Reasonableness and the seven-year rule

25/07/2016

Immigration analysis: When is it reasonable to remove a child from the UK after seven years of continuous residence? Ben Amunwa, immigration barrister at the 36 Group, considers and the effect of the decision in MA (Pakistan) and others v Secretary of State for the Home Department on the reasonableness test.

Original news

R (on the application of MA (Pakistan)) and others v Upper Tribunal (Immigration and Asylum Chamber) and others [2016] EWCA Civ 705, [2016] All ER (D) 52 (Jul)

The Court of Appeal heard six cases together raising a common issue of the correct test of reasonableness which should be applied when determining whether or not it was reasonable to remove a child from the UK once he or she had been resident there for seven years.

What is the background to this case?

Parliament's new statutory human rights framework for article 8 of the European Convention on Human Rights (ECHR) has been the subject of intensive litigation over the past two years, particularly at the Upper Tribunal level.

Introduced by section 19 of the Immigration Act 2014, which created Part 5A of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002), the framework seeks to further codify how judges should strike the balance in their proportionality assessments under ECHR, art 8(2). It seeks to do so through primary legislation for the first time.

In *MA (Pakistan) and others v Secretary of State for the Home Department*, the Court of Appeal considered the framework as a whole, and paid particular attention to the factors judges should consider when deciding whether it would be reasonable to expect a child who has lived continuously in the UK for seven years (or who is a British citizen) to leave.

What were the issues?

At the heart of the appeal lay the so-called 'seven-year rule'. This is a concession that allows for children who have lived in the UK for at least seven years to qualify for leave to remain in certain circumstances, and for illegal over-stayers (who are not subject to deportation) to qualify for leave to remain in the UK if they are the parents of children who have lived in the UK for at least seven years or children who are British, again, in certain circumstances.

In its current form, the seven-year rule is dispersed across three different provisions (para 276ADE(1)(iv) of the Immigration Rules, section EX.1.1(a) of Appendix FM to the Immigration Rules, and NIAA 2002, s 117B(6), read with NIAA 2002, s 117D).

The question for the court was whether the seven-year rule operates as an absolute exemption from removal, or whether it can be qualified by factors such as the conduct of parents and/or their immigration histories.

What did the court say about NIAA 2002, Pt 5A?

Elias LJ (giving the only reasoned judgment, and with whom King LJ and Sir Stephen Richards agreed) made several observations.

First, at para [13], he stated that although the provisions in para 276ADE(1)(iv) of the Immigration Rules and NIAA 2002, s 117B(6) contain some differences, the approach to the test of reasonableness contained in them should be the same.

Secondly, he noted that while NIAA 2002, Pt 5A only applies to courts and tribunals, ‘it would be bizarre for [the Secretary of State] to depart from Parliament’s view of the public interest as reflected in the legislation, and if she were to do so in a manner prejudicial to the individual, it would simply invite appeals’ (para [15]). This accords with and re-enforces the recommendation of the Upper Tribunal in *Dube (ss.117A-117D)* [2015] UKUT 90 (IAC) at para [22].

What factors are relevant when applying the seven-year rule?

The answer is rather nuanced. Claimant advisers will take considerable encouragement from the comments at para [17]:

> ‘there can be no doubt that section 117B(6) [of NIAA 2002] must be read as a self-contained provision in the sense that Parliament has stipulated that where the conditions specified in the sub-section are satisfied, the public interest will not justify removal.’

That suggests that the firm view of the court is that the rule operated as an absolute exemption. Indeed, the Upper Tribunal was of the same mind in *Treebhawon and others (section 117B(6))* [2015] UKUT 674 (IAC) (paras [18]–[22]), although the Court of Appeal did not cite this case in its decision.

However, the court felt bound by the earlier authority of *Secretary of State for the Home Department v MM (Uganda); KO (Nigeria) v Secretary of State for the Home Department* [2016] EWCA Civ 450, [2016] All ER (D) 72 (Jun), (a deportation case which resolved a conflict between two authorities in the Upper Tribunal on the application of the ‘unduly harsh’ test as found in NIAA 2002, s 117C(5), and para 399 of the Immigration Rules). At the time of the hearing, only a brief summary of *MM (Uganda)* was available. The conclusion in that case was that when considering the harshness of the removal on a deportee’s children and/or partner, decision-makers must take into account the seriousness of the deportee’s offending and immigration history, along with any other relevant circumstances (see para [24] of *MM (Uganda)*).

The current position, subject to any further challenge in the Supreme Court, is that judges may consider the conduct and immigration histories of parents when deciding whether it is reasonable to expect children to leave the UK. Where a child has established seven years' residence, that will only be ‘a factor of some weight leaning in favour of leave to remain being granted’ (para [45]), and not an automatic ‘win’.

At para [49], the court clarified that where the provisions of the seven-year rule are met, significant weight should be attached to the children’s interests:

> ‘the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child’s best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary.’

Judges should therefore allow for the particular strength of both of these factors (para [116]). Claimant advisers would do well to pay particular attention to whether or not judges have paid appropriate attention to these factors where relevant.

The case law has come full circle, as the court approved the approach adopted in *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, [2014] All ER (D) 211 (Jun) at paras [34]–[37]. That case pre-dates

Parliament's new statutory human rights framework. The Secretary of State could argue that this approach must be right, because NIAA 2002, Pt 5A was never intended to reset the case law on ECHR, art 8 (see the observation in *Dube* at para [25]) and therefore the statute should be read harmoniously with *EV (Philippines)* and *Azimi-Moyad and others (decisions affecting children; onward appeals)* [2013] UKUT 00197 (IAC) among other cases, which took a less generous approach than NIAA 2002, Pt 5A appears to allow.

Those seeking to argue that the statute should be construed as a self-contained and absolute exemption will have the force of Elias LJ's unambiguous and strongly-worded view at para [17] (plus *Treebhawon*) to rely upon. These comments may be properly classed as judicial dicta rather than obiter dicta (a distinction explained by Megarry J in *Richard West and Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424, para [431], [432]). Arguably, Elias LJ's dissenting view ought to carry significant weight.

How does this square with the principle that children should not suffer the sins of their parents?

The court resolved this issue by taking the approach, as seen in *EV (Philippines)*, that the best interests of the child and the reasonableness test should be dealt with separately.

When considering the best interests of the child, the conduct of parents is irrelevant (in keeping with *ZH (Tanzania)* and *Zoumbas*). When considering the issue of reasonableness, wider public interest factors may be weighed in the balance, including the conduct and immigration statuses of parents (para [45]).

This is at the core of the Secretary of State's argument, as accepted by the court at para [28] of the judgment. In summary, when judges assess reasonableness, they are conducting a proportionality balancing exercise that is not constrained by the apparently narrow parameters of NIAA 2002, s 117B(6).

The court also holds that judges will only exceptionally make an error of law if they decide not to adjourn cases in order to obtain better evidence regarding a child's best interests (see paras [59] and [113]). This restricts the more broadly laid out principles in the Upper Tribunal case of *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223.

What is the threshold for discharging the reasonableness test?

At the time of the Upper Tribunal decision in *Azimi-Moayed*, the provisions governing the seven-year rule required the Secretary of State to show 'compelling reasons' to justify refusing a child leave to remain after seven years' continuous residence.

The court in *MA (Pakistan)* found that the seven-year rule in its current manifestations imposes a lower threshold than that in *Azimi-Moayed*. That case may therefore be distinguished on this particular ground (para [73]).

However, there is still considerable uncertainty over the exact height of the threshold. Throughout the judgment, the test is variously described as requiring reasons that are:

- 'good' (para [103])
- 'good [and] cogent' (para [73]), or

- ‘powerful’ (para [49])

There is troubling disharmony between the court’s conclusion that the starting point, where the seven-year rule is met, is to require ‘powerful’ reasons, but that in some cases, ‘good’ reasons may be sufficient to justify removal.

On one reading, and in keeping with the court’s overall conclusion on proportionality and the approach adopted in *MM (Uganda)*, it is likely that what is considered ‘reasonable’ may depend upon the circumstances of the case and factors such as the conduct of parents could be relevant to determining where the threshold should fall.

Interviewed by Duncan Wood.

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