Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/33993/2013
IA/34003/2013
IA/34006/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 September 2014	**On 29 September 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellants

And

MS HAIDEE VILLAMIN MADERAZO
MASTER EUAN JOSEPH MADERAZO CASTILLO
EMIL VILLANUEVA CASTILLO

Respondent

Representation:

For the Appellants: Mr Lingajothy of Linga & Co Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless for the purposes of this decision I shall refer to the parties as they were described before the First Tier Tribunal that is the Secretary of State as the

respondent. The appellants are citizens of the Philippines born on 30 September 1975, 10 March 2006 and 3 October 1975. They made applications on human rights grounds to the Secretary of State and those applications were refused on 19 August 2013. They appealed and their appeals were allowed on Article 8 grounds by First-tier Tribunal Judge Saunders on 24 June 2014.

2. He recorded that both the first and third appellants arrived in the UK in 2002 and 2003 respectively with entry clearance as visitors. Both overstayed their visit visas and have remained in the UK without leave. They had a son, the second appellant, born to them in 2006.

3. They applied on 26 September 2012 for indefinite leave to remain on the grounds of their son's long residence. Judge Saunders accepted that the second application who was 8¼ years old at the date of hearing was settled and flourishing in his primary school where he was in year 3. He found that his external life as well as his family life with his parents were increasingly important with his development.

4. An application for permission to appeal was sought by the Secretary of State on the basis that the Tribunal failed to provide adequate reasons why the appellant's circumstances were either compelling or exceptional. The appellant had established family and private life in the UK in the full knowledge of their precarious immigration status and had waited years before seeking to regularise that status. The first and third appellants still had ties in the Philippines, having spent the majority of their lives there and were able to speak the language. They socialise with the Filipino community that demonstrate they still had cultural ties.

5. In regards to the second appellant he submitted that he was still young enough to be able to adapt to life in the Philippines as they would have some understanding of the language and culture having been exposed to it by the parents. That child had yet to begin in secondary education and English was spoken and understood in the Philippines and the second appellant would have the support of his parents to help him adapt to life there. The appellants have ties to the Philippines and it was not the UK's responsibility to provide education for the world.

6. Permission to appeal was granted in the following terms:

> "*It is arguable that an error of law has been made in the determination as the judge has not taken note of the guidance in* ***EV (Philippines) & Others v SSHD*** ***[2014] EWCA Civ 874****. All points may be argued*."

The Hearing

7. At the hearing Mr Tufan considered that the judge had possibly mixed the two Rules of paragraph 276 and Appendix FM together whereby Appendix FM requires seven years' residence prior to making an application. This is not the case in respect of paragraph 276ADE(iv).

8. Mr Lingajothy confirmed that at the First-tier Tribunal appeal hearing the Home Office made a concession to the effect that the decision in respect of the second appellant was withdrawn but this appeared to have been overridden by the judge.

9. Nonetheless Mr Tufan referred to the case of **EV (Philippines & Others v Secretary of State for the Home Department [2014] EWCA Civ 874**, 26 June 2014 whereby the UK could not provide medical treatment for the world and "so we cannot educate the world".

10. Mr Lingajothy stated that there was a concession made by Mr Carroll, the Home Office Presenting Officer in the previous hearing in open court and the second appellant had reached 7 years residence by the time the decision had been made. If the appellant satisfied paragraph 276ADE. he also needed to satisfy paragraph FLTR to succeed under the Immigration Rules. The judge had set out compelling circumstances and there was no material error of law. **EV (Philippines)** could be distinguished as those children were not born in the UK and had spent only twenty months here. It was recorded that the appellants were not intending to remain in the UK and there were clear findings to that effect. The judge found it likely to be destabilising and have a distressing effect to uproot the child.

Conclusions

11. The judge appeared to have confused the provision under 276ADE(iv) with the requirements under Appendix FM. However, the second appellant must have seven years' residence prior to making an application under paragraph 276ADE(iv) and did not. He was born in March 2006 and the application was made in September 2012. He could not comply with the Immigration rules under Appendix FM. Neither of his parents is in the UK with leave to enter or remain. And further to E-LTRP.2.2 the child had not lived in the UK for 7 years prior to the application. It would appear that there was a concession made by Mr Carroll the Home Office Presenting Officer at the appeal before the First-tier Tribunal on the basis of paragraph 276 ADE and this was an error.

12. However because of the second appellant's length of residence the judge considered there to be an arguable case warranting separate consideration of proportionality of removal under Article 8 of the ECHR outside the Immigration Rules applying **Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 640** and **R (on the application of Nagre) v Secretary of State for the Home Department [2013] EWHC 720**.

13. The judge made specific reference to **Gulshan** and the correct approach to applying the rules and Article 8, in paragraph 10 of his determination and although on the face of it the finding by the judge, that there was an arguably good ground to consider the matter outside the rules, may be construed as generous, he nevertheless made that finding within the determination and gave his reasoning overall.

14. The Judge quoted **Azimi-Moayed and ors (decisions affecting children; onward appeals)** [2013] UKUT 197 (IAC) and as Mr Tufan pointed this suggests that 7 years

after the age of 4 years is the critical period. The judge, however, was aware that the period after the age of 4 was significant. Nonetheless the judge did take into account the circumstances of the family, that they had been self sufficient financially and that as indicated by the case the child had spent a number of years in the country and had been educated here. The judge was clear he did not consider it to be a 'near miss' case but had regard to the factors regarding minor children. In particular the judge stated 'he is no longer a very young child' and this made reference to the fact that the decision was made nearly one year after the application was made which was a relevant factor.

15. As Mr Lingajothy submitted **EV (Philippines)** can be distinguished on the basis that the child in this particular appeal was born in the UK and had lived over seven years in the UK by the date of decision of the respondent.

16. In **EV (Philippines)** those children had not been born in the UK and had spent a very limited time in the UK prior to the application. It was not challenged that the first and third appellant were in a relationship and the judge made a finding that they did have a family life together and the second appellant had an established private life in the UK as a minor child who had lived in the UK since birth and for the first eight and a half years.

17. Although it can be seen from the face of the determination that there was limited consideration by the judge of the legitimate aim when considering the question of interference and proportionality, this was not a matter challenged by the Secretary of State.

18. At paragraphs 14, 15 and 16 the judge made findings in respect of Section 55 and noted that the last four and a half years were regarded to be significant in terms of the appellant's integration.

19. The judge found that the appellant was no longer a very young child and his best interests were to remain in the social and educational setting he had grown up in and allowed his parents appeals accordingly. He took into account the factors weighing against the parents.

20. The judge considered the Secretary of State's position in his determination at paragraph 18 and considered the position of the parents and applied weight to the Rules in assessing the circumstances of the appellants' private lives and found that the balance tipped "just" in favour of the appellants. Reading the determination as a whole I find that the judge has set out the arguably goods grounds.

21. In **MF (Nigeria) v SSHD [2013] EWCA Civ 1192 MF (Nigeria) v SSHD [2013] EWCA Civ 1192** the Court of Appeal rejected the notion that the test of exceptionality was being reintroduced and the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence.

22. I find that the grounds of appeal are a disagreement with the determination which might have been more expansive in terms of its reasoning and but nonetheless I find on the basis of **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC)**

23. **MM Lebanon and Others R on the Application of the Secretary of State for the Home Department [2014] EW Civ 985** sets out that where the relevant group of Immigration rules are not considered to be a complete code then the proportionality test would be 'more at large' and guided by Strasbourg law. This suggests that other factors might contribute to an analysis whereby a judge might proceed on the basis of an analysis outside the rules guided by Strasbourg law. In this case this is what the judge did.

24. Within the determination there was a brief explanation of the conclusions on the central issue and that those reasons do not need to be extensive. There was an adequacy of reasoning. There is no error of law and the determination shall stand.

Signed Date 25th September 2014

Judge Rimington
Deputy Judge of the Upper Tribunal