Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/22120/2014
IA/22129/2014
IA/22131/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 May 2015	**On 9 June 2015**

Before

THE HON MR JUSTICE EDIS
DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

Sharon Gabriel Egboigbe-Ade
Msr Emmanuel Francis Shanu-Abu
Miss Isabella Edowaye Toyin Shanu-Abu
(NO ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Cooray, instructed by the Joint Council for the Welfare of Immigrants
For the Respondent: Miss A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The appellants are mother and two children, born on 19 December 1967, 7 September 2006 (the first child was 7 years old when the decision of the SSHD which is the subject of this appeal was made) and 20 December

2013 respectively and citizens of Nigeria. They appealed against the respondent's decision made on 2 May 2014 refusing them leave to remain in the United Kingdom further to Article 8 of the European Convention on Human Rights.

2. The first appellant entered the United Kingdom as a visitor on 29 October 2004 but overstayed when her visit visa expired on 1 March 2005. Both the second and third appellants were born in the United Kingdom. The appellants' applications for leave were made on 21 October 2013. At the date of application the second appellant was over 7 years old.

3. On 24 December 2013 the first appellant's application was refused with no right of appeal but on 8 April 2014 the respondent wrote to request further information and then served the appellants with IS151A notices prior to refusing their applications. This gave a right of appeal, which the appellants exercised.

4. The appellants' appeals came before First-tier Tribunal Judge Metzer on 20th January 2015 and he proceeded to dismiss their appeals on human rights grounds on 29th January 2015.

5. Application for permission to appeal was made on the basis that the second appellant fell clearly within the terms of the Enforcement Instructions and Guidance: Chapter 53 – Extenuating Circumstances. The introduction to this Guidance sets out the policy which it seeks to promote:-

> "It is the policy of the Home Office to remove illegal migrants from the UK unless it would be a breach of the Refugee Convention or ECHR, or there are exceptional circumstances for not doing so in an individual case. Separate guidance exists on how to consider an asylum claim or an application for leave to remain on the basis of family or private life. This guidance concerns further exceptional circumstances claiming that removal would be inappropriate."

6. It was submitted that although the First-tier Tribunal judge referred to having had regard to Chapter 53 nothing in the determination elucidated her reasoning and the judge fell into error in omitting to make any clear findings on the matter which was at the heart of the appeal as argued. Had Chapter 53 been properly considered, it was likely the outcome would have been in their favour.

7. It was asserted that Chapter 53 stated that exceptional circumstances must be considered where raised, and that an application fee was paid for the second appellant with the result that Chapter 53 should have been applied to the second appellant separately. The respondent was required to give due weight to the best interests of the children and the second appellant in particular because of his longer connection with the United Kingdom. The factors to be considered under Chapter 53 were that the second appellant had nothing standing against his character and he had not failed to comply with any requirement of him, and although he had never had leave to remain this had never been in his control. He had

accrued seven years' residence in the United Kingdom and the delay was not attributable to him.

8. Moreover more weight should be attached to the length of time a child has spent in the UK compared with an adult. This was sufficient to bring the second appellant within the terms of the policy.

9. Further as the respondent had never applied the policy to the second appellant the decision under Article 8 could not be in accordance with the law as any interference could not be proportionate when the second appellant clearly met the terms of the policy.

10. Curiously the grant of permission to appeal made by First-tier Tribunal Judge Simpson, in response to the application, departed from the terms set out above but stated that the appellant's grounds were that

(a) the judge erred in failing to give reasons for dismissing the second appellant's appeal when the second appellant, a minor, had lived in the UK for more than seven years;

(b) the judge failed to consider whether there were exceptional circumstances meriting a grant of leave to remain.

Further, Judge Simpson found it was arguable that there was an error in law as the decision was silent as to **EV (Philippines) & Others [2014] EWCA Civ 874** and there was only a cursory examination of the **Razgar [2004**] principles. The judge did not appear have to considered proportionality or the best interests of the children despite the guidelines in **EA (Article 8 – best interests of the child) Nigeria [2011] UKUT 315 (IAC)**. There was no mention of paragraph 117A and B of the 2002 Act.

11. At the hearing before us Mr Cooray expanded on his grounds of appeal and relied on those set out in writing. In essence it was wrong for the respondent not to consider the policy and it was wrong for the judge not to have considered the validity of the decision of the respondent against her own published policy.

12. The Home Office Presenting Officer argued that the judge had taken into account the policy and even if there was an error by the respondent the judge had taken into account many other factors. The grant of permission to appeal made no reference to Chapter 53 but, all that taken into account, there would be no material difference to the decision.

13. Ms Fijiwala submitted that the judge had not taken into account factors which would have been to the disadvantage of the appellants such as Section 117 and **EV (Philippines)**. With regard to Section 117B(6) the judge had found that it was not unreasonable to expect the child appellants to leave the United Kingdom and it was clear the judge had

taken into account the relevant case law. Even if the respondent had not considered the policy, the judge had.

14. Mr Cooray, in reply, argued that the policy applied equally to the children as to the adult. The appellants were entitled to have a decision applicable to each one of them and although the applications were made jointly there were three different sets of facts and three different sets of fees paid. Mr Cooray asserted that there was nothing in Chapter 53 which excluded consideration of the children. If a child were an unaccompanied minor the policy would apply.

15. At the hearing, Mr Cooray centred his challenge to the decision, on his written grounds for application for appeal, which we have described above. Nonetheless for completeness we also address the contents of the grant of permission which relates to the best interests of the children. The challenge relates primarily to the second appellant.

Conclusions

16. There is no merit in the assertion that the judge failed to consider the **Razgar** [2004] UKHL 27 principles and an overall reading of the decision makes clear that the judge considered the proportionality and the best interests of the children. At [17] the judge accepts that the first and second appellants had established a right to a private life in the United Kingdom on the basis that "the first appellant having been in the United Kingdom for over ten years and on the documentary evidence the second appellant's schooling in the United Kingdom".

17. The judge specifically referred to **Razgar** and set out the background to the appeal at [18]. He took into account the best interests of the children and, in essence, gave consideration to their welfare as a primary factor (**ZH (Tanzania) (FC) (Appellant) v SSHD [2011] UKSC 4**). He noted that the family would be returned together and would travel to Nigeria together [19]. He identified the key question in relation to the second appellant, further to Section 117(6), which was that the second appellant was educated here had lived continuously in the UK for at least 7 years, but nonetheless he found it would be reasonable to expect the second appellant to leave the UK for Nigeria albeit the second appellant had no knowledge of Nigeria. On an overall reading of the decision the judge made his reasoning clear that the second appellant could adapt to life in Nigeria. The judge also took into account the sickle cell disorder of the third appellant and noted that there was treatment in Nigeria.

18. Although, as First-tier Tribunal Judge Simpson pointed out in granting permission to appeal, the judge did not specifically refer to **EV (Philippines**) he recorded that the second appellant had been in the United Kingdom throughout his life and was attending school but considered that he could adapt to a different country. The judge considered the claims of the first and second appellant in the light of the

immigration history of the first appellant in that she had been an overstayer in the United Kingdom for nearly ten years. The judge reasoned at paragraph 20:

"Although the second appellant has been in the United Kingdom throughout his life and is attending school, I find that he is young enough to be able to adapt to life in Nigeria where the first appellant spent all her formative years. Although I am prepared to accept the medical treatment for the third appellant is not as advanced as it is in the United Kingdom, I find that there is treatment available in Nigeria in according the Country of Origin Information Report and although the third appellant has benefited significantly from medical care received in the United Kingdom, that does not of itself provide a basis for which the NHS should continue to fund the treatment in circumstances where I find there is treatment available in Nigeria."

19. **EV Philippines & Oths v SSHD** [2014] EWCA Civ 874 does not in fact assist the appellants. It is hard to see how a failure to apply it could afford a ground of appeal on the facts of this case. At paragraphs 43-46 Christopher Clarke LJ, with whom the other members of the court agreed said this:-

"43 In the present case the FTT judge treated the best interests of the children as a primary consideration and concluded that their best interests lay in remaining with their parents and continuing their education here. He then considered whether the need to maintain immigration control outweighed that consideration.

44 In carrying out this assessment he took into account the fact (a) that the parents would be employable in the Philippines; (b) that the family would not be homeless; (c) that there was an extended family to which they would have access; (d) that the family had only been in the UK for a limited time – 3 years 9 months at the date of the FTT decision at which time the children were 11,10 and 8; (e) that the children would not be without education in the Philippines. The fact that it would not be as good and that secondary education was not free was not determinative. In addition there was no question of any interference with the appellants' family life. Further, the family could have had no assurance of a guaranteed permanent settlement. The judge took account of the fact that EV had been underpaid by her employers and the chronology provided by the Appellants [13] which reveals the delays attributable to the Respondent.

45 His overall conclusion was that the need to maintain immigration control did outweigh the best interests of the children. In effect he

found that it was reasonable to expect the children to live in another country. The Appellants submit that the judge did not analyse the weight to be given in this case to the need for immigration control. But, as it seems to me, in setting out and examining the factors relating to the Appellants, he was performing that exercise.
46 In my judgment he made no error of law. Nor did he fail to follow the correct approach in reaching his conclusions, which were open to him on the material that he had and the findings which he made. The UT was right so to hold."

20. At paragraph 60, Lewison LJ identified the decisive factors in the balance in a way which seems to us to be applicable to a large number of similar cases, of which the present case is typical:-

'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 interests 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'.

21. The judge did not mention Section 117 of the Nationality, Immigration and Asylum Act 2002, but this omission was in fact to the appellants' advantage as consideration of the terms of the Act would have required the judge to give little weight to a private life established when unlawfully present in the United Kingdom and it would have given statutory weight to the factors which affect the cost to the public of the grant of LTR in a particular case. The judge found at [21]

"Given the ages of the second and third appellants, the very limited extent of the appellants' private life in the United Kingdom and the circumstances in which the first appellant entered the United Kingdom and overstayed for a considerable period and taking into account the respondent's legitimate interest in immigration control, I find it would not be a disproportionate interference with the appellants' rights to private life for the appellants to return as a family unit to Nigeria."

22. Section 117B(6) requires the court or tribunal to consider, in the case of a qualifying child, whether it would be reasonable to expect the child to leave the United Kingdom. If not, then it the public interest does not require the removal of a parent in the position of the first appellant in this case. The second appellant is a qualifying child because he has been in

the United Kingdom for more than 7 years. In paragraph 21 of his decision, the judge said

> *"In reaching that decision I take into account Chapter 53 of the Enforcement Instructions and guidance in the circumstances I find that it would not be unreasonable to expect the second appellant to leave the United Kingdom despite having been present in the United Kingdom since birth."*

23. It appears to us that the judge did make a decision which was in line with authority and the statutory provisions, even if they were not specifically referred to. He made the critical finding of fact when holding that it would be "not unreasonable" to expect the child to leave the United Kingdom in circumstances where his mother and sibling were leaving. We do not therefore allow the appeals on the grounds identified by First-tier Tribunal Judge Simpson.

24. We turn to the consideration of Chapter 53 of the Enforcement Instructions in relation to the second appellant. It was contended that the respondent effectively applied Chapter 53 to the circumstances of the first appellant but did not apply them to the circumstances of the other appellants. In **Abdi (Dajui Saleban) v Secretary of State for the Home Department** [1996] Imm AR 148, the Court of Appeal held that, if it can be shown that the Secretary of State has failed to act in accordance with established principles of administrative or common law, for example, if he did not take account of or give effect to his own published policy, that was "not in accordance with the law". **UR & Others (Policy executive discretion remittal) Nepal [2010] UKUT 480 (IAC**) and **AG (Kosovo) & Others (Polices executive discretions, Tribunal powers) Kosovo [2007] UKAIT 82** re-affirmed the proposition that in the generality of cases a finding that a policy has not been applied properly or at all, will render the decision under appeal not in accordance with the law and will result in a remittal to the original decision maker.

25. In the reasons for refusal letter from the Secretary of State, the respondent made reference to and applied the following criteria from the Guidance specifically to the first appellant:

(i) character conduct and association including any criminal record and the nature of any offence of which the migrant concerned has been convicted

(ii) compliance with any conditions attached to any previous grant of leave to enter or remain and compliance with any conditions of temporary admission or immigration bail where applicable

(ii) length of time spent in the UK spent for reasons beyond the migrant's control after the human rights or asylum claim has been submitted or refused

26. It was observed that the first appellant had no criminal record, but had built up debts with the NHS, had used that service when she was not entitled to and cost the UK taxpayers money, failed to comply with the conditions of her initial visit visa and delayed in making an application to regularise her stay. It was concluded that there had been no length of time spent in the UK for reasons beyond her control. Her circumstances were considered in the round but there were insufficient factors to justify allowing her to remain in the UK.

27. The judge at [21] of his decision made specific reference to Chapter 53 in regard to the second appellant, saying

> *"In reaching that decision I take into account Chapter 53 of the Enforcement Instructions and guidance in the circumstances I find that it would not be unreasonable to expect the second appellant to leave the United Kingdom despite having been present in the United Kingdom since birth."*

28. Chapter 53.1 of the Enforcement Instructions and Guidance provides

> *"Where exceptional circumstances raised amount to an asylum, family and private life* ***claim and have already been fully considered under the relevant Rules and Guidance, officers need not give further consideration if all the factors have been fully addressed****. Where additional factors exist that have not been considered, for example, length of time spent in the UK for reasons beyond the migrant's control, they must be considered in accordance with the factors outlined in paragraph 353B of the Immigration Rules."*

29. The treatment of factors which are said to be exceptional circumstances is set out at 53.1.1 which says

> *"When determining whether or not exceptional circumstances exist, that consideration of the relevant factors needs to be taken as a whole rather than individually. Discretion not to remove on the basis of exceptional circumstances must not be exercised on the basis of one factor alone."*

30. Paragraph 53.1.1 of the Guidance identifies "Relevant Factors". The first two factors identified in the policy were not relevant to the second and third appellants because of their age. The character, conduct or associations of the children were irrelevant because they did not have any criminal convictions as explained both in respondent's decision and that of the judge. Secondly, the factor of compliance with any conditions could not apply to or indeed assist these appellants as they had always been in the UK without leave. The circumstances of the mother, the first appellant, had been specifically considered and the rules specifically state that dependant children should be considered in the light of the adult. The Guidance as identified above states

'*The consideration of relevant factors needs to be taken as a whole rather than individually*'

and further at (iii) of the Guidance adds

'*For the purposes of this guidance, 'family' cases means parent as defined in the Immigration Rules and children who are emotionally and financially dependent on the parent, and under the age of 18 at the date of the decision'*.

31. The children had not been issued with any leave or reporting conditions. These two criteria to our mind were not relevant and therefore it was not incumbent upon the officers to apply them.

32. The third criterion set out in paragraph 53.1.1 of the Enforcement Instructions is entitled

(iii) the length of time in the UK accrued for reasons beyond the migrant's control ***after*** their human rights or asylum claim has been submitted or refused.

33. The policy reads:

> *"The length of residence in the UK is a factor to be considered where residence has been accrued by an unreasonable delay which is not attributable to the migrant. Periods of residence which are built up by actions of non-compliance attributable to the migrant will not count in the migrant's favour. More weight should be attached to the length of time a child has spent in the UK compared to an adult.*
>
> *Provided that the factors outlined in 'character' or 'compliance' do not mean that the claimant cannot benefit from the exceptional circumstances guidance then caseworker must also consider whether there has been a significant delay by the Home Office, not attributable to the migrant in deciding a valid application for leave to remain on asylum or human rights grounds* ***or whether there are reasons beyond the individual's control why they could not leave the UK voluntarily after their application was refused****. For example.*
>
> - *Family cases where delay by the Home Office or* ***factors beyond the control of the family which have prevented departure have contributed to the significant period of residence.*** *(For the purposes of this guidance, family cases means a parent or parents as defined in the Immigration Rules and children who are emotionally and financially dependent on the parent and under the age of 18 at the age of decision). Following an individual assessment of the prospect of enforcing removal, and where the factors outlined in character and compliance do not prevent a case from benefiting from the*

exceptional circumstances guidance, family cases may be considered exceptionally on grounds of delay where the dependent child has lived in the UK for ***more than three years*** *or more whilst under the age of 18.*

- *Asylum other case where the length of delay by the Home Office in deciding the application where there were factors preventing departure may be considered exceptionally on grounds of delay where a person has lived in UK for more than six years."*

34. This rule is framed in terms of delay by the Home Office and factors preventing the 'family' from removing from the United Kingdom. It is not the case that the second appellant was subject to any delay by the Home Office or that he was an unaccompanied minor whereby the fact of removal was beyond his control. Nor has the child lived in the UK for more than three years after the application was made (21st October 2013). As stated in **UR** [14] "policies…are meant to be applied flexibly, and to allow the sensible exercise of discretion".

35. In relation to the third criterion there is reference to 'factors beyond the control of the family which have prevented departure'. The instructions therefore consider the child ***within the context of the family*** and these factors were considered in the respondent's decision in full in relation to the first appellant. This is not a case of an unaccompanied minor whereby the factors would be considered without the setting of the family. Specifically in relation to the first appellant and to criterion (iii), it was recorded by the respondent in the reasons for refusal letter

'it is not considered that there has been any length of time spent in the UK that have been for any reasons beyond your client's control'.

36. We make a further point. The decision of the Secretary of State set out clearly all the factors relevant to the first appellant and at paragraphs 32-42 the Secretary of State gave full consideration to the interests of the children, their age, the medical conditions and the fact that the second appellant had lived in the UK since birth and that both his parents were Nigerian.

37. At the outset Chapter 53 states as set out above

'Where exceptional circumstances raised amount to an asylum, family and private life claim and ***have already been fully considered under the relevant Rules and Guidance, officers need not give further consideration if all the factors have been fully addressed.*** *Where additional factors exist that have not been considered, for example, length of time spent in the UK for reasons beyond the migrant's control'*

38. The judge in a short but focussed decision specified that he took into account Chapter 53 in the decision to which he came. This is a very oblique way of ruling on a submission that the Secretary of State had

acted unlawfully because she failed to apply her policy. There is, therefore, some merit in the submission made. However, there was no obligation on the judge to adhere to the policy, it was not directed at the Tribunal but at officers dealing with enforcement of immigration decisions. What he was being asked to decide was whether the officers had demonstrably failed to have regard to it, and whether the Secretary of State in reaching her decision had failed to address it.

39. **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC)** identifies that

> *'Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge'.*

40. Paragraph 51 of **AG**, cited above, confirms

> *'If (2) or (3) do not apply, and if the Secretary of State has not yet considered the claim within the terms of his policy, the appeal should be allowed with a direction that he do so. But if the appellant fails to establish the terms of a policy, or if the Secretary of State has already properly considered the claim within the terms of any applicable policy, then (given that none of these considerations apply at all unless the appellant's removal would not breach his Convention rights) the appeal should be dismissed'*.

41. The reasons, in this case, may properly be subject to criticism as we have indicated. It may be that the judge regarded the challenge made on the basis of the policy as hopeless, which is why he dealt with it so elliptically. If that is so, we agree with him. After all, he carried out an Article 8 compliant assessment of the proportionality of the removal of the second appellant and specifically held that it was reasonable to expect him to leave the United Kingdom with his family. Any policy which required an officer to come to a different conclusion on the same facts would appear to be unlawful, but this policy clearly does not do that.

42. In this case, all the relevant factors which might assist the appellant had either been considered by the Secretary of State or did not apply. Then, on appeal, the First-tier Tribunal considered them all again and came to the same conclusion. In the circumstances, there was simply no scope for a finding that there were "exceptional circumstances" as envisaged in the policy. Everything had been weighed up and a decision reached. Therefore the passage of the policy set out at paragraph 28 and repeated at paragraph 37 above plainly applied. The Article 8 rights of the appellants were considered by the Secretary of State. That being so, the policy, on its terms, did not apply. If the judge had held that the Secretary of State had decided the matter unlawfully, this was not a case for

remission for a decision under the policy by an official. The better course would be for the judge to decide the issue, not under the policy, but according to the law. This is what he did.

43. Accordingly, although we consider that the reasons suggest that the judge did not address the point under discussion directly this is not an error of law which should vitiate his decision. There is no merit at all in the appellants' case on the policy which could never have succeeded. The submission that the second appellant had a strong case under the policy is unarguable and although we have heard argument on it and decided the issue, we would not have granted permission to raise the question on appeal.

44. We find no error of law, which is material, and the decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed Date 5th June 2015

Deputy Upper Tribunal Judge Rimington