



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/04104/2017  
HU/04105/2017  
HU/04107/2017  
HU/03642/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 1<sup>st</sup> November 2018

Decision & Reasons Promulgated  
On 15<sup>th</sup> November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

MR V.M.N. (FIRST APPELLANT)  
MISS T.H.D.N. (SECOND APPELLANT)  
MASTER N.T.H.N. (THIRD APPELLANT)  
MISS J.N. (FOURTH APPELLANT)  
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Mr Harding, Counsel  
For the Respondent: Ms J Isherwood, Senior HOPO

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

An anonymity direction is made because evidence relates to two minor appellants.

## DECISION AND REASONS

1. The Appellants are citizens of Vietnam who were born in 1976, 1989, 2010 and 2012 respectively. The first and second Appellants are in a relationship akin to marriage and the third and fourth Appellants are their children. The Appellants made human rights applications to remain in the United Kingdom but, by a decision dated 8<sup>th</sup> February 2017, their applications were refused by the Secretary of State. They appealed to the First-tier Tribunal (Judge Solly) which in a decision promulgated on 31<sup>st</sup> January 2018, dismissed the appeals.
2. The Appellants did not attend the hearing before the FtT. An adjournment request made by prior application to the FtT was refused. The FtTJ dealt with the appeals on the basis of the documentary evidence before her. The Appellants now appeal with permission to the Upper Tribunal. The grant of permission which was made on a renewed application to the Upper Tribunal was in the following terms:

“Though I see no arguable merit to the challenge to the decision to refuse an adjournment, it is arguable that the judge did not properly consider the section 55 issues in relation to either set of children. This has clear relevance to the proportionality evaluation.”

It is correct to note at this stage that as well as the two children who form part of the family unit in these appeals, the first Appellant is the father of two children by a previous relationship. Those children are British citizens born in 2005 and 2006 respectively.

3. The issue in the present appeal is whether the judge applied the relevant law including Section 117 of the 2002 Act (as amended) and the decision of the Court of Appeal in **MA (Pakistan) [2016] EWCA Civ 705**. The third Appellant was 7 years old and had lived throughout his life in the United Kingdom at the date of the First-tier Tribunal hearing. However, the third Appellant had not completed seven years of residence in the United Kingdom as at the date of the application to the Secretary of State. It is therefore correct to note, as the FtTJ did, that none of the Appellants qualified for leave under the Immigration Rules.
4. The judge then reminded herself that as the Appellants did not succeed under the Immigration Rules she had to turn to the issue of proportionality [29]. She further said that in arriving at her conclusions she had kept in mind the best interests of the child “as a starting point” [28].
5. Undoubtedly the lack of attendance of the Appellants placed the judge in a difficult position. She made a finding that she gave little weight to family and private life established when the first and second Appellants’ status in the UK was either precarious or unlawful. She also considered the position of the two British children and whether removal would deprive the first Appellant of family life with them [35].

6. The judge made findings that the evidence of family life with those children is limited. There was some evidence contained in the papers that the British children had moved in with the first Appellant and had started school. The judge, however, found the evidence pertaining to contact between the first Appellant and his British children was so sparse that she could not be satisfied that there was meaningful family life between the first Appellant and his British children. She dismissed the appeal.

### **Error of law hearing**

7. Before me Mr Harding appeared on behalf of the Appellants and Ms Isherwood for the Respondent. At the outset of the hearing, Mr Harding made a S.15 application for the inclusion of witness statements from the first and second Appellants. Those statements showed that there was relevant medical evidence pertaining to the Appellants' younger child J.N. Ms Isherwood objected to the inclusion of this evidence on the basis that it had not been put before the FtTJ. Therefore the FtTJ could not be said to have erred. In the interests of justice and bearing in mind that the issue before me centred on the best interests of the minor Appellants, I admitted the evidence on the basis that the thrust of this evidence was before the FtTJ in any event. There was mention of J.N.'s medical history in the appeal papers although it is correct to say that it was to the effect that fortunately the cancer from which J.N. suffered had regressed.
8. Mr Harding followed his initial application by saying that the FtTJ had not addressed adequately or at all the provisions of Section 117B(6) of the 2002 Act:
  - “(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.”
9. In the light of **MA** it was necessary for the judge to consider whether there were “strong reasons for removing a child who had been living in the United Kingdom for more than seven years (a qualifying child for the purposes of Section 117).” A reading of the decision would show that the FtTJ had not turned her mind to the two stage approach advocated in the jurisprudence and had not brought into that consideration the medical condition of J.N. The decision would need to be set aside and re-made with proper consideration being given to those factors.
10. Ms Isherwood submitted that in the light of the Court of Appeal judgment in **AM (Pakistan) [2017] EWCA Civ 180** and **KO and Others v Secretary of State [2018] UKSC 53** the decision was sustainable. The FtTJ was entitled to weigh the public interest considerations relating to the first and second Appellants against the seven

year residence of the third Appellant. These were cases in which the first and second Appellants had demonstrated a blatant disregard for immigration law giving rise to a substantial public interest in their removal.

11. Ms Isherwood's submissions further focused on the lack of evidence which was down to the Appellants choosing not to attend the First-tier hearing. The judge had considered all the evidence before her and therefore could not be said to have erred.

### **Consideration**

12. I find that I agree with Mr Harding's submissions. On a careful reading of the decision, I find I cannot be satisfied that Judge Solly demonstrated that she kept the provisions of Section 117B(6) in mind when she dismissed the appeals on Article 8 grounds. For example there was some evidence contained in the papers that the Appellants' younger child, J.N., was diagnosed with an aggressive form of childhood cancer. The evidence does suggest that fortunately the cancer is in remission but nowhere in the FtT's decision do I see any reference to this evidence nor any consideration of whether this has been factored into the Article 8 assessment.
13. Equally I see no consideration given to the fact that the Appellants' eldest child has lived all his life in the UK and by the time of the FtT hearing had attained 7 years of age. Clearly he is now at school in the U.K.
14. The factors outlined in the previous two paragraphs are ones which should be considered in order to demonstrate that the judge has sufficiently turned her mind to where the best interests of the children lie. It is necessary for this process to be carried out first because these factors have relevance to the Article 8 proportionality evaluation.
15. For the reasons that I have given above, I am not satisfied that the judge has properly applied the case law in this decision. I set aside the decision. There will need to be further fact-finding to update the family circumstances and that is an exercise better conducted in the First-tier Tribunal. In these circumstances, I find that the appeal will have to be remitted to the First-tier Tribunal for a fresh decision to be made. None of the findings are preserved.
16. Mr Harding requested that I direct the appeals be heard in a London Tribunal centre. Whilst I pointed out that listing is solely a matter for the FtT I declined his request on the basis that it was my understanding that the appeals would be heard more quickly in Newport and that in the interests of justice, the matter should return there.

### **Notice of Decision**

The decision of the First-tier Tribunal which was promulgated on 31<sup>st</sup> January 2018 is set aside. The appeals are returned to the First-tier Tribunal (not Judge Solly) for that Tribunal to remake the decision.

**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 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.

Signed

C E Roberts

Date

08 November 2018

Deputy Upper Tribunal Judge Roberts