



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/08734/2016
HU/08743/2016
HU/08749/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11 June 2018

Decision & Reasons Promulgated
On 5 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

N N (FIRST APPELLANT)
V A (SECOND APPELLANT)
K R A (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellants: Mr J Metzger, Counsel, instructed by Raj Law Solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the Appellants to the decision of First-tier Tribunal Judge Rowlands (the judge), promulgated on 9 October 2017, by which he dismissed their appeals against the Respondent's decision of 29 March 2016, refusing their respective human rights claims made on 24 September 2015. In essence, the claims were based upon the fact that the third Appellant, having been born in this country in 2009, had spent a considerable amount of time in the United Kingdom (although that period had not reached the seven year threshold as at the date the claims were made).

The judge's decision

2. The judge was unimpressed by certain aspects of the first and second Appellants' evidence. In particular, he did not accept their explanation as to why they had not sought to regularise their status in this country sooner than they did. He found that they had chosen to stay in this country unlawfully for their own benefit and "to make use of everything that the United Kingdom had to offer including having all the maternity care and delivery of the third Appellant without making a penny contribution." The judge also found that they had nothing to fear on return to Mauritius (it had at some point been indicated that there might be problems from one family or another). The circumstances of the third Appellant are dealt with in [20] and [21]. The judge finds that the third Appellant's "place" was clearly with his parents, wherever that may be. The judge accepted that the third Appellant had been doing well at school and had a number of friends here. He states there was no evidence to suggest that the child's welfare would be compromised by having to leave this country. The judge states that it would be "absolutely reasonable" to expect the child to go back to Mauritius.
3. Perhaps somewhat conspicuous by their absences are any references to the phrase "best interests", section 117B(6) of the Nationality, Immigration and Asylum Act 2002, or the leading case of MA (Pakistan) [2016] EWCA Civ 705.

The grounds of appeal and grant of permission

4. It has to be said that the grounds of appeal are lengthy, rather poorly drafted, and frankly did the Appellants' prospects of obtaining permission no favours at all. However, by a decision dated 4 April 2018 First-tier Tribunal Judge Pickup considered that it was just about arguable that the judge had failed to show that he had approached the relevant legal principles correctly, in particular as regards the third Appellant.

The hearing before me

5. Mr Metzger had helpfully provided a skeleton argument and bundle of relevant materials in advance of the hearing. He made four basic points. First, the judge was wrong to have seemingly connected the issue of best interests to that of lawful status in a country (with reference to [21] of the judge's decision). Second, the judge had

failed to conduct a proper best interests assessment prior to a consideration of the wider public interest factors in the case. Third, the judge had failed to have any reference to MA (Pakistan) and, more importantly, had failed even to make reference to the significance of the seven year threshold and section 117B(6). There was no indication that the judge had had any regard to the fact that the period of residence of over seven years as at the date of hearing represented a strong starting point for the third Appellant. Fourth, in respect of materiality, Mr Metzger submitted that if a proper consideration of all relevant matters had been undertaken, there was a realistic prospect that the outcome may well have been different.

6. Mr Duffy, in his customary fair and realistic manner, accepted that the judge's decision was poor in certain respects. There was a lack of structure and it was difficult to see that the judge had asked himself the right questions in the right order. It seemed as though any consideration of the third Appellant's best interests had begun and ended with the conclusion that he should stay with his family, with the judge then immediately going on to consider wider considerations before or instead of also assessing whether the best interests lay in the child remaining in the United Kingdom.

Decision on error of law

7. As I announced to the representatives at the hearing, I conclude that there are material errors of law in the judge's decision. In light of my discretion under section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007, I set the decision aside. My reasons for this are as follows.
8. With due respect to the judge, there is a lack of structure in his decision. There is no specific reference to "best interests", nor are there references to the primary statutory provision relevant to the appeal, namely section 117B(6). There is no reference to MA (Pakistan) either. Having said that, substance is almost always more important than form and I do recognise that at [16] the judge does make reference to the question of whether or not it would be reasonable to expect the third Appellant to return to Mauritius.
9. The real problem does, in my view, indeed lie in the substance of the approach undertaken by the judge, particularly in relation to [20] and [21]. Best interests assessments of children must be carried out in a clear and adequately-reasoned manner. The first error in the judge's approach is that whilst he was entitled to find that the best interests lay in the third Appellant being together with his parents, he also needed to address the question of whether the best interests *also* lay in him remaining in this country as a result of his birth here, length of residence, and all other relevant circumstances. With regards to [20], only the first limb of this assessment has been looked at. On my reading of this passage the judge has then immediately gone on to conclude that it would be reasonable for the third Appellant to leave the United Kingdom. The question of reasonableness, whilst an important element of the decision-making process as a whole, should have been left until after a full best interests' assessment had been carried out.

10. The second error, connected to the first, lies in [21]. With reference to the now rather out of date decision in LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (IAC) (I note that more relevant and appropriate case law was in fact referred to in the Appellants’ skeleton argument before him) the judge seems to connect the best interests assessment to the fact of lawful status in a country. This is wrong. The best interests’ assessment needs to be conducted without reference to the child’s status, or indeed the immigration history of the parents. This is a second error in approach.
11. The third error is the judge’s failure to have any regard to the very significant factor of the third Appellant’s seven and a half year residence in the United Kingdom as at the date of hearing. It is quite clear from MA (Pakistan) that once this threshold is crossed it represents a matter of “significant weight” in favour of a child remaining in the United Kingdom. As we have been recently reminded by the President in MT and ET (child’s best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC), “powerful reasons” need to be shown in order to counterweigh the lengthy residence of children in these circumstances. In my view the failure of the judge to address this factor constitutes a significant error in approach.
12. I have of course carefully considered the issue of materiality. It is right that the judge makes adverse findings in respect of the first and second Appellants’ immigration history. It is right, as a matter of fact, that none of the family unit have lawful status in this country. It is also the case that the third Appellant’s parents are well-educated and there was no expert evidence to suggest that his welfare would be severely impaired if he were to leave the United Kingdom. Notwithstanding these factors, I conclude that the errors I have identified above are material. It cannot properly be said that if the judge had approached the core issues before him correctly, the outcome of the appeal would inevitably have been the same.

Disposal

13. Both representatives were agreed that I could and should re-make the decision on the evidence before me.
14. Mr Metzger indicated that he wished, with permission, to call the first Appellant and adduce very limited oral evidence on a single issue, namely the third Appellant’s linguistic abilities. Mr Duffy had no objection to this. I gave permission, noting that it was a very limited issue and that this is just the sort of situation in which a pragmatic approach should be adopted in order to facilitate efficient re-making of decisions, rather than, for example remitting a case back to the First-tier Tribunal.
15. The first Appellant confirmed that she still wished to rely on the witness statement that was before the First-tier Tribunal. She was referred to paragraph 9 of that statement and told me that the third Appellant only speaks English: he did not speak either Creole or French. Mr Duffy then asked a number of questions. The first Appellant told me that she could speak Creole and sometimes speaks it with the second Appellant, although never in front of their son. She told me that they had always spoken to the third Appellant in English, even when he was a small baby.

The third Appellant had also of course been brought up with English when going to playgroups and at nursery.

16. Mr Metzger then made submissions on the re-making decision. He relied on his new skeleton argument. He pointed out that as of now the third Appellant has been in this country for nine years and three months. He was born here, is fully integrated and now reaching the end of Year 4 at primary school. I was referred to supporting evidence at B1-D2 and F6-F14 of the Appellants' bundle. Mr Metzger noted that the third Appellant had never been to Mauritius. He did not speak any of the main languages there. In respect of section 117B(6) and the reasonableness assessment, there were no powerful reasons to suggest that the third Appellant should leave the United Kingdom. The parents' immigration history was poor, but there were no really aggravating circumstances. I was referred to pages 74 and 76 of the Respondent's guidance on Appendix FM: Family life 10-year route, dated February 2018.
17. Mr Duffy submitted that the new evidence as to the third Appellant's linguistic abilities was either untrue (as an embellishment) or was an indication that the parents had contrived to make their claim stronger by deliberately not teaching their son to speak Creole. Mr Duffy submitted that the child was young enough to learn a new language in any event. Notwithstanding the third Appellant's age and educational ties, the best interests still remained in being with his parents. The first and second Appellants were longstanding overstayers and none of the family members had status in this country. In light of [18] of the judge's decision there was an adverse immigration history, and it may be that a false document had been used in the past. The third Appellant was not at a crucial state of his education.
18. In reply Mr Metzger submitted that the child's best interests lay in remaining with his parents and in the United Kingdom. He pointed out that the judge had not made a specific finding that deception had ever been used by the first or second Appellants. No suitability issues had been raised by the Respondent in the reasons for refusal letter. The parents had not taught their son to speak Creole because they wanted him to do as well as possible in the United Kingdom, and this included being fully integrated at a linguistic level. They may have been naïve in this but they were not cynical.
19. At the end of the hearing I reserved my decision.

My re-make decision

Findings of primary fact

20. Most of the relevant factual circumstances in this appeal are not in dispute. I find that the first and second Appellants came to the United Kingdom in 2007 and both became overstayers later that year. They have not had lawful status here since. I find that neither the first or second Appellants have any criminal convictions against their names. I find that the third Appellant was born in this country in 2009. He has never been to Mauritius. I find that he is nearing the end of Year 4 of his primary

school education. I find that he is healthy and has no educational or developmental difficulties. It is abundantly clear from the evidence from the school and other supporting documents, together with the simple fact that he was born in this country and has now resided here for over nine years, that this child is very well-integrated into British life. Rightly or wrongly, he has been brought up to think that he is, in essence, British.

21. In respect of the language issue, I do not accept Mr Duffy's submission that the first Appellant has lied to me at the hearing. I find that the third Appellant does in fact only speak English, as claimed. The evidence that he has been brought up in this medium in order that he be fully integrated into British life is, I find, credible. It may be somewhat naïve on the part of the parents to think that their future was almost certain to lie in this country rather than in Mauritius, but in all the circumstances I find that they have acted in good faith throughout.
22. I find that the first and second Appellants are themselves fairly well-educated and there is nothing to indicate that they would be unable to re-establish themselves in Mauritius. It is more probable than not that they would have some form of familial support in their home country.
23. As regards [18] of the judge's decision, I find that there is no express conclusion from the judge that either of them in fact used deception. I find that there has been no dishonesty on the particular of the parents. Having said that, I find, as did the judge, that a degree of blame is attributable to them in respect of the manner of their prolonged overstaying.

Conclusions: best interests

24. In light of my findings and all of the evidence before me I make the following best interests' assessment in relation to the third Appellant. It is clear that these interests lie in remaining with his loving parents. However, I also find that they lie in remaining in the United Kingdom. The third Appellant was born in this country and has only ever known it as his home. He is now over 9 years old and that is a really significant period of time. It is quite clearly way beyond the initial "early years" referred to in some of the case law. The third Appellant is obviously very well-settled in this country, both educationally and socially.

Conclusions: the Article 8-related Rules

25. I turn to the relevant Article 8-related Rules. It is common ground that the Appellants cannot rely on Appendix FM in any way. That must be the case.
26. In respect of paragraph 276ADE, it is quite clear that taking the circumstances of the first and second Appellants in isolation from those of the third, there are no "very significant obstacles" to re-integrating into Mauritian society. In respect of paragraph 276ADE(iv) the third Appellant cannot meet this provision because, as at the date of the claim in September 2015, he had only been in this country for approximately six and a half years.

Conclusions: section 117B(6) of the NIAA 2002

27. I turn then to section 117B(6). There is no question that the first and second Appellants have a genuine and subsisting parental relationship with the third Appellant. He has now been in the United Kingdom for some nine years and three months. The core question is therefore whether it would be reasonable to expect the third Appellant to leave the United Kingdom.
28. I conclude, first of all, that he would be expected to leave. This is because his parents would be removed and there is no suggestion whatsoever that he could possibly remain in this country alone.
29. I then direct myself to MA (Pakistan) with reference also to AM (Pakistan) [2017] EWCA Civ 180. I also bear in mind what the President said in MT & ET.
30. On the Appellant's side of the scales I take the following matters into account. The third Appellant's best interests lie in remaining with his parents and in remaining in the United Kingdom. Without wishing to repeat what I have said in paragraph 24, above, I emphasise the fact of his strong integration into British life, which has arisen from the fact that he was born here and has lived here for over nine years. There is clearly educational, social, cultural and linguistic integration. The fact that his residence has now gone beyond the seven year threshold by over two years is also of importance.
31. There are then the factors resting in the Respondent's side of the scales, namely the wider public interest considerations. First and foremost among these is the general public interest in maintaining effective immigration control, with reference to section 117B(1): that is of itself a significant matter. It is strengthened by the fact that the first and second Appellants are long term overstayers. They have had virtually no lawful residence in this country. The third Appellant has had no lawful residence here whatsoever. I place weight on these last two factors in addition to the general public interest issue.
32. The Appellants all speak perfectly good English. This is a neutral factor.
33. The family unit cannot be financially independent because the parents are not working, although there is no question of them receiving benefits or having engaged in unlawful employment. This factor counts against them.
34. I have had regard to the Respondent's guidance on Appendix FM and the reasonableness test, bearing in mind as I do the fact that that test is the same whether one is considering the Rules or section 117B(6). With reference to page 74, I of course bear in mind the fact that all of the Appellants are Mauritian nationals and there will probably be some form of familial support on return to that country. There are no wider familial ties in this country. The first and second Appellants clearly speak the main languages of Mauritius. There are no particular dangers relating to Mauritius. I then also bear in mind what is said in the guidance about the existence of "strong reasons" which may justify a child leaving the United Kingdom. The guidance

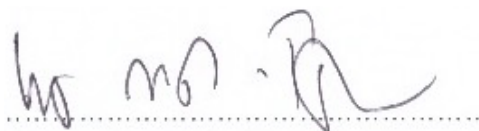
suggests that such “strong reasons” may arise where, for example, the parents have “deliberately sought to circumvent immigration control or abuse the immigration process – for example by entering or remaining in the UK illegally or by using deception in an application for leave to enter or remain”. In the present case the parents have remained in the United Kingdom illegally over a prolonged period of time, although I have found that no deception has been practised by them at any stage. There are no criminal matters recorded against the parents.

35. Weighing up all the relevant matters both for and against, I conclude that whilst there are certainly reasons, indeed what may be described as perfectly decent reasons, to justify requiring the third Appellant to leave the United Kingdom, these are not, on the facts of this case, sufficiently “strong” or “powerful” to outweigh his particular best interests. I do not consider that unlawful stay in the United Kingdom acts, in and of itself, as a “strong reason” sufficient to outweigh the third Appellant's best interests. On a general note, in my view a degree of caution must be exercised in order to avoid overstaying by parents becoming a “trump card” against children’s best interests. There are no such cards in play on either side of the scales. With specific reference to the third Appellant's circumstances, it is the length of residence since birth (over and above the seven-year threshold) in combination with the degree of integration into British life which provides the very weighty ballast to his claim.
36. In consequence of the above, I conclude that it would not be reasonable to expect the third Appellant to leave the United Kingdom. This has the direct effect that the first and second Appellants succeed in their appeals, as they are the primary “beneficiaries” of section 117B(6). However, it follows that the third Appellant must also succeed.
37. My conclusion in these appeals has been reached by a fairly narrow margin, I have to say. This is a case in which there is not very much that can be said in favour of the parents, but there is a child involved who has lived here all of their nine-year life and really is very well-integrated into British society. The wider public interest considerations are significant, but just not significant enough. A different judge may have reached a different conclusion: such is the nature of the Article 8 landscape.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I re-make the decision by allowing the Appellants’ appeals on the basis that the Respondent’s refusals of their human rights claims is unlawful under section 6 of the Human Rights Act 1998.



Signed

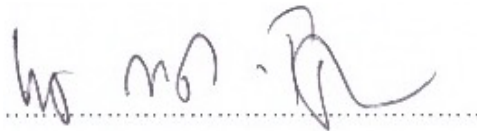
Date: 20 June 2018

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make reduced fee awards of £100.00 in each appeal, making a total of £300.00. The reduction is on account of the fact the third Appellant was not a “qualifying child” under section 117B(6) as at the date of the claims being made. The Appellants have succeeded on appeal in essence because of the passage of time and consequent strengthening of the child’s best interests.

A handwritten signature in black ink, appearing to read 'Ms M. J.', is written over a horizontal dotted line.

Signed

Date: 20 June 2018

Deputy Upper