**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Numbers: HU/18027/2018
HU/18035/2018
HU/18032/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 11th November 2019** | **On 12th December 2019** |

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**ANATOLY [K] (FIRST APPELLANT)**
**GISSELLE [S] (SECOND APPELLANT)**
**[C F] (THIRD APPELLANT)**
**(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellants: Ms Bexson, counsel instructed by GBS UK Immigration
For the Respondent: Miss Bassi, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants appeal against the First-tier Tribunal's decision to dismiss their appeals in a determination promulgated on 17th June 2019. The underlying decision for that appeal was that of the Secretary of State's dated 16th August 2018 which refused their application for leave to remain in the UK on the basis

of their private life. The first appellant is a national of the Ukraine born on 5th January 1987, the second and third were wife and child, both Chilean nationals born on 5th January 1987 and 25th May 2010.

2. The focus of the grounds of appeal was as follows.

**Ground 1**

3. The First-tier Tribunal Judge failed to give adequate consideration to Section 55 of the Borders, Citizenship and Immigration Act 2009 and the UN Convention on the Rights of the Child 1990 which embody the principle that the best interests of the children should be a primary consideration. The judge erred to agree that it was in the best interests of the third appellant to return to Chile. The starting point was **Azimi-Moayed and Others [2013] UKUT 197**. The judge did not appreciate that should the appeal not be successful the third appellant would not be brought up with both his parents. The first appellant was from the Ukraine and the second was from Chile and they would be removed to their respective countries of origin. Respectively they would not be accepted by the other's national authorities and therefore could not remove them.

**Ground 2**

4. The judge erred in using the strict interpretation of the UK immigration laws when finding that the Chilean legislation referred to deportation. The distinction between deportation and removal existed only in the UK immigration enforcement system. The international definition of deportation included any forced removal of a foreigner from the territory of which he was not a national. The appellants had provided a copy of the entire Chilean immigration provision which did not refer to removal.

**Ground 3**

5. The judge was in error when agreeing with the Secretary of State that the first appellant could at any point prior to removal apply for a Chilean spouse visa as the respondent's policy was to keep the passports of failed applicants. His Ukrainian passport was currently with the respondent and he would require his original passport to apply for a visa. They could not leave voluntarily owing to their limited funds and would have to use the Voluntary Returns Scheme.

**Ground 4**

6. The appellants could not leave to reside in their respective countries because they believed their lives would be in danger in the Ukraine and it was not in the best interests of their son. The first appellant's account of his fear of persecution in the Ukraine was credible and he presented original documents

from an Argentinian court to confirm his extradition made back in 2002. The appeal determination failed to mention the respondent's own country guidance presented by the respondent at the hearing and the report confirmed the Ukraine was still a corrupt country and adequate protection from the state would not be forthcoming.

**Ground 5**

7. It was submitted the judge erred in concluding there were no significant obstacles to the first appellant's reintegration into the Ukraine. At paragraph 50 the judge stated the first appellant left when he was 26 and had worked in the flooring industry. In fact, he was only 17 and had never worked in the Ukraine and had not returned for over twenty years.

**Ground 6**

8. Paragraphs 276ADE(1)(iv) and Section 117B (6) of the Immigration Rules were amalgamated into one. The reference to an interpretation of "continuous residence" was more relevant to long lawful continuous residence. There was provision under UKVI guidance, such that discretion could be exercised by the Secretary of State on an exceptional basis in relation to the third appellant's absence from the UK which was a good reason and should not affect the child's continuation of residence. The definition of qualifying child was contained in Section 117D and should not be confused with the definition of qualifying child under the UK Immigration Rules. For the purposes of Article 8 considerations that the third appellant was absent from the UK did not break the continuity of his residence.

9. It would not be reasonable for the third appellant to leave the UK because his life would be at risk should he go to the Ukraine.

10. In the case of **MT and ET [2018] UKUT 88** the Tribunal reiterated that powerful reasons were needed to remove a child after seven years. The third appellant had been in the UK for nine years and that was a lifetime and the only home he knew. He should not be blamed for the matters for which he was not responsible. He left the UK when he was 2 years and 3 months and was 2 years and 11 months when he returned and had now established his own private life. He had been born in the UK and would be entitled to register as a British citizen under Section 1(4) of the British Nationality Act 1981 in May of next year.

11. In sum the family life of the appellants could not be preserved outside the UK and it was submitted that the determination was unsafe, and permission was sought to appeal it.

**Permission to Appeal**

12. Permission to appeal was granted by First-tier Tribunal Judge PM Hollingworth on the basis that deracination (uprooting) of the child had not been assessed sufficiently. Permission was not limited and thus I conclude permission was granted on all grounds.

**The First-tier Tribunal determination**

13. The Judge of the First-tier Tribunal recorded the following evidence and made relevant findings: -

    i. The first appellant entered the UK on 21st November 2008 with the second appellant and both were granted 24 hours leave whilst in transit to the Ukraine. Since that date the first appellant had no right to remain within the United Kingdom. The second appellant, however, departed the UK on 20th May 2013 and re-entered the United Kingdom with six months' leave to enter on 20th May 2013. Prior to their arrival in the UK the first and second appellants both lived in Argentina.

    ii. The third appellant was born in the UK and was almost 9 years of age as at the date of hearing; he attended school and was educated through the medium of English. The second appellant's evidence was that the third appellant could not read or write Spanish and it was submitted that he could not speak Russian, Ukrainian or Spanish. They had been supported in the UK by the first appellant's family.

    iii. The first appellant asserted he could not return to the Ukraine owing to an incident in 1998 when he had a fight with someone said to have an affiliation with the police. Criminal proceedings were pursued, and he fled the Ukraine in 1999 and reunited with his mother in Argentina. He was subject to an international arrest warrant but that was revoked on 26th February 2002 and extradition not pursued. He states that in 2008 he sought to return to the Ukraine but whilst in transit called a friend who told him that the alleged victim was looking for him. The judge found, however, at paragraph 29 that the first appellant's claimed account of continuing risk to be incredible and that "in 2002 the extradition was not pursued as on the first appellant's evidence the Ukrainian authorities did not have sufficient evidence". The judge found the appellant's account of continued risk in the Ukraine was devoid of a reasonable objective belief and in particular

> *"It is so implausible as to be incapable of any reasonable belief that after a period of ten years the appellant only became aware of the continued risk of a precise point that he was in transit in the UK. It is inconsistent with the risks that the appellant claims that he would face within the Ukraine upon return that he did not make inquiries of this friend as to whether there was any continuing risk when making arrangements for his return. " [30]*

iv. The judge noted that the return to the Ukraine specifically was for the purpose of settlement. As such he found no continued risk from the authorities in the Ukraine.

v. The judge found the first appellant was not being deported to Chile and, importantly found, he could make his own way to Chile at any time. The Secretary of State noted that Section 51 of the Chilean legislation "allows the spouse of a Chilean national to apply to be treated as a temporary resident" and the respondent "has produced an article from Refworld which confirms the spouse of a Chilean national can apply for a temporary visa based on their family relationship which after twelve months can lead to permanent residence in Chile", [33];

vi. The judge found the first and second appellant had lived in their countries of origin until their early 20s and would understand the societal expectations of their country on return. The second appellant had family in Chile which included her mother, father and siblings and the first appellant had work experience in the flooring industry.

vii. At least one member of the family would speak the language of the country of return and the second appellant's parents had property in Chile. Indeed, it was noted by the Judge that the first appellant had lived and worked in Argentina, which is Spanish speaking.

**Analysis**

14. At the hearing before me Ms Bexson's primary argument was that the judge had not analysed the impact on the child of removal. The child was five days off being 9 years of age and well settled in school. The judge had concentrated on the parents' immigration history and the reference to Article 8 was cursory. The judge had not considered that the parents would be separated. Deportation and removal existed in the UK and although there was no direct evidence on the voluntary return according to Chilean legislation, if someone had to leave, they would be considered to have been deported. There was a possibility of an indefinite period of separation.

15. The first appellant still believed he was at risk in the Ukraine but, when asked, she accepted had not claimed asylum. There was an error in relation to the continuous residence of the third appellant who had returned to Chile for eight months to secure a Chilean passport and a failure to consider that they had to apply to the Family Court for various documents which prolonged this period. There had been no proper analysis as to whether it was reasonable for the child to return and the judge had not considered integration in the UK. There was no consideration of how the third appellant could adapt, bearing in mind it was in his interests to be with both parents. Next year in May he would be

entitled to make an application under Section 1(4) of the British Nationality Act for British nationality.

16. Miss Bassi submitted that there was only one definition of continuous residence and that came from paragraph 276A. The judge had adequately considered the best interests of the child, who was found to be adaptable and could learn with the assistance of his parents.

17. There was no expert evidence of what deportation meant (see section B, page 58 of the Appellant's bundle which was an unofficial translation of the extracts of the Legal and Regulatory Texts from the Republica de Chile Ministerio de Relaciones Exteriores). The judge considered the Sections as to removal and even if it did include removal the first appellant could apply for a visa as he held a passport which was a practical, rather than a technical problem preventing family unification. There had been no communication to the Secretary of State to inquire if a passport would be released and the respondent relied on a Refworld report that only a photocopy was required for a visa. The findings were open to the judge regarding fear of return to the Ukraine. The grounds were nothing more than a disagreement with the judge's finding.

**Analysis**

18. Taking each point in turn the judge appropriately directed himself in relation to the approach to the best interests of the child. He set out at paragraph 17 the requirements in relation to the best interests of the child directing himself appropriately that they were a primary consideration although they would not always determine the decision, but no other factor should be given more weight. In particular the judge identified **ZH (Tanzania) [2011] UKSC 4)** and **Zoumbas [2013] UKSC 74.** Indeed, that direction was acknowledged by the grounds of appeal. Bearing in mind the later findings of the judge it is not arguable that the third appellant would not be brought up with both of his parents. At paragraph 38 the judge accepted that there would be an interruption to the third appellant's education but noted that his schooling was not at a "critical stage, he was at primary school at the age of 9 years, and as recorded above would be able to learn the language of the country of return with the assistance of his parents".

19. Although there was a specific section on the best interests of the child, the findings on his interests were woven throughout the determination and it was accepted that other than a period of eight months the third appellant had always lived within the UK. It was accepted that the child was a Chilean national and that he had an extended family within Chile which included maternal grandparents, uncles, aunts and cousins. He was found to be of an adaptable age and he would be able to learn the cultural and societal expectations of him of the country of return with the assistance of his parents within a reasonably short period of his return and further he would be able to

learn the language. The judge specifically noted that the child appellant could not be said to be at a critical stage of his education and that his primary focus was on his parents and himself. It was accepted that he may have made friends within school, but he would have the benefit of

> *"Being brought up and educated in Chile being the culture and society to which he belongs as a Chilean citizen. There are also benefits in the third appellant being brought up in Chile given the familial relations that he has within that country. I accept that there will be an interruption in the continuity of the appellant's education. However, the third appellant is of an adaptable age and will be able to learn the language of the country of return".*

20. That was an adequate assessment of the best interests of the child and appropriate weight has been given to the welfare and interests of D, as a primary consideration. The judge was aware of the length of time that the child had spent in the United Kingdom and that is since May 2013. He was not a qualifying child. The child had not spent seven years in the UK.

21. The term of continuous residence derives from the Immigration Rules under paragraph 276A

> *276A. For the purposes of paragraphs 276B to 276D and 276ADE(1).*
>
> *(a) "continuous residence" means residence in the United Kingdom for an unbroken period, and for these purposes a period shall not be considered to have been broken where an applicant is absent from the United Kingdom for a period of 6 months or less at any one time, provided that the applicant in question has existing limited leave to enter or remain upon their departure and return, but shall be considered to have been broken if the applicant:*
>
> *(i) has been removed under Schedule 2 of the 1971 Act, section 10 of the 1999 Act, has been deported or has left the United Kingdom having been refused leave to enter or remain here; or*
>
> *(ii) has left the United Kingdom and, on doing so, evidenced a clear intention not to return; or*
>
> *(iii) left the United Kingdom in circumstances in which he could have had no reasonable expectation at the time of leaving that he would lawfully be able to return; or*
>
> *(iv) has been convicted of an offence and was sentenced to a period of imprisonment or was directed to be detained in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), provided that the sentence in question was not a suspended sentence; or*
>
> *(v) has spent a total of more than 18 months absent from the United Kingdom during the period in question.*

22. Even within that definition any continuous residence for the purposes of lawful residence would not have been broken where the applicant is absent from the UK for a period of six months or less at any one time. There is no similar

provision under Section 117 of the Nationality, Immigration and Asylum Act but any rights that the child would have had would have been extinguished on his departure from the UK in 2012. It appears that the family was remaining in the UK unlawfully until 2012 and indeed the grounds of appeal to the First-tier Tribunal recognise that the couple sought legal advice about regularising their stay in the UK. At best they had precarious leave, if that. Thus, albeit that the child was born in the United Kingdom his residence for the purposes of being a qualified child recommenced only on 20th May 2013. He had not by the date of the application (for purposes of 276ADE(1)(iv) or for the purposes of Section 117) as at the date of the hearing been in the United Kingdom for seven years. Indeed, as the judge acknowledged the second appellant had no lawful right to remain within the UK since her expiry of leave to enter for a period of six months and it is inconceivable that the child would have any lawful right to remain either.

23. Crucially the judge identified the focus of the child was on his parents, rather than his peers and the judge found on cogent reasoning that the best interests of the child were to be in Chile. (Paragraph 46).

24. I pointed out at the hearing that an application in relation to Section 1(4) of the British Nationality Act will not apply where the child has been outside the country, as it is acknowledged, for more than 90 days as regard each of the first ten years of his life.

25. Section 1(4) of the British Nationality Act confirms: -

> *'A person born in the United Kingdom after commencement who is not a British citizen by virtue of subsection (1), (1A) or (2) shall be entitled, on an application for his registration as a British citizen made at any time after he has attained the age of ten years, to be registered as such a citizen if, as regards each of the first ten years of that person's life, the number of days on which he was absent from the United Kingdom in that year does not exceed 90'.*

26. For that reason I find that the contention that the child would be entitled to register as a British citizen was ill founded and there was no supporting reason that the child should be treated differently from a child who had arrived in the UK in 2013. Simply he would not be able to apply for citizenship until 2023.

27. As the child was not a qualifying child for the purposes of Section 117D and Section 117B (6), **MA Pakistan and the Upper Tribunal [2016] EWCA Civ 705** has no bite. Even **MA** survives **KO (Nigeria) [2018] UKSC 53** there is no requirement in these circumstances because the child has not been in the UK for seven years that "powerful reasons are needed to justify removal of the child". As I have pointed out the judge specifically found that it was in the best interests of the child to go to Chile.

28. The argument put forward was that the child could not relocate with both of his parents. Putting aside for one moment the arguments in relation to the

Ukraine it was open to the judge to find that the first appellant could relocate to Chile. There was no argument before the First-tier Tribunal that the appellant would be unable to obtain his original passport and as Miss Bassi pointed out there had been no application for his passport from the Home Office and that a Refworld Report confirmed that only a photocopy of his passport was required in order to make an application for a visa for Chile.

29. At paragraph 33 it was open to the First-tier Tribunal Judge to interpret the Sections in relation to Chilean law as he did, particularly bearing in mind the absence of any expert report on Chilean law and the unofficial translation to which he was referred. Moreover, the judge identified the article from Refworld which confirmed that the spouse of a Chilean national could apply for a temporary visa based upon their family relationship which after twelve months could lead to a permanent residence in Chile. There is no requirement for the family to wait until removal and the mere assertion by the appellants that they did not have the funds to voluntarily return did not meet the exacting standard and threshold to show very significant obstacles to return, and a bare assertion that there is no one to support will not meet the evidential standard **R (Parveen) [2018] EWCA Civ 932**. The judge had noted that the appellants were being supported by family.

30. The judge made a detailed analysis of Section 27(3) of the Chilean legislation and notwithstanding the judge found that "the first appellant could at any time prior to such removal apply for a Chile spousal visa and return to Chile with the second and third appellant who are Chilean nationals", the judge specifically found

> *"I do not accept that the family could not afford flights to Chile on the basis that the second and third appellants have returned previously. For these reasons I find against the appellants' claim that the Chilean immigration legislation would prevent the first appellant returning to Chile with the second and third appellant"* (paragraph 34).

Those adequately reasoned findings were entirely open to the judge and not characterised by any error of law.

31. The judge also noted that there had been no asylum claim in relation to return Ukraine but moreover found the first appellant's account in relation to his return to the Ukraine inherently unbelievable. It was not only that the first appellant failed to make an asylum claim but additionally, the judge considered his claim in relation to paragraph 276ADE and concluded that there was no risk because the first appellant's account was not credible, having related that he only became aware of the continued risk of the precise point he was in transit in the UK. Once again that conclusion was entirely open to him.

32. The judge when considering very significant obstacles did err, but not materially, when he concluded that the first appellant was 26, rather than 17

when he left the Ukraine, but was correct in stating that the appellant had worked in the flooring industry and did not refer specifically to the Ukraine. I note that the first appellant lived in Argentina where they speak Spanish.

33. With all three appellants the judge considered whether there were any very significant obstacles to their return, identifying none. He acknowledged that the conduct of the parents should not be visited on the child and there is no evidence in the decision that he did so. He did however consider the circumstances of the appellant against the background of **KO Nigeria** (albeit that Section 117B (6) does not appear to apply here). Even if it did, as set out at paragraph 19 of **KO**

> '*19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in EV (Philippines) v Secretary of State for the Home Department [2014] EWCA Civ 874, para 58:*
>
> > *"58. 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?"*
>
> *To the extent that Elias LJ may have suggested otherwise in MA (Pakistan) para 40, I would respectfully disagree. There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves.*

34. Overall it is not even arguable that the impact of "deracination or uprooting has not been sufficiently assessed against the level of integration attained in the United Kingdom".

35. The judge made a proper assessment of the Immigration Rules at paragraph 53, finding no very significant obstacles to their return to Chile and the Ukraine and there is no indication that he failed to take a broad and evaluative approach to their integration. He found the appellants financially self-sufficient, no evidence to suggest that the first appellant spoke English and it was open to the judge to find as he did at paragraph 62 that private life was developed when the appellants' status in the UK was either precarious or unlawful and for those reasons little weight was to be attached to their private life. Not least they would be able to work in Chile on return and be able to support themselves. As such he applied Section 117B of the Nationality, Immigration and Asylum Act 2002 and approached the appeal without material error and it was open to him to find that the "balancing exercise that

must be conducted in relation to Article 8 weighs in favour of the respondent's policy aim of legitimate immigration control". The only finding of the judge which may have erred was in relation to Section 117B (6) in determining that the child was a qualifying child. That however was to the advantage of the appellants and the judge made the specific finding that it was reasonable for the third appellant to leave the UK.

36. I find no material error in the decision and it will stand.

37. The appeal remains dismissed.

No anonymity direction is made.

Signed *Helen Rimington* Date 9th December 2019

Upper Tribunal Judge Rimington