Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/25631/2014
IA/25632/2014
IA/25633/2014
IA/25634/2014
IA/25635/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 11th February 2015

Decision Promulgated
On 2nd March 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Justina Obeng Anaafi
Obeng Isaac Anaafi
Abra Obenewa Obeng Anaafi
Abrainna Ansaa Obeng Anaafi
Justy Nana Amfua Obeng Anaafi
(no anonymity direction made)

Appellants

and

Secretary of State for the Home Department

Respondents

Representation:
For the Appellant: Mr Blundell, Counsel instructed by Maliks and Khan Solicitors
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are all nationals of Ghana. They are respectively a mother, father and their three minor children. They have permission[1] to appeal against the decision of the First-tier Tribunal (Judge Somal)[2] to dismiss their linked appeals against the Respondent's decisions to remove them from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999[3].

2. The basis of the appeals was the long residence/Article 8 rights of the family. The First and Second Appellants averred that they had lost all ties to Ghana and that it would be disproportionate to remove them there now. Particular reliance was placed on the fact that the Third and Fourth Appellants, twins born on the 25th September 2006, had by the date of the Respondent's decision lived in this country for more that seven years.

3. Some issue is raised in the grounds, and in the grant of permission, as to whether the Tribunal was correct to have proceeded as it did on the basis that these were simply *Razgar* Article 8 appeals. Although none of the children had accrued seven years residence at the date that the family made their applications for leave to remain in April 2013, by the date of decision in May 2014 they had, and the Respondent acknowledges that in the refusal letter by addressing paragraph 276ADE(1)(iv) of the Rules. It is accepted in that letter that the twins had accrued seven years residence but leave under that provision was refused on the basis that it was reasonable to expect them to go to Ghana. I need not deal with whether the Respondent was correct to have taken that approach, or whether the Tribunal was correct in thinking that the Appellants' representative had conceded that the Rules could not be met. Before me Ms Everett and Mr Blundell agreed that these were indeed *Razgar* Article 8 appeals: 276ADE(1)(iv) should however have been the starting point of the enquiry: if the requirements therein were met at the date of appeal that would almost certainly have been determinative of the Article 8 question, at least insofar as it applied to the Third and Fourth Appellants.

4. The matter in issue in this appeal is whether the First-tier Tribunal did take the correct approach. Did the Tribunal begin by considering whether the Third and Fourth Appellants met the requirements of paragraphs 276ADE(1)(iv) and was that Rule, and in particular the requirement that they show their removal to be unreasonable, properly construed?

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[1] Permission granted on the 16th December 2015 by First-tier Tribunal Judge Levin

[2] Determination promulgated on the 28th October 2014

[3] Immigration decisions dated the 3rd June 2014

Error of Law

5. The answer to both of those questions is no.

6. It is apparent from the "consideration and findings" section of the determination and in particular paragraphs 13-15 that the Tribunal began its assessment of the facts through the prism of Article 8 proportionality, directing itself [at 12] that the Appellants had to show "exceptional circumstances" and [at 15] that the interests of the individual protected by Article 8 "would not normally prevail" over the interests of immigration control. That language indicates that the Tribunal's starting point was the very great weight to be attached to the public interest in maintaining immigration control, and the fact that the number of cases likely to succeed on Article 8 grounds after a failure to meet the Rules is likely to be small. As the parties agree, the case for the Appellants was that these children did meet the requirements of the Rules at the date of the appeal. The assessment of whether that was so did not require, at the outset, the Tribunal to remind itself of the principles of proportionality. The Tribunal was required first and foremost to consider whether the Third and Fourth Appellants could succeed under paragraph 276ADE(1)(iv). If they could, the Respondent would, as Ms Everett conceded, be in some difficulty in showing the decision to remove them to be proportionate. Although the determination does refer to the 'reasonable' test it has conflated it with 'proportionality'. That was the first error of law.

7. The answer to the second question – whether the Tribunal took the correct approach to whether it was *reasonable* that the children leave the UK – is not easy to disentangle from the reasoning. The Tribunal certainly identifies a number of very good reasons why it might be thought that it was reasonable for this family to return to Ghana. The parents were found to be "untrustworthy and unreliable" and their evidence that they had little to return to in Ghana is specifically rejected. It is found that they deliberately obfuscated about the extent to which they have worked illegally in the UK and that they were not telling the truth when they claimed, at hearing, that the church had been paying their rent all this time. It is found that the children would be able to adapt to life in Ghana with the assistance of their parents who are clearly resourceful and skilled people. Consideration is given to the children's medical and educational rights. All of these were relevant factors and Ms Everett is quite right to defend the findings as rational and open to the Tribunal on the evidence before it. The problem, again, lies in the approach taken to what 'reasonable' actually means in the context of paragraph 276ADE(1)(iv). As I note above the determination appears to conflate that test with the proportionality balancing

exercise; the parties before me are in agreement that the two are quite different things.

8. 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[4]. As the policy statement[5] which accompanied the introduction of paragraph 276ADE (1)(iv) put 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'* 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.

9. In his submissions Mr Blundell drew my attention 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 Home Office Minister Lord Wallace of Tankerness explained the government's thinking on the significance of the seven year mark:

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

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

> "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"[6].

10. 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 might include all of the matters mentioned in this determination, but they fall to be assessed in terms of whether they constitute "strong reasons" - the language of the current IDI – that displace those best interests.

11. This determination does not frame the assessment of 'reasonable' in those terms. As I set out above the balancing exercise rather is confined to whether removal is proportionate under Article 8. Although that was ultimately the question that needed to be answered, it was not the primary focus of the Third and Fourth Appellant's appeals.

12. The decision is therefore set aside.

The Re-Making

13. The parties before me agreed that I can remake this matter on the evidence already before the Tribunal.

14. My decision will follow the following framework:

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

i) I will first determine whether the Third, Fourth and now Fifth Appellants meet the substantive requirements of paragraph 276ADE(1)(iv) at the date of this decision;

ii) If they do that will be relevant to my determination of their Article 8 appeals, and in particular to whether the Respondent can show that the decision to remove them is proportionate;

iii) The Article 8 appeals of the First and Second Appellants will be determined with reference to guidance set down in Razgar, and the public interest considerations set out in the Rules and Statute.

276ADE

15. The rule provides:

> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (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
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK

16. In her refusal letter dated 29th May 2014 the Respondent expressly accepts that none of the children's applications fall for refusal under the suitability criteria [at page 7 of 10].

17. The substantive requirement is set out at (iv). Abra and Abrainna are twins born in the UK on the 25th September 2006. Justy was

born on the 21st December 2007. They have all lived in the UK all of their lives. At the date of this determination all three children meet the test in the first limb of (iv), that they have lived continuously in the UK for at least seven years.

18. It is the Respondent's view that they cannot meet the test in the second limb of (iv), that they show it not to be reasonable that they leave the UK. They have demonstrated, with reference to their continuous long residence, that they have a well established private and family life in the UK. Are there "strong reasons" to remove them nevertheless?

19. The arguments advanced by the Respondent fall into two parts: those "countervailing factors" which might be said to weigh against the child, and those factors particular to the child himself which mean that the loss of the Article 8(1) rights in the UK are mitigated by the gain of such rights in Ghana.

20. I deal first with the issue of countervailing factors. It is difficult to understand to what extent the poor behaviour of the child's parents can be weighed against the child. On the one hand there are numerous authorities which say that it would be wrong to blame the child for the sins of the parents, Zoumbas[7] and ZH (Tanzania)[8] amongst them, but on the other it seems entirely artificial to exclude altogether the fact that the parents have no leave, and that they have, it would seem, actively sought to remain in the UK long enough to benefit under this very provision: see to the same effect in the context of Article 8 the guidance in EV (Philippines)[9]. This conundrum is illustrated by the refusal letter [4 of 10]:

> "while the children are not responsible for their immigration status, the behaviour of their parents and their lack of any attempt to remain within the Immigration Rules or to remain in contact with the immigration authorities needs to be taken into account. This is particularly the case as Ms Anaafi was aware that she used another person's passport to enter the UK and Mr Anaafi would have been aware that he had remained here past the expiry date of his visit visa. Therefore, in full knowledge that their immigration status was precarious they remained here, working without permission to do so and also having three children here".

21. I note that the status of the parents is one of the factors listed in the current IDI as being a factor that would generally indicate removal to be reasonable. I therefore weigh that matter, and the First-tier Tribunal's generally negative appraisal of the parents'

[7] Zoumbas v SSHD [2013] UKSC 74

[8] ZH (Tanzania) v SSHD [2011] UKSC 4

[9] EV (Philippines) v SSHD [2014] EWCA Civ 874

behaviour, into the balance. There is, quite rightly, no criticism of the behaviour of any of the children.

22. Next I consider what might be thought of as the positive aspects of removal to Ghana. These children are all Ghanaian by heritage and nationality. It might be said to be to their benefit to be able to avail themselves of the advantages of that citizenship, and to continue their development in the context of their parents' culture. I adopt the finding of the First-tier Tribunal that the children would, with their parents' assistance, be able to adapt to life in Ghana. Their parents would be able to work and provide for them. They may not be familiar with the curriculum in schools there but the medium of instruction is in English and they would manage. In respect of their health I note that the twins continue to receive medical treatment here for a range of complex allergies; there was no evidence that they could not get similar treatment in Ghana and although I do accept that it would be preferable for there to be a continuity of care from the clinicians familiar with their conditions, this is not a factor that I have attached any particular positive weight to. I have attached absolutely no weight to the fear expressed by the adults at the hearing before the First-tier Tribunal that they and the children would be exposed to Ebola. There was no Ebola epidemic in Ghana.

23. I have considered all of these factors. I remind myself that all of these children were born in the UK and that at the date of this re-making the twins have lived in the UK for the 8 and a half years and Justy 7 years and two months. The Secretary of State recognises in her current guidance that in those circumstances "strong reasons" will be required to make their removal reasonable. I have attached significant weight to the fact that the parents have no leave and have, it would seem, deliberately sought to remain in the UK long enough to make these applications. Mrs Obeng Anaafi is an illegal entrant who used someone else's passport to gain entry to the UK. Mr Obeng Anaafi came here as a visitor and overstayed for the past ten years. None of that is to their credit. I have also given consideration to the reasons why the First-tier Tribunal found that the children would be able to live in Ghana. I am not however satisfied that the cumulative weight of all of those factors constitutes "strong reasons" to remove these children. These children have grown up in the UK and will see no difference between themselves and their classmates. Their Article 8 private lives cannot be reduced to a list of the relationships that they have with their friends, teachers, extended family members, their doctors, neighbours, members of their church or their parents' friends. They have, to paraphrase the language of the Home Office guidance, "put down roots here" to the extent that it is

unreasonable to expect them now to leave.

24. I find that each of these children qualifies for leave to remain under paragraph 276ADE(1)(iv).

Article 8: the children

25. That is not of course the end of the matter, since these appeals are brought under Article 8. I find that each of the children have a private life in the UK and that this decision would interfere with it to an extent that Article 8 is engaged. The Secretary of State is entitled as a matter of law to make removal directions against those who did not, at the date the decision was taken, have valid leave to remain in the UK. Those are the first three *Razgar* questions answered. It is now for the Secretary of State to show that the decision is rationally connected to one of the legitimate aims set out in Article 8(2): that is here identified as "protection of the economy". It is also for the Secretary of State to show the decision to remove is proportionate.

26. Ms Everett advanced no reasons why a decision to remove children who qualify for leave to remain under the Rules would be necessary in pursuit of the legitimate aim of protecting the economy, or proportionate. It follows that the appeals of the children are allowed under Article 8.

Article 8: the adults

27. Like their children the adults have been in the UK a significant amount of time. Although neither have accrued sufficient time to qualify under the Rules I am satisfied that they have established private lives here. The huge bundle before me contains evidence from friends, relatives and members of the church all testifying to the quality of the relationships that Mr and Mrs Obeng Anaafi have established here. I am satisfied that their removal from the UK would interfere with that private life and that Article 8 is engaged.

28. There is no dispute that the decision is lawfully available to the Secretary of State and that the removal of illegal entrants and overstayers is rationally connected to the Article 8(2) aim of protection of the economy.

29. In respect of proportionality I am bound my statute to consider the 'public interest' factors set out in ss117A to 117D of the NIAA 2002. Section 117B (6) expressly provides as follows:

> (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.

30. I have found that the children in this case are "qualifying" in that they have spent a continuous period of seven years or more in the UK. I have found that it would not be reasonable to expect them to leave the UK. In those circumstances the public interest does not require the removal of their parents, and their appeals must too be allowed under Article 8.

Decisions

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

32. I re-make the decision in the appeals by allowing all appeals on human rights grounds.

Deputy Upper Tribunal Judge Bruce
11th February 2015