Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/21925/2018
HU/21934/2018
HU/21940/2018
HU/21944/2018
HU/21952/2018

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 19th August 2019	**On 16th September 2019**

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

RATIBA [F]
TAHAR [M]
[M M]
[H M]
[N M]
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellants: Themselves
For the respondent: Mr Bates, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The first appellant is married to the second appellant. The remaining appellants are their children. All are nationals of Algeria. The children were born in the United Kingdom. [MM] was born on 3 May 2011; [HM] was born on 12 September 2012 and [NM] was born on 5 November 2014.

2. The respondent sets out their immigration history. The first appellant states she came to the United Kingdom on a visit Visa on 3 November 2007.This cannot be confirmed. It is known however that in January 2008 the first and second appellants unsuccessfully claimed protection in the Republic of Ireland. This was refused. They then returned to the United Kingdom in May 2008. They went back to the Republic of Ireland in 2012 and made a further unsuccessful claim for protection. At that stage the third appellant had been born and was with them. They then returned to the United Kingdom. In May 2015 a claim for protection was made in the United Kingdom which was unsuccessful. Then, on 12 July 2018 applications were made for leave to remain on the basis of the family's article 8 rights. Those applications were unsuccessful. Their appeal against that decision was heard by First-tier Tribunal Judge Howard and dismissed.

The Upper Tribunal

3. Permission to appeal the decision of First-tier Tribunal Judge Howard to the Upper Tribunal has been granted. This is on the basis it was arguable the judge erred in law for not making specific findings about the best interests of the children, particularly the reasonableness of expecting them to leave the United Kingdom and section 117 B6.

4. The appellants were not represented in the First-tier Tribunal hearing nor are they represented now. They submitted their own application for permission to appeal and have attended at the hearing.

5. The application for permission to appeal did not identify any particular suggested errors of law. Rather, it repeats that the family want to stay in the United Kingdom and their life was stable here and their children can benefit from education. It states that Master Nazim has autism and requires special attention.

6. Mr Bates opposed the appeal. He relied upon the decision of KO (Nigeria) [2019] UKSC 53, stating the best interests of the children were to be with

their parents. In relation to the reasonableness of the return of the qualifying child he pointed out that the Supreme Court had endorsed the respondent's Guidance. He said the judge's decision was based on cumulative factors. The judge had noted that the family were being removed as a unit. They were being removed to their country of nationality. There were no language issues. The judge had regard to the ages of the children. Only one of the children was a qualifying child. The children were at primary school level. The judge found they would undoubtedly receive an education in Algeria. Whilst Nazim would not receive the level of support set out in his care plan in Algeria the judge saw no evidence he would suffer disproportionately if returned. The judge had pointed out that his paternal uncle was in Algeria and had mental disabilities and there was no suggestion he has suffered as a result.

7. At page 7 of the decision the judge set out the factors considered. The judge acknowledged that to remove them would be highly disruptive and that the children did not have any significant connection with Algeria, having been born and raised in the United Kingdom. Their only connection was through their parents. The judge did not accept the children were unaware of Arabic. At page 8 of the decision the judge referred to the respondents published Guidance and the reasonableness of expecting a qualifying child to leave.

8. The judge acknowledged that on return to Algeria a greater burden would be placed upon his parents for his care but that did not render the decision disproportionate.

9. The first appellant emphasised that her eldest child been in the United Kingdom over seven years and the children have developed connections here. She said that in Algeria the educational system operates through Arabic and French and they only speak Arabic. She said that the family were self-sufficient and not a drain on public funds.

Consideration

10. The appellant's have not engaged legal representatives in either the First-tier appeal or for the Upper Tribunal hearing. The grant of permission refers to the application apparently being drafted by the appellants in person. They did not specifically plead any error of law. Permission was granted on the basis there were Robinson obvious points: thus it could be argued the First-tier Tribunal judge had not made specific findings in relation to the best interests of the children and the reasonableness of expecting the eldest child to leave for the purposes of section 117 B6 (see Nixon (permission to appeal: grounds) [2014] UKUT 00368 (IAC))

11. The first appellant has indicated an awareness that if a child has been here seven years then this is a relevant factor. Before me she pleads basically to remain on the basis their lives are better here than in Algeria and the children can benefit from education. The youngest child has autism and there is a care plan in place.

12. It should be born in mind that where it is contended that the duties enshrined in section 55 of the Borders, Citizenship and Immigration Act 2009 have been breached, the onus rests on the appellant and the civil standard of the balance of probabilities applies. There is no onus on the Secretary of State. (MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC))

13. The first appellant has not disputed the factual accuracy of the First-tier Tribunal decision and in particular, the immigration history. Because she was unrepresented the judge took her through the material aspects of her claim and invited her to expand. Following the presenting officer's submissions the judge discussed with the appellant the appeal being made. There is nothing to suggest any procedural unfairness in the way the hearing was conducted.

14. The judge sets out the immigration history. Notably, at paragraph 12 it was recorded that the first and second appellants are from large families with siblings living in Algeria.

15. The judge at paragraph 14 noted that the adults did not have lawful status and there was no evidence of employment. The focus in the claim was upon the children. At paragraph 15 the judge noted the eldest child was a qualifying child and she and her sister are both at school and doing well. The judge was told that the children did not speak Arabic but in the course of the hearing the first appellant addressed her daughters in Arabic and they appear to respond.

16. At paragraph 16 the judge refers to the youngest child being autistic and the subject of a care plan. The judge refers to the most recent draft plan whereby his needs can be addressed in a mainstream school. He is involved with the speech and language therapy service and the plan envisages various ways to support him with a view to his achieving a degree of independence.

17. Under the heading `Findings' the judge recorded that whilst the family had not claimed public funds they had nevertheless been a burden on the public purse by recourse to services, principally accommodation and healthcare and education for the children.

18. The judge found that the immigration rules were not met and considered the appeal on the basis of freestanding article 8 rights. The judge found that article 8 was engaged particularly in relation to the children. The judge accepted that the two older children have established a private life outside the family and that private life was established in relation to the youngest child because of his special needs. The judge then considered the proportionality of the decision particularly in relation to the children.

19. The judge specifically refers to section 117 B. The judge went on to consider in the balancing exercise the weight to attach to the private life established by the children. The judge referred to MA (Pakistan) and others [2016] EWCA Civ 705 and the comments there about a child who has lived in the United Kingdom for seven or more years. The judge comments that the disruption caused by removal may be less with the child is very young. In the present appeal at the time of hearing the eldest child was approaching her eighth birthday. She had spent all her life in the United Kingdom. The judge accepted that the eldest child could not be characterised as very young. The judge sets out the guidance at paragraph 48 of that decision on factors relevant in determining the child's best interests. This includes age and how long they had been in the United Kingdom and how long they have been in education.

20. The judge at page 7 applies those considerations to the appeal. None of the children had completed their primary education. The judge referred to jurisprudence to the affect that where a child gets older their private lives extend beyond the boundaries of the family unit. The judge acknowledged that to remove them would be highly disruptive. The judge also acknowledged that the children did not have a connection was Algeria beyond through their parents. However, on return they will continue to be with their parents. The judge rejected the claim that the children could not speak Arabic and makes the point that in Arabic speaking household they would have learnt the language.

21. The judge specifically deals with the youngest child. He was at the very beginning of his education and the special needs plans have been preparatory. The judge found that his private life outside the family was very limited. The judge acknowledged that the facilities for his needs may not be the same in Algeria as here but did not believe he would suffer as a result.

22. The judge pointed out that the adults had been here unlawfully at best since shortly after their arrival. The judge referred to what Lord Hope said at paragraph 44 of ZH (Tanzania) [2011] UK SC 4 about the tensions between the need to maintain immigration control and the best interests of the

children as a primary consideration. The quotation comments on the conduct of parents and states that considerations of that kind cannot be held against the children and that it would be wrong in principle to devalue what was in their best interests by something which they could not be held responsible for.

23. The judge then went on to consider the wider public interest in the proportionality of the decision. The judge referred to the guidance in place and the reasonableness of expecting the child to leave the United Kingdom quotation refers to a qualifying child.

24. At the end of paragraph 23 the judge is clearly influenced by the fact that the intention is for the whole family to be returned to Algeria. The extent to which the eldest child is engaged with her education is limited. The judge thought she would undoubtedly receive an education in Algeria. The youngest child would not receive the level of support reflected in the care plan drawn up here but there was no evidence he would suffer disproportionately.

25. I do note that the judge has not referred to KO (Nigeria) [2018] UKSC 53 which disapproved the reasoning in MA (Pakistan) & Others [2016] EWCA Civ 705 in so far as the immigration history of the parent being relevant. The question of whether it is reasonable to expect a child to leave the UK was to be decided without considering the immigration history of the parents. The immigration history is relevant however as to whether the parents will be leaving the UK. To that extent their record becomes indirectly material because it may lead to them having to leave the UK. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain.

26. The fact a child has been here seven years does not mean their appeal. and through them their parents appeals. must necessarily succeed. Insofar as section 117 B(6) is a factor the consideration is the reasonableness of expecting the child to leave.

27. At times in the decision the position of the children is rolled up with the consideration of the proportionality of the decision. However, the judge clearly focused upon the best interests of the children. The key issue in relation to removal is the question of reasonableness. I do not see any were in the decision where the consideration of the children's best interests has been prejudiced by their parent's immigration history. What influenced the judge was the intention that they would be returned as a family unit to Algeria. As a starting point it is in the best interests of children to be with both parents and if both parents are being removed so should dependent children who form part of their household unless there are reasons to the

contrary. There was nothing to suggest that the parents, absent the children had any right to remain.

28. The judge evaluated their interests in the context of them being returned to Algeria with their parents. In doing so the reasonableness of expecting them to leave was considered. The judge evaluated the different stages the children were at. The judge commented that the eldest child was still in primary education and could transit to education in Algeria. She was a qualifying child. The youngest child had not started school. He would lose out on the benefit of the preparatory educational plan. However the test is not a simple comparison of the relative facilities in different countries.

29. It is my conclusion that notwithstanding specific reference to section 117 B (6) and KO (Nigeria) [2018] UKSC 53 the principles there and in the earlier jurisprudence has been adequately considered.

Decision

I find no material error of law established in the decision of First-tier Tribunal Judge Howard. Consequently, that decision dismissing the appeals shall stand.

Deputy Upper Tribunal Judge Farrelly Date: 15 September 2019