



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04439/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14 May 2018

Decision & Reasons Promulgated
On 22 May 2018

Before

UPPER TRIBUNAL JUDGE CHALKLEY

Between

MARIYA TSAP
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dhanji of Counsel instructed by AH Solicitors
For the Respondent: Mr Tom Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant and her husband are both citizens of Ukraine. She was born on 17th October 1997, and she and her husband have two children, one born in 2008, and one born in 2011, so that as at the date of the decision of the First-tier Tribunal Judge one was 8 years and the other 6 years of age. They were both born in the United Kingdom but are citizens of Ukraine.
2. The appellant appealed the decision of the respondent taken on 26th January 2016, to refuse her application for leave to remain in the United Kingdom on human rights grounds and notify her of her liability to removal to Ukraine under Section 10 of the Immigration and Asylum Act 1999. Her appeal was heard by First Tier Tribunal Judge Fletcher-Hill.

3. The appellant's grounds asserted that to remove her, her husband and their minor children would breach their rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The appellant had been granted entry clearance on a six months' student work visa from 1st May to 30th October 2001 and she entered the United Kingdom on 1st May 2001. Her boyfriend whom she subsequently married entered the United Kingdom to join her in December 2004 using a false Lithuanian passport to which he was not entitled. He has never had any leave to enter or remain in the United Kingdom and yet has remained here.
4. The appellant overstayed following the expiry of her visa in October 2001 and made no attempt to regularise her status until December 2010 her application was refused in March 2011.
5. On 15th December 2015, the appellant applied for leave to remain in the United Kingdom on the basis of her family and private life with her partner and her two children. The judge dismissed the appeal finding her removal to be proportionate. The judge considered and found that the best interests of the children were to remain living with their parents as they have always done. She noted that there were no insurmountable obstacles to the appellant and her husband returning to Ukraine, given that they had spent their formative years in that country and were educated there and that the appellant had lived there up to the age of 21. She considered the provisions of Section 117B(vi) but found that it was reasonable to expect the appellant's son to leave the United Kingdom. She noted that he would be returning to his country of nationality accompanied by his younger sibling and both parents and would be eligible to attend school and have the assistance of his parents in integrating into a country and culture which they are already familiar with but he is not. He may even then have the opportunity to get to know his maternal grandparents.
6. Leave to appeal was granted by Upper Tribunal Judge Rintoul, who found it arguable that the First-tier Tribunal Judge may have failed to apply *MA (Pakistan)* [2017] EWCA Civ 705 in failing to state what weight she attached to the oldest child having spent seven years in the UK or why that was outweighed.
7. For the appellant it was asserted that the oldest child was a qualifying child for the purposes of paragraph 276ADE which was engaged in the appeal and the issue for the judge was whether it would be reasonable for the child to relocate. The judge nowhere sets out at paragraph 276ADE(1)(iv) in order she take account of or apply the decision in *MA (Pakistan)* [2016] EWCA Civ 705. The issue is whether or not it would be reasonable to expect the appellant's child to leave the United Kingdom. Counsel submitted that there was no consideration of the relevant legal criteria and a failure to attach significant weight to both the presence of a seven year residency and the need to identify powerful reasons why the appellant's child should not be granted leave to remain.
8. He referred to *MT and ET v Secretary of State for the Home Department (child's best interests; ex tempore pilot) Nigeria* [2018] UKUT 00088 (IAC) and drew my attention to

paragraph 28 where what Lord Justice Elias had said in *MA* was quoted. He also took me to paragraph 33 where the Tribunal said,

“On the present state of law as set out in *MA* we need to look for “powerful reasons” why a child who has been in the United Kingdom for over ten years should be removed, notwithstanding that their best interests lie in remaining.”

At paragraph 34 the Tribunal said this,

“In the present case there are no such powerful reasons of course the public interest lies in removing a person such as *MT* who has abused the immigration laws in the United Kingdom. Although Mr Deller did not seek to rely on it, we take account of the fact, as recorded in Judge Baird’s decision, *MT* had, at some stage, received a community order for using a false document to obtain employment. But given the strength of *ET*’s case, *MT*’s conduct in our view comes nowhere close to requiring the respondent to succeed and Mr Deller did not strongly urge us to so find. Mr Nicholson submitted that even on the findings of Judge Martin, *MT* was what might be described as a somewhat run of a mill immigration offender who came to the UK on a visit visa, overstayed, made a claim for asylum that was found to be false, and who has pursued various legal means of remaining in the United Kingdom. None of this is to be taken away as excusing or downplaying *MT*’s unlawful behaviour. The point is that her immigration history is not so bad as to constitute the kind of “powerful” reason that would render reasonable the removal of *ET* to Nigeria.”

9. Commenting on this in making his submissions, Mr Wilding said that the reason why powerful reasons were said to be required were because of the length of *ET*’s stay in the United Kingdom.
10. The judge said at paragraph 64 of the determination that there were no good grounds for permitting the appellant to stay in the United Kingdom outside the Immigration Rules and there was no compelling circumstance on which she could rely. The grounds suggested, commented Mr Dhanji, that the judge erred in trying to find a special or exceptional reason to justify the appellant remaining in the United Kingdom. The determination errs in that there is no reference to or assessment of the fact that the appellant’s children speak English and have no connection to the Ukraine. The judge did not carry out a careful balancing exercise in the light of the most recent authority. The judge’s assessment of the child’s best interests is flawed because there has been an absence of a thorough and careful consideration and, he submitted, his has impacted the key question of reasonableness set out by the Court of Appeal in *MA (Pakistan)*. In fact there is no real reference to whether it would be reasonable for the appellant to return to Ukraine instead the judge refers to the “very significant obstacles” towards the end of the determination.
11. Mr Wilding submitted that there was nothing materially wrong with the determination of Judge Fletcher-Hill. The position following the Tribunal’s decision in *MT and ET v Secretary of State for the Home Department (child’s best interests; ex tempore pilot) Nigeria* [2018] UKUT 00088 (IAC) does not change the situation. In *MT and ET* the child in question was 4 at the time of arrival and 17 at the time of the hearing. She had built up over eleven years living in the United Kingdom. It was unhelpful to suggest that because that case was allowed this case should be. Counsel quite properly referred to paragraph 46 of *MA (Pakistan) & Ors, R (on the application of) v Upper*

Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705 where Elias LJ said:-

“Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise”.

Elias LJ then referred to the guidance of August, 2015 in the form of the Immigration Directorate Instructions entitled “Family Life (As a Partner or Parent) and Private Life: 10 Year Route”. There, it is expressly stated that once a seven year residence requirement is satisfied there need to be “strong reasons for refusing leave”. In this case the children were 8 and 6 and both were born in the United Kingdom. Their best interests were found to be to remain with their parents as a family and this is what the judge said at paragraph 60. There was no evidence to suggest that it would be unreasonable for the children to go with the parents to Ukraine. It is not consistent with any legal authority that once a child reaches the age of 7 years there is a presumption that they should be allowed to remain in the United Kingdom. This judge did properly assess the factual basis of the case and the challenge is nothing more than a disagreement.

12. Responding, Counsel suggested that it was necessary for the Tribunal to look for powerful reasons why the appellant’s child should be removed from the United Kingdom. Mr Wilding submitted that the fact that the whole family were leaving together was a powerful reason why the child should be required so to leave. There is little evidence to show that there were strong reasons why the child could not go with the family to Ukraine, given that he was living with the family and that his best interests were found to be with his parents.
13. Mr Wilding suggested that the Tribunal in *MT and ET* had found the need to look for powerful reasons only because in that case the child in question had been 4 when they arrived in the United Kingdom and had been in the United Kingdom for some eleven years, so that they had been here for a substantial period. While these children were born in the United Kingdom, they had not been able to demonstrate any obstacles to reintegration in their own country.
14. I reserved my decision.
15. Paragraph 276 ADE (1) (iv) provides:

“276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

.....
.....
.....

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; ..."

Judge Fletcher-Hill demonstrates in her determination that she had looked very carefully at all the evidence. She has noted from the material submitted that the family would be returning together to Ukraine as a unit and that the elder child and his sibling would be supported by their parents while they became used to living there and enjoying their full rights as Ukrainian citizens. Ukraine has a functioning education system with free compulsory school which the children would be able to enter and there is no evidence that the appellant and her partner would have been able to maintain their children in Ukraine or that they would be unable to provide for their safety and welfare. The appellant was an overstayer who made no attempt to regularise her status in the United Kingdom for some ten years. Her husband and the children's father entered the United Kingdom illegally and has never had any leave to enter or remain.

16. The judge specifically refers to various parts of the appellant's bundle of evidence comprising amongst other things witness statements and evidence of the children's schooling in the United Kingdom as well as evidence of the appellant's use of NHS facilities. The appellant's husband had worked illegally in the United Kingdom and not paid tax. He had spent the first 29 years of his life in Ukraine and undertook military service before training as a carpenter. She found that the appellant and her husband were resourceful and had worked in the United Kingdom illegally, found accommodation, accessed free services within the NHS and schooling for their children over a number of years. The best interests of the children were found by the judge to be to remain living with their parents as they had always done. As Counsel pointed out she found that there were no good grounds for permitting the appellant to stay in the United Kingdom outside the Immigration Rules. Weighing the matter in the balance as the judge did, she went on at paragraph 67 to consider *Azimi-Moayed and Others (decisions affecting children; onward appeals)* [2013] UKUT 197 (IAC). I believe that she was entitled to conclude as she did at paragraph 72 that it was reasonable to expect the appellant's son to leave the United Kingdom in all the circumstances and that the appeal could not succeed on that ground. I agree with and adopt the submissions of Mr Wilding.

8. The making of the decision by First-tier Tribunal Judge Fletcher- Hill did not involve the making of an error on a point of law. I uphold her decision.

Richard Chalkley

Upper Tribunal Judge Chalkley

17 May 2018