



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/08643/2016  
HU/08639/2016  
HU/08646/2016  
HU/08642/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 24 May 2018

Decision & Reasons Promulgated  
On 20 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

MAMMS  
NSAG  
SS  
AMAMMS  
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms. R. Francis, Counsel instructed by Wilsons Solicitors LLP  
For the Respondent: Ms K. Pal, Home Office Presenting Officer

## DECISION AND REASONS

1. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Carroll, promulgated on 15 August 2017, in which she dismissed the Appellants' appeals against the Respondent's decision to refuse leave to remain on human rights grounds.
2. Permission to appeal was granted as follows:
3. "The grounds are arguable.  
The judge did not make a decision as to whether it was in the two qualifying childrens' best interests to remain in the UK. She merely said that they lay in remaining with their parents. She did consider what their life would be like on a return to Egypt, but appears to have imported an "unduly difficult" test when deciding that it would not be unreasonable to expect them to live there.  
It is arguable that this may have affected her consideration of the proportionality of removal.  
It is also arguable that she may have not considered all of the relevant evidence when reaching her decision."
4. The first and second Appellants attended the hearing. I heard submissions from both representatives. I stated that the decision involved the making of a material error of law as the Judge had failed properly to carry out a best interests' assessment, and had also used a test of "unduly difficult" which is not set out in the law. I set the decision aside to be remade.

### Error of law

5. The Judge's findings are set out from [15] to [20]. At [15] she addresses the immigration history of the first and second Appellants. At [16] she considers the third and fourth Appellants. She states:

"At the core of these appeals is the fact of the third appellant having been in the United Kingdom for more than seven years. A letter from her appears at pages 49 and 50 and there is extensive evidence relating to her schooling. She is clearly happy and learning at school. It is not argued that education is not available in Egypt where the second appellant has close family members, including her mother and her brother. It is, however, argued that linguistic difficulties would make it very difficult for the third and fourth appellants to adapt to life in Egypt. They have both attended Arabic School and the first appellant confirmed in his oral evidence at the hearing of these appeals that he and his wife communicate in Arabic and have done so since the children were born. Both the third and fourth appellants have had very considerable exposure to Arabic language and Egyptian culture both in the context of their family lives and in the context of family friends. At pages 172 and following of the bundle

there appears a number of letters from family friends. None of them attended the hearing to give evidence in support. When the second appellant was asked why this was the case, she said it was because they were all on holiday in Egypt.”

6. At [17] she states:

“The third appellant is, of course also, an Egyptian national. Return to Egypt would entail cultural and societal changes but the evidence does not show that it would be unduly difficult for her who is, of course, still very young to adapt to such change. All of the appellants would be returning as a family unit. Looked at overall, the evidence does not show that it would be unreasonable to expect the third appellant to leave the United Kingdom (paragraph 276ADE(1)(vi)).”

7. At [18] she states:

“The appellants clearly all enjoy family and private lives in the United Kingdom. There is ample evidence before me as to the private lives of the children in the context of their education but, as I have noted above, I have had no evidence from any family friends. I have, in addition, heard no evidence from any employers or from any community organisations. Both the third and fourth appellants are still comparatively young. It is indisputably in their best interests to remain with their parents.”

8. In relation to the best interests’ assessment, ground 1, the Judge found at [18] that it was “indisputably in their best interests to remain with their parents”, but she did not make an assessment of where the third and fourth Appellants should remain. She did not make an assessment of what was in their best interests aside from remaining with their parents. I find that the Judge failed to make a decision as to whether or not it was in their best interests to remain in the United Kingdom. Contrary to the submissions of Ms Pal, I find that the Judge should have made a finding as to whether or not their best interests lay in remaining in the United Kingdom. A finding that it is in an appellant’s best interests to remain in the United Kingdom does not mean that inevitably it must be unreasonable for them to have to leave the United Kingdom, but there must be a finding made either way as to what is in that appellant’s best interests. It was not sufficient to find that their best interests lay in remaining with their parents. I find that the Judge has erred in failing to give proper consideration to the best interests of the third and fourth Appellants.

9. In relation to ground 2, I find that the Judge erred in her application of the reasonableness test as she imported a test of “unduly difficult” when considering whether or not it was reasonable to expect the third Appellant to leave the United Kingdom under paragraph 276ADE(1)(iv). There is no such test. What is required is consideration of whether or not it would be “reasonable” to expect a child to leave the United Kingdom. To assess whether it would be “unduly difficult” is to apply a higher test than the law requires.

10. In relation to her treatment of the evidence, which is the substance of grounds 3 and 4, I find that there has been an insufficient consideration of all of the evidence when assessing what is in the third and fourth Appellants' best interests. The entire assessment is carried out in only five paragraphs. The findings in relation to the family friends are slightly contradictory. On the one hand she finds that the Appellants enjoy family and private lives in the United Kingdom with reference to their family friends [16] but at [18], when considering the third and fourth Appellants and their private lives, she observes that she has heard no evidence from any family friends. Evidence was provided in the bundle in the form of letters, but none of these friends attended the hearing. I find it is unclear what weight she has given to the letters from family friends, and whether she found that they were evidence of a private life in the United Kingdom, or whether they showed that the third and fourth Appellants had no private lives outside of their education.
11. These errors are material, as they go to the issue of the best interests of the children, which must be a primary concern following the case of ZH (Tanzania) [2011] UKSC 4. I therefore set the decision aside to be remade.

### Remaking

12. I have taken into account the evidence contained in the Appellants' bundle which was before the First-tier Tribunal (561 pages), and the skeleton argument from the First-tier Tribunal hearing. I have also taken into account the case of MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC), relied on by Ms. Francis.
13. There is reference in the decision of the First-tier Tribunal to the previous decision in the Appellants' case. Paragraphs from this decision are set out at [7]. I have carefully considered the documents on the file before me but I do not appear to have a full copy of this decision and I was not provided with one at the hearing. However it is clear from the decision of the First-tier Tribunal that the earlier decision was made in 2012. I find that matters have moved on since, significantly in relation to the third Appellant who has now been in the United Kingdom for seven years. I therefore find, in accordance with Devaseelan principles, that the circumstances have materially changed such that I do not need to take the earlier decision as the starting point for my findings.

### *Immigration rules*

14. In the reasons for refusal letter, the Respondent was not satisfied that the first and second Appellants could meet the requirements under the parent route because their children were not British citizens. There was no consideration of whether either the third or fourth Appellants were qualifying children by virtue of the amount of time spent in the United Kingdom. However irrespective of this I find that, given that the

Appellants live together as a family and neither parent has sole responsibility for the children, neither the first nor second Appellant can meet the requirements of E-LTRPT.2.3 or E-LTRPT.2.4. I therefore find that the first and second Appellants cannot meet the requirements under the immigration rules as parents, although not for the reason as stated in the reasons for refusal letter.

15. In relation to private life, the third Appellant has been in the United Kingdom for seven years. This was accepted by the Respondent on page 11 of the reasons for refusal letter. I therefore find that in order to meet the requirements of paragraph 276ADE(1)(iv), she must show that it is not reasonable for her to leave the United Kingdom. There was no detailed consideration of this in the reasons for refusal letter, but simply the statement that it was reasonable for her to leave the United Kingdom.
16. I have considered the third Appellant's best interests in accordance with section 55 of the 2009 Act when considering whether or not it is reasonable to expect her to leave the United Kingdom. Her best interests must be a primary concern following the case of ZH (Tanzania) [2011] UKSC 4.
17. At the date of the hearing before me it was only 19 days before her tenth birthday and as at the date of writing this decision she has turned ten years old.
18. I find that the third Appellant has lived in the United Kingdom since her birth. I find that she has never been to Egypt.
19. The third Appellant attends primary school. Evidence from her school was provided (pages 56 to 67). I find that she has been at school since reception, and is now in year five. She has been at school in the United Kingdom for six years. There is no evidence that she has any educational problems and her reports indicate that she is doing well.
20. I find that the first and second Appellants speak Arabic at home but, while the third Appellant may understand some Arabic, I find that she is not proficient in Arabic. In his witness statement the first Appellant said that they tried to take the children to Arabic school but they hated it [32]. Both children complained that it was too complicated and did not make sense. They both failed their Arabic exams. The Appellants provided a certificate from the Iqraa School (Egyptian Plus) London (page 55). This indicates that the third Appellant failed her reception year at the school in 2016 to 2017. She scored 40 marks in her Arabic test out of a possible 200, when the pass mark was 100. However, given that she does not appear to have any academic problems, I also find that, if she had to learn Arabic, with the support of her parents and given her age and her exposure to it, she would be able to do so in time.
21. I have no evidence that the third Appellant has any significant medical issues.

22. While there is evidence in the bundle, in the form of letters from family friends, which indicates that the third Appellant has some friends with Egyptian heritage, I find that at ten years old she will have started to make her own friends at school who will not necessarily have any connection with Egypt at all. I find that she will have started to develop her own private life away from the family.
23. Although the third Appellant may be eligible to apply for British citizenship, she is not a British citizen and so requiring her to leave would not interfere with any rights she has as a British citizen.
24. I have considered the case of MT and ET. This quoted from the case of MA (Pakistan) [2016] EWCA Civ 705, in particular paragraphs 46 and 49. I have considered [31] of MT and ET which addresses the position of ET, the child in the appeal. It refers to the fact that ET had no direct experience of Nigeria. It found that her best interests in terms of section 55 lay in remaining in the United Kingdom with her mother rather than returning to Nigeria with her mother. ET was 14 years old, and the third Appellant is only 10 years old, but ET came to the United Kingdom aged four so the amount of time spent in the United Kingdom by the third Appellant and ET is the same. As set out in MT and ET the position “changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child’s position in the wider world of which school will usually be an important part”. It restates the position that both the age of the child and the amount of time spent will be relevant in determining where the best interests lie [32].
25. In MT and ET it was also held that the poor immigration history of MT did not constitute a “powerful reason” sufficient to render reasonable the removal of ET to Nigeria.
26. Taking into account all of the above, I find that it is in the third Appellant’s best interests to remain in the United Kingdom. She has never been to Egypt and has spent all of her life in the United Kingdom, ten years. She does not speak Arabic. She attends school in the United Kingdom. I find it is in her best interests to maintain this stability, including in respect of provision of education, and in respect of the development of her private life.
27. While I have found that it is in her best interests to remain in the United Kingdom, I nevertheless need to consider whether it is reasonable to expect her to leave the United Kingdom. I have taken into account the case of MT and ET set out above [24] and [25]. At [49] of MA (Pakistan) it states “however, the fact that the child has been in the UK for seven 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 interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.”

28. I have taken into account the conduct of the first and second Appellants in considering whether or not it is reasonable to expect the third Appellant to leave the United Kingdom. They have a very poor immigration history as set out in the chronology (pages 1 and 2 of the bundle). I do not intend to rehearse it all here, but the first Appellant has never had leave to remain, and the second Appellant had leave only as a visitor sponsored by her mother who was in the United Kingdom receiving medical treatment. However while I take this into account, I attach no blame to the third Appellant due to the conduct of her parents. She has not played any part in remaining in the United Kingdom without leave. She was born here and is a minor.
29. Taking into account the length of time that the Appellant has been in the United Kingdom, and with reference to the case of MT and ET, I find that the third Appellant's best interests outweigh the conduct of her parents despite their very poor immigration history. I therefore find that it is not reasonable to expect her to leave the United Kingdom. I find that the third Appellant meets the requirements of paragraph 276ADE(1)(iv).

*Article 8 outside the immigration rules*

30. I have considered the Appellants' appeals under Article 8 outside the immigration rules in accordance with the steps set out in Razgar [2004] UKHL 27. I find that the Appellants have a private and family life in the United Kingdom sufficient to engage the operation of Article 8. I find that the decision would interfere with their private and family lives.
31. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.
32. In carrying out the proportionality exercise, I have taken into account my findings above in relation to the appeal under the immigration rules. I have also taken into account section 117B of the 2002 Act. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. The third Appellant meets the requirements of the immigration rules, paragraph 276ADE(1)(iv), so there will be no compromise to the maintenance of effective immigration controls by a grant of leave to remain in her case.

33. No findings were made in the First-tier Tribunal relating to the Appellants' English language ability and it is not clear whether the Appellants used an interpreter. In the bundle is evidence of the first and second Appellants' English language skills (pages 238 to 241), and the third and fourth Appellants speak English at school. I find that the Appellants can speak English (117B(2)). In relation to their current financial situation, the bundle contains payslips for the first Appellant up to May 2016 (pages 189 to 202). There were some bank statements provided but these only go up to July 2017 (117B(3)).
34. Sections 117B(4) and 117B(5) provide that little weight is to be given to a private life established when a person is here unlawfully or when leave is precarious. These sections do not apply to family life. I have set out above that the first and second Appellants have a poor immigration history [28]. The third and fourth Appellants cannot be blamed for their lack of immigration status.
35. I have found above that the third Appellant meets the requirements of paragraph 276ADE(1)(iv), and the test under 117B(6) is the same as that set out in paragraph 276ADE(1)(iv). I therefore find, for the same reasons as set out earlier, that it is not reasonable to expect the third Appellant, who is a qualifying child, to leave the United Kingdom. I therefore find the public interest does not require the removal of the first and second Appellants.
36. It is clearly in the fourth Appellants' best interests to remain in the United Kingdom with the rest of his family.
37. Taking into account all of my findings above, I find that the balance comes down in favour of the Appellants, and the decision is not proportionate. I find that the Appellants have shown on the balance of probabilities that the decision is a breach of their rights to a private and family life under Article 8.
38. Given that the third and fourth Appellants are children, I have made an anonymity direction.

### **Notice of decision**

39. The decision of the First-tier Tribunal involves the making of a material error of law. I set the decision aside to be remade.
40. The Appellants' appeals are allowed on human rights grounds, Article 8. The third Appellant meets the requirements of paragraph 276ADE(1)(iv) of the immigration rules.



**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

Date 15 June 2018

**Deputy Upper Tribunal Judge Chamberlain**

**TO THE RESPONDENT**  
**FEE AWARD**

As I have allowed the appeals and because a fee has been paid or is payable, I have considered making a fee award. I have decided not to make a fee award as further evidence was provided for the appeals.

Signed

Date 15 June 2018

**Deputy Upper Tribunal Judge Chamberlain**