Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/15325/2017
HU/16132/2017
HU/16135/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th December 2018	**On 5th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

D N D O
M T C
J N O
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms S Jones (Counsel)
For the Respondent: Mr S Kotas (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge A J Blake, promulgated on 31st August 2018, following a hearing at Taylor House on 16th August 2018. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State,

subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are a family of Ghanaian nationals. The first Appellant is the father, and he was born on 26th November 1976. The second Appellant is the mother, and she was born on 25th September 1978. The third Appellant is their child, and he was born on 4th March 2016, and is currently just over 2 years of age.

The Essence of the Appellants' Appeal

3. The essence of the Appellants' appeal focuses upon the condition of the third Appellant. This is a child who was born to the first and second Appellants 24 weeks prematurely. He had spent some time in neonatal intensive care. He was readmitted on several occasions. He had extensive healthcare provided from neurology. He also had additional physiotherapy, together with language and speech therapy. This was followed by further frequent appointments for his eyesight and hearing. He has had extensive in and outpatient treatment in relation to the chronic lung disease that he has developed as a result of being born prematurely and the incubation to which he was subject. The first and second Appellants claim that they are unable to return back to Ghana where treatment for their child would not be available, or would not be attainable by them, given their stringent financial circumstances. It is a feature of the appeal, nevertheless, that the child was born to them when they were in a "precarious" immigration situation, both having remained in the UK unlawfully for a number of years.

The Judge's Determination

4. It was for this reason, that the manner in which the appeal proceeded before the judge was that "the appeal was only being pursued outside of the Rules on the basis of the best interests of the third Appellant child" (paragraph 69). The judge heard evidence from the first Appellant and concluded that, "I had no doubt that he was an honest and credible witness. I noted that his evidence had gone unchallenged" (paragraph 70). The judge then went on to refer to the case law of **MA (Pakistan) [2016] EWCA Civ 705** and the decision in **Kaur [2017] UKUT 14** (at paragraph 72 of the determination). He referred to the Appellant's condition and "in particular, I noted he had delayed development in walking and speaking. More importantly I noted he had a chronic lung problem …" (paragraph 72). He also regarded it, "as honest the anecdotal evidence that had been given by the Appellant that he had spoken to some doctor friends who had advised him that such medical procedures would not be available to the third Appellant in Ghana" (paragraph 78). The judge went on to conclude that this was "an overwhelmingly powerful case" and that the third Appellant should be allowed to remain in the United Kingdom. It was clearly "in his best interests to receive medical treatment outlined in the

medical reports. I found that his removal would be very likely to cause unnecessary suffering and distress both for him and his family on all the facts of the case" (paragraph 82). The judge went on to also state that this was a case where "the third Appellant's best interests did not outweigh the public interest of his removal on the peculiar facts at large in the case" (paragraph 83).

5. The appeal was allowed.

Grounds of Application

6. The grounds of application state that the judge had elevated the best interests of the child above what was required, so that rather than treating this factor as "a primary consideration", what the judge has done was to make it "the primary consideration". Moreover in the case of **Zoumbas [2014] EWCA Civ 874**, the Supreme Court had recognised that in that case none of the Appellants "has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them …" (paragraph 60). The grounds also stated that the evidence did not demonstrate that the removal would breach Article 3 or 8 in terms of the moral and physical integrity of the third child, and the case law of **N** applied, which had not been considered by the judge.

7. On 25th October 2018 permission to appeal was granted.

Submissions

8. At the hearing before me on 6th December 2018, Mr Kotas, appearing on behalf of the Secretary of State, adopted the grounds of application. In clear, concise, and measured submissions, he stated that the child in this case was not a "qualifying" child, being only some 2 years of age. Therefore, the judge ought to have given equal weight to the public interest in this case, rather than prioritising the best interests of the child, which he appears to have done (at paragraph 81). He had gone on to conclude that this was a case where the third Appellant's "best interests did outweigh the public interest of his removal on the peculiar facts at large in the case", but there was no recognition in this entire calculus of the fact that the position of the first and second Appellants was "precarious". That went directly to what would be in the public interest.

9. Second, one had to consider the position in the "real world", and in circumstances where this was not a qualifying child, it was difficult to see why constant references were made by the judge to the decision in **MA (Pakistan)**, because that case is known for how the reasonableness criterion is to be factored into a situation where there is a child who would otherwise qualify to remain here.

10. Third, the judge was wrong to have taken at face value the anecdotal evidence (at paragraph 78) given by the first Appellant, when he said that

he had spoken "to some doctor friends who had advised him that such medical procedures would not be available in Ghana" (paragraph 78).

11. Finally, the factual findings were, in any event, open to question. If it was indeed the case, as the judge had found, that the removal of the third Appellant "would visit catastrophic results on their overall wellbeing", it did not make sense for the judge in the next breath to also say that, "I noted from the evidence that it was far from clear what the prognosis was for the third Appellant" (paragraph 79). This is no doubt a difficulty which, I am bound to say, was not of the judge's making, because as was noted, by the Appellants' Counsel at the hearing, "there had been no comprehensive expert medical report made available because the Appellants did not have the finance to obtain one" (paragraph 61).

12. For her part, Ms Jones submitted that she would rely upon her skeleton argument, which was helpfully clear and well referenced in relation to what was stated in the determination, with cross-references. She submitted that this was a decision that was unimpeachable. She stated that the judge had indeed taken into account "the issue of the precariousness of their immigration status," which the judge said "was a fact-sensitive one" (paragraph 68). The judge had, for that reason, been expressly asked to look at this appeal on the basis of it "being pursued outside of the Rules" (paragraph 69).

13. The criticism of the judge's reference to **MA (Pakistan)** was misconceived, because what the judge was there doing, was not treating this matter as if the Appellant was a "qualifying" child, but making the obviously more pertinent point, from the angle of the Secretary of State, that "the public interest elements as referred to in Section 117 of the 2002 Act", are such that "the best interests of the child could be overridden by public interest considerations even if it were in his best interests to remain in the UK" (paragraph 80). It was there, submitted Ms Jones, that the judge had referred to the case of **MA (Pakistan)**.

14. In the same way, the judge's reference to **EV (Philippines) [2014] EWCA Civ 874**, was again to emphasise the fact, as endorsed by the Court of Appeal, that "a Tribunal should apply the proportionality test where wider public interest considerations were in play and in circumstances where the best interests of a child dictated that they should remain the United Kingdom," in the particular manner that had been set out in that case at paragraphs 34 to 37 (which the judge noted in full in the body of the determination).

15. Ms Jones went on to say, however, that she would have to accept that the judge's acceptance of "the anecdotal evidence" from the first Appellant, that he had spoken to some doctor friends who had told him that treatment would not be available in Ghana, was an error, but this was not a material error. In fact, the error had only been made because the judge had already accepted the Appellant as a person who had provided honest

and credible evidence, and had also in relation to this matter provided "honest anecdotal evidence" (paragraph 78).

16. As for there being a lack of clarity as to what medical evidence would be available in Ghana, there was none. This is because the first Appellant was cross-examined on this issue. The judge set out the nature of the cross-examination. During the cross-examination, the Appellant had stated that he did not think it would guarantee that he would receive any financial support in Ghana for his child's treatment (paragraph 50). He had gone on to say that the economy in Ghana was in a bad way and that "it would be very hard for him to find employment" (paragraph 51). He had further stated that "it was an unfortunate fact that there was a very high rate of unemployment in Ghana" (paragraph 52). The judge had then made an express finding of credibility in relation to this issue by stating (at paragraph 70) that, "I had no doubt that he was an honest and credible witness. I noted that his evidence had gone unchallenged". I can say straight-away that it does appear to me to be the case that on this particular issue the evidence was indeed unchallenged, by the Presenting Officer.

17. In reply, Mr Kotas submitted that it was difficult to see how the statement by the judge that he had "accepted as honest the anecdotal evidence that had been given by the Appellant that he had spoken to some doctor friends" could not be material. This is because if it was simply anecdotal evidence, it could equally be assumed that medical treatment was indeed available in Ghana. To attach weight to this evidence was plainly a material error. Second, the judge had made no express finding as to the circumstances in Ghana of the third Appellant being able to get the necessary treatment. All that the judge had said was that he had found the Appellant to be "an honest and credible witness" and that "his evidence had gone unchallenged" (paragraph 70). This was not enough. There had to be a specific finding on this specific issue. Third, these matters were all relevant to the question of what would happen to this third Appellant were he to accompany his parents to Ghana. That third question could not be decided without an appropriate consideration being given in a full and fair way to the first two questions.

No Error of Law

18. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. I come to this conclusion, notwithstanding Mr Kotas's admirable submissions before me. Nevertheless, I am of the view that, it is not the case that the judge has prioritised the "best interests of the child" or with the public interest considerations in this case.

19. The judge has consistently referred to the Section 117B consideration (paragraph 67), to the "precariousness of their immigration status" (paragraph 68), to the fact that the best interests of the child "could be

overridden by public interest considerations even if it were in his best interests to remain in the UK" (paragraph 80), and to the proper way in which the proportionality test is to be applied, in cases where the public interest considerations are in play (paragraph 81).

20. He has come to the view, in the light of the particular circumstances of the third Appellant child (which are set out at paragraph 77), that if the Appellant were to be required to return to Ghana this "would visit catastrophic results" on the whole family (paragraph 79). That conclusion was open to the judge, even in circumstances where it was not clear what the prognosis was for the third Appellant. The judge's findings were that this was "an overwhelmingly powerful case" on behalf of the Appellant, in relation to his best interests, because if the Appellant were to be removed this would "very likely cause unnecessary suffering and distress both for him and his family on all the facts of the case" (paragraph 82).

21. In so concluding, the judge did not lose sight of the public interest, because he went on to say that "the third Appellant's best interests did outweigh the public interest of his removal on the peculiar facts at large in the case" (paragraph 83).

Notice of Decision

22. The decision of the First-tier Tribunal did not involve an error of law. The decision shall stand.

23. An anonymity direction is made.

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

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

25. The appeal of the Secretary of State is dismissed.

Signed Date

Deputy Upper Tribunal Judge Juss 4th March 2019