Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA338292015
IA338312015
IA338332015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 10th July 2017	**On 17th July 2017**
Prepared on 11th July 2017	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

ANELICE [F] – 1st Appellant
JVM – 2nd Appellant
JMM – 3rd Appellant
(Anonymity order not made in relation to the 1st Appellant)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A. Alam of Counsel
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are all citizens of Brazil. The first Appellant who I shall refer to as the Appellant was born on 26th of November 1978 and is the mother of the 2nd and 3rd Appellants who were born on [ ] 2005 and [ ] 2008 respectively. They appeal against a decision of Judge of the First-tier Tribunal Walker sitting at Newport on 22nd of August 2016 in which she dismissed their appeals against decisions of the Respondent dated 21st of October 2015. Those decisions were to refuse the Appellants' applications for leave to remain based on their family and private life.

2. The Appellant was granted an EEA residence card with the 2nd Appellant as her dependent on 18 June 2008 valid until 18th of June 2013. On 23rd of October 2008 the 3rd Appellant was born in the United Kingdom. On 21st of May 2013 shortly before the residence card was due to expire the Appellant applied for a further residence card with her 2 children as her dependents but this was refused by the Respondent on 12 October 2013. A further application made on 29th of October 2013 was again refused by the Respondent this time on 17th of January 2014. Finally, she made an application for leave to remain with the 2 children on 28 August 2014 which was refused on 28 October 2014. It appears that this last refusal may have been made without giving the Appellant a right of appeal and judicial review proceedings followed thereafter. The Respondent compromised the judicial review application by agreeing to reconsider the Appellant's case which resulted in the decisions of 21st of October 2015 which have given rise to these proceedings.

3. At the time of the application for leave the 2nd Appellant had lived in the United Kingdom for a period of 7 years. By the date of hearing the 3rd Appellant had also lived in this country for at least that length of time. The Respondent refused the applications under both the Immigration Rules and outside the Rules finding that it was reasonable to expect the children Appellants to leave the United Kingdom as they would be returning with their mother the Appellant as a family unit to Brazil. There would be no significant obstacles to the Appellant's reintegration back to Brazil as she was 38 years old at the time of the reconsideration and had spent the first 30 years of her life in Brazil. Although the 2nd Appellant had spent 7 years in the United Kingdom and was settled in education, education was available in Brazil and there were no compelling circumstances to indicate that the 2nd Appellant would be unable to continue his education and family life there. Brazil had a functioning education system which the children would be able to enter.

The Appellants' Case

4. The Appellant told the Judge at first instance that her children spoke English more than any other language but mixed with a little Portuguese at home. If they returned to Brazil it would be very difficult for the children because they did not read or write Portuguese and would have to leave their friends behind. The Appellant had no property in Brazil. The

children's father was from Brazil but he lived in England now. He and the Appellant were no longer together. In 2007 she had applied for a residence card in relation to her 2nd husband, who was Italian. That relationship broke down in 2010. She did not know where her 2nd husband now lived. Despite the rejection of her EEA applications, she had remained in the United Kingdom on the basis of advice that there were applications in progress. It would be difficult for her to go to Brazil to get a job because of her age, her father had died and she had no friends there. Her sister who is now aged 50 remained in Brazil. The Appellant had asked her family to look out for a job in Brazil for her but they had been unable to find anything. She had friends who she saw regularly who spoke Portuguese.

The Decision at First Instance

5. The Judge found the Appellant to be a very unsatisfactory witness and for the reasons given at paragraph 34 of the determination found there was doubt about the genuine nature of the Appellant's relationship with her 2nd husband. When the Appellant applied for a residence card in 2013 she was no longer in a relationship with her 2nd husband, the EEA national and the basis upon which she applied for that residence card was not known. The Appellant had accepted that it was possible that the children would pick up the Portuguese language upon return. The Judge did not consider that the children would suffer any significant difficulty in being able to converse in or learn Portuguese in Brazil.

6. At paragraph 36 the Judge noted the period of time that the Appellant had lived in the United Kingdom, all of the 3rd Appellant's life and since 2007 in the case of the 2nd Appellant but the children were not at a stage where they had started to study for essential examinations such as GCSEs. The family would be able to rely upon each other for mutual support when they returned to Brazil. The Appellant's sister worked at a hospital and had done so for some years and there would seem to be no reason why the Appellant could not obtain similar employment in Brazil. At paragraph 38 the Judge found that it would be reasonable to expect both the 2nd and the 3rd Appellants to live in Brazil with their mother and therefore they could not take advantage of the reasonableness provisions contained in paragraph EX.1 of the Immigration Rules Appendix FM.

7. The Appellant's private and family life was in reality based in Brazil. Her relationship with a qualifying EEA national partner had lasted no more than 3 years on her own evidence and had ended by 2010. The friends she had made in this country were of Portuguese extraction and she would be to maintain contact with them by modern methods of communication. Although there would be interference in the Appellants' private lives that would be at a minimum level. The children would be able to take up their education in Brazil as was accepted in the Appellant's own evidence. At paragraph 41 the Judge stated: "in the

circumstances I have found above the relocation of the Appellants to Brazil would not be contrary to the interests and welfare of the children. The removal of the Appellants from United Kingdom would therefore be proportionate to the legitimate aim of effective immigration control". She dismissed the appeals under both the Immigration Rules and on Human Rights grounds.

The Onward Appeal

8. The Appellants appealed against this decision arguing that the Judge had imposed an incorrect burden upon the Appellants for them to satisfy when establishing their Article 8 claims outside the Rules. In fact, that ground was based on a mis-reading of the determination which indicated that the Judge was imposing that burden on the Respondent not the Appellants and the objection in the grounds was withdrawn before me. I do not therefore propose to deal with that objection any further.

9. The grounds continued that for Article 8 purposes the circumstances at the date of hearing were to be considered but the decision did not reflect this. Two years had passed since the application for further leave during which time the children had built up further ties in this country. The Judge had given too much weight to the credibility of the Appellant and failed to recognise that the 2nd and the 3rd Appellants should not be penalised for her actions. The Judge failed to give significant weight to the fact that the children had been in United Kingdom continuously for 9 years. The Judge also placed undue weight on the fact that the children had socialised with people of Portuguese descent in United Kingdom. That would not be the same as moving from one country to another with a different culture and lifestyle.

10. It would be unreasonable to expect the children to relocate to Brazil. They did not know how to read or write Portuguese. They could not be expected to learn the national language within a short amount of time and that would severely inhibit their educational and social development. They only spoke some Portuguese. The 3rd Appellant had lived all his life in United Kingdom and the 2nd Appellant for more than 9 years. There was no consideration of the strong ties both emotional and physical and their links that they had built up living for such periods in United Kingdom. The 2nd Appellant had difficulties in settling in school and had only just adapted and settled in.

11. The application for permission to appeal came on the papers before First-tier Tribunal Judge Kimnell on 4th of April 2017. He refused permission to appeal stating that the Judge was aware of the facts to be determined and had said so in the determination. The matter of weight to be attached to the evidence was for the Judge. The permission grounds were simply assertions which did not raise any arguable error of law. The Appellants renewed their application for permission to appeal to the Upper Tribunal on largely the same grounds as before. The renewed

application came before Upper Tribunal Judge McWilliam on 11th of May 2017. In a brief decision she stated: "it is arguable that the Judge did assess the best interests of the children. and factor this into the proportionality assessment."

12. The Respondent replied to this grant of permission noting the typographical error and stating that the grant should have read that it was arguable that the Judge did not assess the best interests of the children but in any event the Respondent opposed the appeals. The reasonableness of the children relocating to Brazil had been fully taken into account by the Judge.

The Hearing Before Me

13. For the Appellants, counsel submitted that by the time of the hearing both children were qualifying children under the Rules. In **MA (Pakistan) [2016] EWCA Civ 705** it was said at paragraph 49 that: "the fact that the child has been in the United Kingdom for 7 years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interest; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."

14. Although it was not accepted that the Appellant had been incredible in her evidence, even if she had been, the children should not be blamed for her conduct. The Judge had not gone into details (as she should have) of the significance of the ties which the children had to this country given the length of time they had been here, almost 9 years. At paragraph 36 of her determination the Judge stated that as the children had socialised with people of Portuguese extraction their removal to Brazil was likely to be less traumatic than would otherwise have been the case had they socialised exclusively with English-speaking people. The Judge recognised therefore that there was a possibility that the children could be traumatised. The factors in favour of the children staying had not been engaged with by the Judge.

15. In reply the Presenting Officer argued that a careful reading of the determination showed that the best interests of the children had been factored in to the Judge's decision. At paragraph 12 of the determination, the Judge had set out in full section 55 of the Borders Citizenship and Immigration Act 2009. The Judge had section 55 very much as a starting point in her mind. At paragraph 41 the Judge found that relocation would not be contrary to the children's best interests and it was not clear from reading the determination how the Judge could have done more to determine the best interests of the children. In the case of **Treebhawon [2017] UKUT 13** a decision made following **MA Pakistan** the Tribunal had said that the best interests of the children would primarily be served by the maintenance of the family unit. In the instant case before me that

would also occur because the children would be removed with the Appellant.

16. In **Treebhawon** it was in the children's best interests if the family were to remain in the United Kingdom because on balance they would be better off economically. That had to be taken into account in the balancing exercise as a primary consideration but the effect of contemporary immigration law was that what was described as a "superficially seductive case" did not cross the threshold necessary to demonstrate a disproportionate interference with private life rights under Article 8. The most sympathetic view of the cases of the **Treebhawon** Appellants did not warrant any different conclusion in law. Referring back to the instant case before me the presenting Officer submitted that the appeal was no more than a disagreement with the decision of the Judge and should be dismissed as no error of law had been shown. In response counsel for the Appellants reiterated the argument that the Judge had failed to take into account evidence about the inability of the children to read or write in Portuguese and that they would have to start from scratch upon return to Brazil.

Findings

17. The test I have to apply in this case is whether there is a material error of law in the determination such that it falls to be set aside. This was essentially an Article 8 appeal inside the Immigration Rules under the reasonableness provisions of Section EX.1 and outside them (under section 117B(6) of the 2002 Act). On the one hand was the best interests of the children which was a primary consideration of the Tribunal and whether it was reasonable to expect them to relocate. Balanced against that was the legitimate aim of immigration control because the Appellant had no leave to be here. Formerly it had been thought that this meant that the best interests of the children had to be described first before considering the proportionality exercise. **MA Pakistan** makes clear that such a formulaic approach to the setting out of the determination is not necessary, what is required nevertheless is an establishment of what the best interests of the children are which are being weighed in the balance (with all other arguments the Appellants can properly deploy in their private and family law claims) against those factors on the Respondent's side of the scales.

18. In this case the Appellant made an application for a residence card when she was not entitled to make such an application and thus she had been here for some period of time without any form of leave. Following the case of **MA Pakistan,** when establishing the reasonableness or otherwise of requiring the children to leave the United Kingdom public interest considerations such as the Appellant's flouting of immigration control could be taken into account. The Judge did not simply rely on the Appellant's poor immigration record to dismiss the appeal. She considered what the impact would be on the children if they were to

leave as a family unit given the fact that both children been living in this country for some considerable time.

19. The determination records how long the children had been here. The Appellant's argument is that the Judge did not place more weight on the length of time the children were here. The problem for the Appellant was that the evidence of the children's attachment to this country consisted of such matters as the fact that they socialised with Portuguese speaking friends. The Judge was entitled to conclude from that that the difficulties to be overcome in relocation, mastering Portuguese and adapting to the Brazilian education system would thereby be reduced. That was a matter for the Judge and I agree with the submission of the Respondent that the Appellants arguments to the contrary are a mere disagreement.

20. Leaving aside the typographical error permission was granted on the basis that it was arguable that the Judge might not have taken into account the best interests of the children. The Judge was aware that the best interests of the children had to be taken into account hence the fact that she cited section 55 of the 2009 Act. She also accepted that the children's relocation to Brazil would interfere in the private lives which they had built up here. It was the Judge's assessment of paragraph 40 that that interference would be at a minimum level. The reason why she came to that conclusion was contained in the next sentence of that paragraph. They would be able to take up their education in Brazil a point that was even accepted by the Appellant herself. The Judge was aware of what stage the children had reached in their education and that had the children been older that might have been a more significant factor (see paragraph 36 of the determination). The Judge was no doubt influenced by the fact that for some of the time the children had been in this country they had been under the age of 4 years in itself a factor of some significance according to the jurisprudence.

21. The Judge was also concerned as to whether the Appellant and her children could survive economically upon return to Brazil since the Appellant's case was that she could not. The Judge dealt with that at paragraph 37 indicating that the Appellant could obtain work in Brazil. That was a matter for the Judge on the basis of the evidence before her. At paragraph 39 the Judge again indicated that she was aware of the impact of the reasonableness provisions in section 117B of the 2002 Act (which the Judge had set out in full at page 6 of her determination). She was aware therefore that it would be disproportionate to interfere with the children's private lives (which they had built up in this country whilst undergoing education) if it was not reasonable to expect the children to leave the United Kingdom.

22. The Judge found that it was reasonable for the reasons which she gave and I agree that the grounds of onward appeal in this case amount in fact to no more than a disagreement with the result. The Judge was aware of the legal test of reasonableness under Section EX.1 under the rules and

section 117B (6) outside the rules. She was aware that she had to consider the best interests of the children as a primary consideration and did so. In those circumstances the proportionality exercise was a matter for her and she gave cogent reasons why she concluded the case the way she did. There were no separate arguments made to me in relation to the Appellant's private life claim, the appeal focussing on the position of the children. I do not consider there was any material error of law in the Judge's decision and I dismiss the Appellant's appeals in this case.

23. I make no anonymity order in relation to the 1st Appellant as there is no public policy reason for so doing. I continue the orders in relation to the 2nd and 3rd Appellants made at paragraph 42 of the Determination. Unless and until a Tribunal or court directs otherwise, the 2nd and 3rd Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss all three Appellants' appeals

Appellants' appeals dismissed.

Signed this 11th day of July 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was payable and I have dismissed the appeal and therefore there can be no fee award.

Signed this 11th day of July 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge