

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Numbers: HU/23826/2016**

**HU/23831/2016**

**HU/23834/2016**

**HU/23836/2016**

**THE IMMIGRATION ACTS**

|  |  |  |
| --- | --- | --- |
| **Heard at Field House** | **Decision & Reasons Promulgated** | |
| **On 11 July 2018** | **On 19 November 2018** | |
|  | |  |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**Mr RODERICK BOLANSOY (FIRST appellant)**

**Mrs ERLIE REYES BOLANSOY (SECOND appellant)**

**R B (THIRD appellant)**

**K B (FOURTH appellant)**

(anonymity directions not made)

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr S Unigwe of Counsel instructed by Melvyn Everson & Co

For the Respondent: Ms Z Ahmad, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. These are linked appeals against the decision of First-tier Tribunal Judge Herbert promulgated on 23 March 2018 refusing the Appellants’ appeals on human rights grounds against a collective decision of the Respondent dated 20 September 2016 refusing leave to remain in the United Kingdom.

2. The Appellants are a family comprising husband and wife and two minor children. The First Appellant was born on 16 June 1976; the Second Appellant, his wife, was born on 22 October 1978. The Second Appellant entered the United Kingdom on 7 June 2004 with one year’s leave pursuant to a Sector-Based Scheme in respect of work permits. The First Appellant entered the United Kingdom shortly after on 15 July 2004 under the same scheme and also with a period of leave granted for twelve months.

3. The couple met whilst in the United Kingdom and formed a relationship. They underwent a marriage ceremony at the Philippines Embassy on 12 December 2007, but they have not contracted a civil marriage in the United Kingdom. Nothing turns for the purposes of this appeal on the exact nature or status of their marital relationship.

4. The Third and Fourth Appellants are the children of the First and Second Appellants. The Third Appellant, their son, was born on 15 May 2010 in the United Kingdom, and the Fourth Appellant, KB, was born on 6 April 2014.

5. The First and Second Appellants, having entered the United Kingdom with a grant of leave of one year, did nothing to regularise their respective statuses at the expiry of their leaves. They both became overstayers. They remained in the United Kingdom for a period approaching seven years until on 30 May 2012 an application for leave to remain was submitted outside the Rules on compassionate grounds. The application was refused with no right of appeal on 17 July 2013.

6. On 5 August 2013 a request for reconsideration was received by the Respondent, but this was rejected on 27 November 2013.

7. The Appellants remained in the United Kingdom, notwithstanding the rejection of the application. Almost a further three years passed before representations were made - which have led to the decision that is the subject of this appeal. Representatives acting on behalf of the Appellants submitted representations under cover of letter dated 18 August 2016 seeking leave to remain in the United Kingdom essentially on Article 8 grounds.

8. The Appellants’ applications were refused for reasons set out in a ‘reasons for refusal’ letter (‘RFRL’) dated 20 September 2016.

9. The Appellants appealed to the IAC.

10. The linked appeals were dismissed for reasons set out in the ‘Decision and Reasons’ of First-tier Tribunal Judge Herbert promulgated on 23 March 2018.

11. The Appellants sought permission to appeal which was granted by First-tier Tribunal Judge Landes on 11 May 2018.

**Error of Law**

12. I do not propose to go into any great detail in respect of the consideration and findings of Judge Herbert at this stage, although I will make some further reference to his findings and observations later on because, as will be seen, the Appellants rely on aspects of his decision, notwithstanding that their appeals were dismissed. I do not propose to set out details because it is common ground before me, and I accept, that the decision of the First-tier Tribunal Judge should be set aside for error of law. Ms Ahmad conceded at the outset that this was the case.

13. The Respondent’s concession is made with particular regard to the circumstances of the Third Appellant who was a child who had been present in the United Kingdom for more than seven years by the time of the hearing before the First-tier Tribunal. It is noted that whilst the Judge found that the Third Appellant could not meet the requirements of paragraph 276ADE of the Immigration Rules, he had failed to make a reasonableness assessment in respect of section 117B(6) and to take that forward to an overall evaluation of proportionality. In particular, with reference to paragraph 15 of the Decision of the First-tier Tribunal it was conceded that by focusing on the Third Appellant’s age at the date of the Respondent’s decision the Judge failed to have regard to the requirement to consider matters at the date of the hearing when considering Article 8 grounds.

14. It is also to be noted that at paragraph 15 – seemingly in the context of still considering the position of the children of the family - the Judge stated:

*“Whilst there would be hardships it could not be said to amount to being unduly harsh…”.*

It was conceded by Ms Ahmad that the reference to *“unduly harsh”* was in error in that in respect of the Third Appellant the relevant test was one of reasonableness rather than harshness, whether that was in respect of the Rules or section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

15. I accept the Secretary of State’s concession and formally set aside the decisions of First-tier Tribunal Judge Herbert for error of law.

**Remaking the Decisions**

16. It was common ground between the parties that the decisions in the linked appeals should be remade by the Tribunal on the basis of submissions.

17. In his submissions before me Mr Unigwe sought to emphasise certain favourable passages from the Decision of Judge Herbert - which for the main part is indeed written in a tone of understanding and sympathy for the predicament of the Appellants, and in particular the minor Appellants who are not responsible for finding themselves living in the United Kingdom without any formal basis so to do. In particular, my attention was directed to the following passages which it was submitted lent considerable weight to a favourable overall consideration of the Appellants’ cases.

*“There is overwhelming evidence before me that all the four Appellants have the standard base of a significant family and private life in the United Kingdom, which is not in dispute. It is also my finding that they would face obstacles to returning to Philippines and these would be obstacles of an economic and emotional nature as obviously removing the children back to the Philippines would deprive them effectively of their circle of friends and progress that both children have made in their education”* (paragraph 15).

*“There are a number of factors that might be born in mind, firstly I have clearly recognised the significant private and family life that both the adult Appellants and their children have undergone in the United Kingdom. I have also considered the fact that there will be clear disruption to both children’s education should they be removed to the Philippines and that the first difficulty will be one of language and one of effectively losing some of the progress in their educational achievement and their circle of friends which as children they would feel acutely”* (paragraph 18).

*“I have also taken into account the difficulties that would be caused in terms of unemployment for both parties and in accommodation before they are able to settle”* (paragraph 19).

18. Mr Unigwe also invited the Tribunal’s focus on to the circumstances of the Third Appellant as a minor who had spent more than seven years in the United Kingdom. He did not suggest that this was the only basis upon which the appeal should proceed, pleading in aid also the substantial period of time that the parents have been in the United Kingdom and their private lives built up in consequence. Nonetheless, as I say, particular emphasis was placed on the circumstances of the Third Appellant - and in that regard section 117B(6) was pleaded as particularly pertinent.

19. Ms Ahmed for her part drew my attention to passages in the decisions of **Azimi-Moayed [2013] UKUT 00197 (IAC)** and **AM (S117B) Malawi [2015] UKUT 0260 (IAC)**. In respect of **Azimi-Moayed** emphasis was placed on subparagraphs 1(i) and 1(iv) of the head note which are in these terms:

*“(1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:*

*(i)         As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.*

*…*

*(iv) Apart from the terms of published policies and Rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable”*.

In respect of **AM** (**Malawi)** my attention was directed in particular to the following passage at paragraph 39:

*“There was no reason to infer that any interruption to the education of the elder child upon return to Malawi would be any more significant than that faced by any child forced to move from one country to another by virtue of the careers of their parents. Nor should the difficulties of a move from one school to another become unduly exaggerated. It would be highly unusual for a child in the UK to complete the entirety of their education within one school. The trauma, or excitement, of a new school, new classmates and new teachers is an integral part of growing up. In too many appeals the First-tier Tribunal is presented with arguments whose basic premise is that to change a school is to submit a child to a cruel and unduly harsh experience. Indeed, as if to illustrate the point, we note that the eldest child of this family has been required to move schools, and move from one end of the UK to the other, as a result of the decisions of her parents. The evidence does not suggest she suffered any hardship or ill effect from so doing”*.

20. Ms Ahmad also sought to emphasise in her submissions that both the adult Appellants have family members still living in the Philippines, and indeed had spent a substantial part of their early life living there. Reference was made to passages in their witness statements referring to the presence of family members in the Philippines and also the findings of the First-tier Tribunal in particular at paragraph 8:

*“The First Appellant states that his mother is 76 years old and frail and therefore he has nowhere to stay if he were to return although he has some extended family in the Philippines. He said his wife the Second Appellant does have her parents and if they were forced to do so they could stay in temporary accommodation with his mother-in-law if the worst case scenario came to pass”*.

21. Necessarily, the Secretary of State also put significant emphasis on the adverse immigration history of the adult Appellants and the public interest in maintaining effective immigration control. Neither parent had had leave to be in the United Kingdom since 2005. In this context my attention is also directed to section 117B of the 2002 Act with regard to the weight to be attached to the family and/or private life dependent upon precarious and/or unlawful presence in the United Kingdom.

22. Ms Ahmad also provided me with some information in respect of the availability of medical services in the Philippines by way of a list of doctors who could provide asthma treatment. I will return to this aspect of the case in due course, but suffice to say at the moment that I can see little in the supporting evidence that provides anything of any great weight with regard to the underlying asthma condition of the Third Appellant that should sound in any significant way in the consideration of the reasonableness of expecting him to leave the UK, or the proportionality of a decision to remove the family from the United Kingdom. It seems to me that the materials were provided by Ms Ahmed as a matter of caution and in case particular emphasis might be placed on this aspect of the history.

23. Mr Unigwe did not in his initial submissions direct my attention to anything very specific in this regard. See further below in respect of the available evidence.

24. I have given very careful consideration to all of the evidence on file in this regard. I note the following matters.

25. The adult Appellants have offered at no stage in these proceedings anything by way of explanation for their election to overstay their leave. I invited Mr Unigwe to direct my attention to anything in the documents on file, including in particular the witness statements, that might offer any such explanation and he was unable to do so. Nor has anything been offered by way of explanation for the election to remain in the United Kingdom after the unsuccessful application in 2013.

26. In this latter context I am not persuaded to the view that it is to an applicant’s credit to plead that he or she has attempted to regularise his or her immigration status, if in reality having done so they have disregarded the outcome of such an attempt and remained in the United Kingdom in defiance of an adverse decision. In substance, this is no more than a contingent respect for immigration control – contingent upon the system of control rendering a favourable decision. Insofar as the earlier outcome decisions were unfavourable, then manifestly by their actions the adult Appellants displayed a disrespect for that immigration control. In this context it is particularly germane given that no explanation has been proffered for remaining for a further three years in defiance of an unfavourable decision before making the instant applications that have resulted in the decisions that are the subject of appeal.

27. It is to be recalled that it is only in light of this passage of time that the adult Appellants are enabled to pursue the core submission that they rely upon in respect of their son having been present in the United Kingdom for more than seven years.

28. The application that was made in 2016 by way of letter dated 18 August 2016 (Annex A of the Respondent’s bundle before the First-tier Tribunal), was somewhat limited in its scope. In a document headed Reasons for Wanting to Stay in the UK, much is said about applicable case law but very little about the circumstances of the family itself. It is possible to pick out perhaps only the following by way of case specific information. At paragraph 1:

*“In light of the applicants’ length of stay, they have established genuine ties in the United Kingdom, with diminished or no ties to their country of origin”*,

and then at paragraph 4:

*“It is noted that the family have been blessed with two children both born in the UK. We understand that their children’s health is a concern to them and that health services in Philippines is not only inadequate but also very expensive. This, we understand, led to the death of Mr Bolansoy’s father in that country”*.

Otherwise, the submission and representations submitted with the application were general in nature.

29. Upon analysis it does not appear that anything more particular was advanced in the application in support of the supposed health concerns in respect of the Appellants’ children.

30. Whilst there were documents in relation to the death of Mr Bolansoy’s father, it is difficult to discern from those documents that there was anything particularly lacking in his healthcare in the Philippines that caused his death.

31. Be that as it may, in the event the only matter that has been relied upon by way of health issues, and the only documents filed in the appeals that relate to health issues, are in respect of the Third Appellant’s asthma.

32. I pause to note that it follows that the application that was made in 2016 had nothing of any particular substance to advance beyond the fact of the length of time the Appellants had been in the United Kingdom. It seems to me it was in substance an essentially empty application. Moreover it is clear that it was only prompted by the service of a RED.0001 document in respect of removal. As such I draw the inference that representations of no real substance were made with the principal motivation of frustrating a legitimate removal process in circumstances where the family had no proper basis to remain in the UK. Again, I remind myself that it is only in consequence of remaining in defiance of control and pursuing such an empty application that the Appellants have reached a stage where they are able to raise an argument based upon the Third Appellant’s seven years in the UK.

33. Notwithstanding what I find to be the cynicism of the adult Appellants, and their poor immigration history including remaining in defiance of adverse immigration decisions, I recognise that neither of the minor Appellants have any responsibility for such conduct. Moreover in considering either section 117B(6) or the analogous paragraph 276ADE(1)(vi) of the Immigration Rules I should consider the question of the reasonableness of expecting the Third Appellant to leave the UK by reference to what is reasonable for him.

34. The starting point for consideration of reasonableness, and a primary consideration (though not paramount) is the best interests of the child.

35. It is uncontroversial that the best interests of both the minor Appellants is served by them continuing to live with their parents.

36. Consideration of the best interests of the minor Appellants must necessarily take into effect those matters identified by the First-tier Tribunal Judge (cited above) in respect of the disruptive impact on schooling and private life/friendship networks in the event of having to relocate. Similarly, it must be taken into account that it was found that there would be an element of economic hardship and temporary unemployment before the parents settled back into life in the Philippines. However, such matters need to be viewed through the prism of the observations in **AM** (**Malawi)** - that such matters as moving home and changing school may be seen as an integral part of growing up. Moreover, the evidence was to the effect that there would be family support in the Philippines, and indeed the First-tier Tribunal Judge observed that the children would be able to connect for the first time with their extended family in the Philippines (paragraph 22). In such circumstances I am not persuaded that there would be any significant adverse impact on the best interests of either child by reason of relocation to the Philippines in circumstances where such relocation would be with the benefit of the continuing care and support of both of their parents.

37. I have referred above to concerns expressed by the Appellants in respect of the Third Appellants asthma. Accordingly I give consideration to this issue within the specific context of best interests, as well as more generally.

38. The material in respect of the Third Appellant’s asthma is threefold.

(i) Letter dated 31 January 2018 from [ ] Group Practice in the following terms:

*“I have been asked by the [Third Appellant’s] mother to provide a letter. I understand that they are undergoing a visa review and the judge has asked for information with regard to RB’s health.*

*RB has to use an inhaler for his breathing when he gets an infection such as a viral wheeze. He has been born and brought up in the UK and his mother is concerned that a change in environment to very hot weather will potentially affect his breathing”*.

I pause to note that what is said there is that the use of an inhaler is only necessitated at the time of infection. It is not suggested that this is a case where asthma is a serious consistently inhibiting debility. Further, so far as the change of weather or environment is concerned, the concern expressed is that of the mother: the GP does not advance an opinion that such concerns are remotely well-founded. I do not consider that the GP’s letter provides medical support for the notion that relocation to the Philippines would have an adverse impact on an underlying condition which in any event does not seem to be at all serious.

(ii) Care plan on the headed notepaper of the Homerton University Hospital prepared for the benefit of the Third Appellant’s school, December 2017 (pages 74-76 of the Appellants’ bundle). The plan confirms the diagnosis of asthma and that medication has been prescribed by way of a Salbutamol inhaler - *“2 puffs when required”*. It is suggested that potential triggers to an episode of asthma are hot, cold or damp weather, exercise or illness, and the likely symptoms that the Third Appellant might experience are exactly those symptoms that one would expect for an asthmatic – difficulty breathing, wheeze, shortness of breath, coughing, tightness in chest or a stomach ache. The care plan, such as it is, is entirely unextraordinary: it essentially is to the effect that the school needs to keep an eye on the matter and make sure that when in school the Third Appellant has up-to-date medication, is monitored to prevent any triggers, and to ensure that he has access to his medication as required. I find nothing in that document that suggests that this is anything other than a young child with a fairly normal and entirely unextraordinary diagnosis of asthma.

(iii) Letter dated 6 February 2018 from Christine Carbon-Gumban MD on the headed notepaper of the Office of the Governor of Tablas Island District Hospital (page 118). There is no suggestion that Dr Carbon-Gumban has any direct knowledge of the Third Appellant. The letter is in these terms:

*“The parents of [the Third Appellant] requests me to enlighten your good office to the possible outcome of Mr B’s health if subjected to a prolonged stay here in the Philippines. I was shown a medical certificate of the family stating that Mr B is suffering from viral wheeze and is using an inhaler for his breathing every time he contracted an infection. Patients with such conditions might be triggered by a change in environment especially to a hot and humid weather like the Philippines. Other contributory triggers of wheezing attacks are dust, pollens and pollution all of which are here. Triggering Mr B’s attack would subject him to prolonged use of inhaler to aid with his difficulty of breathing but in turn might make him dependent on it worse if needed the use of steroids and other medicines and also he might be subjected to several laboratory diagnostics like chest radiographs etc. all of which will be financially shouldered by his parents (healthcare here is not for free). I am also concerned with his way of life if he would always have these attacks making him absent at school (affecting his education) and affecting his interactions with other kids his age thereby affecting his overall confidence in himself. This letter is for the best interests of Mr B’s health and welfare”*.

It seems to me that those matters are not wholly untypical of asthmatics and are contingent upon particular circumstances and developments in the condition which may or may not happen in any environment. This is very much so given the reference to the presence of dust, pollens and pollution which are almost universally present across the globe and are not peculiar to the Philippines. I find nothing in that document remotely suggesting that the Third Appellant’s medical condition should place him at any greater risk in the Philippines than anywhere ese – including the UK.

39. In all such circumstances I find that it is in the Third Appellant best interests to remain in the company of his parents whether that be in the UK, the Philippines or elsewhere. Whilst there may be a temporary impact upon him in the event of relocation to the Philippines by reason of disruption to his education and a disruption of his current friendship network, such matters are not shown to be of significant or durable adverse impact on his overall best interests, are essentially part and parcel of growing up and within the normal range of the vicissitudes of life, and that in any event there are advantageous aspects of becoming acquainted with his extended family in the Philippines. I am not persuaded that there are any relevant health issues that suggest it is in the Third Appellant’s best interests to remain in the UK, or otherwise make it contrary to his best interests that he relocate to the Philippines.

40. For the avoidance of any doubt the same reasoning essentially applies to the Fourth Appellant, save to note that there are no medical concerns advanced for consideration. (I do not consider the reference to constipation in the supporting witness statements to be of any significance in the absence of any detailed diagnosis.)

41. Both the minor Appellants would be leaving the UK with their parents. Indeed the reason that they would be leaving the UK is because their parents have no basis to remain here.

42. The ‘reasonableness’ test is relied upon in respect of the Third Appellant pursuant to section 117B(6) by reason of his having been present in the UK for more than 7 years. However, in general terms it is reasonable to expect a child to accompany a departing parent/s – particularly if returning to the country of shared nationality. Beyond the length of time in the UK there are no special factors that in my judgement indicate it would not be reasonable to expect the Third Appellant to leave the UK. I do not find that there would be any adverse impact on best interests – albeit acknowledging some of disruption and a need to readjust to a new environment. I reject the notion that there are any significant health concerns in play. The Third Appellant would be going to a country of which he is a national and in which he is entitled to the full rights of any other citizen of his country.

43. In all the circumstances I find that the adult Appellants cannot rely upon section 117B(6) to resist removal.

44. I remind myself that pursuant to the public interest considerations under section 117B little weight should be given to a private life established at a time of unlawful presence in the UK or of precarious presence in the UK. The family’s presence has at all times been at least precarious, and latterly has been unlawful.

45. I acknowledge that the adult Appellants have in the past been economically active, and there is no reason to think that if allowed to remain in the UK the family could not be financially independent. No particular concerns have been expressed in respect of knowledge of the English language. However these latter two matters – financial independence and knowledge of English – whilst not being adverse factors herein, are essentially neutral rather than positive.

46. The public interest is served by the maintenance of effective immigration control, which is ordinarily given effect by a fair and consistent application of published immigration rules. The family do not qualify under the Immigration Rules. Moreover, for the reasons explored above there are significant adverse features in the immigration histories of the First and Second Appellants.

47. Accordingly, in all of the circumstances I find that the proportionality argument does not favour any of the Appellants.

48. For the avoidance of any doubt in reaching this conclusion I accept that the disruption to the private life of each of the Appellants is such as to require the first two **Razgar** questions to be answered in their favour. (The same does not apply in respect of the mutual family life as there will be no disruption to that in the event of removal because the family will be removed as a unit.) There is no apparent issue between the parties in respect of the third and fourth **Razgar** questions. In respect of the fifth **Razgar** question, proportionality, I am satisfied that the Respondent has demonstrated that the public interest outweighs the disruption to the private life consequent upon the Respondent’s decisions. The appeals are dismissed accordingly.

**Notices of Decisions**

49. The linked decisions of the First-tier Tribunal contained a material error of law and are set aside.

50. I remake the decisions in the appeals.

51. The appeals are dismissed.

52. No anonymity directions are sought or made.

Signed: Date: **14 November 2018**

**Deputy Upper Tribunal Judge I A Lewis**

**TO THE RESPONDENT**

**FEE AWARD**

I have dismissed the appeals and therefore there can be no fee awards.

Signed: Date: **14 November 2018**

**Deputy Upper Tribunal Judge I A Lewis**