Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08272/2017

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 6th June 2019	**On 29th July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

BM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Pipe of Counsel instructed by TRP Solicitors
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant is a citizen of Zambia born 17th November 1972. He appeals against a decision of Judge Dhaliwal (the judge) of the First-tier Tribunal (the FtT) promulgated on 29th March 2018.

2. The Appellant entered the UK as a student on 15th September 2002. He was subsequently granted further leave to remain as a student until 2nd

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July 2009. He was joined by his wife in May 2006 and she was granted leave in line with the Appellant.

3. The Appellant and his wife have three children born in the UK on 27th October 2009, 6th September 2011, and 9th July 2013.

4. On 2nd August 2011 the Appellant applied for leave to remain in the UK outside the Immigration Rules. This was refused on 23rd September 2011 with no right of appeal. Judicial review proceedings followed. Eventually the application was refused by the Respondent on 21st July 2017 with a right of appeal.

5. The Respondent did not accept that the relevant provisions of the Immigration Rules could be satisfied, and did not accept that the application disclosed any exceptional circumstances which would lead to unjustifiably harsh consequences if the application was refused. It was accepted that the Appellant's middle child, to whom I shall refer as D, suffers from autism, but the Respondent's view was that adequate facilities are available in Zambia to treat children who are autistic.

The First-tier Tribunal Hearing

6. The judge found that Article 8 was engaged and found at paragraph 27 that the best interests of the children would be served by remaining with their parents. In that paragraph the judge found that the "children are not of an age that they have put firm roots down in friendships, such aspects are subject to change". The judge found that the children had no right to future education and healthcare in the UK.

7. The judge found that the eldest child, to whom I shall refer as J, is a qualifying child having accrued more than seven years' continuous residence in the UK at the date of hearing and therefore considered section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

8. The judge went on to consider whether it would be reasonable to expect the child to leave the UK, and had regard to MA (Pakistan) [2016] EWCA Civ 705 on the basis that she was entitled to take into account public interest considerations when assessing the question of reasonableness, which included the immigration history of the parents of the qualifying child, and their conduct in the UK. The judge also took into account the Respondent's own guidance, which states that where a child is a qualifying child by reason of at least seven years' continuous residence, there must be strong reasons for refusing leave.

9. The judge considered significant factors in relation to reasonableness at paragraph 33(i)–(xii).

10. The judge concluded that it would be reasonable for the Appellant (presumably the judge meant reasonable for the qualifying child) to return to Zambia.

11. The judge went on to find the Respondent's decision to be proportionate and the appeal was refused on human rights grounds.

The Application for Permission to Appeal

12. In summary, it was contended that the judge had made an irrational finding, or alternatively made a material misdirection of law in finding at paragraph 27, that the children were not of an age to have put down firm routes in friendships. The judge had failed to properly consider the cumulative long residence of the children and the best interests assessment was flawed. The judge had failed to consider paragraph 46 of MA (Pakistan) which makes reference to the need for strong reasons for refusing leave to a child who has seven years' continuous residence.

13. It was submitted that the finding at paragraph 27 contradicted the judge's finding at paragraph 15 in which she found that the Appellant and his family "have established a strong family and private life in the United Kingdom".

14. It was submitted that at paragraph 23 the judge had failed to recognise that eight years' residence creates a strong presumption that the child's best interests will be served by remaining in the UK with his parents.

15. It was submitted that the judge's treatment of the Respondent's delay in making a decision, between August 2011 and July 2017 was inadequate. The judge had failed to realise that the delay materially reduced the public interest in removing the Appellant and his family.

16. It was submitted that the judge had failed to consider background evidence contained in section B of the Appellant's bundle, in relation to the care of autistic children in Zambia. That evidence demonstrated a lack of understanding of autism, a lack of education provision, superstition leading to ostracism, and a prevailing situation which would lead to the child's health and wellbeing being harmed in Zambia. The judge had not properly engaged with that evidence.

17. The judge had failed to consider material matters, by failing to give proper consideration to the extent of D's autism.

18. The judge had made an irrational finding at paragraph 36 by concluding that there were strong reasons for refusing leave to remain, and the decision did not identify the required strong or powerful reasons.

Permission to Appeal

19. Permission to appeal was granted by Judge Storey in the following terms;

> "It is arguable that in assessing the issue of the reasonableness of expecting the eldest child to leave the UK, the judge failed to apply the guidance set out by the Court of Appeal in MA (Pakistan) requiring strong reasons to be shown for why the child should not remain in the UK.

I do not exclude any of the grounds from being argued".

The Upper Tribunal Hearing – Error of Law

20. Mr Pipe relied upon the grounds upon which permission to appeal had been granted. I was asked to note that subsequent to the FtT decision, the decision in KO (Nigeria) [2018] UKSC 53 had been published which Mr Pipe submitted demonstrated that the judge had been wrong in law when considering reasonableness. The judge had taken into account the behaviour and immigration history of the parents, including their overstaying, and KO made it clear that that was not a relevant consideration.

21. Mrs Aboni relied upon the Respondent's response dated 1st October 2018 submitted pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, contending that the judge had fully considered the position of the children in assessing the question of whether it would be reasonable for them to leave the UK. The judge had correctly considered the best interests of the children. The judge was entitled to find that D, who suffered with autism, could be adequately provided for in Zambia.

22. In my view the FtT decision is comprehensive and prepared with care. However, I was persuaded that the judge had erred in law although she could not be blamed for this. The judge had followed the guidance in MA (Pakistan), in taking into account the behaviour of parents when assessing whether it would be reasonable to expect a qualifying child to leave the UK. This approach was found to be legally incorrect by KO (Nigeria). I set out below paragraphs 16 and 17 of KO (Nigeria);

> "16. It is natural to begin with the first in time, that is paragraph 276ADE(1)(iv). This paragraph is directed solely to the position of the child. Unlike its predecessor DP5/96 it contains no requirement to consider the criminality or misconduct of a parent as a balancing factor. It is impossible in my view to read it as importing such a requirement by implication.
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> 17. As has been seen, section 117B(6) incorporated the substance of the rule without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is 'reasonable' for the child. As Elias LJ said in MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber) [2016] EWCA Civ 705, [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Section 117B(6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv)".

23. Further guidance on this point was given in AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661 and I set out below paragraph 59 of that decision;

> "59. Accordingly the position has now been reached in which this Court is not only free to depart from the approach taken by Laws LJ in MM (Uganda) but indeed is required to do so in order to follow the binding decision of the Supreme Court in KO (Nigeria). That can be done by following the preferred approach of Elias LJ in MA (Pakistan), at para 36, where he said:
>
> > 'Looking at section 117B(6) free from authority, I would favour the argument of the Appellants. The focus on paragraph (b) is solely on the child and I see no justification for reading the concept of reasonableness so as to include a consideration of the conduct and immigration history of the parents as part of an overall analysis of the public interest. I do not deny that this may result in some cases in undeserving applicants being allowed to remain, but that is not in my view a reason for distorting the language of the section. Moreover, in an appropriate case the Secretary of State could render someone liable to deportation, and thereby render him ineligible to rely on this provision, by certifying that his or her presence would not be conducive to the public good'".

24. It is clear that the judge when considering reasonableness of J leaving the UK, took into account the immigration history of his parents at paragraph 33. KO (Nigeria) makes it clear that this is an incorrect approach, and I must conclude that this amounts to a material error of law. The decision of the FtT was set aside. Having set aside the FtT decision I was invited to re-make the decision without a further hearing, which I agreed was appropriate.

Re-making the Decision – My Conclusions and Reasons

25. It was accepted on behalf of the Appellant that he could not satisfy the requirements of the Immigration Rules. I am asked to consider Article 8 of the 1950 European Convention outside the Rules. I find that Article 8 is engaged. The Appellant has established family life with his wife and children, and the family have established private lives. There would be no interference with their family life if they were removed to Zambia together, but there would be interference with their private lives.

26. The burden of proof lies on the Appellant to establish his personal circumstances in the UK, and to establish that family and private life exists which engages Article 8, and why the decision to refuse the human rights claim interferes disproportionately in family and private life rights in this country. It is for the Respondent to establish the public interest factors weighing against the Appellant. The standard of proof is a balance of probabilities throughout. In deciding this appeal I take into account the balance sheet approach recommended at paragraph 83 of Hesham Ali [2016] UKSC 60.

27. The factual matrix is that the first Appellant has resided in the UK since 2002 when he arrived as a student. He was joined by his wife in May 2006. The couple have not had leave since 2nd July 2009.

28. The couple have three children, all of whom were born in the UK. The children are now aged 9, 7, and 5. Two of the children are therefore qualifying children by reason of having accrued seven years' continuous residence in the UK. The middle child, D, is autistic and has special needs which are being catered for in the UK.

29. If it were not for the children, I find that the Appellant's appeal would fail. Because the appeal involves children I must consider their best interests as a primary consideration. This does not mean a paramount consideration or the only consideration, and the best interests of the children can be outweighed by other considerations if appropriate.

30. At paragraph 49 of MA (Pakistan) it is stated that the fact that a child has been in the UK for seven years must be given significant weight because of the relevance in determining the nature and strength of the child's best interests, and because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary. The latest Home Office guidance on this issue was published on 11th April 2019. At page 68 there is reference to a child who has lived in the UK for a continuous period of at least seven years, and it is recognised

> "that over time children start to put down roots and to integrate into life in the UK. The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interests for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK".

31. The length of residence is therefore relevant. Factors relevant to considering the best interests of a child are set out in paragraph 35 of EV (Philippines) [2014] EWCA Civ 874. The factors involve considering the age of the child, the length of time the child has been in the UK, how long the child has been in education and what stage their education has reached. There must also be consideration of the extent to which the child has been distanced from the country where it is proposed they return, how renewable the connection with that country may be, and to what extent the child will have linguistic, medical or other difficulties in adapting to life in that country, and the extent to which the course proposed would interfere with the private life of the child or the child's rights, if there are any, as a British citizen.

32. The three children were all born in the UK. I must take into account that the eldest two children have lived in this country for in excess of seven years. Both are in education although it could not be said they are in a critical stage of their education. However, the second child, D, does have significant special needs which are being catered for. Background evidence does indicate that there are some facilities for autistic children in

Zambia, but it is clear that those facilities are of a significantly lower standard than the facilities available in the UK.

33. Because of the length of continuous residence, and the autism of D, I conclude that the best interests of the eldest child J, and the middle child D, would be to remain in the UK where they were born. The third child is younger, and their best interests would be served by remaining with their parents. Because I find that the best interests of the elder children would be served by remaining in the UK, I conclude it would be in the best interests for the third child to also remain in the UK.

34. Having found that it would be in the best interests of the children to remain in the UK, that does not however mean that the Appellant's appeal must be allowed. I must consider any other relevant considerations, including the public interest.

35. I must have regard to the considerations in section 117B of the 2002 Act, which confirms that the maintenance of effective immigration controls is in the public interest.

36. In particular I must consider section 117B(6) which for ease of reference I set out below;

> '(6) In the case of a person who is not liable to deportation, the public interest does not require the person's 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.'

37. The Appellant is not liable to deportation. It is accepted that he has a genuine and subsisting parental relationship with his children. J and D are qualifying children because they have resided continuously in the UK for a period in excess of seven years. J has now accrued in excess of nine and a half years' residence and D in excess of seven and a half years' residence.

38. I therefore have to decide whether it would not be reasonable to expect J and D to leave the United Kingdom. The guidance in MA (Pakistan) to the effect that seven years' continuous residence must be given significant weight because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary (paragraph 49) remains good law. The Respondent's own guidance indicates that the Respondent would not normally expect a qualifying child to leave the UK. KO (Nigeria) confirms that when considering reasonableness, I must focus on the child, not on the immigration history of the parents.

39. I do not find that there are any powerful or strong reasons why the qualifying children should not be granted leave to remain. The length of residence is significant, as is the treatment that D receives for autism. I conclude that it would not be reasonable to expect the two qualifying children to leave the UK where they have resided since birth.

40. Having made that decision, it follows that the public interest does not require the Appellant's removal, as he has a genuine and subsisting parental relationship with his children. It also follows that leave should be granted to the Appellant's wife and youngest child so that the family unit can remain together.

41. As section 117B(6) is satisfied, I find that it would be disproportionate to remove the Appellant from the UK as the public interest does not require his removal, and therefore his appeal is allowed with reference to section 117B(6) and Article 8 of the 1950 Convention.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal is allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

Anonymity

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 his family. Failure to comply with this direction could lead to contempt of court proceedings. This direction is made because the Appellant's children are minors, and is made pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date 13th June 2019

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

I make no fee award. The appeal has been allowed because of matters considered by the Upper Tribunal following Supreme Court case law which had not been published when the initial decision was made.

Signed Date 13th June 2019

Deputy Upper Tribunal Judge M A Hall