



IAC-HW-AM-V1

Upper Tribunal

(Immigration and Asylum Chamber) Appeal Numbers:

IA/23778/2014

IA/23779/2014

IA/23780/2014

IA/23781/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 18 February 2016**

**Decision & Reasons Promulgated
On 15 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS E D C F + 3
(ANONYMITY DIRECTION MADE)**

Respondents

Representation:

For the Appellant: Mr Avery, Home Office Presenting Officer

For the Respondents: Miss Cooke, Farani-Javid-Taylor, Solicitors, London

DECISION AND REASONS

1. The Appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-tier Tribunal.

2. The Appellants are citizens of Brazil born on 13 July 1981, 20 August 1978, 5 June 2003 and 13 February 2008. They are a wife and her husband and their two children. They appealed against the Respondent's decisions of 14 May 2014 refusing them leave to remain in the United Kingdom and setting removal directions against them as overstayers. The appeals were heard by Judge of the First-tier Tribunal Symes on 26 January 2015. He allowed the appeals under the Immigration Rules and on human rights grounds in a decision promulgated on 24 February 2015.
3. An application for permission to appeal was lodged and permission was refused by Judge of the First-tier Tribunal De Haney on 23 April 2015. Permission to appeal to the Upper Tribunal was lodged and permission was granted by Upper Tribunal Judge Frances on 14 July 2015. The permission states that it is arguable that the Appellants could not satisfy the Immigration Rules at the date of the decision. The permission points out that the judge acknowledged that the Fourth Appellant was one month short of seven years' residence. The permission goes on to state that it is also arguable that in considering proportionality the judge erred in law in his application of Section 117B.
4. There is no Rule 24 response.
5. A first stage error of law hearing was heard at Field House on 8th December 2015 before Upper Tribunal Judge Storey. He found that the First-tier Tribunal Judge had erred in law and adjourned the case for it to be remade in the Upper Tribunal.
6. He points out that the Appellants have been resident in the United Kingdom unlawfully. The First Two Appellants have been overstayers since mid 2007. In the case of the Third Appellant he entered the United Kingdom via Ireland without authorisation in June 2010 and the Fourth Appellant was born in the United Kingdom on 13 February 2008. She suffers from hydrocephalus which has required extensive medical care and has required education in a special needs context. The First Two Appellants have worked illegally in the United Kingdom.
7. Upper Tribunal Judge Storey found that the requirements of paragraph 276ADE have not been satisfied. The requirements of this Rule have to be met at the date of application and none of the Appellants could satisfy the terms of the Rules. The Third Appellant had not at that time lived continuously in the United Kingdom for seven years. The First-tier Tribunal Judge materially erred in law in concluding that the Appellants or even one of them met the requirements of the Rules.
8. Judge Storey then went on to deal with Section 117B(3) of the Nationality, Immigration and Asylum Act 2002 stating that the First-tier Judge wrongly applied this when dealing with financial independence. He stated that the First-tier Judge wrongly failed to apply Section 117B(5) considerations which specify that little weight is to be given to a private life established by a person at a time when the person's immigration status is precarious.
9. Judge Storey found there was a further error of law in that the First-tier Judge failed to apply Section 117B(5) considerations to the proportionality assessment under

Article 8 outside the Rules. The judge made no reference to the fact that the Appellants have developed a private life in the United Kingdom when their immigration status was precarious. He found that the judge addressed the issue of the best interests of the child but did not conduct any kind of balancing exercise. The judge did not consider the family's cultural and linguistic connections with Brazil and made an error by referring to the lack of additional family support if the family had to stay in an urban centre with the First Two Appellants working.

10. Judge Storey referred to the various reports relating to the Fourth Appellant, in particular the reports by Dr Adamovic-Satterthwaite dealing with the requirements of the Fourth Appellant and her present development. He stated that any assessment outside the Rules based on Article 8 is likely to turn very much on his reports and the extent to which they can be relied on in light of the Country Information regarding rural and urban areas of Brazil. For that reason he adjourned the case and set it down for hearing before the Upper Tribunal. There has been no disagreement on the facts relating to the family's circumstances in the United Kingdom. The matter of the likely circumstances of the family in Brazil, either in their home rural area or on relocating to an urban area is one which he found the Upper Tribunal could deal with without the need for remittal.
11. I am dealing with the second stage hearing today.

The Hearing

12. The First Appellant took the stand and asked that her statement which she made for the First-tier hearing be used as evidence for this hearing.
13. Her representative asked her about her daughter's medical condition (the Fourth Appellant). She asked what care she gets in the United Kingdom and what investigations the witness has made about healthcare in Brazil. She said she has made no investigations. She was asked if she knows anything about healthcare in Brazil and she said she does and she thinks her daughter would be on a waiting list for a long time. She said in Brazil she lived in a small town and she would need to move to a larger city where she has no relatives. She said it would also cost a lot of money to have the Fourth Appellant treated in Brazil. She was asked why her daughter would need to wait a long time to see a doctor and she said that the kind of treatment her daughter needs can only be carried out quickly if you have a lot of money in Brazil. She was asked how she knows this and she said she used to work in the health system in her town in Brazil which was Eldorado in Para State.
14. The witness was asked what family she has in Brazil and she said she has her mother, four brothers and three sisters in Brazil. She said her father has another family with someone who is not her mother. The witness said that her mother lives in Maranhao State in the north of Brazil in Chapadinha Town. She said her mother's city is small and her brothers and sisters live in small cities.

15. It was put to her that her daughter often attends a doctor and she was asked if her daughter has ever needed any emergency treatment and she said she has on five or more occasions.
16. The Presenting Officer questioned the witness asking her why the family could not go to live in a big city in Brazil and she said she would have no one there. It was put to her that she has no one in the United Kingdom and she said that is correct. The Presenting Officer asked her if her knowledge of the Brazilian healthcare system is based on the time when she worked there seven years ago and she said yes and no. She said it is based on that and on the internet. She was asked if she has printed out anything about healthcare in Brazil from the internet and she said she has not.
17. Her representative re-examined her asking her if she has any family in the United Kingdom and she said she only has her husband and her children.
18. The second Appellant took the stand. He asked that his statement which he made for the First-tier hearing, be used as evidence for this hearing.
19. His representative asked him if he has any family in Brazil and he said he has his father, his brothers and his sisters. He said they all live in small cities.
20. The Presenting Officer had no questions for this witness.
21. The Presenting Officer made his submissions relying on the refusal letter.
22. He referred to Article 8 and page 5 onwards in the refusal letter. He submitted that this family's immigration history is poor. He submitted that when Article 8 is considered the relevant case law has to be taken into account. He made reference to the case of **E v Philippines and others C5(2013) 2758** and **Hamidreza Azimi-Moayed and three others [2013] UKUT 00197**. He submitted that the starting point in this case, with regard to the best interests of the children, is for them to be with both of their parents. He submitted that the Appellants are not in the United Kingdom legally. He submitted that these two country guidance cases have to be applied and when they are applied these appeals cannot succeed under Article 8 of ECHR.
23. He submitted that the strongest point in the Appellants' favour is the fact that the Fourth Appellant is ill and receives medical treatment in the United Kingdom. He submitted that Brazil has well-developed medical care. There is no COI Report on Brazil but he pointed me to a document by the World Health Organisation dated in February 2016 which states that Brazil's health system reaches out to the poor and is improving all the time. He submitted that the family may well have to go to live in a bigger city than the one they come from and he submitted that they may need to rely on family support when they arrive in Brazil but both parents can work and they do not have any family support in the United Kingdom. He submitted that no evidence has been put to the Tribunal which shows that they will be unable to access the public healthcare system in Brazil. He submitted that no evidence has been produced to show that the public healthcare system in Brazil is not adequate to deal with the Fourth Appellant.

24. With regard to the First Appellant's oral evidence he submitted that this was non-specific. Her experience of the healthcare system in Brazil is out of date. Nothing has been produced to show that there are any particular problems with the healthcare system in Brazil. This family is not being returned to somewhere where there are no proper medical facilities.
25. With regard to Article 8 outside the Rules I was referred to the case of **N [2008] ECHR 453**. He submitted that this claim does not disclose such exceptional circumstances as are required by the case of **N** relating to medical treatment in the country which the Appellants will be returning to.
26. With regard to the education of the children the Presenting Officer submitted that the United Kingdom cannot be responsible for medical treatment and education for the rest of the world. He submitted that for Article 8 to succeed outside the Rules there has to be some other basis. The healthcare in the United Kingdom cannot be compared to the healthcare in Brazil.
27. With regard to general integration into Brazil he submitted that this family speaks Portuguese at home. Some family members have been in the United Kingdom for seven years but not all of them. He submitted that there is no fundamental problem in this family reintegrating into Brazilian society.
28. The Presenting Officer referred me to Part 5A of the Nationality, Immigration and Asylum Act 2002 which contains Sections 117A to D and referred in particular to paragraph 117B(6) which the Appellants are relying on relating to the Fourth Appellant. He submitted that all the sections of Section 117B have to be considered and these include effective immigration control and public interest and he submitted that 117B(6) is just one consideration.
29. He submitted that when Article 8 is considered the status of this family in the United Kingdom is that they are here unlawfully and he submitted that this must weigh heavily against them. He submitted that what I have to decide is whether the interference of removing them to Brazil is sufficient to outweigh the public interest in this family remaining in the United Kingdom and he submitted that it would not be disproportionate to remove them to Brazil. They would be returning to a well-developed country with medical facilities and I was asked to dismiss the appeal.
30. The Appellants' representative made her submissions relying on her skeleton argument. She submitted that the key issues are outlined in paragraph 5 of the skeleton and this is an appeal on Article 8 outside the Rules only.
31. I was referred to the case of **SS Congo and others [2015] EWCA Civ 387** which states that there have to be compelling reasons for a claim to be considered outside the Immigration Rules. She submitted that the compelling reason in this case is the health of the Fourth Appellant. She submitted that not only does her health have to be considered but her educational needs also have to be considered and she has now been in the United Kingdom for more than seven years. She admitted that she had not been in the United Kingdom for seven years at the date of the application.

32. I was referred in particular to Part 5A of the 2002 Act and Section 117B(6). She submitted that this has to be look at when the best interests of the children are considered. She submitted that Appellant number 3 has rights which have to be considered but the main issue is the Fourth Appellant who has special needs. She submitted that the best interests of the child are a primary consideration and there has to be a proportionality assessment when Article 8 outside the Rules is considered.
33. I was referred to paragraph 19 of the skeleton argument. She submitted that I have to decide whether it would be reasonable to expect the Fourth Appellant to have to leave the United Kingdom. She submitted that it would not be reasonable and neither would it be reasonable for the Third Appellant to have to leave the United Kingdom.
34. I was asked to consider the Fourth Appellant's medical conditions which are referred to at paragraph 24 onwards in the skeleton argument. I was referred to the National Health Service letter from Dr Adamovic-Satterthwaite dated 2012. This is in the Appellant's bundle for the First-tier hearing. At that time the Fourth Appellant was four years old. The doctor states that she has profound and complex needs. The letter was updated in 2013. This letter refers not only to her health but also the additional educational help she requires to support her learning and attention.
35. A small additional bundle was also provided for this hearing and I was referred to the physiotherapy that she receives at Evelina London, Guy's and St Thomas Hospital and to the oral evidence today that she has required emergency medical treatment on a number of occasions.
36. The representative submitted that there is a functional healthcare system in Brazil but the report by the World Health Organisation states that it is patchy and needs significant improvements. She submitted that primary healthcare services are starting and I was referred to the article by Deloitte which is dated in 2015 and refers to 6,800 public and private hospitals still not being enough. I was then referred to the Child Fund International charity letter. This is a charity looking for money to help children in Brazil and the representative submitted that the medical care in Brazil may not be sufficient for the Fourth Appellant.
37. She submitted that what I have to decide is whether it would be proportionate for the Fourth Appellant to return to Brazil and if it would be reasonable and if I find that it would not be reasonable she submitted that Section 117B(6) must apply.
38. The representative submitted that it is not clear what medical services would be available to her in Brazil. It is clear that the Furth Appellant medical needs and sometimes requires emergency treatment. She is on a special programme for her needs in the United Kingdom and the representative submitted that the Fourth Appellant would be affected very badly if this family has to relocate to Brazil.

39. The representative submitted that the Fourth Appellant has been in the United Kingdom now for eight years and was born here. She submitted that it would not be reasonable or proportionate for her to relocate to Brazil.
40. I was asked to consider the case law referred to in the skeleton argument and the importance of suitability for children and continuity of educational provisions. She submitted that education is more significant when a child reaches the age of 7 and the fact that the Fourth Appellant has special needs has to be taken into account. She has severe learning problems. I was referred to the speech and language therapy letter dated in 2013 in the Appellants' bundle. She attends a speech therapist. I was asked to give considerable weight to the Evelina London letter in the Appellants' supplementary bundle and also the Fourth Appellant's school report in the Appellants' bundle. In the 2013 letter by Dr Adamovic-Satterthwaite he states that the Fourth Appellant needs significant additional educational help to support her learning and attention. The representative submitted that she will get that in the United Kingdom but it is not known whether she will get that in Brazil. This report refers to the gap between the Fourth Appellant and her peer group widening with age and she submitted that it will be a problem if the Fourth Appellant has to leave the United Kingdom as this gap is likely to widen even more as it is unlikely that she will receive such good education in Brazil as in the United Kingdom. She submitted it is not clear what support she will get, so it cannot be in her best interests to leave the United Kingdom.
41. The representative submitted that all of Section 117B applies and she admitted that there are many points against these appeals. The Appellants are here unlawfully but the children had no choice about where they were going to live their lives. They had to depend on their parents. She submitted that effective immigration control has to be considered but I was referred to the cases of **ZH Tanzania [2011] UKSC 4** and **Zoumbas** both of which make it clear that children should not suffer because of the actions of their parents.
42. She submitted that all the Appellants speak English and have never claimed public funds. She submitted that the fact that the parents have worked unlawfully must be held against them but she submitted that if they are granted leave to remain it is likely that they will work.
43. I was asked to allow the appeals and I was referred to the case of **SQ Pakistan and another EWCA Civ 1251** which states that to force someone with significant medical and educational needs to leave the United Kingdom would cause a profound disruption in their life.

Decision and Reasons

44. The burden of proof is on the Appellants and the standard of proof is the balance of probabilities
45. I have considered all of the evidence on file, the oral evidence given at the hearing and the submissions of both parties.

46. These applications cannot meet the terms of the Immigration Rules. This has been accepted by both parties and I am therefore considering the appeals under Article 8 of ECHR outside the Rules.
47. For Article 8 outside the Rules to be considered there have to be compelling circumstances and in this case it has been put to me that the compelling circumstances are the state of health of the Fourth Appellant who has hydrocephalus.
48. Proportionality has to be assessed and the first thing that must go against the Appellants' applications is that the terms of the Immigration Rules cannot be satisfied. None of the Appellants are in the United Kingdom legally. The First Two Appellants have not claimed benefits but they have been working illegally.
49. I have to consider effective immigration control. Everyone should be treated equally and if these Appellants are allowed to stay in the United Kingdom there must be a reason for treating them differently to others wishing to remain in the United Kingdom who cannot meet the terms of the Rules.
50. Public interest has to be taken into account in the equation. These Appellants have made extensive use of the NHS services in the United Kingdom and the two children have had access to free education in the United Kingdom. These are matters which affect the tax payers.
51. The representative for the Appellants has stated that Section 117B (6) must apply as it would not be reasonable to expect the children, especially the Fourth Appellant, to leave the United Kingdom. Section 117B (6) is not the only part of Section 117B which has to be considered. All the parts have to be considered.
52. Originally it was the case that the family spoke Portuguese at home. The evidence now is that they speak English. I noted that the First Two Appellants gave their evidence through an interpreter at the hearing. I understand that the Third and Fourth Appellants speak English and Portuguese.
53. These Appellants are not financially independent. Little has been produced to indicate that they are integrating into society in the United Kingdom.
54. These Appellants cannot derive from Section 117B(3) any positive consideration when it comes to financial considerations. I also have to consider Section 117B(5) which states that little weight should be given to private lives formed at a time when the person is in the United Kingdom unlawfully. All these Appellants are in the United Kingdom unlawfully. The Fourth Appellant was born when the First Two Appellants were in the United Kingdom unlawfully. I find that little weight can be given to any of these Appellants' private lives.
55. It is clear that these Appellants are not liable to deportation but the Appellants have no right to be here and their situation has been precarious since the end of 2007. The Second Appellant came to the United Kingdom on a visit visa in March 2007 .

56. Based on the above when proportionality is assessed public interest must succeed over the Appellants' rights.
57. I now have to consider the best interests of the children in particular the Fourth Appellant. The Appellants are from Brazil. Their family's culture is Brazilian and their language is Portuguese. They have connections with Brazil and for the family to say that if they relocate to a major city in Brazil so that the Fourth Appellant can receive satisfactory medical treatment they would be without family support does not hold any weight as at present they are in the United Kingdom with no family support. Nothing has been shown to me to indicate that the First Two Appellants would be unable to find work in a city in Brazil. The fact that their families do not live in a large city does not weigh in their favour.
58. When the best interests of the children are considered I have to consider the medical evidence on the Fourth Appellant. There are reports by Dr Adamovic-Satterthwaite which deal with the nature of the Fourth Appellant's problems in terms of medical, social and educational care and support. There is very little evidence to show what medical, social and educational care and support there is available in Brazil. The Fourth Appellant received physiotherapy in 2012. There is reference to headaches which are improving and the fact that her health, considering her problems, is good and she has a good appetite and a good sleep pattern. There is no abnormality in her hearing or vision but her language is delayed because of her condition. The report states that she has complex needs and there is global developmental delay in all developmental areas except self-care skills but it goes on to state that she continues to slowly progress and improve. The physiotherapist's report also states that her motor skills continue to improve. The medical report from Dr Adamovic-Satterthwaite dated in 2013 states that her general development is delayed across all aspects of development and she needs significant additional educational help to support her learning and attention as her concentration is poor.
59. She requires high levels of adult support but she gets this from her parents as well as her teachers and doctors. The MRI scans were satisfactory and it is clear that she has had a good start in life because of the free treatment she has received on the NHS in the United Kingdom and through free special education in the United Kingdom. In 2014 the Fourth Appellant was 6 years old and the doctor in community paediatrics made a report stating that she is happy and has been well since her last review. It is clear that she is below national averages across the curriculum but she is maintaining slow progress. In 2014 the report states that the Fourth Appellant's mother mostly stays at home to support her. In 2015 she was told to discontinue with her spectacles. There is also a report from Evelina London when the Fourth Appellant was aged 7 and at that date she was speaking in sentences, was able to run slowly but was still having some difficulties with her speech. Her mother told the doctor that she was happy with her progress at school. She had not been admitted to hospital since her last visit to the Evelina London clinic at Guy's and St Thomas Hospital. Her mother reported that she is improving. The 2015 report states that the Fourth Appellant looked well and was happy. It goes on to state that she is still developmentally

delayed but that is because of her condition and wherever she is staying she will still have this condition. I have taken into account the said case of N.

60. It is difficult to know what treatment she will receive in Brazil as her mother has not done any research into this. I am surprised about this as she knew this hearing was coming up. She has not been in Brazil for seven years so the fact that she once worked in the health system is more or less irrelevant now. The World Health Organisation article on file refers to a lot of health reform in 1996 and 70% of Brazil's population receiving care in the public system in Brazil. There is a private system in Brazil but that appears only to avoid the queues and inconvenience in the public system. There are still problems in Brazil's national health system but these are mainly to do with infectious diseases. It is clear that the healthcare given in the cities in Brazil is better. There is no reason for this family not to return to Brazil and live in one of the cities. The World Health Organisation Report states that sometimes people travel to urban areas to receive treatment that they could have received from primary health units in their rural areas. This is something that the family will have to assess on return. The Deloitte article dated 2015 states that the health system needs improvement but that could be said of the United Kingdom also. I have also noted the report from Child Fund International, a charity. This states that children in rural communities often lack access to basic medical care but as stated, I believe that this family could go to stay in an urban area. Medical treatment is considered a constitutional right for Brazilian citizens. There is also a good education system in Brazil.
61. These are Appellants some of whom have been in the United Kingdom since 1 March 2007. At the date of the application all of them were here illegally. I accept that this is an arguable case for considering the Appellants' claims outside the Immigration Rules. I have carried out a proportionality assessment. If this was a family in which all its members were healthy I would have no hesitation in stating that they should be removed to Brazil.
62. The compelling circumstances in this case are based on the health of the Fourth Appellant. I have considered **ZH Tanzania [2011] UKSC 4** and **EV Philippines and others [2014] EWCA Civ 874**. These children are not British citizens. At the date of the application they had not been in the United Kingdom for seven years. I have to decide if the need for immigration control outweighs the best interests of the children. The case of **EV Philippines and others** concerns children who are not British citizens. It is clearly in the best interests of the children that they remain with both of their parents. They are a close family. I have considered their ages, the length of time they have been here, the length of time they have been in education and what stage their education has reached. They have become distanced from the country which it is proposed to return them to but they both speak Portuguese as well as English and they will be with their parents who are from Brazil and have lived most of their lives there. The Appellants have no entitlement to remain in the United Kingdom. The children's best interests do not of themselves have the status of paramount consideration. The best interests of children can be outweighed by the cumulative effect of other considerations.

63. The starting point is that if both parents are being removed from the United Kingdom dependant children who form part of the household should also be removed unless there are reasons to the contrary. I accept that the Fourth Appellant has had considerable medical and educational help in the United Kingdom but she has clearly developed well and is now a happy child able to look after herself to a great extent. She is always going to be slightly behind her peers as far as communication and her education are concerned but the most recent reports indicate that she is doing well and she does not, according to the medical evidence, require additional treatment apart from her regular check-ups. Having considered the medical reports on the Fourth Appellant, the relevant case law on the best interests of the child and the health care available in Brazil I do not find that it would be unreasonable for both the children of this family to go to Brazil with their parents. It would not be disproportionate for this family to return to Brazil where the First Two Appellants have lived for most of their lives and where their family members live. As it would not be unreasonable Section 117B(6) does not apply.
64. I find that public interest must succeed when weighed against the rights of the family members in this case. Little weight should be given to private lives formed while the family members' situation in the United Kingdom is precarious and based on the evidence before me I am dismissing this appeal.

Notice of Decision

65. I dismiss these appeals under the Immigration Rules.
66. I dismiss these appeals on human rights grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge I A M Murray