



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

Appeal Numbers: IA/50756/2013  
IA/50758/2013  
IA/50757/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 24<sup>th</sup> July 2014**

**Determination**

**Promulgated**

**On 11<sup>th</sup> August 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE**

**Between**

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

Appellant

**and**

**MS YOLANDA MARGOT LUDENA MARIN (FIRST RESPONDENT)  
MR FRANCISCO JAVIER BEDOYA PORRAS (THIRD RESPONDENT)  
MASTER ISAAC ALEXANDER LUDENA FIAGBE (SECOND RESPONDENT)  
(NO ANONYMITY ORDER MADE)**

Respondents

**Representation:**

For the Appellant: Mr E Tufan, Home Office Presenting Officer

For the Respondents: Mr D O'Callaghan, Counsel

**DETERMINATION AND REASONS**

- 1.** For my convenience I have referred to the parties as they appeared before the First-tier Tribunal.

- 2.** In this case, the Secretary of State appeals a decision of the First-tier Tribunal (Judge Hussain) promulgated on 28<sup>th</sup> May 2014 in which he allowed the appeals of the First Appellant Ms Marin, a citizen of Ecuador, her child from an earlier relationship, the Third Appellant Master Fiagbe, who takes his estranged Ghanaian father's nationality as well as that of Ms Marin's partner, Mr Porras, a national of Colombia. Their applications for regularisation through leave to remain on Article 8 private and family life grounds had been refused by the Respondent under the Immigration Rules set out at paragraph 276ADE and Appendix FM. The Respondent had concluded there were no exceptional circumstances making the removal of the Appellants disproportionate.
- 3.** The judge found that the decisions in respect of the Immigration Rules were, as conceded, correct, but proceeded to allow the appeal on the grounds that the decisions were nonetheless disproportionate because of the weight he accorded the best interests of the minor Appellant in remaining here.
- 4.** Permission was granted on the basis of a challenge to the judge's reasoning as to what it was about the circumstances of the child in the family that made the decision disproportionate.
- 5.** So it was that the matter came before me to decide whether or not the decision of the First-tier Tribunal Judge is vitiated by legal error and if so, what to do about it.
- 6.** The parties proceeded by way of submissions.
- 7.** The Respondent relied on the grounds to the point that the recent jurisprudence requires a judge to identify with sufficient particularity so that the reasons are discernable to the parties, why it is that the circumstances of the Appellants is not adequately covered within the Immigration Rules so that a judicial determination of Article 8 is required and bearing in mind the substantial weight to be given to the position under the Immigration Rules, why circumstances which fall outside of them should nonetheless be considered to result in unduly harsh consequences so that a decision otherwise correct under the Rules can be properly construed as being disproportionate. In terms of the removal of the adults to different countries it was open to them at the time of making removal direction to argue that they should be removed to either of the others countries, and to seek Judicial Review of the directions if merited.
- 8.** For the Appellants Mr O'Callaghan reminded me of the history to these proceedings. The Appellants had made this application in February 2013, it had been refused in April 2013 without in-country rights of appeal. It was only following the issue of a pre-action protocol letter that the Respondent agreed to issue an appealable immigration decision and on 15 November 2013 issued removal directions. The relevance of the delay is that whilst the Third Appellant had not accumulated the necessary seven years so as to establish a gateway under Appendix FM to a consideration

of the issue of whether or not his being required to leave the country was reasonable, in the context of his own private life entitlements, as at the date of the application or decisions in April and November 2013, by the time of the hearing before the First-tier Judge, he had.

- 9.** Counsel had appeared before the First-tier judge, where the discussion was to the point that the applications fell outside of the requirements of the Immigration Rules because of the insufficiency of the length of residence for any of the Appellants in the respective categories of Rule, because the requirement is for the accumulation of the relevant period as at the date of application, in this case February 2013. It was on that base that it was clear in the context of the First-tier Tribunal decision making, that the Appellants could not succeed under the Immigration Rules. That was the judge's starting point. In the context of the case of Gulshan (Article 8 - new Rules - correct approach) [2013] UKUT 640, the requirement to consider the best interests of the child in combination with the need to consider the evidence as at the date of hearing when viewed through the lens of the changed circumstances in terms of the satisfaction of the gateway requirement, there could be no issue that there was at least sufficient to say that there was an arguable case that the matter should be considered outwith the Rules in light of the Rules' lack of coverage in the context of the consideration of the best interests of the child at the relevant date.
- 10.** In the context of the Article 8 assessment itself, Mr O'Callaghan asserted that there was no legal error, the judge had properly taken into account the Rules-based refusal but had made his own assessment of the best interests of the child and concluded that his best interests were clearly served by remaining in the United Kingdom, he was born here although entitled to register for Ecuadorian national he was in fact a Ghanaian national by operation of the law of Ghana where nationality followed paternity. Having spent all of his life in the United Kingdom the judge found that he was fully integrated. The evidence before the judge was not significantly cross-examined in terms of the issue of the child's best interests. There was significant documentary evidence from the Third Appellant's school and the judge had also spoken directly to the child. It was open to the judge to conclude on the basis of the evidence, to the point that it was not argued to be a perverse conclusion, that the child's best interests lay in the United Kingdom. Whilst that position is not determinative of the wider Article 8 exercise, the judge clearly understood that had the application been being considered under the Immigration Rules as at the date of hearing, the question of the best interests of the child would have been determinative.
- 11.** The challenge to the adequacy of reasons is formulaic rather than substantive. The judge does not set out in detail all of the evidence that was relevant to the assessment. It was evidence that was not challenged and so in the context of resolving factual issues significant detail is not required.

- 12.** In terms, reading the judge's decision, the Respondent can clearly understand why the balancing exercise fell in favour of the Third Appellant. It was a judgment call for the judge to make, he reached his conclusion after a consideration of all of the evidence, and the reasons provided, while succinct, are not cursory, and following correct self-direction are adequate.

### **My Consideration and Findings**

- 13.** There is no issue before me that when Article 8 rights are adequately covered within the context of the Immigration Rules, it is sufficient for a judge to frame their consideration in the context of those Rules. It is only when the Rules cannot be considered a complete code or to provide adequate consideration that a judge is required instead to conduct the balancing exercise in the form of a "traditional" Article 8 ECHR framework, commonly described as the Razgar question.
- 14.** The judge in this case refers to the need for "good reasons" to go beyond the rules. The grounds are critical of that reasoning on the basis of the failure to specify the need for exceptional compelling circumstances resulting in unduly harsh consequences. Whilst it is obvious that good reasons will encompass the meaning of the phrases the Respondent asserts are required, it is not so clear that good reasons will only include those. I am satisfied that in the context of a refusal based on an application made before the child had obtained seven years residence, and so resulting in a decision under the rules without any individual consideration of the child's best interests as reflected in the question of the reasonableness of requiring the child to leave, the judge was entitled to find that it was at least arguable that, the child subsequently having passed the seven year threshold the best interests consideration was not adequately covered by the rules. Whilst the judge does not refer to the case of Gulshan, or use the phrase compelling circumstances, or unduly harsh consequences, his reasoning is consistent with the caselaw dealing with the application of the Rules in Article 8 cases. I find that any error in reasoning because of the use of "good reasons" is not a material error here because, when read as a whole, it is clear that the process adopted, in light of the facts found, is consistent with the correct approach. It cannot be said, in the context of the relevant timelines that I have discussed above, and the requirement to consider the best interests of children affected by an immigration decision, as at the date of hearing, that there was no arguable case for the judge to deem it appropriate to conduct the proportionality exercise.
- 15.** Although there is legitimate discussion as to whether or not that could have been conducted in the context of "exceptional circumstances" in the context of the rules rather than the balancing exercise of Article 8, absent error in the balancing exercise, any criticism is formulaic rather than substantive.

- 16.** The relevant date for the assessment of a child's best interests is the date of hearing. As at the date of hearing in this case, i.e. May 2014, the Third Appellant was 7 years and 2 months old, and having been born here had spent his whole life here. The child's best interests are assessed on their own merits, without reference to the adults' adverse immigration history.
- 17.** The judge was obliged to make his own assessment of the best interests of the child and, in broad terms, to bring that finding forward as a primary but not necessarily paramount consideration to the proportionality or balancing exercise under Article 8. The question of weight was for the judge. The grounds infer that the only matter taken into account here was the child's length of residence. A full reading of the decision does not bear out that assertion. The judge had a significant amount of unchallenged evidence before him, and had the benefit of hearing and seeing the witnesses, including the child, and he has taken into account the child's own views.
- 18.** Allowing that the proportionality exercise is open to the judge, following correct self direction, where the balance is drawn is a finding of fact to be made by the judge who had the benefit of hearing and seeing the evidence. In this case it is not suggested that there are factors which the judge has failed to take into account. As Mr O'Callaghan reminded me the challenge here was not one of perversity but one of adequacy of reasoning. In short I find that the grounds in this case amount to no more than a disagreement with the judge's conclusion. In the case of Mukarkar v SSHD [2006] EWCA Civ 1045 at paragraph [40]:

"The mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law ...".

### **Decision**

- 19.** The First-tier Tribunal's decision to allow the Appellants' appeals under Article 8 of the ECHR did not involve the making of an error of law. Those decisions stand.
- 20.** The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

Date

Deputy Upper Tribunal Judge Davidge