Upper Tribunal
(Immigration and Asylum Chamber)

Appeals: HU/03665/2017
HU/03668/2017
HU/03672/2017

THE IMMIGRATION ACTS

Heard at Glasgow	Decisions & Reasons Promulgated
on 4 January 2019	on 16 January 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

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Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr H Ndubuisi, of Drummond Miller, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS, and notice of withdrawal.

1. Designated FtT Judge Macdonald dismissed the appellants' appeals by a decision promulgated on 13 December 2017. The FtT refused permission to appeal on 22 December 2017. On a further set of grounds, the UT granted permission on 17 September 2018.

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2. The matters raised in the first set of grounds are:

   (i) Failure to attach significant weight to the length of residence of the third appellant, a "qualifying child" (under reference to *MA and others* [2016] EWCA Civ 7058).

   (ii) Failure to attribute the increased weight required to the length of residence (under reference to *Azimi-Moayed* [2013] UKUT 00197).

   (iii) Failure to give weight to the health conditions of the first and second appellants, with indications of non-availability of HIV medication in Ghana, and consequences for the child's welfare.

3. The second set of grounds adds:

   (i) Application of the incorrect and more exacting test of "very significant obstacles", rather than reasonableness.

   (ii) Failure to apply the correct test to the best interests of the child, as set out in *MT and ET* [2018] UKUT 00088.

   (iii) Justifying refusal of permission by reference to the immigration history of the first and second appellants.

4. Mr Ndubuisi submitted along the lines of the grounds, and added the following. It was significant that the third appellant had been close to registering as a British citizen; the judge should have applied the presumption that leave was to be granted, absent powerful reasons to the contrary; there were no such reasons; the medical evidence did not reach the standard of article 3, but the judge overlooked its relevance to article 8; it had not been shown that no HIV treatment would be available in Ghana, but there was uncertainty, which impacted on the child's well-being and so on the reasonableness of return; the decision of the FtT should be set aside; taking the evidence before the FtT together with the fact that the third appellant is now a British citizen, the appeals of the first and second appellants should be allowed. (Mr Ndubuisi, sensibly, withdrew the case of the third appellant, which has been superseded by his citizenship.)

5. Answering the submissions for the respondent, Mr Ndubuisi added that the judge "convoluted" the distinct tests of obstacles and of reasonability, and erred fundamentally by referring to the immigration history of the first two appellants while assessing the best interests of the child, who was not to be blamed for their shortcomings. He said finally that "due weight had not been given to very weighty factors".

6. Having considered also the submissions for the respondent, I find that the appellants have not shown that the making of the decision of the FtT involved the making of any error on appoint of law, such that it ought to be set aside.

7. The grounds (particularly the first set) and the submissions are mainly insistence, and disagreement about the weight attached to matters by the FtT, not propositions of error on points of law.

8. The appellants do not show that the judge mixed up two tests. At [31] he clearly finds that the case fails on both tests: there was no background material to suggest it would not be reasonable to expect the appellants to leave the UK, and there were no “very significant obstacles” to integration into Ghana.

9. The judge might have framed his decision differently at [33] with reference to the public interest and the immigration history, if he had the benefit at the time of *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, [2018] 1 W.L.R. 5273, [2018] 10 WLUK 380. That would be a matter of form only. He clearly posed the central question as whether in all the circumstances it was reasonable to expect the family to go to Ghana; see e.g. [27]. The important context, in light of *KO*, would be this: against a background of the parents having no right to remain in the UK, the natural expectation is that the child would go with them.

10. It is clear when reading the FtT's decision as a whole that it took account of all relevant considerations, including the length of the child's residence. Even if it might be in the child’s best interests to remain in the UK with his parents, there was nothing to show that such advantage was more than marginal, or that it was unreasonable for the child to leave as part of the family.

11. The appellants sought an anonymity direction, and the respondent did not oppose that application. It may be doubted whether there is anything in the case to justify departure from the principle of open justice, but the point is marginal, and this decision is anonymised.

12. The appeals of the first and second appellants are dismissed. The appeal of the third appellant is recorded as withdrawn.

7 January 2019
UT Judge Macleman