



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/18427/2015

THE IMMIGRATION ACTS

Heard at Field House
On 25 June 2018

Decision and Reasons Promulgated
On 03 September 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

M B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

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

Anonymity should have been granted at an earlier stage of the proceedings because the case involves child welfare issues. I find that it is appropriate to make an order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent.

Representation:

For the appellant: Mr C. McWatters, instructed by Brent Community Law Centre
For the respondent: Mr P. Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 28 April 2015 to refuse a human rights claim.
2. The appellant was the principle applicant, with her partner and two children as dependents. The First-tier Tribunal concluded that the appellant's partner and two children did not have a valid appeal because no 'appealable decision' had been made in their case even though the decision letter related to all four members of the family. In practical terms, the status of the other members of the family will be dependent on the outcome of the appellant's appeal.
3. Designated First-tier Tribunal Judge Manuell ("the judge") dismissed the appeal in a decision promulgated on 18 October 2017.
4. The appellant appeals the First-tier Tribunal decision on the following grounds:
 - (i) The judge failed to make findings relating to the children's best interests and failed to consider relevant evidence from an independent social worker and the wishes and views of one of the children.
 - (ii) The judge erred in finding that they had been brought up in Jamaican culture, contrary to the observations of the independent social worker i.e. a repeated submission relating to the failure to consider the social work report adequately.
5. Designated First-tier Tribunal Judge Macdonald granted permission to appeal in the following terms:

"The grounds of application contend that the Judge failed to conduct an analysis of the children's best interests and in particular had failed to consider their wishes and feelings as brought out in an independent social worker's report and a letter from [K] to the court. Furthermore, the Judge was said to be wrong to conclude that the children have been brought up in Jamaican culture. Reference was made to *ZH*.

The Judge gave clear reasons for dismissing the appeal but, as the grounds point out, there is no reference to *ZH* or treating the best interests of the children as a primary consideration."

Decision and reasons

Error of law

6. After having considered the grounds of appeal and oral arguments I satisfied that the First-tier Tribunal decision involved the making of an error on a point of law.
7. The argument that the judge failed to conduct a sufficiently rigorous assessment of the best interests of the children according to the principles outlined in *ZH (Tanzania) v SSHD* [2011] UKSC4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874 has merit. There is little

evidence to suggest that the judge conducted an evaluative assessment. The decision focuses on whether it would be practical for the children to return to Jamaica with their mother, but fails to evaluate the ties that the children might have developed in the UK. The Court of Appeal decision in *MA (Pakistan) v SSHD* [2016] EWCA Civ 705 is mentioned, but there is no indication that the interests of the child who had been continuously resident in the UK for a period of over seven years were given 'significant weight'. Similarly, the independent social worker's report was mentioned, but dismissed as a "plea on the children's behalf for the family to remain in the United Kingdom" without any analysis of the report or any findings as to whether the independent social worker's qualifications and views should be given weight. Given that her finding was that it was in the best interests of the children to remain in the UK it was incumbent on the judge to consider the views of a qualified social worker and the views of the child.

8. It is not necessary to make detailed findings relating to the First-tier Tribunal decision because Mr Duffy acknowledged that no findings were made to indicate that the judge had treated the interests of the children as a 'primary consideration' or that proper weight had been given to the interests of the children. For these reasons I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside. The Upper Tribunal heard further submissions and will remake the decision.

Remaking

9. The appellant entered the UK on 11 June 1999 with entry clearance as a visitor that was valid for six months. The appellant remained in the UK after her visa expired in the full knowledge that she had no right to remain in the UK. She entered a relationship with the father of her children ("RC") in 2006. On 13 December 2007 their first child was born ("K"). The child is 10 years old at the date of the hearing and has been resident in the UK all her life.
10. On 30 May 2008 RC applied for further leave to remain with the appellant and K as his dependents. The basis of the application is unclear. The application was refused on 19 October 2009. A further application for leave to remain was made on 20 August 2009. It was refused on 27 October 2009. Further representations were made on 22 December 2010 but were subsequently refused. The appellant continued to remain in the UK without leave to remain.
11. On 07 February 2011 their second child was born ("M"). He is 7 years old at the date of the hearing and has been resident in the UK all his life. On 15 December 2012 further submissions were made to the Home Office, but the decision to refuse leave to remain was maintained on 13 March 2014. Yet more submissions were made to the Home Office on 19 June 2014 and 06 January 2015.
12. The appellant appeals the respondent's decision dated 28 April 2015 to refuse a human rights claim. The respondent found that the appellant did not meet the

family and private life requirements of the immigration rules. The appellant's partner was not a British citizen nor was he settled in the UK (the evidence indicates that he was likely to be remaining without leave). The appellant did not meet the requirements of Appendix FM for leave to remain as a partner or a parent. The respondent concluded that she fell far short of the long residence requirements contained in paragraph 276ADE(1)(iii) of the immigration rules and that there were no 'very significant obstacles' to integration if she returned to Jamaica for the purpose of paragraph 276ADE(1)(vi) given that she had spent the first 26 years of her life there. Similarly, RC did not meet the long residence requirements and there were no 'very significant obstacles' to his integration in Jamaica given that he was a national of the country and was familiar with the culture there.

13. M was only 4 years old at the date of the decision and was therefore not a 'qualifying child' who met the eligibility requirements of paragraph 276ADE(1)(iv). K was 7 years old at the date of the decision. The respondent considered that it was not likely that she had established an extensive private life in the UK outside her family and the education system. She would be able to continue her primary education in Jamaica. She would continue to have the support of her parents and would be able to establish a similar private life in Jamaica. For these reasons the respondent concluded that it would be reasonable to expect the child to leave the UK. The respondent concluded that it would be in the children's best interests to remain in a family unit with their parents. The children could adapt to life in Jamaica. There were no exceptional circumstances to justify granting leave to remain on human rights grounds outside the immigration rules. Both parents had remained in the UK without leave for many years.
14. Both parents are nationals of Jamaica who were born there and have spent most of their lives there. Both have remained in the UK for a significant period without leave to remain. In the appellant's case, she has not had leave to remain since 2000. In her partner's case, he has not had leave to remain since 2004. Neither meets the family life requirements contained in Appendix FM of the immigration rules. Neither have lived in the UK long enough to meet the 20-year long residence requirement contained in paragraph 276ADE(1)(iii) of the rules. Nor is it arguable that either parent could meet the requirements of paragraph 276ADE(1)(vi) of the immigration rules. Both parents were born and grew up in Jamaica and will be familiar with the culture there. No evidence has been produced to show that they would face 'very significant obstacles' to integration there. They express concerns about the levels of criminality in parts of Jamaica and the difficulties that they are likely to face in finding work. No doubt it would be difficult to re-establish themselves there, but the usual difficulties of returning to a country and re-establishing a life there is not sufficient to meet the stringent test requiring 'very significant obstacles'. They are healthy adults who are familiar with the culture in Jamaica and are capable of finding work. They would be in no worse position than any other Jamaican national. For these reasons I conclude that the evidence does not disclose 'very significant obstacles' to integration for the purpose of the private life requirements contained in paragraph 276ADE(1)(vi) of the immigration rules.

15. The appellant does not meet the requirements of the immigration rules and can only rely on an assessment of her rights under Article 8 outside the rules. The appellant, her partner and her children are all citizens of Jamaica and could continue their family life together there. However, given that the children were born in the UK and have known no other life, and in light of the length of residence of the parents, it is reasonable to assume that they have established ties in the UK. Their removal in consequence of the decision is likely to have a sufficiently grave impact on their right to private life to engage the operation of Article 8 (points (i) & (ii) of Lord Bingham's five stage approach in *Razgar v SSHD* [2004] INLR 349).
16. The state can lawfully interfere with an appellant's family and private life if it is pursuing a legitimate aim and it is necessary and proportionate in all the circumstances of the case. In cases involving human rights issues under Article 8, the heart of the assessment is whether the decision strikes a fair balance between the due weight to be given to the public interest in maintaining an effective system of immigration control and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest as expressed in the relevant rules and statutes: see *Hesham Ali v SSHD* [2016] UKSC 60.
17. Section 117B of the Nationality, Immigration and Asylum Act 2002 sets out several public interest considerations that a court or tribunal must take into account in assessing whether an interference with a person's right to respect for private and family life is justified and proportionate. In *AM (Section 117B) Malawi* [2015] UKUT 260 the Upper Tribunal found that the duty to consider section 117B only extended to the provisions that were relevant to the facts of the case.
18. Section 117B(1) states that the maintenance of an effective system of immigration control is in the public interest. The appellant and her partner remained in the UK and started a family at a time when they knew that they did not have leave to remain and may be required to leave at any time. Nothing in their witness statements acknowledges or explains their poor immigration history. Despite being refused leave to remain on several occasions they continued to remain in the UK without permission and made use of public services such as the health and education systems. The public interest in maintaining an effective system of immigration control should be given due weight.
19. It is likely that the appellant and her partner speak English and the evidence indicates that they have worked in the UK in the past (although on the face of it the appellant has never had permission to do so). It is likely that have the skills to be financially independent if they were given permission to work. The public policy considerations relating to English language (section 117B(2)) and financial independence (section 117B(3)) are neutral factors that do not add weight to the appellant's claim: see *AM (Malawi)*.

20. The Tribunal is required by section 117B(4)-(5) to give little weight to any private life that is established at a time when a person's immigration status is unlawful or precarious. For these reasons, I place little weight on any private life that the appellant and her partner might have established when considering where a fair balance should be struck.
21. In assessing the best interests of the children, I have considered the principles outlined in *ZH (Tanzania)*, *Zoumbas* and *EV (Philippines)*. The best interests of the children are a primary consideration but might be outweighed by the cumulative effect of other matters that weigh in the public interest.
22. The respondent must have regard to the need to safeguard the welfare of children who are "in the United Kingdom". I take into account the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55. In the guidance, the respondent acknowledges the importance of international human rights instruments including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: "The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies." The UNCRC sets out rights including a child's right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.
23. Both children were born in the UK and know no other life. It is reasonable to assume, and it is confirmed in the report prepared by the independent social worker, Rosaleen Brown, that their identity and whole life experience is rooted in this country. K was born in the UK and has been continuously resident for 10 years. She is eligible to register as a British citizen, but her mother has been unable to afford the fee to make the application. The child is not a British citizen by birth and must register to acquire British nationality. At the date of the hearing, as a matter of fact, she is not a British citizen. However, I give weight to the fact that a child who was born in the UK is eligible to register as a British citizen after 10 years. Albeit she has not done so, her length of residence is a matter that should be given significant weight. Although her strongest relationships are still likely to be focussed on her immediate family, she is also of an age where relationships at school are of increasing importance: see *MT & ET (children's best interests; ex tempore pilot)* [2018] UKUT 88. In an undated letter sent to the Home Office K said:

"I am writing to let you know that I love my family, my school, my friends and my teachers. I want to stay here in England, that I can go to school, and my friends are Fatima, Sally, Zarah, Sara, Sarah, Isabella, Leila, Layla and Nial. They all go to my school and we play, learn and share together, I wish I could live here for good."

24. M was also born in the UK. He is not yet eligible to register as a British citizen. There little information is provided about his progress save to say that he is doing well and is settled in school. Although Ms Brown's report does at times tip into the realms of advocacy by quoting relevant Tribunal case law and background evidence relating to Jamaica, I have been given no reason to doubt her professional assessment. She is a qualified social worker. As such her evidence can be given weight. She concluded that it is in the interests of the children to remain in the UK given the strength of their ties to the UK and the conditions that the family would face if returned to Jamaica, where their parents would have little or no support network. The disruption to the children's lives would be significant and they would not have the same opportunities as they would in the UK.
25. Although the appellant is legally represented, no evidence has been produced to support the assertions that she and her partner make about the conditions that they are likely to face if returned to Jamaica. The Upper Tribunal is an expert tribunal, which deals with many cases from Jamaica. For this reason, I find that I can take judicial notice of the fact that the conditions in Jamaica are unlikely to be as favourable for the children as they are in the UK. The appellant's witness statement indicates that she comes from an area of Kingston where there are high levels of crime. Her partner's background is less clear. The independent social work report describes him as having previously worked in engineering and as a painter and decorator. The witness statements of the appellant and her partner are confined to stating why they wish to remain in the UK but provide little detail about their background and fail to acknowledge or explain their long period of unlawful residence in the UK. While both parents are likely to be able to work to support the family, and are described as loving and supportive parents, I accept that the conditions that the children are likely to face in Jamaica are not likely to be as good as the UK. I also accept that the disruption of removal to Jamaica, a country that they have never been to, is also not likely to be the best interests of the children. For these reasons I conclude that the evidence points quite clearly to it being in the best interests of the children to remain in the UK with their parents.
26. In assessing whether public interest considerations are sufficiently serious to outweigh the best interests of the children I have taken into account the statutory provisions contained in section 117B(6), which states that the public interest will not require the person's removal where she has a genuine and subsisting relationship with a 'qualifying child' and it would not be reasonable to expect the child to leave the United Kingdom.
27. At the date of the hearing both children are 'qualifying children' for the purpose of paragraph 276ADE(1)(iv) of the immigration rules and section 117B(6) of the NIAA 2002. It is not disputed that the appellant and her partner both have a genuine and subsisting parental relationship with the children. The crux of the appeal rests very much on whether it would be 'reasonable' to expect the children to leave the UK within the meaning of the rules and statute. In *MA (Pakistan)* the Court of Appeal expressed some doubt as to whether the 'reasonableness' test should include

consideration of public interest factors but declined to depart from the earlier decision in *MM (Uganda) v SSHD* [2016] EWCA Civ 450, which concluded that it did. In *MA (Pakistan)* Lord Justice Elias emphasised that significant weight should still be given to the interests of a child, especially with reference to the respondent's published policy guidance: at that time the Immigration Directorate Instructions "Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10 Year Routes" (August 2015).

28. The latest version of the same policy is dated 22 February 2018. It continues to state that 'significant weight' should be given to the fact that a child has been continuously resident in the UK for a period of at least 7 years. The respondent recognises that in that time a child is likely to have set down roots and will be integrated into life in the UK. In this case the children are not British citizens, but they have never been to Jamaica and have no experience of life there. They know no other life than the one they have experienced in the UK. Although the children are not British citizens, at least in the case of K, she has been resident for a sufficiently long period of time that she would now be eligible to apply for British citizenship. But for the fact that the fee is prohibitively expensive for her mother, it is likely that she would have been registered as a British citizen. The second child has now lived in the UK for a continuous period of 7 years and is likely to have set down roots in the UK. Mr Duffy accepted that they had "strong interests" that would have to be weighed against the immigration history of the parents.
29. It is trite law that children should not be blamed for the actions of their parents. In this case both parents arrived in the UK with leave to remain but knowingly overstayed their leave and started a family in the full knowledge that they could be asked to leave at any time. The cumulative effect of public interest factors can, in certain circumstances, outweigh the significant weight that should be given to the best interests of the children. 'Strong reasons' will be needed to remove a family where a child has been resident in the UK for a period of 7 years or more.
30. Although there is some indication that the appellant may have worked in the UK when she had no permission to do so, there is little evidence contained in the summary of her immigration history, or that of her partner, to indicate abuses of the immigration system at the more serious end of the scale e.g. use of false documents or deception. There is no evidence of any other aggravating factors such as criminal convictions in the UK. I give weight to the fact that they overstayed many years, apparently without acknowledgment or remorse for their actions. However, their immigration history indicates that they did make some efforts to regularise their status albeit those applications were refused. Even though the respondent refused leave to remain on several occasions, no action appears to have been taken, over a period of many years, to remove the family from the UK. If the public interest pointed strongly in favour of removing the family, one might expect the respondent to have taken removal action at a much earlier stage. In the intervening period the children have established roots in the UK and K has become eligible to register for British citizenship with all the benefits that might entail.


31. The best interests of children who are long settled in the UK are a primary consideration that must also be given significant weight. Serious reasons must be given to outweigh the best interests of the children. The fact that the appellant and her partner remained in the UK in the full knowledge that they had no leave to remain is a matter that must be given weight, but I conclude that on the facts of this case, that the public interest considerations are not so serious to outweigh the interests of the children. As such, I conclude that it would be unreasonable to expect the children to leave the UK and the appellant meets the requirements of section 117B(6).
32. I conclude that removal of the appellant in consequence of the decision would not strike a fair balance between the weight to be given to the public interest (as expressed in the relevant rules, statute and policy) and the impact on the individuals involved in this case (points (iv) & (v) of Lord Bingham's five stage approach in *Razgar*).
33. The removal of the appellant from the UK would be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside

The decision is remade and the appeal ALLOWED on human rights grounds

Signed 
Upper Tribunal Judge Canavan

Date 22 August 2018