Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/25757/2015
IA/25761/2015
IA/25766/2015
IA/25769/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 May 2018	**On 16 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

DGP (FIRST APPELLANT)
LBM (SECOND APPELLANT)
LTM (THIRD APPELLANT)
LKM (FOURTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms U Miszkiel, Counsel instructed by Chipatiso Associates LLP
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellants in this case are citizens of Tanzania. The first appellant, Ms DGP, was born on 18 July 1974, her son LBM, was born on 13 August 2002 and her daughters LTM, born on 21 January 2005 and LKM, born on 21 August 2007. The first and fourth appellants entered the UK on 2 October 2007. The second and third appellants entered the UK on 1 December 2007 as dependants of the first appellant. The first appellant originally had leave to remain as a student and subsequently submitted human rights applications. On 27 September 2013 the first appellant lodged a judicial review against the refusal of the respondent to grant her a right of appeal following a refusal of the human rights claim on 17 April 2013. The Home Office conceded that judicial review and on 18 November 2014 the appellants submitted a further human rights application. It is these applications, which were refused on 2 July 2015, which were considered by the First-tier Tribunal. In a decision promulgated on 27 April 2017, Judge of the First-tier Tribunal Turquet dismissed the appellants' appeals.

2. The appellants appeal with permission from the Upper Tribunal on the following grounds:

   Ground 1 – that the First-tier Tribunal applied an improperly high standard of proof in using the word "satisfied";

   Ground 2 – at [53] the judge erred in incorrectly finding that not all three children were qualifying children (under section 117D), where the judge mistakenly said that at the date of the hearing only two of the three children had lived in the UK continuously for at least seven years;

   Ground 3 – it was submitted that the judge has confused the reasonableness test with the best interests test and as such the assessment of the EX.1.(a) and 276ADE(1)(iv) under Article 8 was fatally flawed;

   Grounds 4 and 5 – it was argued that the judge failed to give adequate weight to the correct length of residence of the children when assessing both their best interests and the reasonableness of return under paragraph 276ADE(1)(iv) and Section 117B(6). It was argued that the judge failed to assess all relevant factors in relation to all three qualifying children;

   Grounds 6 and 7 – it was argued that the judge's assessment of the best interests was inadequate or unreasonable when considering Article 8 outside of the Immigration Rules. Equally the assessment that it would be reasonable for the children to return to Tanzania was unreasonable.

Error of Law

3. Before me, Mr Walker conceded that the judge had made material errors of fact when looking at the age of the children and how long they had been in the UK and he considered that this caused errors in the judge's decision due to confusion as to how long they were here. Mr Walker submitted that such confusion led to a material error of law in both the judge's consideration of the best interests assessment for all of the children and whether it was reasonable for them to return to Tanzania, which he conceded were infected by these errors.

4. I agree with Mr Walker's sensible concession. Ms Miszkiel sought to amend the grounds of appeal, with consent to include ground 8 that the appellants rely on the arguments made by the appellants in the Supreme Court in the cases of **Pereira and NS (Sri Lanka) & Others UKSC 2016/0187** in relation to the best interests and reasonableness assessment (which are appeals from **MA (Pakistan) and others [2016] EWCA Civ 705** and currently awaiting judgment from the Supreme Court). Ms Miszkiel relied on the arguments made specifically in relations to whether there is a wider public interest consideration when assessing reasonableness under Section 117B(6) of the Nationality, Immigration and Asylum Act 2002..

5. Ms Miszkiel maintained that the judge had erred in applying an elevated standard of proof in that she had stated that she was not "satisfied". I do not accept that this is the case. There is nothing disclosed from a fair reading of the judge's decision that might indicate that she had got the burden of proof wrong and in finding that she was 'not satisfied' is not inconsistent with something being more likely than not.

6. However, I am satisfied that the judge erred in her best interests' assessment. The fact that the decision is ill-structured is not in itself a material error, and the judge reminded herself that it did not matter how the balancing exercise was conducted, providing the best interests of the children were a primary consideration. Nonetheless, there is force in the argument that the judge's assessment of best interests at [53], which was essentially outside of the Immigration Rules, and was preceded by findings that it would be reasonable for the first appellant and her children to relocate, was insufficient. It is trite law that in considering the best interests of the child there can be no consideration of the conduct of the parents. The judge, at [38] and [39] looked at the position of the fourth appellant LKM, born on 21 August 2007, the fourth appellant and the only child who appeared to meet the requirements under paragraph 276ADE. However, the judge was not applying the correct test when assessing the fourth appellant under paragraph 276ADE(1)(iv). It was unclear that the best interests of the fourth appellant had been considered. Instead the findings at [41] focused primarily on whether it would be reasonable for her mother to return, and at [39] and [42] that it would be reasonable for the fourth appellant to leave.

7. **MA (Pakistan) & Ors [2016] EWCA Civ 705** confirms that the assessment has to be from the position of the child. At [46] of **MA (Pakistan)**:

> "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."

8. Paragraph [53] of **MA (Pakistan)** provides:

> "53. Paragraph (7) justifies the observation of Christopher Clarke LJ in *EV (Philippines)* para. 33 that 'the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.' Accordingly, when making that assessment, it would be inappropriate to treat the child as having a precarious status merely because that was true of the parents."

9. Although the Tribunal Judge cited **MA (Pakistan)**, the Tribunal failed to properly apply those principles. The Upper Tribunal in Presidential Panel (**MT and ET (child's best interests; *ex tempore* pilot) Nigeria [2018] UKUT 00088(IAC)**) found as follows:

> "33. On the present state of the 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 her best interests lie in remaining."

10. The Upper Tribunal in **MT and ET** highlighted the relevant points in relation to the best interests of assessment as follows:

> "31. Conversely, ET has no direct experience of Nigeria. Whether or not there is a functioning education system in that country, her best interests, in terms of section 55 of the 2009 Act, manifestly lie in remaining in the United Kingdom with her mother rather than, as the respondent contended, returning to Nigeria with her

> mother. A much younger child, who has not started school or who has only recently done so will have difficulty in establishing that her Article 8 private and family life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, 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.
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> 32. This is why both the age of the child and the amount of time spent by the child in the United Kingdom will be relevant in determining, for the purposes of section 55/Article 8, where the best interests of the child lie."

11. The Tribunal in this appeal failed to adequately address the position of each of the children and conduct a best interests assessment; as highlighted by **MT and ET** (and paragraph 10(7) of **Zoumbas [2013] UKSC 74** and paragraph 24 of **ZH (Tanzania) [2011] UKSC 4**) and in **MA,** such an assessment must not take into consideration the behaviour of the parent and must look at the age of the child, how long they have been in the UK and examine their position in the wider world, including school. Whilst at [44] the judge looked at the position of the second appellant who had been in the UK since the age of 4 and was aged 14 at the date of hearing the judge in considering 117B(6) only considered this in the context of the second appellant and did not adequately consider the position of the third and fourth appellants who had been in the UK for over seven years at the date of the hearing.

12. I take into consideration that there was a body of evidence before the Tribunal in relation to all three children, including up-to-date reports and educational assessments and that the second appellant gave oral evidence in relation to not only himself but the position of his siblings. The Tribunal failed to give any adequate reasons as to why that evidence was rejected, if it was, in respect of the best interests' assessment that was carried out at [53]. There is merit in Ms Miszkiel's submission that the judge approached the Immigration Rules and Article 8 outside the Immigration Rules from the wrong perspective in assuming that the children could go back with their mother, which led to the reasonableness assessment she reached. Whereas, **MA (Pakistan)** at [45], [46] and [47] sets out the correct approach including in cases where a child has put down roots and developed social, cultural and educational links in the UK, such as are likely to be highly disruptive if the child is required to leave the UK, this disruption becomes more serious as they get older, and in such cases there is a very strong expectation that the child's best interests will be to remain in the UK with their parents as part of a family unit and that must rank as a primary consideration in the proportionality assessment. The Tribunal failed to give adequate reasons as to why, in this case where all of the children had been in the UK for over seven years, and the second and third appellants' seven year period does not run from

birth or shortly thereafter, it was decided that their best interests did not lie in remaining in the UK.

13. I agree with Mr Walker that the judge's confusion, which is highlighted at [17], [38], [53] and [56] where the Tribunal is inconsistent in relation to which children have been in the UK for seven years at the date of the hearing or not, has infected her assessment and therefore her findings of best interests of the children (and at [56] the Tribunal refers only to 'his' best interests, suggesting that only the best interests of the second appellant have been considered). This necessarily has infected the assessment of whether or not it is reasonable for the children to return and what the "*strong reasons*" would be that might require the children to return.

14. I do not agree with Ms Miszkiel's submission in relation to the judge's finding, at [50] and [51] (that the first appellant would have made an asylum claim if there was a belief that the children were going to be subjected to FGM). Ms Miszkiel submitted that nevertheless the judge ought to have considered the issue of FGM when considering the best interests. It is difficult to see what that assessment would have involved given that it cannot properly be said that the children would be at risk as it is manifestly clear that their mother would have made the appropriate asylum claim if that were the case. However, such is academic as I am satisfied that the judge's approach to the best interests assessment and the reasonableness question are fatally flawed and the judge failed to have proper regard to the best interests of all three children as a primary consideration. The consideration of the best interests was infected by her prior finding that it was reasonable for the first appellant and therefore in her findings, the children to return.

15. The appellant's' solicitors are in the process of obtaining an updated expert report and had submitted information to the Upper Tribunal, prior to the hearing, in relation to the delay in that report. The Supreme Court's decision in **NS (Sri Lanka)** may be of assistance in the remaking of this appeal (and it is anticipated the decision will be available in the autumn of 2018).

Notice of Decision

16. The decision of the First-tier Tribunal discloses an error of law and is set aside. Due to the nature and extent of the fact-finding required I remit the appeal to the First-tier Tribunal to be heard de novo other than by Judge Turquet.

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: 14 May 2018

Deputy Upper Tribunal Judge Hutchinson