Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/05524/2014
IA/05530/2014
IA/05565/2014
IA/05594/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 September 2014 and 16 January 2015	**On 26 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) TYPAN GAIJAN
(2) PRAVITA GAIJAN
(3) SWARG RAJ GAIJAN
(4) SOORRYADEO GAIJAN
(ANONYMITY DIRECTIONS NOT MADE)

Respondents/Claimants

Representation:

For the Appellant:	Mr P Deller, Specialist Appeals Team on 29 September 2014 Mr P Duffy, Specialist Appeals Team on 16 January 2015
For the Respondents/ Claimants:	Mr J Martin, Counsel instructed by Raja & Co Solicitors on 29 September 2014 Mr J Martin, Counsel instructed by David Benson Solicitors, 28 Merton Road, London SW19 1DN on 16 January 2015

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DECISION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimants' appeals against a decision by the Secretary of State to refuse to grant them further discretionary leave to remain on Article 8 ECHR grounds, and to give directions for their removal under Section 47 of the Immigration, Asylum and Nationality Act 2006. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

2. The claimants are all nationals of Mauritius. The first and second claimants are the parents of the third and fourth claimants. The third claimant was born in Mauritius on 16 November 1991. The fourth claimant was born in Mauritius on 23 October 1996. As the fourth claimant is the principal claimant in this appeal, for reasons which will become apparent, I shall hereafter refer to him simply as the claimant or by the initial S save where the context otherwise requires. I shall refer to the first three claimants by the initials T, P and R, save where the context otherwise requires.

3. T arrived in the United Kingdom with valid entry clearance as a visitor on 1 September 2005. He extended his stay in this country in the capacity of a student. The remaining members of T's family came to this country on 23 November 2006 as student dependants. T successfully extended his leave in the capacity of a student until 30 January 2011. He then made an application for leave to remain as a student under the points-based system on 29 January 2011, but this was refused on 21 October 2011. T appealed, and the remaining members of his family appealed in line as his dependants.

4. The subsequent determination of the First-tier Tribunal is not before me. But apparently T's appeal did not succeed under the Rules, but was allowed on Article 8 grounds. In the determination promulgated on 11 December 2011 the First-tier Tribunal Judge apparently allowed T's appeal under Article 8 to the extent that T was allowed to complete his education by November 2013. The judge also allowed the fourth claimant's appeal to the extent that he should be allowed to continue with his GCSE studies, and to take his GCSE exams in July 2013. As a consequence of the ruling, on 23 February 2012 each of the claimants was granted discretionary leave to remain until 22 November 2013. Their leave was set to expire some two weeks after the scheduled end date of T's course.

5. The letter granting discretionary leave to remain is not before me. But apparently the Secretary of State specifically stated in the letter that none of the claimants could expect to extend their leave beyond 22 November 2013.

6. On 14 November 2013 Raja & Co Solicitors applied on the claimants' behalf for a variation of their leave to remain. In the application form, T was the lead applicant and the remaining members of his family were put forward as his dependants. Under the heading of private life, T said he had one brother and one sister in

Mauritius, and he was in contact with them and with his friends in Mauritius. At section 6.18 he was asked to give details of any factors which would prevent or seriously limit his ability to form a private life in the country where he was born, or any other exception or factors which applied in his case. T said that his course was not complete; also his children together with himself and his wife had established close connections in the UK; and his sons were at a crucial stage of their education.

7. In a letter dated 8 January 2014 the Secretary of State gave her reasons for refusing the claimants' applications. Addressing T, the Secretary of State was not satisfied the grounds under which he was previously granted discretionary leave still persisted. He had now completed the relevant course of study, and therefore the specific circumstances related to why he was granted limited discretionary leave were no longer applicable. So his application for further discretionary leave was refused.

8. Consideration had been given to Appendix FM of the Rules He and his wife did not qualify for leave to remain under the partner route, nor did they qualify for leave to remain under the parent route. Their elder son R was over the age of 18, and therefore was not a child. Their younger son S was aged 17. He was in the UK with limited discretionary leave to remain in line with T valid until 22 November 2013. At the date of application S had only spent six years and eleven months in the UK, and therefore he had not been living in the UK continuously for at least seven years immediately preceding the date of application. The sole parental responsibility requirements were also not met. So T did not qualify for leave by virtue of E-LTRPT2.3 of Appendix FM.

9. It had been considered whether EX.1 applied to the application, but the application fell for refusal under the eligibility requirements of the Rules set out earlier. These were mandatory requirements which applied to all applicants, regardless of whether the EX.1 criteria were met. As T failed to meet these eligibility requirements, he could not benefit from the criteria set out at EX.1.

10. The Secretary of State went on to make a decision on Exceptional Circumstances. T said he had enrolled on further study at level 6, but no documentary evidence was provided to support this. His younger son S had been enrolled in the sixth form in September 2013 and his elder son R had enrolled on his second degree in September 2013. But his family had done this with the knowledge that they all only had a limited period of two months left of their discretionary leave, and they had no expectation that they would be granted further leave to be able to remain in the UK to complete any further studies. If T wished to continue study in the UK, he should make a Tier 4 application as a student. Exercising discretion in his favour in this respect would be to treat him in a more favourable manner when compared to other persons who are either in a similar position or could meet the requirements for leave under the Tier 4 points-based system.

11. In his witness statement dated 25 November 2011 which he had used in his appeal, he stated that his intention had always been to return to Mauritius following the

completion of his training, to start an import/export business. T had said that he wished to return to Mauritius with his family on completion of his course in November 2013. His family was fit to fly to Mauritius, and there were no insurmountable obstacles preventing them from returning there as a family unit. T could use his acquired business qualifications and skills to support his family in his home country.

12. S had spent the first ten formative years of his life in Mauritius, and therefore he would still have social and cultural ties to his home country. His elder son R was over 18, and therefore he could lead an independent life. He had been working in the UK, and could continue to do so in his home country to support himself.

13. His children may be currently enrolled in education in the United Kingdom but it was clear from the objective information available that Mauritius had a functioning education system which his children would be able to enter. They had both completed their compulsory education and could apply for further educational studies either in their home country or they could make applications to study in the UK.

14. The family would return to Mauritius as a family unit and continue to enjoy family life together. Whilst this might involve a degree of disruption to their private lives, this was proportionate to the legitimate aim of maintaining effective immigration control and was in accordance with the Secretary of State's duty under Section 55.

The Hearing before, the Decision of, the First-tier Tribunal

15. The claimants' appeals came before Judge Cockrill sitting at Taylor House in the First-tier Tribunal on 9 July 2014. Mr Martin of Counsel appeared on behalf of the claimants, and the Secretary of State was represented by Miss Jones, Home Office Presenting Officer. The judge received oral evidence from T and his two sons. The judge also heard from Mrs Gaijan, who is T's sister. She had written a letter in support which she adopted. She was a nurse by background, and she indicated in the letter how the claimants were all living with her and how they were all very close as a family.

16. In his subsequent determination, Judge Cockrill said at paragraph 30 that the important feature was to see whether or not any of the claimants met the requirements of the Immigration Rules. He continued in paragraph 31 as follows:

> The focus needs to be on the fourth [claimant] really because he is still the child. The fourth [claimant] then, at the time of the application was made, had been in this country with just a few days short of seven years. If one viewed the matter strictly then he does not meet the requirements of the Rules because he falls short of that seven year period. The only way in which he could get over that problem is if Mr Martin is right and that rather than reading the date of application in a strict matter that the application, in fact, remains outstanding pending the date of the decision and so, at the time of decision, the fourth claimant would have been here for seven years. What is abundantly clear, though, is the mischief that is being aimed at which is, in effect, that *a*

> *child who is settled here for a substantial period like seven years can really expect to enjoy the benefits of such long stay* (my emphasis). It seems to me that rather than have to answer that question as to whether or not the application remains outstanding until the decision, perhaps a better way of looking at the fourth [claimant's] case is to see it in relation to his right to respect for a private life. It seems to me that that really perhaps reflects the reality rather better. By the time of this hearing the fourth claimant has unquestionably been here for more than seven years. He has started on a course now which is due to end in July 2015 and the question that I ask myself is whether or not it is reasonable to expect him now to go to Mauritius, interrupting that course by so doing. It does not seem to me that it is reasonable, given the whole background which I have both read about and heard. I can see that there is force in the **Chikwamba** argument presented by Mr Martin but it would be wholly unnecessary to expect the fourth [claimant] to go to Mauritius simply to make an application which is then going to be successful so that he can return here. He is still under the care of his parents, the first and second [claimants], and as I see matters the best way forward for the fourth claimant is to be afforded leave up until July 2015 so that he can complete the present course. In my overall assessment and judgment that would be the reasonable course to take.

17. The judge went on to find in paragraph 32 that if he was right in his central analysis with regard to the fourth claimant, then it seemed to him the position of the parents was relatively clear cut. They could quite reasonably be expected to remain here until July 2015 to support their child. He accepted therefore that the claimants should qualify for leave under R-LTRPT of Appendix FM on the basis that the fourth claimant met paragraph 276ADE(1). He found the restriction upon a parent applicant having to have sole responsibility hard to grasp. It seemed to him that there could be no logical distinction made between a parent having sole responsibility and two parents being responsible for their child.

18. As regards the third claimant, it was accepted by Mr Martin that this claimant did not meet the requirements of the Rules. His case was therefore entirely on Article 8. It seemed to the judge that he could present a sensible argument that he should be permitted to stay at least until July 2015 because of the position of his brother and he was also undertaking some further studies at Kingston. One of the advantages of that course of action would be to allow the Secretary of State an opportunity to assess the family as a whole in July 2015 to see what leave should then be afforded to them. At that point of course the third claimant would still have one year left of his course.

19. At paragraph 36 the judge returned to the question of the impact on the fourth claimant of being expected to go back to Mauritius now. He would have to retake his A levels and that would be a great waste of time and resources. If that was correct, then it seemed to him that not only could the fourth claimant now benefit from the situation but also the other claimants. This was a very close knit family and both the parents and the children were all working hard together to provide for one another and to support one another. It seemed to him appropriate in the circumstances for leave to be granted for this limited period whilst the fourth claimant remained a minor and was still in education.

20. At paragraph 37, he observed that the third claimant was incurring substantial course fees at Kingston University. For the first year the fees were in excess of £10,000.

21. Judge Cockrill went on to allow the appeals of the first, second and fourth claimants under the Rules, or in the alternative under Article 8 ECHR. He dismissed the appeal of the third claimant under the Rules, but allowed his appeal under Article 8.

The Application for Permission

22. A member of the Specialist Appeals Team settled an application for permission to appeal to the Upper Tribunal. In paragraph 1 he asserted the judge had erred in finding in favour of the claimants in this appeal. But in paragraphs 2 to 6, he only pleaded a material error of law with respect to the appeals of the parents.

23. He pleaded that the judge was wrong to find that the parents were solely responsible for the fourth claimant. The judge had misinterpreted the provisions of Appendix FM. His second complaint was that the judge had undertaken a cursory Article 8 assessment in relation to the parents. There had been no consideration of their respective positions against the principles established in the case of **Gulshan**. The judge had given inadequate reasons as to why proportionality should be exercised in favour of the parents.

The Grant of Permission to Appeal

24. On 11 August 2014 First-tier Tribunal Judge Heynes granted permission to appeal. His reasoning was that an arguable error of law was disclosed by the application, not least the absence of consideration of **Gulshan** in respect of appeals allowed or allowed "in the alternative" on human rights grounds.

25. Insofar as it is material, Judge Heynes granted the Secretary of State permission to challenge the outcome of the appeals of all four claimants. He did not limit the grant of permission to an error of law challenge to the outcome of the appeals of the parents. Judge Heynes treated T as being the lead applicant, with the remaining family members being dependent on his application, and hence dependent on the outcome of his appeal against the refusal of that application.

The Rule 24 Response

26. Mr Martin on behalf of the claimants settled a Rule 24 response. He submitted there was no material error of law in the disposal of the parents' appeals as child S could not be left in the UK to fend for himself. There was also no error of law in the disposal of the appeals of the third and fourth claimants, and none had been alleged in the SSHD's grounds of appeal.

The Hearing in the Upper Tribunal on 29 September 2014

27. At the hearing on 29 September 2014, Mr Deller on behalf of the Secretary of State sought permission to amend the grounds of appeal to plead errors of law in respect of the disposal of the appeals of the sons. He acknowledged that the current grounds of challenge were only explicitly directed at the parents' appeals and raised no specific challenge to the rest of the determination, including saying nothing at all about the third and fourth claimants. He could only rely on the fact that the challenge named all four claimants and cited all four reference numbers, and that permission had been granted in all four appeals.

28. After hearing submissions from Mr Martin, I granted an adjournment for the following reasons stated in the adjournment report form:

> The FTT decision discloses arguable errors of law not raised in the grounds, and to proceed today would be futile. The SSHD needs to serve amended and extended grounds, which the claimants should have time to consider.

The Application for Permission to vary the Grounds of Appeal

29. Pursuant to the directions which I made at the hearing, by letter dated 3 November 2014 Mr Deller asked the Upper Tribunal to exercise its case management powers under Rule 5(3)(a) to accept a variation of the application for permission to appeal such that the grounds of appeal should now read as follows:

> Summary grounds
>
> 1. The FTT erred in its approach to the appeal of the fourth claimant by:
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> - isolating the case from the circumstances of the rest of the family and treating it as a discrete matter;
>
> - failing correctly to apply paragraph 276ADE in respect of the residential requirement as at the date of application and/or reasonableness of expectation that the claimant should leave the UK;
>
> - failing to analyse any residual claim outside paragraph 276ADE with regard to relevant case law and factors relevant to the case.
>
> 2. The FTT erred in its approach to the appeals of the first and second claimants by:
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> - importing errors in respect of the fourth claimant and to its consideration of paragraph 276ADE and Appendix FM;
>
> - misapplying the provisions of Appendix FM;
>
> - failing to have regard to relevant case law in its decision but the claimants succeeded under Article 8 if they failed under paragraph 276ADE/Appendix FM.

3. The FTT erred in its approach to the appeal of the third claimant by:

   - importing errors in its decisions on the first, second and fourth claimants;

   - failing properly to apply relevant case law as to whether a case which fell outside the private and family Rules (276ADE and Appendix FM) could nevertheless succeed under Article 8.

30. In the same letter, Mr Deller went on to make detailed submissions in support of each of the three grounds.

The Supplementary Rule 24 Response

31. On 12 January 2015 Mr Martin served by email a further Rule 24 response directed at the further grounds submitted by Mr Deller. He invited the Tribunal not to exercise its power under Rule 5(3)(a) to allow the Secretary of State to vary her application for permission to appeal. His reasoning was that the Secretary of State should not be allowed to amend her grounds at this late stage. Despite being served with a Rule 24 response, the Secretary of State had put forward no further arguments until the day of the hearing. It was contrary to the overriding objective that the parties should be allowed to fundamentally change their error of law challenge on the day of the hearing.

32. Alternatively, Mr Martin submitted that the new grounds did not disclose arguable errors of law. In response to ground 1, it was not correct that the judge should have considered the family as a whole. The question of whether the fourth claimant could meet the Rules was not dependent on his parents and brother. The issue was whether it was reasonable for him looking at all of the circumstances. That might include a consideration of other family members, and it was not limited to that. A child's studies would always be an important factor in looking at what was reasonable. It made up an important part of private life, which was what paragraph 276ADE was concerned with. There was no requirement that a Tier 4 application should have been made. Mr Martin cited **Nasim & Others (Article 8) [2014] UKUT 0025** at paragraph [41] and paragraph 2 of the head note of **CDS (Brazil) [2010] UKUT 305** as follows:

> Article 8 does not give an Immigration Judge a freestanding liberty to depart from the Immigration Rules, and it is unlikely that a person would be able to show an Article 8 right by coming to the UK for temporary purposes. But a person who is admitted to follow a course that has not yet ended may build up a private life that deserves respect, and the public interest in removal before the end of the course may be reduced where ample financial resource is available.

33. Mr Martin submitted that these authorities showed that was nothing inappropriate in the way in which the judge had approached the case, or in the matters that he had taken into account when looking at the position of the fourth claimant. The judge was fully entitled to find that, if he was wrong under the Rules on the seven year

point, then the fourth claimant should prevail on Article 8 grounds on a **Chikwamba** basis.

Ruling on Application to vary the Grounds of Appeal

34. At the outset of the hearing on 16 January 2015, I received oral submissions from Mr Duffy and Mr Martin as to whether the Tribunal should exercise its power under Rule 5(3) to accept a variation of the Secretary of State's application for permission to appeal. I found in the Secretary of State's favour on this issue, and granted the Secretary of State permission (a) to vary her application for permission to appeal in accordance with the amended grounds put forward by Mr Deller on 3 November 2014 and (b) to rely on the amended grounds. My reasons for my ruling are set out below.

35. Although the application to vary the grounds was not mooted until the previous hearing, the amended grounds could reasonably be characterised as **Robinson** obvious ones, having regard to relevant case law. I was satisfied that the amended grounds were not merely arguable but had prime facie merit (notwithstanding the robust Rule 24 response filed by Mr Martin in which he asserted that all three grounds were unarguable); and I was satisfied that it was in accordance with the overriding objective to deal with cases fairly and justly that the Secretary of State should not be shut out from raising them. There was also no prejudice caused thereby to the third and fourth claimants for three reasons. Firstly, permission to appeal in respect of the outcome of all four appeals had been sought and obtained within time, so the third and fourth claimants were already "before" the Upper Tribunal. Secondly, their legal representatives were given time to consider the amended grounds. Thirdly, although under the original grounds of appeal there was not a *direct* attack on the soundness of the findings in relation to the third and fourth claimants, a *collateral* attack on these findings was likely to arise in any event either in an exploration of whether the asserted errors with regard to the parents were material or when remaking the decisions about the parents.

Reasons for Finding an Error of Law

36. **EV (Philippines) v SSHD [2014] EWCA Civ 874** provides the most recent guidance from the senior courts on the approach to best interests and the question of reasonableness. Clarke LJ said:

> 33. More important for present purposes is to know how the tribunal should approach the proportionality exercise if it has determined that the best interests of the child or children are that they should continue with their education in England. Whether or not it is in the interests of a child to continue his or her education in England may depend on what assumptions one makes as to what happens to the parents. There can be cases where it is in the child's best interests to remain in education in the UK, even though one or both parents did not remain here. In the present case, however, I take the FTT's finding to be that it was in the best interests of the children to continue their education in England with both parents living here. That assumes that both parents are here. But the best interests of the

child are to be determined by reference to the child alone without reference to the immigration history or status of either parent.

34. In determining whether or not, in a case such as the present, the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here; and also to take account of any factors that point the other way.

35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully.

37. Lewison LJ said:

> 49. Second, as Christopher Clarke LJ points out, the evaluation of the best interests of children in immigration cases is problematic. In the real world, the appellant is almost always the parent who has no right to remain in the UK. The parent thus relies on the best interests of his or her children in order to piggyback on their rights. In the present case, as there is no doubt in many others, the Immigration Judge made two findings about the children's best interests:
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> (a) the best interests of the children are obviously to remain with their parents; [29] and
>
> (b) it is in the best interests of the children that their education in the UK [is] not to be disrupted [53].
>
> 50. What, if any, assumptions are to be made about the immigration status of the parent? If one takes the facts as they are in reality, then the first of the Immigration Judge's findings about the best interests of the children point

> towards removal. If, on the other hand, one assumes that the parent has the right to remain, then one is assuming the answer to the very question the Tribunal has to decide. Or is there is a middle ground, in which one has to assess the best interests of the children without regard to the immigration status of the parent?

38. The judge went on to analyse **ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC** 4 in order to elicit an answer to this question. He reached the following conclusion:

> 58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis the facts are as they are in the real world. One parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"
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> 59. On the facts of **ZH** it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family will be separated and the children will be deprived of the right to grow up in the country of which they were citizens.
>
> 60. That is a long way from the facts of our case. In our case none of the family is a British citizen. None has the right to remain in this country. If the mother is removed, the father has no independent right to remain. If the parents are removed, then it is entirely reasonable to expect the children to go with them. As the Immigration Judge found it is obviously in their best interest to remain with their parents. Although it is, of course a question of fact for the Tribunal, I cannot see that the desirability of being educated at public expense in the UK can outweigh the benefit to the children of remaining with their parents. Just as we cannot provide medical treatment for the world, so we cannot educate the world.

39. Jackson LJ agreed with both judgments.

40. The "hypothetical" approach sanctioned by Christopher Clarke LJ is in line with the guidance given by the Upper Tribunal in **MK (India)** which he cites with approval. In **MK**, the Upper Tribunal emphasised the need to conduct the initial best interest assessment without any immigration control overtones. These only came into play when the decision maker moved on to a wider proportionality assessment.

41. However, the "real world" approach is not unprecedented. In particular, it is reflected in the leading speech of Lord Hodge in **Zoumbas v Secretary of State [2013] UKSC 74**, where the Supreme Court dismissed an appeal against removal brought by a Congolese family comprising Mr and Mrs Zoumbas and two daughters, who had been born in the United Kingdom on 3 February 2007 and 14 April 2011 respectively. At paragraph 24 Lord Hodge said:

> There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible

> to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as healthcare and education which the decision maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and healthcare in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their wellbeing.

42. The significance of this brief survey of the relevant law is that it illuminates the question of how the decision maker should go about the task of deciding whether an applicant meets the requirements of EX.1(a)(ii) or Rule 276ADE(iv). The assessment of reasonableness is a holistic one, and the immigration status and history of the parents is a relevant consideration, following **EV (Philippines)**. The fact that there is a qualifying child, either because the child has accrued seven years residence in the UK or because the child is a British national, is not a trump card, as otherwise there would not be a requirement to go on to consider whether, nonetheless, it is reasonable to expect the child to leave the United Kingdom.

43. Judge Cockrill erred in law in finding that the claimant S met the gateway requirement contained in Rule 276ADE(iv). In order to qualify for consideration under this Rule, the claimant had to have accrued seven years' residence as at the date of application. It is not in dispute that the application was submitted on 15 November 2013, which was eight days short of the required seven year residence period. So it was a near miss, but it was still a miss. Mr Martin relied on the Secretary of State's long residence guidance which provides that the Home Office may grant an application if it is received 28 days or less before the applicant meets the required qualifying period, "provided they meet all the other Rules for long residence".

44. However, the guidance is permissive not mandatory. Moreover the proviso is crucial. The caseworker is permitted to treat the applicant as completing the required qualifying period only if the applicant meets all the other Rules for long residence. The caseworker dealing with the application reasonably took the view that the claimant did not meet the second limb of Rule 276ADE. So the decision to treat the claimant as not meeting the seven year qualifying requirement was in accordance with the law, and there was not a failure to apply relevant Home Office guidance.

45. The judge's approach to assessing the second limb of Rule 276ADE was also erroneous in law. Following the guidance of the Court of Appeal in **EV (Philippines)**, a copy of which was included in the Home Office bundle before the First-tier Tribunal, the judge needed to conduct a rounded assessment of reasonableness in a real world context. Although he had been here for a substantial

period "like seven years" the claimant could not "really expect to enjoy the benefits of such long stay". Even if he had accrued seven years residence in accordance with the rules (i.e. by the date of application) this would not have created a presumption that it was now unreasonable for the claimant to leave. It was wholly wrong to focus exclusively on the claimant's understandable desire to complete his A level studies, without paying any regard to a number of counterbalancing factors. These included the fact that the claimant had no right to remain, in common with the rest of his family, and no entitlement to continue to be educated at public expense in the UK. The judge failed to ask himself the right question which was whether it was reasonable to expect the child with no right to remain to follow his parents with no right to remain to Mauritius.

46. It is argued in the Rule 24 response that even if the judge was wrong to find that the claimant qualified under the Rules, there was no material error as the judge was entitled to find that the claimant qualified for leave to remain outside the Rules, applying **Chikwamba**.

47. The **Chikwamba** argument accepted by the judge was that it was unnecessary to expect the claimant to go to Mauritius simply to make an application which was then going to be successful, so that he could return here. His line of reasoning was fatally flawed. The claimant was not entitled to make an application under the Rules for leave to enter or remain in order to complete his A level studies at public expense. The claimant had not applied to complete his A level studies at private expense under the points-based system, and so the **Chikwamba** argument simply did not arise.

48. It is apparent from Mr Martin's skeleton argument for the First-tier Tribunal that the judge misunderstood Mr Martin's case on **Chikwamba**. Mr Martin was not postulating a scenario whereby the claimant went back to Mauritius in order to make an entry clearance application, but was relying on the proposition that the claimant should not be required to make another in-country application for leave to remain under Rule 276ADE "just to satisfy a formal requirement when the substance has been met". But this line of argument was not one which the judge could entertain, as the judge was constrained to follow the rules: he could not re-write them to accommodate the fact that the claimant had now passed the seven year mark. The claimant had not made a fresh application after accruing seven year's residence, and so he could not meet Rule 276ADE.

49. Following the **Nagre**/**Gulshan** line of authority, the judge could not simply embark on a freestanding Article 8 assessment outside the Rules without acknowledging that the claimant's private life claim did not succeed under Rule 276ADE, and without addressing the question of whether there were compelling circumstances not sufficiently recognised by the Rules which justified the Article 8 claim succeeding outside the Rules. Following **MM (Lebanon)**, it was arguably not necessary for the judge to address this by posing an intermediate or threshold test for the Article 8

assessment outside the Rules, but he nonetheless needed to engage with this question in the course of a rounded assessment of the wider proportionality issues.

50. The judge's errors in respect of the claimant's appeal affected his decision on the other appeals, and so they are all vitiated by a material error of law in consequence and must be set aside. The judge was also wrong to find that the parents succeeded in their appeals under the Rules. They were not eligible under the parent route as neither of them had sole responsibility for the claimant's upbringing. They had shared responsibility for the claimant and they all lived together.

The Remaking of the Decision

51. Mr Martin and Mr Duffy agreed that it was not necessary for me to hear any further evidence for the purposes of remaking the decision. The evidence tendered before the First-tier Tribunal by the claimants is not disputed by the Secretary of State.

52. By way of an update, Mr Martin reported that the claimant's older brother R had been required to take a year out of his degree studies by his college, pending the resolution of his immigration status. As for the claimant S, he has now just passed his 18th birthday, and he is due to take his A levels exams in July 2015.

53. Realistically, neither the first, second nor third claimants can succeed in an Article 8 appeal on his or her own account. Each of them is piggybacking on the fourth claimant's Article 8 appeal.

54. For the reasons given in my error of law ruling, the fourth claimant S cannot succeed in his appeal under Rule 276ADE(iv) because he does not meet the gateway requirement of having accrued seven years' residence in the United Kingdom by the date of the application.

55. I refer to the five point **Razgar** test. While the claimant continues to enjoy family life with his parents and older brother, the effect of the refusal decision is not to interfere with family life, as it is proposed that the entire family returns to Mauritius. On the other hand, I answer questions 1 and 2 of the **Razgar** test in favour of the claimant with regard to the establishment of private life in the United Kingdom.

56. I answer questions 3 and 4 of the **Razgar** test in favour of the SSHD, so the crucial question is whether the refusal decision is proportionate. From a private life perspective the claimant's case is weaker than it was, as he is now an adult. Under the UNCRC which underpins our domestic jurisprudence on the topic of giving primary consideration in the proportionality assessment to the best interests of minor children, reaching the age of majority is an absolute cut off point. The UNCRC only applies to children under the age of 18. Similarly, the obligation of the Secretary of State under the 2009 Act to have regard to the safety and welfare of children in the UK does not extend beyond a child's 18th birthday.

57. But even if the claimant continues to be treated as if he was a child under the age of 18, I consider that overall his best interests lie in him returning with his family to Mauritius. While this will shatter the private life that he has established here, he can reconstitute his private life in all its essential elements in Mauritius, the country of which he is a national and where he has lived for the majority of his life. His A level studies will be disrupted, but the knowledge gained thus far will not be wasted. Although there will be delay and a considerable amount of inconvenience, the claimant can complete his A levels, or an equivalent set of qualifications, in Mauritius.

58. The claimant's situation is very far from the paradigm case of **CDS (Brazil)**. He has completed the course of studies envisaged by the grant of discretionary leave to remain. The reason for his inability to complete his A level studies is not a failure to meet some technical requirement of the Rules, but a simple lack of entitlement to follow or complete such A level studies in the first place. The studies are not privately funded, but have been pursued at public expense. The parents who are responsible for his welfare knew full well when the claimant embarked on his A level studies that the family's discretionary leave to remain was about to expire, and that they were expected to return to Mauritius, as the claimant's father had told the Tribunal was the plan. So it was always on the cards that the claimant might well not be able to complete his A level studies. Insofar as it is material, I consider it is likely that the claimant himself was aware of this fact. As the claimant is part of a close knit family, it is not to be inferred that his father misled the claimant as to the precariousness of his ability to complete the A level studies upon which he had embarked. I find that the claimant would have been sufficiently mature to appreciate that he had no legitimate expectation of being able to complete his A level studies, but only a hope that he might be allowed to do so if the application for further leave to remain was successful and/or the appeal against the refusal of further discretionary leave to remain was ultimately successful.

59. On the wider proportionality assessment, the crucial factor militating against the claimant is that he has no right to remain under the Rules in common with the rest of his family.

60. Part 5A entitled "Article 8 of the ECHR: public interest considerations" came into force from 28 July 2014. Section 117A provides:

> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

61. Section 117B lists the following "Article 8: public interest considerations *applicable in all cases* (my emphasis)":

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

62. A public interest consideration in the claimant's favour is that he, together with the rest of his family, speaks English; and the family as a whole are financially independent insofar as they have hitherto maintained and accommodated themselves adequately without recourse to public funds. But little weight should be given to a private life that is formed by a person while his right to remain here is precarious, and this consideration applies to the claimant, just as much as it applies to the remaining members of his family. The claimant is not a qualifying child, and even if he was, it would be reasonable to expect him to leave the United Kingdom with the rest of his family.

63. In conclusion, I find that the refusal of further discretionary leave to remain to the fourth claimant, and the prospective removal of the fourth claimant together with the rest of his family, is proportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls. As the fourth claimant's Article 8 claim fails, it necessarily follows that the intrinsically weaker Article 8 claims of the remaining family members must also fail.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision of the First-tier Tribunal is set aside and the following decision is substituted: the appeals on Article 8 grounds of all four claimants against the refusal of further discretionary leave to remain, and against removal under Section 47 of the 2006 Act, are dismissed.

Signed Date

Deputy Upper Tribunal Judge Monson