receive from parents and other family and his parents' familiarity with life in the country to which they will be returning. That means that J does not himself succeed under paragraph 276(ADE)(1)(iv) and his parents do not succeed in an Article 8 assessment outside the rules on the basis of section 117B(6). It has not been argued that there is any other basis upon which any of them might succeed. Accordingly, in remaking the decision with respect to all three claimants, I dismiss their respective appeals from the decisions of the Secretary of State, made with respect to each of them, on 7 January 2018.

23. I have granted anonymity to each claimant. I was asked to do so by Mr Waithe in order to protect the privacy of J who is, of course, a minor child. Mr Kotas did not oppose a grant of anonymity.

Decision

The decision of the First-tier Tribunal, with respect to each claimant, has already been set aside. In remaking the decisions with respect to each claimant, I dismiss their appeals from decisions of the Secretary of State of 7 January 2018.

Anonymity

I grant each claimant anonymity pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, no report of these proceedings shall name or otherwise identify any of the three claimants or any family member. The grant of anonymity applies to all parties to the proceedings. Failure to comply may lead to contempt of court proceedings.

To the Respondent: Fee Award

I make no fee award.

Signed:

Dated: 28 May 2019

Upper Tribunal Judge Hemingway