



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: IA/00859/2016  
IA/00860/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 11<sup>th</sup> April 2018

Decision & Reasons Promulgated  
On 15 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MS BF (1)  
MISS LOF - A MINOR - (2)  
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellants: Mr J Dhanji, Counsel

For the Respondent: Mr D Clarke, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants are respectively mother and minor daughter born on 1<sup>st</sup> December 1973 and 4<sup>th</sup> June 2007. They are citizens of South Africa. The first Appellant arrived in the United Kingdom on 30<sup>th</sup> July 2003 with leave to enter as a visitor valid to 30<sup>th</sup> January 2004. On 6<sup>th</sup> March 2009 she was refused leave to remain outside the Immigration Rules. On 31<sup>st</sup> March 2015 she applied for leave to remain based on her family and private life. The second Appellant was born on 4<sup>th</sup> June 2007 and has never

had any leave to enter the United Kingdom. The Appellants' applications for leave to remain were refused by Notice of Refusal dated 19<sup>th</sup> May 2015.

2. The Appellants appealed and the appeals came before Judge of the First-tier Tribunal Lodge sitting at Birmingham on 19<sup>th</sup> October 2017. In a decision and reasons promulgated on 25<sup>th</sup> October 2017 their appeals were dismissed.
3. On 6<sup>th</sup> November 2017 Grounds of Appeal were lodged to the Upper Tribunal. On 12<sup>th</sup> February 2018 Judge of the First-tier Tribunal Maller granted permission to appeal. Judge Maller noted that the grounds contended that the First-tier Tribunal Judge had failed to determine the appeal of the child – a qualifying child – under the Respondent's policy. Further he had failed to identify strong reasons why the child should now leave the UK and had erred in his approach in assessing the best interests of the child, treating the immigration status of her mother and their removal as a basis for answering the question of what was in the child's best interests. Judge Maller considered that it was arguable that there may have been shortcomings in the judge's assessment of the child's best interests.
4. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellants appear by their instructed Counsel, Mr Dhanji. The Secretary of State appears by her Home Office Presenting Officer, Mr Clarke. The First-tier Tribunal Judge made an anonymity direction. No application is made to vary that order and it remains in place.

### **Submission/Discussions**

5. Mr Dhanji starts by reminding me that the first Appellant is the mother of the second Appellant and the application was based on the fact that the Appellants and importantly the second Appellant had accumulated over seven years' continuous residence in the UK and therefore the second Appellant was a "qualifying child".

### **Submission/Discussion**

6. Mr Dhanji takes me to paragraph 12 of the determination which is where the judge starts to address the best interests of the child. He considers it is manifestly in the child's best interest to be with her mother. I doubt if this is an issue that is contentious. However he submits that the judge has adopted an inappropriate approach and refers me to paragraph 46 of *The Queen on the application of MA (Pakistan) and Others [2016] EWCA Civ 705* where the Court of Appeal indicated that once the seven year residence requirement was satisfied there would need to be strong reasons for refusing leave and that there would be a strong expectation that the child's best interests would be to remain in the UK with his parents as part of a family unit and that must rank as a primary consideration in the proportionality assessment.
7. Mr Dhanji submits that the judge has considered the matter the other way round and in the wrong context of best interest. He submits his consideration has been very brief. He submits that bearing in mind paragraph 11 of the decision where the judge has

started from the premise that having been in the UK for seven years and this must be given significant weight in the proportionality assessment, that it is strange to have come to the findings that the judge has done. He further takes me to paragraph 49 of *MA (Pakistan)* and the emphasis of the Court of Appeal that as a starting point leave should be granted unless there are powerful reasons to the contrary and he submits that the judge has failed to take this premise into account.

8. In response Mr Clarke submits that there has been a textbook approach to *MA (Pakistan)*. And that the judge has embraced paragraph 46 of *MA* and then set out the reasonableness requirements at paragraph 10 of his decision and has noted the jurisprudence at paragraph 11. He has addressed the issue of best interests between paragraphs 12 and 20 and then at 21 has given due consideration to the wider public interest. He takes me to the factors set out in *EV (Philippines) and Others [2014] EWCA Civ 874*, referring me to paragraph 35 which sets out the factors upon which the best interests of children will depend and to the assessment of the best interests that is recited thereafter at paragraph 58.
9. He then takes me to the reasoning of the judge. He recites the issues that the judge has considered
  - paragraph 11, the basic premise;
  - paragraph 12, the health of the child;
  - paragraph 13, the father figure. The judge, he contends, was correct to give little weight to him in his absence;
  - paragraph 14, the capacity to integrate;
  - paragraph 15, family members in South Africa;
  - paragraph 16, support in South Africa;
  - paragraph 17, cultural ties;
  - paragraph 18, education;
  - paragraph 19, stage of development/education and an acceptance that the child is fully integrated in the UK;
  - paragraph 20, are there additional factors that would assist the Appellant;
  - paragraph 21, countervailing public interest issues and then on balance says it is reasonable for the Appellants to leave.
10. He submits it is reasonable for the First-tier Judge to give such weight as he considers appropriate to all factors. He submits that there has been a textbook approach towards an assessment of reasonableness and the decision is not irrational. He acknowledges that the primary force is to be found with the first Appellant who had substantially overstayed her visa and that the judge had given due and proper weight to all factors and concluded that they outweighed any suggestion that the best interests of the child were to remain in the UK.

11. In brief response Mr Dhanji submits that best interests should be considered in a vacuum and submits that this has not taken place and that the question should have been asked, what is in the second Appellant's best interest and that the starting point should have been that she has been here for ten years and that it is an erroneous approach to say that if the mother is returned, the child should accompany her. He asked me to find errors of law and to set aside the decision.

## **The Law**

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

## **Relevant Case Law**

14. It is appropriate to set out herein the relevant paragraphs from the two principle authorities that have been recited. *MA (Pakistan) [2016] EWCA Civ 70* is authority for the following

### **"Applying the Reasonableness Test**

46. 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. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly

disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment.

49. Although this was not in fact a seven year case, on the wider construction of section 117B(6), the same principles would apply in such a case. 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."
15. The other principle authority referred to is *EV (Philippines) and Others [2014] EWCA Civ 874*. That is authority for the following proposition
  - "34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.
  35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens."
16. It is relevant to note that those two paragraphs from *EV (Philippines)* are in fact to be found at paragraph 48 of *MA (Pakistan)*.
17. Thereinafter at paragraph 58 of *EV (Philippines)* the Court of Appeal stated

"In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

### **Findings on Error of Law**

18. I start by reminding myself that the issue before me is whether or not there has been a material error of law in the decision of the First-tier Tribunal Judge. I am not rehearing this matter (at least not at this instance) nor am I putting myself in the position of being the First-tier Tribunal Judge. It is possible that a different judge might have come to a different conclusion. What it is necessary for the Upper Tribunal to consider is

whether the First-tier Tribunal Judge has materially erred in his approach and findings. I am satisfied that he has not despite the submissions made by Mr Dhanji. I agree with those put forward by Mr Clarke that this has been a classic approach to the consideration of the best interests of the child. In reaching that conclusion I do appreciate how long she has been in this country, that she has never lived abroad and also take into account all the relevant factors set out in the case law and the facts of this particular case. They have been addressed quite properly as set out above by the First-tier Tribunal Judge between paragraphs 11 and 21. The judge has thereafter made findings that he was entitled to. His decision is not irrational. He has given reasons for his decision and he has applied appropriate weight in coming to the conclusions that he did.

19. The judge has given due and proper consideration to what are in the second Appellant's best interest. These are considered substantially within the abovementioned paragraphs and disagree with the submission made by Mr Dhanji that "the judge should have asked that question" insofar as it appears clear from the decision that he certainly has considered the child's best interests in some depth. The fact that the findings ultimately go against the Appellants may be ones that the Appellants do not like and ones which his representative seek to argue against, but that does not mean that they are wrong and were not ones that the judge was entitled to make. Effectively what is being submitted is that the judge's findings were wrong and that another judge would have come to a different decision. That amounts to mere disagreement. So far as the approach to best interests of the child are concerned I am satisfied that the judge has followed the appropriate process and made findings which are sustainable. In such circumstances he has not materially erred in law and the Appellants' appeal is dismissed.

### **Notice of Decision**

20. The decision of the First-tier Tribunal Judge discloses no material error of law and the Appellants' appeal is dismissed and the decision of the First-tier Tribunal Judge is maintained.
21. The First-tier Tribunal Judge granted the Appellants anonymity. No application is made to vary that order and that order will remain in place.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

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 their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 10 May 2018

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT  
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date 10 May 2018

Deputy Upper Tribunal Judge D N Harris