Upper Tribunal
(Immigration and Asylum Chamber) **Appeal**
Numbers: IA/11150/2014

IA/11155/2014
IA/11158/2014
IA/11162/2014
IA/11168/2014
IA/11176/2014
IA/11179/2014

THE IMMIGRATION ACTS

Heard at: Manchester	**Determination Promulgated**
On: 26th February 2015	**On: 20th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Noraldeen Abdalla Militain
Fawziya Milad M Ben Osman
Sara Noraldeen Militain
Zainab Militain
Abdalla Militain
Aseel Militain
Abdurahman Norladeen Militain
(no anonymity direction made)

Appellants

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Dr Mynott, Haq Solicitors
For the Respondent: Ms Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are all nationals of Libya. They are respectively a father, mother and their minor children. They have permission[1] to appeal against the decision of the First-tier Tribunal (Judge Osbourne) to dismiss their linked appeals against the Respondent's decision to refuse to grant them further leave to remain and to remove them from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006.

Background

2. The First Appellant had come to the UK in September 2006 in order to undertake a PhD. He was given leave to enter as a student – subsequently varied to Tier 4 (General) Migrant – and his wife and four eldest children granted leave as his dependents. Their fifth child was born in the UK on the 22nd December 2009. The First Appellant completed his PhD in 2011. He had existing leave when he made an application, on the 20th February 2012, for further leave to remain 'outside of the rules'. The Appellants requested that in light of the war in Libya the Respondent exercise her discretion in their favour and grant them a short period of leave to remain. The applications highlighted that the eldest children of the family were about to take their GCSEs and raised other general "best interests" grounds.

3. The Respondent refused the applications on the 11th April 2013 with reference to the Rules. None of the family could qualify under Appendix FM. It is noted that the family had requested a short extension of leave due to the instability in Libya but since the applications were made after the "Libyan Concession" was withdrawn they could not benefit from it: "furthermore it is now considered safe to return to Libya and as you and your family can return together we do not consider the grounds that you have raised amount to exceptional circumstances as to support a grant of limited leave to remain".

4. The family appealed to the First-tier Tribunal. On the 25th October 2013 they attended what they thought would be a hearing of their appeals. On that date the Home Office Presenting Officer (HOPO) withdrew all of the decisions. It was the understanding of the Appellant's representative that this was because the eldest children were undertaking exams. It was her understanding that the HOPO would be making a positive recommendation to the team dealing with

[1] Permission granted by Designated First-tier Tribunal Judge Appleyard on the 12th August 2014

the applications that discretionary leave to remain be granted.

5. It wasn't. The Respondent issued fresh refusals on the 17th February 2014 with full appeal rights.

The Determination of the First-tier Tribunal

6. The matter came before First-tier Tribunal Judge Osbourne on the 11th June 2014. The Judge heard live evidence from the Appellant's previous representative, Ms Nicola Dean. Ms Dean's recollection was that prior to the previous hearing she had been approached by the HOPO in the waiting room who had indicated that she would be recommending that some form of leave be granted. Judge Osbourne had conflicting evidence from the HOPO in question, who could not recall having had this conversation with Ms Deans. Certainly no such recommendation had been made. Judge Osbourne resolved this conflict in the Respondent's favour. At paragraph 12 she found that whilst she had no reason to doubt Ms Dean's professional integrity she found her to have been mistaken in her recollection of the conversation. That dispensed with the argument being advanced before her that this conversation had given rise to some legitimate expectation on the part of the Appellants that they would be granted discretionary leave.

7. It had further been argued on the Appellants' behalf that the appeals should all be allowed as 'not in accordance with the law' – and effectively remitted to the Respondent. The alleged error in law on the part of the Respondent was that the refusal letters failed to deal with the rights of the children in the context of Article 8, and applied paragraph 322(1) of the Rules (mandatory refusal for a variation of leave for a purpose not covered by the Rules) when it should have been obvious that these were applications under 276ADE. In addition the Respondent's refusal letters had got it wrong in stating that the family had been without leave since February 2012. Addressing these arguments Judge Osbourne records that the original applications were made 'outside of the rules' as they were requesting six months extra leave to enable the family to make arrangements to return to Libya. It was only when the material was lodged for the appeal was it clear that these were human rights appeals. She was satisfied that she could deal with any error in the refusal letters as part of her decision making and declined to remit the cases back to the Secretary of State.

8. The determination then proceeds to consider the arguments put on behalf of each Appellant in respect of paragraph 276ADE, relevant because "the immigration rules are now to be taken as a complete code with regard to Article 8"[41]. It was accepted on behalf of the

Secretary of State that four of the children had been in the UK for more than seven years. As to whether it was reasonable to expect them to leave the UK the determination here records that oral evidence was given by Sara and Zainab, the eldest children who are both taking their GCSEs. Both appeared "happy, confident and relaxed" and demonstrated that they were doing well at school. Sara planned to go to university and study architecture so that she could develop shelters for displaced people in warzones. It was their teacher's evidence that it would be detrimental at this point to disrupt their education. The family were originally from Siirte and the Tribunal accepted that the family home would have been destroyed in the war. Against that background it was understandable that none of the children wished to return there. At paragraph 39 the determination concludes "I am satisfied that it would be a wrench for the children to leave the United Kingdom where they now have a wide circle of friends and are engaged in other activities apart from pursuing their education". As to that education the determination refers to EM and Ors (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC) but notes that attending school for seven years does not provide a "prescriptive right to remain here".

9. The determination proceeds briskly through the first four *Razgar* steps – none of this appears to have been in contention – and assesses proportionality. The factors taken into account are: that the family had initially only made an application for a short period of leave and appeared to be contemplating return to Libya; the fact that they would be returning to a destroyed home and instability including numerous human rights abuses; although the children would be anxious about this they have a strong supportive family to rely upon; an undated report indicated that there was a free education system in Libya; although the system closed down during the war efforts were being made to get it back up and running; this is a family who have taken the children's Islamic education seriously, something that would not be disadvantaged by return to an Islamic country. At paragraphs 61-62 the Tribunal says this:

> "61. The test which I must apply is twofold – firstly I must consider whether the decision to remove the family is 'proportionate' in all the circumstances which involves a balancing exercise taking into account the matters which I have referred to. Secondly I must consider whether the removal of the family unit is 'reasonable' in accordance with paragraph 276ADE (iv) particularly with regard to the needs of the children.
>
> 62. The authorities do not state that there is a presumption in favour of allowing a family to remain in the United Kingdom where children have been here and engaged in education for more than seven years but it is certainly a factor which I have taken into account. However, having also taken into account the resources of this close-knit family in both

> emotional and practical terms and my satisfaction that they have acted to preserve their Libyan identity I am not satisfied that it would be unreasonable for the whole family to return as a unit or that the decision to remove them is disproportionate to all the circumstances of the case."

10. The appeals are thereby dismissed.

Grounds of Appeal

11. It is submitted that the First-tier Tribunal has erred in the following material respects:

    i) In making irrational findings about the conversation between the HOPO and the solicitor. The solicitor had given live evidence which had been subject to cross examination. In the absence of any reason to doubt her truthfulness or recollection there was no rational basis for preferring the HOPO's version of events over hers.

    ii) The determination acknowledges that the Respondent got it wrong when she stated that the family had remained without leave since February 2012. In those circumstances the decisions had to be allowed as 'not in accordance with the law' pursuant to s86(3) of the Nationality, Immigration and Asylum Act 2002.

    iii) The Tribunal has erred in its approach to Article 8. For instance it has failed to make clear findings as to where the children's best interests lie, has failed to consider the impact of removal on the elder ones who are currently taking their GCSEs, and failed to take relevant evidence into account (that most of the schools in Siirte remain damaged). The finding that their education would not be disadvantaged by moving was contrary to the unchallenged opinion of their teachers that it would be very much to their detriment. All of these factors went to whether or not it was reasonable that the children left the UK.

12. The Respondent opposed the appeal on all grounds. It was submitted that all of the findings of the Tribunal were open to it on the evidence presented. The determination contains a comprehensive assessment of the factors relevant to proportionality. The disruption to the children's education has been addressed head-on and the Judge has dealt with all of the points raised.

Error of Law

13. Following the 'error of law' hearing on the 3rd November 2014 I made the following findings.

14. There is absolutely nothing in the argument that the Appellants had a 'legitimate expectation'. Even if it could be demonstrated that the Judge erred in her balancing of the evidence on this point (which it has not been) the only expectation that the Appellants could reasonably have had was that a Home Office Presenting Officer would tell a colleague that she thought they should get leave to remain. Even if it could be demonstrated (which it has not been) that such a recommendation should have been made there is nothing to say that it would have carried any weight with the decision making team. Even if it could be demonstrated (which it has not been) that the appeal should have been allowed as 'not in accordance with the law' what would the outcome have been? That this individual officer would make her recommendation to the decision making team who would then produce exactly the same decision as the First-tier Tribunal had before it. It would gain this family nothing except a longer wait and then in all probability having to return to court.

15. The submission that the appeals had to be allowed as 'not in accordance with the law' is similarly limited in the advantage to be gained by the Appellants. A decision which does not canvass all relevant factors and apply all relevant rules can be said to be 'not in accordance with the law' and be sent back to the Respondent. That would again result in nothing but delay and in all probability, a return to court. In this case, the First-tier Tribunal has given perfectly good reasons why it declined to take this course. Each of these family members had not, contrary to the submissions of Dr Mynott, made applications to remain indefinitely in the UK on human rights grounds. They had asked for a short period of discretionary leave in order to sort out their affairs. That is completely different. The Respondent dealt with the applications that she received. That there may have been errors of fact in the refusal letters was unfortunate, but that does not mean that the decisions were 'not in accordance with the law'. They are, like so many other points raised in refusal letters, a matter of factual dispute to be resolved by the Tribunal.

16. The real question in this appeal is whether the First-tier Tribunal erred in the approach taken to Article 8, assessed in the case of the children against the background of paragraph 276ADE and s55 of the Borders, Citizenship and Immigration Act.

17. Paragraph 276ADE was important because it should have been the starting point of the analysis. If the children could show that they

met the requirements of 276ADE(1)(iv), it is difficult to see how the Secretary of State could demonstrate that their removal would be proportionate. All that the Secretary of State could point to in those circumstances would be that they had not made formal applications; a submission that would no doubt be answered with reference to Chikwamba and the undesirability of delay in matters involving children. The first question the Tribunal should therefore have considered was whether or not it was 'reasonable' to expect the four eldest children to leave the UK. As paragraph 61 demonstrates (see above), that is not the way in which the appeal was approached. The Tribunal here sets out proportionality and reasonableness as two distinct tests but then appears to conflate the two in its reasoning. That is the first error. The second is that there have been no clear findings on whether or not return to Libya would be contrary to the children's best interests. A positive finding to that effect would not lead inexorably to a finding that it would be unreasonable for them to leave, but it would have to be a primary consideration.

18. For those reasons I set the decision of the First-tier Tribunal aside. The first two grounds of appeal are rejected and the cogent findings in the determination about these matters are preserved.

The Re-Made Decision

19. The matter has ben re-made before me following a further hearing on the 26th February 2015 at which I heard oral submissions on the up to date evidence that had been provided in respect of the children.

20. These are Article 8 appeals. I can move swiftly through the first four *Razgar* questions. It is accepted in light of the family's lengthy residence in the UK that each individual has an established private life and that they share a family life with each other. I find that the decision to remove the family would constitute an interference with their private lives in the UK of sufficient consequence that the Article is engaged. The decision to remove persons with no lawful leave to remain is rationally connected to the legitimate aim of protecting the economy and the decision is one that the Secretary of State is in law entitled to take.

21. I begin my assessment of proportionality with assessing the position of the children: s55 of the Borders, Citizenship and Immigration Act 2009. The case advanced by Dr Mynott is that the four eldest children all now qualify for leave to remain under paragraph 276ADE. In those circumstances their removal cannot be said to be proportionate. The only substantive matter in issue under

that provision is (1)(iv). Each must show that he or she:

> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

22. What does "reasonable" mean?

23. The genesis of this provision was the concession known as DP5/96. That policy, and those which followed, created a general, but rebuttable, presumption that enforcement action would "not normally" proceed in cases where a child was born here and had lived continuously to the age of 7 or over, or where, having come to the United Kingdom at an early age, 7 years or more of continuous residence had been accumulated[2]. As the policy statement[3] which accompanied the introduction of paragraph 276ADE (1)(iv) puts it: "a period of 7 continuous years spent in the UK as a child will generally establish a sufficient level of integration for family and private life to exist such that removal *would normally not* be in the best interests of the child" [my emphasis]. The current guidance reaffirms that this is the starting point for consideration of the rule. The Immigration Directorate Instruction 'Family Migration: Appendix FM Section 1.0b *Family Life (as a Partner or Parent) and Private Life: 10-Year Routes'* ("the IDI") gives the following guidance:

> 11.2.4. Would it be unreasonable to expect a non-British Citizen child to leave the UK?
>
> The requirement that a non-British Citizen child has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, recognises that over time children start to put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and *strong reasons will be required in order to refuse a case with continuous UK residence of more than 7 years.*
>
> The decision maker must consider whether, in the specific circumstances of the case, it would be reasonable to expect the child to live in another country.
>
> The decision maker must consider the facts relating to each child in the UK in the family individually, and also consider all the facts relating to the family as a whole. The decision maker should also engage with any specific issues explicitly raised by the family, by each child or on behalf of each child.

[2] For a detailed history of the rule and its development see Dyson LH in Munir v SSHD [2012] UKSC 32 paras 9-13

[3] The Grounds of Compatibility with Article 8 of the ECHR: Statement by the Home Office (13 June 2012) at 27.

24. I have had regard to the Hansard record of the debate in the House of Lords on the introduction of section 117B (6) NIAA 2002 (as amended by the Immigration Act 2014) in which Lord Wallace of Tankerness explained the government's thinking on the significance of the seven year mark:

> "we have acknowledged that if a child has reached the age of seven, he or she will have moved beyond simply having his or her needs met by the parents. The child will be part of the education system and may be developing social networks and connections beyond the parents and home. However, a child who has not spent seven years in the United Kingdom either will be relatively young and able to adapt, or if they are older, will be likely to have spent their earlier years in their country of origin or another country. When considering the best interests of the child, the fact of citizenship is important but so is the fact that the child has spent a large part of his or her childhood in the United Kingdom"[4].

25. All of this guidance recognises that after a period of seven years residence a child will have forged strong links with the UK to the extent that he or she will have an established private life outside of the immediate embrace of his parents and siblings. It is that private life which is the starting point of consideration under this Rule. The relationships and understanding of life that a child develops as he grows older are matters which in themselves attract weight. The fact that the child might be able to adapt to life elsewhere is *a* relevant factor but it cannot be determinative, since exclusive focus on that question would obscure the fact that for such a child, his "private life" in the UK is everything he knows. That is the starting point, and the task of the Tribunal is to then look to other factors to decide whether, on the particular facts of this case, these displace or outweigh the presumption that interference with that private life will normally be contrary to the child's best interests. Those factors are wide-ranging and varied. The IDI gives several examples including, for instance, the child's health, whether his parents have leave, the extent of family connections to the country of proposed return. The assessment of what is "reasonable" will call for the Tribunal to weigh all of these matters into the balance and to see whether they constitute "strong reasons" - the language of the current IDI – to proceed with removal notwithstanding the established Article 8 rights of the child in the UK. "Reasonable" in the context of 276ADE is then not to be equated with *Razgar* proportionality. Although both involve consideration of the same set of facts, the starting point is quite different. An appeal can only be allowed with reference to Article 8 'outside of the Rules' where there are some particular compelling circumstances not adequately reflected in those Rules: see Singh and Khaled [2015] EWCA Civ 74. By contrast it is the Respondent's stated policy that "strong reasons" will be required to *refuse* leave to a child who has

[4] At column 1383, Hansard 5th March 2014

accrued seven years continuous residence.

26. Against that legal framework I consider the facts that relate to these children.

27. The three eldest children are Sara (born 1997), Zainab (1999) and Abdallah (2000). They all spent three years in the UK, with valid leave, between 2000 and 2003. In 2003 the whole family returned to Libya for three years. In August 2006 they came back to the UK with leave to enter as Tier 4 dependents, accompanied by their sister Aseel who was born in Libya in 2005. They have remained here ever since. These children have therefore had a period of eight and a half years continuous lawful residence since that last entry.

28. I find as fact that each child has developed an established private life and has integrated well into the UK, as envisaged by Home Office policy and Ministerial statement. I agree with Judge Osbourne that the children have made good progress at school and that they have "made the most of the educational and social opportunities available to them". They have all made close friends. I note and accept the professional opinion of their teachers that disruption to their education at this point would be to their detriment[5]. I note that the third child, Abdalla, is now in year 10 and has started his GCSEs. Zainab is in her final year of GCSEs and Sara has started her A-levels. Judge Osbourne accepted evidence provided by the Respondent to the effect that there are functioning schools in some places in Libya. That may or may not remain the case. If it is I nevertheless find that it would be contrary to these childrens' best interests for them to be removed from their current schools where they are settled, prospering, and in the case of the eldest three, undertaking important examinations.

29. I have given consideration to the stated opinion of the children themselves that they have no desire to return to Libya. Sara and Zainab gave evidence before Judge Osbourne and expressed their concerns about the unstable situation in Libya. She accepted that they, and their younger siblings were very concerned and that it would be a "wrench" for them to leave. I nevertheless have also weighed the findings of Judge Osbourne that each child of this family speaks Arabic, has supportive parents who could help them re-integrate and have a familiarity with Libyan culture.

30. Happily none of the children have any significant health problems

[5] See for instance letters dated 19th May 2014 and 13th February 2015 from Jayne Ralphson, Head of Student Services at Whalley Range 11-18 High School (in respect of Zainab), letter dated 15th February 2015 from Gillian Winter, Principal of Connell Sixth Form (in respect of Sara)

so apart from the dangers inherent in relocating to a country where the infrastructure has been severely damaged by ongoing conflict, there is no particular concern about their health should they return to Libya.

31. I follow the finding of Judge Osbourne that the family home in Siirte has been destroyed and that the remaining family members in Libya have been displaced. At the date of the appeal before her the First Appellant's parents had been forced to flee their home and were living in a one bedroomed apartment. At the date of the re-making before me the situation had considerably worsened. "Islamic State" affiliated militias had taken control of Siirte[6] and had launched offenses against the strongholds of the other two main parties, "Libya Dawn" and "Dignity"[7], in what is described in the material before me as a "three way civil war". Those few family members remaining in Libya have therefore been internally displaced. In view of this unstable situation I find it would be contrary to the best interests of these children to be removed to Libya.

32. Asked to identify the "strong reasons" why the childrens' private lives should, after eight and a half years, be interfered with, Ms Johnstone submitted that they could continue their educations in Libya or alternatively apply to come back as students themselves. They can speak Arabic and they will have a familiarity with the culture in Libya. Thankfully none have any health concerns. The Appellants acknowledge that they still have family in Libya, since the First Appellant's parents are there. Importantly their parents no longer have any leave to remain so the family would be returned together who could assist them in re-integrating. I have considered all of those factors. None in my view render it "reasonable" that these children be removed now, even when weighed cumulatively. It also rather overlooks the fact that the security situation in Libya is deteriorating daily, that the airport is being intermittently shut due to shelling (there have been no forced removals for some time as a result). Armed militias, not answerable to any central government, are vying for control of territory and control checkpoints throughout the country. It is a moot point whether the present situation falls short of a full-blown civil war but I do not find it reasonable to send these children back to a country teetering on the brink of one.

33. Having considered all of those factors I conclude that the four eldest children presently meet all of the requirements of 276ADE. It is never in a child's best interests to delay resolution of his status and I find that it would be entirely disproportionate to refuse to grant

[6] Country background material at pages 11, Appellant's bundle

[7] See for instance country background material at pages 16, 28 Appellant's bundle

further leave to remain to Sara, Zainab, Abdalla and Aseel. There is nothing weighing on the Respondent's side of the scales since they meet the requirements of the Rules.

34. I now assess the position of their parents. They do not themselves qualify for leave to remain under the Rules and this is my starting point for consideration of their Article 8 appeals.

35. Section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) sets out the public interest considerations that I must have regard to in determining proportionality:

> (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.

36. I have had regard to the fact that the maintenance of effective immigration controls is in the public interest. Although their leave has

now expired this is a family who have never, for as much as a day, been in the country unlawfully.

37. I have had regard to the fact that 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 are less of a burden on taxpayers, and are better able to integrate into society. That parliament was quite right to so legislate is amply illustrated by this family, all of whom speak English and all of whom have taken an active part in the academic and social life of the UK.

38. There is no evidence at all that the family have ever claimed benefits, or that they have otherwise been a drain on the resources of public funds. The First Appellant has paid private fees in his long years of study in the UK, and thus contributed to the funding of higher education.

39. Sub-clause (4) does not apply since the family have always had leave. Sub-clause (5) does, since "precarious" means anything short of settled status. That is the only part of the provision that diminishes the weight to be attached to the family's side of the scales. I note however that the terms of sub-clause (6) are such that this should not, in the case of Dr Militain and Ms Ben Osman, be weighed against them at all. That is because they have a genuine and subsisting parental relationship with their qualifying children: I have found that it would not be reasonable to expect them to leave the UK. The terms of the statute are clear: in those circumstances the public interest does not require their removal. It would therefore be disproportionate to remove Dr Militain and Ms Ben Osman.

40. That leaves Abdurrahman. The Respondent realistically concedes that in view of his age it would be disproportionate to return him to Libya where the remaining family members have succeeded in their Article 8 appeals.

41. I therefore find that the appeal of each Appellant must be allowed on human rights grounds.

Decisions

42. The decision of the First-tier Tribunal contains an error of law and it is set aside.

43. The decision in the appeal is re-made as follows:

"The appeals are dismissed under the Immigration Rules.

The appeals are allowed on human rights grounds."

Deputy Upper Tribunal Judge Bruce
8th April
2015