IAC-PE-SW-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/21063/2014
IA/22416/2014
IA/22422/2014
IA/22427/2014
IA/21064/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 May 2015	**On 29 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ZB (FIRST APPELLANT)
HB (SECOND APPELLANT)
FB (THIRD APPELLANT)
YB (FOURTH APPELLANT)
AB (FIFTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Ms L Kenny of the Specialist Appeals Team
For the Respondents: Mr A Pretzell of Counsel instructed by Makka Solicitors Limited

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Respondents are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Respondents and to the Appellant. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

The Respondents

1. The Respondents to whom I shall refer to as the Applicants are wife and husband and their three children who at the date of the hearing were respectively aged about 12, 10 and 5. They are all citizens of South Africa.

2. On 19 March 2005 the Applicants, other than AB who had not yet been born, arrived in the United Kingdom with leave as visitors. On 16 September 2005 the wife submitted an application for leave to remain as a student. That application was refused without right of appeal. On 14 October 2005 she submitted a further application for leave as a student which was refused. Her appeal against that was dismissed and she lodged a further application on 4 October 2006 which was refused without right of appeal. On 2 July 2013 she submitted a new application for further leave on the basis of her private and family life. This was refused without right of appeal. She issued two pre-action letters to the Appellant (the SSHD) who agreed to review the applications. This resulted in fresh refusal decisions being made with the wife and AB, the youngest child being given a right of in-country appeal. Another pre-action letter was served with a view to obtaining an in-country right of appeal for the husband and the two older children in respect of whom the SSHD then issued fresh decisions with an in-country right of appeal.

3. Since September 2005 the Applicants have been without any substantive leave to remain in the United Kingdom.

The Decision and Original Appeal

4. By decisions of 22 April 2014 in relation to the wife and AB and of 14 May 2014 in relation to the other Applicants the SSHD refused all the applications and proposed to make directions for the removal of the Applicants to South Africa. The reasons are contained in a letter of 22 April 2014. The SSHD addressed the position of each of the Applicants and found that they met the suitability requirements of Appendix FM of the Immigration Rules and that they had established a private life in the United Kingdom. The parents did not meet the length of residence requirements at para. 276ADE of the Immigration Rules and could reasonably be expected to return to South Africa. The eldest child had

been in the United Kingdom for more than seven years but at the date of decision was still in the junior years of her schooling and could return to South Africa with the parents. The middle child had not been in the United Kingdom for more than seven years and also was still in the junior years of schooling. The youngest child had not been in the United Kingdom for seven years. Additionally, the return of all the Applicants to South Africa would not be in breach of the United Kingdom's obligations under Article 8 of the European Convention.

5. On 21 May the Applicants lodged notice of appeal. Essentially the grounds assert the wife met the requirements of paragraph EX1(a) of Appendix FM and that the SSHD had failed to consider the position of the children with regard to her obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009 and to consider the best interests of the children. The Applicants also asserted their claim under Article 8 of the European Convention.

The First-tier Tribunal's Decision

6. On 12 January 2015 the appeals were heard by Judge of the First-tier Tribunal Behan. She heard oral testimony from the parents and the two older children. By a decision promulgated on 12 February 2015 she allowed the appeals of the two older children under the Immigration Rules and the appeals of all the Applicants on human rights grounds.

7. The SSHD sought permission to appeal on the grounds that the Judge had made a material mis-direction of law in respect of the meaning of "reasonableness" under para.276ADE(1)(iii) of the Immigration Rules and her findings under Article 8 were consequently infected by her erroneous decision under the Immigration Rules.

8. By a decision of 9 April 2015 Judge of the First-tier Tribunal Grimmett granted the SSHD permission to appeal on the ground that it was arguable the Judge had erred in failing fully to have regard to the judgments in *Zoumbas v SSHD [2013] UKSC 74* and *EV (Philippines) v SSHD [2014] EWCA Civ 874*.

The Upper Tribunal Hearing

9. All the Applicants attended the hearing. At the start both advocates agreed that just as in the First-tier Tribunal there had been no bundle filed by the SSHD.

10. Ms Kenny for the SSHD argued the springboard for the Judge to have allowed all the appeals was the finding that the appeals of the two older children should be allowed. The SSHD challenged the Judge's finding that it would not be reasonable for the Applicants to return as a family unit to South Africa.

11. It was only the eldest child who had been in education for seven years or more. She referred to para.13(iii) of the determination in *Azimi-Moayed and Others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC)*. The overall balancing exercise conducted by the Judge at paras.23 following of her decision was mis-conceived. It was acknowledged the husband had good prospects of employment on return to South Africa and on balance it would be reasonable for the Applicants to return as a family unit. The Judge's conclusion at para.35 that the public interest did not require the removal of the parents was simply incorrect.

12. The parents were not British citizens and have never had any right of access to free healthcare or education for their children in the United Kingdom. The decision should be set aside.

13. For the Applicants Mr Pretzell submitted that at the date of the application the two older children had been in the United Kingdom for more than seven years. The issue was whether it was practicable for the family and in particular the two older children to re-integrate into a life in South Africa. Following the judgments in *Zoumbas v SSHD [2013] UKSC 74* and *EV (Philippines and others v SSHD [2014] EWCA Civ 874* the SSHD had formed the view that the starting point of any decision was that it was always reasonable to return family members as a family unit. He referred to the response under Procedure Rule 24. Referring to the foot of page 3 he submitted that the comments of Lewison LJ at para.60 of the judgment in *EV (Philippines)* were obiter dicta. Lewison LJ had said that the desirability of being educated at public expense in the UK cannot outweigh the benefit to the children of remaining with their parents. He also noted at para.59 that the facts in the case before the Court of Appeal were a long way from the facts of the case before the Supreme Court in *ZH (Tanzania) v SSHD [2011] UKSC 4* and that in *EV* none of the family was a British citizen and none had a right to remain.

14. The Judge had listed the points which were to the advantage of the Applicants at paras.23-25 of the decision and balanced those against the factors adverse to the Applicants at paras.27-29. At the end of para.28 she had also taken into account the consequences of the delay in dealing with the case.

15. The appeal in *EV* was settled on the basis of findings of fact and the appeal before the Tribunal was not dissimilar only in that like all cases both were fact sensitive. The Judge's decision was both reasoned and reasonable and the SSHD's appeal should be dismissed.

16. Ms Kenny responded that the Judge's decision contained no reference to *EV (Philippines)* (other than its citation at para.21) that removal of the Applicants was in the public interest, especially because of the cost of educating the three children. The Judge had been clear at para.30 that if the appeal had concerned only the parents she would have had little

hesitation in finding their removal entirely reasonable. The children could be adequately educated in South Africa and the evidence was that their father would be able to find employment on return.

17. I enquired which point identified in *EV (Philippines)* as one necessarily to be taken into account the Judge had failed to address in her decision. Ms Kenny responded she had not referred to the public interest. I noted that in fact there was no reference to public interest or any of the legitimate public objectives contained in Article 8(2) of the European Convention in the Reasons for Refusal Letter. The Judge had expressly referred to the public interest of the economic well-being of the state at para.33 of her decision and to ss.117A-117D of the 2002 Act and the public interest at para.35. There were no further submissions.

18. Following a short adjournment into chambers for a discussion between the advocates and myself in which I indicated that if the Judge had dealt with all relevant aspects of the appeal, particularly by way of reference to *EV (Philippines)* then it would be difficult to show that she had made an error of law. If she had dealt with all relevant factors then it would be necessary to show that the Judge had reached a conclusion which was perverse or irrational. On resumption of the hearing, neither advocate wished to make any further submissions. I announced my decision that the First-tier Tribunal's decision did not contain any material error of law such that it should be set aside and now give my reasons.

Findings and Consideration

19. The SSHD has not shown the Judge failed sufficiently to take into account the relevant matters required to be considered as outlined in the judgments in *Zoumbas* and *EV (Philippines)*. She adequately dealt with the relevant facts and made reasoned findings. There was no error of law by reason of a failure to consider any relevant matter or jurisprudence. The SSHD simply disagreed with the Judge's conclusions. I would add that it is a conclusion which many Judges would not have reached on the facts but here the Judge has dealt with all relevant facts and jurisprudence and the SSHD has not shown that the Judge's conclusion is irrational or perverse. Consequently there is no error of law in the First-tier Tribunal's decision and so it cannot be set aside.

20. By making repeated applications of various descriptions, the parents have been permitted or able to extend the time in which they and their family have been able to stay in the United Kingdom. This has continued for so long that the eldest child is now able to satisfy the requirements of para.276ADE(1)(iv). In the light of the jurisprudence enunciated in *Azimi-Moayed [2013] UKUT 197*, which still has some application, notwithstanding the addition to para.276ADE(1)(iv) of the requirement that it should not be reasonable to expect an Applicant to leave the United Kingdom made wef 13 December 2012 and which amendment has

application to this appeal. Consequently, the First-tier Tribunal decision does not contain a material error of law such that it should be set aside.

Anonymity

21. No submissions were made in relation to anonymity but I note the First-tier Tribunal made an anonymity direction and in the circumstances this is continued.

NOTICE OF DECISION

The decision of the First-tier Tribunal did not contain a material error such that it should be set aside. Accordingly, it shall stand.

Signed/Official Crest Date 28. v. 2015

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal